

ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS,

*Petitioner,*

v.

NATIONAL HIGHWAY TRAFFIC  
SAFETY ADMINISTRATION,

*Respondent.*

No. 22-1145 (and consolidated  
case No. 22-1144)

**MOTION OF CLEAN FUELS DEVELOPMENT COALITION; DIAMOND  
ALTERNATIVE ENERGY, LLC; ICM, INC.; ILLINOIS CORN GROWERS  
ASSOCIATION; KANSAS CORN GROWERS ASSOCIATION;  
KENTUCKY CORN GROWERS ASSOCIATION; MICHIGAN CORN  
GROWERS ASSOCIATION; MINNESOTA SOYBEAN GROWERS  
ASSOCIATION; MISSOURI CORN GROWERS ASSOCIATION; TEXAS  
CORN PRODUCERS ASSOCIATION; WISCONSIN CORN GROWERS  
ASSOCIATION; AND VALERO RENEWABLE FUELS COMPANY, LLC,  
IN SUPPORT OF PETITIONERS**

Under Federal Rules of Appellate Procedure 15(d) and 27 and Circuit Rules 15(b) and 27, Clean Fuels Development Coalition; Diamond Alternative Energy, LLC; ICM, Inc.; Illinois Corn Growers Association; Kansas Corn Growers Association; Kentucky Corn Growers Association; Michigan Corn Growers Association; Minnesota Soybean Growers Association; Missouri Corn Growers Association; Texas Corn Producers Association; Wisconsin Corn Growers Association; and

Valero Renewable Fuels Company, LLC (collectively, “Biofuels Movants”) respectfully request leave to intervene in support of Petitioners in Case No. 22-1145, filed by the American Fuel & Petrochemical Manufacturers (“AFPM”), and Case No. 22-1144, filed by a coalition of eleven states. Both petitions challenge the final action of the National Highway Traffic Safety Administration (“NHTSA”), entitled “Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks,” 87 Fed. Reg. at 25,710 (May 2, 2022) (“CAFE Standards”).<sup>1</sup>

Counsel for Biofuels Movants consulted counsel for the Petitioners and Respondents in these cases, requesting that they respond with their position on Biofuels Movants’ motion by an appointed time. Petitioner AFPM consents to the motion, as do Petitioners the State of Texas and the State of Utah. The other Petitioners did not respond to the undersigned counsel’s request prior to the filing of this motion.

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<sup>1</sup> The States’ and AFPM’s June 30, 2022 Petitions have been consolidated with a petition filed by the Natural Resources Defense Council (“NRDC”) (No. 22-1080). Biofuels Movants are not seeking to intervene in that earlier-filed case, though, pursuant to this Court’s consolidation order, which consolidates all three cases, this may be a distinction without any practical difference. *Cf.* D.C. Circuit Rule 15(b) (“A motion to intervene in a case before this court concerning direct review of an agency action will be deemed a motion to intervene in all cases before this court involving the same agency action or order, including later filed cases, unless the moving party specifically states otherwise, and an order granting such motion has the effect of granting intervention in all such cases.”).

Respondents take no position on the motion.<sup>2</sup>

## INTRODUCTION

The current administration is on a quest to put an end to the internal combustion engine and to replace it with the electric motor. Picking winners and losers based on a favored technology rather than on objective performance is not only bad policy, but in this instance it also exceeds—and indeed directly violates—the executive’s statutory authority. In 49 U.S.C. § 32902(h), Congress forbade NHTSA from considering electric vehicles in setting “maximum feasible” average fuel economy standards. Similarly, while the Environmental Protection Agency (“EPA”) has authority to regulate vehicle emissions, it does not have the power to choose what technology must power the automotive fleet, nor does it have ability to allow any state to do so.

NHTSA and EPA know this. Indeed, NHTSA conceded in this final rule that it may “not consider the fuel economy of electric vehicles in setting CAFE standards, consistent with Congress’ direction in 49 U.S.C. 32902(h).” Yet that is just what NHTSA did. NHTSA’s new fuel economy standards explicitly depend upon—*i.e.*, could not be achieved without—a baseline assumption that the number of new electric vehicles will grow by over 400% in the next several years.

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<sup>2</sup> Counsel for Biofuels Movants also consulted with counsel for the Petitioner and Respondents in consolidated case number 22-1080—*see supra* n.1—all of whom stated that they took no position on the motion.

NHTSA claims that it can avoid this restriction if the electrification assumption is baked into “other standards,” which Congress said NHTSA *can* consider. Since the Supreme Court decided *Massachusetts v. EPA* in 2007, which authorized EPA to regulate carbon-dioxide emissions from motor vehicles, NHTSA and EPA have always issued joint rules about fuel economy and greenhouse gas emissions. This makes sense as there is a direct, functional relationship between how efficient an internal combustion engine is and how much carbon dioxide is emitted from the tailpipe. Indeed, fuel economy is calculated by measuring tailpipe carbon-dioxide emissions. As the Supreme Court noted, this reality requires NHTSA and EPA to “administer their obligations and yet avoid inconsistency.”

For the first time in their history, however, EPA and NHTSA have decoupled their rulemakings, precisely to evade express Congressional limits. EPA issued its new emissions rule first, which was explicitly designed to mandate the increased adoption of new electric vehicles up to 17% by Model Year 2026. A few months later, NHTSA incorporated EPA’s *de facto* electric vehicle quota as an “other standard” that it claims spoke into existence a regulatory backdoor to do exactly what Congress said NHTSA *can’t* do: consider electric vehicles in setting “maximum feasible” fuel economy standards. And this is just the beginning, EPA and NHTSA are poised to use this same approach to further impose much greater electric vehicle quotas, with an end game of outlawing the internal combustion engine entirely.

To get to this, of course, EPA and NHTSA must survive court challenges to their rules. And the novel separation of their respective rulemakings appears to be designed as a kind of regulatory insurance policy. EPA knows that its electric vehicle mandate has serious legal vulnerabilities. EPA simply does not have the authority to mandate electrification of the light duty vehicle fleet, but only to set emissions standards. Baking EPA's electric vehicle quota into NHTSA's fuel economy rule attempts to hedge this risk and muddy the waters. Even if EPA's rule is struck down, the administration's hope appears to be that the electric vehicle quota could survive in zombie form in NHTSA's rule, despite the fact that NHTSA could never have imposed such a quota on its own.

This is precisely the kind of too-clever-by-half bootstrapping that the Supreme Court has time and again struck down. The widespread ramifications of transforming America's vehicle fleet from internal combustion engine vehicles to electric vehicles presents a quintessential major question that is beyond the expertise of these agencies and the scope of the statutes the administer. NHTSA's rule requires a clear statutory authorization from Congress that is absent here.

As NHTSA and EPA have acknowledged—indeed, celebrated—this unprecedented forced electrification of the nation's vehicle fleet will cost hundreds of billions of dollars and will significantly impact not only the auto industry, but also major policy and economic questions related to, among other things, the generation and

availability of electricity, the market for and production of semi-conductors and batteries, the demand for and extraction of rare earth minerals around the world, the nation's foreign dependence on other nations, security and trade, the job force, and emergency preparedness.

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Petitioners American Fuel & Petrochemical Manufactures and eleven states have sought review of NHTSA's rule. Biofuel Movants seek to intervene in these cases to protect their unique interests in enforcing Congressional limits on this NHTSA rulemaking.

## **BACKGROUND**

In 1975, Congress required the Secretary of Transportation to establish ambitious corporate average fuel economy ("CAFE") standards applicable to manufacturers of new automobiles.<sup>3</sup> The Secretary of Transportation delegated the promulgation and enforcement of CAFE standards to NHTSA.<sup>4</sup>

When setting "maximum feasible" CAFE standards for new automobiles, NHTSA must consider and balance several statutory factors to ensure that fuel

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<sup>3</sup> Energy Policy and Conservation Act of 1975, Pub. L. 94-163 § 502(a), 89 Stat. 871, 902; *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1324 (D.C. Cir. 1986).

<sup>4</sup> *See id.* § 501(e).

economy standards serve the interests of the entire country.<sup>5</sup> For example, under the “economic practicability” factor, the Secretary must consider any “adverse economic consequences, such as a significant loss of jobs or the unreasonable elimination of consumer choice.”<sup>6</sup> Significantly, “[i]n carrying out” its responsibilities, NHTSA, “may not consider the fuel economy of dedicated automobiles,”<sup>7</sup> which are defined as automobiles that “operate[] only on alternative fuel,” such as electricity.<sup>8</sup>

NHTSA set CAFE standards independently for many years. This changed following the Supreme Court’s ruling in *Massachusetts v. EPA* in 2007, which held that carbon dioxide was a “pollutant” within the meaning of the Clean Air Act and that it was thus subject to regulation upon a finding by EPA that carbon dioxide endangers public health or welfare.<sup>9</sup> Based on the universally acknowledged, direct and proportional relationship between a car’s fuel economy and the carbon dioxide emitted at the tailpipe,<sup>10</sup> EPA contended that it could not regulate greenhouse gas

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<sup>5</sup> 49 U.S.C. § 32902(f).

<sup>6</sup> 67 Fed. Reg. 77,015, 77,021 (Dec. 16, 2002).

<sup>7</sup> 49 U.S.C. § 32902(h)(1).

<sup>8</sup> *Id.* §§ 32901(a)(1)(J), (a)(8).

<sup>9</sup> 549 U.S. 497, 532–33 (2007).

<sup>10</sup> Under NHTSA’s test procedures, automobile manufacturers measure automobile fuel economy using a “carbon-balance” method: by measuring carbon per gallon in the test fuel and dividing it by the rate at which carbon is emitted from the tailpipe,

emissions because doing so would be equivalent to regulating fuel economy—a matter committed solely to the Department of Transportation’s jurisdiction by the Energy Policy Conservation Act.<sup>11</sup> The Supreme Court acknowledged the overlap, but concluded that “there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency.”<sup>12</sup> Following this decision, and the change of Presidential administrations in 2009, EPA made an “endangerment finding” for carbon dioxide and began regulating it as a pollutant.

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manufacturers reliably estimate how fast an automobile is consuming fuel based on how rapidly it is consuming the fuel’s carbon. *See* 40 C.F.R. §§ 600.113-12(h) (gasoline), (i) (diesel), (j) (methanol), (k) (natural gas), (l) (ethanol), (m) (liquified petroleum gas); *see also* 40 C.F.R. Part 600, App’x II (sample calculations from prior gasoline formula). While other carbon-related emissions (like hydrocarbons or carbon monoxide) are included in the carbon-balance equations, these emissions are trivial and dependent on factors other than efficiency. Carbon dioxide emissions account for 99% of all measured mass-based emissions per mile and depend on efficiency. *See* EPA, Greenhouse Gas Emissions from a Typical Passenger Vehicle 1 (May 2014) (“The amount of CO<sub>2</sub> created from burning one gallon of fuel depends on the amount of carbon in the fuel. Typically, more than 99% of the carbon in a fuel is emitted as CO<sub>2</sub> when the fuel is burned. Very small amounts are emitted as hydrocarbons and carbon monoxide, which are converted to CO<sub>2</sub> relatively quickly in the atmosphere.”); Average Fuel Economy Standards for Light Trucks Model Years 2008–2011; Final Rule, 71 Fed. Reg. 17,566, 17,661 (“[C]ompliance with federal fuel economy standards is based primarily on CO<sub>2</sub> emission rates of covered vehicles.”).

<sup>11</sup> The Department of Transportation (and thus NHTSA) derives its authority to implement fuel economy standards from the Energy Policy and Conservation Act, as amended by the Energy Independence and Security Act, 49 U.S.C. §§ 32901-32919 (2007), while EPA derives its authority to regulate pollutants emitted by mobile sources from Title II of the Clean Air Act, *see* 42 U.S.C. §§ 7521-7554 (1990).

<sup>12</sup> *Massachusetts v. EPA*, 549 U.S. at 532.

Consequently, starting in 2010, NHTSA acted jointly with EPA to promulgate fuel economy standards and carbon-dioxide emissions limits for Model Years 2012 through 2016.<sup>13</sup> This ensured that their regulations were properly harmonized and that both agencies complied with Congress's directions and restrictions on their respective authorities.

In 2012, EPA and NHTSA jointly promulgated a second phase of standards for Model Years 2017 through 2025, which relied in part on agreement from auto manufacturers to achieve a 50 percent reduction in GHG emissions from new light-duty vehicles by 2025, compared to 2010 levels.<sup>14</sup>

Six years later, under President Trump, EPA and NHTSA conducted a revised determination known as the "Mid-Term Evaluation," which found based on updated data that the fuel economy standards for Model Years 2022 through 2025 were "too stringent."<sup>15</sup> Based on the updated information, EPA and NHTSA proposed and

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<sup>13</sup> Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324 (May 7, 2010) (promulgated by EPA *and* NHTSA).

<sup>14</sup> 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards; Final Rule, 77 Fed. Reg. 62,624 (Oct. 15, 2012) (promulgated by EPA *and* NHTSA).

<sup>15</sup> Mid-Term Evaluation of Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light Duty Vehicles: Notice; Withdrawal, 83 Fed. Reg. at 16,077 (Apr. 13, 2018) (promulgated by EPA *and* NHTSA).

finalized revised fuel economy and emissions standards for Model Years 2021 through 2026 (“SAFE II Rule”).<sup>16</sup>

The agencies then reversed course yet again after President Biden took office and issued an executive order directing EPA and NHTSA to reconsider the SAFE II Rule and for the Attorney General to seek to have cases challenging the SAFE II Rule held in abeyance pending the outcome of the agencies’ reconsideration.<sup>17</sup> Those cases have been in abeyance since April 4, 2021.

Unlike all other post-*Massachusetts v. EPA* fuel-economy rulemakings, under the Biden Administration, EPA and NHTSA then proceeded to conduct separate rulemakings regarding, respectively, tailpipe emission standards and corporate fuel economy standards. First, EPA independently finalized the Revised GHG Standards, repealing its part of the SAFE II rule. EPA’s new standards depend on an assumption that sales of electric vehicles will grow by more than 400% in the next few years, such that 17% of Model Year 2026 sales will be electric vehicles (as compared to

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<sup>16</sup> The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks: Notice of Proposed Rulemaking, 83 Fed. Reg. 42,986 (Aug. 24, 2018) (published by EPA *and* NHTSA); The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks; Final Rule, 85 Fed. Reg. 24,174 (Apr. 30, 2020) (promulgated by EPA *and* NHTSA)

<sup>17</sup> *See* Exec. Order No. 13,990 §§ 2(a)(ii), 2(d), 86 Fed. Reg. 7,037, 7,037–39 (Jan. 20, 2021).

the current average of 4.1%).<sup>18</sup> Further, EPA’s rule implements two mechanisms to bolster the new standards while heavily favoring electric vehicles over emission-reduction technology associated with liquid-fuel vehicles: EPA treats new electric vehicles as responsible for zero GHG emissions (thus sidestepping the substantial emission levels associated with generating the required electric power, among other things); and it also grants an electric vehicle “multiplier” credit trading system. This credit trading system effectively provides a regulatory cross subsidy from traditional automakers to those who make electric vehicles. The resulting standards EPA promulgated require annual carbon-dioxide emission reductions of between 5 and 10 percent for Model Years 2023 through 2026—dramatically different from the prior rule’s 1.5 percent annual decrease.<sup>19</sup> EPA’s rule will cost an estimated \$180 billion to \$300 billion, making it the costliest rule in American history.<sup>20</sup>

NHTSA’s new CAFE Standards chart a similar course, though with some

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<sup>18</sup> Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 74,434, 74,438 (Dec. 30, 2021) (promulgated by EPA).

<sup>19</sup> *Id.* at 74,434.

<sup>20</sup> *See id.* at 74,443, tbl. 4; for the comparative cost of this rule *see* The Reg List, Regulation Rodeo, <https://regrodeo.com/> (last accessed July 29, 2022). By contrast, SAFE II is the *least* costly rule in the history of federal regulations; that rule projected \$199.5 billion in cost *savings*.

important differences.<sup>21</sup> The new CAFE Standards increase fuel economy requirements for both passenger cars and light trucks by 8 percent per year for Model Years 2024–2025 and by 10 percent per year for Model Year 2026.<sup>22</sup> The two new rules “represent roughly equivalent levels of stringency” because NHTSA has attempted to harmonize its new standards with EPA’s.<sup>23</sup> As already noted, while NHTSA acknowledges that it may “not consider the fuel economy of electric vehicles in setting CAFE standards, consistent with Congress’ direction in 49 U.S.C. 32902(h),” it nevertheless incorporated electric vehicle fuel economy by purporting to find a regulatory back door: relying on EPA’s *de facto* electric vehicle mandate in determining what fuel efficiency increases were the “maximum feasible.”<sup>24</sup> NHTSA estimates the costs of the final rule will be approximately \$128 billion.<sup>25</sup>

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In this lawsuit, the Biofuels Movants seek to intervene to challenge the stringency of NHTSA’s CAFE Standards, and, in particular, NHTSA’s claim to have

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<sup>21</sup> For example, EPA projects much lower battery costs than NHTSA, resulting in a higher projected market share for electric vehicles. *Compare* 86 Fed. Reg. at 74,487 with 87 Fed. Reg. at 25,825–26.

<sup>22</sup> 87 Fed. Reg. at 25,720.

<sup>23</sup> *Id.* at 25,744.

<sup>24</sup> *Id.* at 25,721.

<sup>25</sup> *Id.* at 25,724.

statutory authority to indirectly consider electric vehicles in setting such standards.

The Biofuels Movants support increasing the fuel efficiency of the domestic transportation fleet consistent with the authority granted NHTSA in the Energy Policy and Conservation Act and with Congress's directives in the Energy Independence and Security Act of 2007, which created the current Renewable Fuel Standard program to expand the nation's renewable fuel sector in support of the nation's environmental, energy, climate, and energy-security policy. NHTSA and EPA's rules cut directly against these statutes and conflict with the Renewable Fuel Standard. They ignore those agencies' place in the overall statutory scheme and flatten the congressionally implemented guardrails on their authority. The composition of the country's vehicle fleet is precisely the kind of transformative issue that courts have increasingly recognized that Congress must address directly and that agencies may not claim new authority to regulate.

Biofuels Movants, accordingly, have a unique perspective from which to add to Petitioner's arguments challenging NHTSA's Revised Fuel Economy Standards.

### **INTEREST OF INTERVENORS**

Biofuels Movants consist of a business league, three for-profit companies, and several agricultural trade organizations, all of which are involved in the biofuels supply chain, particularly with respect to ethanol, biodiesel, and renewable diesel. Ethanol is a key component in the fuel of America's passenger cars and light trucks,

where it provides a valuable and environmentally friendly source of octane, which helps to reduce emissions and increase fuel efficiency. Biodiesel and renewable diesel are produced using renewable feedstocks and are low-carbon alternatives to petroleum-derived diesel.

Biofuels Movants and their members have made significant investments in biofuels production in all stages of the supply chain, based in large degree on the policy directives expressly established by Congress to encourage investment in domestic production of renewable fuels, and they now face the prospect of devalued and stranded assets if this Congressional policy is undermined by a shift to electrification based on the quite different policy objectives of this administration.

As explained in the attached declarations, *see* Exhs. A & B, Biofuels Movants involved in the ethanol supply chain are injured by NHTSA's new CAFE Standards, which will directly lead to the destruction of demand for ethanol and thus a reduction in these Movants' profits and investments. NHTSA itself projects the CAFE Standards will reduce total gasoline consumption by about 234 billion gallons through 2050.<sup>26</sup> Under the Congressionally mandated Renewable Fuel Standard program, gasoline typically includes a 10% ethanol blend level, so the NHTSA rule can be expected to result directly in ethanol demand destruction of at least 23 billion gallons

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<sup>26</sup> *Id.* at 26,068

for that period. Similarly, Biofuels Movants involved in the biodiesel and renewable diesel supply chains are injured because of demand destruction, particularly with respect to the sale of diesel for use in light-duty trucks. *See* Exh. A & C.

For these same reasons, most of the Biofuels Movants are now challenging EPA's vehicle GHG emissions rule because it exceeds that agency's authority under Title II of the Clean Air Act and because it is arbitrary, capricious, and contrary to law.<sup>27</sup> There, as here, EPA's unlawful incorporation of an electric vehicle mandate will lead to the substantial destruction of ethanol, biodiesel, and renewable diesel demand.

## GROUNDS FOR INTERVENTION

### *A. Standard for Intervention*

Under Federal Rule of Appellate Procedure 15(d), 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." That rule does not specify any standard for intervention, but because "the policies underlying intervention" in district courts "may be applicable in appellate courts,"<sup>28</sup> this Court may look to Federal Rule of Civil Procedure 24 for guidance. Rule 24 provides

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<sup>27</sup> *See Texas, et al. v. EPA*, No. 22-1031 (D.C. Cir. 2021).

<sup>28</sup> *Int'l Union v. Scofield*, 382 U.S. 205, 216 n.10 (1965).

that leave to intervene be granted to a movant that timely “claims an interest relating to the ... 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.”<sup>29</sup> These requirements are readily satisfied here.

*B. The Motion is Timely.*

The Biofuels Movants are filing their motion for leave to intervene within 30 days of the petitions for review filed on June 30, 2022, in case number 22-1144 and case number 22-1145. Under Federal Rule of Appellate Procedure 15(d), this motion is therefore timely.

*C. Biofuels Movants Have a Substantial Interest in the Matter.*

Biofuels Movants have a substantial interest in ensuring that NHTSA adheres to its statutory constraints in setting CAFE Standards. These Movants are harmed by NHTSA promulgating a rule that—in direct violation of those constraints and without necessary consideration of the widespread ramifications on not only the transportation fuel industry, but also the electric power generation industry, the national economy, and international security and trade—imposes standards dependent on

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<sup>29</sup> Fed. R. Civ. P. 24(a)(2).

forcing electrification of the nation's vehicle fleet to the disadvantage of continued development and deployment of low-emission and high-efficiency high-octane fuel technology.

As this Court has observed, Congress enacted the Renewable Fuel Standards program “in order to ‘move the United States toward greater energy independence and security’ and ‘increase the production of clean renewable fuels.’”<sup>30</sup> And as detailed above, many Biofuels Movants have made significant investments in fuel ethanol supply chain technology and infrastructure. Such fuels are responsible for significant economic and environmental benefits with far less disruption and cost than the electrification that the NHTSA rule compels.<sup>31</sup> The Biofuels Movants involved in the renewable diesel and biodiesel supply chains base their business models on providing an affordable, low-carbon alternative to diesel made from petroleum.<sup>32</sup> By unlawfully incorporating EPA's Revised GHG Standards, NHTSA places Biofuels Movants and their members' expected return on their investments directly within the crosshairs of this proceeding.

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<sup>30</sup> *Americans for Clean Energy v. EPA*, 864 F.3d 691, 697 (D.C. Cir. 2017) (Kavanaugh, J.) (quoting the Energy Independence and Security Act, Pub. L. No. 110-140, 121 Stat. 1492 (2007)).

<sup>31</sup> See Exhs. A & B.

<sup>32</sup> See Exh. A & C.

In addition, Biofuels Movants have Article III standing to sue.<sup>33</sup> Biofuels Movants have substantial interests that are adversely affected by this litigation.<sup>34</sup> Biofuels Movants are perhaps not directly regulated by the CAFE Standard, but the rule is one that governs fuel efficiency and what kind of “alternative fuels” will be used (*i.e.*, electricity or biofuels) to power America’s light duty vehicle fleet. Accordingly, the outcome of the petitions for review of this rule affects (and is designed to affect) the volume of biofuels that will sold, and puts Biofuels Movants at a competitive disadvantage *vis a vis* other sources of “alternative fuel,” such as electricity. The full implementation of the CAFE Standards will lead to lost profits for all in the biofuels industry.<sup>35</sup> These injuries can be redressed only if NHTSA’s new fuel economy rule is set aside.

*D. Existing Parties do not Adequately Represent Biofuels Movants’ Interests.*

Biofuels Movants’ interests are not adequately represented by any other party

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<sup>33</sup> *Deutsche Bank Nat’l Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013).

<sup>34</sup> *See Roeder v. Islamic Repub. of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (“[A]ny person who satisfies Rule 24(a) will also meet Article III’s standing requirement.”) (citation omitted).

<sup>35</sup> *See, e.g., DIRECTV, Inc. v. FCC*, 110 F.3d 816, 829 (D.C. Cir. 1997) (“[S]tanding . . . may be established by reference . . . to lost profits.”).

in this case. This Court has held that this is not an onerous standard.<sup>36</sup>

Biofuels Movants' interests are unique and distinct from the interests of AFPM. While they share a concern that the CAFE Standards will destroy demand for liquid fuels, Biofuels Movants are particularly interested in NHTSA's *de facto* choice of electrification over renewable liquid fuels. Additionally, Biofuels Movants cannot be assured that their interests will be adequately represented by the petroleum industry, with which they both cooperate and compete, or with state governments, which have unique legal concerns arising from state sovereignty and their status as representatives of their citizens.<sup>37</sup> Biofuels Movants are also uniquely suited to detail the conflict between the Congressionally mandated requirements of the Renewable Fuel Stand, from which they benefit directly, and the executive-order-derived extra-statutory leaps incorporated in the NHTSA rule.

Finally, while Biofuels Movants' are not moving to intervene in case number 22-1080, to the extent that consolidated case is relevant to the inquiry, Biofuels

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<sup>36</sup> See *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015) (“[A] movant ordinarily should be allowed to intervene unless it is clear that the party will provide adequate representation.” (internal quotation marks and citation omitted)).

<sup>37</sup> See *id.* at 321 (“[This Court] look[s] skeptically on government entities serving as adequate advocates for private parties.” (citing *Fund for Animals, Inc. v. Norton*, 322 F.3d. 728, 736 (D.C. Cir. 2003))).

Movants note that their interests are unique and distinct from the interests of Petitioner NRDC. While Biofuels Movants support many of the air quality objectives that NRDC has advocated for, they disagree sharply over whether electrification<sup>38</sup> or clean-burning renewable fuels provide the better method to achieve these goals.

*E. Biofuels Movants Will Not Cause Delay or Undue Prejudice.*

Given the early stage of this litigation, participation by Biofuels Movants will cause neither delay nor any prejudice to the parties. Biofuels Movants intend to cooperate and coordinate with Petitioners and any other Petitioner-intervenors, including those whose interests and perspectives may not align with those of Biofuels Movants, and will of course follow any schedule issued by this Court.

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<sup>38</sup> See, e.g., NRDC, *Promote Electric Vehicles*, <https://www.nrdc.org/issues/promote-electric-vehicles> (last accessed July 22, 2022).

## CONCLUSION

For the foregoing reasons, Biofuels Movants respectfully request that the Court enter an order granting them leave to intervene in support of Petitioners in case numbers 22-1144 and 22-1145.

Dated: July 29, 2022

Respectfully submitted,

/s/ Michael Buschbacher

Jonathan Berry

Michael Buschbacher

BOYDEN GRAY & ASSOCIATES PLLC

801 17th Street NW, Suite 350

Washington, DC 20006

202-955-0620 (telephone)

202-955-0621 (fax)

buschbacher@boydengrayassociates.com

*Counsel for Biofuels Movants*

## RULE 26.1 DISCLOSURE STATEMENT

Under Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1, Proposed Intervenor-Petitioners provide the following disclosure statements:

**Clean Fuels Development Coalition** is a business league organization established in a manner consistent with Section 501(c)(6) of the Internal Revenue Code. Established in 1988, CFDC works with auto, agriculture, and biofuel interests in support of a broad range of energy and environmental programs. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in CFDC.

**Diamond Alternative Energy, LLC** is a Delaware limited liability company and a wholly owned direct subsidiary of Valero Energy Corporation, a Delaware corporation whose common stock is publicly traded on the New York Stock Exchange under the ticker symbol: VLO.

**ICM, Inc.** is a Kansas corporation that is a global leader in developing biorefining capabilities, especially for the production of ethanol. It is a wholly owned subsidiary of ICM Holdings, Inc., and no publicly held company has a 10% or greater ownership interest in ICM Holdings, Inc.

**Illinois Corn Growers Association** is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Kansas Corn Growers Association** is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Kentucky Corn Growers Association** is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Michigan Corn Growers Association** is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Minnesota Soybean Growers Association** is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Missouri Corn Growers Association** is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Texas Corn Producers Association** is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Wisconsin Corn Growers Association** is an agricultural organization. It has

no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

**Valero Renewable Fuels Company, LLC**, a Texas limited liability company, is a wholly owned direct subsidiary of Valero Energy Corporation, a Delaware corporation whose common stock is publicly traded on the New York Stock Exchange under the ticker symbol: VLO.

Dated: July 29, 2022

Respectfully submitted,

/s/ Michael Buschbacher

Jonathan Berry

Michael Buschbacher

BOYDEN GRAY & ASSOCIATES PLLC

801 17th Street NW, Suite 350

Washington, DC 20006

202-955-0620 (telephone)

202-955-0621 (fax)

buschbacher@boydengrayassociates.com

*Counsel for Biofuels Movants*

ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS,

*Petitioner,*

v.

NATIONAL HIGHWAY TRAFFIC  
SAFETY ADMINISTRATION,

*Respondent.*

No. 22-1145 (and consolidated  
case No. 22-1144)

**CERTIFICATE AS TO PARTIES AND *AMICI CURIAE***

Under Circuit Rules 27(a)(4) and 28(a)(1)(A), Proposed Intervenors submit the following Certificate as to Parties and *Amici Curiae*:

Petitioners: American Fuel & Petrochemical Manufacturers (No. 22-1145); The States of Texas, Arkansas, Indiana, Louisiana, Mississippi, Montana, Nebraska, Ohio, South Carolina, Utah, and the Commonwealth of Kentucky (No. 22-1144). These cases are consolidated with Case No. 22-1080 brought by Petitioner Natural Resources Defense Council; however, Proposed Intervenors have not moved to intervene in that case.

Respondents: National Highway Traffic Safety Administration, Steven Cliff, in his official capacity as Administrator of the National Highway Traffic Safety

Administration, United States Department of Transportation, and Pete Buttigieg, in his official capacity as Secretary of the U.S. Department of Transportation.

Intervenors for Petitioners: None at this time.

Intervenors for Respondents: None at this time.

Amici Curiae: None at this time.

**CERTIFICATE OF COMPLIANCE**

The foregoing motion contains 4,335 words and complies with the type-volume limit in Fed. R. App. P. 27(d)(2)(A). The document complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5)(A).

Dated: July 29, 2022

Respectfully submitted,  
/s/ Michael Buschbacher  
Michael Buschbacher

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of July, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which will be therefore served on all parties.

Dated: July 29, 2022

Respectfully submitted,  
/s/ Michael Buschbacher  
Michael Buschbacher

# Exhibit A

ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS,

*Petitioner,*

v.

NATIONAL HIGHWAY TRAFFIC  
SAFETY ADMINISTRATION,

*Respondent.*

No. 22-1145 (and consolidated  
case No. 22-1144)

**DECLARATION OF DEEPAK GARG IN SUPPORT OF MOTION FOR  
LEAVE TO INTERVENE OF CLEAN FUELS DEVELOPMENT COALI-  
TION, ICM, ET AL.**

I, Deepak Garg, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am a Vice President leading the Fuels Regulatory Planning and HSE Assurance division of the Valero family of companies, which includes Valero Renewable Fuels Company and Diamond Alternative Energy, LLC (collectively “Valero”). I am responsible for regulatory business impact assessment, compliance support, and other matters relating to Valero’s production and sale of liquid fuels, including both petroleum products such as gasoline and diesel and renewable fuels such as ethanol and renewable diesel. My responsibilities include analyzing impacts

of regulatory and statutory changes on the liquid fuels production industry, including the impacts on renewable fuels.

2. In particular, I have extensive experience in supporting Valero's compliance with the requirements of the federal Renewable Fuel Standard, which requires so-called "obligated parties" to blend certain percentages of renewable fuels into transportation fuels or to purchase an equivalent number of "Renewable Identification Numbers" credits, or RINs, to meet an EPA-specified Renewable Volume Obligation ("RVO").

3. As a refiner of gasoline and diesel, Valero is an obligated party under the federal Renewable Fuels Standard and a purchaser of RINs. As the owner of two subsidiaries that produce ethanol and renewable diesel, Valero is also a producer and seller of renewable fuels (and thus, RINs).

4. One of these subsidiaries is Valero Renewable Fuels Company, LLC ("Valero Renewable Fuels"), which is an independent ethanol producer owning and operating 12 ethanol plants with a combined production capacity of around 1.6 billion gallons per year.

5. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet, and it is a renewable fuel subject to the requirements of

the Renewable Fuel Standard. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist “knocking” in an engine—reducing vehicles’ fuel usage, net greenhouse gas emissions, and the emission of toxic chemicals such as benzene. Across most of the United States, refiners add 10% ethanol to gasoline to raise its octane rating to a level suitable for use in most vehicles.

6. Diamond Alternative Energy, LLC (“Diamond Alternative”) operates and is a part owner of the Diamond Green Diesel renewable diesel production facility in Norco, Louisiana. Diamond Green Diesel currently produces 290 million gallons of renewable diesel, making it America’s largest renewable diesel plant.

7. Renewable diesel is made from sustainable low-carbon feedstocks, such as used cooking oil, inedible animal fats derived from processing meat fats and fuel-grade corn oil. Its chemical composition is nearly identical to that of petroleum-based diesel, making it a “drop-in” fuel that can be stored, distributed, and used interchangeably with petroleum-derived diesel, but its production results in 80% fewer greenhouse gas emissions for the finished fuel. As with ethanol, renewable diesel is one of the fuels that is subject to and generates credits under the Renewable Fuel Standard.

8. Ensuring that Valero Renewable Fuels and Diamond Alternative Energy fit within Valero’s larger business model requires careful business and regulatory

compliance analysis of how market demand and federal and state regulations together affect demand for both petroleum-based fuels and renewable fuels.

9. National Highway Traffic Safety Administration's ("NHTSA") new regulation entitled "Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks," 87 Fed. Reg. at 25710 (May 2, 2022), will add substantial compliance costs and will undercut the renewable fuels requirements of the RFS.

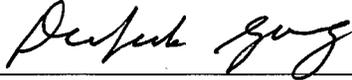
10. This rule requires an increase in fuel economy for both new passenger cars and light trucks, by 8 percent per year for model years 2024–2025, and by 10 percent per year for model year 2026.

11. As NHTSA explains at length, these restrictions will depress demand for liquid fuels, including depressing the demand for the ethanol that Valero Renewable Fuels and other ethanol producers produce as well as the renewable diesel that Diamond Green Diesel and other renewable diesel producers manufacture. Valero Renewable Fuels and Diamond Alternative Energy would suffer competitive injury if NHTSA forces consumers to buy vehicles that use less fuel per mile or purchase vehicles that do not operate using liquid fuel at all because the rule effectively restricts the opportunity to sell biofuels and causes product devaluation.

12. These economic costs are not speculative. NHTSA projects the new standards will reduce total gasoline consumption by about 234 billion gallons of gas through 2050. If gasoline remains at the current 10% ethanol blend level, this will result in ethanol demand destruction of around 23 billion gallons for that period. While the new standards are in effect, they will drive down demand for the ethanol, to the financial detriment of Valero Renewable Fuels and other ethanol producers and stakeholders. The increased adoption of electric vehicles and plug-in hybrid vehicles, and—in particular, electric or plug-in hybrid trucks and sport utility vehicles—will also displace demand for both traditional diesel fuel and renewable diesel. Adjusting to these realities, moreover, will impose substantial compliance costs, in large part because of the way these reductions conflict with the RVO requirements of the Renewable Fuel Standard.

13. In sum, Valero Renewable Fuels and Diamond Alternative Energy have a significant financial stake in the outcome of this case.

Dated: July 29, 2022

  
\_\_\_\_\_  
Deepak Garg

# Exhibit B

ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS,

*Petitioner,*

v.

NATIONAL HIGHWAY TRAFFIC SAFETY  
ADMINISTRATION,

*Respondent.*

No. 22-1145 (and consolidated case No. 22-1144).

**DECLARATION OF LANE HOWARD IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE OF CLEAN FUELS DEVELOPMENT COALITION, ICM, ET AL.**

I, Lane Howard, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Associate Director of Market Development of the Missouri Corn Growers Association, a non-profit trade association based in Missouri with a membership of nearly 1,700 Missouri corn farmers, as well as their supporters and members of corn farming-related industries. We operate for the purpose of promoting the general commercial, legislative, and other common interests of our members.

2. I am familiar with all aspects of the Association's work and with the

market for corn and products, such as ethanol, that are made using the corn grown by our members.

3. Missouri is one of the nation's leading corn producing states, with a net production of approximately 561 million bushels of corn. The great majority of this corn is used as a feedstock for ethanol production.

4. The ethanol industry supports over 400,000 jobs in more than 25 states. Ethanol contributes more than \$52 billion to the national GDP and profitably processed more than 5.1 billion bushels of corn in 2021.

5. Ethanol is the second-largest component of the fuel that powers the United States' vehicle fleet. Ethanol provides a low carbon source of energy and octane rating—the measure of a fuel to resist “knocking” in an engine—reducing vehicles' fuel usage, net greenhouse gas emissions, and the emission of toxic chemicals such as benzene. Across most of the United States, refiners add 10% ethanol to gasoline to raise its octane rating to a level suitable for use in most vehicles. In 2021 alone the use of ethanol reduced greenhouse gas emissions by more than 50 million metric tons.

6. National Highway Traffic Safety Administration's (“NHTSA”) new regulation entitled “Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks,” 87 Fed. Reg. at 25710 (May 2, 2022), requires an increase in fuel economy for both new passenger cars and light

trucks, by 8 percent per year for model years 2024–2025, and by 10 percent per year for model year 2026.

7. As NHTSA explains at length, these restrictions will depress demand for liquid fuels. This includes depressing the demand for the ethanol made with the corn grown by our members. Corn growers across the country will suffer economic injury when NHTSA forces consumers to buy vehicles that use less fuel per mile or purchase vehicles that do not operate using liquid fuel at all.

8. These economic harms are not speculative. NHTSA projects the new standards will reduce total gasoline consumption by about 234 billion gallons of gas through 2050. If gasoline remains at the current 10% ethanol blend level, this will result in ethanol demand destruction of around 23 billion gallons for that period. While the new standards are in effect, they will drive down demand for the ethanol, to the financial detriment of our members and other ethanol producers and stakeholders.

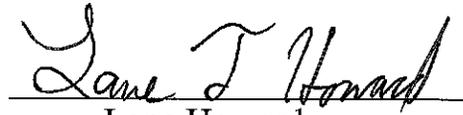
9. This demand destruction harms the Missouri Corn Growers Association in at least two ways. First, it harms its members by decreasing demand for the corn they grow. And second, these financial harms redound to the Association itself, which will lose funding it uses to pursue its mission of advocating for the interests of its members.

10. In addition, by causing a contraction in liquid fuel production—

including all forms of diesel fuel—NHTSA’s rule is likely to undercut the current economies of scale in the fuel industry, increasing the cost-per-gallon of producing fuel. This increased cost will be passed on directly to consumers of liquid fuel. Growing corn requires extensive use of heavy farming equipment, almost all of which requires substantial quantities of diesel fuel. Farming is a low margin business, and the increases in fuel cost resulting this rule will have a substantial harmful effect on our members’ bottom lines.

11. All of these injuries would be substantially ameliorated if NHTSA’s *de facto* electric vehicle mandate were set aside.

Dated: July 29, 2022

  
Lane Howard

# Exhibit C

ORAL ARGUMENT NOT YET SCHEDULED

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

AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS,

*Petitioner,*

v.

NATIONAL HIGHWAY TRAFFIC SAFETY  
ADMINISTRATION,

*Respondent.*

No. 22-1145

**DECLARATION OF JOSEPH SMENTEK IN SUPPORT OF MOTION FOR  
LEAVE TO INTERVENE OF CLEAN FUELS DEVELOPMENT COALI-  
TION, ICM, ET AL.**

I, Joseph Smentek, declare under penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the Executive Director of the Minnesota Soybean Growers Association, a non-profit trade association based in Minnesota with a membership of nearly 2,600 Minnesota soybean farmers, as well as their supporters and members of soybean-related industries. We operate for the purpose of promoting the general commercial, legislative, and other common interests of our members.

2. I am familiar with all aspects of the Association's work and with the market for soybeans and products, such as biodiesel, that are made using the soy-

beans grown by our members.

3. Minnesota is one of the leading producers of soybeans and a leader in the biodiesel industry. In 2021, for example, there were 85.5 million gallons of biodiesel produced in Minnesota, in large part from soybeans grown in Minnesota by our members. Soybeans grown by our members are also used as a biodiesel feedstock at numerous biodiesel production facilities in many other states. And demand for biodiesel is a key driver of demand for Minnesota-grown soybeans.

4. National Highway Traffic Safety Administration's ("NHTSA") new regulation entitled "Corporate Average Fuel Economy Standards for Model Years 2024–2026 Passenger Cars and Light Trucks," 87 Fed. Reg. at 25710 (May 2, 2022), requires an increase in fuel economy for both new passenger cars and light trucks, by 8 percent per year for model years 2024–2025, and by 10 percent per year for model year 2026.

5. As NHTSA explains at length, these restrictions will depress demand for liquid fuels, in large part because manufacturers will have to sell a much higher percentage of electric vehicles (including both battery-electric vehicles and plug-in hybrids) than they currently do. The increased adoption of electric vehicles and plug-in hybrid vehicles, and—in particular, electric or plug-in hybrid trucks—will displace demand for both traditional diesel fuel and biodiesel, which is a prevalent fuel used in many trucks models currently sold. Indeed, NHTSA also projects that

diesel demand will be almost entirely eliminated, replaced by the electric vehicles that NHTSA's rule prefers.

6. This demand destruction harms the Minnesota Soybean Growers Association in at least three ways. First, it harms its members by decreasing demand for the soybeans they grow. And second, these financial harms redound to the Association itself, which will lose funding it uses to pursue its mission of advocating for the interests of its members.

7. In addition, by causing a contraction in liquid fuel production—including all forms of diesel fuel—NHTSA's rule is likely to undercut the current economies of scale in the fuel production industry, increasing the cost-per-gallon of fuel production. This increased cost will be passed on directly to consumers of liquid fuel. Growing soybeans requires extensive use of heavy farming equipment, almost all of which requires substantial quantities of diesel fuel. Farming is a low margin business, and the increases in fuel cost resulting this rule will have a substantial harmful effect on our member's bottom line.

8. These injuries would be substantially ameliorated if NHTSA's *de facto* electric vehicle mandate were set aside.

Dated: July 29, 2022

  
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Joseph Smentek