No. 11-1428
(Consolidated with 11-1441 and 12-1427)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DELTA CONSTRUCTION COMPANY, INC., et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Appeal from the Environmental Protection Agency
EPA-76FR57106

DELTA CONSTRUCTION COMPANY, INC., ET AL.'S PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Federal Statutes

*Authorities upon which we chiefly rely are marked with asterisks.

Page

Federal Regulations

Rules of Court

Miscellaneous

INTRODUCTION

On April 24, 2015, the panel in Case No. 11-1428 (consolidated with Case Nos. 11-1441 and 12-1427), which also served as the panel in Case No. 13-1076, issued a single judgment in the cases, holding that the Petitioners lacked standing. The judgment was filed in each case docket. Following the lead of the panel, this single petition for rehearing en banc covers the indicated cases and is being filed in each case docket. Some of the Petitioners overlap in the cases, but they are not identical. Consequently, although the content of this petition is the same in each case, the captions for each case docket are different and identify the separate case numbers and their respective lead Petitioners. In addition, the Certificate as to Parties, Rulings, and Related Cases, as well the Rule 26.1 Corporate Disclosure Statement, set forth in the Addendum, apply separately to each case.

RULE 35 STATEMENT

Petitioners Delta Construction Company Inc., et al. (Case No. 11-1428), and California Construction Trucking Association, Inc., et al., (Case No. 13-1076), submit that hearing en banc is warranted because the panel decision (I) conflicts with several decisions of the United States Supreme Court and this Court, *Larson v. Valente*, 456 U.S. 228 (1982), *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Fla. Audubon Soc'y v. Benson*, 94 F.3d 658, 663-64 (D.C. Cir. 1996); and (ii) involves a question

of exceptional importance affecting the extent to which persons injured by federal government action can obtain redress of their injuries from Article III courts.

BACKGROUND

Under their respective statutory authorities, the Environmental Protection Agency ("EPA") and the National Highway Traffic Safety Administration ("NHTSA") promulgated joint rules governing greenhouse gas emissions and fuel economy standards for cars, 75 Fed. Reg. 25,324 (May 7, 2010) (the "Car Rule") and trucks, 76 Fed. Reg. 57,106 (Sept. 15, 2011) (the "Truck Rule"). Section 202(a) of the Clean Air Act requires EPA to regulate air pollutants, including greenhouse gases, emitted from "any class or classes of new motor vehicles or new motor vehicle engines, which in [EPA's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1); *see Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (greenhouse gases are "air pollutants" under the Clean Air Act). In 2009, EPA triggered its duty to regulate greenhouse gas emissions from new motor vehicles when it found that such emissions endanger public health and welfare. *See* 74 Fed. Reg. 66,496 (Dec. 15, 2009) (the "Endangerment Finding"). Under instructions from the President, EPA partnered with NHTSA to jointly promulgate the Car Rule and the Truck Rule, which govern both greenhouse gas emissions standards ("EPA standards") and fuel economy standards ("NHTSA standards") for new cars and trucks. 76 Fed. Reg. at

57,108. NHTSA's authority for promulgating fuel economy standards is separate and distinct from EPA's authority to govern greenhouse gas emissions standards. *See* 49 U.S.C. § 32902; 49 C.F.R. § 1.95.

The joint EPA/NHTSA Car Rule establishes an integrated and indivisible National Program governing greenhouse gas emissions and fuel economy standards for new cars. 76 Fed. Reg. at 57,113. The EPA standards in the Car Rule depend upon the NHTSA standards, and vice versa, 75 Fed. Reg. at 25,328. The joint EPA/NHTSA Truck Rule was also designed to operate as a unitary, interdependent whole. 76 Fed. Reg. at 57,110; *Cf. id. at* 57,113. *See also*, 75 Fed. Reg. at 25,509.

The Petitioners herein seeking en banc review (the "California Petitioners") challenged EPA's portions of both the Car Rule (Case No. 13-1076), and the Truck Rule (Case No. 11-1428) on the ground that, in promulgating each rule, EPA failed to comply with a statutory mandate to submit the rules for peer review to the Science Advisory Board, as required by the Science Advisory Board organic statute, 42 U.S.C. § 4365 (the "SAB Statute"). The California Petitioners asserted that, as purchasers of new cars and trucks, they are injured by increased purchase costs attributable to EPA's greenhouse gas emission standards. Another petitioner, Plant Oil Powered Diesel ("POP Diesel"), separately challenged NHTSA's portion of the Truck Rule but not the Car Rule. The panel heard oral argument from the parties in the Car Rule and the Truck Rule challenges at the same time and issued a single,

integrated opinion. Addendum (A-1). This petition for en banc reconsideration is brought solely by the California Petitioners in connection with their challenges to EPA's greenhouse gas emissions standards under both the Car Rule and the Truck Rule.

The panel did not address the merits of the challenges, holding that the California Petitioners lacked standing to bring the actions. The panel stated that it had "no need to consider whether the California Petitioners have properly alleged an injury-in-fact because we agree with EPA that they have shown neither causation nor redressability." Slip Opinion at 8-9. In reaching that conclusion, the panel cited *Massachusetts v. EPA*, 549 U.S. at 543 ("As is often the case, the questions of causation and redressability overlap."), and this Court's decision in *Branton v. FCC*, 993 F.2d 906, 910 (D.C. Cir. 1993) ("The two requirements tend to merge . . . in a case such as this where the requested relief consists solely of the reversal or discontinuation of the challenged action.").

The panel opined that, because the Car Rule and Truck Rule were joint rulemakings of EPA and NHTSA, even if EPA's greenhouse gas emissions standards were vacated, the NHTSA fuel economy standards would continue to injure the California Petitioners because costs of new cars and trucks would still increase due to NHTSA's standards. The California Petitioners argued in the briefing that each of the EPA/NHTSA joint rules constituted an indivisible National Program for new cars

and trucks, respectively, and that the NHTSA standards could not survive unaffected if the EPA standards were removed. Pet'rs' Reply Br. at 8 (Truck Rule challenge, Case No. 11-1428); Pet'rs' Reply Br. at 12 (Car Rule challenge, Case No. 13-1076). At oral argument counsel for the California Petitioners reaffirmed that the NHTSA standards could not survive on their own in current form without the EPA standards. Oral Arg. Tr. at 25. Addendum (A-44). In turn, government counsel was asked whether NHSTA's standards would continue unaffected if the EPA standards were vacated, and government counsel asserted that they would. Oral Arg. Tr. at 34. Addendum (A-53). Relying in part on the statement of government counsel at oral argument, the panel held that the NHTSA standards would continue in effect without change, even if the EPA standards were vacated. Slip Op. at 10.

The California Petitioners also argued that two Supreme Court cases, *Larson*, and *Arlington Heights*, supported the standing of California Petitioners because those cases stood for the proposition that an injury is redressable if a favorable decision would remove one of several causes of the injury. Oral Arg. Tr. at 26-27. The panel rejected the argument. Slip Op. at 11. But *Larson* and *Arlington Heights* are controlling here, and the panel's decision is inconsistent with them. Likewise, the panel's decision is inconsistent with this Court's opinion in *Benson*.

ARGUMENT

I

THE PANEL'S DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND THIS COURT

Larson involved a Minnesota statute (the "Charities Act"), which required registration and substantial disclosures by charitable organizations, designed to protect the public from fraudulent practices. Charitable organizations subject to the Charities Act were required to register with the Minnesota Department of Commerce (the "Department") before soliciting contributions in the state. With certain exceptions, charitable organizations registering under the Charities Act were required to file extensive annual reports detailing their total receipts and income from all sources, their costs of management, fundraising, and public education, and their transfers of property or funds. The Charities Act authorized the Department to deny or withdraw the registration of any charitable organization if the organization was found to have engaged in fraudulent, deceptive, or dishonest practices. A charitable organization was deemed ineligible to maintain its registration if it expended an "unreasonable amount" for management, general, and fundraising costs, with those costs being presumed unreasonable if they exceeded thirty percent of the organization's total income and revenue.

Until 1978, all "religious organizations" were exempted from the requirements of the Charities Act, but effective March 29, 1978, the Act was amended to include a "Fifty Percent Rule" in the exemption provision covering religious organizations. The Fifty Percent Rule provided that only those religious organizations that received more than half of their total contributions from members of affiliated organizations would remain exempt from the registration and reporting requirements of the Charities Act.

Shortly after the amendment was enacted, the Department notified the Holy Spirit Association for the Unification of Christianity (the "Unification Church") that it was required to register under the Charities Act. The Unification Church and some of its members challenged the Fifty Percent Rule on Free Exercise and Establishment Clause grounds. An individual plaintiff filed a declaration stating that, among the doctrinally mandated activities emphasized by the Unification Church were door-to-door and public place solicitations of funds, which were in conflict with the Fifty Percent Rule.

The Department challenged the plaintiffs' standing, asserting that the Unification Church was not a "religious organization" within the meaning of the original, pre-1978 Charities Act and that it therefore would not be entitled to an exemption under that Act even if the Fifty Percent Rule were to be declared

unconstitutional. Thus, the Department argued that the plaintiffs lacked standing because they did not meet the requirements of causation and redressability.

The Supreme Court rejected the Department's argument, holding that the application of the Fifty Percent Rule to the plaintiffs was a palpable injury disabling them from soliciting contributions unless the Unification Church complied with registration and reporting requirements, and that relief from the rule would remove the cause of *that* particular injury, *i.e.*, the Fifty Percent Rule. 456 U.S. at 242. The Court went on to state:

> Of course, the Church cannot be assured of a continued religious-organization exemption even in the absence of the [amended] . . . rule. . . . But that fact by no means detracts from the palpability of the particular and discrete injury caused to appellees by the State's threatened application of [the amended] . . . rule. The Church may indeed be compelled, ultimately, to register under the Act on some ground other than the . . . [amended] rule . . . [but that possibility] does not deprive this Court of jurisdiction to hear the present case.

Id. at 242 (citations omitted). Thus, the Court held that although granting relief from the Fifty Percent Rule does not mean the Unification Church will never be subject to the registration and other requirements of the Act on other grounds, it *does* mean that striking the rule relieves the Church from registering on *those* grounds, and that is sufficient to satisfy both causation and redressability. Significantly, the Court went on to state:

> At the every least, then, a declaration that the [amended] . . . rule is unconstitutional would put the State to the task of demonstrating that the

> Unification Church is not a religious organization within the meaning of the Act. . . . Thus, appellees will be given substantial and meaningful relief by a favorable decision of this Court.

Id. at 243.

The parallels between *Larson* and the instant case are clear. If EPA's greenhouse gas emissions standards are removed, the California Petitioners will no longer be subject to those standards. And even if the NHTSA fuel economy standards survive, there is no evidence that those standards, without the greenhouse gas emissions standards, will cause the same out-of-pocket expenses to the California Petitioners as the joint standards operating in tandem.

The panel points out that the preambles to the Car Rule and the Truck Rule state that compliance with the EPA standard qualifies as compliance with the NHTSA standard, and vice versa. Slip Op. at 9. But that is irrelevant to the issues of causation and redressability. The enforcement policy to which the two agencies agreed provides no insight regarding whether the combination of greenhouse gas emissions standards and fuel economy standards create the same cost increases as the fuel economy standards would create standing alone. Significantly, the estimates of increased costs for new cars and trucks attributable to the rules, as set forth in the administrative record, apply to the cost increases caused by the joint rules and are not separated according to which parts of cost increases are individually attributable to EPA's standards or NHTSA's standards. *See* 75 Fed. Reg. at 25,509 (Car Rule);

76 Fed. Reg. at 57,127 (Truck Rule). Accordingly, the panel's decision that the California Petitioners lack standing because of the causation and redressability requirements is at odds with the Supreme Court's holding in *Larson*.

The panel decision also conflicts with *Arlington Heights*. In that case, a nonprofit real estate developer, which had contracted to purchase a tract of land in order to build racially integrated low-income housing, along with certain prospective tenants, filed a suit for injunctive relief and declaratory judgment, alleging that local authorities refused to change the tract from single-family to multi-family classification because of racial discrimination. The Court held that the plaintiffs had Article III standing, observing that the refusal by the local authorities to change the zoning is *a* barrier to constructing the integrated, low-income housing and that if the developer

> secures the injunctive relief it seeks, *that* barrier will be removed. An injunction would not, of course, guarantee that Lincoln Green will be built. [The developer] would still have to secure financing, qualify for federal subsidies, and carry through with construction. . . . [A] court is not required to engage in undue speculation as a predicate for finding that the plaintiff has the requisite personal stake in the controversy. [The developer] has shown an injury to itself that is "likely to be redressed by a favorable decision."

429 U.S. at 261-62 (emphasis added) (citation omitted). Again, there is no evidence in the record that the NHTSA fuel economy rules, standing alone without the EPA greenhouse gas emissions rules, would have as great an impact upon the costs of the

California Petitioners as the combined rules acting in tandem. As the Supreme Court stated in *Arlington Heights*, courts should not "engage in undue speculation as a predicate to finding" Article III standing. *Id.*

The panel relied on *Crete Carrier Corp. v. EPA*, 363 F.3d 490, 492 (D.C. Cir. 2004). *See* Slip Op. at 9-10. In that case, the petitioners were trucking companies who challenged EPA's refusal to grant their administrative petition for reconsideration of an EPA rule requiring truck manufacturers to produce engines that limit nitrous oxide and nonmethane hydrocarbon emissions. The petitioners argued that they were injured by increased costs of the engines mandated by the rules. This Court observed that the engine manufacturers were subject to identical standards pursuant to a consent decree that they had entered into before the litigation commenced, concluding that providing the relief requested to the trucking company petitioners would not relieve them of the identical price increases under the consent decree, which is independently applicable to the manufacturers. 363 F.3d at 493. By contrast, here there is no evidence that the NHTSA fuel economy standard, standing alone, would create the same price hike as the joint EPA/NHTSA rule, standing together. Indeed, the record shows that the EPA and NHTSA standards address two entirely different things. EPA's standards address greenhouse gas emissions, while NHTSA's standards address fuel efficiency requirements. The preamble to the final Truck Rule states:

> The combined rulemaking by EPA and NHTSA is designed to regulate *two separate characteristics* of heavy duty vehicles: Greenhouse gas emissions (GHG) and fuel consumption.

76 Fed. Reg. at 57,124 (emphasis added). For the Car Rule, the preamble states:

> In this joint rulemaking, EPA is establishing *GHG emissions* standards under the Clean Air Act (CAA), and NHTSA is establishing *Corporate Average Fuel Economy* (CAFÉ) standards under the Energy Policy and Conservation Action (*sic*) of 1975 (EPCA), as amended by the Energy Independence and Security Act of 2007 (EISA).

75 Fed. Reg. at 25,328 (emphasis added). Thus, unlike the consent decree and the EPA rules for nitrous oxide and nonmethane hydrocarbon emissions that were at issue in *Crete Carrier Corporation*, which were identical, EPA's greenhouse gas emissions standards and NHTSA's fuel economy standards are not identical and, in the absence of any contrary evidence, price increases for new cars and trucks, respectively, cannot reasonably be expected to be identical from *each* of the standards standing on its own. Indeed, the two agencies have not asserted, in this litigation or elsewhere, that their respective standards, standing alone, would create identical increases in the costs of new cars or trucks. Accordingly, it is " 'likely' as opposed to merely 'speculative' that the [discrete] injury will be 'redressed by a favorable decision' " to vacate the EPA greenhouse gas emissions standards. *See Lujan v. Defenders of Wildlife,* 504 U.S. at 560. The California Petitioners have thus shown that "the relief sought, assuming the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." *See Benson*, 94 F.3d at 663-64.

II

THIS CASE INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE

"[*U*]*bi jus, ibi remedium*—for every right, [there is] a remedy." *Towns of Concord, Norwood & Wellesley, Mass. v. FERC*, 955 F.2d 67, 73 (D.C. Cir. 1992). This legal maxim is an integral part of the due process guaranteed by the Constitution. *See* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 San Diego Law Review 1633 (2004). The fundamental right to have an independent judicial evaluation of grievances, especially against government action, lies at the heart of Article III, and "[a]gencies may not use shell games to elude review." *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293 (D.C. Cir. 2000).

Here, in an effort to elude judicial review, the government proffers a smokescreen: the Car Rule and the Truck Rule were issued jointly by EPA and NHTSA. But, as indicated in the Background section, *supra*, the California Petitioners argued that, if the EPA portion of the joint rule were rescinded, the NHTSA portion could not stand on its own. At oral argument, the government counsel stated that it could. The panel's decision was based in part on government counsel's unsubstantiated statement. Slip Op. at 10 ("government counsel confirmed at oral argument" that NHTSA's standards are not dependent on EPA's standards).

Moreover, as indicated in Section I, *supra*, the panel summarily dismissed the California Petitioners' arguments regarding *Larson* and *Arlington Heights*.

Yet the panel acknowledged that "it is theoretically possible that the EPA-specific portions cause a distinct injury that could be redressed by the court." *Id.* In the absence of evidence that the NHTSA standards cause an *identical* injury to the California Petitioners, as was the case in *Crete Carrier Corp.*, and without more palpable evidence than the conclusory and uncorroborated statement proffered by government counsel at oral argument that the NHTSA standard could survive without the EPA standard, the panel erred in summarily dismissing the California Petitioners' claims on redressability grounds.[1] When a petitioner is denied access to the courts, the issue is one of "exceptional importance" under Rule 35 because the ability to obtain redress of grievances is an "issue of great moment to the community" and not only to the particular petitioners affected by the decision. *See* Douglas H. Ginsburg

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[1] An overly broad redressability rule that requires courts to unduly address other potential causes of an injury not challenged by a petitioner could actually *expand* judicial power beyond Article III's constraints, because only active "cases or controversies" may be decided by federal courts. That is precisely why *Larson* focused on the redressability of the particular cause of injury complained of by the petitioners and not every conceivable cause of the injury. Ironically, if a court focuses too heavily on other potential causes of injury to deny standing, not only does it expand the issues beyond the current case or controversy but it also risks closing the doors of federal courts to those seeking relief from a particularized cause of the injury. That is an issue of exceptional importance regarding the role of courts in our Constitutional system of tripartite government.

& Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo. Wash. L. Rev. 1008, 1025 (1991). If the California Petitioners in this case are denied access to this Court on standing grounds that are unsupportable, a bad precedent is established. The Court sitting en banc could correct the panel's error, thereby not only providing relief to the California Petitioners but also ensuring that future petitioners are not unduly denied access to judicial review in this Court.

CONCLUSION

For these reasons, the Court should grant en banc rehearing to ensure the panel's error is addressed and corrected to conform with prior decisions of the Supreme Court and this Court, and to deal with the exceptionally important standing issues raised here.

DATED: June 4, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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DATED: June 4, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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s/THEODORE HADZI-ANTICH
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