No. 24-7

In the Supreme Court of the United States

DIAMOND ALTERNATIVE ENERGY, LLC, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, generally preempts state laws that regulate emissions from new motor vehicles, but the CAA directs the Environmental Protection Agency (EPA) to waive preemption for California laws under specified conditions. See 42 U.S.C. 7543(a) and (b). In 2013, EPA issued a waiver to allow California to impose certain vehicle-emissions standards. EPA partially withdrew that waiver in 2019 but reinstated it in 2022. Petitioners, who had not challenged the 2013 waiver, then challenged EPA's 2022 reinstatement decision. The questions presented are as follows:

1. Whether petitioners have established the redressability component of Article III standing.

2. Whether EPA correctly interpreted 42 U.S.C. 7543(b) when the agency granted California a waiver in 2013 and reinstated that waiver in 2022.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 98 F.4th 288.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2024. The petition for a writ of certiorari was filed on July 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C. 7401(b)(1). Under the Act, each State generally has flexibility to determine how it

will meet air-quality goals. Pet. App. 3a. For "new motor vehicles," however, the Act directs the Environmental Protection Agency (EPA) to prescribe nationwide "standards applicable to the emission of any air pollutant * * * which in [its] judgment cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7521(a)(1). Section 209(a) of the Act generally preempts any "State or any political subdivision thereof" from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles." 42 U.S.C. 7543(a).

In turn, Section 209(b) of the Act, 42 U.S.C. 7543(b), creates an exception to that preemption rule. Section 209(b) generally requires EPA to "waive application of [Section 209(a)] to any State which has adopted standards * * * for the control of emissions from new motor vehicles or new motor vehicle engines prior to March 30, 1966, if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. 7543(b)(1). Section 209(b) further specifies, however, that "[n]o such waiver shall be granted if the Administrator finds that": "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title." 42 U.S.C. 7543(b)(1)(A)-(C).

California is the only State that regulated vehicle emissions before March 30, 1966, so it is the only State that is eligible for a waiver under Section 209(b). *Engine Mfrs. Ass'n* v. *EPA*, 88 F.3d 1075, 1079 n.9 (D.C.

Cir. 1996). Congress made a waiver available to California because, at the time the CAA was enacted, the State "was already the 'lead[er] in the establishment of standards for regulation of automotive pollutant emissions' at a time when the federal government had yet to promulgate any regulations of its own." *Id.* at 1079 (citation omitted; brackets in original). Congress also recognized "the unique problems facing California as a result of its climate and topography." H.R. Rep. No. 728, 90th Cong., 1st Sess. 22 (1967).

Under the original 1967 CAA provision, a waiver of preemption was available only if California's standards were "more stringent than applicable Federal standards." Air Quality Act of 1967, Pub. L. No. 90-148, § 208(b), 81 Stat. 501. In 1977, Congress amended Section 209(b) to "expand California's flexibility to adopt a complete program of motor vehicle emissions control." *Motor & Equipment Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1110-1111 (D.C. Cir. 1979), cert. denied, 446 U.S. 952 (1980); see Clean Air Act Amendments of 1977 (1977 amendments), Pub. L. No. 95-95, § 207, 91 Stat. 755. The 1977 amendments added language (quoted above) specifying that, to obtain a waiver, California need only determine that its standards "will be, in the aggregate, at least as protective" as federal standards. § 207, 91 Stat. 755. The 1977 amendments also allowed other States to "adopt and enforce" vehicle-emissions standards that "are identical to the California standards for which a waiver has been granted for such model year." 42 U.S.C. 7507(1); see § 177(1), 91 Stat. 750.

Since the CAA's enactment, EPA has granted 75 Section 209(b) waivers for California's vehicle-emissions program. Pet. App. 9a. In 1993, EPA granted a waiver for California's "'Zero Emission Vehicle' pro-

duction requirement," which required an annually increasing percentage of vehicles sold in California to produce zero on-road emissions. 58 Fed. Reg. 4166, 4166 (Jan. 13, 1993). And in 2009, EPA granted a waiver for California's first set of greenhouse-gas emission standards. 74 Fed. Reg. 32,744, 32,745-32,747 (July 8, 2009).

Despite its substantial regulatory efforts, California "continue[s] to face significant pollution and climate challenges." Pet. App. 10a. California is home to seven of the Nation's ten worst areas for ozone pollution and six of the Nation's ten worst areas for small particulate matter. See 87 Fed. Reg. 14,332 14,377 n.469 (Mar. 14, 2022). And the State "is particularly impacted by climate change," including through "increasing risks from record-setting fires, heat waves, storm surges, sea-level rise, water supply shortages and extreme heat." *Id.* at 14,365; see *id.* at 14,334 n.10.

2. This case concerns a set of emissions standards, known as the Advanced Clean Car (ACC) program, that California adopted in 2012. That program includes a low-emission-vehicle program, which (as relevant here) establishes "standards to regulate [greenhouse-gas] emissions." 78 Fed. Reg. 2112, 2114 (Jan. 9, 2013). It also includes a zero-emission-vehicle program, which requires a certain percentage of manufacturers' fleets to be zero-emission vehicles. See *id.* at 2114-2115. Under the ACC as originally constructed, both the low-emission-vehicle program and the zero-emission-vehicle program increase in stringency through model-year 2025. See Cal. Code Regs. tit. 13, § 1961.3(a)(1)(A) (2024); C.A. Admin. R. Doc. 7, at 22; C.A. Admin. R. Doc. 811, at 1. After model-year 2025, the programs were designed to remain in effect, with their stringency held constant at 2025 levels. See *ibid.*; see also 78 Fed. Reg.

at 2119 (describing the ACC's zero-emission-vehicle requirements as extending through "2025 and beyond"). In 2013, EPA found "that the entire ACC program me[t] the criteria for a waiver of Clean Air Act preemption and thus * * * grant[ed] a waiver for [California's] ACC program." 78 Fed. Reg. at 2113; see *id.* at 2112.

California amended its ACC zero-emission-vehicle standards in 2022 so that they expire following model-year 2025. See Cal. Code Regs. tit. 13, § 1962.2 (2024). California intends to replace those standards as part of a new program known as ACC II, which includes increasing zero-emission-vehicle requirements from model-year 2026 through model-year 2035 and then holds the 2035 levels constant for subsequent years. See *id.* § 1962.4 (2024). California has sought a CAA waiver for ACC II, but EPA has not yet acted on that request. In contrast, California has not amended the ACC's low-emission-vehicle standards for greenhouse-gas emissions; those standards will continue to hold greenhouse-gas emissions at the stringency level set for model-year 2025 in "subsequent" model years. See *id.* § 1961.3(a)(1)(A) (2024).

In 2019, "after car manufacturers had adjusted their fleets to comply with California's Advanced Clean Car Program," Pet. App. 12a, EPA withdrew California's waiver for the portions of that program that addressed zero-emission vehicles and set low-emission-vehicle standards for greenhouse gases, 84 Fed. Reg. 51,310, 51,310 (Sept. 27, 2019). EPA articulated three bases for the withdrawal. See *id.* at 51,328-51,341. First, EPA believed that portions of the waiver conflicted with a then-recent determination by the National Highway Traffic Safety Administration (NHTSA) that state greenhouse-gas regulations like California's were

preempted by the Energy Policy and Conservation Act (EPCA), 49 U.S.C. 32919(a). 84 Fed. Reg. at 51,337-51,338. Second, EPA asserted that Section 209(b) requires examination of California's emission standards in isolation, rather than "California's entire program in the aggregate." *Id.* at 51,341. Third, EPA determined that California could not demonstrate that its low-emission-vehicle standards for greenhouse gases and its zero-emission-vehicle regulations were needed to meet compelling and extraordinary conditions because, in EPA's view, California could not show a "particularized nexus" between greenhouse-gas emissions and California's air-pollution problems. *Ibid.*

After EPA withdrew the 2013 waiver, automobile manufacturers representing nearly 30% of U.S. vehicle sales, including Honda, Ford, Volvo, BMW, and Volkswagen, entered into independent agreements with California under which the manufacturers would continue to meet California's low-emission-vehicle and zero-emission-vehicle standards. See 87 Fed. Reg. at 14,346 n.115. "Automakers were motivated to sign these agreements by the investments they had already made in updating their fleets and growing consumer demand for electric vehicles." Pet. App. 14a.

In 2022, EPA reinstated California's 2013 waiver. 87 Fed. Reg. at 14,332. EPA identified three principal grounds for its reinstatement decision. First, EPA concluded that it had made procedural errors in 2019 when the agency reconsidered the 2013 waiver. *Id.* at 14,333. Second, EPA determined that the 2019 withdrawal decision had rested on a faulty interpretation and application of Section 209(b). *Ibid.* Third, the agency found that it had improperly considered NHTSA's interpre-

tation of EPCA, which NHTSA had since withdrawn in any event. *Ibid.*; see Pet. App. 14a.

3. Petitioners, a group of entities that produce or sell liquid fuels and raw materials used to produce those fuels, sought judicial review of EPA's 2022 reinstatement decision in the D.C. Circuit. See Pet. App. 2a; 42 U.S.C. 7607(b)(1).[1] Petitioners argued that EPA's reinstatement decision exceeded the agency's authority under Section 209(b). Pet. App. 3a. Various States (including California) and localities, automakers, and environmental organizations intervened in support of EPA. *Id.* at 15a & nn.4-6.

The court of appeals dismissed petitioners' claims for lack of Article III standing. Pet. App. 1a-49a. Petitioners asserted that the 2022 reinstatement decision "will cause them economic injury." *Id.* at 16a. The court concluded, however, that petitioners had not "met their burden of demonstrating that those injuries are redressable" by a judicial decree holding the challenged EPA decision invalid. *Id.* at 19a.

In the court of appeals, petitioners "argue[d] that, by requiring vehicle manufacturers to sell vehicles that use less or no liquid fuel, California's [low-emission-vehicle] and [zero-emission-vehicle] requirements depress the demand for liquid fuels" that petitioners "produce and sell." Pet. App. 19a. "The difficulty for" petitioners, the court observed, "is that their claimed injuries 'hinge[] on' the actions of third parties—the automobile manufacturers who are subject to the waiver." *Id.* at 22a

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[1] A group of 17 States also sought judicial review. See Pet. App. 2a & n.1. Those States have filed a separate petition for a writ of certiorari seeking review of the D.C. Circuit's decision in this case. See *Ohio* v. *EPA*, No. 24-13 (filed July 5, 2024). The government is filing a separate brief opposing that petition.

(citation omitted). The court explained that petitioners' "injuries would be redressed only if automobile manufacturers responded to vacatur of the waiver by producing and selling fewer non-conventional vehicles or by altering the prices of their vehicles such that fewer non-conventional vehicles—and more conventional vehicles—were sold." *Ibid.*

The court of appeals also observed that "redressability is further complicated by the relatively short duration of the waiver that Petitioners challenge." Pet. App. 22a. The court stated that petitioners had challenged only EPA's 2022 decision "to reinstate the waiver it had previously granted California as to Model Years 2017 through 2025." *Ibid.* So "to meet their burden of demonstrating redressability," the court concluded, petitioners would need to "demonstrate a 'substantial probability' not only that automobile manufacturers are likely to respond to a decision of this Court by changing their fleets in a way that alleviates their injuries in some way, but also that automobile manufacturers would do so relatively quickly—by Model Year 2025." *Id.* at 23a (citation omitted).

The court of appeals determined that "[t]he record evidence provides no basis" for finding redressability. Pet. App. 23a. The court first noted that petitioners had "fail[ed] to point to any evidence affirmatively demonstrating that vacatur of the waiver would be substantially likely to result in any change to automobile manufacturers' vehicle fleets by Model Year 2025." *Ibid.* Indeed, the court found that "[t]he only evidence points in the opposite direction, indicating that automobile manufacturers need years of lead time to make changes to their future model year fleets." *Ibid.*, see *id.* at 23a-

24a (citing rulemaking comments by various automakers).

The court of appeals further emphasized record evidence showing that "'manufacturers are already selling *more* qualifying vehicles in California than the State's standards require,'" which "suggest[s] that vacatur of the zero-emission-vehicle mandate would not redress Petitioners' injuries." Pet. App. 28a (citation omitted). The court observed that several automobile manufacturers had filed a brief explaining "that 'both internal sustainability goals and external market forces' are prompting manufacturers to transition toward electric vehicles, irrespective of California's regulations." *Id.* at 24a n.8 (citation omitted). The court thus perceived a lack of evidence that "vacatur of the challenged waiver" would "result in any change on the part of automobile manufacturers." *Id.* at 27a.

The court of appeals observed that, "[d]espite the paucity of evidence in the record regarding the redressability of their injuries" and "the relatively short nature of the waiver they challenge," petitioners "seem to have treated redressability as a foregone conclusion." Pet. App. 24a-25a. The court noted that petitioners had not "attempt[ed] to explain in any detail how their injuries are redressable, let alone to 'cit[e] any record evidence' or to file 'additional affidavits or other evidence sufficient to support' redressability." *Ibid.* (citation omitted; second set of brackets in original). The court therefore had "no basis to conclude that Petitioners' claims are redressable—a necessary element of standing that Petitioners bear the burden of establishing." *Id.* at 29a.

ARGUMENT

Petitioners ask (Pet. 15-26) this Court to review the court of appeals' holding that, in light of "the record

evidence" in this case, petitioners have not shown that a favorable judicial ruling would redress their injuries. Pet. App. 29a. The court below applied established Article III principles to the record here and properly concluded that petitioners had not shown that their injuries are redressable. That fact-bound conclusion does not conflict with any decision of another court of appeals or otherwise warrant this Court's intervention.

Petitioners also ask (Pet. 26-37) this Court to grant certiorari to consider the merits of their statutory argument, even though neither the court of appeals nor any other court has addressed that argument. But multiple threshold issues could thwart this Court's review of that argument. And in any event, this Court traditionally acts as a Court of review, not of first view. Nor is there any compelling need to review the statutory issue now, particularly because that same issue is currently pending before the D.C. Circuit in a separate case. The petition should be denied.

A. The Court Of Appeals' Redressability Holding Does Not Warrant This Court's Review

Applying settled standing principles to the record evidence in this case, the court of appeals held that petitioners had failed to establish that their asserted injuries are redressable. The court's conclusion was correct and does not warrant this Court's review.

1. a. "[I]t is a bedrock principle that a federal court cannot redress 'injury that results from the independent action of some third party not before the court.'" *Murthy* v. *Missouri*, 144 S. Ct. 1972, 1986 (2024) (citation omitted). "In keeping with this principle," the Court has "'been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.'" *Ibid.*

(quoting *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 413 (2013)). The Court has recently and repeatedly rejected, on redressability grounds, claims of Article III standing that depend on such guesswork. See, *e.g.*, *Murthy*, 144 S. Ct. at 1995; *Haaland* v. *Brackeen*, 599 U.S. 255, 294 (2023); *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 568-571 (1992).

Here, the court of appeals properly observed that petitioners' asserted injuries "hinge on the response" of a "third party to the government action," *Defenders of Wildlife*, 504 U.S. at 562—namely, "the automobile manufacturers who are subject to [EPA's] waiver." Pet. App. 22a. Yet because the 2013 waiver has now been in effect for over a decade, automakers have made significant "investments" in "updating their fleets and growing consumer demand for electric vehicles." *Id.* at 14a. In addition, "'both internal sustainability goals and external market forces' are prompting [them] to transition toward electric vehicles, irrespective of California's regulations." *Id.* at 24a n.8 (citation omitted). And EPA has promulgated federal greenhouse-gas emissions standards that outpace California's comparable standards and govern model-years 2023 through 2032 (and then subsequent years). See 86 Fed. Reg. 74,434 (Dec. 30, 2021); 89 Fed. Reg. 27,842 (Apr. 18, 2024); 40 C.F.R. 86.1818-12. As a result of these various factors, manufacturers "are already selling *more* qualifying vehicles in California than the State's standards require." Pet. App. 28a (citation omitted); see C.A. State Resp.-Intervenors' Add. 98 (explaining that "multiple manufacturers have announced plans to sell substantially more zero-emission vehicles in the future than [California's] standards * * * require").

Despite that evidence of automakers' independent conduct, petitioners "treated redressability as a foregone conclusion." Pet. App. 25a. They did not "attempt[] to explain in any detail how their injuries are redressable, let alone to 'cit[e] any record evidence' or to file 'additional affidavits or other evidence sufficient to support' redressability." *Id.* at 24a-25a (citation omitted; second set of brackets in original). Petitioners accordingly failed to meet their "burden * * * to adduce facts showing that" the third-party automakers would act "in such manner as to * * * permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562.

The court of appeals also relied on the "short duration of the waiver that Petitioners challenge." Pet. App. 22a. The court stated that the case "concern[s] only the EPA's decision, in March 2022, to reinstate the waiver it had previously granted California as to Model Years 2017 through 2025." *Ibid.* To support that proposition, the court cited EPA's 2022 reinstatement decision, which states that "[a]s a result of this action, EPA's 2013 waiver for the ACC program, specifically the waiver for California's [greenhouse-gas] emission standards and [zero-emission vehicles] sales mandate requirements for model years (MYs) 2017 through 2025, comes back into force." 87 Fed. Reg. at 14,333.

Contrary to the court of appeals' suggestion, EPA's 2013 waiver does not expire after model-year 2025. As noted above, in 2013, EPA found "that the entire ACC program me[t] the criteria for a waiver of Clean Air Act preemption and thus * * * grant[ed] a waiver for [California's] ACC program." 78 Fed. Reg. at 2113. And although the 2022 reinstatement decision referenced requirements applicable through model-year 2025, it also noted that, "in 2013, EPA granted California's waiver

request for the state's [ACC] program," and that the "result" of the 2022 action was "the reinstatement of the ACC program waiver." 87 Fed. Reg. at 14,332, 14,367. As originally constructed, the ACC program increased in stringency only through model-year 2025 but still remained in effect thereafter. See pp. 4-5, *supra*. Even now, following California's enactment of ACC II, only the ACC's zero-emission-vehicle program expires after model-year 2025, while the low-emission-vehicle standards for greenhouse-gas emissions remain in force thereafter (at 2025 levels of stringency). See p. 5, *supra*. Thus, because EPA's 2013 waiver applied to the ACC, and the ACC does not fully terminate with model-year 2025, the waiver likewise does not terminate with model-year 2025.

In this Court, petitioners have not challenged the court of appeals' apparent understanding that the 2013 waiver sunsets after model-year 2025. To the contrary, petitioners embrace that understanding (Pet. 26), arguing that the Court's review of the second question presented is urgently necessary "[b]ecause California's waiver expires at the end of model year 2025." See Pet. 4-5 (similar). Especially given petitioners' acceptance of the court of appeals' apparent premise about the waiver's duration, there is no basis for the Court to grant certiorari to review that premise.

More fundamentally, regardless of the 2013 waiver's continuing legal force, the waiver's practical effects are greatly diminished by intervening changes in the market. The court of appeals considered multiple factors, and its ultimate conclusion on redressability was correct. As explained above, record evidence indicates that, because of market forces and other independent factors, "vacatur of the challenged waiver may not

result in any change on the part of automobile manufacturers." Pet. App. 27a. And petitioners failed to present their own evidence suggesting otherwise. On this record and in light of petitioners' presentation, the court properly found that petitioners had "failed to meet their burdens of demonstrating that their claims are redressable." *Id.* at 30a.

b. Petitioners' counterarguments lack merit. Petitioners contend (Pet. 18) that, if EPA's waiver were vacated, "then the government will no longer be forcing automakers to sell more electric vehicles," so automakers will "make more vehicles that run on liquid fuel, or they will adjust their prices." According to petitioners (*ibid.*), "[t]hat is Economics 101, not a proposition that requires an affidavit for support."

While there may be cases where commonsense economic principles can suffice to establish redressability, the court of appeals correctly held that this is not one of them, given the record evidence about the automobile-manufacturing market discussed above. To be sure, petitioners could have sought to offer their own evidence showing that automakers would likely change course if the challenged EPA waiver was vacated. But petitioners instead provided "conclusory" declarations simply stating that petitioners' injuries "'would be substantially ameliorated if EPA's decision were set aside.'" Pet. App. 22a.

Petitioners briefly contest (Pet. 19-20) the court of appeals' reading of the declarations in the record. But issues that "turn[] entirely on an interpretation of the record in one particular case" are the "quintessential example of the kind that [this Court] almost never review[s]." *Taylor* v. *Riojas*, 592 U.S. 7, 11 (2020) (per curiam) (Alito, J., concurring in the judgment). In any

event, petitioners' reading of the declarations is mistaken. The first declaration they cite asserts that California's "original waiver request" in 2013 observed that the State "aims to reduce emissions through 'reductions in fuel production.'" C.A. Pet. Standing Decl. of Jennifer M. Swenton at 5-6 (citation omitted). But that 2013 statement says nothing about whether—following the years of "investments [automakers] had already made in updating their fleets and growing consumer demand for electric vehicles," Pet. App. 14a—automakers would still alter their production lines to manufacture more gasoline-fueled cars if EPA's 2013 waiver were vacated more than a decade later. Petitioners also cite a declaration from a California Air Resources Board official stating that, "all else being equal," "it is reasonable to expect that" without the waiver "there would be * * * additional gasoline-fueled vehicles produced and sold during these model years." C.A. Decl. of Sylvia Vanderspek at 11. But that statement is not accompanied by any supporting evidence or explanation, and it conflicts with automakers' own representations.

Petitioners further assert (Pet. 20) that "the court of appeals appeared to require plaintiffs to obtain affidavits from the directly regulated parties—here, the automakers." But while such affidavits would be one way for petitioners to substantiate their theory of redressability, the court below did not suggest that it is the only way. Instead, the court simply noted petitioners' failure to produce *any* form of evidence indicating that automakers would change their conduct in response to a judicial ruling in petitioners' favor.

Finally, petitioners' reliance (Pet. 17, 20) on this Court's decision in *Department of Commerce* v. *New York*, 588 U.S. 752 (2019), is misplaced. There, the

Court held that the plaintiff States had standing to challenge the government's reinstatement of a citizenship question on the census because that action would have "result[ed] in noncitizen households responding to the census at lower rates than other groups, which in turn would cause them to be undercounted and lead" their States to lose federal funds. *Id.* at 767. The Court held that the States had "met their burden of showing," including through historical evidence presented "at trial," that third-party noncitizens "will likely react in predictable ways to the citizenship question." *Id.* at 768. Here, by contrast, petitioners presented no record evidence that third-party automakers would react to vacatur of EPA's waiver by altering their fleets or pricing. Pet. App. 24a-25a. *Department of Commerce* therefore does not support petitioners' position.

2. a. Petitioners' assertion of a circuit conflict (Pet. 21-24) is misconceived. None of the decisions they cite involved record evidence affirmatively indicating that independent third parties would likely not alter their conduct if the plaintiffs succeeded on the merits. Petitioners identify no decision suggesting that "commonsense inferences" about third-party conduct (Pet. 24) are sufficient even in the face of such evidence.

In *NRDC* v. *NHTSA*, 894 F.3d 95 (2018), the Second Circuit held that certain environmental groups had standing to challenge an agency's indefinite delay of a rule that "would have increased civil penalties for violations of" fuel-economy standards. *Id.* at 100. In finding redressability, the court emphasized that, "by automakers' own admission, the increased penalty has the potential to affect [their] business decisions and compliance approaches." *Id.* at 105. Here, by contrast, automakers' public statements and actions suggest that

they would *not* change their business decisions and compliance approaches even if EPA's waiver were vacated.

In *General Land Office* v. *Biden*, 71 F.4th 264 (2023), the Fifth Circuit held that States had standing to challenge an agency's decision to divert funds away from the construction of a border wall. *Id.* at 272-274. But in concluding that the States' asserted injuries were redressable, the court relied heavily on "the procedural posture of a motion to dismiss," which meant that the States could rely solely on "allegations" and were "not yet obliged to produce specific evidence." *Id.* at 274. By contrast, the procedural posture here—a petition for review of agency action on a full administrative record—*does* require petitioners to produce evidence supporting redressability. See Pet. App. 18a; cf. *Defenders of Wildlife*, 504 U.S. at 563 (explaining that "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation").

In *Wieland* v. *HHS*, 793 F.3d 949 (8th Cir. 2015), and *Skyline Wesleyan Church* v. *California Department of Managed Health Care*, 968 F.3d 738 (9th Cir. 2020), the courts of appeals considered challenges to laws that had caused insurers to refuse to offer certain plans that would have comported with the plaintiffs' religious beliefs. See *Skyline Wesleyan*, 968 F.3d at 742; *Wieland*, 793 F.3d at 951-952. Both courts found that the plaintiffs' conscience-based injuries were redressable, because "insurers had previously offered plans that were acceptable to [the plaintiffs]" before the challenged laws were enacted and would "predictabl[y]" do so again if those laws were invalidated. *Skyline Wesleyan*, 968

F.3d at 750; see *Wieland*, 793 F.3d at 957. But neither of those cases involved record evidence suggesting that market forces would make it unlikely for insurers to change their products.

b. Petitioners also assert (Pet. 23-24) an *intra*-circuit conflict with the D.C. Circuit's decision in *Energy Future Coalition* v. *EPA*, 793 F.3d 141 (2015). As an initial matter, any resolution of an intra-circuit disagreement would be the task of the court of appeals, not this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 901-902 (1957) (per curiam). And petitioners declined to seek rehearing en banc in this case.

In any event, *Energy Future Coalition* differs meaningfully from this case. There, biofuel producers sued EPA, asserting that an EPA regulation prevented an ethanol-based fuel from being "use[d] as a test fuel" by vehicle manufacturers. *Energy Future Coalition*, 793 F.3d at 143. The court concluded that the biofuel producers had standing because "if EPA permitted vehicle manufacturers to use [the ethanol-based fuel] as a test fuel, there is substantial reason to think that at least some vehicle manufacturers would use it." *Id.* at 144. In support of that conclusion, the court cited comments from Ford Motor Company "saying that it 'supports the development and introduction'" of an ethanol-based fuel and "that the 'development of such a fuel would enable the first steps to the development of a new generation of highly efficient internal combustion engine vehicles.'" *Ibid.* (citation omitted). Here, the court of appeals cited automaker comments saying essentially the opposite: That automakers would likely not produce more gasoline-fueled vehicles, even if EPA's 2013 waiver was vacated.

c. Finally, petitioners substantially overstate (Pet. 24-25) the importance of the first question presented. The court of appeals did not suggest that plaintiffs can never base standing on "common-sense inferences about how third parties behave in response to *legal* barriers to certain behavior." Pet. 24. Nor did it suggest that parties who are not themselves the subject of a challenged regulation "must secure the cooperation of a directly regulated party to establish standing." Pet. 25.

Instead, the court of appeals simply held that, where redressability depends on the prospect that a favorable judicial ruling will induce independent third parties to change their conduct, and the only pertinent record evidence shows that those third parties likely will not do so, the plaintiff has not satisfied Article III. The court's redressability holding turned substantially on distinctive characteristics of the automobile-manufacturing industry and the many steps automakers had already taken over several years to comply with—and exceed—California's standards. See Pet. App. 23a-24a, 28a. The consequences of that holding are unlikely to be widespread.

B. This Court Should Not Grant Certiorari On A Novel Statutory Issue That No Court Has Addressed

Petitioners ask (Pet. 26-37) this Court to grant certiorari not only to review the redressability issue that the court of appeals decided, but also to resolve the merits of their statutory challenge—which neither the court below nor any other court has addressed. The Court should reject that request. This case is an extremely poor vehicle for deciding petitioners' statutory claim, and that claim lacks merit in any event.

1. a. If this Court granted certiorari on the second question presented, it could not decide that issue on the

merits unless it first reviewed and rejected the court of appeals' determination that petitioners lack Article III standing. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); pp. 11-16, *supra*. In addition, EPA has raised another threshold argument that could impede the Court's review of petitioners' statutory argument: namely, that EPA's 2019 decision to withdraw the 2013 waiver was procedurally invalid because it reopened a long-settled adjudication and relied on improper considerations. See EPA C.A. Br. 53-58; 87 Fed. Reg. at 14,344-14,352. That argument is logically antecedent to the question whether the reinstatement decision properly applies Section 209(b).

Even if the Court ultimately concluded that neither of those threshold obstacles bars its review of the second question presented, a grant of certiorari on that issue would be contrary to the Court's usual practice. This Court ordinarily does not decide merits questions "in the first instance" where, as here, the court of appeals has resolved a case on threshold grounds. *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citation omitted). Instead, when the Court "reverse[s] on a threshold question, [it] typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Ibid.*; see, *e.g.*, *Bond* v. *United States,* 564 U.S. 211, 214 (2011).

That approach would make particular sense here because the Court would otherwise be "without the benefit of" *any* "lower court opinions to guide [its] analysis of the merits." *Zivotofsky*, 566 U.S. at 201. Indeed, no court has ever passed on the statutory question raised by petitioners. The fact that this Court would be "the first to address the [second] question[] presented" thus weighs against review. *Does 1-3* v. *Mills*, 142 S. Ct. 17,

18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

Finally, this Court's resolution of the second question presented would not be outcome-determinative in the circumstances of this case. Petitioners argue that EPA must apply Section 209(b) by evaluating whether each individual California emission-reduction standard for which the State has sought a waiver is needed to address "California's distinctive local pollution problems." Pet. 28; see Pet. 27-34. That argument lacks merit, as explained below. But even if petitioners' interpretation of Section 209(b) were correct, EPA independently determined that California's low-emission-vehicle and zero-emission-vehicle standards qualified for waivers under that interpretation. See 87 Fed. Reg. at 14,334 ("[E]ven if the focus is on [California's] specific standards, when looking at the record before it, EPA erred in [2019] in concluding that California does not have a compelling need for the specific standards at issue.").

In its 2022 decision to reinstate the 2013 waiver, EPA found "that California is particularly impacted by climate change, including increasing risks from record-setting fires, heat waves, storm surges, sea-level rise, water supply shortages and extreme heat." 87 Fed. Reg. at 14,363. And EPA determined that California "needs" both the low-emission-vehicle and zero-emission-vehicle standards to address the "compelling and extraordinary" "climate-change impacts" that it faces. *Ibid.* In addition, EPA found that California faces "serious criteria air pollution problems" and that the zero-emission-vehicle standard directly reduces "criteria pollutant concentrations in California" by increasing the share of vehicles that produce no criteria pollutants whatsoever. *Id.* at 14,363-14,364. Indeed, California's

vehicle program has included a zero-emission-vehicle standard since 1990 for precisely that reason. See *id.* at 14,363. Accordingly, EPA concluded that California's low-emission-vehicle and zero-emission-vehicle standards were "particularly relevant" to reducing "California's air pollution problems." *Id.* at 14,366.

b. Petitioners ask (Pet. 36) this Court to ignore all of the foregoing jurisdictional and prudential obstacles because they contend that the second question presented "has for too long evaded this Court's review," and that "[t]he challenged waiver is in effect only through model year 2025." But if petitioners are correct that the challenged waiver meaningfully affects their operations only through model-year 2025, then that only further confirms that this Court's intervention can do little to benefit them. If this Court granted certiorari on both questions presented and ultimately held that petitioners have standing, it likely would not issue a merits decision until spring or summer of 2025, when model-year 2026 cars will already be on the road. See 40 C.F.R. 85.2304(a) (establishing that the model year may begin "on January 2 of the calendar year preceding the year for which the model year is designated," *i.e.*, on January 2, 2025, for model year 2026); 40 C.F.R. 85.2305(a).

Nor is there any reason to think that the statutory issue presented will necessarily evade judicial review. Numerous Section 209(b) waivers have been reviewed by courts on the merits. See, *e.g.*, *American Trucking Ass'ns* v. *EPA*, 600 F.3d 624, 627-629 (D.C. Cir. 2010); *Motor & Equip. Mfrs. Ass'n* v. *Nichols*, 142 F.3d 449, 462-464 (D.C. Cir. 1998). Indeed, the precise issue of statutory interpretation that petitioners raise here is currently pending before the D.C. Circuit in a case arising from EPA's 2023 waiver for California's standards

governing heavy-duty vehicles and engines. See Private Pet. Br. 39-58, *Western States Trucking Assoc., Inc.* v. *EPA*, No. 23-1143 (D.C. Cir. Nov. 3, 2023); 88 Fed. Reg. 20,688, 20,688 (Apr. 6, 2023). That waiver applies to California standards that govern through model-year 2035 and beyond, see Cal. Code Regs. tit. 13, § 1963.1 (2024), so the challenge there will not be affected by any issues concerning the duration of the waiver.[2]

Moreover, the alleged urgency here results in part from petitioners' own litigation decisions. Petitioners did not challenge EPA's 2013 waiver in 2013, when there was ample time to obtain a judicial decision before model-year 2025. Instead, they challenged only EPA's 2022 reinstatement of the 2013 waiver, by which time model-year 2025 was fast approaching. And once they filed their challenge in the D.C. Circuit, they litigated on a normal timeline, without seeking expedition. Petitioners also suggest (Pet. 35-36) that granting review now is necessary because California has adopted new standards applicable to passenger vehicles for future model years. But if EPA grants California a waiver for those new standards—which EPA has not yet done—petitioners can challenge the waiver at that time.

2. a. In any event, petitioners' statutory argument lacks merit. Section 209(b) provides that EPA generally "shall" grant California a preemption waiver "if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. 7543(b)(1). Section 209(b) further specifies,

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[2] The D.C. Circuit has held *Western States Trucking* in abeyance pending the court's resolution of *Texas* v. *EPA*, No. 22-1031 (argued Sept. 14, 2023). See *Western States Trucking*, *supra*, No. 23-1143 (Dec. 21, 2023).

however, that "[n]o such waiver shall be granted if the Administrator finds that," *inter alia*, "such State does not need such State standards to meet compelling and extraordinary conditions." 42 U.S.C. 7543(b)(1)(B).

In its 2022 reinstatement decision, EPA concluded that California's 2012 waiver request had been properly granted in 2013 pursuant to Section 209(b)'s criteria. See 87 Fed. Reg. at 14,358-14,361; see also 78 Fed. Reg. at 2113. In reaching that conclusion, EPA affirmed that the 2013 waiver grant had correctly considered California's standards in the aggregate, as EPA has consistently done in waiver decisions across the last five decades. See 87 Fed. Reg. at 14,353-14,354 (discussing this traditional practice); cf. *Motor & Equipment Mfrs. Ass'n*, 142 F.3d at 464 (agreeing with EPA that, for purposes of Section 209(b)(1)(C), "California's consistency is to be evaluated 'in the aggregate,' rather than on a one-to-one basis") (citation omitted).

Section 209(b)(1) requires California to base its protectiveness determination on its "standards * * * in the aggregate." 42 U.S.C. 7543(b)(1). Subparagraph (b)(1)(B)'s directive that EPA must consider whether "*such* State standards" are needed "to meet compelling and extraordinary conditions," 42 U.S.C. 7543(b)(1)(B) (emphasis added), therefore is likewise best understood to refer to the standards in the aggregate. See *Slack Techs., LLC* v. *Pirani*, 598 U.S. 759, 766 (2023) ("The word 'such' usually refers to something that has already been 'described' or that is 'implied or intelligible from the context or circumstances.'") (citation omitted). Because the state standards just mentioned in paragraph (b)(1) have an aggregate character, "such State standards" in subparagraph (b)(1)(B) have the same aggregate character. Although petitioners contend that

"Section 209(b)'s 'in the aggregate' language does not carry down to the rest of 209(b)," Pet. 32 (emphasis omitted), petitioners disregard the word "such," whose usual purpose is to make clear that such a connection exists.

Petitioners further contend (Pet. 32) that EPA's aggregate approach to subparagraph (b)(1)(B) is inconsistent with its approach to subparagraph (b)(1)(C). But petitioners' premise is wrong: As EPA explained, it interprets subparagraph (b)(1)(C) to also "refer to standards in the aggregate." 87 Fed. Reg. at 14,361; see *id.* at 14,361 n.266 (explaining that EPA has evaluated California's "suite of standards" and that "EPA's assessment under 209(b)(1)(C) is not in practice a standard-by-standard review"); *Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 464.

Petitioners also advance a highly restrictive reading of other terms in subparagraph (b)(1)(B)—like "'extraordinary'" and "need"—contending that the provision only permits standards that are "essential" to meeting "California's distinctive local pollution problems." Pet. 28, 31. But that argument presupposes that California's standards must be evaluated individually rather than in the aggregate. Petitioners appear to acknowledge (Pet. 32) that, if "EPA's whole-program approach" is valid, then subparagraph (b)(1)(B) is satisfied even under their reading of "'extraordinary'" and "'need[].'"

b. Section 209(b)'s history reinforces EPA's aggregate approach. As noted above, see p. 3, *supra*, the 1967 version of the CAA required California's standards to be "more stringent than applicable Federal standards." § 208(b), 81 Stat. 501. As amended in 1977, however, the statute requires California to determine only that its

standards "in the aggregate" will be at least as protective as federal standards. § 207, 91 Stat. 755. That 1977 amendment ensured that California had flexibility to adopt an appropriate program of "emission control standards," "even if those standards were in some respects less stringent than comparable federal ones." *Motor & Equip. Mfrs. Ass'n*, 142 F.3d at 464 (citation omitted). As EPA recognized 40 years ago, Congress would "not have given this flexibility to California and simultaneously assigned to the state the seemingly impossible task of establishing that 'extraordinary and compelling conditions' exist for each less stringent standard." 49 Fed. Reg. 18,887, 18,890 n.24 (May 3, 1984).

c. Petitioners' reliance (Pet. 33) on various "clear-statement rules" is misplaced. As the government's brief in opposition in *Ohio* v. *EPA*, petition for cert. pending, 24-13 (filed July 5, 2024), explains, Section 209(b) raises no serious issue under the equal-sovereignty principle. And because the petitioners in *Ohio* v. *EPA* argue that Congress is *categorically* foreclosed from subjecting different States' laws to different preemption standards, their approach would render Section 209(b) unconstitutional under *either* a whole-program *or* a standard-by-standard interpretation. The constitutional-avoidance canon therefore has no evident role to play here.

The major-questions doctrine is likewise inapplicable. Contrary to petitioners' implication (Pet. 34), economic consequences standing alone have never been enough to trigger the major-questions doctrine. After all, the doctrine is a tool for discerning "the text's most natural interpretation" by situating the text in "*context*." *Biden* v. *Nebraska*, 600 U.S. 477, 508 (2023)

(Barrett, J., concurring). So in deciding whether the doctrine applies, this Court has considered not just the "economic and political significance" of the asserted authority, but also other surrounding circumstances, such as the "history and the breadth of th[at] authority." *West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022) (citation omitted); see, *e.g.*, *Nebraska*, 600 U.S. at 501 (same).

Here, neither the history nor the breadth of the provision at issue "provide[s] a 'reason to hesitate.'" *West Virginia*, 597 U.S. at 721 (citation omitted). Indeed, unlike the federal statutory provisions at issue in *West Virginia* and *Nebraska*, the waiver provision does not "confer[] authority upon an administrative agency" to make "'major policy decisions.'" *Id.* at 721, 723 (citation omitted). Rather, it requires EPA to adjudicate waiver requests and confines EPA's discretion to determining whether specified criteria are met. And while the major-questions doctrine is designed in part to "preserve room for lawmaking" by state and local governments, *id.* at 739 (Gorsuch, J., concurring), restricting the availability of Section 209(b) waivers (as petitioners request) would curb state power and expand federal power.

Petitioners' invocation (Pet. 34) of the federalism canon is even further afield. Petitioners contend (Pet. 34) that, "under EPA's view, California alone among the States can regulate the nation's automobile market in the service of addressing climate change and forcing a transition to electric vehicles." Petitioners' proposed construction of Section 209(b), however, would not expand state regulatory authority in this sphere. To the contrary, adopting that interpretation would make it more difficult for California to obtain preemption waivers, and it would correspondingly reduce other States'

practical ability to choose between California and federal vehicle-emission standards. Petitioners' invocation of the federalism canon as a ground for *constraining* state regulatory authority would thus flip the canon on its head.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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