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STANDING UP FOR INDUSTRY STANDING IN ENVIRONMENTAL REGULATORY CHALLENGES

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Abstract: Article III of the U.S. Constitution limits courts to hearing only cases and controversies. To address this limitation, federal courts have developed the doctrine of standing, which requires a litigant to have suffered a cognizable injury in fact, which was caused by the challenged conduct and that will be redressable by a favorable outcome. Courts have struggled to balance these components and, in practice, different requirements have developed for meeting standing depending on the nature of the case and the type of party bringing suit. This Article explores the U.S. Court of Appeals for the District of Columbia Circuit's recent decisions in *Coalition for Responsible Regulation, Inc. v. EPA*, *Grocery Manufacturers Ass'n v. EPA*, and *Alliance of Automobile Manufacturers v. EPA*. It argues that the D.C. Circuit's findings in these cases—that industry petitioners lacked standing to sue—are the result of the court's overly narrow analysis of EPA rulemakings as individual acts, without regard to the broader effect of the regulatory scheme of which the rulemakings are a part. In so doing, the D.C. Circuit has precluded industry petitioners from accounting for the practical financial harms they have suffered. The authors conclude that the consequence of this narrow review is a higher bar to establish standing for industry petitioners than for environmental plaintiffs. Ultimately, the D.C. Circuit's decisions raise the specter that a regulatory program that has tangible impacts on a regulated industry will nonetheless be shielded from judicial review.

INTRODUCTION

Federal courts play a pivotal role in American governance, serving as a check on the actions of the legislative and executive branches. This check is particularly crucial with the rise of the administrative state, in which expert admin-

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istrative agencies are vested with the power to both craft and enforce rules that impact the day-to-day operations of American businesses.¹ Although there is no official count of agencies within the executive branch of government, one source lists 137 separate federal agencies, one of which is the U.S. Environmental Protection Agency (EPA).² The rules promulgated by all of the executive agencies and published in the U.S. Code of Federal Regulations currently occupy more space on the shelves of the Library of Congress than all of the current statutes enacted by Congress.³ When an administrative agency oversteps its bounds by taking an action that is either contrary to its congressional charter or is arbitrary and capricious, it is the role of the federal courts to rein in the agency.⁴

Often, however, federal courts never reach the merits of an administrative challenge because they conclude that they lack jurisdiction to do so. Article III of the U.S. Constitution limits federal court jurisdiction to “cases” and “controversies.”⁵ One doctrine that has been developed by the federal courts to effectuate this jurisdictional limitation is standing, which requires that a plaintiff seeking to invoke a federal court’s jurisdiction show that he or she has a real stake in the outcome of the litigation.⁶ The seminal Supreme Court case articulating the

¹ See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (holding that Congress may vest broad power in agencies as long as it provides an “intelligible principle” to which the agency must conform); Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 283 (1986) (discussing the tension between the courts’ role of ensuring that agencies act according to statutory directives and the need to defer to agency expertise).

² DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 15 (2012).

³ According to one researcher, the Code of Federal Regulations occupies 304.5 inches of shelf space in the Library of Congress, whereas the United States Code occupies only seventy-three inches of shelf space. See David Hayes, *Are Federal Regulations Too Numerous? Has the Number of Them Multiplied Excessively?* (2008), <http://extent-of-regulation.dhwritings.com/>, archived at <http://perma.cc/TS54-MJAY>.

⁴ See Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2012) (requiring that a reviewing court set aside agency actions, findings, or conclusions that the court finds to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”); see also Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 321 (2013) (“A quick look at the standards of review set forth in [section] 706 of the APA demonstrates this: courts ensure that agencies carry out their mandatory duties, follow proper procedures, engage in reasonable analyses, obey the Constitution, and act only within the confines of their statutory mandates.”).

⁵ U.S. CONST. art. III, § 2.

⁶ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (articulating the standing doctrine); *Allen v. Wright*, 468 U.S. 737, 761 (1984) (holding the plaintiffs did not have standing where they asked the Court to restructure certain IRS tax schemes rather than seeking the enforcement of specific legal obligations); *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (holding that a federal court may only hear a case where the plaintiff has suffered a “threatened or actual injury” that resulted from allegedly illegal activity); see also Cass Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 168–96 (1993) (providing a historical overview of the standing doctrine through the *Lujan* decision).

standing doctrine, *Lujan v. Defenders of Wildlife*, arose in the context of an environmental challenge.⁷ In that case, the Court held that the “irreducible constitutional minimum of standing” consists of the following three components: (1) an “injury in fact,” i.e., an invasion of a legally protected interest that is concrete and particularized, and is “actual or imminent, not conjectural or hypothetical;” (2) a causal connection between the injury and the conduct complained of, i.e., the injury complained of must be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court;” and (3) a showing that it is “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision” of the court.⁸

The Supreme Court has not precisely delineated what can and what cannot constitute an injury-in-fact sufficient to confer standing, or just how likely it must be that an injury can be redressed by a court.⁹ Courts often struggle with this balance, as well as with the question of how much evidence, if any, a litigant must proffer in order to establish standing.¹⁰ In practice, different requirements for showing standing have arisen depending on the posture of the case, e.g., whether the litigant is being directly regulated by the EPA action in question or whether the party is seeking to protect an interest in a clean environment.¹¹

This Article discusses three recent decisions of the U.S. Court of Appeals for the District of Columbia Circuit—*Coalition for Responsible Regulation, Inc. v. EPA*,¹² *Grocery Manufacturers Ass’n v. EPA*,¹³ and *Alliance of Automobile Manufacturers v. EPA*¹⁴—that appear to have raised the standing bar for regulat-

⁷ See 504 U.S. at 556 (holding that environmental organizations lacked standing to challenge actions funded by the federal government in foreign countries that threaten endangered species because the organizations’ members could not show that they suffered injury-in-fact).

⁸ *Id.* at 560–61 (internal quotations omitted).

⁹ See *Allen*, 468 U.S. at 751 (acknowledging that the components of standing, including injury in fact, are “not susceptible of precise definition”); *Ass’n of Data Processing Serv. Org. v. Camp*, 397 U.S. 150, 153 (1970) (rejecting the old “legal interest” test of standing; instead focusing the standing inquiry on whether the plaintiff suffered an “injury in fact”).

¹⁰ See *infra* notes 41–45 and 90–95 and accompanying text. See generally *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 104–05 (1998) (holding that plaintiffs’ did not suffer a redressable injury due to a steel company’s failure to provide reports required by the Emergency Planning and Community Right-to-Know Act); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (expanding the category of redressable injuries beyond economic harms).

¹¹ See *infra* notes 39–109 and accompanying text.

¹² 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *rev’d in part sub nom.* *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

¹³ 693 F.3d 169 (D.C. Cir. 2012).

¹⁴ No. 11-1334, 2014 WL 5838463 (D.C. Cir. Oct. 21, 2014) (per curiam). These standing decisions carry particular weight because of the D.C. Circuit’s central role in hearing challenges to regulatory actions and shaping administrative law. See Bradford Mank, *Standing & Statistical Persons: A Risk-Based Approach to Standing*, 36 *ECOLOGY L.Q.* 665, 696 (2009). “The D.C. Circuit’s standing test is important because the circuit has exclusive or concurrent jurisdiction for many regulatory stat-

ed industries challenging an EPA action, and that have strained the constitutional mooring on which the standing doctrine is based.¹⁵

Part I of the Article outlines the constitutional bases for the standing doctrine and explains how it is rooted in the limitation of the federal courts' jurisdiction to cases and controversies.¹⁶ Part II goes on to describe how standing decisions in environmental regulatory challenges generally entail an analysis as to whether the plaintiff falls into one of four broad categories: (1) regulated parties that are the object of the EPA action; (2) business interests that suffer a "competitive injury" based on the impact of the action on their competitors; (3) environmental special interest groups seeking to protect the environment; and (4) governments appearing as *parens patriae*¹⁷ to protect the environmental interests of their citizens and public lands.¹⁸ Part II also explains how courts have applied different burdens for establishing Article III standing depending on the category into which the particular plaintiff falls.¹⁹

Part III discusses the background of the recent D.C. Circuit cases set forth above.²⁰ It then explains that the difficulty industry petitioners faced in establishing standing in those cases stemmed in part from the D.C. Circuit's conducting a narrow assessment of each specific regulatory action before it, instead of taking into account how the action fit into a broader program that undeniably impacted the industry.²¹ This has seemingly allowed the EPA to strategically manage its rulemaking so as to defeat standing and thereby insulate from judicial review agency actions that strained the scope of its regulatory authority.²²

Part IV explains how the D.C. Circuit appears to be taking a more restrictive view of what constitutes a redressable injury-in-fact in challenges brought by industry groups than it is in challenges brought by environmental advocacy groups.²³ Although courts have been open to environmental groups seeking to protect their members' aesthetic interests in a clean environment, the D.C. Cir-

utes and hears more regulatory cases than any other circuit." *Id.*; see also *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 535 n.14 (1978) ("Since the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit], the decision of that court . . . will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals.")

¹⁵ See *infra* notes 263–293 and accompanying text.

¹⁶ See *infra* notes 25–35 and accompanying text.

¹⁷ Under the doctrine of *parens patriae*, a government has standing to bring a lawsuit on behalf of a citizen, particularly a citizen who is legally disabled from bringing the suit him-or-herself. BLACK'S LAW DICTIONARY 1287 (10th ed. 2014).

¹⁸ See *infra* notes 36–109 and accompanying text.

¹⁹ See *infra* notes 36–109 and accompanying text.

²⁰ See *infra* notes 110–262 and accompanying text.

²¹ See *infra* notes 151–227 and accompanying text.

²² See *infra* notes 257–262 and accompanying text.

²³ See *infra* notes 263–294 and accompanying text.

cuit opinions discussed in this Article have required exacting evidence of concrete economic harm from the regulated industries.²⁴ In doing so, the court refused to entertain regulatory challenges brought by industry parties that had a significant stake in seeing the EPA action overturned and thus presented a live case and controversy between the industry parties and the EPA. Nonetheless, the court refused to fulfill its important role in checking the actions of the executive agency.

I. THE CONSTITUTIONAL BASIS FOR STANDING

Article III of the U.S. Constitution restricts the power of the federal courts to hear only “cases” and “controversies.”²⁵ In 1792, in one of its earliest decisions, the U.S. Supreme Court ruled that the “case” and “controversy” requirements of Article III prevented federal courts from issuing mere advisory opinions where there was no actual dispute between the litigants, and it therefore refused to offer President George Washington guidance as to how the Nation could lawfully maintain neutrality in the event of an outbreak of hostilities between England and France.²⁶

Since then, federal courts have established three interrelated doctrines to address this Article III limitation on their jurisdiction: standing; ripeness; and mootness. Standing under Article III requires a plaintiff to demonstrate an actual stake in the outcome of the litigation by showing an injury-in-fact, that such injury is fairly traceable to the defendant’s challenged action or inaction, and that the injury is one that could be redressed by a favorable decision from the court.²⁷

²⁴ See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *rev’d in part sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014); *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012); *Alliance of Automobile Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463 (D.C. Cir. Oct. 21, 2014) (per curiam).

²⁵ U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . [and] to Controversies to which the United States shall be a Party . . .”).

²⁶ Letter from the Supreme Court to President George Washington (Aug. 8, 1793) (on file with the National Archives), *available at* <http://founders.archives.gov/documents/Washington/05-13-02-0263>, *archived at* <http://perma.cc/W4QM-46U8>.

²⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Allen v. Wright*, 468 U.S. 737, 751 (1984). In addition to these Article III standing requirements, federal courts have also determined whether a litigant has “prudential standing,” i.e., that the interest the plaintiff seeks to protect is within the “zone of interests” to be protected or regulated by the statute in question. *Grocery Mfrs. Ass’n*, 693 F.3d at 179 (quoting *Nat’l Petrochem. Refiners Ass’n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir.2002) (per curiam)). For example, federal courts have dismissed challenges under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4370h (2012), that have sought to vindicate purely economic interests that are not related to the environmental interests NEPA aims to protect. See *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 945 (9th Cir. 2005); *Thompson Metal Fab, Inc. v. U.S. Dep’t of Transp.*, 289 F.R.D. 637, 642 (D. Or. 2013). In *Ashley Creek*, the Ninth Circuit dismissed, for lack of prudential standing, a lawsuit challenging a phosphate mining project under NEPA because the

The ripeness doctrine prevents courts from entertaining a lawsuit too soon, that is, before the facts have developed to a point where a live controversy exists between the litigants.²⁸ Mootness prevents courts from entertaining a lawsuit too late, that is, after the circumstances have developed to a point where there is no longer a live controversy between the litigants, even though there was one earlier in time.²⁹

Two of these constitutionally-based doctrines—ripeness and mootness—were created by the courts to avoid being drawn into political or policy disputes before those controversies were fully developed or after the judiciary could afford meaningful relief to the litigants.³⁰ Standing also protects the Article III Branch in another way: by focusing on the parties and ensuring that they have adequate motivation to present the court with a comprehensive factual record and the best legal arguments supporting their respective positions.³¹

At their cores, however, these three doctrines are nothing more than judicially created standards designed to effectuate the case and controversy re-

plaintiff's only interest was that of a competing supplier of phosphate who stood to benefit if the project did not go forward. 420 F.3d at 945. The court held that "[i]n light of the purpose of [section] 102(2)(C) [of NEPA]—protection of the environment—and the specific statutory requirements for the content of an [environmental impact statement,] . . . a purely economic injury that is not intertwined with an environmental interest does not fall within [section] 102's zone of interests." *Id.* The doctrine of prudential standing is beyond the scope of this Article. It should be noted, however, that the moniker "prudential standing" is in question after the Supreme Court's decision in *Lexmark Int'l Inc. v. Static Control Components, Inc.*, which found the term to be a "misnomer." 134 S. Ct. 1377, 1387 (2014) (quoting *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J., concurring)). Rather, a court should "determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim," i.e., whether "this particular class of persons ha[s] a right to sue under this substantive statute." *Id.*

²⁸ See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). The basic rationale for the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from becoming entangled in abstract disagreements. *Id.* at 148.

²⁹ See *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). In *DeFunis v. Odegaard*, the Supreme Court dismissed on mootness grounds the appeal of a student who had been denied admission to law school, but had then been provisionally admitted during the pendency of the case and was months away from graduating. *Id.* at 314, 320; see also *Wildearth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1178 (10th Cir. 2012) (dismissing as moot an environmental group's citizen suit against an energy company for building a new coal-fired power plant without a valid construction permit where the defendant finished construction of the plant while the suit was pending and the alleged violations could not reasonably be anticipated to recur).

³⁰ See *DeFunis*, 416 U.S. at 317; *Abbot Labs.*, 387 U.S. at 148–49 (stating that the ripeness doctrine is meant to prevent courts from adjudicating "abstract disagreements," and requires courts "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration"); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241–42 (1937) (holding that a justiciable controversy must be definite and concrete, not hypothetical or abstract).

³¹ See *Lujan*, 504 U.S. at 560–61 (noting that the party invoking federal jurisdiction has the burden of proving each element of standing).

strictions of Article III of the Constitution.³² They each stem from the “concern about the proper—and properly limited—role of the courts in a democratic society.”³³ This concern is especially acute in lawsuits challenging government action or inaction, for entangling courts in such matters where there is no genuine case or controversy between the litigants “would significantly alter the allocation of power . . . away from a democratic form of government.”³⁴ The standing doctrine reflects the fundamental jurisdictional limitation of federal courts by requiring that “the plaintiff . . . alleg[e] such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction.”³⁵

II. APPLICATION OF THE STANDING DOCTRINE IN ENVIRONMENTAL REGULATORY CHALLENGES

In litigation challenging environmental regulatory actions, an assessment of the plaintiff’s standing generally falls into one of four categories: (1) individual entities—or their trade associations³⁶—that are the object of the regulatory action; (2) business interests that are not the direct object of the regulatory action but suffer a “competitive injury” based on the impact of the action on their competitors; (3) individuals and environmental special interest groups seeking to protect or enhance the environment; and (4) governments appearing as *parens patriae* to protect the environmental interests of their citizens and public lands.³⁷ Although the constitutional underpinnings of the standing doctrine are the same no matter the context of the litigation, in practice courts have applied different burdens for establishing standing depending on the category under which the particular action falls.³⁸

³² See *id.* at 560 (observing that standing is an essential part of Article III’s case and controversy restrictions); *Allen*, 468 U.S. at 751 (noting that the standing requirement “has a core component derived directly from the Constitution”).

³³ *Warth v. Seldin*, 422 U.S. 490, 498 (1975); see Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–66 (1973) (acknowledging that the three doctrines demonstrate a “strong ambivalence” about the role of judicial review in a democratic society).

³⁴ See *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring); see also *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3, (1964) (noting that the inability of federal courts “to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy”).

³⁵ *Warth*, 422 U.S. at 498–99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

³⁶ Trade associations and public interest groups must also meet the test for “organizational standing,” which requires the organization to show that: “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977).

³⁷ See *infra* notes 39–109 and accompanying text.

³⁸ See *infra* notes 39–109 and accompanying text.

A. Standing of Parties That Are the Object of Agency Action

The standing of parties that are the object of the challenged agency action has been a relatively straightforward matter until recently. Where an administrative agency effectively says to the regulated community “thou shalt do X,” or “thou art prohibited from doing Y,” standing to challenge that action has typically been presumed.³⁹ The U.S. Supreme Court has recognized that in circumstances where the plaintiff is himself an object of the action or inaction at issue, “there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.”⁴⁰

On the injury-in-fact prong, the courts have generally accepted the costs associated with regulatory compliance as satisfying the constitutional minimum for standing.⁴¹ In most circumstances, the costs of a regulatory action or inaction will be evident from the administrative record because the industry “petitioner ordinarily will have participated in the proceedings before the agency.”⁴² Generally, therefore, when the industry is the direct target of the regulation under attack, its claim to “standing to seek review of administrative action is self-evident.”⁴³ This presumption alleviates the burden of the regulated industry to aver facts establishing standing, for in contrast to the other types of challenges discussed herein, “no evidence outside the administrative record is necessary for the court to be sure of” standing in these circumstances.⁴⁴ Consequently, questions of standing are often not even raised in regulatory challenges brought by parties that are the direct object of the regulation.⁴⁵

³⁹ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561–62 (1992).

⁴⁰ *Id.*

⁴¹ See generally *Iowa League of Cities v. EPA*, 711 F.3d 844, 870 (8th Cir. 2013) (holding that a group of cities had suffered injury in fact where complying with EPA water treatment regulations would be costly); *City of Wausheka v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003) (finding the city had sufficient injury in fact because it would face substantial costs to comply with EPA drinking water regulations).

⁴² See *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002).

⁴³ *Id.* at 899–90.

⁴⁴ *Id.* at 890. The Rules of the U.S. Court of Appeals for the District of Columbia Circuit provide that “[i]n cases involving direct review in this court of administrative actions, the brief of the appellant or petitioner must set forth the basis for the claim of standing.” D.C. Cir. R. 28(a)(7). The Rules further provide that “[w]hen the appellant’s or petitioner’s standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing.” *Id.* (citing *Sierra Club*, 292 F.3d at 900–01).

⁴⁵ See generally *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *rev’d*, 134 S. Ct. 1584 (2013) (noting the standing question was not raised in challenge brought by industry groups to EPA Cross-State Air Pollution Rule); *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (noting the standing question was not raised in challenge brought by electric utilities to a EPA rule regarding the emission of hazardous air pollutants from coal and oil-fired electric utility steam generating units).

B. Standing of Non-Regulated Parties to Assert Competitive Harm

The judiciary has also acknowledged that a company or industry can suffer constitutionally cognizable injury-in-fact even if it is not the specific target of the challenged regulation. Courts have accepted indirect economic losses resulting from the impact of a regulatory action on others as sufficient to establish standing.⁴⁶ The doctrine of competitor standing recognizes “that economic actors suffer an injury-in-fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them.”⁴⁷ A loosening of obligations on a competing entity or industry can create economic harm by enhancing their ability to compete and, thereby, damaging the enterprise value of the petitioner.⁴⁸ Significantly, in contrast to challenges brought by entities that are the direct object of a regulatory action, standing in challenges alleging competitive harm is generally not self-evident and must therefore be established by averring specific facts showing that all three standing prongs are satisfied.⁴⁹

In *Honeywell International Inc. v. EPA*, for example, the U.S. Court of Appeals for the District of Columbia Circuit held that a manufacturer of an approved substitute for a particular ozone-depleting chemical had standing to challenge an Environmental Protection Agency (EPA) rule authorizing the use of other substitutes.⁵⁰ The court found that the petitioner had established an injury-in-fact—lost sales of its product—and held that that injury was traceable to the EPA’s action “because the rule legalizes the entry of a product into a market in which Honeywell competes.”⁵¹ Redressability was established because “a favorable opinion of the court could remove the competing chemicals from the market.”⁵²

⁴⁶ See *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (finding that increased competition might injure a business); *Louisiana Energy & Power Auth. v. Fed. Energy Regulatory Comm’n*, 141 F.3d 364, 367 (D.C. Cir. 1998) (recognizing that plaintiff electricity provider suffered an injury-in-fact when the Federal Energy Regulatory Commission allowed plaintiff’s competitor to sell electricity at more favorable rates).

⁴⁷ *Sherley*, 610 F.3d at 72.

⁴⁸ *Honeywell Int’l Inc. v. EPA*, 374 F.3d 1363, 1369 (D.C. Cir. 2004); *Louisiana Energy & Power Auth.*, 141 F.3d at 367.

⁴⁹ See, e.g., *Honeywell*, 374 F.3d at 1368–69 (discussing affidavit); *Bristol-Myers Squibb Co. v. Shalala*, 91 F.3d 1493, 1497–99 (D.C. Cir. 1996) (requiring complaint to allege specific facts that show standing); see *supra* notes 7–8 and accompanying text (laying out the three standing prongs).

⁵⁰ 374 F.3d at 1369.

⁵¹ *Id.*

⁵² *Id.* at 1369–70.

*C. Standing of Advocacy Organizations Seeking to
Protect the Environment*

Standing in the context of individuals and advocacy groups seeking to protect the environment traces back to the U.S. Court of Appeals for the Second Circuit's 1966 decision in *Scenic Hudson Preservation Conference v. Federal Power Commission (Storm King)*.⁵³ In the nearly five decades since *Storm King*, courts have struggled to strike a balance between limiting federal courts' jurisdiction and allowing litigants their day in court.⁵⁴ With *Storm King*, the judiciary began a string of rulings that would relax traditional standing requirements for environmental groups.⁵⁵ *Storm King* marked the first time that a federal Court of Appeals held that an environmental group could satisfy standing based on their members' "special interest in aesthetic, conservational, and recreational aspects" of the environment and that traditional economic harm was not essential.⁵⁶

The Supreme Court soon joined the Second Circuit in relaxing traditional injury-in-fact requirements for environmental interest groups.⁵⁷ In *Sierra Club v. Morton*, the Court acknowledged that Article III standing could arise from injury to "scenery, natural and historical objects, and wildlife and . . . impair[ment] of the enjoyment of the [environment] for future generations."⁵⁸ The Court gave that injury-in-fact prong a similarly liberal interpretation in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*.⁵⁹ The Court found that Students Challenging Regulatory Agency Procedures ("SCRAP")—an unincorporated association of five law students—had standing to challenge Interstate Commerce Commission orders authorizing a railroad rate increase on the transport of scrap materials because the students "used the forests, streams, mountains, and other resources in the Washington metropolitan area for camping, hiking, fishing, and sightseeing, and that this use was disturbed by the ad-

⁵³ 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). Storm King Mountain stands along the west bank of the Hudson River. *Id.* at 611. Consolidated Edison planned to carve away part of the mountain adjoining the river and construct a pump storage hydro-electric plant with transmission lines across the river. *Id.*

⁵⁴ See *infra* notes 55–109 and accompanying text.

⁵⁵ See *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183–84 (2000) (finding that interest group members had standing to sue because they demonstrated that their recreational, aesthetic, and economic interests in a waterway were affected by defendant's pollutant discharge); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 685 (1973) (holding that a group of law students had met the elements of standing by showing that their use of an outdoor area would be negatively affected by a rate increase on recyclable goods); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (broadening the categories of injury that may be alleged to assert standing beyond economic harm).

⁵⁶ 354 F.2d at 616.

⁵⁷ See *Sierra Club*, 405 U.S. at 738.

⁵⁸ *Id.* at 734.

⁵⁹ See 412 U.S. at 685.

verse environmental impact caused by the nonuse of recyclable goods brought about by a rate increase on those commodities.”⁶⁰ Although the Court recognized that “many people suffer the same injury,” it still found the allegations of “a specific and perceptible harm” distinguished SCRAP members from the general population.⁶¹ The Court expressed no concern over the chain of causation between a rate hike for the rail transport of scrap materials and increased environmental degradation resulting from an assumed reduction in the use of recycled goods.⁶²

In *Lujan v. Defenders of Wildlife*, the Court appeared to take a step back from the *SCRAP* ruling, and focused on the redressability prong of standing that was overlooked in *SCRAP*.⁶³ In that case, the environmental group elected not to attack a particular project, but instead mounted a programmatic challenge to a government action—asserting that the Endangered Species Act (“ESA”) required interagency consultation not only on domestic actions, but on federally funded international activities as well.⁶⁴ The Court held that the petitioners had failed to establish the “irreducible constitutional minimum of standing,” which requires three showings.⁶⁵ First, the plaintiff must show an “‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not conjectural or hypothetical.’”⁶⁶ Second, “there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’”⁶⁷ Finally, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision’” of the court.⁶⁸

In *Lujan*, the Court found the connection between the plaintiffs’ alleged injury—harm to a species overseas by an action funded by a federal agency that was not required to undertake interagency consultation under the ESA—and the available remedy—a remand requiring the ESA consultation regulations be extended to foreign activities—to be too remote to sustain standing.⁶⁹ Writing for

⁶⁰ *Id.*

⁶¹ *Id.* at 687–89.

⁶² *See id.* at 685. Justice White, dissenting in this case, believed that the causation between the rate hike and increased environmental degradation should have been the plaintiffs’ downfall, stating that “the alleged injuries are so remote, speculative, and insubstantial in fact that they fail to confer standing.” *Id.* at 723 (White, J., dissenting).

⁶³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁶⁴ *Id.* at 559.

⁶⁵ *Id.* at 560.

⁶⁶ *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 756 (1984)).

⁶⁷ *Id.* (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

⁶⁸ *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43).

⁶⁹ *Id.* at 568–69.

the majority, Justice Scalia placed great weight on the fact that the federal actors who would actually fund the international projects that would harm the foreign species were not before the Court.⁷⁰ The attenuated remedial chain, in combination with an independent actor—the funding agency—who was not a party to the litigation, was held to defeat redressability and thus deny standing.⁷¹

Similarly, in *Steel Co. v. Citizens for a Better Environment*, the Court again found that an environmental group lacked standing.⁷² In that case, a steel plant's neighbors sued concerning violations of the Emergency Planning and Community Right-to-Know Act ("EPCRA").⁷³ The sole injury-in-fact claimed was purely informational—the plaintiffs wanted the reports required under the statute.⁷⁴ The Court questioned whether informational injury alone could satisfy Article III injury-in-fact, but again based its ruling on redressability.⁷⁵ As none of the specific items of relief sought—(a) a declaratory judgment that the facility violated EPCRA, (b) access to emission records, (c) injunctive relief allowing periodic inspections by the environmental group of the site, (d) copies of plant compliance reports, (e) the payment of both civil penalties to the Treasury, and (f) the citizen group's attorneys' fees—would address the claimed injuries from late EPCRA reporting, the Supreme Court concluded that the environmental group's harm could not be redressed by any order it had the power to issue.⁷⁶

With the turn of the century, the Supreme Court's interest in the 1970s and 1980s of using redressability to constrain the liberal environmental standing rulings appeared to wane. This trend is exemplified by the Court's decision in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, in which it found the plaintiffs had standing to protect their aesthetic, recreational, and economic interests in a river.⁷⁷ Although not a challenge to agency rulemaking, the Court demonstrated its sometimes lax requirements for standing in cases involving a public interest group acting as a citizen enforcer of a federal environmental law.⁷⁸ The plaintiff members' affidavits offered no evidence that the river had actually been injured by the defendant's Clean Water Act permit violations, but the statements did claim that members who resided near the facility had curtailed swimming, fishing, and other recreational uses because of the *potential effects* of

⁷⁰ *Id.* at 569.

⁷¹ *Id.* at 568–69.

⁷² 523 U.S. 83, 109–10 (1998).

⁷³ *Id.* at 86.

⁷⁴ *Id.* at 104–05.

⁷⁵ *Id.* at 105.

⁷⁶ *Id.* at 105–06, 109–10.

⁷⁷ 528 U.S. 167, 169 (2000).

⁷⁸ *See id.* at 181–83 (finding that members' affidavits describing their curtailed use of the North Tyger River due to defendant's pollutant discharge into that river met the elements of standing).

the permit exceedences.⁷⁹ For the Court—even in the absence of proof of actual environmental harm to the waterway—the voluntary constraint of outdoor activity adequately demonstrated injury-in-fact and standing.⁸⁰

The arc of Supreme Court environmental interest group standing jurisprudence—see-sawing from *Morton* and *SCRAP* to *Lujan* and *Steel Co.*, and then back to *Laidlaw*—exposes a Court struggling to define the limits of the relaxed standing requirements it has afforded environmental plaintiffs.⁸¹ Thus far, the Court's decisions appear to reveal a settled willingness to accept non-economic, recreational or aesthetic harms as sufficient to establish injury-in-fact.⁸² An episodic Court majority, however, remains convinced that Article III is not satisfied by member affidavits that are not tightly linked to the geographic location where the injury occurred and is troubled by redressability when the effectiveness of the available remedies depends upon the assumed actions of third parties.⁸³

One of the most recent D.C. Circuit cases to address the standing of environmental organizations to challenge agency action, *Sierra Club v. Jewell*, demonstrates how the pendulum has swung back in the direction of permissive standing in such cases.⁸⁴ There, environmental organizations brought an action challenging a decision removing the Blair Mountain Battlefield (the “Battlefield”) from the Register of Historic Places (the “Register”), which the plaintiffs alleged would potentially open up the site to surface mining.⁸⁵ A divided panel held that the plaintiffs had standing even though the land in question was privately owned and the organizations' members therefore had no right to access it.⁸⁶ The panel extended the type of cognizable aesthetic interest that confers standing to “observing the landscape from surrounding areas,” and “enjoying the Battlefield while on public roads.”⁸⁷ Addressing the causation and redressability prongs, the panel rejected the finding of the district court that surface mining would take place even if the Battlefield were delisted because the restrictions on

⁷⁹ *Id.* at 182–83.

⁸⁰ *Id.* at 183, 185–86.

⁸¹ See *supra* notes 57–80 and accompanying text (illustrating the inconsistent ideological approach to relaxed standing requirements for environmental plaintiffs).

⁸² See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 685 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 738 (1972).

⁸³ See, e.g., *Summers v. Earth Island Inst.*, 555 U.S. 488, 495–96 (2009) (holding that environmental organizations lacked standing to challenge U.S. Forest Service regulations exempting certain types of fire-rehabilitation activities and salvage-timber sales from the notice, comment, and appeal process, where the organizations did not offer any evidence concerning an actual or threatened Forest Service action that would harm any of their members).

⁸⁴ See generally 764 F.3d 1 (D.C. Cir. 2014) (aligning with the Supreme Court's decisions in *Morton* and *SCRAP* in the early 1970s by holding that harm to the plaintiffs' interest in observing the landscape meets the injury-in-fact prong of standing).

⁸⁵ *Id.* at 3–4.

⁸⁶ *Id.* at 6.

⁸⁷ *Id.*

mining on property listed in the Register contained an exception for permits with valid and existing rights.⁸⁸ The panel noted that the extent to which this exception would limit mining activities on the property was open to interpretation, and so long as the plaintiffs offered a “non-frivolous contention” that its requested relief would redress its injuries, standing was satisfied.⁸⁹

Although the burden of *proof* for an environmental advocacy group to show standing may be relatively low, the burden of *production* can be demanding.⁹⁰ In contrast to challenges brought by the regulated community where standing may be “self-evident,”⁹¹ a court will not simply presume that an environmental group or its members have standing to challenge an action of the EPA.⁹² Rather, “[t]he party invoking federal jurisdiction bears the burden of establishing these elements.”⁹³ Generally, this showing is made through affidavits submitted by members of the environmental group establishing “through specific facts” that they are among the parties injured by the government’s action or inaction.⁹⁴ Moreover, given that the plaintiffs in such challenges are not the direct object of the government action or inaction being challenged, adducing evidence establishing harm, causation, and redressability “is ordinarily ‘substantially more difficult’ to establish” than it would be for a party that is the object of the action or inaction.⁹⁵

D. Standing of State Governments Suing as *Parens Patriae*

In the *parens patriae* context, the Supreme Court has recently recognized the special position of a sovereign protecting the interests of its citizens and its territory. In *Massachusetts v. EPA*, the Court addressed a challenge to the EPA’s decision not to regulate greenhouse gas (“GHG”) emissions from motor vehicles.⁹⁶ The Commonwealth asserted standing by claiming that rising ocean levels associated with global warming endangered the Massachusetts shore and that the Commonwealth was losing coastal property to the rising sea levels.⁹⁷ The

⁸⁸ *Id.* at 8.

⁸⁹ *Id.* at 8–9.

⁹⁰ See generally *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000) (granting standing to members of an environmental advocacy group who had presented affidavits documenting the different aesthetic and recreational harms they might suffer); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (requiring plaintiffs to show, through affidavits or other specific facts, that they were directly affected by defendant’s conduct).

⁹¹ See *supra* note 43 and accompanying text.

⁹² See *Lujan*, 504 U.S. at 561.

⁹³ *Id.*

⁹⁴ *Id.* at 563.

⁹⁵ *Id.* at 561–62.

⁹⁶ 549 U.S. 497, 505 (2007).

⁹⁷ *Id.* at 522.

EPA focused its standing attack on the “redressability” prong, arguing that even if there is a causal connection between man-made GHG emissions and global warming, any action by the EPA to limit GHG emissions from motor vehicles would have only an insignificant impact on Massachusetts’ purported injuries because any reductions achieved in domestic automobile emissions would be overwhelmed by anticipated increases in emissions occurring in other nations.⁹⁸ A majority of the Court rejected this argument.⁹⁹ The Court found redressability satisfied so long as the desired remedy—GHG regulation of the U.S. automotive fleet—would contribute in some way to alleviating the petitioner’s alleged injury.¹⁰⁰

The Supreme Court cited to two bases for its relaxed approach to redressability in *Massachusetts v. EPA*: (1) the fact that Massachusetts was seeking to vindicate a “procedural right” accorded by Congress in the Clean Air Act, i.e., the right to challenge an agency action unlawfully withheld,¹⁰¹ and (2) the fact that Massachusetts was acting in a quasi-sovereign capacity.¹⁰² The majority stressed the “special position and interest of Massachusetts” as a sovereign State and not a private individual.¹⁰³ Tracing precedent back ninety-nine years, the Court concluded “States are not normal litigants for invoking federal jurisdiction” and, accordingly, granted “the Commonwealth . . . special solicitude in [the] standing analysis.”¹⁰⁴

After *Massachusetts v. EPA*, it can be assumed that a state acting as *parens patriae* will have a relatively easy hurdle to overcome in invoking federal jurisdiction and in satisfying the Supreme Court’s standing requirements.¹⁰⁵ Given,

⁹⁸ *Id.* at 523–24; *see also* COMM. ON SCI., ENG’G, & PUB. POL’Y, NAT’L ACAD. OF SCI., POLICY IMPLICATIONS OF GREENHOUSE WARMING: MITIGATION, ADAPTION, AND THE SCIENCE BASE 5 (1992), available at http://dgc.stanford.edu/labs/caldeiralab/Caldeira%20downloads/Geoengineering_NAS1992.pdf, archived at <http://perma.cc/VT39-J34D>.

[G]reenhouse gases released anywhere in the world disperse rapidly in the global atmosphere. Neither the location of release nor the activity resulting in a release makes much difference. A molecule of CO₂ from a cooking fire in Yellowstone or India is subject to the same laws of chemistry and physics in the atmosphere as a molecule from the exhaust pipe of a high-performance auto in Indiana or Europe.

COMM. ON SCI., ENG’G, & PUB. POL’Y, *supra*, at 5.

⁹⁹ *Mass. v. EPA*, 549 U.S. at 524–25.

¹⁰⁰ *Id.* at 526.

¹⁰¹ *Id.* at 517; *see* 5 U.S.C. § 706(1) (2012) (requiring a reviewing court to compel agency action unlawfully withheld); 42 U.S.C. § 7607(b)(1) (2012) (allowing a party to petition for review of the promulgation of air quality or emissions standards).

¹⁰² *Mass. v. EPA*, 549 U.S. at 520.

¹⁰³ *Id.* at 518.

¹⁰⁴ *Id.* at 518, 520.

¹⁰⁵ *See id.* at 520 (granting Massachusetts “special solicitude in the Court’s standing analysis given that the state was protecting its “quasi-sovereign interests”).

however, the heavy reliance of the *Massachusetts v. EPA* Court's standing analysis on the sovereign prerogatives that the State was seeking to vindicate and the majority's pointed efforts to distinguish the State from private parties, there would be danger in extrapolating this approach to standing to cases brought only by industry trade associations or environmental groups.¹⁰⁶

Indeed, courts have refused to extend this relaxed standing test to private litigants also seeking to compel regulatory actions to reduce GHG emissions from industrial sources. In 2013, in *Washington Environmental Council v. Bellon*, for instance, the U.S. Court of Appeals for the Ninth Circuit held that an environmental advocacy group did not have standing to challenge the Washington State Department of Ecology's decision not to require oil refineries to install control technology to limit GHG emissions.¹⁰⁷ Despite alleging the same sort of harm and seeking the same sort of remedy as the State petitioners in *Massachusetts v. EPA*, the Ninth Circuit held that the plaintiffs in *Washington Environmental Council* could not show a causal link between their "localized injuries and the greenhouse effect" given that "a multitude of independent third parties are responsible for the changes contributing to Plaintiffs' injuries," and because they could not show that the pollution controls they sought would have any impact alleviating their alleged injuries.¹⁰⁸ The court distinguished *Massachusetts v. EPA* principally on the basis that "the present case [does not involve] a sovereign state," and held that because the plaintiffs were private organizations, they "cannot avail themselves of the 'special solicitude' extended to Massachusetts by the Supreme Court."¹⁰⁹

III. RECENT CASES LIMITING STANDING FOR INDUSTRY PETITIONERS SEEKING TO CHALLENGE EPA REGULATORY ACTIONS

Despite the general presumption discussed above that standing is self-evident for entities that are the object of a regulatory program, three recent decisions by the U.S. Court of Appeals for the District of Columbia Circuit—*Coalition for Responsible Regulation, Inc. v. EPA*,¹¹⁰ *Grocery Manufacturers*

¹⁰⁶ See *id.*; Bradford Mank, *Should States Have Greater Standing Rights Than Ordinary Citizens?: Massachusetts v. EPA's New Standing Test for States*, 49 WM. & MARY L. REV. 1701, 1704 (2008) (arguing that although providing more lenient standing rights to states than to private individuals, the Court was unclear about when and to what extent states are entitled to easier standing).

¹⁰⁷ 732 F.3d 1131, 1147 (9th Cir. 2013).

¹⁰⁸ *Id.* at 1143, 1144, 1146.

¹⁰⁹ *Id.* at 1145; see also RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 146 (6th ed. 2009) (speculating that in future standing cases, *Mass. v. EPA* could be easily distinguished because it involved the "special solicitude" of a state protecting its quasi-sovereign interests).

¹¹⁰ 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *rev'd in part sub nom.* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).

Ass'n v. EPA,¹¹¹ and *Alliance of Automobile Manufacturers v. EPA*¹¹²—appear to have raised the standing bar for such litigants.¹¹³ These decisions were rendered in the context of two Environmental Protection Agency (EPA) regulatory programs: (1) EPA's stationary source permitting program for GHG emissions;¹¹⁴ and (2) EPA's decision to allow the sale of gasoline containing up to fifteen percent ethanol ("E15") and its subsequent rule to prevent misfueling with E15.¹¹⁵

Two observations arise from the courts' holdings in these cases. First, the standing outcomes in the challenges to both of these programs stemmed in part from the courts' narrow assessment of the specific regulatory actions before them—or, as one dissenting Judge put it, in an "isolation chamber"¹¹⁶—and not of how those actions fit into broader regulatory programs that, taken together, undeniably impacted the industry.¹¹⁷ Each program caused harm to the regulated entities when viewed in the broader regulatory context in which it operates.¹¹⁸ But in order to make the programs feasible, the EPA was compelled to undertake ancillary actions that on their face served to ameliorate the burdens on the affected industries.¹¹⁹ Rather than focus on the regulatory programs as a whole when assessing whether the challenged rule caused a redressable harm to the regulated industries, the D.C. Circuit focused on each EPA decision separately.¹²⁰ Based

¹¹¹ 693 F.3d 169 (D.C. Cir. 2012).

¹¹² No. 11-1334, 2014 WL 5838463 (D.C. Cir. Oct. 21, 2014) (per curiam).

¹¹³ See *infra* notes 263–294 and accompanying text.

¹¹⁴ See 42 U.S.C. § 7475 (2012) (requiring a permit for all major stationary sources of air pollution); Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,514 (June 3, 2010) [hereinafter Tailoring Rule] (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (tailoring the criteria for determining which stationary sources fall under the permitting requirements for greenhouse gas ("GHG") emissions under the Clean Air Act).

¹¹⁵ Regulation to Mitigate the Misfueling of Vehicles and Engines with Gasoline Containing Greater Than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs, 76 Fed. Reg. 44,406 (Jul. 25, 2011) [hereinafter Misfueling Mitigation Rule] (to be codified at 40 C.F.R. pt. 80); Partial Grant and Partial Denial of Clean Air Act Waiver to Increase the Allowable Ethanol Content of Gasoline to 15 Percent, 75 Fed. Reg. 68,094, 68,095 (Nov. 4, 2010) [hereinafter E15 Partial Waiver] (notice).

¹¹⁶ *Grocery Mfrs. Ass'n*, 693 F.3d at 189 (Kavanaugh, J., dissenting).

¹¹⁷ See *id.* at 178; *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 146 (D.C. Cir. 2012) (per curiam), *rev'd in part sub nom.* *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). (finding petitioners lacked standing because the EPA's Timing and Tailoring Rules did not cause petitioners specific injury in fact).

¹¹⁸ See generally 42 U.S.C. § 7475(o)(2) (providing a renewable fuel program that requires an increasing amount of renewable fuels be introduced to market every year between 2006 and 2022); 40 C.F.R. §§ 80.1406 (2014) (naming petroleum refiners as obligated parties under the renewable fuel program), 80.1427 (requiring obligated parties to contribute to the increasing volume of renewable fuels).

¹¹⁹ See *infra* notes 144–150 and accompanying text.

¹²⁰ See *Grocery Mfrs. Ass'n*, 693 F.3d at 175–76 (rejecting plaintiffs alleged causal link between new fueling standards and potential liability the plaintiffs might incur due to consumers using the wrong fuel in engines manufactured by the plaintiffs); *infra* notes 151–227 and accompanying text.

on this isolated view, the D.C. Circuit held that the parties challenging the EPA action lacked standing because the individual actions before the court—when viewed in isolation—did not cause them harm.¹²¹ Significantly, the D.C. Circuit’s dismissals of these challenges on standing grounds were outcome-determinative, as they shielded from review controversial EPA actions that stood on shaky legal grounds.

The second observation is that through these opinions, the D.C. Circuit appears to be viewing industry standing with a much more skeptical eye than courts have in the past—more skeptical even than courts are currently assessing standing for environmental groups.¹²² In contrast to environmental groups, which can establish standing by showing that an agency action or inaction threatens its members aesthetic interests of enjoying the environment, industry groups are being required to offer specific and concrete evidence of direct economic harm.¹²³ Often, however, the impact of an EPA action to the regulated community goes beyond dollars and cents.¹²⁴ Yet despite the fact that the petitioners in such challenges seek to protect significant business interests, and therefore present a live controversy against the EPA, the D.C. Circuit has been reluctant to find standing.¹²⁵

A. The Challenge to the EPA’s Tailoring Rule in Coalition for Responsible Regulation, Inc. v. EPA

1. Legal and Regulatory Background of the Tailoring Rule and the EPA’s Stationary Source GHG Rulemaking

In 2010, the EPA issued several rules that together required stationary sources of air pollution to obtain permits for their GHG emissions, with a principle focus on their carbon dioxide emissions.¹²⁶ These rules were a result of the Supreme Court’s decision in *Massachusetts v. EPA*, which held that the EPA has the authority to regulate GHG emissions under the Clean Air Act (“CAA”) and is

¹²¹ *Grocery Mfrs. Ass’n*, 693 F.3d at 175–77.

¹²² *Compare* *City of Wausheka v. EPA*, 320 F.3d 228, 234 (D.C. Cir. 2003) (finding plaintiff city had shown injury in fact where it would face substantial costs to comply with EPA regulations), *with* *Coal. for Responsible Regulation*, 684 F.3d at 146 (finding that industry petitioners did not suffer injury by being subjected to the regulation of GHGs).

¹²³ *Compare* *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000) (holding that members of environmental advocacy group had suffered sufficient injury to have standing where the members alleged aesthetic and recreational harms due to pollution of a river), *with* *Alliance of Auto. Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463, at *2 (D.C. Cir. Oct. 21, 2014) (*per curiam*) (finding that industry petitioners lacked standing in part due the lack of specificity with which they alleged economic harms).

¹²⁴ *See infra* notes 197–203 and accompanying text.

¹²⁵ *See supra* notes 110–124 and accompanying text.

¹²⁶ *See infra* notes 129–147 and accompanying text.

required to promulgate regulations limiting GHG emissions from new motor vehicles if the Agency were to make an “endangerment finding” under section 202(a) of the Act.¹²⁷

That decision spurred a cascade of regulations targeting both mobile and stationary sources of GHG emissions.¹²⁸ First, the EPA made an endangerment finding under section 202(a) (the “Endangerment Finding”), concluding that “elevated concentrations of [GHGs] in the atmosphere . . . endanger the public health and . . . welfare,” and that “emissions of . . . [GHGs] from new motor vehicles contribute to [that] air pollution.”¹²⁹ In light of that Endangerment Finding, the EPA and the National Highway Traffic Safety Administration subsequently jointly issued the “Tailpipe Rule,” establishing fuel economy and GHG emission standards for light duty vehicles.¹³⁰

These actions put the EPA at a crossroad because the promulgation of the Tailpipe Rule arguably triggered stationary source GHG permitting requirements under the CAA’s Prevention of Significant Deterioration (“PSD”) program and Title V permitting program.¹³¹ The PSD program requires new and modified “major emitting facilit[ies]” to undergo permitting if the source or modification will result in an increase in air pollution.¹³² The statute defines “major emitting facility” as a stationary source that emits or has the potential to emit 250 tons per year (“tpy”) of “any air pollutant,” or 100-tpy of “any air pollutant” for statutori-

¹²⁷ 549 U.S. 497, 528 (2007); see 42 U.S.C. § 7521(a) (2012). That section provides in relevant part:

The Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a).

¹²⁸ See Charles Riordan, Comment, *Barring the Gates: Timing and Tailoring Environmental Standing and Greenhouse Gas Regulation After Corri v. EPA*, 40 B.C. ENVTL. AFF. L. REV. 567, 570–72 (2012).

¹²⁹ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516, 66,537 (Dec. 15, 2009) [hereinafter the Endangerment Finding] (to be codified at 40 C.F.R. ch. I).

¹³⁰ Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) [hereinafter the Tailpipe Rule] (to be codified at 49 C.F.R. pts. 531, 533, 536–538).

¹³¹ See Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,355 (proposed July 30, 2008) (to be codified at 40 C.F.R. ch. I) (pointing out that “it has become clear that if EPA were to regulate [GHG] emissions from motor vehicles under the [CAA], then regulation of smaller stationary sources that also emit GHGs—such as apartment buildings, large homes, schools, and hospitals—could also be triggered”).

¹³² 42 U.S.C. §§ 7475, 7479 (2012).

ly enumerated industrial source categories.¹³³ As a condition for obtaining a PSD permit, the Act requires that the facility must comply with emissions limitations reflecting the “best available control technology” (“BACT”) for “each pollutant subject to regulation under [the Act].”¹³⁴ In a 1980 rulemaking construing the PSD provisions of the CAA, the EPA determined that all “major stationary sources” were subject to the PSD program, and defined “major stationary sources” as those that emit “any air pollutant subject to regulation under the Act” in amounts above the statutory thresholds.¹³⁵ Similarly, Title V requires an operating permit for any “major stationary source” that has the potential to emit at least 100-tpy of “any air pollutant.”¹³⁶

Applying these statutory thresholds to carbon dioxide created a dilemma for the EPA after *Massachusetts v. EPA* because unlike traditional air pollutants regulated by the EPA, such as sulfur dioxide and particulate matter, carbon dioxide is emitted in large quantities from many types of stationary sources.¹³⁷ Thus, applying these statutory thresholds to carbon dioxide would sweep a myriad of sources into the PSD and Title V permitting programs for the first time and at a cost of billions of dollars.¹³⁸ In fact, the EPA found that “[t]o apply the statutory PSD and [T]itle V applicability thresholds literally to sources of GHG emissions would bring tens of thousands of small sources and modifications into the PSD program each year, and millions of small sources into the [T]itle V program.”¹³⁹ These new sources could include hotels, hospitals, schools and churches—entities that Congress did not intend to be subject to permitting under the CAA.¹⁴⁰

The EPA also found that the workload and cost of incorporating these new sources into the permitting programs would be substantial and potentially unworkable, stating, “[t]he total additional workload, in work hours, for PSD per-

¹³³ *Id.* § 7479(1).

¹³⁴ *Id.* § 7475(a)(4).

¹³⁵ Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 45 Fed. Reg. 52,676, 52,730 (Aug. 7, 1980) (to be codified at 40 C.F.R. pts. 51, 52, and 124).

¹³⁶ 42 U.S.C. §§ 7602(j), 7661a(a) (2012).

¹³⁷ See Tailoring Rule, 75 Fed. Reg. 31,514, 31,535 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (noting that a reason the statutory thresholds would apply to so many additional sources is that many sources emit large quantities of carbon dioxide from generating heat or electricity); *Clean Energy: Air Emissions*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/cleanenergy/energy-and-you/affect/air-emissions.html> (last updated May 22, 2014), archived at <http://perma.cc/S5XY-FB5M> (showing that fossil fuel-fired power plants account for seventy percent of sulfur dioxide emissions in the United States, but only forty percent of the country’s carbon dioxide emissions).

¹³⁸ Tailoring Rule, 75 Fed. Reg. at 31,536.

¹³⁹ *Id.* at 31,533.

¹⁴⁰ Regulating Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354, 44,375 (proposed July 30, 2008).

mits would be more than 19.5 million more work hours, compared to 150,795 work hours for the current PSD program, and the total additional costs would be over \$1.5 billion, compared with \$12 million for the current PSD program.”¹⁴¹ Indeed, the EPA recognized that applying PSD and Title V permitting to carbon dioxide would be entirely contrary to the intent of Congress, which was to require only large industrial sources to be subject to permitting requirements.¹⁴² The EPA therefore concluded that doing so would be an “absurd result.”¹⁴³

The EPA was therefore put to a choice: either reconsider its historical interpretation of the scope of PSD and Title V, and instead construe those provisions such that they do not apply to carbon dioxide, or continue construing these provisions as applying to all pollutants subject to regulation under the CAA, but ignore the Act’s unambiguous emissions thresholds.¹⁴⁴ The EPA chose the latter course. In April 2010, it issued the so-called “Timing Rule” in which it determined that regulating vehicular GHG emissions under section 202 triggers PSD and Title V permitting requirements as of the date that the motor vehicle GHG regulations took effect (which in that case was January 2, 2011).¹⁴⁵ In the EPA’s

¹⁴¹ Tailoring Rule, 75 Fed. Reg. at 31,557.

¹⁴² *Id.* at 31,555. The Tailoring Rule states,

Congress’s mechanism for limiting PSD was the 100/250 tpy threshold limitations. Focused as it was primarily on NAAQS pollutants [i.e., pollutants regulated under the National Ambient Air Quality Standards], Congress considered sources that emit NAAQS pollutants in those quantities generally to be the large industrial sources to which it intended PSD to be limited.

Id. The preamble further notes that,

It is not too much to say that applying PSD requirements literally to GHG sources at the present time—in the absence of streamlining or increasing permitting authority resources and without tailoring the definition of “major emitting facility” or “modification”—would result in a program that would have been unrecognizable to the Congress that designed PSD. Congress intended that PSD be limited to a relatively small number of large industrial sources.

Id.

¹⁴³ Tailoring Rule, 75 Fed. Reg. 31,514, 31,541 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

¹⁴⁴ For example, opponents of the EPA’s rulemaking argued that the term “any air pollutant” should be read in the context of the PSD programs, which is to prevent areas of the country from backsliding with respect to compliance with National Ambient Air Quality Standards (“NAAQS”), and should therefore not include GHGs because they are not regulated under the NAAQS program. *See, e.g.*, Comment of the Utility Air Regulatory Group (UARG), Docket EPA-HQ-OAR-2009-0517-5317, at 4, 23 n.9, Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule Step 3, 77 Fed. Reg. 14,226 (proposed Mar. 8, 2012), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0517-5317>, archived at <http://perma.cc/E7GL-7CFV>. As will be discussed in greater detail below, a version of this view was ultimately adopted by the Supreme Court in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

¹⁴⁵ Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) [hereinafter the Timing Rule].

view, that determination provided a concession to the industry by delaying the applicability of PSD and Title V to GHG emissions until the Tailpipe Rule went into effect, as opposed to when it was finally promulgated.¹⁴⁶ In order to address the “absurdity” of applying the CAA’s numeric thresholds to carbon dioxide emissions, the EPA subsequently issued the so-called “Tailoring Rule” in which the Agency decided to lower the thresholds for PSD and Title V such that permitting would be required only for sources with the potential to emit at least 100,000 tpy of carbon dioxide, and to require BACT where a source proposes to increase its emissions by at least 75,000-tpy of carbon dioxide.¹⁴⁷

The preambles to the Timing Rule and the Tailoring Rule show that the EPA was only able to make the resulting regulation workable, and thus subject stationary sources to GHG permitting, by relying on both rules. In the preamble to the April 2, 2010 Timing Rule, the EPA recognized “the substantial challenges associated with incorporating GHGs into the PSD program” and explained that “given the substantial magnitude of the PSD implementation challenges presented by the regulation of GHGs, EPA proposed in the Tailoring Rule to at least temporarily limit the scope of GHG sources covered by the PSD program to ensure that permitting authorities can effectively implement it.”¹⁴⁸ The EPA further explained that in light of the “significant administrative challenges presented by the application of the PSD and Title V requirements for GHGs “it was “necessary to defer applying the PSD and Title V provisions for sources that are major based only on emissions of GHGs until a date that extends beyond January 2, 2011.”¹⁴⁹ In the Tailoring Rule, the EPA explained that “construing the PSD and title V requirements literally (as previously interpreted narrowly by EPA) would render it impossible for permitting authorities to administer the PSD provisions.”¹⁵⁰

¹⁴⁶ *Id.* at 17,006.

¹⁴⁷ Tailoring Rule, 75 Fed. Reg. at 31,516. The EPA justified the Tailoring Rule on three doctrines of administrative law: (1) “absurd results,” which allows an agency to avoid the literal reading of a statute in order to avoid results that are plainly contrary to the intent of Congress; (2) “administrative necessity,” which allows an agency to construe a statute in a manner that would make it possible for the agency to perform its functions; and (3) “one step at a time,” under which an agency may address mandates through phased action. *Id.* at 31,541–42.

¹⁴⁸ Timing Rule, 75 Fed. Reg. at 17,020.

¹⁴⁹ *Id.* at 17,007.

¹⁵⁰ Tailoring Rule, 75 Fed. Reg. 31,514, 31,542 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

2. The D.C. Circuit Dismissed Challenges to the Tailoring Rule on Standing Grounds and Upheld the Rest of the EPA's Stationary Source GHG Permitting Program

Several state coalitions, industry trade associations, and public interest groups challenged the EPA's GHG rulemaking in the D.C. Circuit.¹⁵¹ These challenges raised three broad issues: (1) the scientific basis for the EPA's Endangerment Finding, (2) the legal bases for the Timing Rule and the Tailoring Rule, and (3) the EPA's decision to promulgate motor-vehicle emission standards under section 202(a), despite the Agency's conclusion that doing so would trigger costly stationary-source regulation.¹⁵²

In addition to supporting the merits of its rulemaking, the EPA argued that the petitioners lacked standing to challenge the Timing and the Tailoring rules because "neither the Timing Decision nor the Tailoring Rule caused the injury Petitioners allege: having to comply with PSD and Title V for emission of [GHGs]." ¹⁵³ Specifically, the EPA argued that "[w]ithout the Timing Decision, both State and Industry Petitioners would have been subject to PSD and Title V for [GHGs] at significantly earlier times than January 2, 2011" and "[w]ithout the Tailoring Rule, Industry will face PSD and Title V applicability for millions of additional sources and States will be required to permit all of these sources."¹⁵⁴ Strictly speaking, of course, these arguments were correct; viewed in isolation these decisions alleviated the industry's burdens of the EPA's determination that the CAA requires that GHG emissions be subject to PSD and Title V requirements.¹⁵⁵ But, it was clear from the regulatory record that both of these rules were necessary prerequisites to the EPA's stationary source GHG permitting programs that, taken as a whole, indisputably caused injury to the regulated community.¹⁵⁶

¹⁵¹ *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012) (per curiam), *rev'd in part sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

¹⁵² *Id.*

¹⁵³ Final Brief for Respondents at 79, *Coal. for Responsible Regulation*, 684 F.3d 102 (No. 10-1073).

¹⁵⁴ *Id.*

¹⁵⁵ *See id.*

¹⁵⁶ *See Tailoring Rule*, 75 Fed. Reg. 31,514, 31,557 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71). The preamble to the Tailoring Rule states,

We consider it difficult to overstate the impact that applying PSD requirements literally to GHG sources as of January 2, 2011—before streamlining or increasing permitting resources and without tailoring—would have on permitting authorities and on the PSD program, and we are concerned that this impact could adversely affect national economic development. The number of PSD permits that would be required from such an approach is far beyond what the PSD program has seen to date. It is clear throughout the country, PSD permit issuance would be unable to keep up with the flood of incoming applications, resulting in delays, at the outset, that would be at least a decade or longer,

In *Coalition for Responsible Regulation v. EPA*, a three-judge panel of the D.C. Circuit agreed with the EPA's position on standing, and held that "[p]etitioners have failed to establish that the Timing and Tailoring Rules caused them 'injury in fact,' much less injury that could be redressed by the Rules' vacatur."¹⁵⁷ The court found that although "Industry Petitioners contend[ed] that they are injured because they are subject to regulation of [GHGs]," they lacked standing because "neither the Timing nor Tailoring Rules caused the injury Petitioners allege: having to comply with PSD and Title V for [GHGs]."¹⁵⁸ To the contrary, the court found,

[T]he Timing and Tailoring Rules actually mitigate Petitioners' purported injuries. Without the Timing Rule, Petitioners may well have been subject to PSD and Title V for [GHGs] before January 2, 2011. Without the Tailoring Rule, an even greater number of industry and state-owned sources would be subject to PSD and Title V, and state authorities would be overwhelmed with millions of additional permit applications. Thus, Petitioners have failed to "show that, absent the government's allegedly unlawful actions, there is a substantial probability that they would not be injured and that, if the court affords the relief requested, the injury will be removed."¹⁵⁹

Having kept the Tailoring Rule intact on account of its standing decision, there was nothing preventing the court from upholding the EPA's decision that PSD and Title V permitting were statutorily required once GHGs were subject to regulation under section 202(a) with respect to motor vehicles.¹⁶⁰ The court agreed with the EPA's position that its interpretation applying PSD and Title V permitting to all pollutants subject to regulation under the Act was "compelled" by the text of the statute.¹⁶¹

The D.C. Circuit reached its conclusion despite its concession that "phrases like 'any air pollutant' are, in certain contexts, capable of a more limited meaning."¹⁶² The court nonetheless determined that the petitioners had "failed to identify any reasons that the phrase should be read narrowly here."¹⁶³ Of course, the

and that would only grow worse over time as each year, the number of new permit applications would exceed permitting authority resources for that year.

Id.

¹⁵⁷ *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 146 (D.C. Cir. 2012) (per curiam), *rev'd in part sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014)

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* (quoting *Chamber of Commerce v. EPA*, 642 F.3d 192, 201 (D.C. Cir. 2011)).

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 143–44.

¹⁶² *Id.* at 143.

¹⁶³ *Id.*

EPA itself was offering the reason that the phrase “any air pollutant” should have been given a narrow reading in the PSD and Title V contexts: it would be impossible to implement the programs applying a broad reading to include GHGs.¹⁶⁴ The D.C. Circuit, however, did not have to face the merits of this issue because it held that no party had standing to challenge the Tailoring Rule, which was the vehicle used by the EPA to alleviate the absurdity of its construction of the statute.¹⁶⁵

3. The U.S. Supreme Court Overturned the Tailoring Rule Without Directly Addressing the Standing Question and Struck Down Portions of the EPA’s Stationary Source GHG Permitting Program

After the D.C. Circuit denied rehearing *en banc*, the Supreme Court granted certiorari for *Utility Air Regulatory Group v. EPA*, but limited the question to “[w]hether EPA permissibly determined that its regulation of [GHG] emissions from new motor vehicles triggered permitting requirements under the CAA for stationary sources that emit [GHGs].”¹⁶⁶ In an opinion written by Justice Scalia, a bare majority of the Court reversed the D.C. Circuit’s holding that the CAA “compelled” the EPA’s interpretation that PSD and Title V applied to GHGs once they were regulated under Title II, and in fact found that such a reading was not even permissible under the Act.¹⁶⁷ Although the Supreme Court did not *expressly* overrule the D.C. Circuit’s decision on standing to challenge the Tailoring Rule, the court understood how that rule was a necessary component of the EPA’s stationary source rulemaking, and therefore addressed it on the merits.¹⁶⁸ The Court recognized the “calamitous consequences” of applying PSD and Title V to GHGs,¹⁶⁹ and how the EPA tried to use the Tailoring Rule to ameliorate those concerns:

EPA thought that despite the foregoing problems, it could make its interpretation [that the CAA compels stationary source permitting for GHG emissions once those substances are regulated anywhere under the Act] reasonable by adjusting the levels at which a source’s [GHG] emissions would oblige it to undergo PSD and Title V permitting. Although the Act, in no uncertain terms, requires permits for sources

¹⁶⁴ See *supra* notes 141–156 and accompanying text.

¹⁶⁵ See *Coal. for Responsible Regulation*, 684 F.3d at 146. The D.C. Circuit also upheld the other portions of the EPA’s GHG rulemaking, the Endangerment Finding and the Tailpipe Rule. *Id.* at 116–29.

¹⁶⁶ *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2438 (2014).

¹⁶⁷ *Id.* at 2439–43.

¹⁶⁸ See *id.* at 2438, 2445.

¹⁶⁹ *Id.* at 2442.

with the potential to emit more than 100 or 250 tons per year of a relevant pollutant, EPA in its Tailoring Rule wrote a new threshold of *100,000* tons per year for [GHGs]. Since the Court of Appeals thought the statute unambiguously made [GHGs] capable of triggering PSD and Title V, it held that petitioners lacked Article III standing to challenge the Tailoring Rule because that rule did not injure petitioners but merely relaxed the pre-existing statutory requirements. Because we, however, hold that EPA's [GHG]-inclusive interpretation of the triggers was *not* compelled, and because EPA has essentially admitted that its interpretation would be unreasonable without "tailoring," we consider the validity of the Tailoring Rule.¹⁷⁰

On the merits, the Court held that "EPA's rewriting of the statutory thresholds was impermissible and therefore could not validate the Agency's interpretation of the triggering provisions."¹⁷¹ An agency, the Court held, has "no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms."¹⁷² Ultimately, the Court held, "[b]ecause the Tailoring Rule cannot save EPA's interpretation of the triggers, that interpretation was impermissible under *Chevron*."¹⁷³

Although the Supreme Court did not expressly overrule the D.C. Circuit's decision that no party had standing to challenge the Tailoring Rule, it is difficult not to read that decision as implicitly overruling that decision because the Court proceeded to the merits of that regulatory action.¹⁷⁴ Once the Tailoring Rule was struck down, there was no pillar with which the EPA could support the rest of its regulatory program.¹⁷⁵ The Supreme Court held that the EPA could not reasonably read the CAA's PSD and Title V provisions as applying to GHG emissions precisely *because* the Agency lacked the authority to "tailor" the statute to make such a regulatory program work in practice.¹⁷⁶ It is clear that any successful challenge to the EPA's stationary source GHG permitting program would have required the petitioners to also challenge the Tailoring Rule.¹⁷⁷ Consequently, an

¹⁷⁰ *Id.* at 2444–45.

¹⁷¹ *Id.* at 2445.

¹⁷² *Id.*

¹⁷³ *Id.* at 2446. The Court, however, upheld the EPA's determination that BACT may apply to a stationary source's GHG emissions if that source would otherwise have triggered PSD permitting on account of emissions of non-GHG pollutants. *Id.* at 2447–49. Here, the CAA's provisions were not ambiguous: "To obtain a PSD permit, a source must be 'subject to the best available control technology' for 'each pollutant subject to regulation under [the Act]' that it emits." *Id.* at 2447 (quoting 42 U.S.C. § 7475(a)(4) (2012)).

¹⁷⁴ *See id.* at 2447.

¹⁷⁵ *See id.* at 2446.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

assessment of whether the Tailoring Rule caused the regulated industry harm should not have been made in an “isolation chamber,” but rather in the broader context of the regulatory program.¹⁷⁸

B. Challenges to the EPA’s E15 Partial Waiver and the Misfueling Mitigation Rule in Grocery Manufacturers Association v. EPA and Alliance of Automobile Manufacturers v. EPA

1. Legal and Regulatory Background of the E15 Waiver and the Misfueling Mitigation Rule

The EPA’s partial waiver to allow the sale of gasoline with E15, and its subsequent rule to prevent misfueling with E15, present a very similar scenario to the legal challenge to the Tailoring Rule in which the D.C. Circuit viewed each rulemaking in an “isolation chamber” and found that the petitioners lacked standing.¹⁷⁹ These actions stemmed from section 211 of the CAA, which outlines the EPA’s regulatory obligation with respect to transportation fuels.¹⁸⁰ Section 211(o) contains the CAA’s Renewable Fuel Standards (“RFS”) program.¹⁸¹ The RFS program was created under the Energy Policy Act of 2005, and established mandates for the volume of renewable fuels that must be sold in the United States.¹⁸² The Energy Independence and Security Act of 2007 increased the volume of renewable fuel required to be blended into transportation fuel from 9 billion gallons in 2008 to 36 billion gallons by 2022.¹⁸³ Ethanol derived from corn is a renewable fuel under the statute.¹⁸⁴ Until recently, however, the amount of ethanol allowed in motor fuel was limited to ten percent (known as “E10”).¹⁸⁵ This volume restriction limited the total amount of ethanol that could be used to satisfy the RFS.¹⁸⁶

Consequently, ethanol producers petitioned the EPA to allow the sale of gasoline with up to fifteen percent ethanol (known as “E15”).¹⁸⁷ This request

¹⁷⁸ See *id.*; *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 186, 189 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

¹⁷⁹ See *Grocery Mfrs. Ass’n*, 693 F.3d at 180, 189.

¹⁸⁰ 42 U.S.C. § 7545 (2012).

¹⁸¹ *Id.* § 7545(o).

¹⁸² Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1501–1520, 119 Stat. 594, 1067–92 (2005).

¹⁸³ Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 202, 121 Stat. 1491, 1521–22 (2007).

¹⁸⁴ 42 U.S.C. § 7545(o)(1)(F).

¹⁸⁵ E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,095 (Nov. 4, 2010) (notice) (“Prior to today’s action, ethanol was limited to [ten percent by volume] in motor vehicle gasoline (E10).”).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

implicated the fuel waiver provision found in section 211(f) of the CAA.¹⁸⁸ The statute provides that no fuel or fuel additive may be introduced into commerce unless it is “substantially similar” to one already used in the certification of vehicles or engines subject to federal emissions standards.¹⁸⁹ The EPA may “waive” this restriction for a particular fuel or fuel additive if it finds that:

[S]uch fuel or fuel additive or a specified concentration thereof, and the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified [pursuant to the Act].¹⁹⁰

In a decision published on November 4, 2010, the EPA took the unusual step of granting a “partial waiver” for E15, allowing it to be offered for sale for use in motor vehicles from model year (“MY”) 2007 and later.¹⁹¹ The Agency deferred a decision on whether to approve E15 for use in MY2001–2006 motor vehicles pending completion of studies by the Department of Energy.¹⁹² Subsequently, the EPA issued a second partial waiver allowing the use of E15 in MY2001–2006 light duty vehicles.¹⁹³ Significantly, the EPA denied the waiver for MY2000 and older vehicles and for non-road engines and other vehicles because the Agency could not determine that the use of E15 in such vehicles and engines would not contribute to failures of emissions controls.¹⁹⁴ The partial waiver decision was contingent upon the EPA finalizing a rule “mitigating the potential for misfueling of E15 in all vehicles, engines and equipment for which E15 is not approved,” which had been proposed at the time of the partial waiver decision.¹⁹⁵ In July 2011, the EPA finalized its Misfueling Mitigation Rule, which prohibits the use of E15 in vehicles and engines for which it is not approved, requires a prescribed warning label on pumps dispensing E15, requires “product transfer documents specifying . . . ethanol content . . . [to] accompany the transfer of gasoline blended with ethanol through the fuel distribution sys-

¹⁸⁸ *Id.* at 68,094.

¹⁸⁹ 42 U.S.C. § 7545(f)(1)(B) (2012).

¹⁹⁰ *Id.* § 7545(f)(4) (alteration to original).

¹⁹¹ See E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,095 (Nov. 4, 2010) (notice).

¹⁹² *Id.* at 68,094.

¹⁹³ Partial Grant of Clean Air Act Waiver Application to Increase the Allowable Ethanol Content of Gasoline to 15 Percent, 76 Fed. Reg. 4662 (Jan. 26, 2011).

¹⁹⁴ E15 Partial Waiver, 75 Fed. Reg. at 68,097–98.

¹⁹⁵ *Id.* at 68,098.

tem,” and requires “a survey of retail stations to ensure compliance with the requirements for E15 labeling”¹⁹⁶

2. The D.C. Circuit Dismissed Challenges to the E15 Waiver and the Misfueling Mitigation Rule on Standing Grounds

In *Grocery Manufacturers* and *Alliance of Automobile Manufacturers*, these EPA actions were each challenged by trade groups claiming that their members were harmed by the E15 regulatory program.¹⁹⁷ The so-called “engine-products group,” which consisted of trade associations representing manufacturers of motor vehicles and non-road engines, challenged both the E15 Partial Waiver and the E15 Misfueling Mitigation Rule.¹⁹⁸ The engine products group asserted that E15 causes damage to both pre-MY2000 and post-MY2000 motor vehicles and engines and to non-road engines, thus subjecting them to potential lawsuits, recalls, and reputational harm.¹⁹⁹ For example, vehicle and engine manufacturers submitted studies suggesting that “allowing the use of E15 in motor vehicles could cause a substantial number of motor vehicles to fail emissions standards because of increased catalyst deterioration over the motor vehicles’ full useful life”²⁰⁰ Evidence was also submitted in the administrative record showing that increased concentrations of ethanol accelerates the corrosion of engine parts,²⁰¹ and may pose “a significant safety hazard to operators of small non-road engines”²⁰² The engine products group also challenged the Misfueling Mitigation Rule, arguing that its measures were not sufficient to prevent misfueling and that a stronger and more detailed warning label should be required.²⁰³

¹⁹⁶ Misfueling Mitigation Rule, 76 Fed. Reg. 44,406, 44,406 (Jul. 25, 2011) (to be codified at 40 C.F.R. pt. 80). The EPA also denied a petition for rulemaking to require retail stations to continue to offer E10 for sale. *Id.*

¹⁹⁷ *Alliance of Auto. Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463, at *1 (D.C. Cir. Oct. 21, 2014); *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 173 (D.C. Cir. 2012).

¹⁹⁸ *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *1; *Grocery Mfrs. Ass’n*, 693 F.3d at 173.

¹⁹⁹ *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2; *Grocery Mfrs. Ass’n*, 693 F.3d at 175–76.

²⁰⁰ E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,102 (Nov. 4, 2010) (notice).

²⁰¹ Indeed, the EPA found that for MY2000 and older vehicles, E15 use “may result in degradation of metallic and non-metallic components in the fuel and evaporative emissions control systems that can lead to highly elevated hydrocarbon emissions from both vapor and liquid leaks” and that “[p]otential problems such as fuel pump corrosion or fuel hose swelling will likely be worse with E15 than historically with E10, especially if motor vehicles operate exclusively on it.” *Id.* at 68,129.

²⁰² *Id.* at 68,133.

²⁰³ See Joint Brief of Petitioners at 16–22, 27–31, *Alliance of Auto. Mfrs.*, No. 11-1334, 2014 WL 5838463. In fact the EPA tacitly recognized that a certain amount of misfueling would continue even with the implementation of the E15 Misfueling Mitigation Rule. See Misfueling Mitigation Rule, 76 Fed. Reg. 44,406, 44,432 (Jul. 25, 2011) (to be codified at 40 C.F.R. pt. 80) (concluding that the proposed rule will only “reduce the potential for misfueling and consequent emission increases and repairs to nonroad products and MY2000 and older motor vehicles,” but not eliminate it entirely).

A second group consisting of trade associations representing petroleum refiners and marketers (the so-called “petroleum group”) also challenged both the E15 Partial Waiver and the Misfueling Mitigation Rule.²⁰⁴ The petroleum group argued that refining, transporting, and storing E15 would increase their costs of doing business.²⁰⁵ For example, petroleum refiners and importers are obligated parties under the RFS, and therefore will be required to introduce E15 into commerce.²⁰⁶ Additionally, granting the partial waiver for E15 meant that there would be another gasoline-ethanol blend in the market in addition to E10, and petroleum marketers would be required to undertake special fuel production, transportation, and fuel segregation efforts to accommodate E15, all at additional costs to these parties.²⁰⁷ As to the Misfueling Mitigation Rule, the petroleum group pointed out that that rule imposed the costs and burdens of the labeling, transfer documentation, and compliance survey directly on its members.²⁰⁸

A third group, which consisted of trade associations of food producers (the so-called “food group”), challenged the E15 Partial Waiver, but not the Misfueling Mitigation Rule.²⁰⁹ The food group claimed that allowing the increased use of ethanol for fuel enhanced the demand for (and hence the price of) corn.²¹⁰ For instance, the EPA’s analyses showed that the incremental demand for corn ethanol resulting from the RFS would result in an 8.2% increase in the price of corn and a 10.3% increase in the price of soybeans.²¹¹

In separate decisions issued just over two years apart, the D.C. Circuit held that none of the petitioners had standing to challenge either of these EPA actions.²¹² The remainder of this Part will focus on the Article III standing of the petroleum group and the engine products group in both of these decisions.²¹³ In

²⁰⁴ *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *1; *Grocery Mfrs. Ass’n*, 693 F.3d at 176–77.

²⁰⁵ *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *1; *Grocery Mfrs. Ass’n*, 693 F.3d at 177.

²⁰⁶ See Opening Brief for Petitioners at 19, *Grocery Mfrs. Ass’n*, 693 F.3d at 169 (No. 10-1380).

²⁰⁷ *Id.* These contentions were supported by citations to the administrative record of the E15 Partial Waiver. *Id.*

²⁰⁸ See Joint Brief of Petitioners, *supra* note 203, at 8, 12–13.

²⁰⁹ See *Grocery Mfrs. Ass’n*, 693 F.3d at 179.

²¹⁰ *Id.*

²¹¹ Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,683 (Mar. 26, 2010) (codified at 40 C.F.R. pt. 80).

²¹² *Alliance of Auto. Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463, at *1–2 (D.C. Cir. Oct. 21, 2014); *Grocery Mfrs. Ass’n*, 693 F.3d at 169.

²¹³ A majority of the *Grocery Manufacturers* court held that the food group lacked prudential standing, and therefore the panel’s decision, written by Judge Sentelle, did not address whether the food group had Article III standing. 693 F.3d at 179. Judge Tatel concurred with Judge Sentelle that the engine products group and the petroleum group lacked Article III standing and that food group lacked prudential standing. *Id.* at 180 (Tatel, J., concurring). He agreed, however, with dissenting Judge Kavanaugh that the food group had Article III standing based on competitive harm. *Id.* Judge Kavanaugh would have found that the food group and the petroleum group had both Article III standing and prudential standing, and did not address the standing of the engine products group. *Id.* at 180–

each instance the D.C. Circuit—similar to its approach to the GHG Tailoring Rule—myopically considered just the rulemaking before it, without considering how that EPA action would impact the parties in the broader context of the EPA’s fuels program.²¹⁴ In doing so, the court again did not address the merits of an EPA action that was based on an aggressive reading of the scope of the Agency’s statutory authority.²¹⁵

a. The Petroleum Group’s Standing in Grocery Manufacturers Association v. EPA and Alliance of Automobile Manufacturers v. EPA

In *Grocery Manufacturers*, the petroleum group presented evidence in the administrative record that the combination of the RFS and the E15 partial waiver would effectively compel its members to blend and market E15 and that doing so would subject them to increased operating costs like storage and transportation, among others.²¹⁶ Nonetheless, the panel determined that the E15 Partial Waiver, *standing alone*, did not cause them any harm because it was not, strictly speaking, compulsory.²¹⁷ The court concluded that it could not “fairly trace the petroleum group’s asserted injuries in fact—the new costs and liabilities of introducing and dealing with E15—to the administrative action under review in this case” because it “does not force, require, or even encourage fuel manufacturers or any related entity to introduce the new fuel; it simply permits them to do so”²¹⁸

The panel rejected the petroleum group’s argument that the partial waiver combined with the RFS caused harm by effectively requiring the blending and marketing of E15.²¹⁹ First, the court found that even if the RFS and the partial waiver compelled the blending and marketing of E15, it is the RFS and not the partial waiver that caused the injury.²²⁰ Alternatively, the court found that the petroleum group had “not established that refiners and importers will indeed have to introduce E15 to meet their volume requirements under the RFS” because the standard does not obligate the use of E15 to meet the volume requirements and because the CAA provides mechanisms by which the EPA can waive

90 (Kavanaugh, J., dissenting). Because the question of the food group’s standing turned on prudential standing and competitive harm, it will not be addressed in this article. For a discussion of the food group’s standing, see Kimberly R. Wendell, *Time to Take a Stand: Grocery Manufacturers Association v. Environmental Protection Agency*, 34 ENERGY L.J. 687, 701–07 (2013).

²¹⁴ See *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2; *Grocery Mfrs. Ass’n*, 693 F.3d at 174–80.

²¹⁵ See *infra* notes 258–261 and accompanying text.

²¹⁶ See *Grocery Mfrs. Ass’n*, 693 F.3d at 176–77.

²¹⁷ *Id.* at 176–79.

²¹⁸ *Id.* at 177.

²¹⁹ *Id.* at 178; Opening Brief of Petitioners, *supra* note 206, at 19–20.

²²⁰ *Grocery Mfrs. Ass’n*, 693 F.3d at 178.

the volume requirements.²²¹ The panel also rejected the argument that the E15 Partial Waiver would cause harm to downstream entities that are involved in the transfer, handling, and blending of E15.²²² Again, the panel focused on the fact that the partial waiver is not a compulsory regulation but rather gives blenders and refiners a choice:

Neither the RFS nor the partial E15 waivers “require” downstream entities to have anything to do with E15. If they face any pressure to handle E15, it is likely economic in nature. Downstream parties very well might lose business if they decline to blend or otherwise deal with E15, but that makes the choice to handle E15 one they make in their own self-interest, not one forced by any particular administrative action.²²³

Judge Kavanaugh’s strongly worded dissent in *Grocery Manufacturers* disagreed with the panel’s determination that the petroleum group lacked standing.²²⁴ Judge Kavanaugh conceded that “the E15 waiver *alone* does not require the petroleum group to use E15, make changes, and incur costs.”²²⁵ He pointed out, however, that the court “cannot consider the E15 waiver in some kind of isolation chamber,” and when viewed in its broader context, “the combination of the renewable fuel mandate *and* the E15 waiver will force gasoline producers to produce E15.”²²⁶ Therefore, Judge Kavanaugh concluded, “the petroleum group’s injury is not self-imposed, but is directly caused by the agency action under review in this case.”²²⁷

A separate panel of the D.C. Circuit concluded in *Alliance of Automobile Manufacturers* that the petroleum group also lacked standing to challenge the Misfueling Mitigation Rule.²²⁸ The court reached this conclusion despite the fact that the petroleum group’s members are the object of the regulations that would directly impose regulatory restrictions and costs on sellers of E15.²²⁹ The court found that standing was not self-evident because the petroleum group offered “no evidence that any of its members sells or plans to sell E15.”²³⁰

²²¹ *Id.* at 177–78 (citing 42 U.S.C. § 7545(o)(7)(A)(i)–(ii), (D)–(F) (2012)).

²²² *Id.* at 178.

²²³ *Id.*

²²⁴ *Id.* at 189 (Kavanaugh, J., dissenting).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Alliance of Auto. Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463, at *2–3 (D.C. Cir. Oct. 21, 2014).

²²⁹ *See id.*

²³⁰ *Id.* at *3.

b. The Engine Products Group's Standing in Grocery Manufacturers Association v. EPA and Alliance of Automobile Manufacturers v. EPA

The standing of the engine products group must be analyzed in the context of both the E15 Partial Waiver (which did not allow the use of E15 in pre-MY2001 motor vehicles and non-road engines because it could cause harm to such engines) and the Misfueling Mitigation Rule (which was intended to prevent the use of E15 in those engines in which it could cause harm).²³¹ In both *Grocery Manufacturers* and *Alliance of Automobile*, the D.C. Circuit again denied the industry standing without considering the interplay between these rules.²³²

The engine products group supported its standing to challenge the E15 Partial Waiver by citing to the administrative record, which shows that E15 can cause damage to both vehicles and engines for which it has been approved and for which it has not been approved, thus subjecting the manufacturers of such vehicles and engines to reputational harm and increased costs from warranty and safety-related claims.²³³ Indeed, the EPA effectively conceded that E15 could cause harm to older vehicles and non-road engines through its refusal to grant a waiver for the use of E15 in such vehicles and engines.²³⁴ The EPA also conceded through the promulgation of the Misfueling Mitigation Rule that there is a substantial risk that consumers would either intentionally or unintentionally use E15 in vehicles and engines for which it has not been approved.²³⁵ Further, evidence was presented in the rulemaking record that misfueling with an unapproved fuel is common, especially where the approved fuel is more expensive than the unapproved fuel.²³⁶

Nevertheless, the D.C. Circuit found that the engine products group had failed to establish standing to challenge either the E15 Partial Waiver or the Misfueling Mitigation Rule.²³⁷ The *Grocery Manufacturers* court held that “the engine manufacturers provide almost no support for their assertion that E15 ‘may’

²³¹ See *Grocery Mfrs. Ass'n*, 693 F.3d at 175–76.

²³² See *id.*

²³³ *Id.*

²³⁴ E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,129 (Nov. 4, 2010) (notice).

²³⁵ Misfueling Mitigation Rule, 76 Fed. Reg. 44,406, 44,407 (Jul. 25, 2011) (to be codified at 40 C.F.R. pt. 80) (implementing misfueling mitigation measures and a “substantial consumer education and outreach effort” in order to minimize unintentional use of E15).

²³⁶ See KRIS KISER ET AL., COMMENTS OF ALLIANCE FOR A SAFE ALTERNATIVE FUELS ENVIRONMENTAL (ALLSAFE) AND THE OUTDOOR POWER EQUIPMENT INSTITUTE (OPEI) 2–3 (2009), available at <http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0211-2490>, archived at <http://perma.cc/E24Z-EY63> (pointing out that after the EPA phased out leaded gasoline in the 1970s, there was widespread intentional misfueling with leaded gasoline despite the fact that fuel inlets for new motor vehicles were redesigned with narrower diameters in order to prevent the insertion of the larger-diameter nozzles that dispensed leaded gasoline).

²³⁷ *Grocery Mfrs. Ass'n*, 693 F.3d at 175–76.

damage the engines they have sold, subjecting them to liability.”²³⁸ This conclusion, however, was at odds with the EPA’s decision not to grant a waiver for pre-MY2001 vehicles or for non-road engines, and with the evidence discussed above concerning damage that E15 was found to cause such engines.²³⁹ The D.C. Circuit further held that any harm to the members of the engine products group from misfueling with E15 was “speculative” and dependent on the acts of third parties misfueling with E15.²⁴⁰

In light of the evidence in the administrative record that E15 will cause damage to pre-MY2001 vehicles and non-road engines, and that the danger of misfueling is significant enough to warrant a separate EPA rule, the only way to rationalize the decision of the *Grocery Manufactures* court is in the context of the Misfueling Mitigation Rule.²⁴¹ Indeed, the D.C. Circuit recognized the danger that vehicles and engines manufactured by the engine products group may be harmed through misfueling, and conceded that preventing misfueling was an important aspect of the EPA’s program.²⁴² Referring to the then-pending Misfueling Mitigation Rule, the court explained:

The term “misfueling,” as used in the EPA decisions, refers to the use of E15 in pre-2001 vehicles and other non-approved vehicles, engines, and equipment. The misfueling mitigation conditions and strategies which EPA set forth as necessary for such a plan included pump-labeling requirements, participation in a pump-labeling and fuel-sample compliance survey, and proper documentation of ethanol content on transfer documents.²⁴³

Consequently, just as the Tailoring Rule was a necessary prerequisite to the EPA’s stationary source [GHG] permitting program,²⁴⁴ an effective Misfueling

²³⁸ *Id.* at 175.

²³⁹ *See id.*; E15 Partial Waiver, 75 Fed. Reg. at 68,097–98, 68,129. The *Grocery Manufacturers* court also dismissed evidence presented by the engine products group that E15 could cause damage to newer vehicles for which it was approved, concluding that “a single reference to internal testing by Mercedes–Benz documenting a [two] percent hit to fuel economy and ‘potential vehicle damage’ from the use of E15 in Mercedes vehicles” was “hardly evidence of a substantial probability that E15 will cause engine harm.” 693 F.3d at 175–76. But there was evidence beyond the Mercedes–Benz study in the administrative record showing that E15 can harm MY2001 and newer vehicles that the D.C. Circuit did not address. *See supra* notes 120–122 and accompanying text.

²⁴⁰ *Grocery Mfrs. Ass’n*, 693 F.3d at 176.

²⁴¹ *See supra* notes 191–196 and accompanying text (explaining that EPA’s E15 Partial Waiver was contingent upon the finalization of a rule to mitigate the potential for misfueling of E15 in vehicles, engines, and equipment for which E15 is not approved).

²⁴² *Grocery Mfrs. Ass’n*, 693 F.3d at 173.

²⁴³ *Id.*

²⁴⁴ *See* Tailoring Rule, 75 Fed. Reg. 31,514, 31,542 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71); *supra* notes 126–150 and accompanying text.

Mitigation Rule was a necessary prerequisite to a viable E15 Partial Waiver.²⁴⁵ Without an effective Misfueling Mitigation Rule, the E15 Partial Waiver arguably would have been illegal.²⁴⁶ As discussed above, section 211(f) of the CAA prevents the EPA from issuing a waiver for a new fuel unless it finds that the new fuel “will not cause or contribute to a failure of any emission control device or system”²⁴⁷ The EPA’s justification for the partial waiver was that this limitation in section 211(f)(4) would be satisfied so long as the Misfueling Mitigation Rule effectively restricts the use of E15 to only vehicles in which it would not cause a failure of an emission control device or system.²⁴⁸ Thus, there could be no E15 Partial Waiver without the Misfueling Mitigation Rule and specifically, its intended effect of restricting E15 use in the aforementioned manner.²⁴⁹

Nevertheless, a separate panel of the D.C. Circuit, in *Alliance of Automobile Manufacturers*, held that the petitioners lacked standing to challenge the Misfueling Mitigation Rule.²⁵⁰ Addressing the engine products group’s standing in a single short paragraph, the court concluded that the group “failed to offer evidence connecting sales of E15 under the regulation to injuries that EPG members are sufficiently likely to suffer so as to afford it standing.”²⁵¹ But the evidence of the engine products group’s injuries was apparent from the record.²⁵² By the EPA’s own admission, E15 will cause harm when used in pre-MY2001 vehicles and non-road engines, and the EPA promulgated the Misfueling Mitigation Rule for the specific purpose of preventing that harm.²⁵³

It should be evident that manufacturers of vehicles and engines have a vested interest in ensuring that their products will not be harmed by a new fuel for which the engine has not been tested or certified.²⁵⁴ Therefore, the Misfueling Mitigation Rule caused injury to the industry in much the same way that the Tailoring Rule did: by providing the necessary legal foundation for a broader regu-

²⁴⁵ See *supra* notes 179–196 and accompanying text.

²⁴⁶ See 42 U.S.C. § 7545(f)(4) (2012); Misfueling Mitigation Rule, 76 Fed. Reg. 44,406 (Jul. 25, 2011) (to be codified at 40 C.F.R. pt. 80).

²⁴⁷ 42 U.S.C. § 7545(f)(4).

²⁴⁸ See E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,129 (Nov. 4, 2010) (notice) (articulating the EPA’s conclusion that a partial waiver can be issued as to a “subset of motor vehicles” and explaining that the E15 Misfueling Mitigation Rule would ensure that the fuel is used only in approved vehicles); see also Opening Brief of Respondent, *supra* note 206, at 32–34.

²⁴⁹ See E15 Partial Waiver, 75 Fed. Reg. at 68,146; Opening Brief of Respondent, *supra* note 206, at 32–34.

²⁵⁰ *Alliance of Auto. Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463, at *2 (D.C. Cir. Oct. 21, 2014).

²⁵¹ *Id.*

²⁵² See Misfueling Mitigation Rule, 76 Fed. Reg. 44,406 (Jul. 25, 2011) (to be codified at 40 C.F.R. pt. 80); E15 Partial Waiver, 75 Fed. Reg. at 68,129.

²⁵³ See Misfueling Mitigation Rule, 76 Fed. Reg. at 44,406; E15 Partial Waiver, 75 Fed. Reg. at 68,129.

²⁵⁴ See E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,129 (Nov. 4, 2010) (notice).

latory program that caused harm to the industry.²⁵⁵ Nonetheless, the D.C. Circuit determined that the engine products group lacked standing to challenge either the E15 Partial Waiver or the Misfueling Mitigation Rule, in part because the court did not consider whether the waived fuel would cause damage in the absence of a Misfueling Mitigation Rule that would effectively prevent misfueling.²⁵⁶

Moreover, just as was the case with the Tailoring Rule, the D.C. Circuit's decisions that none of the petitioners had standing to challenge the E15 Partial Waiver and the Misfueling Mitigation Rule shielded from review an EPA action that was based on the Agency's very aggressive reading of the statute.²⁵⁷ As Judge Kavanaugh noted in his dissent in *Grocery Manufacturers*, the merits of the E15 Partial Waiver "are not close" given that in "granting the E15 partial waiver, EPA ran roughshod over the relevant statutory limits."²⁵⁸ According to the plain terms of section 211(f)'s waiver provisions, "in order to approve a waiver, EPA must find that the proposed new fuel will not cause any car model made after 1974 to fail emissions standards."²⁵⁹ Despite this clear prohibition, "EPA issued a waiver for E15 even though it acknowledged that E15 likely would contribute to the failure of some cars made after 1974—namely, those made between 1975 and 2000—to achieve compliance with emissions standards."²⁶⁰ Given these facts, Judge Kavanaugh concluded that "EPA's E15 waiver thus plainly runs afoul of the statutory text" and that "EPA's disregard of the statutory text is open and notorious."²⁶¹ Moreover, if the D.C. Circuit had overturned the Misfueling Mitigation Rule, then there would have been no legal foundation for the partial waiver, and presumably, the court would have been forced to vacate it.²⁶²

IV. THE D.C. CIRCUIT'S RECENT DECISIONS IMPOSE MORE EXACTING STANDING REQUIREMENTS ON INDUSTRY PETITIONERS THAN PUBLIC INTEREST GROUPS WHILE STRAYING FROM THE WELL-SETTLED GATE-KEEPING FUNCTION OF THE STANDING DOCTRINE

These recent decisions of the U.S. Court of Appeals for the District of Columbia Circuit appear to make it more difficult for industry petitioners to estab-

²⁵⁵ See *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

²⁵⁶ See *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2.

²⁵⁷ See *id.* at *2–3; *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 175–76 (D.C. Cir. 2012).

²⁵⁸ *Grocery Mfrs. Ass'n*, 693 F.3d at 190 (Kavanaugh, J., dissenting).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² See *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2–3; E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,094 (Nov. 4, 2010) (notice).

lish standing in environmental challenges than it is for environmental advocacy groups, particularly when it comes to showing injury-in-fact.²⁶³ In doing so, the D.C. Circuit is taking standing far beyond its constitutional moorings, and is declining to assert its jurisdiction over lawsuits where there is a live case and controversy between litigants who have significant stakes in the outcome.²⁶⁴ Each of the Environmental Protection Agency (EPA) actions discussed above had *some* meaningful impacts on the industries challenging them.²⁶⁵ The Tailoring Rule was an integral component of the EPA's greenhouse gas ("GHG") permitting program for stationary sources and defined the scope of the sources that would be subject to those requirements.²⁶⁶ The E15 Partial Waiver virtually assured that blenders and refiners of motor fuel will have to produce and market fifteen percent ethanol ("E15") in order to meet the Renewable Fuel Standards ("RFS") mandate, and created a substantial risk that vehicles and engines manufactured by the engine products group would be harmed when fueled with E15.²⁶⁷ And, the Misfueling Mitigation Rule directly imposed regulatory requirements on marketers of the fuel.²⁶⁸ As a result, industry groups vigorously opposed the EPA's actions during the notice and comment period to the EPA rulemaking, and filed suit after the Agency finalized its actions.²⁶⁹ Despite these seemingly substantial impacts on affected industry parties, the D.C. Circuit in each instance found that the industry petitioners failed to show that they had suffered any cognizable injury that could be redressed by a court decision in their favor.²⁷⁰

These decisions stand in stark contrast to cases addressing the standing of environmental groups, which seem to set a very low bar for the types of harm that can confer standing to that demographic.²⁷¹ This inconsistency was expressed in Judge Kavanaugh's dissent in *Grocery Manufacturers Ass'n v. EPA*, where he observed:

Under the majority opinion's approach, it appears that a citizen who breathes air (or at least a citizen who has breathing problems) would have standing to challenge the E15 waiver. That's because the E15

²⁶³ See *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 190 n.7 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

²⁶⁴ See *id.* at 190.

²⁶⁵ See *id.* at 188.

²⁶⁶ See Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

²⁶⁷ See E15 Partial Waiver, 75 Fed. Reg. at 68,129.

²⁶⁸ See Joint Brief of Petitioners, *supra* note 203, at 8, 12–13.

²⁶⁹ See *Alliance of Auto. Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463, at *1 (D.C. Cir. Oct. 21, 2014); *Grocery Mfrs. Ass'n*, 693 F.3d at 169.

²⁷⁰ See *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2–3; *Grocery Mfrs. Ass'n*, 693 F.3d at 180.

²⁷¹ See *Grocery Mfrs. Ass'n*, 693 F.3d at 190 n.7 (Kavanaugh, J., dissenting).

waiver will cause emissions that will negatively affect air quality. There is of course no such petitioner involved in this suit. But standing law protects economic interests as well as health interests. And the economic interests of the food and petroleum groups are palpably and significantly affected by the E15 waiver, just as are the health interests of citizens with breathing issues.²⁷²

Of course, the types of interests that courts have found to be sufficient to confer standing for environmental groups go beyond human health.²⁷³ Indeed, the Supreme Court has recognized that harm to “the mere esthetic interests of the plaintiff . . . will suffice” to establish the sort of concrete and particularized injury necessary to confer standing.²⁷⁴ Thus, for example, a plaintiff’s “enjoyment of flora or fauna,”²⁷⁵ or a “desire to use or observe an animal species,”²⁷⁶ or even a desire to simply not “observe offensive amounts of air pollution from the smokestacks,”²⁷⁷ have all been found to be the sorts of interests protected by the standing doctrine. In *Sierra Club v. Jewell*, the D.C. Circuit went so far as to hold that observing *from afar* the scenic landscape of property one does not own and cannot even lawfully enter is a cognizable interest, and a harm to that interest can confer standing.²⁷⁸ Presumably, courts have been so expansive concerning the types of harm that can confer standing in these cases because they have been satisfied that the petitioners alleging such harm had “such a personal stake in the

²⁷² *Id.*

²⁷³ See generally *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (recognizing standing where the plaintiff suffers harm to recreational or aesthetic interests); *S. Utah Wilderness Alliance v. Office of Surface Mining Reclamation & Enforcement*, 620 F.3d 1227, 1234 (10th Cir. 2010) (holding plaintiffs met the injury-in-fact prong where the plaintiffs’ interest in enjoying land for scientific, recreational, or aesthetic purposes is harmed); *Am. Soc’y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003) (finding plaintiff suffered injury sufficient to confer standing where his interest in observing elephants was harmed by the defendant’s alleged animal abuse).

²⁷⁴ *Summers*, 555 U.S. at 494.

²⁷⁵ *Am. Soc’y for Prevention of Cruelty to Animals*, 317 F.3d at 337.

²⁷⁶ *S. Utah Wilderness Alliance*, 620 F.3d at 1234 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992)); see also *Am. Bottom Conservancy v. U.S. Army Corps of Eng’rs*, 650 F.3d 652, 656 (7th Cir. 2011) (“[D]enying a person who derives pleasure from watching wildlife of the opportunity to watch it is a sufficient injury to confer standing.”). The court in *American Bottom Conservancy* noted that the “magnitude, as distinct from the directness, of the injury is not critical to the concerns that underlie the requirement of standing.” 650 F.3d at 656. Thus, courts have denied standing where members of an environmental group have failed to show a *direct* injury to their aesthetic interests. See *id.* In *Wilderness Soc. Inc. v. Rev.*, the U.S. Court of Appeals for the Ninth Circuit held that a “general intention to return to the national forests of two geographically large states is too vague to confer standing because [the affiant] has not shown that he is likely to encounter an *affected* area of the Umpqua National Forest in his future visits.” 622 F.3d 1251, 1257 (9th Cir. 2010).

²⁷⁷ *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1071–72 (9th Cir. 2014).

²⁷⁸ See 764 F.3d 1, 6 (D.C. Cir. 2014).

outcome of the controversy” that there was a live case or controversy for the court to adjudicate.²⁷⁹

The same could—and should—be said of the interests that the industry petitioners in the challenges to the Tailoring Rule and the E15 decisions were seeking to protect.²⁸⁰ For example, the parties challenging the EPA’s stationary source GHG rulemaking correctly determined that the Tailoring Rule was a necessary prerequisite to that program that indisputably caused them harm; without the Tailoring Rule, the EPA could not have promulgated that program given the absurd results that would have followed.²⁸¹ The industry petitioners, therefore, had a stake in seeing that rule overturned, and there was a significant controversy between the petitioners and the EPA concerning the Rule’s merits.²⁸² As such, in its determination of the industry petitioners standing in the aforementioned cases, the D.C. Circuit should have assessed the entire GHG permitting program broadly to determine whether the Tailoring Rule caused the petitioners a concrete injury, thus satisfying the injury-in-fact prong of standing.²⁸³

Similarly, the producers of motor vehicles and non-road engines had economic and reputational interests in not allowing a fuel into the market that was shown to damage products they have manufactured, and thus subjecting them to the threat of recalls and product liability lawsuits and to reputational harm.²⁸⁴ In *Grocery Manufacturers*, however, the D.C. Circuit found that even if misfueling with E15 took place and damaged consumers’ vehicles and engines, “a theoretical possibility of lawsuits” without showing that such lawsuits would be “meritorious” is insufficient to show injury-in-fact.²⁸⁵ The court did not cite any authority for this aspect of its holding, which would seemingly make it impossible to cite a threat of future lawsuits as a basis for harm; after all, a potential litigant is not going to admit in a court filing that a future lawsuit against it would be meritorious.²⁸⁶ If a member of an environmental organization has access to the

²⁷⁹ See *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975).

²⁸⁰ See *Alliance of Auto. Mfrs. v. EPA*, No. 11-1334, 2014 WL 5838463, at *2–3 (D.C. Cir. Oct. 21, 2014); *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 175–77, 179 (D.C. Cir. 2012); *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 147 (D.C. Cir. 2012) (per curiam), *rev’d in part sub nom. Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

²⁸¹ See Tailoring Rule, 75 Fed. Reg. 31,514, 31,542 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71).

²⁸² See *supra* notes 151–156 and accompanying text.

²⁸³ See *supra* notes 68–89 and accompanying text (discussing the injury-in-fact prong of the standing analysis), 157–165 (illustrating the compartmentalized approach taken by the D.C. Circuit in industry challenges to the Tailoring Rule).

²⁸⁴ See *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2–3; *Grocery Mfrs. Ass’n*, 693 F.3d at 175–76, 176–77, 179; E15 Partial Waiver, 75 Fed. Reg. 68,094, 68,129 (Nov. 4, 2010) (notice).

²⁸⁵ *Grocery Mfrs. Ass’n*, 693 F.3d at 176 (emphasis added).

²⁸⁶ See *generally id.* (finding that the threat of litigation was insufficient to confer standing where “the engine-products petitioners have failed to point to any grounds for a *meritorious* suit against them”).

federal courts to protect a non-pecuniary interest such as being able to enjoy flora and fauna, then so too should a business be able to protect its non-pecuniary interests such as being able to operate in a regulatory environment that does not give rise to the threat of litigation.²⁸⁷ In light of the ideological basis for the granting environmental organizations standing based on the aforementioned harms, these harms should be sufficient to assure a court that it is being called upon to adjudicate a live controversy between industry petitioners and the EPA concerning the legality and technical merits of the Agency's rules and programs.

The D.C. Circuit's opinions in *Grocery Manufacturers* and *Alliance of Automobile Manufacturers* could be read as holding merely that the petitioners had failed to offer evidence of their alleged injuries, as opposed to holding that the injuries alleged were insufficient to confer standing as a matter of law.²⁸⁸ Indeed, the majority in *Grocery Manufacturers* determined that because the E15 Partial Waiver does not “directly impose regulatory restrictions, costs, or other burdens on any of” the petitioners, standing in the case was “not self-evident,” thus subjecting the petitioners to a heightened burden of production to show standing.²⁸⁹ Similarly, the *Alliance of Automobile Manufacturers* court dismissed the challenge because the petroleum group “provide[d] no evidence that any of its members sells or plans to sell E15,” and because the engine products group “failed to offer evidence connecting sales of E15 under the regulation to injuries that [engine-products group] members are sufficiently likely to suffer so as to afford it standing.”²⁹⁰ But by requiring such extra-record evidence in the first place, the court erected barriers to standing that had not previously existed for industry petitioners challenging an EPA action that directly impacts them.²⁹¹ Indeed, the court appears to have ignored its own prior cases holding that “no evidence outside the administrative record is necessary for the court to be sure of” standing where the regulated industry is challenging an agency action.²⁹² In the case of

²⁸⁷ See *id.* at 176; *Am. Soc’y for Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003).

²⁸⁸ See *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2–3; *Grocery Mfrs. Ass’n*, 693 F.3d at 175–77, 179.

²⁸⁹ *Grocery Mfrs. Ass’n*, 693 F.3d at 175 (emphasis added).

²⁹⁰ *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *3.

²⁹¹ See, e.g., *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002).

²⁹² *Id.* The engine products group was arguably the object of the EPA's actions in the E15 Partial Waiver and the Misfueling Mitigation Rule because, as the manufacturers of the products in which a new fuel would be used, they are among the beneficiaries of section 211(f)'s command that no waiver may be granted unless the EPA finds that the new fuel will not cause a failure of any emission control device or system used to achieve compliance with emission standards. See 42 U.S.C. § 7545(f)(4) (2012); *Alliance of Auto. Mfrs.*, 2014 WL 5838463, at *2–3; *Grocery Mfrs. Ass’n*, 693 F.3d at 175–76. Additionally, the Clean Air Act requires motor vehicle manufacturers to warrant that their vehicles will comply with applicable emissions standards over the vehicles' useful lives. 42 U.S.C. § 7541. In the event of a failure to meet emissions standards, the manufacturer may be required to recall its vehi-

the Misfueling Mitigation Rule, for example, the EPA's own analyses in the administrative record estimated the total compliance cost to be borne by gasoline distributors to be \$3.64 million per year.²⁹³ This by itself should have been sufficient injury-in-fact to confer standing to challenge the rule.²⁹⁴

CONCLUSION

Industry petitioners do not lightly or without reason go through the expense of pursuing lawsuits seeking to overturn an action of a federal regulatory agency. Rather, they do so based upon a legitimate concern that the agency action will cause some harm to their business interests. The harm might be the increased costs resulting directly from having to comply with a regulatory program, or it might take a more subtle form, such as creating a heightened risk of lawsuits or compelling companies to choose not to sell certain products in order to avoid regulatory burdens. But whatever interests are being protected, there can be little question that a legitimate case and controversy exists between the industry parties and the regulator concerning the legal and technical merits of the agency action. Federal courts should, in such instances, exercise the jurisdiction conferred under Article III of the U.S. Constitution, and entertain such challenges.

The decisions of the D.C. Circuit in *Coalition for Responsible Regulation, Inc. v. EPA*, *Grocery Manufacturers Ass'n v. EPA*, and *Alliance of Automobile Manufacturers v. EPA*, however, raise the specter that a regulatory program that has tangible impacts on the regulated community will be shielded from judicial review. The legacy of these cases might be to teach agencies to fracture a complex regulatory program into separate rulemakings, thereby insulating individual regulations—despite their combined effect—from legal challenges by the very parties most directly impacted.

As seen in the cases of the EPA's stationary source greenhouse gas permitting program and the E15 Partial Waiver and Misfueling Mitigation Rule, a segmented EPA action may not, standing alone, cause sufficient direct economic injury to the regulated industries to establish standing. That does not mean, however, that the action does not cause harm when viewed in the broader context of the industries' regulatory obligations. The U.S. Supreme Court apparently grasped this reality in its decision to overturn the Tailoring Rule in *Utility Air Regulatory Group v. EPA*, even though the Court did not directly address the standing of the parties to challenge that rule. Nevertheless, the D.C. Circuit, and other federal

cles in order to remedy the problem. *Id.* § 7541(c). Consequently, the EPA's motor vehicle fuel program directly impacts motor vehicle manufacturers. *See id.*

²⁹³ Misfueling Mitigation Rule, 76 Fed. Reg. 44,406, 44,432 (Jul. 25, 2011) (to be codified at 40 C.F.R. pt. 80).

²⁹⁴ *See supra* note 41 and accompanying text.

courts considering whether to entertain regulatory challenges brought by regulated parties, should be guided by the underlying acknowledgement of the practical harm caused to industry parties in *Utility Air Regulatory Group*, and in so doing, be more open to accepting the standing of industry petitioners.