No. 24-7

In the Supreme Court of the United States

DIAMOND ALTERNATIVE ENERGY, LLC, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.

Respondents.

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

BRIEF FOR THE SULPHUR INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PATRICK F. PHILBIN
Counsel of Record
CHASE HARRINGTON
TORRIDON LAW PLLC
801 Seventeenth Street NW
Suite 1100
Washington, DC 20006
(202) 249-6900
pphilbin@torridonlaw.com

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INTEREST OF *AMICUS CURIAE*

The Sulphur Institute (TSI) is a non-profit trade organization representing sixty global member companies involved with producing, consuming, marketing, transporting, or otherwise adding value to elemental sulfur, sulfuric acid, and sulfur-related agricultural products.[1] Founded in 1960, TSI currently focuses on: (i) sharing and promoting within TSI's membership excellence in supply chain operations, including the safe and efficient handling, storage, and logistics practices for sulfur; (ii) providing information to governmental authorities in the U.S. and abroad as they contemplate and develop regulatory frameworks for sulfur and its value-added applications; and (iii) expanding the public's knowledge regarding the benefits of sulfur and sulfur-related issues.

Sulfur is a valuable commodity and integral component of the U.S. and world economies. It is used to manufacture numerous products, including fertilizers, chemicals, paints, rubber products, medicines, fibers, sugar, detergents, plastics, paper, and many other products. Sulfur also is a vital nutrient for the crops making up much of our Nation's food chain. Without adequate sulfur supplies, stakeholders in supply and distribution chains in these other industries, including the consuming public, will be significantly affected.

America no longer mines sulfur. Rather, sulfur is recovered from oil and natural gas in the refining process to reduce emissions of the chemical into the environment.

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[1] This brief was not authored in whole or in part by counsel for any of the parties; no party or party's counsel contributed money for preparing or submitting this brief; and no one other than *amicus curiae* and its counsel have contributed money for preparing or submitting this brief.

Regulations that curb petroleum fuel consumption reduce America's sulfur supplies.

Petitioners challenge the prior administration's decision to grant California a preemption waiver under the Clean Air Act (CAA), allowing the State to impose strict greenhouse gas tailpipe emissions standards and mandate the sale of electric vehicles. *See* 87 Fed. Reg. 14,332 (Mar. 14, 2022). This waiver would allow California (and other states that opt into its emission standards) to force the motor vehicle industry to shift from internal combustion engines to electric vehicles. As fuel consumption plummets, so will sulfur supplies.

TSI, as the global advocate for sulfur and sulfur-related products, has a strong interest in the outcome of this litigation. TSI is well-positioned to provide the Court with insight into the industrial and social benefits of this chemical, as well as how the D.C. Circuit's standing decision will affect manufacturers (like the members of TSI) who operate in integrated production streams. TSI can also explain the adverse consequences of limiting sulfur supplies available to other industrial sectors—all factors that were not adequately considered by EPA in its rulemaking.

Accordingly, TSI offers this *amicus* brief in support of Petitioners' challenge to the EPA's grant of California's CAA waiver request.

BACKGROUND

A. Sulfur Supply Chains Are A Critical Component of the Economy.

Sulfur is a critical commodity to many sectors of the American and world economy. The most widely used derivative of sulfur is sulfuric acid (H_2SO_4). While sulfuric acid is used as an industrial raw material for many

applications, its largest use is for the manufacture of phosphoric acid, a precursor to phosphate fertilizers and non-fertilizer phosphates.[2] Sulfur and its derivatives are also used in metallurgical ore leaching, caprolactam, pigments, hydrofluoric acid, pulp and paper chemicals, sulfur fertilizers, petroleum refining, batteries, detergents, fungicides, pharmaceuticals, personal care products, cosmetics, leather tanning, rubber vulcanization, plasticizers, dyestuffs, explosives, aramid fibers, construction materials, sugar manufacture, dehydrating agent in organic chemical and petrochemical processes, water treatment, and steel pickling.[3] The array of industrial products derived from sulfur is so vast that no comprehensive value estimates exist.

1. Sulfur Is Produced As A Byproduct of Refining Gasoline and Natural Gas.

In the past, sulfur was primarily mined from native sources in Texas and Louisiana. But the technique of extracting sulfur from underground deposits takes enormous energy to melt the sulfur and pump the molten product to the earth's surface. This method, called the Frasch process, ceased in America in 2000. In fact, this type of sulfur extraction has declined over the last decade to less than 2% of world production.[4]

Today, sulfur is principally extracted from oil and gas refining. The Clean Air Act, 42 U.S.C. §7401 *et seq.*, requires the energy industry to reduce the amount of "criteria pollutants," emitted from motor vehicles and

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[2] *See* S&P Global, Chemical Economics Handbook: Sulfur (Mar. 2024), https://tinyurl.com/mrj3dpy3.

[3] TSI, *Glossary* "Sulphur uses," https://perma.cc/2DKM-M9HM.

[4] *See* TSI, *FAQ*, https://perma.cc/7RVX-5HZH.

internal combustion engines. *See id.* §§7408-7409. One of the criteria pollutants subject to the CAA is sulfur dioxide (SO_2), 40 C.F.R. §50.4, which is created by burning off naturally occurring sulfur contained in oil. To prevent SO_2 from entering the atmosphere and to comply with the CAA, the energy industry began recovering sulfur from the oil refining process using the Claus Recovery Method. This technique, implemented through a Sulfur Recovery Unit, extracts naturally occurring liquid sulfur from oil and gas streams to produce low-sulfur fuel used for internal combustion engines.[5]

Desulfurization of fossil fuels accounts for most sulfur production. According to one study, "[m]ore than 80% of the sulfur used industrially comes from oil and natural gas."[6] The United States Geological Survey (USGS) reports that sulfur recovery produced about 8 million metric tons of sulfur in 2023.[7]

Decrease in gasoline consumption results in a decrease in sulfur supplies. According to the Bureau of Transportation Statistics, during the COVID-19 pandemic, there was a significant decrease in passenger travel.[8] With reduced demand for gasoline, there was also a direct correlation between refinery output and sulfur

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[5] *See* B. G. Goar, *Sulfur Recovery Technology*, Conf-860447 (1986), https://perma.cc/T98R-R7KH.

[6] *See* Mark Maslin et al., *Sulfur: A potential resource crisis that could stifle green technology and threaten food security as the world decarbonizes*, 188 The Geographical J. 498, 498 (2022), https://perma.cc/23S8-XL2N.

[7] U.S. Geological Survey, Mineral Commodity Summaries—Sulfur (Jan. 2024), https://perma.cc/YF43-Q6WE.

[8] U.S. Dep't of Transp., Bureau of Transp. Statistics, "Daily Vehicle Travel During the COVID-19 Public Health Emergency," (July 21, 2020), https://tinyurl.com/4r8kk23h.

supply necessary for the dozens of industries that require the chemical as an industrial raw material. According to the USGS, American sulfur production during 2020 dropped by 800,000 tons—apparently due to scaled back refining during the pandemic.[9]

Once extracted, the sulfur, now in molten form, is temporarily stored in a holding area at the refinery and then transported by either railcar or cargo tank truck to industrial facilities that make sulfuric acid. These facilities include fertilizer plants, pulp and paper mills, copper smelters, sulfuric acid regeneration plants, and other chemical processing facilities. In the form of sulfuric acid, sulfur ranks as one of the more important elements used as an industrial raw material. "It is of prime importance to every sector of the world's industrial and fertilizer complexes. Sulfuric acid production is the major end use of sulfur, and consumption of sulfuric acid has been regarded as one of the best indexes of a nation's industrial development."[10] In fact, "[m]ore sulfuric acid is produced in the United States every year than any other chemical."[11]

2. Sulfur Is Critical To The U.S. Agricultural And Fertilizer Sectors.

Sulfur is one of the 17 essential plant nutrients and is indispensable to plant growth and crop development.[12] Among other benefits, sulfur: (i) aids in the formation of

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[9] U.S. Geological Survey, *supra* note 7.

[10] U.S. Geological Survey, *Sulfur Statistics and Information*, https://tinyurl.com/a223krdk.

[11] *Ibid.*

[12] TSI, *Sulphur – The Fourth Major Crop Nutrient*, https://perma.cc/6PQ8-MCMU.

chlorophyll that permits photosynthesis through which plants produce starch, sugars, oils, fats, vitamins, and other compounds; (ii) serves as a building block for protein production; (iii) improves the synthesis of oils found in oilseeds; and (iv) increases crop yields and improves produce quality, which of course determine the market price ultimately realized by farmers.[13]

Ironically, while the CAA is the reason this country now has ample supplies of sulfur produced from oil and gas refining, it also had the unintended effect of reducing the amount of "free sulfur" available to farmers as a crop nutrient. When sulfur was removed from fuel in the refining process, sulfur from atmospheric deposition created from internal combustion engine exhaust and other industrial processes no longer fell from the sky onto farmers' fields, creating a sulfur deficiency in many crops. As atmospheric deposition decreased, there was not enough free sulfur to aid in the growth of crops that feed the world like wheat, canola, beans, and corn.[14]

Farmers had to replace these sulfur deficiencies, and the TSI, academia, and the fertilizer industry responded accordingly. Throughout the 1980s and 1990s, TSI, in cooperation with other agricultural research entities, conducted studies on sulfur crop nutrition, and the studies established that sulfur-enhanced fertilizer substantially increases crop yields.

As a result, one of the major applications of sulfuric acid is in the production of phosphate fertilizers. In 2019,

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[13] *Ibid.*

[14] *See generally* Eve-Lyn S. Hinckley & Charles T. Driscoll, *Sulfur fertilizer use in the Midwestern US increases as atmospheric sulfur deposition declines with improved air quality*, 3 Commc'ns. Earth & Env't. 324 (2022), https://doi.org/10.1038/s43247-022-00662-9.

64% of all sulfur produced globally was used in the production of phosphate and other fertilizers.

All of this has a sizable impact on the U.S. economy. In 2019, the fertilizer industry contributed about $130 billion and nearly 500,000 jobs to the U.S. economy.[15] Likewise, major crops such as corn, wheat, and soybeans all benefit from a healthy sulfur supply chain, which in turn generates thousands of jobs and billions of dollars in economic output for the U.S. According to the United Soybean Board, the total economic impact from the soybean sector is $124 billion, contributing 223,000 paid, full-time equivalent jobs, as well as an additional 62,000 family members, beyond growers themselves, who support and are integral to soybean farming operations.[16] The total wage impact of the sector averaged $10 billion.[17] Similar economic benefits are seen with corn and wheat. The National Corn Growers Association reports that, in 2023, the total U.S. corn crop value was $73.6 billion.[18]

Yet, without adequate sulfur stocks generated by the petroleum and natural gas refining sector, such economic benefits will be placed in jeopardy.

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[15] *See* The Fertilizer Inst., "TFI Releases Fertilizer Industry Economic Impact Study: Contributes $130 Billion to US Economy," (Sept. 24, 2020), https://perma.cc/4L84-RLLZ.

[16] *See* "The Economic Impact of U.S. Soybeans and End Products on the U.S. Economy—2023 Update," Report for United Soybean Bd. & Nat'l Oilseed Processors Ass'n at 3 (Aug. 2023), https://perma.cc/PNH4-YCFE.

[17] *Ibid.*

[18] Nat'l Corn Growers Ass'n, *World of Corn 2024* at 3, https://perma.cc/BHB4-V8MR.

B. California Seeks To Curb Petroleum and Natural Gas Refining.

For decades, California has sought to address global climate change by imposing zero-emission mandates on new vehicles sold in the State. These mandates depend on EPA granting California a waiver from the (otherwise) uniform federal emissions regime set by the Clean Air Act (CAA). 42 U.S.C. §7543(b). In 2009, EPA granted California a waiver to adopt regulations setting fleet-average greenhouse gas emissions for new cars. 74 Fed. Reg. 32,744, 32,783 (July 8, 2009). In 2013, EPA granted an additional waiver to California's Advanced Clean Car regulations, designed to force the motor vehicle industry to shift from internal combustion engines to electric vehicles. 78 Fed. Reg. 2,112, 2,137 (Jan. 9, 2013). This waiver has been revoked and renewed over the last decade with each change in presidential administration.

During the first Trump administration, EPA rescinded the 2013 preemption waiver on the grounds that California's preemption waiver authority was limited to California-specific emission conditions like smog rather than global climate change. 84 Fed. Reg. 51,310, 51,328, 51,339 (Sept. 27, 2019). When President Biden took office, he directed EPA to consider "revising" the 2019 withdrawal of California's 2013 waiver, 86 Fed. Reg. 7,037 (Jan. 25, 2021), which it did in 2022, 87 Fed. Reg. 14,332 (Mar. 14, 2022).[19] To date, seventeen other States have opted into California's restrictions, and together they control over 40% of America's new vehicle market.

The scope of California's CAA waiver authority under §7543(b) is therefore a recurring issue with important

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[19] Following the recent change in administration, EPA has again determined to reassess California's preemption waiver.

implications for the sulfur industry. If California is permitted to steer the nation towards an electric vehicle fleet, fuel consumption will plummet and so will sulfur supplies.

SUMMARY OF ARGUMENT

The D.C. Circuit's ruling on standing is wrong and should be reversed. It is well established that Article III standing can rest on causation of injury traced through the predictable reactions of third parties to government regulation. And the redressability prong of standing is the flip side of the causation coin.

In this case, it did not require any speculative leap to recognize that regulatory actions (like California's zero-emission-vehicle mandate) expressly designed to steer the Nation towards an all-electric vehicle fleet would cause injury for those, like Petitioners, who produce liquid fuel—and that the injury would be redressed by removing the mandate. Indeed, EPA's waiver allowing California to adopt a zero-emissions-vehicle mandate was expressly *intended* to force lower consumption of liquid fuels than otherwise would have occurred. The very premise of allowing California to set its own rules was that California's rules would have a predictable effect in reducing combustion of liquid fuels and thereby reducing emissions.

The D.C. Circuit's decision requiring proof of redressability—especially in the form of affidavits from the regulated entities themselves explaining how they would react if the special waiver for California were removed—conflicts with this Court's standing jurisprudence, conflicts with the decisions of several other circuits, and will interfere with the ability of businesses in integrated supply or production chains to challenge regulatory actions that affect them through the predictable reactions of other regulated entities in the interconnected chain.

ARGUMENT

The D.C. Circuit's Standing Decision Was Wrong.

The D.C. Circuit's decision upends settled principles of standing law. In particular, it threatens to hobble the ability of myriad companies that operate in linked production or supply chains—like members of TSI—to establish standing to challenge regulations that affect their interests by controlling the actions of others in their interconnected industries. In such situations, the parties challenging the rule are not themselves directly subject to the regulations, but they nevertheless bear the effects of the regulations through the predictable actions of regulated third parties. Until now, such predictable effects have clearly been sufficient to establish standing.

A. Challengers To Government Regulation May Rely On the Predictable Effect of Government Action On Third Parties.

1. Under this Court's familiar three-part standing inquiry, a plaintiff need only show (1) "injury in fact"; (2) a "causal connection" making that injury "fairly traceable" to the defendant's action; and (3) a likelihood "that the injury will be redressed by a favorable decision." *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Applying those factors, this Court's decisions have made clear that a plaintiff can establish standing based on "the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce* v. *New York*, 588 U.S. 752, 768 (2019); *see also Warth* v. *Seldin*, 422 U.S. 490, 505 (1975) ("When a governmental prohibition or restriction . . . causes specific harm to a third party . . . the indirectness of the injury does not necessarily deprive the person harmed of standing to vindicate his rights."). Indeed, it is well established that government regulation

may cause injury to others who are economically interconnected with the directly regulated entity and that setting aside such a regulation satisfies the redressability prong of standing, especially given that causation and redressability are typically "flip sides of the same coin." *FDA* v. *All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024) (quotation omitted).

As the Court recently explained, "the Court has identified a variety of familiar circumstances where government regulation of a third-party individual or business may be likely to cause injury in fact to an unregulated plaintiff." *Id.* at 384. In particular, the Court has routinely recognized that, in the context of businesses in an economically interconnected chain, "when the government regulates (or under-regulates) [one] business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain, such as certain manufacturers, retailers, suppliers, competitors, or customers." *Ibid.* For example, this Court has allowed challenges to certain government acts that give an advantage to the plaintiff's competitor, *Nat'l Credit Union Admin.* v. *First Nat. Bank & Tr. Co.*, 522 U.S. 479, 488 (1998) (upholding standing of private banks to challenge agency's decision to amend charter of federal credit union); *Monsanto Co.* v. *Geertson Seed Farms*, 561 U.S. 139, 153-56 (2010) (conventional seed farms' challenge to deregulation of genetically modified alfalfa), or changes to regulatory burdens on third parties that will have downstream effects on plaintiff's business, *see Motor Vehicle Manufacturers Association of United States, Inc.* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983) (insurance company suing agency for recission of vehicle safety regulation). Indeed, "entire classes of administrative litigation . . . have traditionally been brought by unregulated parties." *Corner Post, Inc.* v. *Board of*

Governors of the Fed. Rsrv. Sys., 603 U.S. 799, 833 (2024) (Kavanaugh, J., concurring).

Where the plaintiff's theory of standing depends on an injury is indirectly caused by government action on someone else, standing is sufficiently shown where there is "a predictable chain of events leading from the government action to the asserted injury." *All. for Hippocratic Med.*, 602 U.S. at 385. Standing cannot depend on "guesswork" or "speculation" about third parties' actions. *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 413-14 (2013). But it can rest on a showing that "third part[ies] . . . will likely react in predictable ways to the defendants' conduct." *Murthy* v. *Missouri*, 603 U.S. 43, 58 (2024) (quoting *Dep't of Commerce*, 588 U.S. at 768).

In such situations, the predictable downstream effects that regulation on one entity will have for other entities has been understood as sufficient to create standing—that is, it is sufficient as to both causation and redressability. A plaintiff need only show that "third parties will likely react in predictable ways" due to the challenged regulatory action and that their reactions "in turn will likely injure plaintiffs." *All. for Hippocratic Med.*, 602 U.S. at 383 (quoting *California* v. *Texas*, 593 U.S. 659, 675 (2021)); *see also Bennett* v. *Spear*, 520 U.S. 154, 169 (1997) (standing can rest on the "determinative or coercive effect" of the agency action on a third party).

In this case, the "predictable effect" of the EPA waiver is straightforward. California's greenhouse gas emission standards and zero-emissions vehicle mandate are designed to reduce consumption of liquid fuels. EPA granted California a preemption waiver so that California could tackle the "logical link" between local air pollution from the combustion of liquid fuels and greenhouse gases. Pet. App. 207a. The goal of the waiver and the mandate

are the same: to reduce the consumption of liquid fuels by reducing the number of cars manufactured that use liquid fuels. That necessarily impacts the businesses of Petitioners. It takes no "guesswork" or "speculation" to know that if there are fewer cars that need liquid fuels to run, then demand for Petitioners' products will be reduced.

And setting aside the waiver (and thereby blocking California's mandate) would redress the injury because it would "likely" avert the predictable drop in demand for liquid fuels that the waiver (and California's mandate) are expressly designed to create. *See Lujan*, 504 U.S. at 560-61. The court of appeals' requirement that Petitioners provide *evidence* from auto manufacturers that they would produce fewer liquid-fuel automobiles cannot be reconciled with this Court's prior decisions, which consistently permit reliance on such "predictable effect[s]." *Dep't of Commerce*, 588 U.S. at 768. This Court did not require that plaintiffs prove by evidence that a biological opinion would influence how a government agency set water-level restrictions, *Bennett*, 520 U.S. at 170, or that a citizenship question would predictably reduce census responses by noncitizens, *see Dep't of Com.*, 588 U.S. at 76. Rather, plaintiffs' standing could draw upon commonsense inferences about how third parties behave in response to government action. The D.C. Circuit's decision to impose an artificial evidentiary barrier is inconsistent with these cases.

Other courts of appeal illustrate the correct approach under this Court's precedents. For example, in *NRDC* v. *NHTSA*, 894 F.3d 95 (2d Cir. 2018), the Second Circuit explained that causation and redressability need not be proved "with absolute certainty" and that a "substantial likelihood" is all that is required "even in cases where the injury hinges on the reactions of . . . third parties . . . to

the agency's conduct." *Id.* at 104 (citation omitted). The court found that environmental groups had standing to challenge agency action delaying an increase in civil penalties for third-party automakers without any affidavits and instead based largely on the view that "common sense and basic economics tell us that the increased cost of unlawful conduct will make that conduct less common." *Id.* at 105 (citation omitted). In other words, the court relied on the "predictable effect" of the agency action on the conduct of third parties to hold that the environmental groups had standing.

Similarly, the Fifth Circuit found that Texas had standing to challenge DHS's decision to divert funds from border wall construction because of its predictable effect on illegal immigration. *General Land Office* v. *Biden*, 71 F.4th 264, 273 (5th Cir. 2023). As the Fifth Circuit explained, border barriers both reduce illegal entries where they are constructed and "increase the rate at which illegal aliens are detected and apprehended." *Id.* at 272. Those predictable effects of funding border barriers reduced costs for Texas associated with illegal border crossings. *See id.* Accordingly, diverting funding from border barriers (so that fewer barriers would be constructed) could logically be expected to *increase* illegal crossings by migrants, which would predictably increase costs for Texas. That logical inference based on predictable actions by third parties (migrants seeking to cross the border illegally) was sufficient to sustain standing. Indeed, the Fifth Circuit expressly explained that Texas' standing argument "appropriately rel[ied] on the 'predictable effect of Government action on the decisions of third parties.'" *Id.* at 273 (quoting *Dep't of Commerce*, 139 S. Ct. at 2566).

Even the D.C. Circuit's own prior rulings undermine its decision in this case. The D.C. Circuit has previously

held that, "[w]hen redress for a plaintiff's injury depends on a third party's independent action and the third party stands to profit by doing as the plaintiff hopes, we have found that the third party's 'pecuniary interests' and the basic dynamic of 'naked capitalism' are enough to satisfy the redressability requirement." *Teton Historic Aviation Found.* v. *Dep't of Def.*, 785 F.3d 719, 728 (D.C. Cir. 2015) (per curiam) (quoting *Abigail All. for Better Access to Developmental Drugs* v. *Eschenbach*, 469 F.3d 129, 135 (D.C. Cir. 2006)). In other words, without any need for affidavits, "financial incentives provide an independent basis to find standing" because the court can "trust in [a third party's] economic self-interest to assume that it would likely" behave in accordance with those interests. *Ibid.*; *see also, e.g.*, *In re Idaho Conservation League*, 811 F.3d 502, 510 (D.C. Cir. 2016) (explaining that the "court has long relied on . . . economic and other incentives to find standing").

2. The court of appeals' error will have a broad effect on businesses operating in industries with linked production chains or supply-and-demand relationships. Until now, it was clear that if a regulation was designed to induce a particular action by a regulated entity and that action would necessarily impact another company (for example, by reducing demand for its products), the company affected would have standing to bring a challenge based on "the predictable effect of Government action on the decisions of third parties." *Dep't of Commerce*, 588 U.S. at 768. The D.C. Circuit's decision erroneously casts that basic principle in doubt.

Proper application of standing principles is vitally important for industries—like the sulfur industry—that exist in interconnected supply or production chains. Sulfur producers are not directly regulated by agencies that

regulate vehicle emissions or petroleum refineries. But because sulfur is recovered from oil and gas as part of the refining process, regulations on those subjects have major, predictable impacts on the supply of sulfur.

For example, by allowing California to set emissions standards, the EPA waiver will, by design, slash the rate of U.S. fuel refining by reducing demand for liquid fuel. And that will inexorably slash the domestic production of sulfur. At the same time, EPA's waiver will substantially increase the demand for sulfur. Green technologies, like electric vehicles, increase demand for cobalt, nickel, and lithium—all of which are extracted with sulfuric acid.[20] EPA's waiver, then, would deliver a one-two punch to domestic sulfur supply chains: it will both slash sulfur production (from diminished fuel refining) while simultaneously incentivizing the manufacture of electric vehicles that depend on sulfur for making electric batteries. According to researchers, decarbonization coupled with the expansion of the green economy could result in a "shortfall in sulfuric acid of between 100 and 320 million tonnes."[21] The result may be an overstretch in the domestic sulfur supply that forces manufacturers to become dependent on foreign sources of sulfur.

The D.C. Circuit's novel and myopic focus in its standing analysis would effectively shut the courthouse doors to any petitioner who is not directly regulated by an agency, but who necessarily incurs injury from the predictable effects of the agency's actions on the decisions of others. It would hobble meaningful judicial review—and insulate broad-reaching regulatory action from appropriate scrutiny—by prohibiting entire industries that are

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[20] Maslin et al., *supra* note 6, at 498, 501.

[21] *Id.* at 501.

logically and predictably affected by a government action from bringing a challenge. Such a short-sighted approach irrationally ignores the interconnected nature of many industries in our economy and, by limiting potential litigants, would improperly insulate agency action from searching review.

B. Requiring Downstream Entities To Cooperate With Regulated Entities To Establish Standing Raises an Improper Barrier To Judicial Review that Would Heighten the Harms of Regulatory Capture.

The D.C. Circuit's apparent requirement, *see* Pet. App. 30a-32a, that, to show standing, a potential challenger must secure affidavits from the companies directly subject to a regulation—to prove how the regulated entities will react to the regulation (or to setting aside the regulation)—is particularly wrongheaded. Even where companies are inextricably linked in interconnected production chains or supply relationships, their interests are not necessarily entirely aligned.

A regulated entity may have multiple reasons for acquiescing in a particular action by its regulator. The regulated entity may value certainty over reduced regulatory burdens on a particular matter and thus may forego any challenge to a rule.[22] Or the regulated entity may accept regulatory burdens in one area in an effort to secure more favorable regulatory treatment on a different matter. Worse, incumbents in a regulated industry may favor

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[22] *See generally* Randall S. Billingsley and Carl J. Ullrich, *Regulatory Uncertainty, Corporate Expectations, and the Postponement of Investment: The Case of Electricity Market Deregulation* (2011), https://perma.cc/U83A-MULC (finding government deregulation of electric utilities resulted in diminished investment).

some regulatory burdens because they raise barriers to entry that stymie competition. *See N. Carolina State Bd. of Dental Examiners* v. *FTC*, 574 U.S. 494, 501 (2015) (state dental licensing board); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975) (state bar).

Requiring a company that will be inexorably affected by a regulatory change to secure cooperation from the directly regulated entities—those who have an ongoing relationship with the regulator—raises a gatekeeping restriction that would stifle legitimate challenges to government action. It makes the gatekeeper to vital judicial review a regulated entity whose need to maintain a relationship with the regulator necessarily gives it a different set of incentives from others who may be affected by the regulation.

Indeed, the theory of regulatory capture suggests that the relationship between regulator and regulated entity may, in some instances, produce regulations that bend toward the interests of the regulated entity. This can occur when well-heeled, sophisticated entities "exercise disproportionate influence over agency policymaking by virtue of the resources they commanded, the information they possessed, and the long-term relations they maintained with agency officials." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2265 (2001)*; cf. Buffington* v. *McDonough*, 143 S. Ct. 14, 20-21 (2022) (Gorsuch, J., dissenting from denial of certiorari) (explaining that wealthy and influential entities "can lobby agencies for new rules that match their preferences.").

"With every agency, the fear of regulatory capture is ever-present." *See PHH Corp.* v. *CFPB*, 881 F.3d 75, 185 (D.C. Cir. 2018) (Kavanaugh, J. dissenting) (quoting Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages. Why*

We Need a Financial Product Safety Commission, Democracy, Summer 2007, at 8, 18); James Q. Wilson, *The Politics of Regulation* 357-94 (1980). The possibility of regulatory capture makes it particularly dangerous to make the regulated entity the gatekeeper for regulatory challenges brought by other parties whose interests are affected through the regulated entity's actions.

Here, for example, the world's largest car manufacturers intervened to *protect* California's "stricter" emissions standards. *See* Mot. to Intervene 8, *Ohio* v. *EPA*, No. 22-1081, Doc. 1949658 (D.C. Cir. June 7, 2022). They justified intervention on the ground that, because they have committed to pay the costs of transitioning to electric vehicles, they have "significant interests in ensuring that other automobile manufacturers" (*i.e.*, their competitors) "are required to comply" as well. *Id.* at 14. Intervenors have determined they can absorb such costs. Smaller companies whose supply chains rely on petroleum fuel consumption may not. Because downstream producers have divergent interests from the directly regulated entities (like auto manufacturers) who may prefer stricter regulations, it is crucial that other entities like Petitioners be permitted to demonstrate standing based on rational inferences of predictable commercial behavior. Under the D.C. Circuit's misguided application of standing principles, however, downstream producers must cooperate with directly regulated entities before they can challenge unlawful agency action.

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The decision below upends previously clear principles of Article III standing. It creates confusion concerning the extent to which entities in integrated supply chains can establish standing based on the predictable downstream effects of regulation. And it will make

downstream producers like TSI depend on directly regulated entities with divergent interests in order to challenge unlawful regulations.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted.

PATRICK F. PHILBIN
Counsel of Record
CHASE HARRINGTON
TORRIDON LAW PLLC
801 Seventeenth Street NW
Suite 1100
Washington, DC 20006
(202) 249-6900
pphilbin@torridonlaw.com

Counsel for Amicus Curiae
The Sulphur Institute