ORAL ARGUMENT NOT YET SCHEDULED

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, et al., Respondents.	)	Case No. 22-1081

OPPOSITION TO STATE PETITIONERS' MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

Respondents United States Environmental Protection Agency, et al. ("EPA"), respectfully submit this opposition to the Motion of Petitioners the States of Ohio, et al., for Leave to Supplement the Record. ECF 1989429. As explained below, EPA opposes State Petitioners' request that the Court allow State Petitioners to include with their reply brief a new declaration concerning their standing in the above-captioned matter. *See id.* at Exhibit A. This Court generally disallows standing declarations submitted with a petitioner's reply brief – after a respondent's brief has been filed and the opportunity to rebut a petitioner's assertions has passed. As further explained below, the narrow conditions under which supplemental declarations have been allowed do not apply here. Therefore,

State Petitioners' supplementation motion should be denied, the supplemental declaration of Benjamin Zycher should be excluded, and the references to the proposed supplemental declaration appearing in State Petitioners' reply brief, ECF 1989432, should be struck.

BACKGROUND

On May 12, 2022, State Petitioners challenged a final action taken by EPA that restores a waiver granted to the State of California in 2013 pursuant to Section 209(b) of the Clean Air Act, which allows it to enforce state-law vehicle regulations. *See* ECF 1946617. State Petitioners' opening brief, ECF 1969895, asserted standing to challenge EPA's grant of the California waiver based on cursory declarations from the Petitioner states affirming that they purchase vehicles for state use, as well as a declaration from Benjamin Zycher arguing that California's regulation of vehicles within its borders will have economic costs in other states. In its responsive brief, EPA challenged State Petitioners' standing assertions as insufficient because, among other things, no declaration provided evidence that states actually suffered concrete injury while the waiver was in place; the allegations of future injury in Mr. Zycher's declaration relied on an "extended chain of contingencies" and ignored numerous intervening factors; and State Petitioners had not, in any case, shown that any purported injury would be redressable. *See* ECF 1981480. Respondent-Intervenor States and Local

Governments also challenged State Petitioners' standing and provided evidence contradicting Mr. Zycher's first declaration. *See* ECF 1985732.

State Petitioners filed their reply brief on March 10, 2023. ECF 1989432. Accompanying that brief was State Petitioners' "Motion … For Leave to Supplement the Record," ECF 1989429, attaching as Exhibit A a new declaration from Benjamin Zycher. *See id.* at Exhibit A. The proposed declaration advances Mr. Zycher's views on evidence presented by Respondent-Intervenor States and Local Governments concerning the relationship between California's regulations and the manufacture and price of conventional vehicles nationwide. It does not address the factual and other shortcomings identified by EPA in its brief.

ARGUMENT

The D.C. Circuit has been clear that standing, "in the same way as any other matter on which [a party] bears the burden of proof," must be supported with an evidentiary showing based on the administrative record or through submission of additional evidence to the court of appeals. *Twin Rivers Paper Co. LLC v. Sec. & Exch. Comm'n*, 934 F.3d 607, 613 (D.C. Cir. 2019). "Because 'full development of the arguments for and against standing requires the same tried and true adversarial procedure we use for the presentation of arguments on the merits' the petitioner must make this evidentiary presentation no later than when it files the opening brief" – a principle the Court "ha[s] reiterated … many times." *Id.*

(quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002), and compiling additional case law); *see, e.g.*, *Texas v. EPA*, 726 F.3d 180, 198 (D.C. Cir. 2013) ("The petitioner bears the burden of averring facts in its opening brief establishing [the] elements [of standing]."). As the *Twin Rivers* Court noted, this principle is also codified in the Court's rules. *See* 934 F.3d at 613.

State Petitioners' supplementation motion subverts the adversarial process, and this "most fair and orderly process by which to determine whether the petitioner has standing," *Sierra Club*, 292 F.3d at 901, by submitting new opinions from Mr. Zycher after Respondents' opportunity to address those opinions in their brief has passed. This is prejudicial to Respondents and so, as in *Twin Rivers*, State Respondents' supplemental declaration should be disallowed.

Petitioners' motion also fails to establish that any good-cause exception to the principle reiterated in *Twin Rivers* applies here. The Court has applied such a good-cause exception in only very limited circumstances, arising from its ruling in *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678 (D.C. Cir. 2004) ("*CARE*"). In that case, the Court held that the submission of standing declarations with the petitioner's reply brief could be "excused in this case" because the supplemental declarations made standing "patently obvious." *Id.* at 685. Because standing was obvious and "irrefutable, [the opposing party] was not prejudiced by its inability to respond to the supplemental declaration." *Id.* The

Court has since affirmed that such an exception may *only* apply where the "injury and causation are patently obvious from the supplemental declarations."[1] *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 111-12 (D.C. Cir. 2021); *see also Twin Rivers*, 934 F.3d at 616.

Petitioners' supplementation motion and supplemental declaration do not satisfy this requirement. While the Court at the merits stage will decide whether Petitioners have standing, for purposes of the motion to supplement it suffices to conclude that Petitioners' standing, even with the proposed new material, is neither obvious nor "irrefutable." Petitioners' declaration at most engages in and prolongs conceptual arguments and theories that do not unequivocally establish standing. For example, Mr. Zycher speculates as to how "basic economics" will be reflected in future market behavior and opines on events and market dynamics that are "possible in principle" but that Mr. Zycher thinks are unlikely. *See, e.g.*, ECF 1989429, Exhibit A at ¶ 11 (claiming that "investors historically always have been

[1] *Twin Rivers* articulated additional criteria to exclude even further supplemental declarations where standing *is* patently obvious – in particular, a requirement that the petitioner have already made a substantial standing showing in its initial brief and a prohibition on supplemental declarations raising entirely new theories of standing. 934 F.3d at 615. But those criteria are beside the point here, where State Petitioners' standing is not patently obvious in the first place. The Court has also separately allowed late declarations on standing where a party "reasonably assumed that their standing was self-evident" from the administrative record, *see Am. Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C. Cir. 2005), but that is not the case here, nor do State Petitioners assert as much.

willing to risk their money in a myriad of new industries in the hope that the inevitable short-term losses … will be outweighed by longer-term profitability as the market grows," and then speculating that auto producer and capital market behavior "suggests that the market does not believe" this will be the case with zero-emission vehicles). These "debatable questions" are not an appropriate basis for a supplemental standing declaration. *See Twin Rivers*, 934 F.3d at 616.

The inappropriateness of State Petitioners' attempt is underscored by the fact that their supplemental declaration does not satisfy the basic premise of the *CARE* exception, as it does not supply any "new *factual* material tendered to shore up deficient individual affidavits." *Twin Rivers*, 934 F.3d at 615 (describing the supplemental declarations allowed in *CARE*) (emphasis added); *see also Nat'l Council for Adoption*, 4 F.4th at 111 (describing *CARE* petitioners' submission of this "new factual material" to "definitively lock in standing"). The emphasis on factual material was not an incidental component of the result in *CARE*, where the initial affidavits "did not allege facts sufficient" to support standing and where the new factual material "cure[d]" the omission, *CARE*, 355 F.3d at 684-85, and "pinned down" the asserted injury, *Twin Rivers*, 934 F.3d at 615. The incontestable nature of the facts advanced there – in contrast to the argumentative theories populating State Petitioners' proposed supplemental declaration here –

was precisely what allowed the Court to determine that opposing parties would not suffer prejudice from their inclusion.

The same was true in *National Council for Adoption*. There, the Court allowed supplementation only after concluding that no prejudice could result because the supplemental declarations "provided the precise information [the respondent] had been insisting the [petitioner] needed for standing." 4 F.4th at 112. State Petitioners' declaration does not purport to address any of the factual or other deficiencies EPA identified in the initial standing declarations, *see* ECF 1981480 at 23-28, including that State Petitioners have presented no evidence whatsoever that they are harmed by California's greenhouse gas regulations for conventional vehicles, *id.* at 23-24. So the Court cannot similarly excuse State Petitioners' supplemental declaration as factually responsive, substantively irrefutable, and non-prejudicial. Instead, it engages in theoretical debate and advances arguments quite at odds with the limited factual gap-filling allowed by *CARE*, and that only serve to demonstrate that State Petitioners' standing is far from "patently obvious." As such, State Petitioners have failed to establish that their supplemental declaration falls within this Court's narrow exception to the principle that standing must be established "no later than when [a petitioner] files the opening brief." *Twin Rivers*, 934 F.3d at 613.

CONCLUSION

For the foregoing reasons, Respondents the United States Environmental Protection Agency and Michael S. Regan, Administrator, respectfully request that the Court deny Petitioners' supplementation motion, exclude the proposed supplemental declaration of Benjamin Zycher attached thereto, and strike from Petitioners' reply brief any references to the proposed supplemental declaration.

DATED: March 20, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opposition to State Petitioners' Motion for Leave to Supplement the Record complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that the foregoing complies with the type-volume limitation of Fed. R. App. P. 27(2)(A) because it contains approximately 1566 words, excluding exempted portions, according to the count of Microsoft Word.

/s/ *Chloe H. Kolman*
CHLOE H. KOLMAN

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Opposition to State Petitioners' Motion for Leave to Supplement the Record have been served through the Court's CM/ECF system on all registered counsel this 20th day of March, 2023.

/s/ Chloe H. Kolman
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