No. 05-219

In the Supreme Court of the United States

NATIONAL ALTERNATIVE FUELS ASSOCIATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed a petition for review of a rule promulgated by the Environmental Protection Agency when the petitioner failed to establish its Article III standing in accordance with the procedure established by court of appeals precedent and explicitly set forth in the court's scheduling order.

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OPINION BELOW

The memorandum and judgment of the court of appeals (Pet. App. 3a-6a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a-4a) was entered on February 25, 2005. A petition for rehearing was denied on May 13, 2005 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on August 11, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

In 2000, the National Alternative Fuels Association (NAFA) and others filed petitions for review pursuant to 42 U.S.C. 7607(b)(1) with the United States Court of Appeals for the District of Columbia Circuit regarding various provisions of a rule promulgated by the Environmental Protection Agency (EPA) pursuant to 42 U.S.C. 7521 and 7545, which established limits on the sulfur content of gasoline.[1] See *Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emissions Standards and Gasoline Sulfur Control Requirements*, 65 Fed. Reg. 6698 (2000). The petitions were consolidated and stayed during settlement negotiations.

By November 2003, all claims were settled and dismissed except for those pursued by NAFA. The court of appeals lifted the stay on the NAFA claims in November 2003, and issued a scheduling order on July 9, 2004, which required that petitioner file its merits brief by August 27, 2004. Pet. App. 13a-15a. The court scheduled the case for argument on February 14, 2005, and provided that "[b]ecause the briefing schedule is keyed to the date of argument, the Court will grant requests for extension of time limits for briefs or transcripts only for extraordinarily compelling reasons." *Id.* at 14a. The court of appeals also included in the text of its order the following provision:

> The court reminds the parties that "a petitioner whose standing is not self-evident should establish

[1] In its petition, NAFA presents substantive arguments about the rule. Pet. 4-8. The government disputes the petition's factual and legal assertions, but does not address them because the merits of the claim are not before this Court.

> its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceedings. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner's opening brief and not . . . in reply to the brief of the respondent agency. In either procedural context the petitioner may carry its burden of production by citing any record evidence relevant to its claim of standing and, if necessary, appending to its filing additional affidavits or other evidence sufficient to support its claim. In its opening brief, the petitioner should also include in the 'Jurisdictional Statement' a concise recitation of the basis upon which it claims standing." *Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002).

Id. at 15a.

On August 14, 2004, NAFA sought a five-week extension of its briefing deadline to allow its counsel more time for "assistance from his client and from his client's retained expert." Pet. 12. The court granted a one-week extension, making petitioner's brief due September 3, 2004. Pet. App. 11a-12a.

NAFA filed its brief on September 3, 2004, describing itself as "a group of scientists and concerned individuals 'who are committed to clean and efficient combustion fuels,'" and who seek "to focus intellectually honest scientific attention to the dynamics of our environment," Pet. App. 5a (quoting Final Pet. Br. at 4). NAFA had similarly characterized itself in public comments submitted to EPA that were part of the

administrative record for the disputed rule. *Id.* at 5a-6a.[2]

NAFA filed a motion to file an amended brief, but the motion, and a subsequent motion for reconsideration, were denied. Pet. App. 9a-10a. The government filed its brief on November 2, 2004, and asserted, inter alia, that NAFA had failed to establish standing in accordance with court procedure. Pet. 10. NAFA filed a reply brief, but it was stricken after briefing on a motion by the government to strike "because NAFA improperly attempted to raise standing arguments for the first time in its reply brief, impermissibly raised new arguments on the merits challenging the agency's rule, and inappropriately offered extra-record evidence in support of its petition." Pet. App. 6a; see *id.* at 7a-8a. NAFA's subsequent motion for reconsideration was denied. *Id.* at 9a-10a.

On February 25, 2005, the court of appeals issued its memorandum and judgment dismissing NAFA's petition for review. Pet. App. 3a-6a. The court explained that the petition was dismissed "for want of jurisdiction" because "NAFA has failed to establish its standing to pursue the petition for review" as required by circuit court precedent. *Id.* at 5a. The court of appeals found that petitioner's standing was "far from self-evident," and that it "proffer[ed] no argument or evidence whatsoever relating to its standing in its opening brief," and then attempted to "loosely, vaguely, and unimpressively * * * cure this deficiency in its reply brief." *Ibid.*

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[2] The government disputes the allegations made by NAFA regarding extra-record settlement discussions (Pet. 13), but does not address the allegations in this response because they were not properly before the court of appeals, and are not relevant to the issue before this Court regarding the sufficiency of NAFA's standing allegations.

Petitioner filed motions for panel rehearing and rehearing en banc, which were denied on May 13, 2005. Pet. App. 1a-2a.

ARGUMENT

The court of appeals correctly ruled, based on the standing allegations in petitioner's opening brief below, that petitioner and its individual members do not have Article III standing to challenge EPA's rule. The court of appeals also correctly struck petitioner's reply briefs, which "loosely, vaguely, and unimpressively" failed to demonstrate Article III standing, and which violated the D.C. Circuit's local rules, its briefing order in this case, and established precedent. See Pet. App. 6a. Those rulings are correct, and do not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 12) that the court of appeals improperly dismissed its petition because petitioner was not given sufficient notice of the court's procedure by the inclusion of a "'reminder' note from the clerk * * * buried in a notice of briefing and argument schedule." That argument is incorrect, and does not merit review by this Court.

Petitioner received ample notice of the court's required procedure. The so-called "reminder note" was set forth in the text of the court's scheduling order, contained a citation to the court's decision in *Sierra Club* v. *EPA*, 292 F.3d 895 (D.C. Cir. 2002), and included a word-for-word quotation from that case detailing the standard procedure to be followed by a petitioner seeking review of an agency decision. See Pet. App. 15a; see also Pet. App. 5a.

In *Sierra Club*, the court of appeals determined that a standard procedure for establishing standing was warranted because standing is "an essential and unchanging part of the case-or-controversy requirement of Article III," meaning that the absence of standing deprives a federal court of jurisdiction to hear the case. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). In contrast to cases that originate in the district court, petitions for review of agency actions originate in an administrative forum that is "not subject to Article III of the Constitution of the United States." *Sierra Club*, 292 F.3d at 899 (quoting *Pfizer Inc.* v. *Shalala*, 182 F.3d 975, 980 (D.C. Cir. 1999). Therefore, even though "the petitioner ordinarily will have participated in the proceedings before the agency," the parties were not required to establish Article III standing at that stage of the proceeding, meaning that it is not until the petitioner seeks judicial review in the court of appeals that "the constitutional requirement that it have standing kicks in, * * * the same, of course, as it would * * * if such review were conducted in the first instance by the district court." *Ibid*.

The party that "invok[es] federal jurisdiction bears the burden of establishing" its standing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. When a party seeks review of agency action before the court of appeals, it is "asking the court of appeals for a final judgment on the merits," so "it must support each element of its claim to standing 'by affidavit or other evidence'" sufficient to justify a judgment on the merits. *Sierra Club*, 292 F.3d at 899 (quoting *Lujan*, 504 U.S. at 561).

Accordingly, the court of appeals established a "fair and orderly process" that would provide "arguments for and against standing"—"the same tried and true adversarial procedure we use for the presentation of arguments on the merits." *Sierra Club*, 292 F.3d at 900-901. As quoted in the scheduling order in this case, the court in *Sierra Club* announced the following procedure to be utilized in all future cases:

> Henceforth, therefore, a petitioner whose standing is not selfevident should establish its standing by the submission of its arguments and any affidavits or other evidence appurtenant thereto at the first appropriate point in the review proceeding. In some cases that will be in response to a motion to dismiss for want of standing; in cases in which no such motion has been made, it will be with the petitioner's opening brief—and not, as in this case, in reply to the brief of the respondent agency. In either procedural context the petitioner may carry its burden of production by citing any record evidence relevant to its claim of standing and, if necessary, appending to its filing additional affidavits or other evidence sufficient to support its claim. In its opening brief, the petitioner should also include in the "Jurisdictional Statement" a concise recitation of the basis upon which it claims standing.

Ibid.

Petitioner was thus provided ample notice of its obligation to establish its standing and the appropriate mechanism for doing so. Petitioner's claim that it did not receive adequate notice is therefore without merit. And, in any event, petitioner points to nothing that

would justify this Court's review of this factbound question.

2. Petitioner also contends (Pet. 15-16) that it was an "arbitrary denial of due process" to "refuse[] to allow Petitioner NAFA to make a supplemental showing as to its standing" because the "Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome." Pet. 16 (quoting *Foman* v. *Davis*, 371 U.S. 178, 181-182 (1962) (quoting *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957))). That argument is without merit.

Petitioner did not make just one "misstep." Instead, petitioner failed to demonstrate a jurisdictional prerequisite in accordance with the procedures clearly established by the court. Petitioner's attempt to remedy that default by supplying new arguments and extra-record evidence in its reply brief was a further violation of the D.C. Circuit's rules, which prohibit the submission of new arguments and extra-record material in a reply brief. Pet. App. 6a; see *Coalition for Noncommercial Media* v. *FCC*, 249 F.3d 1005, 1010 (D.C. Cir. 2001) (reply brief, "as we have said many times, is too late for a new argument"). Petitioner offers no plausible basis for excusing its defaults, and the D.C. Circuit's factbound refusal to do so does not merit this Court's review.

3. Petitioner also errs in contending (Pet. 8-14) that the court of appeals violated petitioner's First Amendment right to petition the court for redress of grievances by dismissing its petition based on "idiosyncratic court preferences." The First Amendment does not confer on litigants who fail to establish Article III standing any right to federal court review of the merits of their claims. Here, petitioner did

not establish its standing to maintain the suit, and the court of appeals properly dismissed the case for lack of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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