

ORAL ARGUMENT NOT YET SCHEDULED
Nos. 15-5304 and 15-5334

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**CARPENTERS INDUSTRIAL COUNCIL; SISKIYOU COUNTY,
CALIFORNIA; AMERICAN FOREST RESOURCE COUNCIL; HAMPTON
AFFILIATES; THE MURPHY COMPANY; ROUGH & READY LUMBER
CO.; PERPETUA FORESTS COMPANY; SENECA SAWMILL
COMPANY; SENECA JONES TIMBER COMPANY; SWANSON GROUP
MFG. LLC; and TRINITY RIVER LUMBER COMPANY,**

Plaintiffs-Appellants

and

**LEWIS COUNTY; SKAMANIA COUNTY; and KLICKITAT COUNTY,
WASHINGTON,**

Plaintiffs-Intervenors-Appellants

v.

**SALLY JEWELL, SECRETARY OF INTERIOR, and DANIEL M. ASHE,
DIRECTOR, U.S. FISH AND WILDLIFE SERVICE,**

Defendants-Respondents

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA, Case No. 1:13-cv-0361-RJL**

**PLAINTIFFS-APPELLANTS CARPENTERS INDUSTRIAL COUNCIL *ET*
AL.'S REPLY BRIEF IN NO. 15-5334**

**Mark C. Rutzick
MARK C. RUTZICK , INC.
12402 Myra Virginia Ct
Oak Hill VA 20171
Phone/Fax: 703-870-7347
Attorney for Plaintiffs-Appellants
Carpenters Industrial Council *et al.***

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Summary of Argument

A. The district court's refusal to consider Carpenters' 10 new declarations was legal error:

1. Carpenters was not required to file a motion showing good cause for the district court to consider the 10 declarations. Carpenters had a right under uniform American common-law show cause practice since the founding of the Republic to file the declarations in response to the district court's Show Cause Order. The Federal Rules of Civil Procedure do not supersede or nullify common-law show cause practice.

2. The government waived its argument that Carpenters was required to file a motion to show good cause because the government failed to present that argument in the district court.

3. Carpenters filed a motion for leave to submit a reply brief in response to the Show Cause Order for the purpose of showing good cause for the new declarations. This motion functionally satisfies any duty to file a motion to show good cause.

4. If a duty to file a motion to show good cause exists and was not satisfied by Carpenters' motion to file their reply brief, Carpenters should be excused from filing such a motion because Carpenters justifiably interpreted the Show Cause Order to permit new declarations without a motion, and Carpenters could not have grasped the

district court's unexpressed intent to limit responses to legal briefs. Basic fairness prohibits dismissal of Carpenters' case, with issue-preclusive effect, based on their reasonable failure to perceive the unexpressed intent of the Show Cause Order.

5. Good cause is an equitable determination with four recognized factors, and the district court committed legal error by failing to apply the correct legal standard to that equitable decision.

B. Carpenters proved their Article III standing:

1. The Supreme Court's recent standing decision in *Spokeo, Inc. v. Robins*, - U.S. - , 2016 WL 2842447 (May 16, 2016) introduces "historical practice" as a new factor for Article III standing. The long established common-law claim of "private nuisance" has been historically used by an adjacent landowner to prevent increased fire risk from adjoining property – as the adjacent landowners seek to do in this case, providing a historical basis for Article III standing.

2. Carpenters proved their standing not only through 13 declarations but also through citation to additional proof in the administrative record, which the government failed to rebut, thereby conceding the sufficiency of that proof.

3. The district court erroneously failed to apply this Court's relaxed "geographical nexus" standing rule for adjacent landowners. Carpenters have standing

under the geographical nexus rule.

4. No judicial precedent makes Carpenters' economic injury standing contingent on identifying specific geographical areas where hypothetical future timber sales will not be offered. This Court's decision in *Mountain States Legal Foundation v. Glickman*, 92 F.3d 1228 (D.C. Cir. 1996) ("*Mountain States*") found economic injury standing for logging companies based on a region-wide reduction in timber sales with no identification of specific areas where sales will not be offered. Proof of such specific areas would be impossible to obtain, if it exists at all. Similarly, standing based on increased wildfire risk does not require Carpenters to prove where future fires will occur, a practical impossibility that was not required in *Mountain States*.

5. Carpenters properly relied on post-filing evidence of injury to demonstrate that future injury was imminent at the time the case was filed, and remains imminent.

6. Affirming the district court will create a circuit split with the Ninth and Tenth Circuits, which the Court should and can avoid by following i) this circuit's geographical nexus standing test, ii) the result in *Mountain States*, and iii) the "historical practice" test described in *Spokeo*.

Argument

I. THE DISTRICT COURT'S REFUSAL TO CONSIDER CARPENTERS' 10 NEW DECLARATIONS WAS LEGAL ERROR.

A. Two centuries of common-law American jurisprudence allowed Carpenters to file new declarations in response the district court's Show Cause Order without leave of court, and the Federal Rules of Civil Procedure do not supersede the common-law practice.

Carpenters could find no prior case in the history of the United States where a party has objected to the filing of factual evidence in response to a show cause order, or a court has required good cause to file factual evidence in response to a show cause order, or a court has refused to accept factual evidence in response to a show cause order. Opening Br. 24-25. In response, the government has failed to cite any case where one of those events occurred. The government concedes "it is no surprise that affidavits and declarations are routinely admitted in response to show-cause orders." Opposition Brief (Opp. Br.) 17.

The government offers two answers to the uniform common-law practice, neither of which has merit:

1. The government argues the common-law show cause practice is meaningless because in some courts a party can use a show cause order like a motion to request judicial action, and accepting a factual response would be expected in that setting. *Id.*

Perhaps so, but all 40 of the 20th and 21st century cases cited in Carpenters' Opening Brief involve a court issuing a show cause order in a pending case. In that large subset of show cause cases (or elsewhere), there is no decision where a party objected to the filing of factual evidence in response to a show cause order, or a court required good cause to file factual evidence, or a court refused to accept factual evidence. The unbroken historical practice approves submission of factual evidence in response to a show cause order in situations like this case, and Carpenters had the right to do so.

2. The government also contends Rule 6 of the Federal Rules of Civil Procedure (Federal Rules), adopted in 1937, supersedes and nullifies the historical show cause practice, limiting the common-law right to answer a show cause order with factual evidence. Yet the government points to absolutely nothing to support that contention. They cite no case giving Rule 6 this effect, and the advisory notes to Rule 6 give no hint of any intent to alter common-law practice.

From the premise that the Federal Rules supersede and nullify common-law show cause practice, the government views the issue as whether “a show-cause order somehow trumps Rule 6 ... and allows the filing of new affidavits on its own” Opp. Br. 16. That puts the procedural cart before the horse. The Federal Rules do not authorize or codify show cause orders, but implicitly assume they are part of civil

practice. *See* Rules 4.1, 45 and 73. Show cause orders predate the Federal Rules by several centuries, and continue to be widely used despite the lack of authorization in the Federal Rules. One district court in this circuit has concluded that a court “can initiate orders to show cause under its own inherent authority ...” *SEC v. Bilzarian*, 613 F.Supp.2d 66, 72 (D.D.C. 2009). Plainly, show cause orders have legal effect apart from the Federal Rules.

The real issue operates in the opposite direction: do the Federal Rules limit (“trump,” to use the government’s word) the common-law or inherent power of a court to conduct show cause proceedings by restricting the right of the court to receive factual evidence in response to a show cause order? That question is answered in the negative by Rule 81, which describes the common-law practices that are superseded by the Federal Rules, and abolishes two common-law writs, leaving all others in place. Rule 81(b). The Federal Rules do not limit the power of a court to receive factual evidence in response to a show cause order. Carpenters properly followed common-law show cause practice by submitting their 10 new declarations without leave of court. No motion for leave to file the declarations was required.

B. The government waived its “failure to file a motion” argument because the argument was not raised in the district court.

The government’s only defense of the district court’s refusal to consider the 10

declarations is that Carpenters lost their opportunity to show good cause because Carpenters did not file a motion under Rule 6(b) for leave to submit the declarations. Opp. Br. 14 (“no motion was made”), 16 (“Carpenters’ affirmative burden [was to] fil[e] a motion for leave to file the affidavits”), 18 (“it was incumbent upon [Carpenters] to file a motion”).

The government never raised this “failure to file a motion” argument in the district court. *See* CR 88. “It is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal.” *Potter v. D.C.*, 558 F.3d 542, 550 (D.C. Cir. 2009) (citation and quotation omitted).

The government does not argue its failure should be overlooked “because injustice might otherwise result.” *Defs. of Wildlife & Ctr. for Biological Diversity v. Jewell*, 815 F.3d 1, 11 (D.C. Cir. 2016) (citation and quotation omitted). The reverse is true: the government’s failure to raise this argument in the district court was highly prejudicial to Carpenters. If the government had timely raised this argument, Carpenters could easily have filed a motion expressly denominated under Rule 6(b).

C. Carpenters filed a timely motion for leave to show good cause for the district court to consider the 10 new declarations.

The government’s argument that Carpenters did not file a motion asking the

district court to find good cause¹ for the 10 new declarations presumes no such motion was filed. In reality, on July 30, 2015 – three days after the government’s response to the Show Cause Order argued that Carpenters must show good cause for additional declarations – Carpenters submitted a motion for leave to file a reply brief on the order to show cause to present the good cause demanded by the government. CR 89. The reply brief, lodged with the court as an attachment to the motion, also explained why no showing of good cause was required, CR 89, Ex. A at 5-7, and responded to other new government arguments including the claim that in light of *Swanson Group Mfg. LLC v. Jewell*, 790 F.3d 235 (D.C. Cir. 2015) (“*Swanson Group*”) Carpenters’ previously-unquestioned standing was now “highly questionable.” CR 88 at 2.

The proposed reply brief made three points on the good cause issue:

[1]. While Fed.R.Civ.P. 6(c)(2) calls for affidavits or declarations to be submitted with a summary judgment motion, that section does not apply to affidavits or declarations submitted with a brief that is not part of a summary judgment motion. ... Here, the new declarations accompanied Plaintiffs’ response to the Court’s Order To Show Cause, rather than a summary judgment brief. ...

[2]. Even if Fed.R.Civ.P. 6(c)(2) applies to this case, ... a court has the discretion to permit a party to file an affidavit opposing a motion for summary judgment after the deadlines proscribed by Federal and Local Rule.” ... “[T]he timing requirements [of Rule 6(c)(2)] are applied

¹Good cause encompasses the showing of excusable neglect required under Rule 6(b)(1)(b).

flexibly in practice.” ...

[3]. Fed.R.Civ.P. 6(b) allows any deadline to be extended for good cause. The *Swanson I* decision and the Court’s Order To Show Cause supply the good cause required for an extension under Fed.R.Civ.P. 6(b). ... The published appellate decision clearly changed the law for the plaintiffs in *Swanson I* based on the evidence they filed in that case. This Court must have thought *Swanson I* might impact this case ... because otherwise the Court would not have issued its Order To Show Cause.

Defendants must agree that *Swanson I* raises new legal issues because in this case, where Defendants previously did not contest standing, Defendants have now reversed their position to argue that standing is “highly questionable”.... Both the *Swanson I* decision and the Court’s Order To Show Cause are good cause for filing new declarations at this time.

CR 89, Ex. A at 5-7 (citations omitted).

While “[a]ny post-deadline motion [under Rule 6(b)] must contain a high degree of formality and precision, putting the opposing party on notice that a motion is at issue and that he therefore ought to respond,” *Smith v. D.C.*, 430 F.3d 450, 457 (D.C. Cir. 2005) (citation and quotation omitted), Carpenters’ motion to file their reply brief satisfies every requirement for formality, precision and notice. This Court has interpreted these requirements functionally rather than formalistically, indicating in *Yesudian ex rel. United States v. Howard Univ.*, 270 F.3d 969, 971 (D.C. Cir. 2001), that the Rule 6(b) motion requirement can be satisfied by a memorandum filed by the requesting party. *Id.* Similarly, Carpenters’ motion functionally satisfies the

requirement in *Lujan v. Nat'l. Wildlife Fed'n.*, 497 U.S. 871, 896 (1990), that any post-deadline extension request must be “upon motion made.”

Carpenters’ motion was not expressly denominated a “motion for leave to file 10 new declarations,” but its purpose and intent to accomplish that objective were crystal clear. In the motion, CR 89 at 2, Carpenters explained to the district court:

Plaintiffs filed their response to the Show Cause Order on July 17, 2015 along with 11 [*sic*] new declarations, and Defendants filed their response on July 27, 2015, objecting to the new declarations This Reply would allow Plaintiffs to respond, for the first time, to Defendants’ new standing arguments.

The district court, and the government, could not have failed to understand that the motion and proposed reply brief were asking the court to find good cause under Rule 6(b) to consider the 10 new declarations.

Although one day later, before the government responded, the district court denied the motion *sua sponte*, Minute Order (7/31/15), Carpenters satisfied all the Rule 6 procedures required to ask the district court to consider the 10 new declarations.

D. Alternatively, Carpenters should be excused from filing a motion under Rule 6(b) because Carpenters justifiably interpreted the Show Cause Order to permit the filing of declarations without a motion.

As noted, for centuries American courts have uniformly allowed parties to respond to a show cause order with factual evidence. Opening Br. 19-27. Nothing in

the words of the district court's Show Cause Order informed Carpenters that the rules in this case were different from every other show cause case in American history, and that only a legal brief could be filed. The Order to Show Cause simply stated that "plaintiffs shall show cause in writing within 10 days of this order why this case should not also be dismissed for lack of standing." CR 91 at 1.

The September 28, 2015 Memorandum Opinion revealed that the district court intended that the Show Cause Order "was *not* an invitation to re-open the evidentiary record for new declarations and averments about the nature of plaintiffs' alleged harm," CR 91 at 7, but rather "was a request for the parties to state *reasons* why the existing declarations were sufficient: *Id.* at 6-7 (both emphases in original). Regardless of the district court's later-disclosed intent, nothing in the Show Cause Order revealed that intent.

If the district court meant only to invite supplemental legal briefing on the existing standing declarations, the court could have said exactly that, which is what occurred in *Lujan*, 497 U.S. 871, on which the government relies. Opp. Br. 9-13. In that case "the District Court issued an order directing respondent to file a supplemental memorandum regarding the issue of its standing to proceed ... that plainly did not call for the submission of new evidentiary materials." *Id.* at 894-95 (emphasis added). In

Lujan there was no show cause order as there was in this case, and the words of the district court order clearly called for a “supplemental memorandum.” Had the district court in this case followed *Nat'l. Wildlife Fed'n* by issuing an order for a “supplemental memorandum” rather than a show cause order, there would have been no uncertainty about the district court’s intent.

The confusion created by the Show Cause Order had a major and perhaps decisive prejudicial effect on the outcome of this case: the district court ignored the 10 new declarations and found the initial three (pre-*Swanson Group*) declarations inadequate, resulting in dismissal of the case. That adjudication, if affirmed by this Court, will have issue-preclusive effect that will bar all the plaintiffs from ever again challenging the 2012 critical habitat designation in any court, potentially shielding that controversial decision from any judicial review. *See Nat'l Assn. of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015) (applying issue preclusion as to Article III standing to dismiss a plaintiff’s second case after first case was dismissed for lack of Article III standing).

A permanent bar on litigation against the 2012 critical habitat designation is a severe price to pay for Carpenters’ failure to grasp the district court’s unexpressed intent that the Show Cause Order was not intended to allow declarations, and that a

separate motion under Rule 6(b) would be required to file new declarations.

This deep prejudice to Carpenters offends the fairness that underlies American law. “The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension.” *Int'l Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). “[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.” *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974). While these cases involve court injunctions, their import applies just as strongly to any other court order that causes harm to a litigant.

Similarly, in the context of an administrative order, this Court has emphasized that “elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected.” *McElroy Elecs. Corp. v. F.C.C.*, 990 F.2d 1351, 1358 (D.C. Cir. 1993). “Where the agency's order suffers from a lack of clarity, such that its effect upon the petitioners is unclear, ... we will ask what the petitioners justifiably understood and whether anything in the order made it apparent that the [agency] meant otherwise.” *Id.* (citation omitted). “An order which does not satisfy the requirement of specificity and definiteness will not withstand appellate scrutiny.” *EFS Mktg., Inc. v. Russ Berrie & Co.*, 76 F.3d 487, 493 (2d Cir. 1996). The same approach should apply to review

of any district court order with an ambiguity that inflicts prejudice on a litigant.

In a variety of contexts, courts refrain from punishing litigants for misinterpreting an ambiguous order. *Bell v. Executive Comm. of United Food & Commercial Workers Pension Plan For Employees*, 191 F. Supp. 2d 10, 13 (D.D.C. 2002) (“Given the arguably ambiguous language of the Order, the Court will not penalize plaintiffs for their interpretation by requiring them to file a formal motion.”); *Corley v. Spitzer*, 2015 WL 127718 *3 (S.D.N.Y. 2015) (“to the extent the Court's February 10 Order was unclear, the resulting confusion was attributable to the Court's imprecision, and should not be held against Defendants after they filed their motion and supporting brief”); *Unicare, Inc. v. Thurman*, 97 F.R.D. 7, 14 (W.D.N.Y. 1982) (“because the Order was somewhat ambiguous the severe sanction of dismissing [the plaintiff's] Amended Complaint should not be imposed”).

Similar to the litigants in all of these cases, Carpenters should not be penalized for failing to perceive the unexpressed intent of the Show Cause Order.

E. The district court committed legal error by failing to apply the correct legal standard to its decision that Carpenters failed to show good cause.

After the district court refused to allow Carpenters to show good cause for the 10 new declarations, the court rejected the 10 new declarations because Carpenters did not show good cause, CR 91 at 7, a ruling that was, of course, highly prejudicial to

Carpenters.

There is no indication the district court applied the correct legal standard to this decision. The Memorandum Opinion provides no explanation for the court's conclusion, and no reference to any legal standard. "An abuse of discretion occurs by definition when the district court does not apply the correct legal standard or misapprehends the underlying substantive law, and we examine *de novo* whether the district court applied the correct legal standard." *Price v. D.C.*, 792 F.3d 112, 114 (D.C. Cir. 2015).

The proper legal standard for excusable neglect required for good cause under Rule 6(b)(1)(b) is well known: "[T]he determination of excusable neglect is an equitable matter [including] several relevant factors: the risk of prejudice to the non-movant, the length of delay, the reason for the delay, including whether it was in control of the movant, and whether the movant acted in good faith." *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835, 838 (D.C. Cir. 2006). The leading federal practice scholars have suggested that "the underlying principle" of Rule 6 is "giving the party opposing the application notice and an adequate opportunity to respond." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2949 at 237 (2013).

Even without Carpenters' written showing of good cause that the district court refused to consider, the facts proving good cause and excusable neglect under the four *FG Hemisphere Associates, LLC* factors were in plain sight and judicially noticeable:

1. Considering the 10 new declarations would have caused no prejudice to the government. With Carpenters' consent, the district court had given the government the additional time it requested to review and respond to the new declarations. Minute Order (7/6/15).

2. Measured from the date Carpenters filed their summary judgment motion in the district court, 13 months passed before Carpenters filed the 10 new declarations in July 2015. Half that time was spent completing the summary judgment briefing in the district court, and nothing happened after summary judgment briefing was completed. No harm from that delay has been suggested.

3. As is self-evident from the Show Cause Order, the reason for filing the new declarations was this Court's *Swanson Group* decision that was published in June 2015 (an event obviously not within Carpenters' control), causing the district court to issue the Show Cause Order, which led the government to reverse its previous position and question Carpenters' Article III standing, and led Carpenters to prepare and file the 10 new declarations. While the government asserts (Opp. Br. 19) that *Swanson Group*

did not “adopt any new requirements” for standing, just one page later (page 20) the government cites *Swanson Group* to demand Carpenters provide “details” of future harm to establish standing, an obligation that is evidently not stated in any prior case. Obviously, there was something new about *Swanson Group* that led the government to reverse its previous “no challenge to standing” position and argue against standing in this case.

4. Carpenters acted in good faith at all times. No one disagrees.

The district court could have, and should have, found good cause for the 10 new declarations even without the motion asking it to do so.

II. CARPENTERS PROVED THEIR ARTICLE III STANDING.

A. Historical practice supports adjacent landowner standing to prevent increased fire risk.

The *Spokeo, Inc.* decision, 2016 WL 2842447 *7, introduced “historical practice” as a factor for Article III standing. “Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”

For two centuries, American historical practice, through the common-law claim

of “private nuisance,” has commonly allowed an adjacent landowner to seek judicial redress to prevent increased risk that fire starting on the neighbor’s land will spread to the property of the adjacent landowner. *Ramsay v. Riddle & Thornton*, 20 F. Cas. 212, 213 (C.C.D.D.C. 1807); *Rogers v. Danforth*, 9 N.J. Eq. 289, 293 (Ch. 1853); *Ryan v. Copes*, 45 S.C.L. 217 (S.C. App. L. 1858); *Rhodes v. Dunbar*, 57 Pa. 274, 290 *14 (1868); *Hyatt v. Myers*, 73 N.C. 232, 238-39 (1875); *Blanc v. Murray*, 36 La. Ann. 162 (1884); *McGregor v. Camden*, 47 W. Va. 193, 34 S.E. 936, 938 (1899). This history supports Carpenters’ Article III standing.

B. Carpenters base their standing not only on their declarations but on additional proof in the record, which the government failed to rebut.

In judicial review of agency action “the petitioner may carry its burden of production by citing any record evidence relevant to its claim of standing” *Sierra Club v. E.P.A.*, 292 F.3d 895, 900 (D.C. Cir. 2002) (emphasis added). Yet the government argues this case as if all proof of standing must appear in Carpenters’ standing declarations, and as if Carpenters rely solely on the declarations. Opp. Br. 20 (“Carpenters rely entirely on the ten new affidavits submitted in response to the district court’s show-cause order”); 24 (“the declarants provide no evidence”); 27 (Herrick “declaration presumes that a ‘lack of management . . . will follow the designation,’ but provides no evidence in support of that claim”).

The government misunderstands Carpenters' case. Carpenters do not rely solely on the declarations to prove standing. Carpenters also rely on five full pages of citations to the Final Rule and other FWS documents in the administrative record. Opening Br. 39-44. The government entirely disregards, and fails to rebut, any of this record evidence – thereby conceding the sufficiency of that evidence. *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1056 (D.C. Cir. 1986) (“FSLIC in effect conceded [plaintiff’s claim] by failing to deny the assertions in [plaintiff’s] opening brief”); *Maxwell v. Snow*, 409 F.3d 354, 357 (D.C. Cir. 2005) (same).

C. The district court failed to apply the relaxed “geographical nexus” standing test for adjacent landowners, which remains the law of this circuit.

Standing for procedural claims by adjacent landowners is subject to the “relaxed standing test, generally known as the ‘geographical nexus’ test.” Opening Br. 52. The geographical nexus test does not dispense with concrete injury, but relaxes the kind of proof required to show concrete injury. *Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n*, 509 F.3d 562, 567 (D.C. Cir. 2007) (finding standing because “Petitioners here live near the proposed uranium enrichment facility ... [and] [t]hey allege a risk of injury from radiation generated by the facility. ...”). The government did not dispute Carpenters' argument that their claims are procedural in nature. Opp. Br. 21.

The government's only attempted answer to the “geographical nexus” standing

rule is that the Supreme Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009) indirectly overruled this doctrine. Opp. Br. 21. The argument is meritless. It is true that *Summers*, like several prior precedents, rejects "procedural injury" alone as a basis for Article III standing. 555 U.S. at 496.² But that point is irrelevant to this case because Carpenters do not base their Article III standing on procedural injury. Carpenters base their Article III standing entirely on economic and environmental injury. The procedural nature of Carpenters' claims simply serves as the trigger for the geographical nexus standing rule. The geographical nexus rule was not at issue in *Summers*, and was neither addressed nor overruled.

D. Carpenters do not have to identify specific geographical areas that will cause their economic injury, and do not have to predict where future wildfires will occur.

1. Economic injury does not require proof of the specific geographic location from where the economic harm originates.

As noted, the Fish and Wildlife Service designated 3,138,411 acres of critical habitat within the four million acres of "matrix lands" allocated for sustained-yield

²But compare the Supreme Court's recent standing decision in *Spokeo, Inc.*, 2016 WL 2842447 *8, which stated that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact."

timber management in the governing land management plan (the Northwest Forest Plan). Carpenters offered proof that this designation will cause an “inevitable” decline in federal timber sales that will cause economic injury to Carpenters, similar to the economic injury in *Mountain States*. Opening Br. 39-44. The government contends this proof is inadequate because Carpenters must “identify the specific areas where they personally have been or imminently will be injured,” Opp. Br. 20, but the declarants “provide no information as to what specific areas are sufficiently certain to be the source of a concrete and particularized future injury to plaintiffs.” Opp. Br. 22.

The argument is completely without merit. It is based on *Summers*, 555 U.S. 488, but *Summers* only addresses proof of non-economic (aesthetic/recreational/wildlife-enjoyment) standing. No court has ever required standing to include proof of a specific geographic location that causes economic harm. In the choice of laws context, economic harm occurs to a business at the principal location of the business, not the site of the business’ raw materials. *See, e.g., Alpine Atl. Asset Mgmt. AG v. Comstock*, 552 F. Supp. 2d 1268, 1279 (D. Kan. 2008) (for “financial harm,” court looks to the law of “the place where [the plaintiff] felt the alleged financial harm, which is the location of its principal place of business”).

Courts agree that Article III standing is shown by evidence of economic injury

to the plaintiff regardless of the geographic origin of the injury. “[P]alpable economic injuries have long been recognized as sufficient to lay the basis for standing” *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 792 F.3d 281, 293 (3d Cir. 2015), *cert. denied*, 136 S. Ct. 1246 (2016), *quoting Sierra Club v. Morton*, 405 U.S. 727, 733-34 (1972). “Economic injury is clearly a sufficient basis for standing.” *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 951 (9th Cir. 2013) (citation and quotation omitted). “Standing clearly exists when a plaintiff alleges direct economic harm.” *Hosein v. Gonzales*, 452 F.3d 401, 403-04 (5th Cir. 2006). This Court found the threat of economic injury to a group of lumber companies was sufficient to establish standing to challenge a Forest Service timber allocation rule in *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 (D.C. Cir. 1976), with no proof of any “specific areas.” The *Summers* decision neither directly nor indirectly alters the traditional rule of standing based on economic injury.

The government wrongly argues *Mountain States* imposes a “specific areas” requirement for economic injury. Opp. Br. 20. It did not. In *Mountain States*, the plaintiffs, alleging economic and environmental injury, were challenging a Forest Service plan that reduced logging on a 284,432 acre (444 square mile) region more than six times larger than the District of Columbia. *See Mountain States Legal Found. v.*

Glickman, 922 F.Supp. 628, 630 (D.D.C. 1995) (the district court decision that was reversed on appeal). The plaintiffs did not point to any “specific area” within that region where their injury would occur. The injury sufficient for Article III standing was a region-wide reduction in timber sales (economic injury) and region-wide increased risk of wildfire (environmental injury). Without asking the logging companies to identify “specific areas” where timber sales will not be offered, the *Mountain States* Court held that “[g]overnment acts constricting a firm's supply of its main raw material clearly inflict the constitutionally necessary injury.” 92 F.3d at 1233.

Here the government wants Carpenters to identify “specific areas” within 3,138,411 acres of critical habitat in matrix lands which the Forest Service or BLM would have “offered in future timber sales” if the land had not been designated as critical habitat. Opp. Br. 24. No such proof was required in *Mountain States*, and no such proof is required here. To gain standing, a plaintiff “need not be omniscient and pinpoint precisely when and where the next infraction will occur.” *Int’l Union of Bricklayers v. Meese*, 761 F.2d 798, 803 (D.C.Cir. 1985).

2. Proof of the location of hypothetical future timber sales does not exist.

The proof demanded by the government – the location of hypothetical future timber sales that will never be offered – almost certainly does not exist, and it would

be administratively impossible for any litigant to obtain it if it did. The Forest Service and BLM have sole authority to select timber sale locations on their respective lands, and only the agencies know where and when future timber sales will occur. The public has no knowledge of those decisions until the agency publishes a formal environmental document asking for public review of each separate sale. That step occurs after the agency has completed the process of selecting the area to be logged. For uncompleted or abandoned timber sale plans, the public is never informed, and the information is never disclosed. If the Forest Service or BLM have abandoned specific planned future timber sales due to the critical habitat designation, the public would never know.

To hunt down information on uncompleted or abandoned timber sale plans, if it exists, a member of the public would have to file a Freedom of Information Act request with the Forest Service or BLM, hope that if such plans once existed their records were preserved by the agency, and hope the preserved documents (which are by definition predecisional) are released. Notably, the government never claims this information exists or would be available to the public.

3. Wildfire risk standing does not require proving where future wildfires will occur.

The government argues Carpenters must prove where a future wildfire will occur. Opp. Br. 28-29 (must prove a “measurably increased risk of wildfire and

disease in any location”). The Siskiyou County and Seneca Jones declarations identify their specific adjacent lands that face the increased wildfire risk; the government does not claim otherwise. The government says what is missing is proof that a wildfire is “certain to occur” in either of those specific areas. Opp. Br. 28.

The government bases this argument on a misreading of *Swanson Group*, mistakenly claiming the case requires that “plaintiffs must provide ‘details’ that render a ‘prediction of future injury’ certain to occur.” Opp. Br. 28 (emphasis added). In fact, the case required a prediction of future injury that is “more certain than those this court has concluded are ‘insufficient.’” *Swanson Group*, 790 F.3d at 242 (citation omitted). The court did not indicate how likely the future injury must be, and definitely did not require future injury to be “certain to occur.” *Mountain States* found Article III standing based on increased wildfire risk without requiring the plaintiffs to prove where future wildfires would occur, or that future wildfires were “certain to occur” in any specific location within the 284,432 acre region in that case.

The Fish and Wildlife Service, like everyone else, is aware that wildfires are unpredictable and that no one can say where future wildfires will break out in forested areas, even as it is aware that there will be future wildfires in forested areas. AR 176. Congress had recognized these facts when it enacted the Healthy Forest Restoration

Act, 16 U.S.C. §§ 6501 *et seq.*, in 2003 “to reduce wildfire risks to communities” that are “within or adjacent to Federal land.” 16 U.S.C. § 6502. That is why the wildfire injury for Siskiyou County and Seneca Jones is an increased risk of wildfire, rather than a claim that wildfire will occur at a certain time in any specific location.

If judicial endorsement or administrative admission of the unpredictability of wildfire is needed on top of Congressional and FWS recognition, the Court of Appeals for the Federal Circuit has noted “the sporadic and unpredictable nature of wildfires,” *Crewzers Fire Crew Transp., Inc. v. United States*, 741 F.3d 1380, 1381 (Fed. Cir. 2014), President Obama has proclaimed that “wildfires are often unpredictable,” Presidential Proclamation – Fire Prevention Week, 2012 WL 4751784 *1, and the Department of Justice has pointed to “the unpredictable location and severity of wildfire” to justify federal agency decisions. *Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv.*, 726 F. Supp. 2d 1195, 1231 (D. Mont. 2010).

E. Carpenters properly relied on post-filing evidence of injury to demonstrate that future injury was imminent at the time of filing and remains imminent.

The government complains that some of the standing evidence Carpenters submitted below involved events occurring after the complaint was filed, and thus should not be considered in determining Article III standing. Opp. Br. 25-26. This argument fails for two reasons:

1. Evidence that specific injuries occurred in various locations and various times during 2013 and 2014, when awarded timber sale contracts were suspended after the critical habitat designation for re-consultation required by the Endangered Species Act, 50 C.F.R. § 402.16(d), is proof that those injuries were imminent when the complaint was filed in March 2013.

2. A party seeking injunctive relief, as Carpenters do here, “must show an imminent future injury.” *Swanson Group*, 790 F.3d at 240. Evidence of specific injuries during 2013 and 2014 proves similar future injuries are currently imminent.

F. The government does not dispute that affirming the district court will create a circuit split with the Ninth and Tenth Circuits.

The government, Opp. Br. 30, does not deny that affirming the district court decision will create a direct split between this court and Ninth and Tenth Circuit decisions, most clearly including the decision in *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir.1995), *cert. denied*, 516 U.S. 1042 (1996). That case found that an Oregon county had standing to challenge an earlier northern spotted owl critical habitat rule based on a declaration from the county, essentially identical to the Siskiyou County and Seneca Jones declarations here, which stated that “[b]y failing to properly manage for insect and disease control and fire, the federal land management practices threaten the productivity and environment of the adjoining [county] lands.” *Id.* at 1501. The

court found the declaration sufficient because “[i]t is logical for the County to assert that its lands could be threatened by how the adjoining federal lands are managed.” *Id.*

The Court can “avoid creating [a] circuit split[],” *U.S. v. Villanueva-Sotelo*, 515 F.3d 1234, 1251 (D.C. Cir. 2008) (citation and quotation omitted), by following i) this circuit’s geographical nexus standing test, ii) the result in *Mountain States*, and iii) the “historical practice” test in *Spokeo* to hold that Siskiyou County and Seneca Jones have adjacent landowner standing to challenge the critical habitat rule based on their reasonable fear, drawn from statements in the Final Rule, that the designation will reduce forest management in designated areas and thereby increase the risk of wildfire spreading from poorly managed federal lands to adjacent lands, without requiring Carpenters to prove when and where on federal land each such wildfire will start.

Conclusion

The judgment of the district court should be reversed, and the case should be remanded to the district court with instructions to decide the case on the merits.

Dated this 20th day of May, 2016.

MARK C. RUTZICK, INC.

By: /s/ Mark C. Rutzick

Mark C. Rutzick

Attorney for Plaintiffs-Appellants Carpenters
Industrial Council *et al.*

Statement of Compliance with Fed.R.App.P. 32 (a)(7)(C)

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Circuit Rule 32, the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6,469 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Mark C. Rutzick

Mark C. Rutzick

Certificate of Service

I certify that on May 20, 2016 I served the PLAINTIFFS-APPELLANTS' REPLY BRIEF IN NO. 15-5334 on all counsel of record by electronic filing in accordance with the Court's ECF/CM system.

/s/ Mark C. Rutzick

Mark C. Rutzick