UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

CENTER FOR BIOLOGICAL DIVERSITY, *et al.,*

Plaintiffs,

v.

TENNESSEE VALLEY AUTHORITY,

Defendant.

No. 21-cv-00319-TAV-HBG

ORAL ARGUMENT REQUESTED

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Rachel L. Wolf
BPR 026034
Law Office of Rachel Wolf
706 Walnut Street, Suite 401
Knoxville, TN 37902
(865) 325-9653
Rlwolf.esq@gmail.com

Howard M. Crystal
(D.C. Bar No. 446189)*
Anchun Jean Su
(D.C. Bar No. CA285167)*
Center For Biological Diversity
1411 K Street N.W., Suite 1300
Washington, D.C. 20005
Telephone: 202-809-6926
Email: hcrystal@biologicaldiversity.org
jsu@biologicaldiversity.org

**Admitted pro hac vice*

December 13, 2021

TABLE OF CONTENTS

TABLE OF EXHIBITS

TABLE OF AUTHORITIES

Cases

Statutory Provisions

INTRODUCTION

Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C § 553(e), in February, 2020 Petitioners submitted an APA Petition to the Tennessee Valley Authority ("TVA") for a rule that would preclude TVA from continuing to pay membership and other fees to outside groups engaged in lobbying and related advocacy activities. *See* February, 2020 Petition for Rulemaking (Declaration of Peter Galvin ("Galvin Decl."), Exhibit ("Ex.") 1) (hereafter "APA Pet."). TVA responded, but that response neither granted nor denied the APA Petition, and entirely ignored the Petition's arguments and evidence in support of the new rule. May 20, 2020 TVA letter to Petitioners (*Id.*, Ex. 2) (hereafter "TVA Letter").

The APA, 5 U.S.C. § 551, *et seq.*, requires TVA to either grant or deny Petitioners' APA Petition, with a coherent explanation that actually addresses the Petition's bases. *See, e.g., Milbrand v. United States Dep't of Labor*, No. 17-3451, 2018 U.S. App. Lexis 3025 (6th Cir. Feb. 7, 2018). Accordingly, Plaintiffs filed this suit, seeking relief over both the TVA Letter, which fails to respond to the APA Petition in the manner the APA requires (Claim One), and over TVA's unreasonable delay in failing to resolve the APA Petition close to two years after receiving it (Claim Two). *See* Plaintiffs' Complaint (Doc. 1).

Now, citing inapplicable precedents, TVA has filed a motion to dismiss asserting that as a matter of law the agency is free to ignore the APA Petition altogether. Def. Brief In Support of Mot. to Dismiss ("Def. Br.")(Doc. 15). As detailed below, TVA's legal arguments must fail. Moreover, because this suit only concerns disputed legal issues, it can be resolved on the merits at this time, and thus Plaintiffs are moving for summary judgment.

A long line of precedents in this Circuit and others confirms that, when presented with an APA Rulemaking Petition, a federal agency must *respond* within a reasonable time – and, if the

Petition is being denied, that the response must at least briefly explain the grounds for denial in light of the arguments presented. *E.g., Milbrand*, No. 17-3451, 2018 U.S. App. Lexis 3025; *Cmty. Service Inc. v. United States*, 418 F.2d 709, 711 (6th Cir. 1969); *Whale & Dolphin Conservation v. Nat'l Marine Fisheries Serv.*, No. 21-112, 2021 U.S. Dist. LEXIS 217216 (Nov. 10, 2021).

TVA's argument that the APA does not permit a Petition for the *kind* of rule at issue here, TVA Br. at 11-15, is both unprecedented and unavailing. As detailed below, TVA's crabbed view of the APA is not supported by any case law, and wrongly conflates whether TVA must meaningfully respond to the APA Petition with the entirely separate question of whether issuing the requested rule would require notice and comment rulemaking. *See infra* at 7-12.

Similarly, TVA's argument that there are no grounds for the Court to direct TVA to respond to the APA Petition, TVA Br. at 17-21, misapprehends fundamental administrative law principles. While, as TVA emphasizes, courts do not generally second-guess agency *decisions* regarding how to best comply with broad and general mandates, *id.*, that limitation has no relevance here, where TVA has not made a decision on the APA Petition at all. Thus, since the only agency action at issue is the discrete APA requirement for TVA to *respond* to the APA Petition, the Court may grant relief – as reviewing courts often do under just these circumstances. *See infra* at 12-15.

Finally, contrary to TVA's arguments, TVA Br. at 21-25, Plaintiffs have Article III standing. Plaintiff organizations who co-submitted the APA Petition have Article III standing in light of the informational injury they are suffering due to TVA's refusal to resolve the Petition. *Ohio v. Raimondo*, 848 Fed. App'x. 187, *1-2 (6th Cir. May 18, 2021); *Nat'l Wrestling Coaches Ass'n v. United States Dep't of Educ.*, 263 F. Supp. 2d 82, 126 (D.D.C. 2003). Plaintiffs also

have Article III standing due to their members' injuries, as demonstrated by Plaintiffs' attached member declarations, which explain that these members — who are TVA ratepayers — suffer economic and constitutional injuries by being compelled to financially support groups engaged in advocacy contrary to their interests and values.[1]

Accordingly, since it is undisputed that TVA has not responded to the APA Petition in the manner required by the APA almost twenty-two months after receiving it, Plaintiffs are entitled to summary judgment and an Order directing TVA to respond.

BACKGROUND

A. The Administrative Procedure Act's Rulemaking Petition Provisions

The APA provides a basic, mandatory framework for agency procedures, and applies to TVA. 5 U.S.C. § 701(b). Under the APA, each agency is required to consider any "petition for the issuance, amendment, or repeal *of a rule*." *Id.* § 553(e) (emphasis added). A "rule," in turn, is defined broadly as follows:

> 'rule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

Id. § 551(4).

[1] *See* Declarations of Randy Buckner ("Buckner Decl."); Douglas Finnan ("Finnan Decl.); Christopher Scott Irwin ("Irwin Decl."); Frances Lambert ("Lambert Decl."); JoAnn McIntosh ("McIntosh Decl."); Kent Minault ("Minault Decl."); Kermit Moore ("Moore Decl."); Jonathan Nolt ("Nolt Decl."); Brady Watson ("Watson Decl."); Richard Williams ("Williams Decl."); and Theresa McGill Wishart ("Wishart Decl.").

Under the APA, an agency is required to respond to a matter presented to it — including a Rulemaking Petition — within a "reasonable time." *Id.* § 555(b) ("With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."). As particularly relevant here, the APA further provides that in the event an agency determines to resolve a Rulemaking Petition by denying it, the agency must provide "[p]rompt notice," along with "a brief statement of the grounds for denial." *Id.* § 555(e). In the event an agency fails to provide such a response, a reviewing court may compel the agency to do so. *E.g.*, *Whale & Dolphin Conservation*, No. 21-112, 2021 U.S. Dist. LEXIS 217216, *7-10; *see also, e.g.*, *Garcia v. United States Dep't of Homeland Sec.*, 14 F.4th 462 (6th Cir. 2021) (reiterating judicial power to compel agency action unreasonably delayed).

B. Petitioners' February, 2020 APA Rulemaking Petition, And TVA's Letter

More than thirty years ago, the federal government issued regulations to ensure that outside entities do not spend federal dollars on certain lobbying activities. *See* 55 Fed. Reg. 6,736 (Feb. 26, 1990). These regulations were codified for TVA at 18 C.F.R. Part 1315.

Pursuant to APA Section 553, 5 U.S.C. § 553(e), on February 20, 2020, Petitioners submitted a Rulemaking Petition to TVA requesting a new Part 1315 provision — Part 1315.100(f) — to address a related concern: costs expended on outside groups that engage in lobbying and related advocacy activities.[2] In numerous citations and attachments, the APA Petition details the lobbying, advocacy, and other political activities of a number of outside

[2] While TVA submitted to the Court just the cover APA Petition, Def. Mot., Attachment 1, the Court should also consider the Petition's substantial supporting materials, submitted here in support of Plaintiffs' motion for summary judgment. Galvin Decl., Ex. 1, Attachments ("Att.") 1-16.

groups which regularly charge TVA tens of thousands of dollars.[3] The invoices for these costs — which are also included with the Petition — show that TVA pays millions of dollars to these groups, and that their services may include such advocacy activities as "influencing legislation."[4]

Arguing that spending TVA funds — which TVA ratepayers pay through their electricity bills — on these groups is inconsistent with TVA's mandate under the TVA Act, 16 U.S.C. § 831, *et seq*., as well as with TVA ratepayers' First Amendment rights against compelled subsidization of objectionable speech, the APA Petition proposes a new rule. In particular, the Petition proposes the following subpart (f) be added to 18 C.F.R. § 1315.100 (which currently ends at subpart (e)):

> (f) No TVA funds may be:
>
> ***
>
> (ii) paid to a third party organization that either:
>
> (A) engages in litigation related to agency regulations or other governmental activities; or
>
> (B) influences or attempts to influence legislative or executive action, including policy research to support such efforts; or
>
> (C) makes political contributions.

See Galvin Decl., Ex. 1, Att. 2.[5]

Following the receipt of the APA Petition, in May, 2020 TVA sent Petitioners a letter that did not explicitly grant or deny the rulemaking petition, as required by the APA. Rather, TVA simply asserted that the agency's spending on these outside groups is appropriate. *See* TVA

---

[3] APA Pet. at 3-10.

[4] *See* APA Pet. at 11; *see also id.*, Att. 13, at 3 (invoice for Energy and Wildlife Action Coalition membership, noting that the "portion of [ ] membership dues relating to influencing legislation . . .is estimated to be 12%").

[5] Although the Petition also included a Section (f)(i) addressing charitable contributions, Plaintiffs' Complaint does not address that issue – and thus Defendants' discussion of TVA's *charitable contributions* is not relevant to this case. TVA Br. at 13.

Letter (Galvin Decl., Ex. 2). The letter ignores the APA Petition's substantial evidence that these outside groups engage in lobbying and other advocacy activities, and does not explain how TVA's support for such groups is consistent with TVA's mission, or ratepayers' First Amendment rights.

C. Plaintiffs' Lawsuit And TVA's Motion To Dismiss

Because TVA neither granted nor denied the Petition, in September, 2021 Plaintiffs filed this suit. Importantly, the suit does not seek an order directing TVA to grant the APA Petition. Rather, Plaintiffs simply seek to compel TVA to comply with its basic APA obligation to actually *respond* to the Petition by either granting it, or providing a denial that includes an explanation that addresses the Petition's bases for the requested regulation. Complaint ¶¶ 68-77 (Doc. 1).

TVA now seeks dismissal on three alternative grounds. First, TVA argues the APA does not permit Petitioners to request the particular kind of rule they have submitted to TVA. TVA Br. at 11-15. Second, TVA argues the Court has no power to direct TVA to act. *Id.* at 15-21. And finally, TVA asserts Plaintiffs lack Article III standing to pursue this suit. *Id.* at 21-25.

As discussed below, contrary to TVA's assertions, the APA permits a Petition over just the kind of rule sought by Petitioners, and empowers a reviewing Court to direct TVA to respond by either granting or denying the Petition. Thus, because Plaintiffs also have Article III standing, and TVA has no justification for ignoring the Petition, Plaintiffs are entitled to summary judgment.

ARGUMENT

"Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Stiltner v.*

Donini, No. 20-4136, 2021 U.S. App. LEXIS 23698, *4 (6th Cir. Aug. 9, 2021) (quoting Fed. R. Civ. P. 56(a)). As demonstrated below, because there are no materially disputed facts concerning TVA's failure to adequately respond to the APA Petition, Plaintiffs are entitled to summary judgment.

I. TVA Must Grant Or Deny The APA Petition.

As reflected in numerous precedents, upon receiving an APA Rulemaking Petition a federal agency has only three options. First, it may grant the Petition and move forward with the rule. Second, it may affirmatively deny the Petition, in which case a petitioner may challenge the adequacy of the agency's explanation for denial. *See, e.g.*, *Milbrand,* No. 17-3451, 2018 U.S. App. Lexis 3025. And finally, it may legitimately delay its response on the grounds that a decision on the petition is precluded by other higher agency priorities – in which case a petitioner may challenge the length of, and justifications for, the agency's delay. *See, e.g.*, *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 112–15 (D.D.C. 2003).

TVA has chosen none of these options here. Rather, TVA refuses to resolve the Petition at all on the grounds that Petitioners are not entitled to request the rule they seek, and that the Court has no power to direct TVA to respond. However, TVA does not cite a *single* precedent where a court declined to direct an agency to respond to an APA Rulemaking Petition on either of these bases. Moreover, these arguments are fundamentally at odds with both the plain language of the APA and the long line of cases interpreting the Act.

A. Any Petition For A "Rule" May Be Requested In An APA Rulemaking Petition, Regardless of Whether The Rule Requires Notice And Comment Procedures.

TVA's threshold argument is that the APA does not allow a Rulemaking Petition for the *kind* of rule Plaintiffs' APA Petition presents. TVA Br. at 11-15. However, in making this argument TVA entirely ignores the APA's broad definition of a "rule," which, again, includes:

> the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4). As another court in this Circuit has explained, this "broad definition of the term 'rule' includes virtually every statement an agency may make." *Air Brake Sys. v. Mineta*, 202 F. Supp. 2d 705, 711 (E.D. Mich. 2002), *aff'd*, 357 F.3d 632 (6th Cir. 2004) (other citations omitted).

Given this breadth, the action that Petitioners have requested — a new regulation that would preclude TVA from continuing to pay third-party groups engaged in political lobbying and other advocacy activities — squarely fits within the APA's broad definition of a "rule." In particular, it is an "agency statement of general [ ] applicability" that would "implement, interpret, or prescribe law or policy," by establishing a "prescription for the future of [certain TVA] *costs* . . . ." 5 U.S.C. § 551(4) (emphasis added).

TVA does not argue that Petitioners have not presented a new rule. Rather, TVA instead seeks to draw the Court's attention to *other* parts of the APA — Section § 553(a) and § 553(b) — which address the *procedures* that apply to different kinds of agency rules. TVA Br. at 11-15. In particular, while most rules require notice and comment before being finalized, there are several narrow exceptions which apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice," and "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a) and (b). Putting matters more simply, as many courts have summarized, it is well-recognized that "*legislative rules* require notice and comment and *interpretive rules* do not."

Mann Constr., Inc. v. IRS, 495 F. Supp. 3d 556, 574 (E.D. Mich. 2020) (emphasis added); *Tenn. Hosp. Ass'n v. Azar*, 908 F.3d 1029, 1042 (6th Cir. 2018) ("The APA sets different procedural requirements for 'legislative rules' and 'interpretive rules': the former must be promulgated pursuant to notice-and-comment rulemaking; the latter need not.").

Focusing on this distinction, TVA argues that Section 553(e) only applies to legislative rules, and thus that Plaintiffs must demonstrate that their Petition seeks a legislative rule in order for TVA to be under any obligation to respond. TVA Br. at 11-15.

However, contrary to TVA's premise, *nothing in the APA limits a Section 553(e) rulemaking petition to legislative rules*. To the contrary, the APA unambiguously authorizes any "petition for the issuance, amendment, or repeal *of a rule*," 5 U.S.C. § 553(e) (emphasis added), without cabining the kind of rule that may be the subject of a Section 553(e) Petition. *See, e.g.*, *Bostock v. Clayton Cty*., 140 S. Ct. 1731, 1738 (2020) (emphasizing that the plain language of a statute controls). Accordingly, as the Federal Circuit has explained, "on its face the provision [for rulemaking petitions] applies to 'a rule' without qualification, a term that . . . encompasses, as the APA itself states, *more than legislative rules*." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1351 (Fed. Cir. 2011) (emphasis added).[6]

Contrary to TVA's arguments, therefore, an agency must consider a petition for *any* rule, regardless of whether issuing the rule would require notice and comment rulemaking. And thus, the notice and comment precedents on which TVA relies are entirely irrelevant to the agency's obligation to simply respond to the APA Petition.[7] Indeed, TVA does not cite a *single* precedent

[6] This broad approach to the right to Petition is also consistent with the "right of people...to petition the Government for redress of grievances" enshrined in the First Amendment. *See, e.g., United Mine Workers v. Illinois State Bar Ass'n,* 389 U.S. 217, 222 (1967) (reiterating that the right to petition the government is among most precious of liberties).

[7] *See* TVA Br. at 12-14 (*citing Sherwood v. TVA*, 925 F. Supp. 2d 906 (E.D. Tenn. 2013)

where a court allowed an agency to ignore an APA Petition due to the *kind* of rule the petition requested.[8]

Moreover, even if TVA's argument otherwise had any merit, the agency also errs in arguing that the rule set out in Petitioners' APA Petition here falls within the narrow exceptions to notice and comment requirements contained in APA Section 553(a), which addresses "'agency management or personnel or [ ] public property, loans, grants, benefits, or contracts.'" 5 U.S.C. § 553(a)(2). As this Court explained in *Sherwood*, Section 553(a) "is read narrowly and is 'operative only to the extent that any one of the enumerated categories is *clearly and directly involved* in the regulatory effort at issue.'" *Sherwood*, 925 F. Supp. 2d at 919 (quoting *Baylor Univ. Med. Ctr. v. Heckler*, 758 F.2d 1052, 1058-59 (5th Cir. 1985)) (emphasis added). Here, none of these categories applies.

As noted, Petitioners' proposed 18 C.F.R. § 1315.100(f), which restricts TVA spending on certain third party organizations engaged in lobbying and other advocacy activities, sets out a new "agency statement of general [ ] applicability" that would "implement, interpret or prescribe law or policy," by establishing a "prescription for the future of [certain TVA] *costs* . . . ." 5

(discussing whether notice and comment rulemaking is required for a rule covered by Section 553(a)); *People of the State of Cal. v. U.S. EPA*, 689 F.2d 217, 222 (D.C. Cir. 1982) (finding that the agency action did not require notice and comment rulemaking); *Peterson v. Nat'l Telecommunications & Info. Admin.*, 505 F. Supp. 2d 313, 319 (E.D. Va. 2006) (same); *Lincoln v. Virgil*, 508 U.S. 182, 196 (1993) (finding notice and comment not required before agency rescinded its rule)).

[8] The House Report for the APA further confirms that Section 553(a) in particular only exempts an agency from certain procedures, and does not apply to Section 553(e) Petitions. *See* Proceedings in the House of Representatives May 24 and 25, 1946 & Proceedings in the Senate of the United States March 12 and May 27, 1946, in Administrative Procedure Act, Legislative History, Sen. Doc. No. 248, 79th Cong. 2d Sess., at 257 (explaining Section 553(a) concerns whether an agency must follow certain "rule-making procedures" for the discrete classes of rules identified, and expressly noting that, regardless of those procedures, "*[c]hanges can [ ] be sought through the petition procedures of section 4(d) [the Rulemaking Petition provision*]") (emphasis added)).

U.S.C. § 551(4) (emphasis added). An agency's prospective *costs*, however, is not included in the narrow list of exceptions to notice and comment provided in APA Section 553(a). Accordingly, this provision has no application here.

TVA's extended arguments concerning the categories that *are* listed in Section 553(a), TVA Br. at 11-13, cannot change this outcome.

First, TVA argues that Petitioners' rule relates to "agency management." TVA Br. at 11. To the contrary, the rule, which concerns TVA's prospective costs, has nothing to do with how the agency is managed.

Second, TVA argues that Petitioners' rule relates to the disposition of "public property," because, TVA claims, it concerns TVA's "sale of TVA's electricity." TVA Br. at 12. But, in fact, the Petition has nothing to do with electricity at all.

Indeed, TVA's reliance on this Court's decision in *Sherwood*, *id.* at 12-13, demonstrates this point, for in that case the Court found the public property exception applied because the rule at issue "directly relate[d] to the safe distribution of electric energy . . . ." *Sherwood*, 925 F. Supp. 2d at 920. Here, by contrast, Petitioner's rule does not have anything to do with how TVA distributes electricity to its customers.[9]

Finally, TVA claims that Petitioners' rule concerns TVA contracts and grants. TVA Br. at 13. However, TVA mixes apples and oranges in citing the Petition's reference to TVA being "free to enter into contracts" with entities doing charitable work. TVA Br. at 13 (citing APA Pet.

[9] TVA also suggests that any of its spending also concerns "public property" covered by Section 553(a). TVA Br. at 13. However, that expansive interpretation of this narrow exception would leave no independent meaning for Congress' separate use of the word "costs" in defining an agency rule, 5 U.S.C. § 551(4). *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used").

at 20 n.67). As TVA elsewhere acknowledges, *see* TVA Br. at 4, n.7, while the APA Petition also addresses TVA's charitable giving, this lawsuit does not seek to compel TVA to respond to that part of the Petition, and thus TVA's relationships with charitable entities is not at issue here.

In short, since the definition of a "rule," for which an APA Section 553(e) Petition may be submitted, 5 U.S.C. § 553(e), expressly includes a "prescription for the future of" an agency's "costs," 5 U.S.C. § 551(4), and Section 553(a)(2) does not expressly include this kind of rule, 5 U.S.C. 553(a)(2), the APA Petition does not seek a rule that would otherwise be covered by Section 553(a)(2). *See, e.g.*, *Byers v. United States, IRS,* 963 F.3d 548, 553 (6th Cir. 2020) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).

However, as discussed above, *see supra* at 7-10, the Court need not even reach this issue, because TVA must respond to the Petition regardless of the *kind* of rule the Petition seeks.

B. The APA Empowers A Reviewing Court To Direct An Agency To Grant Or Deny A Rulemaking Petition Within A Reasonable Time.

Once again relying on inapplicable precedents, TVA also argues that the APA does not authorize judicial review of an agency's refusal to grant or deny a rulemaking petition. TVA Br. at 15-21. TVA is mistaken.

As the Court of Appeals noted just a few months ago, there is a "basic presumption of judicial review" for claims under the APA. *Garcia v. United States Dep't of Homeland Sec.*, 14 F.4th 462, 474 (6th Cir. 2021). As it relates to this case in particular, it is well established that the "APA requires [an agency to] conclude a matter presented to it — *including responding to a rulemaking petition* — within a reasonable time." *Envtl. Integrity Project v. United States EPA*,

160 F. Supp. 3d 50, 57 (D.D.C. 2015) (emphasis added; citations omitted). Thus, as another district court reiterated just last month, an agency must "'fully and promptly' consider a rulemaking request," after which it "may either grant the petition, undertake public rule making proceedings, or deny the petition." *Whale & Dolphin Conservation*, No. 21-112, 2021 U.S. Dist. LEXIS 217216, *6-7 (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 813 (D.C. Cir. 1981)).

Any action short of actually granting or denying the requested action does not satisfy this obligation. *See, e.g.*, *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418-19 (D.C. Cir. 2004). Indeed, as the Court recently explained in *Whale & Dolphin Conservation*, if an agency letter "providing no definitive answer" to an APA Rulemaking Petition were "an adequate 'response' for APA purposes, then [an agency] could effectively inoculate itself from being compelled to respond . . . ." 2021 U.S. Dist. LEXIS 217216, *9.

Accordingly, when faced with an agency's refusal to definitively resolve an APA Petition, reviewing courts simply consider whether competing priorities or other relevant factors might justify the agency's delay, and routinely order an agency to respond unless it can justify its inaction. *See, e.g.*, *Families for Freedom v. Napolitano*, 628 F. Supp. 2d 535 (S.D.N.Y. 2009); *NRDC v. United States EPA*, 956 F.3d 1134 (9th Cir. 2020).[10]

Despite these clear precedents, TVA argues that the Court is powerless to direct TVA to act because Plaintiffs have not identified a "discrete action that TVA is required, and failed, to take." TVA Br. at 10. To the contrary, as the foregoing caselaw makes absolutely clear, the APA requires TVA to take the discrete action *of either granting or denying the rulemaking petition*.

[10] TVA's argument that it can ignore the Petition because there is no "ongoing agency proceeding," TVA Br. at 15-17, is fundamentally irreconcilable with these consistent precedents, for it ignores that by virtue of submitting a Section 555(e) Petition, petitioners *initiated* an agency proceeding that must be completed with the agency either granting or denying the Petition. Once again, none of the precedents TVA cites hold otherwise.

None of TVA's precedents concern whether an agency must definitively grant or deny an APA Petition. Rather, they are mostly judicial challenges to agency decisions to *deny* plaintiff's requests, and thus turn on the scope of review for an agency's denial. *See, e.g.*, *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217,1222 (9th Cir. 2011). For example, in *Gardner*, on which TVA relies (*see* TVA Br. at 10 and 18), the plaintiffs were challenging the agency's "*denial of [plaintiff's] petition* to close" certain lands to public use. *Id.* at 1224 (emphasis added). Thus, the issue was not – as it is here – whether the agency was required to *respond* to the Petition, but whether an agency's response was "arbitrary and capricious." *Id.* at 1225-26.

Similarly, in *Block v. Sec. & Exch. Comm'n*, 50 F.3d 1078, 1085 (D.C. 1995), on which TVA also relies (TVA Br. at 16), the court was reviewing an agency's "*rejection* [of] the petitioners' application" for a hearing, and simply found the agency within its discretion in rejecting the hearing request. *Id.* at 1081-86 (emphasis added). Once again, this case, by contrast, does not concern whether TVA correctly rejected Plaintiffs' APA Petition, but whether TVA is required to grant or deny the Petition *at all*.[11]

To be sure, as TVA emphasizes, to challenge whether an agency action is "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), a plaintiff must identify a "*discrete* agency action that it is *required to take*." TVA Br. at 9 (quoting *Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 64 (2004))(emphasis in original). Thus, for example, in *SUWA* the Court determined that plaintiffs could not seek an order directing an agency to comply with a broad statutory mandate, absent a specific Congressional directive. 542 U.S. at 65-68.

[11] TVA's additional citations on this point are similarly inapposite. *See* TVA Br. at 9, 11 (citing, *e.g., Alvarado v. Table Mountain Rancheria,* 509 F.3d 1008, 1019-20 (9th Cir. 2007) (challenging denial decision); *Sierra Club v. Jackson*, 648 F.3d 848, 854 (D.C. Cir. 2011)(same)).

Seeking to analogize to this precedent, TVA asserts that the Court is powerless to act here because TVA has no discrete mandate to take the action requested in the APA Petition. TVA Br. at 18-19.

However, once again, this sleight-of-hand fundamentally mischaracterizes what this case is about. Plaintiffs are not asking the Court to direct TVA to grant the APA Petition. Rather, Plaintiffs merely seek an Order directing TVA to definitively *respond* to the Petition, which could take the form of a denial. And because the APA itself contains the discrete mandate that an agency respond to a Rulemaking Petition within a reasonable time, *SUWA* and its progeny have no application.[12]

Accordingly, the Court has the authority to direct TVA to respond to the APA Petition, TVA's arguments to the contrary notwithstanding.

II. Plaintiffs Have Article III Standing To Pursue This Suit.

Contrary to TVA's arguments, TVA Br. at 21-25, Plaintiffs also have Article III standing. First, the Plaintiffs who submitted the APA petition have a statutory right to information in the form of a response to the APA Petition, in the same manner as a Plaintiff who submits a Freedom of Information Act, 5 U.S.C. § 552, *as amended*, request. *See, e.g.*, *Pub. Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 448-50 (1989); *Ohio v. Raimondo*, No. 21-3294, 848 Fed. Appx. 187, *1-2 (6th Cir. May 18, 2021). Second, Plaintiffs also have associational standing through their TVA ratepayer members, who ultimately pay for these third-party groups involved in political advocacy efforts, and who object to funding groups engaged in this kind of advocacy.

[12] Indeed, even where an agency has complete discretion on its substantive decision, the APA requires the agency to follow the Act procedures. *See, e.g., Make the Road N.Y. v. Wolf*, 962 F.3d 612, 634 (D.C. Cir. 2020) ("Even when a decision is committed to agency discretion by law, and so is immune from substantive review, the agency's decision may still be subject to notice-and-comment rulemaking."); *Polyweave Packaging, Inc. v. Buttigieg*, No. 21-0054-JHM, 2021 U.S. Dist. LEXIS 166899, at *39 (W.D. Ky. Sep. 1, 2021) (same).

See, e.g., *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) (explaining a plaintiff has standing even where only "one dollar" is at stake); *Jones v. Coleman*, 848 F.3d 744, 748-49 (6th Cir. 2017).[13]

A. Petitioners' Informational Injury Confers Article III Standing To Receive A Response To the APA Petition.

The Supreme Court has long recognized that where Congress establishes a right to specific information, an agency's refusal to provide that information can be a discrete "informational injury" affording Article III standing. *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Pub. Citizen*, 491 U.S. at 448-50. Thus, for example, in *Public Citizen*, the Court found plaintiffs had Article III standing simply because they claimed the agency had failed to provide them with information they would obtain if they prevailed in the suit. *Id.* at 449.

In this case, Congress has specifically directed that an agency respond to a Section 553(e) Rulemaking Petition, and, if it is being denied, that the agency must provide at the very least "a brief statement of the grounds for denial." *Id.* § 555(e). Accordingly, the APA Petitioners have Article III standing here to obtain an adequate response from TVA. *See, e.g.*, *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 126; *Cmty. Service Inc. v. United States*, 418 F.2d 709, 711 (6th Cir. 1969).

In light of these precedents, it is not surprising that TVA does not cite a *single* case where a court found a plaintiff lacked Article III standing to obtain a basic agency response to an APA Section 555(e) Rulemaking Petition. Indeed, earlier this year the Court of Appeals re-affirmed the principle that a plaintiff's Article III standing may be based on informational injury alone.

---

[13] Plaintiffs' allegations in their Complaint concerning these injuries, *see* Complaint ¶¶ 10-21, are more than sufficient for Article III purposes at the pleading stage, *see, e.g., Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012), and the Court should consider Plaintiffs' attached declarations in resolving Article III standing in relation to Plaintiffs' motion for summary judgment.

Ohio v. Raimondo, No. 21-3294, 848 Fed. Appx. 187, *1-2 (6th May 18, 2021). In *Raimondo,* the State of Ohio sought to obtain population data that the Commerce Department was statutorily required to provide. *Id.* at *1. Simply noting Ohio's claim that "the Secretary failed to deliver Ohio's data *as the Census Act requires*," the Court had no difficulty concluding that "Ohio suffered (and continues to suffer) an informational injury" affording Article III standing. *Id.* (emphasis added)*; see also, e.g.*, *Am. Canoe Ass'n v. City of Louisa Water & Sewer Comm'n,* 389 F.3d 536, 545-47 (6th Cir. 2004) (finding standing based on statutory right to information); *Protect Our Aquifer v. TVA*, No. 20-2615, 2021 U.S. Dist. LEXIS 151923, *34 (W.D. Tenn. Aug. 12, 2021) (same).

Accordingly, the Plaintiffs who submitted the APA Petition have Article III standing here because they have a statutory right to obtain an adequate response to the APA Petition, and TVA's refusal to provide that response causes cognizable informational injury.[14]

B. Plaintiffs Also Have Article III Standing In Light Of Their Members' Cognizable Injuries.

As TVA recognizes, TVA Br. at 21, an organization may also demonstrate Article III standing on behalf of its *members*, by satisfying a three-part test: (1) the "members would otherwise have standing to sue in their own right"; (2) "the interests at stake are germane to the organization's purpose"; and (3) "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Online Merchs. Guild v. Cameron*, 995 F.3d

[14] It is well-established that "only one plaintiff needs to have standing" to pursue a claim. *Parsons v. United States DOJ*, 801 F.3d 701, 710 (6th Cir. 2015). Here, for example, the Center for Biological Diversity, who was one of the APA Petition submitters, and who has a long-standing project to address coerced ratepayer funding for outside groups' lobbying and advocacy activities, has Article III standing to obtain a meaningful response from TVA in order to further its work on this issue. *See* Galvin Decl. ¶¶ 3-6; *see also, e.g.,* Declaration of Daniel Tait, ¶¶ 3-6 (discussing interests of Energy Alabama).

540, 549 (6th Cir. 2021); *see also Action on Smoking & Health v. DOL*, 100 F.3d 991, 992 (D.C. Cir. 1996) (explaining this also includes an organization's Board members). Plaintiffs also have Article III standing here on this basis.

As detailed in Plaintiffs' attached organizational declarations, this case concerns matters closely tied to their organizational purposes, and resolution of this narrow suit does not require Plaintiffs' members' participation. In particular, Plaintiffs actively work to address pollution and other environmental harms experienced by their members, who include TVA ratepayers, and if TVA were to grant the APA Petition and stop funding outside groups engaged in the particular kinds of lobbying and advocacy addressed in the Petition, that would advance those interests. *See, e.g.,* Galvin Decl. ¶¶ 3-6; Tait Decl. ¶¶ 3-6; Moore Decl. ¶¶ 4-9.

Accordingly, Plaintiffs satisfy the second and third prong of the member-standing test.

As regards the first prong, as demonstrated by the attached member declarations, Plaintiffs' members have Article III standing here in their own right, because TVA's funding of the outside groups at issue in the APA Petition injures these members themselves. *See* Buckner Decl. ¶¶ 2-12; Finnan Decl. ¶¶ 4-12; Irwin Decl. ¶¶ 4-12; Lambert Decl. ¶¶ 3-5; McIntosh Decl. ¶¶ 4-9; Minault Decl. ¶¶ 4-9; Moore Decl. ¶¶ 4-9; Nolt Decl. ¶¶ 3-8; Watson Decl. ¶¶ 4-9; Williams Decl. ¶¶ 4-9; Wishart Decl. ¶¶ 4-8.

As the APA Petition and attachments document, TVA pays millions of dollars to outside organizations engaged in lobbying and other advocacy. *See* APA Pet. at 11 and Atts. 9-14 (documenting TVA costs).[15] Because TVA is funded by ratepayers, these costs TVA incurs to

[15] For example, TVA pays the Edison Electric Institute ("EEI") $500,000 every year. APA Pet., Att. 9, and for a number of years paid an additional more than $450,000 to EEI for TVA's contributions to the Utility Air Regulatory Group. *Id.*, Att. 7. Similarly, over a five-year period TVA paid EEI another more than $240,000 for its "member dues" to "EWAC" – the Energy and Wildlife Action Coalition. *Id.*, Att. 13. TVA has also paid the Utility Water Act Group well more than $1 million dollars, *id.*, Att. 10, and also regularly pays the Nuclear Energy Institute ("NEI").

fund these outside groups are inevitably passed along to ratepayers, causing Plaintiffs' members who are TVA ratepayers cognizable economic injuries.[16]

It is irrelevant for Article III purposes how much of these costs each individual TVA ratepayer may be responsible for. *See, e.g.*, *TVA v. United States EPA*, 278 F.3d 1184, 1209 (11th Cir. 2002) (finding Article III standing based on likelihood for "some rate increases" by TVA, without requiring any particular amount); *Uzuegbunam,* 141 S. Ct. at 802 (explaining that even "one dollar" can be sufficient to invoke the court's jurisdiction). Indeed, as the Supreme Court held in *Uzuegbunam*, particularly where First Amendment rights are at stake, even "an award of nominal damages" is sufficient for a case to proceed. *Id.* at 796.

This case similarly concerns the First Amendment rights of TVA ratepayers, whose values and interests are undermined by the advocacy undertaken by groups funded through their electricity rate payments.[17] As extensively documented in the APA Petition and supporting documents, the outside groups funded by TVA regularly engage in regulatory advocacy and litigation opposing governmental efforts to protect public health and the environment. APA Pet. at 3-10. This includes, for example:

- Advocating in opposition to U.S. Environmental Protection Agency ("EPA") and other agency regulatory initiatives designed to protect human health and the environment, *e.g.*, APA Pet. at 3 (discussing EEI); *id.* at 6-7 and Att. 8 (discussing Utility Regulatory Groups); *id.* at 7-8 (discussing EWAC);

Id., Att. 11.

[16] TVA is self-funded by ratepayers.16 U.S.C. § 831n-4(f); *see* Pub. Law 86-136 (1959); TVA at a Glance, *How We're Funded*, https://www.tva.com/about-tva/tva-at-a-glance;

[17] As regards the speech that "these members find objectionable," TVA Br. at 24, as explained in Plaintiffs' member declarations, these members specifically object to, *e.g.,* work done by "the Utility Regulatory Groups, which TVA also regularly funds, [and who] routinely object to EPA regulations designed to protect human health and the environment." Moore Decl. ¶¶ 6-7; *see also, e.g.* Finnan Decl. ¶¶ 9-10; Irwin Decl. ¶¶ 8-9; Buckner Decl. ¶¶ 6-7; McIntosh Decl. ¶¶ 6-7; Watson Decl. ¶¶ 6-7.

- litigating against agency regulations intended to strengthen environmental protections, *id.*; and
- advocating in favor of incumbent energy sources and against certain clean energy initiatives, *e.g. id*. at 4 (discussing EEI); *id.* at 10 (discussing NEI).

As the APA Petition also explains, the U.S. Supreme Court and lower courts have long recognized that a utilities' expenditures on lobbying and related advocacy activities raises First Amendment concerns. APA Pet. at 14 (*citing*, *e.g.*, *Consolidated Edison Co. v. PSC*, 447 U.S. 530, 543 (1980); *Cahill v. NY Public Svc. Comm'n*, 556 N.E.2d 133 (N.Y. 1990)). For example, the highest court in New York long ago ruled that the First Amendment prohibits utilities from forcing ratepayers to finance utility spending on "politically and religiously active organizations . . . engaged in activities and causes contrary to [ratepayers'] political or personal beliefs." APA Pet. at 15 (*quoting Cahill*, 566 N.E.2d at 134-35).[18]

The APA Petition also addresses how a 2018 change in Supreme Court First Amendment jurisprudence requires an even closer examination of these constitutional issues. *See* APA Pet. at 14-17 (discussing *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018)). In particular, the Petition explains, pre-2018 judicial precedents discussing the use of utility ratepayer funds for advocacy relied on a First Amendment standard established by the Supreme Court in *Abood v. Detroit Board of Educ.*, 431 U.S. 209 (1977). *See, e.g.*, *Consolidated Ed.*, 447 U.S. at n.13

[18] TVA's claim that the First Amendment has no application here because government speech is exempt from First Amendment scrutiny, TVA Br. at 24-25, is based on a false premise. The APA Petition does not concern *TVA's* speech, but rather the advocacy activities of *private parties* using ratepayer funds – just like the speech at issue in the First Amendment precedents cited in the APA Petition itself. Indeed, the Supreme Court highlighted these two very different sources of speech in *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550 (2005), on which TVA relies (TVA Br. at 24), distinguishing "government speech," on the one hand, *id.* at 562, from cases where "an individual is required by the government to subsidize a message he disagrees with, *expressed by a private entity*," on the other. *Id.* at 557 (emphasis added). Thus, since the APA Petition concerns just such private speech, the First Amendment is plainly implicated. *See also* TVA Br. at 24 n.25 (acknowledging First Amendment implications of "forced subsidization of a private speaker").

(discussing *Abood*); 543; *Cahill*, 566 N.E.2d at 135-38 (discussing *Abood* extensively). That *Abood* standard provided that so long as the government was not forcing individuals — in that case, employees required to pay union dues — to *directly* support a group's advocacy activities, it could still require funding for the group's *non*-advocacy work. *See Abood*, 431 U.S. at 233-42.

However, as the APA Petition also details, in the Supreme Court's 2018 *Janus* decision, the Court found the *Abood* standard incompatible with the First Amendment, and concluded that in order to safeguard First Amendment rights individuals could not be forced to financially support outside groups *at all*, including, in that case, a union's *non-political* work. APA Pet. at 15-16 (citing *Janus*, 138 S. Ct. at 2481-82). Given this important change in law, the APA Petition argues that there is now a serious question not only whether a utility like TVA may force ratepayers to directly pay for lobbying and advocacy by outside groups, but also whether they may be forced to financially support outside groups that engage in lobbying and other advocacy at all, regardless of how the receiving groups are spending ratepayer dollars. *See* APA Pet. at 15-17.

Once again, *this case does not ask this Court to resolve any of these constitutional questions*, but rather simply concerns whether TVA must meaningfully respond to the issues raised in the APA Petition. However, as the foregoing discussion demonstrates, Plaintiffs' members have legitimate First Amendment concerns with being forced to financially support these outside groups. Thus, just as the union members in *Janus*, and the ratepayers in *Cahill*, were entitled to have a reviewing court resolve their claims, Plaintiffs' members legitimate First Amendment concerns in this case are also more than sufficient to confer Article III standing. *See also Jones v. Coleman*, 848 F.3d 744, 749 (6th Cir. 2017) (discussing relaxed standing requirements where First Amendment rights are at stake).

III. The Court Should Enter Summary Judgment For Plaintiffs And Direct TVA To Formally Respond To The APA Petition At This Time.

As the foregoing discussion demonstrates, the APA dictates that TVA provide a definitive response to the APA Petition, and empowers the Court to direct TVA to respond. In addition, Plaintiffs have Article III standing.

Accordingly, the only question remaining is whether, given the undisputed facts in this case, Plaintiffs are entitled to summary judgment on their claims.

Plaintiffs' Claim One challenges TVA's May 21, 2020 Letter as arbitrary and capricious. *See* Complaint ¶¶ 68-72. As Plaintiffs have demonstrated, when faced with an APA Petition, an agency must either grant or deny the Petition, and, if the latter, provide "a brief statement of the grounds for denial," 5 U.S.C. §555(e). *See, e.g.*, *Cmty. Service Inc. v. United States*, 418 F.2d 709, 711 (6th Cir. 1969). The Court of Appeals' discussion in *Cmty. Service, Inc.* is instructive. In that case, the Federal Communications Commission ("FCC") had summarily denied petitioners' APA Petition for the waiver of a rule concerning its broadcasting rights. *Id.* at 711. Recognizing the agency's basic APA obligation, in denying a Section 553(e) Petition, to provide "'a brief statement of the grounds for denial,'" *id.* at 717 (quoting 5 U.S.C. 555(e)), the Court found the FCC's "failed to sufficiently articulate its grounds for denial," 418 F.2d at 714, because the agency had failed to address the arguments and evidence presented by the petitioners. *Id.* at 715-18.

Similarly, in this case, since the TVA Letter entirely ignores the arguments and evidence in the APA Petition, *see* TVA Letter (Galvin Decl., Ex. 2), TVA's Letter is insufficient under the APA. Indeed, unlike the response in *Cmty. Service, Inc.*, TVA's letter does not even state that the Petitioners' request for a new rule is being denied. *Id.*

TVA asserts that the Court may not review the TVA Letter because it was simply a "polite response to its stakeholders" which did not constitute final agency action on the Petition. TVA Br. at 19-20. But, in that event, the Petition remains pending before TVA, and the Court should grant Plaintiffs' summary judgment on their alternative Claim Two, which challenges TVA's unreasonable delay in resolving the APA Petition nearly two years after receiving it. *See* Complaint ¶¶ 73-77.

As the Ninth Circuit reiterated just last year, in considering claims concerning agency delay, including in responding to APA Petitions, "[r]epeatedly, courts in this and other circuits have concluded that 'a reasonable time for agency action is typically counted in *weeks or months, not years*.'" *Natural Resources Defense Council v. EPA*, 956 F.3d 1134, 1139 (9th Cir. 2020) (*quoting In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004))(emphasis added). In light of this guidance, TVA's delay in providing a final response to the APA Petition violates the APA.[19]

Finally, it bears emphasizing that while TVA offers several arguments *in its brief* claiming there are grounds to deny the APA Petition, it is black letter law that an agency's decision may not be upheld based on *post-hoc* arguments made by the agency's lawyers in briefs to a reviewing court. *See, e.g.*, *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1908–09 (2020); *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action").

[19] As TVA notes, where an agency's delay is short, a court may decline relief. *See* TVA Br. at 17 (*citing Center for Biological Diversity v. Bernhardt*, 2021 U.S. Dist. LEXIS 76657 (D. Nev. Apr. 21, 2021)). Thus, for example, in *Bernhardt*, the Court determined the agency had not unreasonably delayed responding to a petition where the suit had been filed twelve days after the petition was submitted. *Id.* at *17-18. Here, by contrast, TVA's extended delay falls well on the other side of the line.

Accordingly, given the combination of TVA's almost two-year delay in resolving the APA Petition, and its representation that it does not intend to respond further at any time, Plaintiffs are entitled to summary judgment on their claim that TVA's failure to resolve the APA Petition constitutes agency action "unreasonably delayed or unlawfully withheld." 5 U.S.C. § 706(1).[20]

CONCLUSION

Almost twenty-two months ago, Petitioners sent TVA an APA Petition seeking a new rule to preclude TVA from continuing to pay membership and other fees to outside groups engaged in lobbying and related advocacy activities. TVA has neither granted nor denied the Petition, and has no basis for further delay. Accordingly, because Plaintiffs have Article III standing, and the APA empowers the Court to direct TVA to respond to the APA Petition, Plaintiffs respectfully urge the Court to deny TVA's motion to dismiss, grant Plaintiffs' motion for summary judgment, and direct TVA to provide a definitive response to the APA Petition within thirty days.

Plaintiffs also respectfully urge the Court to hear oral argument before resolving the pending motions.

[20] To be sure, courts have discretion to allow an agency more time where the agency demonstrates that the requested agency action is precluded by higher agency priorities. *Garcia v. United States Dep't of Homeland Sec.*, 14 F.4th 462, 485-89 (6th Cir. 2021). Here, however, where rather than simply asserting it is busy with other priorities, TVA has taken the absolute position that it will not respond to the APA Petition at any time, those considerations are not relevant.

Respectfully submitted,

/s/ Rachel L. Wolf
Rachel L. Wolf
BPR 026034
Law Office of Rachel Wolf
706 Walnut Street, Suite 401
Knoxville, TN 37902
(865) 325-9653
Rlwolf.esq@gmail.com

/s/ Howard M. Crystal
Howard M. Crystal
(D.C. Bar No. 446189)*
Anchun Jean Su
(D.C. Bar No. CA285167)*
Center For Biological Diversity
1411 K Street N.W., Suite 1300
Washington, D.C. 20005
Telephone: 202-809-6926
Email: hcrystal@biologicaldiversity.org
jsu@biologicaldiversity.org
**Admitted pro hac vice*

Counsel for Plaintiffs

December 13, 2021

CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically through the Court's ECF system on the date shown in the document's ECF footer. Notice of this filing will be sent by operation of the Court's ECF system to all parties as indicated on the electronic filing receipt. Parties may access this filing through the Court's ECF system.

/s/ Howard M. Crystal
Howard M. Crystal