IN THE SUPREME COURT OF THE UNITED STATES

CONCERNED HOUSEHOLD ELECTRICITY CONSUMERS COUNCIL AND FAIR ENERGY FOUNDATION,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Harry W. MacDougald
Caldwell, Carlson, Elliott & DeLoach LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346

Francis Menton
Law Office of Francis Menton
85 Broad Street, 18th floor
New York, New York 10004
(212) 627–1796

(404) 843-1956

hmacdougald@ccedlaw.com

fmenton@manhattancontrarian.com

QUESTION PRESENTED

Can the "injury in fact" element of standing, as to a consumer group challenging a federal agency action, be established by an evidentiary showing that the policies mandated by that agency action have resulted in large increases in consumer prices in the places where they have been implemented?

PARTIES TO THIS PROCEEDING

Petitioners: Concerned Household Electricity Consumers Council, an unincorporated association of the following individuals: Joseph D'Aleo, Clement Dwyer, Jr., Scott Univer, Robin Weaver, and James P. Wallace III.

FAIR Energy Foundation, a 501(c)(3) non-profit that is not owned by and has no interest in any other entity.

Respondent: United States Environmental Protection Agency.

Intervenors below: American Lung Association, American Public Health Association, Appalachian Mountain Club, Clean Air Council, Clean Wisconsin, Environmental Defense Fund, National Parks Conservation Association, Natural Resources Council of Maine.

RULE 29.6 STATEMENT

The Concerned Household Electricity Consumers Council (CHECC) has no parent company or publicly held company with a 10% or greater ownership interest in it.

The Fair Energy Foundation (FAIR) has no parent company or publicly held company with a 10% or greater ownership interest in it

RELATED PROCEEDINGS

United States Court of Appeals for the District of Columbia Circuit:

Concerned Household Electricity Consumers Council, et al. v. EPA, Case No. 22–1139, Per Curiam Judgment dated May 25, 2023 (unpublished, reproduced in the Appendix at pages 1–8)

Concerned Household Electricity Consumers Council, et al., v. EPA, Case No. 22–1139, Denial of Petition for Rehearing En Banc, July 20, 2023

United States Environmental Protection Agency:

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Action on Petitions, 87 Fed. Reg. 25,412 (April 29, 2022)

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (December 15, 2009)

TABLE OF CONTENTS

QUESTION PRESENTED iii

RULE 29.6 STATEMENT iv

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES viii

JURISDICTION xi

CONSTITUTIONAL PROVISION INVOLVED xi

INTRODUCTION 1

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE PETITION 12

I. The Court should grant certiorari to make the requirements of standing consistent and rational as between consumer groups and self-styled environmental groups in cases challenging federal regulations and actions. 13

A. As currently applied, the test for standing to challenge agency regulations and actions is completely disparate as between environmental plaintiffs seeking additional regulation and consumer plaintiffs seeking less regulation. 14

1. For the present Petitioners, the D.C. Circuit held that definitive and admissible evidence linking policies of fossil

fuel suppression with higher consumer electricity prices somehow constituted "no evidence" of injury in fact. 16

2. For favored categories of plaintiffs, such as environmental plaintiffs, the lower courts regularly grant standing based on rank speculation about inchoate, non–monetary harms. .. 24

B. The test for standing to challenge agency regulations and actions should be neutral as between environmental plaintiffs seeking more regulation and consumer groups seeking less. ... 29

II. It is imperative that the rules of standing not be manipulated to insulate from judicial scrutiny the one regulation that is both the single most economically significant, and also the single most scientifically flawed, of all the regulations on the federal books. 30

TABLE OF AUTHORITIES

Cases

Alon Refining Krotz Springs v. EPA, 936 F.3d 628 (D.C. Cir. 2019)·····6

Ciba–Geigy Corp. v. EPA, 46 F.3d 1208 (D.C. Cir. 1995)····· 6

Defenders of Wildlife v. Secretary, Department of the Interior, 354 F.Supp. 2d 1156 (D.Or. 2005)·····18

Ecological Rights Foundation v. Pacific Lumber, 230 F.3d 1141 (9th Cir. 2000)·····18

Group Against Smog & Pollution, Inc. v. EPA, 665 F.2d 1284 (D.C. Cir. 1981)····· 6

Kelsey Cascadia Rose Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)·····16, 17

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)·····6, 10

Massachusetts v. EPA, 549 U.S. 497 (2007)·····5, 6, 8, 17, 22

Natural Resources Defense Council v. Wheeler, 955 F.3d 68 (2020)16, 17

Natural Resources Defense Council, Inc. v. Thomas, 845 F.2d 1088 (D.C. Cir.1988)····· 6

Oljato Chapter of the Navajo Tribe v. Train, 515 F.2d 654 (D.C. Cir. 1975)·····6

PPG Indus., Inc. v. Costle, 659 F.2d 1239 (D.C. Cir. 1981)····· 6

Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608, 616 (2d Cir. 1965)····18

Utility Air Regulatory Group v. EPA, 573 U.S. 302 (2014)····8

West Virginia v. EPA, 597 U.S. __, 142 S.Ct. 2587 (2022)···· 2, 7

Statutes

28 U.S.C. § 1254····ix

Rules

D.C. Circuit Rule 28(a)(7)···· 11

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act," 74 F.R. 66,496 (Dec. 15, 2009)····iv, 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 15, 20, 21, 22

Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Action on Petitions, 87 F.R. 25,412 (Apr. 29, 2022)···· iv, 5

Federal Rule of Evidence 201····15

Federal Rule of Evidence 803(8)(A)(ii)····15

Greenhouse Gas Standards and Guidelines for Fossil Fuel–Fired Power Plants, 88 Fed. Reg. 33,240 (May 23, 2023)···· 7, 20

Multi–Pollutant Emissions Standards For Light and Medium–Duty Vehicles, 88 Fed. Reg. 29,184 (May 5, 2023)····7, 20

Treatises

RESTATEMENT THIRD OF TORTS, § 47 *Negligent Conduct Directly Inflicting Emotional Harm on Another* 17

Constitutional Provisions

Article III, Section 2, Clause 1 ..... ix, 9

JURISDICTION

The Judgment of the D.C. Circuit was entered on May 25, 2023. The Petition for Rehearing En Banc was denied on July 20, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article III, Section 2, Clause 1:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies to which the United States shall be a Party. . . ."

INTRODUCTION

In this case the D.C. Circuit ducked the merits of the single most significant challenge to a regulation currently pending in the federal court system. The means employed by the Court of Appeals to avoid the merits was to impose a test for standing that is inconsistent with the standards applied for more favored categories of plaintiffs throughout the federal courts, including in the D.C. Circuit itself. The court's decision, if allowed to stand, effectively makes the regulation in question — which is likely the most economically significant regulation in the entire body of federal regulations — immune from court scrutiny of any kind.

The requirement to demonstrate "standing" is constitutionally required and is understandably fundamental to the granting of access to a plaintiff in the federal court system. However, the lower courts have manipulated the doctrine of standing in such a way that favored categories of plaintiffs, like environmental plaintiffs seeking increased government regulation, get automatic standing based on even the most speculative assertions of future environmental conditions, such as that droughts or sea levels may increase; while at the same time less favored groups, including consumer groups like Petitioners here who are seeking court review that could *reduce* overreaching government regulation, are denied standing despite showings of concrete monetary harm based on widely recognized and indisputably accurate government statistical data.

The present case takes the manipulation of the standing doctrine by the lower courts to a whole new level. This case concerns an Environmental Protection Agency (EPA) regulation called the Greenhouse Gas Endangerment Finding (the "Endangerment Finding"), that is likely the most economically consequential regulation of all the thousands that have been issued by federal agencies. The Endangerment Finding is driving and will continue to drive massive additional costs to consumers — at least in the hundreds of billions of dollars in the aggregate, and tens of thousands of dollars per capita — and Petitioners proved that contention by submitting evidence in the Court of Appeals consisting of definitive and uncontestable statistical data from government and other agencies. The Court of Appeals held this clear evidence to constitute "no evidence," and summarily denied the Petitioners standing.

This Court should grant certiorari in the present matter to level the playing field by making clear that showings of monetary harm based on definitive statistical data are a valid method to meet the standing test.

In *West Virginia v. EPA*, 597 U.S. __, 142 S.Ct. 2587 (2022), this Court held that when "history and the breadth of the authority that [an agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority, then the agency must point to "clear congressional authorization" for the authority it claims. On

that basis, this Court invalidated a massive attempted transformation of the electricity–generation sector of the economy known as the Clean Power Plan, which had been issued by EPA in 2015.

Yet immediately following issuance of the *West Virginia* decision, EPA, together with other federal agencies as well, got to work on even more massive and transformative regulatory initiatives, to replace and far exceed in economic impact the invalidated Clean Power Plan. The new initiatives have even less claim for clear authorization in congressionally–passed statutes. In 2023, and only as examples, proposed regulations have emerged from EPA that would completely upend the vehicle–manufacturing and electricity–generating sectors. The supposed point behind these extraordinary regulatory initiatives is to reduce and ultimately eliminate the use of hydrocarbon (or "fossil") fuels, which currently provide approximately 80% of the energy used in our modern economy.

The entire basis for this ongoing regulatory avalanche is the "Endangerment Finding." The Endangerment Finding is a regulation originally issued by EPA in 2009. The Endangerment Finding is the single most economically–significant regulation currently on the federal books. It claims to determine that CO2 and other "greenhouse gases" constitute a "danger to human health and welfare." On that basis the administrative state, led by EPA, asserts the ability to order the transformation of about 80% of all use of energy by the American people. These regulatory initiatives will impose costs on the American

economy and on consumers and citizens far in excess of anything ever before undertaken by the regulatory state, at the minimum in the hundreds of billions of dollars, and more likely far into in the trillions to tens of trillions. The increased costs will necessarily ultimately fall on consumers of electricity even if they are not directly regulated because the regulated entities will have no choice but to either pass the costs on to consumers or go out of business.

Petitioners in this matter are consumers of electricity, who are right in the crosshairs of EPA's regulatory onslaught. Petitioners have been seeking since 2017 to bring to bear new scientific research and evidence that clearly invalidate the Endangerment Finding. On that basis, they seek to have the courts order EPA to reconsider, and ultimately rescind, the Endangerment Finding.

Petitioners' efforts ran into a wall in the D.C. Circuit, which on May 25, 2023 issued its Judgment dismissing Petitioners' request that EPA be ordered to reconsider the Endangerment Finding. (App. 1–8). The stated basis for the decision of the Court of Appeals is that the Petitioners lack standing to bring their claims, and in particular, that Petitioners failed to prove an "injury in fact" and "causal connection" to the conduct at issue. (App. 4)

The Court of Appeals' decision as to standing is completely inconsistent with the rules for standing applied to other, more favored groups seeking to challenge federal actions or regulations. In particular,

environmental groups regularly are found to have shown the "injury in fact" and "causal connection" elements of standing by means of claimed fears and anxieties about hypothetical and inchoate environmental degradation projected to happen at unspecified times far in the future. Here, Petitioners presented definitive data, most issued by the government itself, proving the uncontestable association of increased consumer electricity prices with policies of fossil fuel suppression in jurisdictions that have pursued such policies. These data are admissible in evidence under the Federal Rules of Evidence. But the Court of Appeals held that Petitioners lack standing because they are not directly the subject of the regulation in question and had provided "no evidence" of injury. (App. 4)

It is in the nature of the Endangerment Finding that no person or entity is "directly" subject to the regulation in the sense in which the D.C. Circuit uses that term. The Endangerment Finding itself is only the foundation for the oncoming regulatory avalanche. But it is also the necessary basis of all the current and forthcoming energy and greenhouse gas regulations, and for that reason is the single most economically significant regulation on the books. If Petitioners cannot challenge it for the reason set forth by the Court of Appeals, then nobody can. And then we will have to wait multiple years for challenges to the new vehicle and power plant and other rules to reach this court, while meanwhile consumer electricity prices multiply by a factor of

three or five or ten, and the entire domestic vehicle-manufacturing sector gets put out of business.

In a purportedly constitutional republic, the law of standing cannot be so twisted as to shield from judicial scrutiny the foundation of an agency's self-issued writ of boundless regulatory authority.

STATEMENT OF THE CASE

On December 15, 2009, EPA published in the Federal Register a lengthy set of "findings" with the title "*Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act,*" 74 F.R. 66,496, *et seq*. (the "Endangerment Finding"). The Endangerment Finding purported to determine that carbon dioxide (CO2) and other so-called "greenhouse gases" constitute a "danger to human health and welfare." The Endangerment Finding laid out its claimed scientific basis in the form of what it called three "lines of evidence."

The Endangerment Finding then became the essential basis for a barrage of regulatory initiatives, both from EPA and other agencies, seeking a sweeping transformation of the entire U.S. economy, in large part through the suppression of the use of the predominant form of

energy, namely hydrocarbon (or "fossil") fuels. These regulatory initiatives in most cases proceeded without support, or with only the most tenuous support, from statutes passed by Congress. Among many such initiatives entirely dependent on the Endangerment Finding, the most significant was the "Clean Power Plan," 80 Fed. Reg. 64,661 (October 23, 2015), which sought to mandate a transformation of the electricity–generation sector of the economy.

In the years following adoption of the Endangerment Finding, it became abundantly clear that the claimed scientific basis for the Finding was completely lacking, that EPA's claimed three "lines of evidence" in support of the Finding had been falsified by empirical data, and that the Finding was in fact based on pseudoscience.

On January 20, 2017, Petitioner Concerned Household Electricity Consumers Council (CHECC) filed a Petition with EPA seeking reconsideration of the Endangerment Finding based on scientific research and evidence that had emerged since the Finding was adopted. CHECC is a group of consumers, all of whom purchase electricity. In its initial Petition for Reconsideration, CHECC proved its standing and that of its members via an evidentiary showing, based on public records, of the definitively–established link between government fossil fuel suppression measures and increased electricity prices to consumers.

Throughout the period 2017 through 2021, CHECC filed some seven Supplements to its Petition, each bringing to EPA's attention additional scientific research and evidence demonstrating the invalidity of its purported Endangerment Finding. Petitioner Fair Energy Foundation (FAIR) filed a separate Petition for Reconsideration of the Endangerment Finding in May, 2019, which asserted the same or similar scientific objections, and further asserted that the *Massachusetts v. EPA*, 549 U.S. 497 (2007). should be reconsidered in light of the Major Questions Doctrine, a test it would surely fail.

EPA issued a final denial of the two Petitions for Reconsideration on April 29, 2022. *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act; Final Action on Petitions,* 87 F.R. 25,412, and linked "Decision Document" (App. 9–95)

On June 27, 2022, CHECC and FAIR filed timely Petitions for Review of the agency action with the D.C. Circuit. The Court of Appeals had jurisdiction to review EPA's Denial of the Petitions because (1) the two petitions each sought a rulemaking and were denied. *Alon Refining Krotz Springs v. EPA*, 936 F.3d 628, 642 (D.C. Cir. 2019) ("In particular, the [Supreme] Court noted that section 7607(b)(1) 'expressly permits review" of EPA's "rejection of [a] rulemaking petition.' [*Massachusetts v. EPA*, 549 U.S. 497] at 520, 528."); and (2) denial was a final agency action subject to review under *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir.

1975); *PPG Indus., Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981); *Group Against Smog & Pollution, Inc. v. EPA*, 665 F.2d 1284, 1290 (D.C. Cir. 1981); *Natural Resources Defense Council, Inc. v. Thomas*, 845 F.2d 1088 (D.C. Cir.1988); and *Ciba–Geigy Corp. v. EPA*, 46 F.3d 1208, 1210 (D.C. Cir. 1995).

On the issue of their standing, in their briefing to the D.C. Circuit, CHECC and FAIR made an evidentiary presentation as to the definitively–established link between government policies suppressing the use of hydrocarbon fuels in electricity generation and rapidly increasing price of electricity to consumers. (App. 135–141) The presentation as to standing in the brief to the Court of Appeals was based on the same approach used in the original 2017 Petition for Reconsideration, but also incorporating updated government data from the intervening years up to 2022.

The D.C. Circuit held oral argument on the CHECC/FAIR appeal on April 14, 2023. On May 25, 2023 the court issued a Per Curiam Judgment dismissing the appeals of CHECC and FAIR. The sole ground for the dismissal was a determination that CHECC and FAIR lacked standing to pursue their claims. The court held, "Petitioners fail to meet their burden to establish standing because they provide no evidence that they or any of their members have been injured by the Endangerment Finding. . . . CHECC's brief does not identify a single regulation based on the Endangerment Finding that has affected its members." (App. 4, 6)

Of the three parts of the standing test set out in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992), the Court of Appeals focused only on the first part of the test, namely whether Petitioners had sufficiently shown an "injury in fact." The court thereby seemingly determined that widely available and unquestionably accurate data as to the association of fossil fuel suppression and higher electricity prices — including official U.S. federal and state government data specifically admissible under the Federal Rules of Evidence — somehow constitute "no evidence" when it comes to establishing consumer standing to challenge a federal regulatory action. The court also disingenuously feigned unawareness of the impending regulatory onslaught against hydrocarbon fuels, particularly as used for electricity generation, that everyone knew the Biden administration was getting ready to unleash under the banner of the Endangerment Finding.

On June 30, 2022 — three days after the present case had been initiated in the D.C. Circuit — this Court decided *West Virginia v. EPA*, 597 U.S. __, 142 S.Ct. 2587 (2022). *West Virginia* held that the transformation of the electricity sector of the U.S. economy embodied in EPA's Clean Power Plan was invalid under this Court's Major Questions Doctrine. However, *West Virginia* left the Endangerment Finding in place. As a consequence, EPA immediately began planning a renewed assault on the energy economy and on electricity consumers, in an end run against *West Virginia v. EPA*. The renewed assault is entirely based on the pseudoscientific Endangerment Finding that

remained in place. As of the time of briefing and argument in the present case in the D.C. Circuit in the fall of 2022 to April 2023, the exact nature of the renewed regulatory assault had not emerged.

On May 5, 2023 — almost immediately after the April 14, 2023 oral argument in this case — EPA issued a new proposed Rule as to consumer vehicles, titled *Multi-Pollutant Emissions Standards For Light and Medium-Duty Vehicles*, 88 Fed. Reg. 29,184 (May 5, 2023) (the "Vehicle Rule"). Then, on May 23, EPA issued another proposed rule titled *Greenhouse Gas Standards and Guidelines for Fossil Fuel-Fired Power Plants*, 88 Fed. Reg. 33,240 (May 23, 2023) (the "Power Plant Rule"). The Vehicle Rule, upon taking effect, will effectively ban all consumer vehicles other than electric ones; and the Power Plant Rule will effectively render illegal all use of hydrocarbon fuels in the generation of electricity by some point in the 2030s. The Power Plant Rule is an even more sweeping effort to transform the electricity generation sector of the economy than was the Clean Power Plan invalidated by this Court under the Major Questions Doctrine in *West Virginia v. EPA* little more than one year ago. This is EPA thumbing its nose at this Court, with the pseudoscientific Endangerment Finding as its sole basis since all subsequent Endangerment Findings are explicitly premised on the original. It is a novelistic irony that so far two of EPA's major regulatory assaults on fossil fuels, the Tailoring Rule and the

Clean Power Plan, were invalidated on major question grounds,[1] while the root of EPA's regulatory authority over greenhouse gas emissions, *Massachusetts v. EPA*'s interpretation of "air pollutant" to include greenhouse gases, is itself fundamentally irreconcilable with the Major Questions Doctrine.

Even though the current regulatory onslaught against consumers and the economy is entirely based on the Endangerment Finding, under the D.C. Circuit's ruling, no consumer has shown or can show standing to challenge this Finding. Prospective parties other than consumers have no financial incentive to do so. Given the extraordinary magnitude of the consequences of the regulation in question, this matter urgently calls for this Court's review.

REASONS FOR GRANTING THE PETITION

The Court should hear this case for the following reasons:

1. The rules of standing articulated by the Court of Appeals in this case are inconsistent with the rules applied to more favored groups challenging government actions or regulations in courts throughout the country, and indeed in the D.C. Circuit itself.

---

[1] *See Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) and *West Virginia v. EPA*, 597 U.S. __, 142 S.Ct. 2587 (2022).

2. The Endangerment Finding is the most economically significant regulation on the federal books today. It has been thoroughly undermined, discredited and invalidated by scientific research and data that have emerged since its issuance in 2009. It cries out for judicial scrutiny and remand to the agency for reconsideration and rescission. It is unconscionable for the courts to duck scrutiny of the Endangerment Finding based on a specially–engineered approach to standing which is applied to disqualify politically–disfavored consumer groups who challenge highly consequential environmental regulations, while meanwhile an entirely different approach to standing gets applied to politically–favored environmental plaintiffs seeking more regulation.

I. The Court should grant certiorari to make the requirements of standing consistent and rational as between consumer groups and self–styled environmental groups in cases challenging federal regulations and actions.

Standing is a fundamental requirement for access of a party to federal court, deriving from the limitation of federal court jurisdiction to "cases" and "controversies" found in Article III, Section 2, Clause 1 of the Constitution.

But in the context of challenges to federal agency regulations and actions, and particularly in the environmental area, the doctrine of standing over the years has been twisted beyond recognition. Somehow the lower courts have found ways to bend over backwards to allow claims by politically–favored parties to proceed, while much more concrete and definitive showings of injury by less politically–favored plaintiffs get dismissed. The divide is most dramatic in the distinction between the sorts of allegations deemed sufficient to establish standing for an individual or group alleging injury from some form of harm to the environment (politically favored) versus the situation of the present case, where plaintiff consumers challenge an overreaching environmental regulation for imposing massive costs on consumers (politically disfavored). As illustrated by the present case, the latter are held to a far more demanding, and completely inconsistent, standard. This court should grant certiorari to rectify that imbalance.

A. As currently applied, the test for standing to challenge agency regulations and actions is completely disparate as between environmental plaintiffs seeking additional regulation and consumer plaintiffs seeking less regulation.

The test for a plaintiff to establish standing, as articulated in the leading cases from this Court, would appear on its face to be neutral as to the type of plaintiff bringing the claim. The classic three–part test

for standing is set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992):

> [O]ur cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not "conjectural" or "hypothetical," . . . . Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

In the present case, only the first two parts of the *Lujan* test — the requirement for an "injury in fact" and "causal connection" — are at issue.

Certainly nothing about the words of *Lujan* would suggest a stark divide in the standing test between those who sue to seek more environmental regulation versus those who sue to seek less. Indeed, from the words of *Lujan*, one might surmise that a consumer group alleging harm from additional economic costs imposed by regulation would have a clearer case for establishing standing than an environmental group claiming standing based on non–monetary and inchoate environmental harm, often far in the future. Imminent

substantial monetary harm would be much more "concrete and particularized" than inchoate environmental degradation some time far in the future. But in practice that is not how it works. In practice, as illustrated by this case, even the clearest showing of imminent monetary harm from Endangerment Finding–induced regulation gets brushed aside, while the most speculative projections of inchoate environmental degradation where the plaintiff seeks more regulation are always deemed sufficient.

The contrast is stark between how the D.C. Circuit dealt with the present case to how it and the other Courts of Appeals deal with claims brought by environmental plaintiffs seeking to have agencies impose additional regulation allegedly to protect the environment.

1. For the present Petitioners, the D.C. Circuit held that definitive and admissible evidence linking policies of fossil fuel suppression with higher consumer electricity prices somehow constituted "no evidence" of injury in fact.

In the present case, Petitioners cited real world evidence of the clear linkage between policies of fossil fuel suppression and higher consumer electricity prices to prove the "injury in fact" and "causal connection" elements of standing. But the Court of Appeals simply ignored that evidence, and stated as follows:

> Petitioners fail to meet their burden to establish standing because they provide no evidence that they or any of their members have been injured by the Endangerment Finding.

(App. 4). Further to its statement that Petitioners had submitted "no evidence" of injury in fact, the court criticized Petitioners for not submitting affidavits of their members, and then added that Petitioners had not submitted "other evidence" to establish standing:

> [P]etitioners submitted no affidavits or other evidence to establish standing, instead merely arguing in their briefs that the Endangerment Finding has injured them or their members.

(App. 5). Continuing its theme that Petitioners' showing of standing had somehow been deficient, the court emphasized once again a supposed requirement of "additional affidavits," and ended by citing its Rule 28(a)(7), which it stated "codifie[d] this requirement in our local rules." *Id.*

It is all nonsense. Neither D.C. Circuit Rule 28(a)(7) nor any other Rule of the D.C. Circuit requires or mentions submitting affidavits as a requirement for establishing standing as separate items with an appellant's brief. The relevant portions of D.C. Circuit Rule 28(a)(7) read as follows:

> (7) **Standing**. In cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing. This section,

> entitled "Standing," must follow the summary of argument and immediately precede the argument. When the appellant's or petitioner's standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.

The word "affidavits" does not appear. Granted, certain D.C. Circuit case law does suggest, in dictum, that an appellant can submit affidavits with its brief when standing is an issue. However, nothing in the D.C. Circuit Rules or case law states that the submission of affidavits is a requirement.

Moreover, it is anomalous, to say the least, for a court of review to receive and evaluate without any fixed standards the weight and credibility of original evidence as if it were a fact-finding body. The process is entirely ad hoc and improvisational from one case to the next.

Nor *could* affidavits be a requirement to establish standing, because in many cases — this one being an obvious example — the harm to petitioners resulting from the regulation at issue is not an appropriate subject for sworn testimonial statements of the petitioners. The connection between policies of fossil fuel suppression and increasing consumer electricity prices is not something that a consumer can know of personal knowledge so as to swear out an affidavit. Rather, the connection can only be known and proved by data

compiled and published by statistical agencies as to amounts of electricity production from fossil fuels versus renewables, and other data from statistical agencies as to consumer electricity prices in the same locations.

In other words, the entire logic of the D.C. Circuit Judgment is a makeweight concocted to rationalize getting rid of politically disfavored petitioners on a technicality, without having to grapple with the merits. This in spite of the fact that the "injury in fact" to the Petitioners will easily be in the tens of thousands of dollars each.

Meanwhile, Petitioners of course did submit exactly the sorts of evidence most pertinent to proving injury in fact and causation, namely evidence from statistical agencies showing production of electricity by generation source and consumer electricity prices for jurisdictions that have adopted policies of fossil fuel suppression. This showing appears at pages 30–34 of Petitioners' Opening Brief in the D.C. Circuit. (App. 135–141)

Although such data exist for many jurisdictions around the world, due to space limitations in the brief Petitioners focused on two particular jurisdictions, California and Germany. California is the state among U.S. states, that has proceeded the farthest in building wind and solar facilities and suppressing fossil fuels. In Europe, among the large countries, Germany is the one that has proceeded farthest with the same policies. (Denmark has proceeded even farther than Germany,

but it is a small country, and definitive data for Denmark in the English language are harder to find.)

In their D.C. Circuit brief as to California, and as to percentage of electricity generation from wind and solar, Petitioners obtained then–most recent 2020 data from the California Department of Energy. For average consumer electricity prices for California and the rest of the U.S., Petitioners obtained data for the same year from the Energy Information Administration (part of the federal Department of Energy). The California data presented showed the dramatic consequences of California's fossil fuel suppression. In 2020 California got a U.S.–leading 24.36% of its electricity from wind and solar, while its consumers paid an average price of 18.48 cents per kWh. The 18.48 cents represented an increase from 15.62 cents per kWh just five years previously in 2015, as California ramped up its wind and solar generation and scaled back fossil fuels. Meanwhile, the 18.48 cents average price paid by consumers in California represented almost a 70% premium over the average price paid by other U.S. electricity consumers, which in 2020 was 10.93 cents per kWh. (App. 136–137).

The following links to official government data sites were provided in the brief to the D.C. Circuit to back up these figures as to California (and as to average consumer electricity prices for the entire U.S.): California Department of Energy — https://www.energy.ca.gov/data-reports/energy-almanac/california-electricity-data/2021-total-system-electric-generation/2020 (last

visited Oct. 3, 2023); U.S. Energy Information Administration – https://www.eia.gov/electricity/monthly/epm_table_grapher.php?t=epmt_5_6_a (last visited Oct. 3, 2023). (App. 136–137). If one follows that EIA link today, one finds data for 2022 and 2023 instead of 2020 and 2021. It turns out that as California has continued its mad program of suppressing fossil fuels, its average consumer electricity prices increased to 28.96 cents per kWh in 2022 and 31.22 cents in 2023. (The same EIA chart shows the U.S. average consumer electricity price for 2023 as 16.11 cents per kWh. That means that California's average price is now very nearly double the U.S. average.)

Petitioners' D.C. Circuit Opening Brief then cited comparable definitive data for Germany. The data as to percent of electricity generation from renewables came again from the U.S. EIA. The data for average German consumer electricity prices came from a Germany–focused English–language site called Clean Energy Wire, which in turn obtained the data from the German Association of Energy and Water Industries. The following links to these sources were provided to the Court of Appeals: U.S. Energy Information Administration – http://www.eia.gov/todayinenergy/detail.php?id=26372 (last visited Oct. 3, 2023); Clean Energy Wire – https://www.cleanenergywire.org/factsheets/what–german–

households-pay.[2] (App. 137). The cited data showed that Germany was obtaining more than 30% of its electricity from wind and solar sources, and that its average consumer electricity price in 2021 was 32.16 cents per kWh. If one goes to the same Clean Energy Wire link today, one finds that the average German consumer electricity price for the second half of 2022 was 40.07 cents per kWh — nearly two and a half times the average U.S. price.

All of this definitive information most assuredly qualifies as "evidence" of the harm to electricity consumers from suppressing fossil fuels and increasing the percentage of electricity generation from wind and solar. The information is evidence both in the informal sense of being exactly what a rational person would consider to determine if the claim of consumer harm were true; and it is also "evidence" in the sense that it would be admissible in evidence under the Federal Rules of Evidence if this were a trial in a federal court. The information is formally admissible in evidence via judicial notice under Federal Rule of Evidence 201(b)(2):

> The court may judicially notice a fact that is not subject to reasonable dispute because it: . . . (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

---

[2] That link is now dead. An updated version of this fact sheet is available at https://www.cleanenergywire.org/factsheets/what-german-households-pay-electricity (last visited Oct. 3, 2023).

The cited data from government sources (which is nearly all of it) is also separately admissible as "public records" under Federal Rule of Evidence 803(8)(A)(ii):

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness: . . . (8) Public Records. A record or statement of a public office if: . . . (A) it sets out: . . .(ii) a matter observed while under a legal duty to report. . . .

Even if it weren't the test of Fed.R.Ev. 201, these data on percentage of electricity generation from wind and sun, and on consumer electricity prices, are widely published, well-known, and not subject to reasonable dispute. They are evidence in every sense of the word, and indeed definitive evidence. Only willful blindness could obscure that fossil fuel suppression increases the consumer cost of electricity. Requiring individual consumer affidavits to establish what is obvious from admissible government statistics is no more than a pretext for avoiding the merits — which are devastating to the validity of the Endangerment Finding.

2. For favored categories of plaintiffs, such as environmental plaintiffs, the lower courts regularly grant standing based on rank speculation about inchoate, non-monetary harms.

The economic injury asserted by Petitioners in this matter is large and definitively-established — yet was held insufficient. Meanwhile, for individuals or groups that are politically favored, the law of the D.C. Circuit and other circuits recognizes standing based on purported harms that are undetectably small, non-economic, inchoate, aesthetic, subjective, or even just predicted by models that have never been validated by real world evidence. In environmental cases courts consistently recognize standing even when the real-world evidence definitively refutes the claim of harm or where the harm is totally undetectable by any means known to science.

Consider *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68, 76-77 (2020). That is the most recent case from the D.C. Circuit granting standing to an environmental claimant asking for additional regulation. There, NRDC claimed standing to challenge an EPA regulation based on an assertion by one member that his coastal property was allegedly "threatened" by climate change. There was no assertion that any of the harm had actually yet occurred, nor when it would occur, nor how it could be redressed by a court order that would have the same power over sea level as the commands of King Canute, but without the humility. In the real world, no scientifically valid

evidence has ever established any link between GHG emissions and any supposed enhanced "threats" to coastal property, and all attempts to show that such emissions have led to accelerating sea level rise or increased hurricane activity have failed. No matter. The Court held as follows:

> Petitioners then have adequately linked the 2018 Rule to an injury–in–fact: the 2018 Rule will lead to an increase in HFC emissions, which will in turn lead to an increase in climate change, which will threaten petitioners' coastal property.

Or consider *Kelsey Cascadia Rose Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020). That case alleges a constitutional right to a stable climate and asks the court to order the U.S. government to force an end to all fossil fuel use in this country. The Ninth Circuit in 2020 held plaintiffs had sufficiently alleged the "injury in fact" and "traceability" elements of standing (while rejecting redressability) based on allegations that:

> Kelsey spends time along the Oregon coast in places like Yachats and Florence and enjoys playing on the beach, tidepooling, and observing unique marine animals. . . . The current and projected drought and lack of snow caused by Defendants are already harming all of the places Kelsey enjoys visiting, as well as her drinking water, and her food sources—including wild salmon. . . . Defendants have caused

> psychological and emotional harm to Kelsey as a result of her fear of a changing climate, her knowledge of the impacts that will occur in her lifetime, and her knowledge that Defendants are continuing to cause harms that threaten her life and wellbeing.

Complaint for Declaratory and Injunctive Relief, 2015 WL 4747094 (D.Or.). In tort law the impact rule keeps such patent nonsense out of court. *See* RESTATEMENT THIRD OF TORTS, § 47 *Negligent Conduct Directly Inflicting Emotional Harm on Another*. It is no credit to administrative law that it accepts harms tort law has rejected for hundreds of years.

If Petitioners in the present case were not obliged to spend more on electricity, they would also have more disposable income left over for "playing on the beach, tidepooling, and observing unique marine animals." They might even derive a certain aesthetic or economic satisfaction from observing lower electric bills, just as the *Juliana* plaintiffs enjoy observing unique marine animals. The causal chain to higher electricity prices cited by Petitioners is far more direct and obvious than the speculative and neurotic chain of fallacious inferences held sufficient in *NRDC v. Wheeler*, *Juliana* and *Massachusetts v. EPA.*

The linchpin of the *Juliana* plaintiffs' claim of injury is the "projected drought and lack of snow" due to "climate disruption." In reality, many areas in the Pacific Northwest had well above normal

snow last winter. Many western ski resorts have just experienced abundant if not record snow. Yet somehow even empirical falsification of the *Juliana* plaintiffs' speculative lamentations poses no problem to their assertion of injury in fact.

Many dozens of cases can be found throughout the lower courts demonstrating the often non-economic, conjectural, and/or aesthetic nature of a showing that will be deemed sufficient to establish the injury in fact element of standing when the plaintiff is an environmentalist seeking more regulation. Here are just a handful of examples:

- In *Ecological Rights Foundation v. Pacific Lumber*, 230 F.3d 1141, 1147 (9th Cir. 2000), defendant had a sawmill on Yager Creek, while plaintiffs alleged they used the creek for recreation. Plaintiffs averred that they "particularly enjoy their visits because they can view wildlife in and around the creek," and claimed that they "fear that runoff from Pacific Lumber's two facilities is damaging the creek and its wildlife." The District Court had dismissed for lack of standing, but the Ninth Circuit reversed as to several plaintiffs, holding "The 'injury in fact' requirement in environmental cases is satisfied if an individual adequately shows that she has an aesthetic or recreational interest in a particular place, or animal, or plant species and that that interest is impaired by a defendant's conduct."

- Plaintiffs in *Defenders of Wildlife v. Secretary, Department of the Interior,* 354 F.Supp. 2d 1156, 1159 (D.Or. 2005) challenged the proposed removal of the gray wolf from the Interior Department's list of endangered species. The court quoted the language of the Ninth Circuit from *Ecological Rights Foundation*, and then applied it, stating "The affidavits submitted by the plaintiffs demonstrate that individual members have an aesthetic or recreational interest in observing wolves." That was deemed sufficient to establish standing.

- *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 616 (2d Cir. 1965) is the seminal case establishing standing for an environmental plaintiff for a matter of pure aesthetics. Plaintiffs alleged that the construction of a pumped storage power facility on Storm King Mountain along the Hudson River would impair their views. On the issue of standing, the Second Circuit held: "In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of "aggrieved" parties under § 313(b) [of the Federal Power Act].

Thus, the contrast between the treatment of Petitioners in the present matter and of favored environmental plaintiffs is stark. For a favored environmental plaintiff, purely non–economic, aesthetic and recreational assertions have been held clearly sufficient to establish standing to sue in federal court. And when it comes to litigation involving assertions of "climate change," wild Chicken Little speculation as to imaginary future harm, even when definitively refuted by subsequent events after the filing of the complaint, is nonetheless sufficient to confer standing.

B. The test for standing to challenge agency regulations and actions should be neutral as between environmental plaintiffs seeking more regulation and consumer groups seeking less.

It is totally unacceptable for the federal court system to be applying standing rules in cases of environmental regulation that uniformly allow access to the courts by environmental claimants seeking more regulation, while denying access to the courts to consumer groups seeking less regulation.

Petitioners here are not challenging existing decisions granting standing to environmental plaintiffs. But they do seek a rule of law that would put consumer groups asking for reduced regulation on equal footing to obtain access to federal courts. That could be accomplished in substantial part by a decision that presentation of uncontested

statistical evidence linking certain regulatory policies to higher consumer costs is a valid method to demonstrate standing.

II. It is imperative that the rules of standing not be manipulated to insulate from judicial scrutiny the one regulation that is both the single most economically significant, and also the single most scientifically flawed, of all the regulations on the federal books.

The Endangerment Finding that is the subject of the present Petition is the single most economically significant of all the regulations ever issued by the federal government. It forms the entire basis for the current all–of–government avalanche of regulations that supposedly are going to "save the planet" by eliminating the most reliable and cost–effective energy sources from the American way of life. This avalanche of regulations includes not just the Power Plant Rule and the Vehicle Rule discussed earlier in this Petition, but dozens of more rules and proposed rules and administrative actions of every sort from every corner of the bureaucracy: actions to suppress drilling for oil and gas, actions to block pipelines from getting built, actions to end energy resource extraction on federal lands, actions to eliminate the use of coal entirely, actions to make washing machines and dryers and dishwashers less functional, actions to forbid the purchase of inexpensive lightbulbs, actions to require massive and costly emissions disclosures from all public companies, actions to ban or restrict heating or cooking using natural gas, hundreds of billions of dollars of

taxpayer subsidies for energy sources much less cost effective than what we now have, and dozens upon dozens upon dozens of more such costly actions from throughout the government. All of these actions are entirely based on, and have no justification other than, the Endangerment Finding.

To estimate the cost to Americans of the Endangerment Finding in the hundreds of billions of dollars is to understate the matter by at least an order of magnitude, and more likely two to three orders. If forced by the administrative state to proceed to the end, the cost will likely be in the tens of trillions of dollars, and maybe hundreds of trillions. And the American people will be left far, far poorer, and our energy security and national security will be put in grave jeopardy.

And meanwhile the Endangerment Finding on its merits is based on quicksand. The Endangerment Finding is the most economically significant of all federal regulations, but its supposedly sound scientific basis is easily proven to have been built on a house of cards. The 2009 Endangerment Finding, as one of its three lines of evidence, claimed that the Earth had been facing record setting global average surface temperatures. However, such global average surface temperature data have been, and continue to be totally fabricated for a very significant portion of the planet for which there was no surface temperature data whatsoever until relatively recently, all to provide support for global warming claims.

For example, the Southern Hemisphere is 80.9 % ocean and prior to the year 2000 there were no credible monthly ocean surface data whatsoever for this massive area. This fact alone means that until 2000, the surface temperature record had no data whatsoever for over 40% (50%*0.809) of the planet. But it is even worse than that because for much of the surface temperature record since about 1850, there are virtually no credible data outside of North America and Europe. *See* App. 105–106**.**

EPA claimed in the Endangerment Finding that global temperatures were setting records because of GHG emissions.

But proof that substantial parts of the temperature data are fabricated invalidates this claim. Moreover, the invalidation of these global average surface temperature data has been shown by the Petitioners to invalidate each of the three lines of evidence in EPA's 2009 GHG Endangerment Finding, and all subsequent endangerment findings which rest on the 2009 finding. *See* App. 107–110**.**

This merits argument was not even rebutted by the EPA; it was simply ignored. Also not rebutted was a separate merits argument proving that, in fact, all greenhouse gases have negative social costs so that they are all really beneficial gases requiring no climate–motivated regulation at all. *See* App. 101–103**.**

Moreover, rising global temperatures, properly measured, are readily explained by changes in solar, volcanic and

oceanic/atmospheric activity; that is, changes in natural factors. *See* App. 111–118

Based on the invalidated EPA arguments outlined above, the Biden Administration has mandated enormous changes in key sectors of the American economy. Two examples: EPA's auto sector regulations require 67%% of new vehicles be battery electric by 2032; and in the electric power sector, its regulation would require alternate fuels and very costly carbon capture and sequestration for any coal or gas–fired generation. Moreover, there are many more examples of major energy and economic policy errors driven by EPA's 2009 Greenhouse Gas Endangerment Finding.

While the Endangerment Finding is the root of all this regulation, the root of the Endangerment Finding is *Massachusetts v. EPA*. Having set loose a regulatory Cthulhu on the American economy through the tiniest mousehole in administrative law — the definition of "air pollutant" in in 42 U.S.C. § 7602(g) — *Massachusetts v. EPA* should be overturned under the Major Questions Doctrine.

The D.C. Circuit looked at the regulatory tsunami driven by the Endangerment Finding and concluded that the consumers who are the targets of the immense and needless costs are not entitled to judicial review because there is no injury in fact. This is an embarrassment to the American judicial system on a level with *Dred Scott v. Sanford*. This honorable Court has the opportunity to straighten this matter out.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted, this __ day of October, 2023.

Harry W. MacDougald
Caldwell, Carlson, Elliott & DeLoach LLP
Two Ravinia Drive, Suite 1600
Atlanta, Georgia 30346
(404) 843–1956
hmacdougald@ccedlaw.com

Francis Menton
Law Office of Francis Menton
85 Broad Street, 18th floor
New York, New York 10004
(212) 627–1796
fmenton@manhattancontrarian.com