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, et al., Respondents.	)	Case No. 22-1081 (and consolidated cases)

RESPONDENTS' OPPOSITION TO MOTION FOR LEAVE TO SUPPLEMENT THE RECORD AND TO FILE A SUPPLEMENTAL BRIEF

Fuel Petitioners' motion for leave to file a post-argument supplemental brief and to supplement the record with additional declarations, ECF 2019756 ("Mot."), should be denied for multiple independent reasons. If the Motion is granted, EPA requests an opportunity to file a responsive supplemental brief.

1. As an initial matter, the Federal Rules of Appellate Procedure and this Court's rules of practice do not provide any presumptive opportunity for supplemental briefs, or affidavits in support thereof. Thus, where supplemental briefs are submitted after oral argument, it is normally only at the direction of the Court. The only authority Fuel Petitioners cite for submission of supplemental

briefs is one in which the *Court* ordered that briefing. Mot. at 2. And their proposed support for filing post-argument affidavits is even less apt. *See infra* n.2.

Where a party lodges a supplemental brief unilaterally and without adequate justification – here, because it seeks to address matters it declined to address during merits briefing – it does so in violation of its original briefing deadline and word limits. Granting Fuel Petitioners' motion here would set a precedent for future unsolicited requests for supplemental briefing following argument.[1] The Court should grant such a motion only if the reasons for doing so are compelling. Fuel Petitioners do not justify their highly irregular request.

2. Fuel Petitioners' suggestion that their supplemental brief and declarations address matters raised "for the first time" at oral argument is incorrect. State Respondent-Intervenors' merits brief included a section specifically challenging Fuel Petitioners' standing, *see* ECF 1990949 at 13-15 ("State Br."), which, as Fuel Petitioners' Motion acknowledges, directly challenged Fuel Petitioners' ability to demonstrate redressability. Mot. at 1; ECF 2019761 at 1-2 (quoting Respondent-Intervenors' argument that Fuel Petitioners had failed to establish that "vacatur would change [manufacturers'] decisions [about which vehicles to offer]") ("Proposed Supp. Br."); *see also* Oral Arg. 0:25:21 (Garcia, J.,

[1] Notably, Fuel Petitioners' counsel has sought leave to file unsolicited post-argument briefing in both this case and the *Texas v. EPA* case argued the day before. *See Texas v. EPA*, D.C. Cir. No. 22-1031, ECF 2017835.

correcting Fuel Petitioners counsel's misrepresentation that no party raised redressability in the briefing). Fuel Petitioners had an opportunity to answer those concerns in their reply brief before argument; that they may feel they did so insufficiently is no justification for allowing them a second opportunity to address their standing and the relief this Court might or might not be able to grant them. *See* Proposed Supp. Br. at 3-4 (re-arguing that Fuel Petitioners have standing); *id.* at 4-12 & Decls. of Walter Kreucher & Reginald Modlin (introducing new argument and opinion on the availability of redress).

Fuel Petitioners' new quibbles about how the State Respondent-Intervenors articulated their argument are of no moment: whether Fuel Petitioners have marshaled sufficient evidence of redressability will not turn on whether that evidence concerns automakers' *ability* or concerns automakers' *desire* to change plans for the remaining model years. *See* Mot. at 1-2 (claiming a distinction between whether automakers "could" or "would" change plans). Respondent-Intervenors have argued that Petitioners did not provide any evidence *at all*. State Br. at 13. And, logically, automakers would need to be both able *and* likely to change their plans for Petitioners to satisfy the standing test's redressability prong.

In any event, Petitioners' burden to establish their standing existed independent of challengers' specific arguments. *See, e.g.*, *Twin Rivers Paper Co. LLC v. Sec. & Exch. Comm'n*, 934 F.3d 607, 613 (D.C. Cir. 2019) (affirming that a

petitioner "bears the burden of proof" to establish standing "when it files the opening brief," and compiling case law); *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]."); Oral Arg. 0:30:42-0:31:07, 0:33:17 (panel noting Petitioners' burden on standing); D.C. Cir. Rule 28(a)(7). Allowing Fuel Petitioners a second bite at the standing apple now would thus both unjustifiably undermine the Court-ordered word limits to which all parties' briefs were subject and directly contradict precedent concerning the timing and nature of their standing burden.

Indeed, this is not even the first time *in this matter* that a group of petitioners has attempted to remedy defects in its standing presentation by seeking leave to supplement the record and their presentation. *See* Ohio Mot. for Leave to Supp. the Record, ECF 1989429. The Court denied that motion for leave in a per curiam order before oral argument. ECF 2011544. Fuel Petitioners' motion *after* oral argument for leave to file a supplemental brief addressing standing – and to supplement the record with affidavits supporting its new arguments – is even less timely, so the result here should be no different.[2]

[2] Even if Fuel Petitioners' request to supplement the record with additional affidavits could be considered independent of the supplement brief they support, Fuel Petitioners have failed to establish that they fall within any of the narrow exceptions where this Court has allowed untimely affidavits on standing – and those circumstances are even narrower when considering post-argument

3. Even if the alleged new issue Fuel Petitioners seek to address is recast as one of mootness, *see* Mot. at 1-3; Proposed Supp. Br. at 1-2 & 4, Petitioners' Motion for Leave remains deficient. Fuel Petitioners ascribe their need to address mootness to the fact that Respondent-Intervenors "argued for the first time" at oral argument that Fuel Petitioners "lack standing because it is too late for automakers to change their plans" for the vehicle model years covered by the challenged waiver. Mot. at 1; *see also* Proposed Supp. Br. at 4 (citing Respondent-Intervenors counsel's discussion of "redressability" during oral argument). As noted above, Respondent-Intervenors' contentions as to *standing* are not new and cannot justify supplemental briefing. Fuel Petitioners' new suggestion that these are, in fact, mootness arguments, *e.g.*, Mot. at 3; Proposed Supp. Br. at 1, does not entitle

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submissions. *See* ECF 1990914 at 4-7 (U.S. Opposition to State Petitioners' Motion for Leave to Supplement the Record). Fuel Petitioners cite only one D.C. Circuit case in support of their effort to supplement the record, but in *American Library Association v. FCC*, the Court allowed post-argument standing affidavits only because the parties had "reasonably assumed that [petitioners'] standing was self-evident" and so no party had addressed standing in their briefs, 401 F.3d 489, 492 (D.C. Cir. 2005); that is plainly not the case here. Fuel Petitioners' remaining citation – to a footnote in a 9th Circuit case from nearly four decades ago – is even farther afield: the court there stated that it was considering post-argument affidavits "solely to rebut the dissent's contrary assertion" and only because the affidavits corrected a misleading affidavit filed by the opposing party. *United States v. Paris*, 827 F.2d 395, 401 n.3 (9th Cir. 1987). *But see Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002) (disapproving of earlier cases in which parties were allowed to file post-argument affidavits and declaring that "[h]enceforth" standing must be established "at the outset of [the] case").

Petitioners to reopen merits briefing on an issue that was fairly presented earlier in the case.

Fuel Petitioners also cannot transmute the *panel's* questions about mootness or standing into an allegation that *Respondent-Intervenors* raised a "[n]ew [m]ootness [a]rgument" that now warrants a response. *Compare* Proposed Supp. Br. at 4 *with* Oral Arg. 0:24:15-0:35-34. The only discussion of mootness at oral argument was a colloquy between Fuel Petitioners' counsel and members of the panel, and that discussion occurred *before* either Respondents or Respondent-Intervenors had even addressed the Court. Oral Arg. 0:24:15-0:24:50. By contrast, Respondent-Intervenors' discussion with the panel about automakers' plans for the remaining model years was addressed (by both counsel and the Court) as a question of redressability, not mootness. *Cf.* Proposed Supp. Br. at 4 (citing the "redressability" discussion beginning at 1:06:40 of oral argument). Indeed, Fuel Petitioners' own extended discussion at argument of automakers' plans for the remaining model years concerned redressability and Petitioners never challenged that characterization in their responses to the panel. Oral Arg. 0:24:50-0:35:34.

Thus, even to the extent supplemental briefing might be justified where a party had no notice of a new argument advanced by their *opponents*, there can be no such concerns of equity here. Petitioners had an opportunity to respond to concerns about redressability at the merits stage and they had the same opportunity

as Respondent-Intervenors (and the United States) to address the mootness and redressability questions raised by the panel at argument. Their apparent reconsideration of how best to answer those questions cannot justify additional briefing here.

Moreover, of course, the Court's regular processes allowed the panel itself to request supplemental briefing from the parties on mootness or redressability. But it has not done so here, and Fuel Petitioners cannot get around that fact by incorrectly claiming that *Respondent-Intervenors* raised a new mootness issue that justifies Petitioners' irregular request.

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The Court should deny the motion and strike Fuel Petitioners' supplemental brief and declarations. If the Court nonetheless finds supplemental briefing appropriate, EPA requests an opportunity to file a responsive supplemental brief within 21 days after the Court's order.

Respectfully submitted,

DATED: October 10, 2023

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CERTIFICATES OF COMPLIANCE AND SERVICE

I certify that this filing complies with Fed. R. App. P. 27(d)(1)(E) because it uses 14-point Times New Roman, a proportionally spaced font.

I also certify that this filing complies with Fed. R. App. P. 27(d)(2)(A), because by Microsoft Word's count, it has 1,512 words, excluding the parts exempted under Fed. R. App. P. 32(f).

Finally, I certify that on October 10, 2023, I filed the foregoing with the Court's CMS/ECF system, which will notify each party.

/s/ Chloe H. Kolman
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