No. 17-72260 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAFER CHEMICALS HEALTHY FAMILIES, ET AL.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

ON PETITION FOR JUDICIAL REVIEW OF ACTIONS BY THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

SUPPLEMENTAL BRIEF OF INTERVENORS IN SUPPORT OF RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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June 28, 2019

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INTRODUCTION

"No principle is more fundamental to the judiciary's proper role in our system of government" than the limitation of federal jurisdiction in Article III "to actual cases or controversies." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). The case-or-controversy requirement prevents courts from deciding questions that do not affect the rights of the litigants before them or "advising what the law would be upon a hypothetical state of facts." *Habeas Corpus Res. Ctr. v. U.S. Dep't of Justice*, 816 F.3d 1241, 1247 (9th Cir. 2016). Yet that is what Petitioners would have this Court do in deciding their facial challenge to the Framework Rules.

The Framework Rules, standing alone, do not and cannot harm Petitioners. The Rules do not regulate Petitioners' conduct or require them to do (or refrain from doing) anything. The Rules establish a framework for EPA to evaluate the risks posed by certain industrial chemicals. EPA will then use the risk evaluations to decide whether and how to regulate *third parties* that manufacture, process, distribute or dispose of those chemicals. Significantly, EPA will make both the risk evaluations and the ultimate regulatory decisions on a case-by-case basis following administrative proceedings that provide notice of EPA's proposals and an opportunity for public comment. EPA's final decision to designate a chemical a "low-priority" chemical, to find no unreasonable risk, or to find an unreasonable risk and address it through a risk management rule will be subject to judicial review. Although it is theoretically possible that EPA *could* exclude a use of a particular chemical that *could* affect the risk

evaluation in a way that *could* cause the agency not to regulate some use of a chemical that *could* injure Petitioners' members, that does not create a justiciable controversy now, before the Rules have been applied. "[A]llegations of *possible* future injury are not sufficient;" the injury must be "imminent" or "*certainly impending*." *Clapper*, 133 S. Ct. at 1147 (emphasis in original).

Furthermore, the ripeness doctrine is designed to avoid embroiling the court in abstract disagreements over administrative policies that could result from judicial review of Petitioners' facial challenge to the Framework Rules. If application of the Rules results in the exclusion of a use from a risk evaluation that affects EPA's final regulatory decision about a particular chemical, the administrative record will explain the reasons for EPA's decision and shed light on its real-world consequences. That is particularly significant here, where EPA has discretion to exclude uses for a variety of reasons that may be challenged or defended on different grounds, that may not be exercised in a particular matter, or that may be mooted by other regulatory actions. Thus, even though Petitioners purport to challenge the Rules on "purely legal" grounds (Supp. Br. 1), "further factual development would 'significantly advance [the court's] ability to deal with the legal issue presented and would aid [the court] in their resolution.'" *Habeas Corpus Res. Ctr.*, 816 F.3d at 1254.

For all of these reasons, further explained below, the petitions should be dismissed for lack of jurisdiction.

ARGUMENT

I. The Doctrines Of Standing And Ripeness Ensure That Courts Do Not Decide Questions That Require Them To Issue Advisory Opinions Based Upon Hypothetical Facts

Standing and ripeness are components of the "case-or-controversy requirement." *Habeas Corpus Res. Ctr.*, 816 F.3d at 1247. Standing "concerns *who* may bring suit," and ripeness "concerns *when* a litigant may bring suit." *Id.* (emphasis in original). There is, however, "overlap between these concepts," and "in many cases, ripeness coincides squarely with standing's injury in fact prong." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc). Because Petitioners' discussion of these doctrines is incomplete and inaccurate, we first discuss the general principles and then demonstrate why Petitioners lack standing and present no ripe claims.

A. Standing

The standing doctrine limits "the category of litigants empowered to maintain a lawsuit in federal court to seek redress of a legal wrong." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). It allows lawsuits only by those who suffer an "injury in fact" that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 133 S. Ct. at 1147. Petitioners, as the "party invoking federal jurisdiction," bear "the burden of establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Although Petitioners recite this standard (Supp. Br. 2), their discussion omits several

principles critical to understanding why they lack standing to challenge the Framework Rules.

First, in claiming they are injured because the Framework Rules supposedly violate statutory provisions enacted to protect their interests (Supp. Br. 2-4), Petitioners omit an important point of law: the Framework Rules do not regulate Petitioners. The Rules establish a framework for *EPA* to follow in conducting risk evaluations that may lead EPA to regulate *third parties* that manufacture, process, distribute or dispose of industrial chemicals. *See* 15 U.S.C. § 2605. That is significant because there "is ordinarily little question" that a petitioner can establish standing when it is the regulated party. *Defs. of Wildife*, 504 U.S. at 561-62. But when "the plaintiff is not himself the object of the government action or inaction he challenges," standing is "ordinarily substantially more difficult to establish." *Habeas Corpus Res. Ctr.*, 816 F.3d at 1248.

Second, although Congress does have some "power to define injuries" (Supp. Br. 2), that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549. "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* "To establish such an injury, the plaintiff must allege a statutory violation that caused him to suffer some harm that 'actually exist[s]' in the world." *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1112 (9th Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at

1548). "In other words, even when a statute has allegedly been violated, Article III requires such violation to have caused some real—as opposed to purely legal—harm to the plaintiff." *Robins*, 867 F.3d at 1112.

Third, Petitioners do not establish real harm by hypothesizing that EPA *could* conduct risk evaluations in a way that *could* cause the agency to fail to regulate some chemical uses that *could* injure Petitioners' members. To establish standing based on an injury that allegedly could be caused by EPA's actions in the future, Petitioners must show that the injury is "imminent" or "*certainly impending*." *Clapper*, 133 S. Ct. at 1147 (emphasis in original); *see also, e.g.*, *Habeas Corpus Res. Ctr.*, 816 F.3d at 1251 (same). "[A]llegations of *possible* future injury are not sufficient." *Clapper*, 133 S. Ct. at 1147 (emphasis in original). Petitioners' Supplemental Brief ignores that fundamental point. The requirement that injury be imminent is "not just an empty formality." *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007). "It preserves the vitality of the adversarial process" by assuring that petitioners "have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented" are resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.*

B. Ripeness

The ripeness doctrine serves a similar, but distinct, purpose. It stems from the recognition that judicial resolution of a challenge to a statute or regulation "in advance of its immediate adverse effect in the context of a concrete case" often "involves too

remote and abstract an inquiry for the proper exercise of the judicial function." *Texas v. United States*, 523 U.S. 296, 301 (1998). It is "drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993).

As a constitutional matter, a case is ripe for review only when "the issues presented are definite and concrete, not hypothetical or abstract," and a party's alleged injury is not "too imaginary or speculative to support jurisdiction." *Thomas*, 220 F.3d at 1139. A claim is "not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300. And when, as here, Petitioners seek "injunctive and declaratory judgment remedies," they must show that their claims are the type of "ripe" claims that warrant that discretionary relief. *Catholic Soc. Servs.*, 509 U.S. at 57; *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967) (same).[1] That prudential inquiry involves "two overarching considerations: 'the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Thomas*, 220 F.3d at 1141

[1] Because courts have discretion to deny declaratory and injunctive relief in cases within their jurisdiction, there is no "tension" between the prudential ripeness doctrine and "a federal court's obligation to hear and decide cases within its jurisdiction." Supp. Br. 23 (quoting, among other cases, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014)); *cf. Wilton v. Seven Falls Co.*, 515 U.S. 277, 287 (1995) (describing as "untenable" the "proposition that a district court, knowing at the commencement of litigation that it will exercise its broad statutory discretion to decline declaratory relief, must nonetheless go through the futile exercise of hearing a case on the merits first").

(quoting *Abbott Labs.*, 387 U.S. at 149). Consequently, a claim is not ripe when the challenged regulations cause no immediate "significant practical harm," *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998), and "further factual development would significantly advance [the court's] ability to deal with the legal issues presented," *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003).

II. Petitioners' Challenges To The Framework Rules Are Not Justiciable

"[S]tanding is not dispensed in gross" and Petitioners must establish that *each* of their claims is justiciable. *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1650 (2017). As discussed below, they have failed to meet that burden.

A. Petitioners' Members Face No Certainly Impending Harm From The Exclusion Of Legacy Uses

Petitioners argue that they have standing to challenge EPA's exclusion of legacy uses from risk evaluations because removing any source of chemical exposure from the risk equation "*necessarily* deflates the calculation of risk." Supp. Br. 5 (emphasis in original). But EPA's risk calculation, standing alone, has no legal effect and cannot harm Petitioners or their members. So Petitioners' real argument is that EPA's risk calculation creates "a material risk that EPA's *ultimate regulatory decisions* will not protect Petitioners' members against unreasonable chemical risks," which is what TSCA is "designed to prevent." *Id.* (emphasis added). As explained below, Petitioners have wholly failed to substantiate that claim with regard to either the Prioritization or Risk Evaluation Rule.

1. Prioritization Rule. Petitioners speculate that the exclusion under the Prioritization Rule of "'legacy' sources of exposure (like lead paint and water pipes)" might cause EPA to designate a chemical (like lead) a "low-priority" substance that does not warrant regulation, when it should be designated a "high-priority" substance that warrants further risk evaluation. *See* Supp. Br. 9. But any failure to consider legacy uses in determining prioritization could be immaterial because EPA could designate lead a "high-priority substance" based on the potential risks from current and reasonably foreseeable uses. *See* 15 U.S.C. § 2605(b)(1)(B)(i). In fact, EPA has begun risk evaluations for other chemicals on the 2014 Work Plan for Chemical Assessments that have legacy uses (*e.g.*, asbestos and Cyclic Aliphatic Bromide ("HBCD") Cluster) because their current uses may pose an unreasonable risk to health or the environment. MA90-149; MA209-266.

Moreover, any harm that Petitioners' members might face if EPA were to designate lead a low-priority substance is not "imminent" or "*certainly impending*." *Clapper*, 133 S. Ct. at 1147 (emphasis in original). EPA has not begun the prioritization process for lead, and may not do so for several years.[2] In the interim, there could be regulatory changes or other intervening factors that eliminate the alleged risks

[2] Although EPA eventually will "put lead through the prioritization process" because EPA must prioritize all the chemicals on the 2014 Work Plan for Chemical Assessments, Supp. Br. 9 n.2, that may not happen for several years because there are 90 chemicals on the Work Plan, and EPA may also evaluate chemicals that are not on the Work Plan, 15 U.S.C. § 2605(b)(2)(B).

Petitioners want EPA to evaluate and regulate under TSCA.[3] Petitioners' speculation that their members will be harmed by a low-priority designation that "has not yet occurred and may never occur" is "too speculative to satisfy the constitutional requirement of ripeness." *Coons v. Lew*, 762 F.3d 891, 898 (9th Cir. 2014). And such a designation, if it ever occurs, would be judicially reviewable. *See* 15 U.S.C. § 2618(a)(1)(C).

2. Risk Evaluation Rule. Petitioners also have not established that their members face certain harm from the exclusion of legacy uses under the Risk Evaluation Rule. Petitioners claim that their members are "currently exposed" to asbestos and lead from legacy uses that will not be studied or remedied by EPA's ultimate regulations, Supp. Br. 8-9, but the record does not substantiate this claim. On the contrary, most of the declarations cited by Petitioners describe not current exposure, but *past* exposure or generic fears that people could *possibly* be exposed to these chemicals in the future in a way EPA may fail to redress.[4] Such allegations do

[3] For example, as "part of EPA's efforts to reduce childhood lead exposure," EPA just issued a final rule revising the "dust-lead hazard standards" for "floors and window sills." Pre-Publication Notice of EPA Final Rule on Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint (June 21, 2019), https://www.epa.gov/sites/production/files/2019-06/documents/prepubcopy_9995-49_fr_doc_san5488_dlhs_frm.pdf.

[4] *See* PA38-39 (fear that removal of lead paint from outdoor water tank three years ago could have left paint dust in yard or air); PA72-74 (woman who removed lead paint from her house fears grandsons could be exposed if they have playdates with children who live in historic homes where the lead paint has not been removed); PA254-58 (daughter exposed to lead paint years ago in home where the paint was subsequently

not give rise to a justiciable controversy. *See, e.g.*, *Clapper*, 133 S. Ct. at 1147 ("allegations of *possible* future injury are not sufficient") (emphasis in original); *Defs. of Wildlife*, 504 U.S. at 560 (injury cannot be "conjectural or hypothetical"); *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) ("past injury" insufficient where there is no "*imminent* future injury") (emphasis added).

Petitioners also cite declarations claiming that certain union members are currently being exposed to legacy uses of asbestos and lead in certain industrial settings. Supp. Br. 8-9. But Petitioners' exceedingly vague declarations do not discharge their burden of demonstrating "certainly impending harm," particularly given that it is quite possible that EPA will consider the risks union members allegedly face. Petitioners claim, for example, that "USW members are exposed to legacy uses of lead in facilities that recycle used lead and copper." PA390. But they cite no document in which EPA has said it considers recycling of lead to be a legacy use. Nor could they, since EPA has not yet begun the prioritization process for lead. Moreover,

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removed and the lead "clean[ed] up"); PA325-29 (woman previously diagnosed with lead poisoning in 1993 alleges no known current exposure but fears could be exposed from dietary supplements or old buildings or city water in Chicago); PA423-34 (no allegation of exposure by any member, but general allegations that members could be exposed from lead paint on subway tracks, roads, or bridges in New York, from water in public schools, or because they live in older housing where the lead paint may not have been removed); PA437-47 (researcher with no alleged personal exposure to lead is concerned about exposure to the general population); PA446-47 (professor with no alleged personal exposure is concerned about "the potential for widespread exposure" from lead in the environment); PA401-02 (members of Vermont PIRG could be exposed to asbestos because asbestos products are in landfills and "asbestos insulation remains in use in many homes, schools and businesses in Vermont").

this is contrary to what EPA has done to date. In the scope documents for the HBCD Cluster and 1,4 dioxane, EPA *included* recycling of the chemicals (or recycling of products containing the chemicals) as a "condition of use" to be studied in the risk evaluation. MA172, MA205, MA233, MA235. Petitioners provide no reason for believing EPA will take a different approach with recycling of lead, so the threat of harm, "though theoretically possible—is not reasonable or imminent," and their claims "not justiciable." *Thomas*, 220 F.3d at 1141 (quoting *Ohio Forestry Ass'n*, 523 U.S. at 732).

Petitioners also claim that union members "encounter 'in place' asbestos when they repair, replace, or maintain equipment with gaskets or insulation." PA389. Tellingly, Petitioners declaration do not do not provide any detail or explanation as to what it means to "encounter" asbestos in this way. Nor do they ever say that these "encounters" are likely to cause harm that is not already addressed by existing rules and that an additional EPA rule could therefore redress (*e.g.*, that work with friable asbestos without sufficient protective equipment and procedures). Moreover, EPA has included "Sheet Gaskets" used in chemical manufacturing and "Other Gaskets and Packing" used in "Equipment Seals" as "conditions of use" to be considered in "the TSCA risk evaluation for asbestos" and will consider occupational exposures

associated with those uses.[5] To the extent there is uncertainty about whether the gaskets referenced in the scope document are the type of gaskets union members encounter in their jobs, it serves only to reinforce that Petitioners' facial challenge is not ripe. The scope of the risk evaluation will be fleshed out in the administrative proceedings, and if Petitioners' members are harmed by the final regulation of asbestos, they can bring their "legal challenge [then] at a time when harm is more imminent and more certain." *Ohio Forestry Ass'n*, 523 U.S. at 734. Petitioners should not be heard to complain about any delay since they "bear[] the burden of establishing" that a justiciable controversy exists, yet failed to provide sufficient detail to establish their standing. *Defs. of Wildlife*, 504 U.S. at 561; *see also Thomas*, 220 F.3d at 1141 (claim not ripe where "conclusory affidavits" rendered the record "remarkably thin and sketchy" and the "case unfit for judicial resolution").

B. Petitioners' Challenge To EPA's Potential Exclusion Of Conditions Of Use From Risk Evaluations Is Not Justiciable.

Petitioners also present no justiciable challenge to EPA's preamble statement that it believes it has the statutory authority to exclude conditions of use from the scope of a risk evaluation for a particular chemical "in order to focus its analytical efforts on those exposures that are likely to present the greatest concern." 82 Fed. Reg. 33,726, 33,729 (July 20, 2017). EPA gave a few examples of situations in which it

[5] Environmental Protection Agency, *Problem Formulation of the Risk Evaluation for Asbestos* 22, 30-31 (May 2018), https://www.epa.gov/sites/production/files/2018-06/documents/asbestos_problem_formulation_05-31-18.pdf.

might decide to exercise that authority—*e.g.*, where the use presents only a *de minimis* exposure, or where the chemical is "unintentionally present as an impurity in another chemical substance" and it is "more appropriate to evaluate such risks within the scope of the risk evaluation for the separate chemical substances that bear the impurity." *Id.* at 33,729-30. EPA made clear, however, that "it would be premature to definitively exclude a priori specific conditions of use from risk evaluation[s]," and that it would analyze each situation on a case-by-case-basis. *Id.* at 33,730. Petitioners' challenge to these preamble statements is thus a quintessential example of an unripe claim: It asks this Court to resolve "abstract disagreements over administrative policies" before those policies have been fleshed out and applied in a final administrative decision that affects Petitioners in "a concrete way." *Nat'l Park Hosp. Ass'n*, 538 U.S. at 807.

Indeed, Petitioners' challenge to the Framework Rules is analogous to the challenge to the Department of Justice regulations that this Court held not ripe in *Habeas Corpus Resource Center*. That case involved procedural and substantive challenges to regulations establishing the framework the Attorney General would apply in subsequent administrative proceedings to certify that a state provides competent counsel to indigent capital prisoners during state postconviction proceedings—a certification that, when granted, permitted the "fast-tracking" of the prisoners' habeas claims through federal court. 816 F.3d at 1243-46. The district court found the regulations were arbitrary and capricious in several respects, but this Court reversed

on ripeness grounds even though capital prisoners could be "adversely affected" by a certification that "shortens the statute of limitations for filing a federal habeas petition." *Id.* at 1249, 1252. The Court's reasons for finding the capital prisoners' challenge to the Attorney General's framework rules not ripe are equally applicable to Petitioners' challenge to the TSCA Framework Rules.

The Court noted that delayed judicial review was "unlikely to cause hardship to capital prisoners" because the challenged regulations neither required them to do anything nor "immediately alter[ed] their federal habeas rights or procedures." *Id.* at 1253. Before a capital prisoner's rights could be affected, the sentencing state would have to request certification, there would be an opportunity for public comment, and the Attorney General would have to certify that the state's plan complied with the regulations–a decision that would be subject to judicial review. *Id.* The same is true here. The Framework Rules impose no duties on Petitioners' members, and the rules do not regulate (or deregulate) any chemicals that could cause them harm. The rules simply establish a framework for EPA to follow in deciding whether to regulate individual chemicals in future proceedings that provide opportunities for both public comment and judicial review. [6]

[6] *See* 40 C.F.R. § 702.31 (draft scope documents subject to comment); *id.* § 702.49 (draft risk evaluation subject to comment); 15 U.S.C. § 2605(i) (determination that a chemical does not pose an unreasonable risk and final rule regulating chemical, including determination the chemical poses an unreasonable risk, are final agency action); 15 U.S.C. § 2618 (authorizing judicial review of rules and orders under 15 U.S.C. § 2605(i)(1)); *see also* EPA Br. 38-39.

Petitioners attempt to convey the impression of imminent harm by saying that their members are exposed to 1,4-dioxane in drinking water, and EPA is using its "unlawful authority" under the Risk Evaluation Rule "*now* to exclude" 1,4-dioxane as a byproduct of other manufacturing processes. Supp. Br. 11 (emphasis in original). EPA has proposed a thorough risk evaluation of 1,4-dioxane, including uses that could introduce the chemical into drinking water. MA174, MA180-81. In the portion of scoping document cited by Petitioners, EPA has simply proposed to exclude 1,4-dioxane "produced as a by-product of reactions in the production of other chemicals … from the scope of the risk evaluation," because it expects to consider "1,4-dioxane by-product and contaminant issues" in "the scope of any risk evaluation of [the] ethoxylated chemicals" that produce 1,4-dioxane as a by-product. MA170. Petitioners have not established that this will cause them any certainly impending harm.[7] They have not alleged, for example, that the amount of 1,4-dioxane produced as a by-product is a significant percentage of the 1,4-dioxane used in the United States, or that

[7] Moreover, this is just one way in which EPA might exercise its discretion to exclude a use of a particular chemical, so even if Petitioners could show that they have standing to challenge this application of the Risk Evaluation Rule, it would not mean they have standing to challenge the EPA's authority to exclude other uses, such as a *de minimis* use or the use of a chemical in a closed system. *See* 82 Fed. Reg. at 33,729. Indeed, the fact that EPA may exclude different uses for different reasons further underscores that their facial challenge is not ripe, and that the legality of the rule will be "better grasped when viewed in light of a particular application." *Texas*, 523 U.S. at 301.

the exclusion of the by-product sources will materially affect the amount of 1,4-dioxane in their drinking water.

In addition, it is notable that Petitioners base their case for jurisdiction, in this instance and others, not on the administrative record for the Framework Rules under review, but on non-final agency documents in other, still-pending proceedings. That confirms the unripeness of their claims. The scope document they rely on for 1,4-dioxane is subject to public comment, and will be followed by a draft risk evaluation that too will be subject to public comment before EPA makes any final decision about the risks posed by that chemical. *See* MA162. Thus, Petitioners have shown only that "it is possible that some future [agency] action might harm [them]," which is "insufficient to satisfy the constitutional prong of our ripeness doctrine." *Coons*, 762 F.3d at 898 (plaintiff's challenge to establishment of Independent Payment Advisory Board based on contention that the Board "could exercise its discretion to recommend reduction in reimbursement rates" in the future, "thereby causing him injury, is unripe"). [8]

Petitioners' challenge is also unripe as a prudential matter because judicial review now "could hinder agency efforts to refine its policies" through application of the regulations and embroil the court in "abstract disagreements over administrative policies that the ripeness doctrine seeks to avoid." *Habeas Corpus Res. Ctr.*, 816 F.3d at

[8] Of course, if EPA rejects the comments and issues a finding of no unreasonable risk or fails to regulate a use of 1,4-dioxane that harms Petitioners' members, Petitioners will then have a ripe claim and may obtain judicial review.

1254. Petitioners attempt to distinguish *Habeas Corpus Resource Center* on the ground that it was "uncertain[]" there how the Attorney General would conduct the certification process, whereas their challenge here to the EPA's authority to exclude conditions of use presents a "purely legal" challenge. Supp. Br. 12, 24. That argument does not withstand scrutiny. It ignores that the statutory authority EPA claims to have (and that Petitioners dispute) is the discretion to exclude conditions of use when appropriate "to make reasonable, technically sound scoping decisions in light of the overall objective of determining whether chemical substances in commerce present an unreasonable risk." 82 Fed. Reg. at 33,730. What that means in practice, and whether it is consistent with the statute, "will become clearer" when it is applied to particular chemical substances. *See Habeas Corpus Res. Ctr.*, 816 F.3d at 1254.

Petitioners' argument also ignores that EPA's particular exercise of its discretionary authority that allegedly harms their members—the exclusion of 1,4-dioxane as a byproduct of or impurity in other substances from the scope of the risk evaluation for 1,4-dioxane—is not "pre-ordain[ed]." Supp. Br. 24. EPA acknowledged that "[i]n some instances, it may be most appropriate from a technical and policy perspective to evaluate the potential risks arising from a chemical impurity within the scope of the risk evaluations for the impurity itself," while in others "it may be more appropriate to evaluate such risks within the scope of the risk evaluation for the separate chemical substances that bear the impurity." 82 Fed. Reg. at 33,730. The administrative process will establish the reasons for EPA's scoping and risk evaluation

decisions for 1,4-dioxane, and may shed more light on the "statutory and practical justifications" for EPA's exclusion of particular conditions of use under the Risk Evaluation Rule. *See Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158, 166 (1967). Thus, even if "the question presented here is 'a purely legal one,'" it is one in which "further factual development would 'significantly advance [the court's] ability to deal with the legal issue presented.'" *Nat'l Park Hosp. Ass'n*, 538 U.S. at 812 (quoting *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 82 (1978)).

C. The Possibility That EPA Might Separately Analyze The Risk Presented By Individual Conditions Of Use Of Some Chemicals Does Not Give Rise To a Justiciable Claim

For similar reasons, Petitioners' speculation that EPA will separately analyze the risk posed by individual chemical uses and, as a result, "will determine that individual chemical uses do not present unreasonable risk, even where the uses, in combination, do" does not give them standing or create a ripe challenge to the Risk Evaluation Rule. Supp. Br. 13-14. EPA has acknowledged that it "may choose the aggregate exposure approach and issue one risk determination document for all conditions of use," and it has flatly rejected Petitioners' suggestion that "the Rule prevents EPA from doing so." EPA Br. 54. Petitioners provide no contrary evidence. They assert that some of their members are exposed to HBCD when they eat plants and animals that may be "contaminated by multiple conditions of use," but they cite nothing in the draft scope document for HBCD that precludes EPA from analyzing the risk from combined exposures. Supp. Br. 14. Any alleged harm is thus

"speculative" and "not certainly impending." *Coons*, 762 F.3d at 898. And disagreements about how EPA will conduct risk evaluations will "sort themselves out" as EPA conducts risk evaluations, makes unreasonable risk determinations, and defends its decisions in court, if they are indeed challenged. *Habeas Corpus Res. Ctr.*, 816 F.3d at 1254. Until then, this Court lacks jurisdiction. *Id.*[9]

D. Petitioners Do Not Have Informational Standing

Perhaps implicitly recognizing that the Framework Rules are not causing their members any current or future injury that is certainly impending, Petitioners also argue that they have informational standing. Supp. Br. 19-22. They are mistaken.

To be sure, courts have held that when Congress enacts a law requiring an agency to disclose information, the denial of access to that information "constitutes a sufficiently distinct injury to provide standing to sue." *Spokeo*, 136 S. Ct. at 1549-50; *see also, e.g.*, *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019) (environmental group has standing to challenge regulation that "will keep secret" information that TSCA allegedly required EPA to make public). But that principle does not give

[9] Petitioners also challenge "four provisions in the Framework Rules that, on Petitioners' reading, would prevent EPA from considering 'all reasonably available information' in prioritization decisions and risk evaluations." Supp. Br. 15. EPA, however, has moved for a voluntary remand of some of these provisions, and it disputes Petitioners' reading of others. *See* EPA Br. 55-57. It is therefore speculative whether these provisions will harm Petitioners, and the claims are not ripe because the meaning of these provisions will become more clear when they are applied to particular chemicals. And even if there were a live dispute as to these provisions, that would not give Petitioners standing to challenge the other aspects of the Framework Rules.

Petitioners standing because the Framework Rules do not prohibit the disclosure of any information TSCA requires to be made public.

TSCA requires EPA to disclose its prioritization decisions, a "nontechnical summary of each risk evaluation," and information the agency considered in making those determinations. *See* 15 U.S.C. § 2625(j). The Framework Rules do not prohibit EPA from disclosing any of this information, and Petitioners have not alleged that they do. *See* Supp. Br. 20. Rather, Petitioners' complaint is that the Framework Rules allow EPA to narrow the *substantive scope* of risk evaluations by "greenlighting EPA to consider fewer exposures than Congress mandated." Supp. Br. 5. The fact that a risk evaluation of a limited number of exposures may potentially contain less information than a risk evaluation of a larger number of exposures does not turn an alleged violation of TSCA's substantive regulatory requirements into an alleged violation of TSCA's information disclosure requirements that could give Petitioners informational standing. Following that reasoning, a limitation of the scope of any rulemaking proceeding would always give rise to informational standing because there would then be less information in the administrative record the agency is required to make available to the public.

Moreover, even if Petitioners could establish a cognizable injury in the denial of information from EPA's risk evaluations, their claims are not ripe because the alleged loss of information is speculative and cannot be determined before the administrative record is complete and EPA makes a final decision on a particular chemical.

Petitioners assert, for example, that they will be deprived of information about exposures from uses that may be excluded from EPA's risk evaluation of a particular chemical. Supp. Br. 21-22. But EPA has said it may consider "background exposures from legacy use" in its "assessment of aggregate exposure or as a tool to evaluate the risk of exposures resulting from non-legacy uses." 82 Fed. Reg. at 33,730. In addition, the comment process on EPA's draft scope documents and risk evaluations for individual chemicals could generate additional information or cause EPA to expand a risk evaluation to cover a use it initially proposed to exclude. Until the administrative process is complete, it is impossible to know whether Petitioners will be deprived of information about any chemical, or in a way that is material and relevant to them. Any claim based on the denial of information thus "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas*, 523 U.S. at 300.

CONCLUSION

The petitions for review should be dismissed for lack of jurisdiction.

June 28, 2019

Respectfully submitted,

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Dated: June 28, 2019

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UNITED STATES COURT OF APPEALS
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