UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 20-4285

Caption [use short title]

State of California v. United States Department of Energy

Motion for: Intervention by Competitive Enterprise Institute and Freedomworks Foundation

Set forth below precise, complete statement of relief sought:

The Competitive Enterprise Institute and Freedomworks Foundation seek intervention as a right or, in the alternative, permissive intervention

MOVING PARTY: Competitive Enterprise Institute and Freedomworks Foundation

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: State of California et al.

MOVING ATTORNEY: Devin Watkins

OPPOSING ATTORNEY: Somerset Perry

[name of attorney, with firm, address, phone number and e-mail]

Competitive Enterprise Institute
1310 L Street NW, 7th Floor, Washington, DC 20005
(202) 331-1010 devin.watkins@cei.org

Office of the Attorney General
1515 Clay Street, 20th Floor Oakland, CA 94612
(510) 879-0852 Somerset.Perry@doj.ca.gov

Court-Judge/Agency appealed from: U.S. Department of Energy

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:
/s/ Devin Watkins **Date:** 1/28/2021

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

No. 20-4285

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATES OF CALIFORNIA, CONNECTICUT, ILLINOIS, MAINE, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NEW YORK, NEVADA, OREGON, VERMONT, and WASHINGTON, COMMONWEALTH OF MASSACHUSETTS, THE DISTRICT OF COLUMBIA, and the CITY OF NEW YORK,

Petitioners,

v.

U.S. DEPARTMENT OF ENERGY; DAN BROUILLETTE, in his official capacity as Secretary of the United States Department of Energy,

Respondents.

ON PETITION FOR REVIEW OF THE FINAL ORDER OF THE U.S. DEPARTMENT OF ENERGY

MOTION OF THE COMPETITIVE ENTERPRISE INSTITUTE AND FREEDOMWORKS FOUNDATION TO INTERVENE ON BEHALF OF RESPONDENTS

Devin Watkins (admission pending) *
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street N.W., 7th Floor
Washington, D.C. 20005
(202) 331-1010
devin.watkins@cei.org

**Counsel of Record for Movants*

January 28, 2021

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Movants hereby state:

Movant Competitive Enterprise Institute ("CEI") is a non-profit 501(c)(3) corporation organized under the laws of the District of Columbia for the purpose of defending free enterprise, limited government, and the rule of law. It has no parent companies. No publicly held corporation has a ten percent or greater ownership interest in it.

Movant FreedomWorks Foundation is a non-profit 501(c)(3) corporation organized under the laws of the District of Columbia for the purpose of educating and empowering Americans with the principles of individual liberty, small government and free markets, and has over 5 million members nationwide. It has no parent companies, and no publicly held corporation has a ten percent or greater ownership interest in it.

INTRODUCTION

Pursuant to Federal Rules of Appellate Procedure 15(d) and 27 and Rule 27.1 of the Local Rules and Internal Operating Procedures of the Court of Appeals for the Second Circuit ("Second Circuit Rules"), the Competitive Enterprise Institute ("CEI") and the FreedomWorks Foundation, by and through undersigned counsel, respectfully move to intervene in support of Respondents, the United States Department of Energy ("the agency") and Dan Brouillette, in his official capacity as

Secretary of the Department of Energy, in opposition to the petition for review ("Petition") of the Petitioners.

Counsel for Movants contacted Counsel for Petitioners and Counsel for Respondent about their positions on the motion and whether they intend to file a response to the motion. *See* Second Circuit Rule 27.1(b). The parties responded that they have not yet decided to take a position on this motion. Petitioners also said they reserved the right to oppose our motion after reviewing it.

The Petition challenges a Department of Energy final rule entitled *"Energy Conservation Program: Establishment of a New Product Class for Residential Dishwashers"* published in the Federal Register at 85 Fed. Reg. 68,723 on October 30, 2020 ("Final Rule").

Movants' timely request to intervene in support of Respondent should be granted. CEI was the organization which initially petitioned the agency to establish the Final Rule on March 21, 2018 under the Administrative Procedure Act, which requires that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). FreedomWorks Foundation is a membership organization with approximately 5 million members nationwide, many of whom are impacted by the final rule. Declaration of Sarah Anderson. Over 1,700 of its members submitted comments during the agency's rulemaking process. *Id.*

Petitioners object to the agency's Final Rule and will likely ask this Court to vacate and remand the Final Rule to the agency. The consequences of any relief Petitioners might obtain would adversely affect FreedomWorks Foundation's members and would undo the results of the rulemaking petition submitted by CEI. As such, Movants have direct, substantial, and legally protectable interests in the outcome of the Petition, which challenges the Final Rule and, if successful, would harm the Movants.

Movants' interests also differ from those of Respondent. Movants represent the petitioner for the Final Rule and many people who would be harmed by the revocation of the Final Rule. For that reason, as explained below, Respondent may not adequately represent Movants' interests.

BACKGROUND

Several years ago, CEI began investigating the effects of regulations on the cycle times of dishwashers. It discovered that dishwasher cycle times had doubled in the last 35 years, and that dishwashers that required about an hour to wash and dry a load of dishes no longer existed in the marketplace.

On March 21, 2018, CEI petitioned the agency for a new class of dishwashers that would once again operate with one-hour cycles. CEI's petition was published in the Federal Register for public comment. U.S. Department of Energy, *Energy Conservation Program: Energy Conservation Standards for Dishwashers, Notification of Petition for Rulemaking*, (Apr. 24, 2018). There were organizations which supported this

rulemaking petition, such as the FreedomWorks Foundation and the 60 Plus Association, as well as those like the Petitioners in this case who opposed it.

On July 16, 2019 the agency granted CEI's petition for rulemaking and eventually finalized the Final Rule at issue in this case.

ARGUMENT

I. Movants Satisfy the Standards for Intervention as of Right

Federal Rule of Appellate Procedure 15(d) provides that an applicant for intervention in a case arising from a petition to review a government action must file a motion for leave to intervene within 30 days after the petition is filed, supported by a concise statement of the interest and the grounds for intervention. Although the appellate rules do not specify a standard for intervention, this Court utilizes the principles underlying intervention under Rule 24 of the Federal Rules of Civil Procedure. Rule 24 provides that the Court shall permit anyone to intervene who "claims an interest relating to the property or 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." See *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014) (citing Fed.R.Civ.P. 24(a)(2)). "To intervene as of right, a movant must: '(1) timely file an application, (2) show an interest in the action, (3) demonstrate that the interest may be impaired by the disposition of the action, and (4) show that the interest is not protected adequately by the parties to the action.'" *Brennan v. New York*

City Bd. of Educ., 260 F.3d 123, 128-29 (2d Cir. 2001) (citations omitted).

Movants need not demonstrate Article III standing to intervene. *Hoblock v. Albany County Bd. of Elections*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005) (explaining that "there is no Article III standing requirement in the Second Circuit, with an intervenor only needing to meet the Rule 24(a) requirements and have an interest in the litigation…"). Regardless, the members of FreedomWorks Foundation would be harmed by the revocation of this rule and as such FreedomWorks Foundation has Article III standing to represent its members in this matter.

When applying Rule 24, "courts are guided by practical and equitable considerations in an effort to balance 'efficiently administrating legal disputes by resolving all related issues in one lawsuit, on the one hand, and keeping a single lawsuit from becoming unnecessarily complex, unwieldy or prolonged, on the other hand.'" *Floyd v. City of New York*, 302 F.R.D. 69, 83 (S.D.N.Y.), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014) (citing *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir.1994)). "A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *United States v. City of Los Angeles*, 288 F.3d 391, 397-98 (9th Cir. 2002); *see also U. S. Postal Serv. v. Brennan*, 579 F.2d 188, 193 n.2 (2d Cir. 1978).

Movants satisfy these requirements, and this Court should grant this Motion so that they may protect their interests.

A. The Motion to Intervene is Timely

Petitioners filed this case on December 29, 2020. Movants are filing by the January 28, 2020, deadline. *See* Fed. R. App. P. 15(d) (intervention motion due within 30 days of petition). No prejudice or delay would result from Movants' intervention because they are seeking to join this case at the earliest possible stage.

B. Movants Have A Direct and Substantial Interest in the Subject of the Petition

The "interest" test is "primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011). The inquiry "should be, as in all cases, whether . . . 'there is a relationship between the legally protected interest and the claims at issue.'" *Id.* at 1176 (*citing Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993)). An intervening party's interest in the remedy a petitioner seeks can also establish a protectable interest. *City of Los Angeles*, 288 F.3d at 399-400.

Movants unquestionably have a vital interest in the subject of this Petition. One of the Movants petitioned for this rule and the other represents thousands of people who would benefit from the rule. Both Movants also submitted comments during the rulemaking process. Docket No. EERE-2018-BT-STD-0005-3137 (CEI); Docket # EERE-2018-BT-STD-0005-1137 (FreedomWorks Foundation). When a group seeking intervention has participated "in the administrative process leading to the

governmental action," the group has a direct and substantial interest in the litigation. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 124546 (6th Cir. 1997). This Court has routinely found that associations representing members affected by a federal regulation have a sufficient interest to intervene to challenge or support actions by federal agencies. *See, e.g., Nat. Res. Def. Council v. Costle*, 561 F.2d 904 (2d Cir.1977).

Movants have the direct, practical interest needed to intervene.

C. The Disposition of this Petition For Review Could Impair Movants' Ability to Protect Their Interests

The resolution of this Petition may impair Movants' ability to protect its interests. In this Circuit, where a proposed intervenor has a significant protectable interest, the Court has held that "the disposition of the action may as a practical matter impair or impede their ability to protect their interests[,]" and the party would be entitled to intervene. *New York Pub. Interest Research Grp., Inc. v. Regents of Univ. of State of New York*, 516 F.2d 350, 352 (2d Cir. 1975).

As discussed above, Movants petitioned for this rule and represent the individuals this rule was designed to help. Thus, the Final Rule directly affects their interests. Because the Petitioners will likely seek to vacate the Final Rule, or at least reduce its scope, this litigation threatens the interest of Movants.

D. Movants' Interests Are Not Adequately Represented by Existing Parties

Finally, the existing parties do not adequately represent Movants' interests. The question is whether the existing parties' interests are so similar to those of the

Movants that adequacy of representation would be assured. *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir.2001). The requirement to show inadequate representation is not a high bar, as it "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (citation omitted).

In assessing this factor, courts have looked to whether a present party will make all of a proposed intervenor's arguments, whether the party is capable and willing to make such arguments, and whether a proposed intervenor would offer any necessary elements to the proceeding that would not be covered by the other parties. *Cook v. Pan American World Airways, Inc.*, 636 F.Supp. 693, 697 (S.D.N.Y. 1986) (citing *Blake v. Pallan*, 554 F.2d 947, 955 (9th Cir.1977)).

Here, Movants' interests are not represented at all by the Petitioners; in fact, they are directly adverse to them. Petitioners are seeking to vacate the rule that Movants wish to defend.

Nor can Respondent adequately represent Movants' interests, as the agency is the regulatory authority and does not represent the people whom this rule was designed to help. Movants, on the other hand, do represent the interests of those people.

Additionally, the Final Rule was issued by the prior administration and Respondents represent the new administration, which has indicated it may not

support the Final Rule. On January 20, 2021, the Presidential Biden-Harris Transition issued a press release titled "FACT SHEET: List of Agency Actions for Review" which consists of a list of regulatory actions the new administration will be reviewing and presumably may be opposed to. Biden-Harris Transition, FACT SHEET: List of Agency Actions for Review (Jan. 20, 2021), available at https://web.archive.org/web/20210120120540/https://buildbackbetter.gov/press-releases/fact-sheet-list-of-agency-actions-for-review/. The fourth regulatory action listed for the Department of Energy under review is the Final Rule in this case.

Movants do not know whether the new administration will actually oppose this Rule. If that does occur, it is important that there be an adversarial presentation, because "[a]bsent an adversarial presentation, a diligent judge may overlook relevant facts or legal arguments in even a straightforward case." *Davis v. Ayala*, 576 U.S. 257, 294 (2015). It is in the interests of Movants and of the public to ensure that the Final Rule is defended, and that this lawsuit does not allow the Respondents to effectively vacate the rule through another party's litigation while avoiding the notice-and-comments requirements of formal rulemaking. For this reason, Movants are not adequately represented by Respondents. *Brennan v. New York City Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir.2001) (finding the potential for respondents to settle and refuse to defend the interests of the intervenor means the potential interveners are not adequately represented by respondents).

II. In the Alternative, Movants Should Be Granted Permissive Intervention

In the alternative, Movants seek leave for permissive intervention. As above, the Federal Rules of Civil Procedure may be used as a reference in the absence of a directly relevant Federal Rule of Appellate Procedure. Fed. R. Civ. P. 24(b)(1) authorizes permissive intervention when, on a timely motion, the applicant's claim or defense, and the main action, have a question of law or a question of fact in common. *Comer v. Cisneros*, 37 F.3d 775, 801 (2d Cir. 1994) (finding that permissive intervention was appropriate under Rule 24(b) where the "claims of the intervenors and those presented by the plaintiffs…present common issues of fact and identical issues of law[,]" and "the claims presented by the intervenors would not delay or prejudice the adjudication of the rights of either the original parties…but will in fact help to facilitate a resolution in this case."). Permissive intervention requires neither a showing of the inadequacy of representation nor a direct interest in the subject matter of the action.

First, as demonstrated above, this motion to intervene is timely. It is filed within the required timeframe and will not cause undue delay, prejudice the parties, or contribute to the waste of judicial resources. With the Petition only recently filed, this Court has not yet set a schedule for briefing the merits of Petitioner's claims.

Second, Movants would address the issues of law and fact that the Petitioners presents on the merits. Because Movants and Petitioners maintain opposing positions

on these common questions, Movants meet the standards for permissive intervention as well.

Intervention would thus contribute to the just and equitable adjudication of the legal questions presented and should be permitted.

CONCLUSION

For these reasons, Movants' Motion to Intervene should be granted.

Dated: January 28, 2021

Respectfully Submitted,

/s/ Devin Watkins
Devin Watkins
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-1010
devin.watkins@cei.org

Counsel for Movants

CERTIFICATE OF COMPLIANCE

Counsel certifies as follows:

1. The above brief complies with the type-volume requirement of Fed. R. App. P. 27(d)(2)(A) because this brief contains 2309 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. The above brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

Dated: January 28, 2021

Respectfully submitted,

/s/ Devin Watkins

Devin Watkins
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-1010
devin.watkins@cei.org

Counsel for Movants

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2021, a copy of the Motion of Competitive Enterprise Institute and FreedomWorks Foundation to Intervene on Behalf of Respondents and the Declaration of Sarah Anderson was electronically filed and served by operation of the Court's CM/ECF system to all parties.

Dated: January 28, 2021

Respectfully submitted,

/s/ Devin Watkins
Devin Watkins
COMPETITIVE ENTERPRISE INSTITUTE
1310 L Street NW, 7th Floor
Washington, DC 20005
(202) 331-1010
devin.watkins@cei.org

Counsel for Movants