No. 24-7

In the Supreme Court of the United States

DIAMOND ALTERNATIVE ENERGY, LLC, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* TEXAS OIL & GAS ASSOCIATION, LOUISIANA MID-CONTINENT OIL & GAS ASSOCIATION, THE PETROLEUM ALLIANCE OF OKLAHOMA, TEXAS INDEPENDENT PRODUCERS AND ROYALTY OWNERS ASSOCIATION, AND TEXAS ASSOCIATION OF MANUFACTURERS IN SUPPORT OF FUEL PETITIONERS

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QUESTION PRESENTED

Amici write in support of Fuel Petitioners' second question presented:

> Whether EPA's preemption waiver for California's greenhouse-gas emission standards and zero emission-vehicle mandate is unlawful.

Because the waiver rule's regulatory objective is one of major national policy and EPA's written explanation for the rule fails to demonstrate clear statutory authority to reach that major national policy question, *Amici*'s brief, below, adds argument that the mandate violates the major questions doctrine.

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STATEMENT OF INTEREST[1]

Amici are statewide trade associations from Texas, Oklahoma, and Louisiana, representing the oil and gas industry and related manufacturing industries in their respective states. These industries are the foundational economic drivers for Texas, Oklahoma, and Louisiana. The economies and public welfare of these states depend on the immediate and long-term future of these industries. *Amici*, and the industry members they represent, are squarely in the crosshairs of the Administration's attack on fossil fuels in the transportation sector and other key economic sectors. EPA's preemption waiver, here, is a critical step in the Administration's multi-agency effort to cripple the oil and gas industry.

1. The Texas Oil & Gas Association (TXOGA) represents every facet of the Texas oil and gas industry, including small independent businesses and major producers. Collectively, TXOGA's membership produces roughly 90% of Texas' crude oil and natural gas and operates the vast majority of the state's refineries and pipelines. In 2023 alone, the Texas oil

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, *Amici* certify that counsel of record for all parties received notice of the intent to file this brief at least 10 days before it was due.

and natural gas industry supported over 480,000 direct jobs and paid $26.3 billion in state and local taxes and state royalties. In turn, Texas uses state oil and gas revenues to fund public education, infrastructure, first responders, and economic stabilization programs. TXOGA and each of its members are directly impacted by EPA's actions in this particular rulemaking.[2] For these reasons, all of Texas Oil & Gas Association's member companies and the dependent sectors of Texas' economy are subject to profound adverse consequences from the regulatory actions addressed in the petition.

2. Texas Independent Producers and Royalty Owners Association (TIPRO) is one of the country's largest oil-and-gas trade associations. TIPRO's nearly 3,000 members—from small family-owned operations to large publicly traded oil and gas producers and royalty owners of all sizes—represent Texas's foundational economic driver, the oil and gas industry. In 2023, Texas supplied 23% of all oil and gas jobs nationwide and provided highest oil and gas payroll in the country in 2023, totaling $59 billion. Texas produced over 1.9 billion barrels of oil and 12.2 trillion cubic feet of natural gas in 2023, both new records. And Texas's oil and natural gas industry purchased American goods and services to the tune of $288 billion, illustrating how deeply the oil and gas

[2] Texas Oil & Gas Association, *2023 Annual Energy & Economic Impact Report* (Jan. 30, 2024), https://www.txoga.org/2023eeir/

industry is woven into the fabric of the American economy.[3] For these reasons, all of Texas Independent Producers and Royalty Owners Association's member companies and individual members, and the dependent sectors of Texas' economy, are subject to profound adverse consequences from the regulatory actions addressed in the petition.

3. Texas Association of Manufacturers (TAM) actively represents the interests of more than 600 member companies. Texan manufacturers account for more than 11.2% of the total output in Texas—$269 billion in 2022—and employ almost 925,000 Texans in jobs that pay more than $105,699 annually on average. And for each manufacturing job, five additional jobs are created in a community. For more than twenty years, Texas has remained the number one exporting state in the United States for manufactured goods. As noted by the U.S. Department of Energy, "refined products made from oil & natural gas make the manufacturing of over 6000 everyday products and high-tech devices possible." These products include everything from contact lenses and hearing aids to cell phones and laptops.[4] For these reasons, all of Texas Association of

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[3] Texas Independent Producers and Royalty Owners Association, *2024 State of Energy Report* 3–4 (2024), https://tipro.org/tipro-energy-report-2024/.

[4] Texas Association of Manufacturers, *Manufacturing Matters*, https://manufacturetexas.org/manufacturing-matters; National Association of Manufacturers, *Manufacturing in the United States: Texas*, https://nam.org/manufacturing-in-the-united-

Manufacturer's member companies and the dependent sectors of Texas' economy are subject to profound adverse consequences from the regulatory actions addressed in the petition.

4. Louisiana Mid-Continent Oil & Gas Association (LMOGA) represents the oil and gas industry in the second-largest oil producing state and fourth-largest gas producing state. In 2019, Louisiana supported the production of 738 million barrels of crude oil and liquid condensate, 3.81 trillion cubic feet of dry (or pipeline quality) natural gas, and 102.4 million barrels of natural gas plant liquids—a first-point-of-sale total value of $55.5 billion. The Louisiana oil and gas industry provided $73.0 billion dollars of direct, indirect, and related state income. And state and local tax revenues from the industry provided $4.5 billion to the state economy throughout the supply chain. A total of 249,800 private sector employees received wages or salaries in 2019 supported by oil and gas activity.[5] For these reasons, all of Louisiana Mid-Continent Oil & Gas Association's member companies and the dependent

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states/regions/texas/; U.S. Department of Energy, *Products Made from Oil and Natural Gas* (Nov. 2019), https://www.energy.gov/sites/prod/files/2019/11/f68/Products%20Made%20From%20Oil%20and%20Natural%20Gas%20Infographic.pdf.

[5] ICF International, Inc., *The Economic Impact of the Oil and Natural Gas Industry in Louisiana* (Oct., 5, 2020), https://www.lmoga.com/assets/uploads/documents/LMOGA-ICF-Louisiana-Economic-Impact-Report-10.2020.pdf.

sectors of Louisiana's economy are subject to profound adverse consequences from the regulatory actions addressed in the petition.

5. The Petroleum Alliance of Oklahoma (OK Petro) represents the oil and gas industry in the Nation's fourth-largest oil producing state and fifth-largest gas producing state. In 2022, Oklahoma's oil and gas industry produced more than 1.8 billion barrels in proved crude oil reserves and more than 36 trillion cubic feet of natural gas reserves, directly contributing $55.7 billion to state GDP in 2023. In turn, Oklahoma's oil and gas industry provided $30.7 billion in income to Oklahomans, and its total impact accounted for 22% of statewide economic activity. The oil and natural gas industry is Oklahoma's largest private-sector employer and is its largest taxpayer, contributing a record $2.9 billion in total taxes in 2023. And beyond taxes, state royalty payments exceeded $1.9 billion. The oil and gas industry provides Oklahoma's only major source of earmarked funding for education and county roads and bridges, totaling $288 million and $177 million, respectively, in 2023.[6] For these reasons, all of The Petroleum

[6] U.S. Energy Information Administration, *Oklahoma State Energy Profile* (July 18, 2024), https://www.eia.gov/state/print.php?sid=OK; Oklahoma Energy Resources Board, *Oklahoma Oil & Natural Gas: Economic Impact* (2023), https://oerb.com/ECONOMIC-IMPACT/; OERB, *Oklahoma Oil & Natural Gas: 2023 Economic Impact Update* (Mar. 2024), https://oerb.com/wp-content/uploads/2024/03/Economic-Impact-Full-Report.pdf;

Alliance of Oklahoma's member companies and the dependent sectors of Oklahoma's economy are subject to profound adverse consequences from the regulatory actions addressed in the petition.

SUMMARY OF THE ARGUMENT

1. The *per curiam* panel opinion of the Court of Appeals for the D.C. Circuit wrongly held that Fuel Petitioners lack standing to challenge EPA's grant of a preemption waiver under Section 209(b) of the Clean Air Act to California's whole "Advanced Clean Cars" (ACC) program. Federal and California authorities have made clear that reducing use of fossil fuels in vehicles, potentially down to zero, is the objective of the EPA waiver and California's ACC program. There can be no question that the producers, refiners, and marketers of these same fuels have standing to challenge a rule aimed directly at them.

2. EPA's California Waiver Rule is one of the key weapons in the Administration's existential attack on the oil and gas sector. As Fuel Petitioners demonstrate, EPA's expansive preemption waiver grant misconstrues Section 209(b) of the Clean Air Act. Pet. Cert. 26–33. *Amici* respectfully urge the Court to grant Petitioner's request for certiorari and

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Mark C. Snead et al., *Oklahoma's Oil and Gas Economy* (2022), http://oerb.com/wp-content/uploads/2022/02/RegTrk-OK-Oil-Gas-Final-Draft-20220201.pdf.

reverse EPA's California Waiver Rule on those grounds.

3. EPA's overreach here also runs afoul of the Court's holding in *West Virginia v. EPA*, in which the Court struck down EPA's non-legislatively authorized attempt to completely transform the nation's electric power generation fleet. 597 U.S. 697 (2022). This case is one more instance of EPA imagining sweeping regulatory authority where none exists, wielding the Clean Air Act in an attempt to create seismic shifts in American markets (with devastating economic and societal ramifications). By abdicating regulatory authority to the State of California through the Clean Air Act's narrow preemption waiver, Section 209(b), EPA's conduct here is far worse than its efforts targeting electric power generation. *Amici* respectfully request that the Court grant certiorari review and rule that EPA's preemption waiver grant in this case violates the major questions doctrine.

ARGUMENT

I. Because EPA's preemption waiver expressly targeted the oil and gas industry, Fuel Petitioners have standing to challenge that action.

EPA admittedly has targeted the oil and gas industry with a raft of rulemakings in a concerted effort to force a change from fossil fuels and other liquid-fuel propulsion to electric vehicles. *See, e.g.*,

Exec. Order No. 13,990, 3 C.F.R. § 13990 (2022); Exec. Order No. 14,037, 3 C.F.R. § 14037 (2022).[7] This particular rulemaking—EPA's about-face grant of a preemption waiver to the whole of California's Advanced Clean Car program—is one such attack on the industry. As a result, Fuel Petitioners have standing to challenge the agency action—"remov[ing] a regulatory hurdle" to the use of Fuel Petitioners' products is enough to establish redressability. *See Energy Future Coalition v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.).

There is little question that nationwide reduction of the use of fossil fuels in vehicles, eventually down to zero, is the objective of EPA's wholesale preemption waiver for California's ACC program. Leaders of both EPA and California have said as much. EPA Administrator Michael Regan, citing his belief in "California's long-standing statutory authority *to lead*" (seemingly an admission of EPA's abdication to the Golden State), proceeded to roll back EPA's prior denial of a preemption waiver at the President's direction. Press Release, U.S. Environmental Protection Agency, *EPA Reconsiders Previous Administration's Withdrawal of California's Waiver to*

[7] As part of the coordinated agency strategy, EPA and the National Highway Traffic Safety Administration have also taken other agency actions, which are currently awaiting decision by the D.C. Circuit. *See Texas v. EPA*, No. 22-1031 (filed Feb. 28, 2022); *Natural Res. Def. Council v. NHTSA*, No. 22-1080 (filed May 11, 2022).

Enforce Greenhouse Gas Standards for Cars and Light Trucks (April 26, 2021), https://www.epa.gov/newsreleases/epa-reconsiders-previous-administrations-withdrawal-californias-waiver-enforce (emphasis added). EPA has continued to note that the California Air Resources Board's (CARB) 2012 waiver request attributed certain "benefits" of its ACC program "not to vehicle emissions reductions specifically, but to increased electricity and hydrogen use *that would be more than offset by decreased gasoline production and refinery emissions*." 87 Fed. Reg. 14,332, 14,336 (Mar. 14, 2022) (emphasis added) (citing *CARB Request for Waiver of Preemption for Low Emission Vehicle and Zero Emission Vehicle Regulations ("Advance Clean Car Program")* (2012 Waiver Request), EPA-HQ-OAR-2012-0562-0004, 1, 6 (Aug. 30, 2012)). Put differently, one of the express goals is for "net *upstream* emissions" to be "reduced through the increased use of electricity *and concomitant reductions in fuel production*." *Id.* (emphasis added) (citing 2012 Waiver Request, at 15–16).

Likewise, California's Gavin Newsom touted the ACC program's intended goal—"to end" the country's "reliance on *fossil fuels*" and to "make a zero-emission future a reality *for all Americans*." Press Release, Gavin Newsom, Governor, State of California, Governor Newsom Statement on Biden Administration's Restoration of California's Clean

Car Waiver (March 9, 2022), https://www.gov.ca.gov/2022/03/09/governor-newsom-statement-on-biden-administrations-restoration-of-californias-clean-car-waiver/ (emphasis added). In short, the very purpose of EPA's grant of a preemption waiver was to force nationwide conversion from liquid-fuel-powered vehicles to electric vehicles by abdicating the decision to California.

Contrary to the lower court's conclusion, Fuel Petitioners (entities and associations representing interests at all levels of the liquid fuel supply chain) are not ancillary to EPA's final agency action. *See* App. To Pet. Cert., 29a–30a. To be sure, automakers are also impacted by the rulemaking. The automakers are simply the device the agencies are using to directly undermine, and in their view hopefully eliminate, the Fuel Petitioners' industries and livelihoods. There can be no question that the producers, refiners and marketers of these fuels have standing on all grounds to challenge a rule (among other similarly purposed federal regulations) aimed directly at them. The automakers involvement does not change the ultimate target of the EPA and the California Air Resources Board—the oil and gas industry. A "plaintiff satisfies the redressability requirement" by showing "that a favorable decision will relieve a discrete injury"; a plaintiff "need not show that a favorable decision will relieve his *every* injury." *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007). Fuel Petitioners have standing

to challenge this agency action which would clearly injure them.

II. The Court should strike down EPA's agency action under the major questions doctrine because Congress did not clearly state that EPA may force a nationwide shift away from fossil fuels via regulatory delegation to California.

This is not the first time EPA has wielded "unheralded power" under the Clean Air Act to manipulate markets and disfavor a core American industry. *See West Virginia v. EPA*, 597 U.S. 697 (2022). EPA now wields its narrow preemption-waiver power under the Clean Air Act to enable California to choke the oil and gas industry in personal, municipal, and corporate transportation systems nationwide. This overly aggressive interpretation of the Clean Air Act could have devastating economic effects on the oil and gas industry, including *Amici* and throughout the states they call home. But EPA has answered this major question of economic and political significance *without* a clear congressional mandate to do so.

A. This is a major questions case.

The major questions doctrine is an established part of the canon for judicial review of agency rulemaking. The major questions doctrine "'label' . . . took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring

problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Id.* at 734.

In *West Virginia*, the Court observed that the Clean Power Plan's "point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar." *Id.* at 714. After all, "EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables." *Id.* at 698.

Here, the "point, after all" of EPA's preemption waiver for California's Advanced Clean Cars program is to leverage California's mandated shift from liquid-fuel-powered vehicles to electric vehicles to nationwide effect. Not only did EPA provide the preemption waiver, it also rescinded prior rulemaking to allow Section 177 "opt-in" states to adopt California's mandates. 87 Fed. Reg. 14,332 (Mar. 14, 2022); *see* 42 U.S.C. § 7507. And 17 States (as well as the District of Columbia) have adopted California's standards, representing approximately 40% of the new car market and the commensurate liquid fuel products associated with those new vehicles. *See id.*; California Air Resources Board, *States that have Adopted California's Vehicle Regulations* (June 2024), https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations.

As a result, *Amici*'s members, are not facing a mere "shift" in their sectors; they are facing the opening salvo in an emerging and coordinated federal and state blockade of the use of liquid fuels in the new vehicle market. In turn, Texas, Oklahoma, and Louisiana are facing the start of a "highly consequential" destruction of their foundational economic driver, as well as their home states' very prosperity, derived from the oil and gas and manufacturing industries. The fallout from this will be felt nationwide and abroad.

"A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia*, 597 U.S. at 735. So "the Government must—under the major questions doctrine—point to 'clear congressional authorization' to regulate in that manner.'" *Id.* at 732 (quoting *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)). Congress did not clearly authorize EPA to effectively abdicate nationwide regulation to California through Section 209(b)(1)(B) of the Clean Air Act. And Congress did not clearly authorize EPA, and, in turn, California, to increasingly push of liquid-fuel-powered vehicles out of nearly half of the country's new vehicle market. There is no congressional authorization for EPA to utilize the Clean Air Act's authority to destroy key industrial

sectors and the prosperity of the millions of citizens who depend on those sectors.

B. Congress did not hide an elephant-sized mandate for forced vehicle electrification (at California's bidding) in the Clean Air Act's preemption-waiver mousehole.

Congress must "speak clearly if it wishes to assign to an agency decisions of 'vast economic and political significance.'" *Utility Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (citation omitted). "Oblique or elliptical language, will not supply a clear statement," and agencies may not "seek to hide elephants in mouseholes or rely on 'gap filler' provisions." *West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring).

Here, the Clean Air Act's state regulation prohibition and waiver provision relied on by EPA are as follows:

> **(a) Prohibition**
>
> No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to this part. No State shall require certification, inspection, or any other approval relating to the control of emissions from

any new motor vehicle or new motor vehicle engine as condition precedent to the initial retail sale, titling (if any), or registration of such motor vehicle, motor vehicle engine, or equipment.

(b) Waiver

(1) The Administrator shall, after notice and opportunity for public hearing, waive application of this section to any State which has adopted standards (other than crankcase emission 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. . .

(2) If each State standard is at least as stringent as the comparable applicable Federal standard, such State standard shall be deemed to be at least as protective of health and welfare as such Federal standards for purposes of paragraph (1).

(3) In the case of any new motor vehicle or new motor vehicle engine to

> which State standards apply pursuant to a waiver granted under paragraph (1), compliance with such State standards shall be treated as compliance with applicable Federal standards for purposes of this subchapter.

42 U.S.C. § 7543(a)–(b). The preemption waiver contemplated in this provision is generally known as "the California waiver" because California is the only state that had adopted standards for the control of emissions before March 30, 1966, per Clean Air Act Section 209(b)(1). *See id.*

Section 209 (formerly Section 208) joined the Clean Air Act through the Air Quality Act of 1967. *See* 81 Stat. 485, 501 (1967). The preemption waiver, part of Title II—the National Emission Standards Act—permitted limited exceptions to EPA's preemptive authority to set emission standards to address "compelling and extraordinary conditions" in the State. *See id*. The National Emission Standards Act was intended to set national standards for vehicles with actual *emissions*, not for vehicles without emissions and not to dictate or eliminate fuel sources used in new vehicles. In 1967, when the preemption waiver was enacted, Congress could not have conceived of mass electrification of new vehicles. And in any event, Congress did not enable EPA to mandate mass electrification in an enabling statute that was unequivocally intended to set standards for vehicles

with actual emissions. Likewise, Congress did not empower EPA to abdicate a sea change away from liquid fuels at the sole discretion of the state of California's policy decision. No such mandate has since been added to the enabling statute.

The sole, clear subject of these portions of the Clean Air Act is "standards" for the "control of emissions." The preemption waiver simply does not provide a clear statement that could authorize EPA to invert federalism principles to permit California to tilt 40% of the United States' new car market away from liquid-fuel propulsion and towards electrification. Authorization for emissions standards does not equate to authorization to, in essence, eliminate liquid-fuel-powered vehicles. EPA must "point to 'clear congressional authorization' to regulate in that manner." *West Virginia*, 597 U.S. at 732 (quoting *Utility Air*, 573 U.S. at 324). It cannot.

EPA's (and California's) decision in the absence of clear congressional authority has economic significance. The economic ramifications of EPA's broad reading, particularly on *Amici* and their home states, cannot be overstated. And in addition to the primary impacts on the oil and gas industry and secondary impacts on state revenue from the industry, other sectors rely on the ongoing viability of the oil and gas industry. Various business sectors, such as the commercial aviation industry, and the United States military (though *Amici* do not presume to

speak for them) lean heavily on the oil and gas industry. But EPA has ignored the cascading impacts beyond the transportation and liquid fuel business sectors. *See* 87 Fed. Reg. 14332.

EPA also overlooked the political significance of its expansive preemption waiver. Congress did not mandate vehicle electrification through the Clean Air Act's preemption waiver. Indeed, congressional attempts to legislate federal mandates for electric vehicles have failed at least five times.[8] And for decades, EPA itself has vacillated on the scope of the waiver with the changing political tides that followed presidential elections.[9] This history of political uncertainty over the very decision made by EPA (or rather abdicated to California) in this case illustrates the commonsense conclusion that this decision touches on a matter of vast political significance. Moreover, EPA's interpretation of Section 209(b) is so gaping that principles of federalism (reflected in

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[8] *See*, S. 3664, 115th Cong. § 2 (2018), https://www.congress.gov/bill/115th-congress/senate-bill/3664; S. 1487, 116th Cong. §1 (2019), https://www.congress.gov/bill/116th-congress/senate-bill/1487; H.R. 2767, 116th Cong. § 1 (2019), https://www.congress.gov/bill/116th-congress/house-bill/2764; H.R 8635, 116th Cong. § 2 (2020), https://www.congress.gov/bill/116th-congress/house-bill/8635; S. 4823, 116th Cong. § 2 (2020), https://www.congress.gov/bill/116th-congress/senate-bill/4823.

[9] *See* 73 Fed. Reg. 12,156, 12,163 (Mar. 6, 2008); 74 Fed. Reg. 32,755, 32,783 (July 8, 2009); 78 Fed. Reg. 2,112 (Jan. 9, 2013); 84 Fed. Reg. 51,310, 51,328, 51,339 (Sept. 27, 2019).

Section 209(a)) fall out, putting California at the helm to the detriment of its sister states, further raising the political stakes.

C. This case presents an appropriate vehicle to address EPA's expansive view of the Clean Air Act's preemption waiver.

To date, EPA's everchanging interpretations of the Clean Air Act's preemption waiver have escaped the eyes of this Court. This case presents the opportunity to review EPA's interpretation of the Clean Air Act's preemption waiver at its broadest. Because this is one of many agency actions driven by Executive Order 13,990, certiorari review (particularly under the major questions doctrine) will provide a North Star in related cases.

And addressing these issues now will quell uncertainty in this agency arena and address the urgent need for resolution on the merits. Parties have challenged EPA's yo-yoing preemption waiver decisions before, only to find that the passage of time during judicial review has stymied review of the merits of EPA's decisions. *See, e.g.*, *Chamber of Commerce v. EPA*, 642 F.3d 192 (D.C. Cir. 2011). *Amici* respectfully ask the Court to take up these questions.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, reverse the D.C. Circuit's standing decision and reverse the EPA California waiver rule for being outside of statutory authority and in violation of the major questions doctrine.

Respectfully submitted,

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