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

PETITIONER STATES' REPLY IN SUPPORT OF MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

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This Court allows parties to supplement the record with additional evidence of standing when there is "good cause" to do so. *Nat'l Council for Adoption v. Blinken*, 4 F.4th 106, 111 (D.C. Cir. 2021). Here, there is good cause to grant the petitioner States' motion to supplement the record with an additional standing declaration. *See* Motion of Petitioner States ("Mot."), Doc. 1989429. Neither the EPA nor the Intervenor States and Local Governments makes a compelling argument to the contrary.

1. Recall the governing law. In *Sierra Club v. EPA*, this Court established a "fair and orderly process" for demonstrating standing. 292 F.3d 895, 901 (D.C. Cir. 2002). Where standing is not self-evident, petitioners must prove standing with evidence attached to an opening brief. This makes sense: if petitioners were not required to provide evidence at the outset, respondents would have to "flail at the unknown in an attempt to prove the negative," and the Court might be forced to order supplemental briefing, slowing down the decisional process. *Id.* By requiring petitioners to submit evidence of standing with their opening briefs, the Court guarantees respondents an opportunity to make "an informed response," and petitioners "an opportunity to reply to that objection." *Id.*

"While *Sierra Club* lays out the general rule that petitioners whose standing is not self-evident should demonstrate their standing at the first appropriate point in

the litigation," this Court may "allow petitioners to support their standing in their reply brief, in affidavits submitted along with the reply brief, through citations to the existing record at oral argument, or through additional briefing or affidavits submitted to the court after oral argument." *Am. Library Ass'n v. FCC*, 401 F.3d 489, 494 (D.C. Cir. 2005). No rigid framework governs the question whether to allow such submissions. Rather, the Court will allow the submission of additional evidence when there is "good cause" to do so. *Nat'l Council for Adoption*, 4 F.4th at 111.

This Court has identified various factors that indicate the presence or absence of good cause. For example, if the petitioner "reasonably thought it had established standing when it submitted its initial [evidence]," then this Court will be more inclined to allow the submission of additional evidence bolstering the original theory. *Id.* at 112. Along similar lines, the Court is more likely to find good cause for the submission of new evidence that does not "raise an entirely new theory of standing." *Id.* (quoting *Twin Rivers Paper Co., LLC v. SEC*, 934 F.3d 607, 615 (D.C. Cir. 2019)). If the additional evidence makes standing "patently obvious," that too supports a finding of good cause. *Id.* Finally, courts considering whether to allow newly submitted evidence consider whether other parties would be prejudiced by the late submission. *Id.* When the respondent is able to "attack" the "content" of the new

submission in filings objecting to the submission, that greatly weakens the prejudicial effect. *Id.* at 113.

These factors are just factors—no case announces a rigid formula for showing good cause. Good cause is not supposed to be a game of "gotcha." *Am. Library Ass'n*, 401 F.3d at 494. Rather, it is designed to prevent abuse and prejudice, while at the same time enabling the adversarial process to aid this Court in properly resolving the cases before it.

2. Now turn to the circumstances giving rise to this motion. The States' briefing advanced two theories of standing. First, the States argued that the challenged agency action infringes the States' constitutional right to equal sovereignty, and that this constitutional injury can be redressed with an order setting aside the challenged action. That theory is purely legal, and the States did not need to support it with evidence. But the States also advanced an economic theory of standing. Relevant here, they argued that the waiver would increase the cost of conventional vehicles nationwide. *See* Brief of State Petitioners at 14–16, Doc. 1990758; Reply Brief of State Petitioners at 3–7, Doc. 1990811. They supported this theory with evidence. In particular, they submitted declarations showing that they purchase conventional vehicles, along with a declaration from Benjamin Zycher, an economist, explaining

the market dynamics causing the price increase. Addendum to Brief of State Petitioners at Add.6–54, Doc. 1990758.

The EPA, which is the respondent here, submitted no contrary evidence at all. But the Intervenor State and Local Governments (the "Intervenors") did. Addendum to Brief of State and Local Government Respondent-Intervenors at Add083–103, 107–118, Doc. 1990949. They attached to their brief two declarations. *Id.* Those declarations do two things relevant here. First, they purport to identify flaws in Zycher's analysis. Second, the declarations introduced evidence that, according to the Intervenors, shows the challenged agency action will have no effect on the prices the States pay for conventional vehicles.

The States then moved to supplement the record with a declaration from Zycher responding to the Intervenors' declarations. That short, supplemental declaration responds to the declarants' criticisms of Zycher's initial declaration. *See, e.g.*, Mot. at Ex.A ¶¶13–16. It also identifies flaws in those portions of the Intervenors' declarations that purport to affirmatively prove the absence of economic harm. *Id.* at ¶¶4–12.

3. There is good cause to permit the States to supplement the record with Zycher's additional declaration. As an initial matter, the point of requiring petitioners to submit evidence with their opening brief is to ensure that respondents and

intervenors have a chance to make "informed response[s]." *Sierra Club*, 292 F.3d at 901. Both the EPA and the Intervenors received that opportunity—they were able to respond to the States' evidence of standing, including by responding to Zycher's declaration. But the Intervenors' response included affirmative evidence of its own. In particular, it included declarations criticizing Zycher's analysis and introducing affirmative evidence that, according to the Intervenors, shows the challenged agency action will inflict no economic injury on the States. Fairness requires that the States have an opportunity to "reply to [those] objection[s]," and they can do so fully only by submitting evidence. *Id.*

At least three of the four factors to which this Court has looked in analyzing good cause support granting the States' motion to supplement.

First, and most important, neither the EPA nor the Intervenors "suffered … prejudice from the timing of the supplemental declarations." *Nat'l Council for Adoption*, 4 F.4th at 112. Because Zycher's declaration responds exclusively to the Intervenors' evidence and briefing, it has no bearing on anything the EPA has said or submitted. Regardless, both the EPA and the Intervenors submitted lengthy oppositions to the States' motion "attack[ing]" the supplemental declaration's "content." *Id.* at 113. Indeed, the EPA's and Intervenors' responses to Zycher's short declarations are many words longer than they would prudently have been able to include in a

merits brief. Thus, the States' submitting this evidence through a motion to supplement *benefited* the EPA and Intervenors by giving them greater space to respond to the substance of the States' standing arguments. Beyond that, there are still months to go before oral argument, and both the EPA and the Intervenors can move to submit evidence of their own if they are so inclined. Neither the EPA nor the Intervenors can plausibly claim to be prejudiced by the States' motion. To the contrary, *the States* would be prejudiced if not permitted to respond to arguments and criticism that the Intervenors introduced into this case when they filed their brief.

Second, the supplemental declaration does not "raise an entirely new theory of standing." *Id.* (quoting *Twin Rivers*, 934 F.3d at 615). Instead, it responds to the Intervenors' declarants' critiques of, and their evidence affirmatively opposing, the economic theory of standing that the States have advanced since the outset.

Third, and relatedly, the States "reasonably thought [they] had established standing when [they] submitted [their] initial" evidence. *Id.* at 112. For one thing, the constitutional theory of standing is established as a matter of law. As for the economic theory of standing, the supplemental declaration does not introduce a new theory of standing, but rather responds to critiques of the original theory—a theory that, as the absence of any effort to smuggle in a new theory suggests, the States believe they established in their opening brief.

It is true enough that the supplemental motion does not make the economic theory of standing "patently obvious," *id.*, in the sense of placing the standing issue beyond fairminded debate. But this Court's good-cause caselaw does not require parties to satisfy any rigid set of conditions before supplementing the record. *Id.* Thus, the Court can grant the motion without regard to whether the new evidence makes standing obvious beyond debate. It should be noted, however, that if the Court credits Zycher's additional declaration, that declaration would "definitively lock in standing" by showing that the challenged agency action injures the States. *Nat'l Council for Adoption*, 4 F.4th at 111. Rather than making the declaration's admission depend on its persuasiveness, the Court should admit the declaration and then determine its persuasiveness.

4. The EPA and the Intervenors oppose the States' motion, but their arguments do not withstand scrutiny.

The EPA's objection rests primarily on the false premise that this Court will find good cause to permit the submission of supplementary evidence "*only*" when that evidence makes standing "patently obvious." EPA's Opposition to Motion for Leave to Supplement ("EPA Opp.") at 4–5 & n.1, Doc. 1990914. No case says that. In claiming otherwise, the EPA cites *National Council for Adoption*, 4 F.4th at 111–12, along with *Twin Rivers*, 934 F.3d at 616. One searches the cited pages in vain for

any such rigid requirement. And tellingly, the EPA quotes nothing from either decision advocating their rule. In fact, both of the cited cases eschewed a rigid framework in favor of a common-law approach, comparing the "circumstances" before them to past cases allowing or rejecting efforts to supplement the record. *Twin Rivers*, 934 F.3d at 614–16; *accord Nat'l Council for Adoption*, 4 F.4th at 111–13. Finally, a rigid rule along the lines the EPA proposes would contradict the inherently flexible nature of a good-cause standard, along with the principle that "the court retains the discretion to seek," or to "allow" the submission of, evidence "necessary to determine whether petitioners, in fact, have standing." *Am. Library Ass'n*, 401 F.3d at 494.

Similar problems plague the EPA's argument that the States' motion "does not satisfy the basic premise" of the good-cause exception because it "does not supply any 'new *factual* material tendered to shore up deficient individual affidavits.'" EPA Resp.6 (quoting *Twin Rivers*, 934 F.3d at 615). No case limits the good-cause standard's application to the submission of such material. And there is no justification for imposing such a limit. Parties may establish standing with "arguments firmly rooted in the basic laws of economics." *New Jersey v. EPA*, 989 F.3d 1038, 1048 (D.C. Cir. 2021) (quoting *Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 382 (D.C. Cir. 2020)). There is no principled reason to carve out an economic-theory

exception to the rule that parties can submit additional evidence of standing when there is good cause to do so.

Regardless, Zycher's evidence *is* factual—it makes claims, based on economic theory, about the behavior of people in the automobile market. Such claims are no less factual in nature than a natural scientist's assessment of the effect that greenhouse-gas emissions will have on global temperature. While litigants might dispute the *accuracy* of such factual claims, they are factual claims nonetheless.

The Intervenors object to the granting of the States' motion too, "but [their] heart is plainly not in it." *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982 (2021). Rather than arguing that Zycher's supplemental declaration ought not be admitted, the Intervenors spend six pages criticizing the substance of Zycher's two-page analysis. *See* Intervenor States and Local Governments' Opposition to Motion for Leave to Supplement ("Intervenors Opp.") at 3–8, Doc. 1990951. It appears the Intervenors, recognizing that the motion might be granted, concluded that their opportunity to respond to the motion would best be spent "attack[ing]" the supplemental declaration's "content." *Nat'l Council for Adoption*, 4 F.4th at 113.

Finally, both the EPA and Intervenors argue that submission of this evidence at the reply stage prejudices them. EPA Opp.4; Intervenors Opp.9–10. The EPA's argument on this score does not deserve to be taken seriously. Zycher's

supplemental declaration responds to the Intervenors' evidence and briefing, not to the EPA's submissions. It is impossible to see how the States prejudiced the EPA by submitting evidence that responds to evidence submitted by a different party.

The Intervenors' prejudice argument is equally unavailing. They claim that the late filing denies them the opportunity to refute Zycher's analysis, perhaps with "data regarding technological advancements and falling technology costs." Intervenors Opp.10. But the Intervenors have taken the opportunity to refute the declaration, at great length. *Id.* 3–8. Their "attack" on the "content" of Zycher's declaration—which, again, is much longer than the Intervenors would have been able to include in a merits brief—defeats their prejudice arguments. *Nat'l Council for Adoption*, 4 F.4th at 113. The only threat of prejudice here extends to the petitioner States: if their motion is denied, they will be deprived of any opportunity to counter the evidence the Intervenors submitted.

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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 2,214 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.

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 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.

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