

ARGUED SEPTEMBER 15, 2023  
No. 22-1081 (and consolidated cases)

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**In the United States Court of Appeals  
for the District of Columbia Circuit**

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STATE OF OHIO, ET AL.,  
*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL S. REGAN, IN  
HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRON-  
MENTAL PROTECTION AGENCY,  
*Respondents,*

ADVANCED ENERGY ECONOMY, ET AL.,  
*Intervenors.*

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On Petition for Review from the United States  
Environmental Protection Agency  
(No. EPA-HQ-OAR-2021-0257)

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**MOTION FOR LEAVE TO SUPPLEMENT THE RECORD AND  
TO FILE A SUPPLEMENTAL BRIEF**

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**MOTION FOR LEAVE TO SUPPLEMENT THE RECORD AND TO  
FILE A SUPPLEMENTAL BRIEF**

Pursuant to Federal Rule of Appellate Procedure 27, private petitioners respectfully move this Court for leave to supplement the record and to file a supplemental brief.

At oral argument, counsel for the state and local government intervenors argued for the first time that private petitioners lack standing because it is too late for automakers to change their plans for any future years covered by California’s preemption waiver. *See* Oral Arg. 1:10:54-1:11:50; *id.* at 1:09:14 (“There just isn’t any time left.”); *id.* at 1:10:56 (“[T]hey 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.”). None of the respondents or intervenors made this precise argument—which is actually a mootness argument based on current conditions—in their briefs. In a single sentence of their brief, in a section on Article III standing, the state and local government intervenors asserted that private petitioners had not shown that manufacturers would change course if California’s waiver were withdrawn. *See* State Br. 15. The intervenors’ point was that private petitioners had not shown causation for standing purposes. *But see* Pet. Reply Br. 3-5. No one clearly argued that manufacturers *could not* change course—

that their plans are so set through the end of Model Year 2025 that a decision from this Court will make no difference in the real world for the next two-plus years.

Supplemental briefing and the inclusion of additional record evidence is warranted to address that new argument. *See, e.g., Pharmaceutical Care Mgmt. Ass'n v. District of Columbia*, 613 F.3d 179, 187 (D.C. Cir. 2010) (addressing supplemental briefing requested after a party “took [a] position for the first time” “[a]t oral argument”). In this Circuit, a court may “allow petitioners to submit post-argument affidavits addressing the issue of standing when ‘good cause is shown.’” *Am. Libr. Ass'n v. FCC*, 401 F.3d 489, 495 (D.C. Cir. 2005) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)). The same logic should apply to mootness concerns that were distinctly articulated for the first time at oral argument, especially where it is “clear from some of the questioning at oral argument [that] the judges struggled with the issue.” *Id.*; *see Sierra Club*, 292 F.3d at 900 (explaining that the court had granted a request to “submit post-argument affidavits”); *United States v. Paris*, 827 F.2d 395, 401 n.3 (9th Cir. 1987) (relying on “declarations submitted after oral argument in this case” in response to “statements made at oral argument”).

Private petitioners therefore request leave to submit a short brief and two declarations that address intervenors' late-breaking mootness argument. Private petitioners respectfully submit that the supplemental brief and declarations might assist the Court in deciding this case.

Counsel for private petitioners conferred with counsel for EPA, which does not consent to this motion and reserves taking a position until it has reviewed the filing.

Private petitioners' proposed supplemental brief and declarations are attached.

SEPTEMBER 29, 2023

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This motion complies with Federal Rule of Appellate Procedure 27(d)(2) because it is 512 words long.

The motion also complies with the requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5) and (6) because it was prepared in 14-point font using a proportionally spaced typeface.

s/ Jeffrey B. Wall  
JEFFREY B. WALL

SEPTEMBER 29, 2023

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 29th day of September, 2023, I electronically filed the foregoing motion with the Clerk for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

s/ Jeffrey B. Wall  
JEFFREY B. WALL

SEPTEMBER 29, 2023