

ORAL ARGUMENT NOT YET SCHEDULED

No. 22-1081 and consolidated cases

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

State of Ohio, et al.,
Petitioners,

v.

Environmental Protection Agency and Michael S. Regan, in his official capacity,
as Administrator of the U.S. Environmental Protection Agency
Respondents.

On Petition for Review of Action by the U.S. Environmental Protection Agency

**MOTION OF PETITIONERS THE STATES OF OHIO, ALABAMA,
ARKANSAS, GEORGIA, INDIANA, KANSAS, KENTUCKY,
LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA,
OKLAHOMA, SOUTH CAROLINA, TEXAS, UTAH, AND WEST
VIRGINIA FOR LEAVE TO SUPPLEMENT THE RECORD**

DAVE YOST

Attorney General of Ohio

BENJAMIN M. FLOWERS

Ohio Solicitor General

MICHAEL HENDERSHOT

Chief Deputy Solicitor General

SYLVIA MAY MAILMAN

Deputy Solicitor General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

bflowers@ohioattorneygeneral.gov

*Counsel for State of Ohio**(Additional counsel listed after signature block)*

MOTION TO FOR LEAVE TO SUPPLEMENT THE RECORD

The States move for leave to supplement the record with an additional declaration from their economic expert, Benjamin Zycher. The declaration is attached as Exhibit A to this motion.

“The petitioner’s burden of production in the court of appeals is ... the same as that of a plaintiff moving for summary judgment in the district court: it must support each element of its claim to standing ‘by affidavit or other evidence.’” *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). To the extent a petitioner’s standing is “not self-evident,” the petitioner must “supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review.” *Id.* at 900. That evidence should be presented at the “first appropriate point in the review proceeding.” *Id.* Additional affidavits and declarations are appropriate—even if filed alongside a reply brief—where a petitioner adds specificity to declarations already submitted with the opening brief. *Nat’l Council for Adoption v. Blinken*, 4 F.4th 106, 111 (D.C. Cir. 2021); *Am. Libr. Ass’n v. FCC*, 401 F.3d 489, 494 (D.C. Cir. 2005).

A supplemental declaration is appropriate here. Petitioner States included eighteen standing affidavits with their opening brief, including expert analysis from an economist, Benjamin Zycher. The EPA and the intervenors challenge the States’

standing and raise questions about Zycher's analysis. The Intervenor States and Local Governments, in particular, attached to their brief declarations responding to Zycher's initial declaration. Petitioner States seek to submit a responsive declaration, by the same expert economist, to "definitively lock in standing." *Nat'l Council for Adoption*, 4 F.4th at 111. Indeed, because this challenge was statutorily required to be initiated in this Court, the proceedings here are the parties' first and only opportunity to build a record. In a typical district-court proceeding, parties would be able to respond to one another's expert reports. There is no reason that should cease to be the case simply because Congress decided that cases like this one should begin in a circuit court, rather than in a district court.

To be clear, the States contend that they have established standing on the record as it exists already. But the declaration to which this motion relates further strengthens their case.

The private petitioners have consented to this motion. The United States objects to the motion and informed the petitioner States by email that it "reserves the right to file a response." The Respondent-Intervenor Public Interest Organizations, along with the State and Local Government Respondent-Intervenors, have not yet taken a position but informed the petitioner States that they reserve the right to

oppose. The remaining parties did not inform the petitioner States whether they take a position on the motion.

March 10, 2023

Respectfully submitted,

STEVE MARSHALL
Attorney General of Alabama

DAVE YOST
Attorney General of Ohio

/s/ Edmund G. LaCour Jr. (BMF per au-
thority)

EDMUND G. LACOUR JR.
Solicitor General
Office of the Attorney General
State of Alabama
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
(334) 242-7300
(334) 353-8400 fax
Edmund.LaCour@AlabamaAG.gov

Counsel for State of Alabama

/s/ Benjamin M. Flowers

BENJAMIN M. FLOWERS
Ohio Solicitor General
MICHAEL HENDERSHOT
Chief Deputy Solicitor General
SYLVIA MAY MAILMAN
Deputy Solicitor General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980
(614) 466-5087 fax
benjamin.flowers@ohioago.gov

Counsel for State of Ohio

TIM GRIFFIN
Attorney General of Arkansas

CHRISTOPHER M. CARR
Attorney General of Georgia

/s/Nicholas J. Bronni (BMF per authority)

NICHOLAS J. BRONNI
Solicitor General
Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2007
Nicholas.Bronni@arkansasag.gov

Counsel for the State of Arkansas

/s/ Stephen J. Petrany (BMF per authority)

STEPHEN J. PETRANY
Solicitor General
Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3408
spetrany@law.ga.gov

Counsel for State of Georgia

THEODORE E. ROKITA
Attorney General of Indiana

/s/ Thomas M. Fisher (BMF per authority)

THOMAS M. FISHER
Solicitor General
Office of the Indiana Attorney General
IGC-South, Fifth Floor
302 West Washington Street
Indianapolis, IN 46204-2770
(317) 232-6255
Tom.Fisher@atg.in.gov

Counsel for State of Indiana

DANIEL CAMERON
Attorney General of Kentucky

/s/ Matthew F. Kuhn (BMF per authority)

MATTHEW F. KUHN
Solicitor General
Office of Kentucky Attorney General
700 Capital Avenue, Suite 118
Frankfort, Kentucky 40601
(502) 696-5400
Matt.Kuhn@ky.gov

Counsel for State of Kentucky

KRIS KOBACH
Attorney General of Kansas

/s/ Anthony J. Powell (BMF per authority)

ANTHONY J. POWELL (*application for admission pending*)
Solicitor General
120 S.W. 10th Avenue, 3rd Floor
Topeka, KS 66612
(785) 368-8435
(785) 291-3767 fax
jeff.chanay@ag.ks.gov

Counsel for State of Kansas

JEFF LANDRY
Attorney General of Louisiana

/s/ Elizabeth B. Murrill (BMF per authority)

ELIZABETH B. MURRILL
Solicitor General
J. SCOTT ST. JOHN
Deputy Solicitor General
Louisiana Department of Justice
1885 N. Third Street
Baton Rouge, Louisiana 70804
(225) 326-6766
murrille@ag.louisiana.gov
stjohnj@ag.louisiana.gov

Counsel for State of Louisiana

LYNN FITCH
Attorney General of Mississippi

/s/ Justin L. Matheny (BMF per authority)

JUSTIN L. MATHENY
Deputy Solicitor General
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205-0220
(601) 359-3825
justin.matheny@ago.ms.gov

Counsel for State of Mississippi

ANDREW BAILEY
Attorney General of Missouri

/s/ Jeff Johnson (BMF per authority)

JEFF P. JOHNSON
Deputy Solicitor General
Supreme Court Building
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-8870
(573) 751-0774 fax
jeff.johnson@ago.mo.gov

Counsel for State of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

/s/ Christian Brian Corrigan (BMF per authority)

CHRISTIAN BRIAN CORRIGAN
Solicitor General
KATHLEEN L. SMITHGALL
Assistant Solicitor General
Montana Department of Justice
215 N Sanders St
Helena, MT 59601
(406) 444-2026
David.Dewhirst@mt.gov
Kathleen.Smithgall@mt.gov

Counsel for State of Montana

MICHAEL T. HILGERS
Attorney General of Nebraska

/s/ Justin D. Lavene (BMF per authority)

JUSTIN D. LAVENE
Assistant Attorney General
Office of the Nebraska Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
jim.campbell@nebraska.gov
justin.lavene@nebraska.gov

Counsel for State of Nebraska

GENTNER DRUMMOND
Attorney General of Oklahoma

/s/ Bryan Cleveland (BMF per authority)

BRYAN CLEVELAND
Deputy Solicitor General
Oklahoma Attorney General's Office
313 NE 21st Street
Oklahoma City, OK 73105
(405) 521-3921
bryan.cleveland@oag.ok.gov

Counsel for State of Oklahoma

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

/s/ Judd E. Stone II (BMF per authority)

JUDD E. STONE II
Solicitor General
RYAN S. BAASCH
Assistant Solicitor General
KATIE B. HOBSON
Assistant Attorney General
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
(512) 936-1700
(512) 474-2697 fax
Ryan.Baasch@oag.texas.gov
Katie.Hobson@oag.texas.gov

Counsel for State of Texas

ALAN WILSON
Attorney General of South Carolina

/s/ James Emory Smith, Jr. (BMF per authority)

JAMES EMORY SMITH
Deputy Solicitor General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803)734-3680
esmith@scag.gov

Counsel for State of South Carolina

SEAN D. REYES
Attorney General of Utah

/s/ Melissa A. Holyoak (BMF per authority)

MELISSA A. HOLYOAK
Utah Solicitor General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
(801) 366-0260
melissaholyoak@agutah.gov

Counsel for State of Utah

PATRICK MORRISEY
Attorney General of West Virginia

/s/ Lindsay S. See (BMF per authority)

LINDSAY S. SEE
Solicitor General
MICHAEL R. WILLIAMS
Senior Deputy Solicitor General
Office of the West Virginia Attorney
General
State Capitol, Bldg 1, Room E-26
Charleston, WV 25305
(682) 313-4550
Lindsay.S.See@wvago.gov

Counsel for State of West Virginia

CERTIFICATE OF COMPLIANCE

Pursuant to Fed R. App. P. 32(f) and (g), I hereby certify that the foregoing complies with Fed. R. App. P. 27(d)(2)(A) because it contains 465 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

/s/ Benjamin M. Flowers
BENJAMIN M. FLOWERS
Counsel for State of Ohio

EXHIBIT A

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

STATE OF OHIO, et al.,

Petitioners,

v.

U.S. ENVIRONMENTAL
PROTECTION AGENCY and
MICHAEL S. REGAN, in his official
capacity as Administrator of the U.S.
Environmental Protection Agency,

Respondents.

Case No. 22-1081

Consolidated with 22-1083, -1084, -
1085

I, Benjamin Zycher, declare as follows:

1. My background is described in the initial declaration. Add.37–38.
2. This declaration is done in my personal capacity and reflects neither the views of the American Enterprise Institute nor any current or previous employer or organization with which I have been affiliated.
3. I have reviewed the portions of the briefs submitted by the EPA and Intervenor States and Local Governments that address Petitioner States' standing, including the declarations of Joshua M. Cunningham and Kenneth Gillingham.

Car manufacturers will cross-subsidize zero-emission sales by increasing prices for conventional vehicles

4. Declarant Joshua Cunningham concludes that manufacturers subject to California's zero-emission-vehicle ("ZEV") regulations will have "no need to cross-subsidize zero-emission vehicle sales." Intervenor-States Add.87. This assertion cannot be correct. If the auto producers are not going to cross-subsidize an artificial increase in the sales and/or market share of ZEVs, then one direct implication is that manufacturers will not increase the prices of the internal-combustion-engine (ICE) vehicles. Other factors (including general economic conditions, exchange rates, prices of foreign autos) held constant, this would mean that the number of ICE vehicles demanded, per time period, would not change. To be sure, the demand for ICE vehicles would decline if ZEV prices were to fall by some substantial amount relative to the (constant) prices of ICE vehicles. But that latter possibility requires cross-subsidization unless there is a technological breakthrough for ZEVs, which is possible in principle, but very far from assured, and in the absence of which the resources needed to satisfy the ZEV sales or market share mandates must come from somewhere. Because further increases in government subsidies for ZEVs are very unlikely given the current political alignment in Congress, cross-subsidization by the producers cannot be avoided.
5. So the market demand, i.e. quantity demanded, for ICE vehicles would remain constant in the near term without cross-subsidization, because prices for ICE vehicles would remain constant. That would create a problem for manufacturers under California's regulations, which require auto producers to sell a smaller percentage of ICE vehicles relative to ZEVs. Manufacturers need some way to comply with that requirement—some way to boost sales of ZEVs relative to ICE vehicles.
6. No mechanism other than rationing the sales of ICE vehicles and/or lower prices for ZEVs can make this system work, and such lower prices require cross-subsidization, unless there is some substantial decline in input costs, again possible in principle, but highly unlikely given tight supplies of cobalt and other important inputs.
7. Rationing sales of ICE vehicles would drive consumers in part to the pre-owned market.

That would transfer wealth from the auto producers to the owners of the used vehicles. Basic economics rejects the theory that manufacturers would pursue this option.

8. Nor can the manufacturers expect to profit by selling ZEVs at prices the market will be willing to pay. The required (artificial) increase in ZEV sales requires a price discount of some sort, whether explicit or implicit, precisely because ZEVs do not satisfy consumer preferences at competitive prices. We know they do not satisfy consumer preferences at competitive prices because the whole point of the subsidies and mandates is to shift the market toward California's preferred fleet-sales mix. The necessary discounted prices would not cover costs (that is, yield a competitive rate of return) by definition; that is why cross-subsidization cannot be avoided.
9. Intervenor States and Local Governments assert: "An automobile manufacturer facing such a loss" from price cuts on ZEVs "has several options, and the least expensive (and, thus, most attractive) is to accept a short-run reduction in profits in order to invest in the innovation necessary to produce compliant vehicles consumers want to buy." Intervenor-States Br.12. Note first that acceptance of a "short-run reduction in profits in order to invest in the innovation necessary to produce compliant vehicles consumers want to buy" *is the very definition of a cross-subsidy*. More broadly, note the implicit assumption by the Intervenor States and Local Governments that some investment in innovation (R&D) can be predicted with certainty (or a high probability) to yield vehicles satisfying both the regulatory requirements and consumer preferences at costs and prices that shift the market toward the favored outcome.
10. This is not correct. Not all "invest[ment] in ... innovation" yields competitive returns, and yet implicit in the Intervenor States' assertion is that such investment can be predicted to yield the outcome desired by the California Air Resources Board with near certainty. The reality that mandates are required to effect that outcome disproves the assertion: Market forces constantly allow short-term losses when innovation is perceived to be sufficiently likely to yield longer-term returns such that the present value of the net profitability stream (profits minus losses) is sufficient to allow an expected rate of return at least equal to the opportunity cost of capital (the after-tax market rate of interest).

11. In other words, investors historically always have been willing to risk their money in a myriad of new industries in the hope that the inevitable short-term losses attendant upon the need for large investments and a small or nonexistent initial market will be outweighed by longer-term profitability as the market grows. That the auto producers narrowly and the capital market more generally have not been willing to make such early investments in a shift from ICE vehicles toward ZEVs suggests that the market does not believe that “the least expensive (and, thus, most attractive) [option] is to accept a short-run reduction in profits in order to invest in the innovation necessary to produce compliant vehicles consumers want to buy.” If investment in “innovation” were the only thing necessary to produce a reliable return, then no such investment would ever lose money. Why then does California not invest state dollars—say, from the California Public Employees’ Retirement System—to generate revenue, rather than impose a mandate?
12. In sum, cross-subsidization is the only option for complying with California’s regulations that is consistent with market behavior.

Price increases will be felt nationwide

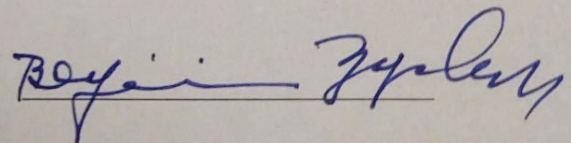
13. Declarant Cunningham believes car prices “are not uniform nationwide.” Intervenor-States Add.91. But his discussion is entirely consistent with my earlier conclusion that the California mandate will lead to an increase in prices for conventional vehicles in all states, not just those adopting the California mandate.
14. Cunningham’s geographic price comparisons do not control for “applicable taxes or other fees such as title, licensing, or documentation fees, or other state or local government charges.” Intervenor-States Add.93–94. But those charges, which vary by state and within states, would yield differences in sales prices. Holding such factors constant—along with factors such as transportation costs and other second-order considerations—prices must be uniform across markets except perhaps in the very short term due to localized fluctuations in market conditions.
15. The factors discussed above can easily explain the dollar disparities that he cites. 2022 Ford Escape: \$1794 across Texas, Ohio, and California; 2022 Ford F-150: \$1426 across

Ohio and California; 2022 Ford Explorer: \$1835 across Texas, Ohio, and Sacramento, CA; 2022 Chevrolet Silverado: \$1481 across Texas, California, and Ohio. The other examples, Intervenor-States Add.93, are very similar in magnitude, and are fully consistent with my central argument, that the waiver and need to cross-subsidize will have nationwide effects on pricing.

16. Cunningham admits the cross-border market for cars, and thus the reality that price increases would have nationwide effect. He explains that, “when Colorado adopted the California emission standards at issue in this case, an auto dealer association challenged that adoption and alleged: ‘[P]rices of new vehicles in Colorado are expected to rise substantially due to the adoption of California’s . . . standards . . . [thus] it is likely that Colorado consumers will begin purchasing vehicles across Colorado’s border to take advantage of reduced out of state prices as no neighboring states (or any nearby states) have adopted California’s . . . regulations.’” Intervenor-States Add.95–96 (emphasis omitted). Basic economics dictates that this geographic demand shift by Colorado consumers across state borders would have an upward price effects in those neighboring states.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 3, 2023.



Benjamin Zycher