ORAL ARGUMENT HELD SEPTEMBER 15, 2023

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

STATE OF OHIO, et al., Petitioners, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency, Respondents.	No. 22-1081 (and consolidated cases)

OPPOSITION OF STATE AND LOCAL GOVERNMENT RESPONDENT-INTERVENORS TO FUEL PETITIONERS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD AND TO FILE A SUPPLEMENTAL BRIEF

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(additional counsel on signature pages)

Fuel Petitioners seek leave to file a supplemental brief and to supplement the record on standing based on the pretext that State and Local Government Respondent-Intervenors (State Respondents) introduced new arguments at the September 15, 2023 oral argument. Neither the briefing nor the argument transcript supports this premise, and the motion should be denied.

In fact, Petitioners identify no authority supporting their requests. As to supplemental briefing, Petitioners cite cases in which this Court, *of its own accord*, has ordered parties to file such briefs after argument. Mot. 2 (citing *Pharmaceutical Care Mgmt. Ass'n v. District of Columbia*, 613 F.3d 179, 187 (D.C. Cir. 2010); *Am. Libr. Ass'n v. FCC*, 401 F.3d 489, 495 (D.C. Cir. 2005)). Petitioners identify no instance of this Court permitting post-argument supplemental briefing upon unilateral request by a party; and for good reason, as EPA points out in its opposition. EPA Opp. 1-2. As to supplementing the record on standing, this Court has clearly indicated that "a litigant should not expect the court" to grant such a motion "[a]bsent good cause shown." *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002); *see also* Mot. 2 (citing *Sierra Club* twice). Yet Petitioners' motion does not identify, much less establish, any of the grounds this Court has previously

recognized might justify such a motion. *See Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 111-112 (D.C. Cir. 2021) (describing grounds).

Nor does good cause exist to allow Petitioners' attempt to rehabilitate their standing showing at this late stage of the litigation. This Court's precedent identifies the evidence required to establish standing to challenge a Clean Air Act Section 209(b)(1) waiver when the alleged injuries stem from manufacturers' decisions about which vehicles to sell. *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 204 (D.C. Cir. 2011). Petitioners submitted 14 standing declarations with their opening brief, but none of them provided the requisite facts. Petitioners should not be allowed to evade this Court's well-established rule that "evidentiary presentation[s]" for standing should come "no later than" their opening brief, *Twin Rivers Paper Co. LLC v. SEC*, 934 F.3d 607, 613 (D.C. Cir. 2019), simply because the inadequacies of their submissions were discussed at oral argument.

For those reasons, the Court should deny Petitioners' motion. If, however, this Court grants Petitioners' motion, State Respondents respectfully request an opportunity to file supplemental briefing in response within 30 days of the Court's order.

I. PETITIONERS' MOTION IS BASED ON FALSE PREMISES

Fuel Petitioners' extraordinary requests are based on two purported justifications. First, they claim the only standing "point" raised in State Respondents' brief was "that private petitioners had not shown causation." Mot. 1. In fact, State Respondents argued these Petitioners had not "met the 'substantially more difficult' challenge to establish causation *and redressability* based on the decisions of third-parties—i.e., automobile manufacturers." State Resp.-Int. Br. at 13 (emphasis added, quoting *Chamber of Commerce*, 642 F.3d at 201); *see also id.* (arguing Petitioners provided no evidence that vacatur would change manufacturers' decisions "about which vehicles to offer"); *id.* at 14 (arguing Petitioners had not "established any probability that manufacturers would change course if EPA's decision were vacated").

Fuel Petitioners clearly understood this; their reply brief argued State Respondents were "simply wrong" about the potential impacts of "*the outcome of this litigation*," Fuel Petitioners' Reply at 5 (emphasis added), and responded that "the causation *and redressability* prongs are clearly satisfied," *id.* at 6 (internal quotation marks omitted, emphasis added). This

Court likewise understood State Respondents to have argued that Fuel Petitioners "haven't demonstrated redressability." *See* Transcript 24:13-17.[1]

Second, Fuel Petitioners claim that California raised a new mootness point at oral argument. Mot. 1. In fact, mootness first arose at oral argument in questions from the Court to Petitioners' counsel. Transcript 23:13. And Fuel Petitioners themselves raised mootness in an attempt to deflect the Court's redressability questions. Transcript 24-25 (Court asking about redressability); 27:5-10 (Petitioners: "the Government should bear a pretty heavy burden in trying to show that we somehow can't get any effective relief" and alleging a "capable of repetition problem").

Contrary to Petitioners' claim, California's counsel did not argue that this case is moot because it is impossible "for automakers to change their plans for any future years covered by California's preemption waiver." Mot. 1. Rather, California argued that Petitioners failed to identify or provide any "evidence establishing a substantial probability that automakers would stop selling the clean vehicles that consumers in California are demanding at levels above what the standards require and that consumers are paying price premiums for." Transcript at 59:25-60:1, 60:22-61:1; *id.* at 57:2-3

[1] Relevant excerpts from the official transcript of the September 15, 2023 oral argument can be found in Attachment A.

("Petitioners have not advanced any evidence of redressability."); 59:5-7 ("[I]t's their burden to show redress, and they literally didn't put in any evidence about market conditions."). That was not a new argument. *See* State Resp.-Int. Br. 13 ("Petitioners provide *no* evidence … that vacatur would change [manufacturer] decisions" concerning "which vehicles to offer.").

Notably, Petitioners identify no point at which California's counsel used the word "moot." Instead, Petitioners rely on a reference to "Model Year 2025," Mot. 1, that was part of California's response to a question from the Court *about redressability in that specific model year*, Transcript at 59:25-60:3. That was not a mootness argument.[2] In any event, responses to questions from the Court do not, by themselves, provide a basis for supplemental briefing. If they did, post-argument supplemental briefing

[2] To the extent Petitioners' motion turns on a purported need to establish that "manufacturers can change their production, distribution, and pricing plans well into" model year 2025, Proposed Supp. Br. 2, it is worth noting that these same Petitioners alleged precisely the opposite in a complaint filed in Minnesota district court in March 2023. *See* Complaint at ¶ 65, *Clean Fuels Dev. Coalition v. Kessler*¸ No. 0:23-cv-00610-KMM-DTS (D. Minn. March 13, 2023), ECF No. 1 ("[A]utomakers either already have finalized, or will imminently finalize, their production and sales plans for their model year 2025 vehicles.").

would likely become the norm. Petitioners are not entitled to an exceptional, third brief based on their inaccurate claims.

II. FUEL PETITIONERS HAD AMPLE NOTICE OF THEIR REDRESSABILITY BURDEN AND FAILED TO MEET IT

Petitioners have not established, and cannot establish, good cause for another reason. They had ample notice of the legal burdens they bore to establish standing in this case and ample opportunity to attempt to meet those burdens before oral argument. Specifically, when petitioners allege injuries from manufacturers' responses to a Clean Air Act Section 209(b)(1) waiver granted to California, this Court's "jurisdiction … hinges entirely upon the impact that the waiver decision will have [in] the remainder of the time during which the California waiver applies." *Chamber of Com.*, 642 F.3d at 204. Thus, when some of the period in which the California waiver applied is in the past, as much of it is here, this Court "divide[s] [its] analysis of the injuries asserted by the petitioners into two time periods"—past and future. *Id.* at 202. And this Court looks to evidence about "market conditions" in the relevant periods to determine all three elements of standing. *Id.*

Yet, although they filed their petitions in May 2022 (after most of the model years for this waiver were complete), Petitioners never parsed which

model years remained at issue or identified evidence specific to the *future* model years on which their standing rises or falls. They likewise submitted no evidence of market conditions at the time they filed suit. Instead, Petitioners' 14 declarants made only general statements that California's standards require delivery of certain vehicles to California's market, drawing no distinction between past and future time periods. *E.g.*, ECF No. 1990958 at 100 ¶ 6. Or they pointed to projections made in 2011 or 2012 concerning the impacts of *all* model years of these California standards combined. *E.g.*, *id.* at 104 ¶ 7; *see also Chamber of Com.*, 642 F.3d at 203-04 (rejecting reliance on such dated analyses). In other words, Petitioners' declarations are devoid of any discussion of manufacturers' likely responses to vacatur of EPA's waiver restoration in light of the market conditions present at the time the petitions were filed or anticipated in any future, remaining model year.[3]

State Respondents identified the inadequacy of Petitioners' showing in their brief. State Resp.-Int. Br. 13-15. State Respondents also submitted evidence of market conditions in 2022—the calendar year in which these

[3] Petitioners' proposed supplemental declarations do not cure this failure because they, too, are devoid of any discussion of current or future market conditions, even though the declarants acknowledge that these conditions—including consumer demand and applicable legal requirements—are highly relevant to manufacturer decisions. *E.g.*, Decl. of Reginald Modlin at ¶ 6.

petitions were filed—indicating, *inter alia*, that manufacturers were selling more clean vehicles in California than California's standards require and that "consumers are willing to face long waits and pay [price premiums] to get [those] vehicles." State Resp.-Int. Addendum ADD-87, 90, 98. In reply, Petitioners simply pointed to additional analyses that once again made assertions about *all* model years combined (including the six that predated the petition). Fuel Petitioners' Reply 4 (citing to analysis "for Model Years 2017-2025," JA239, and to arguments that California has always needed these standards, for all the model years to which they apply, *e.g.*, JA237 (citing California's 2012 Waiver Request)).

Fuel Petitioners failed to heed this Court's direction that standing in this particular context would require "evidence that, if the waiver were vacated, [automobile manufacturers] would proceed on a different course more favorable to the petitioners." *Chamber of Com.*, 642 F.3d at 205-06. Whatever their reasons for that choice, they are not entitled to change course now, after briefing and argument have concluded. *Twin Rivers Paper Co.*, 934 F.3d at 613.

CONCLUSION

For the foregoing reasons, Fuel Petitioners' motion should be denied. If the motion is granted, however, State Respondents respectfully request leave to file a supplemental brief in response within 30 days.

Dated: October 10, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing opposition complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) because it contains 1,675 words. I further certify that this motion complies with the typeface requirements of Federal Rules of Appellate Procedure 27(d)(1)(E), 32(a)(5), and 32(a)(6) because it has been prepared using a proportionally spaced typeface (Times New Roman) in 14-point font.

Dated: October 10, 2023

/s/ Caitlan McLoon
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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2023 I electronically filed the foregoing opposition with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

I further certify that all parties are participating in the Court's CM/ECF system and will be served electronically by that system.

Dated: October 10, 2023

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Attachment A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATE OF OHIO et al.,
Petitioners,
v. : No. 22-1081 et al.
ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, in his official capacity as Administrator of the U.S. Environmental Protection Agency,
Respondent.
- - - - - - - - - - - - - - - - - X

Friday, September 15, 2023

Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES WILKINS, CHILDS, AND GARCIA

APPEARANCES:

ON BEHALF OF THE FUEL PETITIONERS:

JEFFREY B. WALL, ESQ.

ON BEHALF OF THE STATE PETITIONERS:

BENJAMIN M. FLOWERS, ESQ.

they've done whole program under (C) and sometimes they haven't, but the last time the agency addressed this -- and this is at page 525 of the JA -- the EPA said, we don't do whole program under (C) because it wouldn't make sense; we look at whether manufacturers can comply with individual standards, same thing for need.

JUDGE GARCIA: Understood. Thank you. And I think with the indulgence of my colleagues, I do have some threshold questions about jurisdiction.

MR. WALL: Sure.

JUDGE GARCIA: And so the first is just -- your petition and the waiver concerned model years '22 to '25. Is the petition now moot as to model years '22 and '23? Just as a technical matter, those vehicles have been rolled out. Is that the right way to think about it?

MR. WALL: I'm not sure, Judge Garcia, because I think you would -- the mootness is for the claim, and the claim is made against all the model years. So I think the claim isn't moot. Whether we could --

JUDGE GARCIA: Fair enough. Fair enough. So --

MR. WALL: -- whether we could obtain relief for those model years, I --

JUDGE GARCIA: Right.

MR. WALL: -- nobody has challenged that -- I'm honestly not sure.

JUDGE GARCIA: Okay. So I think if we're thinking about standing and, in particular, redressability, at least the way to think about that is to focus on model years '24 and '25, because that's still what's in the future and plausibly affected --

MR. WALL: I -- I mean --

JUDGE GARCIA: -- and --

MR. WALL: -- at a minimum, Judge Garcia, no one on the other side of the case -- and they've made every argument, I think, they could -- no one has said we cannot get effective relief through the end of the application of this waiver. No one is here sort of saying, you have a --

JUDGE GARCIA: But that's respectfully not accurate. The States --

MR. WALL: Yes.

JUDGE GARCIA: -- on page 15 of their brief, make an argument that you haven't demonstrated redressability --

MR. WALL: So --

JUDGE GARCIA: -- and so here's --

MR. WALL: -- I took -- I took the States to be challenging our Article III standing on harm grounds. Maybe they do also say something about redressability, but I think it is clear that we could get relief for the later model years under the rule.

JUDGE GARCIA: So let's -- let me ask the

question, then, because I think in the Chamber of Commerce case, which was a generally similar situation, the Court addressed redressability and said there was no evidence that if the waiver were vacated, manufacturers would proceed on a different course more favorable to petitioners, and here we have statements from several of these manufacturers -- not all of them, but many manufacturers -- saying they would not change their electrification plans, and we have a lot of evidence that in this industry, pricing and production plans are made years in advance.

So the question is, what is the evidence in this record that any manufacturer would change its fleet in model years '24 and '25 if we were to rule in your favor?

MR. WALL: So I think the two things I'd point you to, Judge Garcia -- the first is in page 477 of the joint appendix. Toyota said -- and Toyota is not among the automakers coming in in this case -- Toyota said it had designed around the withdrawal, strongly suggesting that it wanted the -- it wanted the withdrawal of the waiver to stay in place because it had made decisions based on that, and the -- the industry brief, I think, confirms this at page 17, because what they say is, they -- those automakers, the ones that filed the brief -- have made investments in electrification in order to meet California standards, and they say they are worried that if the waiver is withdrawn,

where we've come in -- and we've said we've got clear harm from the rule in an Article III sense, and we know the rule extends for several years, and we have at least one automaker in the record that has said it made its decisions in reliance on the withdrawal -- it seems to me the Government should bear a pretty heavy burden in trying to show that we somehow can't get any effective relief before the end of this rule, and if that were true, Judge Garcia, I think it would start to raise a pretty serious capable of repetition problem, because these are done by sets of model years.

We came right in. We came to this Court as quickly as we could. If the answer now is you can't get effective relief, it seems to me we're going to be in a real bind every time we do this.

JUDGE GARCIA: I appreciate that that might be the case in this particular case, but sort of because of the long-term planning requirements in this industry -- these are generally set 10 years at a time, right? The 2013 waiver was for 2015 to 2025, and I'm, candidly, entirely with you. Common sense would just dictate that the whole point of this rule is to reduce liquid fuel consumption over a 10-year period. That's certainly going to happen -- but in this particular case, it seems like we're in a unique situation where now, my understanding is, some model year

respondent-intervenor California. I want to start, Judge Garcia, with your questions about standing. Petitioners have not advanced any evidence of redressability. Their declarations refer only to California's analysis that it did in its original rulemaking back in 2011 or 2012, which provides no evidence about current market conditions.

And to their point that -- and then the Toyota comment, what Toyota was saying -- what Toyota was asking of EPA was not to restore the waiver for the years during which the withdrawal had been in effect. Those years are in the past. Toyota said nothing about its inability to meet California standards in the future -- all the years that we are now dealing with -- or indicated that it would, you know, not be able to meet them or would change its plans if the restoration decision was vacated.

JUDGE GARCIA: Well, their argument on standing certainly has a pretty strong commonsense appeal, right? The goal of this is to reduce liquid fuel consumption. If it's not going to make any difference, why did California and EPA go through all this trouble, and by the same token, wouldn't vacating it reverse that effect? I mean, why isn't that the simple open-and-shut way to think about this?

MS. MECKENSTOCK: Well, so two points, Your Honor, and first, this is a threshold matter. The point of these standards is to reduce emissions, not reduce fuel

was withdrawn, it was -- that withdrawal was immediately challenged, so the automakers continued to plan to comply with it, with the original waiver, and now here we are 10 years after the fact, and there just isn't any time left for them -- and beyond that, it's their burden to show redress, and they literally didn't put in any evidence about market conditions now that could support the conclusion they need.

And as to their point that they couldn't have challenged the original waiver in 2013, that's not true. They rely on the deemed to comply provision, but I think it's important for this Court to understand, the deemed to comply provision only ever applied to the greenhouse gas emission standards. There's never been a deemed to comply provision in the zero-emission vehicle standards. So they certainly could have challenged the waiver as to those.

I want to turn, then, to the statutory interpretation and EPA's whole-program approach, and I want to start at the very beginning of the statute with what it directs EPA to do, which is to waive application of preemption to the state -- not for particular standards, but to the state.

JUDGE GARCIA: I'm very sorry, one more question on standing.

MS. MECKENSTOCK: Sure.

JUDGE GARCIA: In your view, what evidence would

they need to show redressability? Is it some version of that in a certain time line, manufacturers would decide to reduce prices on conventional vehicles by model year '25?

MS. MECKENSTOCK: So fuel petitioners' arguments are not really about pricing. They're just about sales. So they would need evidence that manufacturers are going to change their product lines and sell different vehicles in model year 2025, which starts as early as January 1st of next year, if you -- if --

JUDGE GARCIA: I think their injuries are redressed if more people buy gas-powered cars, and one way to do that would be to reduce the price on it, right?

MS. MECKENSTOCK: I suppose that manufacturers could do that. I just --

JUDGE GARCIA: Okay.

MS. MECKENSTOCK: -- I was just trying to distinguish between the price injury that state petitioners assert.

JUDGE GARCIA: I appreciate that. Sorry, go ahead.

MS. MECKENSTOCK: No, no problem. No, all -- and all I'm saying is, I think they would need some evidence establishing a substantial probability that automakers would stop selling the clean vehicles that consumers in California are demanding at levels above what the standards require and

that consumers are paying price premiums for. In other words, manufacturers are currently making the cars people want and people are willing to pay a lot for them. So I think they need a lot of evidence to show that manufacturers are going to stop doing that.

JUDGE GARCIA: Thank you. Please proceed with the statutory points.

MS. MECKENSTOCK: So, as I was saying, the waiver provision directs EPA to waive application of preemption to the state, not for particular standards, and if Congress had intended the waiver to be standard-specific, it would have used the language it used in 209(b)(2), where it says each state standard, and as counsel for EPA explained, Congress maintains that program-level review by starting with the first criterion as an aggregate test and then carrying through that aggregate language with the such state standards, and there is no other set of standards to which such could refer other than the standards in the aggregate, and this is all consistent with Congress's intention that California have a complete program.

And, Judge Wilkins, to your point about 202(a) and EPA's program being comprehensive, you're right, EPA is required to regulate every pollutant it concludes is harmful, and it doesn't make sense that California would -- that Congress would have said, compare that comprehensive