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

BRIEF OF WESTERN STATES PETROLEUM ASSOCIATION, AMERICAN TRUCKING ASSOCIATIONS, INC., NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC., CALIFORNIA ASPHALT PAVEMENT ASSOCIATION, OREGON FUELS ASSOCIATION, WASHINGTON OIL MARKETERS ASSOCIATION, CALIFORNIA FUELS & CONVENIENCE ALLIANCE, ARIZONA PETROLEUM MARKETERS ASSOCIATION, AND NEVADA PETROLEUM MARKETERS & CONVENIENCE STORE ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Western States Petroleum Association (WSPA) is a non-profit trade association that represents a large portion of the petroleum exploration, production, refining, transportation, and marketing companies in Arizona, California, Nevada, Oregon, and Washington.[1] Founded in 1907, WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible.

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 2,400 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

The National Federation of Independent Business, Inc. (NFIB) is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and

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[1] In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief pursuant to Rule 37.2.

grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members. An affiliate of NFIB, the NFIB Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

California Asphalt Pavement Association is a nonprofit trade association that represents members of the asphalt pavement industry in California. The industry is a primary consumer of liquid asphalt, a petroleum-based product that is produced as part of the oil refining process. Because there is no alternative for liquid asphalt, any reduction or elimination of the availability of this product as an indirect result of California's emissions standards will severely harm the industry. It will disrupt the ability of local, state, and federal agencies—the industry's largest customers—to build and maintain roads and highways. Beyond impacting the 15,735 men and women employed in manufacturing asphalt pavement mixtures, California's standards will put at risk the 343,000 American jobs involved in the construction of that infrastructure.

The Oregon Fuels Association (OFA) is the voice of Oregon's locally-owned fuel stations, fuel distributors, and heating oil providers. OFA members are at the forefront of environmental stewardship within the industry as the leading suppliers of biodiesel and other low carbon fuels. Often multi-generational,

family-owned businesses, members fuel Oregon's economy by providing career opportunities to thousands of employees across the state. OFA is a leading advocate for common sense regulations that balance affordable fuels and environmental stewardship.

Washington Oil Marketers Association (WOMA) is a nonprofit trade association with individual and corporate members that market petroleum products in Washington State and associate members that sell products and services that support the petroleum industry. WOMA members account for nearly 80% of all petroleum products sold in Washington State, including 68,000,000 gallons of heating oil to residential and industrial users. WOMA is the only association in Washington State that focuses on all aspects of the petroleum marketing industry and monitors legislative and regulatory issues involving fuel, energy, alcohol, tobacco, transportation, the environment, and the state budget and taxes. WOMA also lobbies on behalf of petroleum marketers and oil heat dealers with state government agencies and the legislature in Olympia and stays engaged with related state and national associations.

The California Fuels and Convenience Alliance (CFCA) is the industry's statewide trade association representing the needs of small and minority wholesale and retail marketers of gasoline, diesel, lubricating oils, motor fuels products, and alternative fuels, including but not limited to, hydrogen, compressed natural gas, ethanol, renewable and biodiesel, and electric charging stations; transporters of those products; and retail convenience store operators.

Since 1967, the Arizona Petroleum Marketers Association (APMA) has been the state's leading trade

association representing the petroleum marketing, convenience store and related industries. APMA's primary purpose is to protect and advance its members' legislative and regulatory interests in the state's and nation's capitols.

The Nevada Petroleum Marketers & Convenience Store Association (NPM&CSA) is a statewide trade association that represents an extensive membership of liquid fuel and lubricant distributors, transporters, retailers, and convenience store owners. The fuel distribution, transportation, retailing, and convenience industry are critical components of Nevada's economy with stations and stores in every county. Nevada has more than 1229 C-stores employing more than 18,000 employees. Annual gross sales are more than $4.7 billion with fuel sales accounting for $2.6 billion.

SUMMARY OF ARGUMENT

This case forms part of a sprawling constellation of regulatory challenges addressing increasingly stringent regulations of internal combustion vehicles. These include regulations promulgated by California and authorized by the Environmental Protection Agency's (EPA's) Clean Air Act waivers, EPA's own tailpipe emission standards, and the National Highway Traffic Safety Administration's (NHTSA's) corporate average fuel economy standards.

Petitioners, like amici and their members, stand to be injured by California's regulations, which will indisputably reduce the demand for liquid fuels. But despite numerous active and ongoing cases challenging the regulations, the D.C. Circuit has

continuously dodged ruling on the merits. Here it did so by manipulating standing doctrine.

The D.C. Circuit's opinion engenders confusion in two primary ways.

First, it sets a rigid standard for Petitioners to prove redressability. The court rejected Petitioners' arguments that their injuries would be redressed by vacatur of the waiver in light of the "predictable" and indeed intended "effects" of EPA's waiver. Instead, the court demanded a much stronger showing of evidence from regulated entities that they would alter their behavior in response to a favorable ruling from the court.

Second, the court conflated redressability and mootness doctrines. The court focused on the time that had elapsed since the start of the litigation, and the remaining regulatory timeframe, and concluded there was insufficient time for the requested relief to have any effect. But the court labeled this inquiry, which is quintessential mootness, as one of redressability. In doing so, it not only ignored important details attendant to each distinct doctrine, but it also flipped the burden of proof from Respondents to Petitioners. And worse still, since Petitioners had demonstrated that car manufacturers could and would alter their behavior if the court ruled in their favor, the court's conclusion was also incorrect.

These errors create significant obstacles to standing in other contexts. If left undisturbed, it incentivizes agencies to regulate in short timeframes that are set to expire before a court may render a decision. And it also prompts questions about how the court's analysis here fits in with industries

requiring long lead times to reach regulatory compliance.

Moreover, this Court should grant the petition to review the merits of EPA's Clean Air Act waiver here, which authorizes California to regulate global greenhouse gas emissions.

The issues presented are poised to recur as challenges to EPA and NHTSA's next set of vehicle regulations are already under way in the D.C. Circuit and the Sixth Circuit. Left uncorrected, the court's decision below may hinder these regulatory challenges such that a court may never reach the merits of these important questions.

ARGUMENT

I. The D.C. Circuit's opinion muddles both redressability and mootness doctrines.

As explained by Petitioners, the D.C. Circuit departed from Supreme Court precedent and its own prior decisions when it imposed a barrier to merits review based on an improperly stringent and novel standard for demonstrating redressability. Rather than allowing Petitioners to show standing from the "determinative or coercive effect" of EPA's Advanced Clean Cars I waiver, the court demanded *proof* that any decision in Petitioners' favor would cause directly regulated entities to alter their plans. *See* Pet.15-21. So although a petitioner may usually rely on the "predictable effect" of regulation on third parties to establish causation and redressability, *see* Pet. 16-17, the D.C. Circuit here required Petitioners to obtain evidence from the directly regulated entities themselves. *See* Pet.20-21. In so doing, the court also

improperly entangled the concepts of redressability and mootness.

Under Article III of the Constitution, an "affected party" seeking to challenge federal agency action in federal court must establish that there is an actual "case or controversy" for the court to resolve. U.S. Const. art. III. Under the longstanding three-part test for standing, a party must demonstrate that it has suffered (1) an injury in fact; (2) that is "fairly traceable" to the agency's action; and (3) that is redressable by favorable judicial relief. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations marks and alterations omitted). Causation and redressability are "flip sides of the same coin": "If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury. So the two key questions in most standing disputes are injury in fact and causation." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380-81 (2024) (citation omitted).

In the context of challenges to agency rulemaking, the quintessential injury-in-fact from an agency's rule is the imposition of compliance costs directly on the party or industry challenging the regulation. *See Abbott Lab'ys v. Gardner*, 387 U.S. 136, 140 (1967) (There is a "basic presumption of judicial review" under the APA for parties who have been "adversely affected or aggrieved by agency action." (citation and quotation marks omitted)). "[T]he Court has [also] identified a variety of familiar circumstances where government regulation of a third-party individual or business may be likely to cause injury in fact to an *unregulated* plaintiff." *All. for Hippocratic Med.*, 602 U.S. at 384-85 (emphasis added) (collecting cases).

An unregulated party may assert an injury from "upstream" or "downstream" effects of the regulation for others involved, like manufacturers, retailers, or customers. *Id.*; *see also Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2460 (2024) (Kavanaugh, J., concurring) ("An unregulated plaintiff . . . [may] challenge an allegedly unlawful agency rule that regulates others but also has adverse downstream effects on the [unregulated party]."). Actions brought by unregulated parties are a class of "historically common and vitally important litigation against federal agencies." *Corner Post*, 144 S. Ct. at 2469 (Kavanaugh, J., concurring).

In the decision below, the D.C. Circuit created a nearly impossible burden. First, the court distorted the redressability requirement by demanding that unregulated parties *prove* how third parties will react to a favorable decision on the merits. Second, the court muddled the distinction between standing and mootness by lodging in redressability a determination that sounds in mootness. Together, these twin errors make standing prohibitively difficult for unregulated parties to prove.

A. The D.C. Circuit set an unduly high bar for Petitioners to demonstrate redressability.

The D.C. Circuit reconfigured standing doctrine by imposing an ill-considered and unworkable requirement that unregulated plaintiffs must *prove* how third parties would react to a favorable decision on the merits.

Ordinarily, a plaintiff establishes that its injuries are redressable by showing "a likelihood that the requested relief will redress the alleged injury." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103

(1998). Unregulated entities—whose injuries depend in part on the actions of regulated third parties—may rely on "the predictable effect of Government action on the decisions of third parties" to demonstrate redressability. *Dep't of Com. v. New York*, 588 U.S. 752, 768 (2019). For example, in *Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990), a consumer group petitioned the D.C. Circuit for review of the NHTSA's fuel economy standards for passenger cars. Petitioners argued that NHTSA's rule demanding greater fuel efficiency hindered the ability of its members to "buy larger passenger vehicles." *Id.* at 112. Respondents argued petitioners failed to show redressability because manufacturers may not necessarily respond to a court decision by producing larger vehicles. *Id.* at 116-17. But the D.C. Circuit pointed to "past experience" showing that manufacturers *do* respond to lower fuel efficiency standards by producing larger vehicles and that consumer demand was in favor of larger vehicles so manufacturers would probably respond to those "market forces" to "meet that consumer demand." *Id.* at 117. Indeed, "an entire line of cases finds redressability [in] . . . circumstances turning on third-party conduct that is voluntary but reasonably predictable." *Competitive Enter. Inst.*, 970 F.3d at 384; *see id.* at 381-82 (collecting cases).

Petitioners adequately demonstrated that the third-party conduct necessary to alleviate their injury was a "reasonably predictable" result of a favorable ruling. California's Advanced Clean Cars program would mandate that car manufacturers produce fewer vehicles that consume liquid fuel. Petitioners (who produce liquid fuel) indicated that their

injury (reduced demand for liquid fuel) would be mitigated by a favorable ruling vacating EPA's authorization of California's Advanced Clean Cars program. Petitioners supported redressability with "over a dozen declarations by individuals who are affiliated with Fuel Petitioner entities and organizations . . . explain[ing] that the entity or organization is involved with producing or selling fuel and that the waiver causes Fuel Petitioners economic injury by reducing the demand for fuel and related products." *Ohio v. EPA*, 98 F.4th 288, 301 (D.C. Cir. 2024).

Nonetheless, the D.C. Circuit dismissed their petition for lack of standing, concluding that they failed to demonstrate "a 'substantial probability' . . . that automobile manufacturers are likely to respond to a decision by this Court by changing their fleets in a way that alleviates their injuries in some way." *Id*. at 302 (citation omitted).

Rather than allowing Petitioners to rely on the "predictable effects" of the rule, the D.C. Circuit demanded "record evidence," or "additional affidavits" "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." *Dep't of Com.*, 588 U.S. at 768; *Ohio v. EPA*, 98 F.4th at 300, 302-03, 305. In other words, the court expected Petitioners to obtain definitive evidence from the regulated car manufacturers that they would alter their production, pricing, and distribution in response to a favorable court decision. This requirement is as unnecessary as it is unrealistic.

As Petitioners explain, the D.C. Circuit failed to acknowledge evidence that Petitioners' harms would

be redressed through the predictable effects of a favorable decision on third parties' conduct and did not respond to caselaw supporting this approach. *See* Pet. 20. Instead, the court imposed a novel evidentiary requirement—demanding Petitioners to adduce evidence from the regulated party, who participated as intervenor-respondents in the litigation. *Id*. This onerous requirement asks far too much of unregulated parties, who need only demonstrate that the third-party conduct necessary to mitigate their injuries is "reasonably predictable."

B. The D.C. Circuit's opinion engenders confusion between redressability and mootness.

Although the D.C. Circuit couches its holding in redressability, its analysis seems to confuse redressability and mootness. Because of the unique role the D.C. Circuit plays in adjudicating administrative law cases, the confusion the court has engendered carries greater weight.

In the first half of the court's redressability analysis, it concluded that Petitioners failed to prove that car manufacturers would alter their production, pricing, and distribution in the event of a favorable ruling. In the second half, the court determined that Petitioners failed to show, as of the time of the court's decision, that "manufacturers would do so *relatively quickly*—by Model Year 2025," even though Petitioners filed their petition for review in May 2022. *Ohio v. EPA*, 98 F.4th at 302 (emphasis added).

With some exceptions, mootness is "the doctrine of standing set in a time frame." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). Because of this

characterization, lower courts sometimes "conflate[] [the] Court's case law on initial standing, with its case law on mootness." *Id.* at 174. The two doctrines are closely related but distinct. "It is the doctrine of *mootness*, not standing, that addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit." *West Virginia v. EPA*, 597 U.S. 697, 719 (2022) (cleaned up) (citation omitted). But "[a] case is not moot . . . unless it is *impossible* for [the Court] to grant any effectual relief." *United States v. Washington*, 596 U.S. 832, 837 (2022) (cleaned up) (emphasis added) (citation omitted). Thus, "the *heavy burden* of proving mootness falls with the party asserting a case is moot." *Maldonado v. D.C.*, 61 F.4th 1004, 1006 (D.C. Cir. 2023) (emphasis added) (internal quotation marks and citation omitted).

So while standing asks whether a party has "[t]he requisite personal interest that must exist at the *commencement* of the litigation," mootness asks whether that personal interest "continue[s] throughout [the] existence [of the litigation]." *Laidlaw*, 528 U.S. at 189 (emphasis added) (internal quotation marks and citations omitted); *Louie v. Dickson*, 964 F.3d 50, 54 (D.C. Cir. 2020).[2] And while a plaintiff bears the burden of establishing the elements of

[2] This Court's standing doctrine contains additional confusion stating both that standing is assessed *at the outset of litigation* and that each element of standing must be supported "with the manner and degree of evidence required at the *successive stages of the litigation*." *Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024) (emphasis added) (citing *Lujan*, 504 U.S. at 561). Granting the Petition would provide an opportunity to clarify this confusion.

standing, *Lujan*, 504 U.S. at 560-61, the party asserting mootness (typically the defendant) bears the burden of proving a case is moot.

Here, it seems the D.C. Circuit conflated the doctrines of standing and mootness, and confused their respective burdens, by mislabeling a mootness question as a redressability one.

As explained by Petitioners, EPA did not contest Petitioners standing, but California and other state and local intervenors did so in their briefing, arguing that Petitioners had not shown that "manufacturers would change course if EPA's decision were vacated." Pet.11 (quoting C.A. California Br. 13-15). Then, at oral argument, counsel for state and local intervenors reiterated this same assertion but argued it as a matter of mootness. Pet.12.

Petitioners moved to file supplemental briefing and supplemental declarations demonstrating further that the matter was not moot. *Id*. These declarations included statements from individuals like Walter Kreucher, who worked at Ford for over thirty years on regulatory compliance. *Id.*; C.A. Pet. Standing Addendum, Kreucher Decl. ¶ 1; *see also* C.A. Pet. Standing Addendum, Modlin Decl. ¶ 1 (over forty years' experience working in emissions and fuel economy regulatory compliance at Chrysler). Kreucher explained that "if California's vehicle [greenhouse gas] emission and [zero-emission vehicle] standards were to be eliminated or made less stringent, automobile manufacturers could and likely would change their production, pricing, and/or distribution plans for Model Year 2025 as late as December 2025." C.A. Pet. Standing Addendum, Kreucher Decl. ¶ 5; *see also* C.A. Pet. Standing Addendum, Modlin Decl. ¶ 5

(same). The D.C. Circuit, however, refused to consider this information since it framed the issue in terms of redressability. *Ohio v. EPA*, 98 F.4th at 306.

The court then proceeded to evaluate the "redressability" issue with a mootness analysis. The court asked whether, given the short regulatory timeframe remaining, car manufacturers might still have time to alter their behavior. *Id.* at 302-303. Because manufacturers could or would no longer change their production, pricing, and distribution, the court concluded Petitioners no longer had an injury that would be remedied by the court's decision. *Id.* at 303-04. And the court made this assessment, not as of the time the litigation commenced, but at the time of its decision. *See, e.g.*, *id.* at 302 ("Petitioners fail 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."); *see also e.g.*, *id.* (stating that petitioners failed to show "that automobile manufacturers would [respond to a decision by this Court by changing their fleets] relatively quickly—by Model Year 2025").

In short, the court asked whether an "intervening circumstance," *i.e.*, the passage of time since the Advanced Clean Cars waiver was granted, rescinded, and reinstated, had rendered Petitioners claims moot. *West Virginia v. EPA*, 597 U.S. at 719.

The D.C. Circuit's error is problematic for at least three reasons. First, courts already tread carefully on the distinction between standing and mootness, and the D.C. Circuit's opinion blurs that carefully drawn line. *See, e.g.*, *Narragansett Indian Tribal Historic Pres. Off. v. FERC*, 949 F.3d 8, 12 (D.C. Cir. 2020)

(citation omitted) (holding that a question about redressability "may sound like [a question about] mootness" but finding the proper inquiry was one of standing in light of the timing—namely that the question arose at the time the action commenced). Second, by deciding on standing rather than mootness, the court liberated Respondents of their "heavy burden" to prove mootness. *Maldonado*, 61 F.4th at 1006. And third, the court dismissed a question that is still live. This Court has explained that if resolution of an issue has the potential to affect future behavior, then the question is not moot. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115 (1974) (determining that a case was not moot even though the strike upon which the action was based had ended because a federal court decision could substantially affect future labor-management negotiations); *see also West Virginia v. EPA*, 597 U.S. at 719-20 (declining to "dismiss [the] case as moot" because the Government could reimpose the regulation at issue); *Washington*, 596 U.S. at 837 ("A case is not moot . . . unless it is *impossible* for [the Court] to grant any effectual relief.") (cleaned up) (emphasis added)).

C. The D.C. Circuit's erroneous decision erects increasingly high standing obstacles for parties challenging federal regulations.

Left uncorrected, the D.C. Circuit's opinion creates a variety of unintended consequences. Most immediately, the decision erects a redressability obstacle for the many unregulated petitioners actively challenging vehicle regulations in other cases in the circuit courts. Looking forward, the D.C. Circuit's reasoning creates a perverse incentive for agencies to

regulate seriatim in shorter and shorter timeframes. And even beyond the realm of vehicle regulations, the court's decision below could affect regulatory challenges in industries with similar timeframes.

The D.C. Circuit's opinion creates confusion for ongoing regulatory challenges in related cases. Petitioners in this case, along with other similarly *unregulated* parties, have filed petitions for review against EPA and NHTSA regulations governing vehicle emissions and fuel economy.[3] These regulations are intended to help meet the Biden Administration's stated goal that "50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles." Exec. Order 14037, 86 Fed. Reg. 43583 (Aug. 5, 2021), Strengthening American Leadership in Clean Cars and Trucks.[4] The directly regulated vehicle

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[3] *See, e.g.*, *Kentucky v. EPA*, No. 24-1087 (D.C. Cir.) ("Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles"); *Nebraska v. EPA*, No. 24-1129 (D.C. Cir.) (state challenge to EPA's "Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3"); *In re: MCP No. 189, National Highway Traffic Safety Administration, Department of Transportation, Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027 and Beyond and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030 and Beyond, Fed. Reg. 52540, Published on June 24, 2024* (6th Cir.); *Western States Trucking Ass'n v. EPA,* No. 23-1143 (D.C. Cir.) (California's Advanced Clean Trucks waiver); *Iowa v. Granholm*, No. No. 24-01721 (8th Cir.) (petroleum equivalency factor used to calculate fuel economy standards); *see also Texas v. EPA,* No. 22-1031 (D.C. Cir.) (emissions standards for Model Years 2023-2026); *National Resources Defense Council v. NHTSA,* No. 22-1080 (D.C. Cir.) (fuel economy standards for Model Years 2024-2026).

[4] For reference, in 2023, new electric vehicles constituted 9% of sales in the United States. Anh Bui & Peter Slowik,

manufacturers have yet to come forward as challengers. But petitioners, including parties like the fuel producers in this case, are directly affected by the government's concerted effort to reduce the consumption of liquid fuels and continue to challenge these regulations.

The D.C. Circuit's ruling could also incentivize agencies to regulate in short intervals to obstruct judicial review. In this case, the short regulatory timeframe remaining was key to the court's determination that Petitioners' injury was not redressable. EPA reinstated California's waiver for Advanced Clean Cars in March 2022, which reactivated California's Advanced Clean Cars program for Model Years 2017 through 2025. *Ohio v. EPA*, 98 F.4th at 298. Petitioners filed their petition for review in May 2022 with over three years remaining in the regulatory timeframe. In the decision below, the court relied, in part, on the erroneous conclusion that since Model Year 2025 was the final year of the waiver, car manufacturers would be unable to change production, pricing, and distribution before the regulatory period ended. *Id*. at 302-03.

As a result of the court's opinion, agencies could intentionally structure rules to evade review by making "unredressably" short timeframes. To illustrate, by statute the NHTSA must set "average fuel economy standards for passenger and non-passenger automobiles . . . for at least 1, but not more than 5, model years." *See, e.g.*, 49 U.S.C. § 32902(b)(3). If

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Market Spotlight: Electric Vehicle Market and Policy Developments in U.S. States, 2023, The International Council on Clean Transportation (June 4, 2024), https://perma.cc/EG6N-3MW2.

NHTSA were to opt for the minimum timeframe—one year—the regulatory period could be complete before a court renders its decision. Based on the timing, potential challengers would be consistently foreclosed from bringing suit.[5]

As a final illustration, the D.C. Circuit's opinion could also hinder regulatory challenges for any type of industry with lead time for regulatory compliance, not just car manufacturers. In denying the redressability of Petitioners' injuries, the court placed great weight on the fact that car manufacturers "need years of lead time to make changes to their future model year fleets." *Ohio v. EPA*, 98 F.4th at 302. And given the regulatory time frame, the court concluded that manufacturers would have too little "time to alter their product plans." *Id.* at 302.

Consequently, other (highly regulated) industries seeking to challenge agency regulations could face a steep impediment to standing. Implementation of virtually every regulatory burden requires lead time and planning. Under the court's holding here, petitions for review will continually face an obstacle to standing based on the requisite time-period required to plan and comply and, in some circumstances, the

[5] This point also illustrates that the D.C. Circuit's timing analysis addressed an issue of mootness, not redressability. If such agency gamesmanship were to occur, a court could apply its exception to *mootness* to hear a case that is "capable of repetition, yet evading review." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016); *see also id.* ("That exception applies . . . where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." (cleaned up) (citation omitted)).

dwindling time horizon of the regulation itself. Petition for review will be too late, since industries trying to predict and prepare for regulatory action will be too far along for their injuries to be redressable.

The D.C. Circuit's opinion risks "clos[ing] the courthouse doors on . . . unregulated plaintiffs—a radical change to administrative law that would insulate a broad swath of agency actions from any judicial review." *See Corner Post*, 144 S. Ct. at 2463 (Kavanaugh, J., concurring).

II. This Court should review the merits and vacate the waiver granted to California.

Because EPA's grant of the waiver here allows California to "assert[] highly consequential power beyond what Congress could reasonably be understood to have granted [in the Clean Air Act]," the case implicates the major-questions doctrine. *West Virginia v. EPA*, 597 U.S. at 724. Under the doctrine, courts must review "assertions of extravagant statutory power . . . with skepticism," especially where "the history and the breadth of the authority that the agency has asserted, and *the economic and political significance* of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 721, 724 (cleaned up) (emphasis added).[6]

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[6] An agency action also implicates a major political question if it "would upset the usual constitutional balance of federal and state powers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). In this sense, the major-questions doctrine is similar to the federalism canon—that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 590 U.S. 604, 622-23 (2020); *see West Virginia v.*

The Court has noted that an issue is *economically significant* where an agency claims, for example, "power over a significant portion of the American economy." *Id.* at 722 (internal quotation marks omitted).

And the Court has found issues to be of major *political significance* when the agency claims the power "to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"; the issue "has been the subject of an earnest and profound debate across the country," *id.* at 724, 732 (internal quotation marks and citations omitted); or the agency action "intrudes into an area that is the particular domain of state law," *Ala. Ass'n of Realtors v. HHS*, 594 U.S. 758, 764 (2021) (per curiam). No single factor is necessary, but all factors here point in the same direction: the decision to allow California to force a nationwide shift in new sales from gas-powered vehicles to electric vehicles implicates a major question. *Cf.* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

EPA, 597 U.S. at 744 (Gorsuch, J., concurring) ("[T]he major questions doctrine and the federalism canon often travel together."). EPA's reading of Section 209(b) would improperly give California authority, shared with no other state, to overhaul the *national* vehicle and fuel industries to address an inherently *global* phenomenon.

Here, the vast *economic impact* of the section 209(b) waiver on the automobile and energy industries cannot be overstated. As relevant to amici, California's standards will indisputably harm the petroleum industry, placing hundreds of thousands of jobs—and billions of dollars in tax revenue—at risk. *See* Br. of Amici Curiae Western States Petroleum Ass'n et al., *Ohio v. EPA,* No. 22-1081 (D.C. Cir.) at 1. Downstream industries will also suffer. The asphalt industry, for example, is reliant on oil refining for liquid asphalt, a petroleum-based product. *See id.* at 2-3. And if petroleum production is curtailed, the industry will be unable to meet its commitments to supply those who pave America's roads. *See id.* Again, hundreds of thousands of jobs nationwide are on the line, not to mention core elements of this country's infrastructure. *See id.* at 3.

There are two primary ways the waiver implicates questions of major *political* significance as well. First, the agency has "adopt[ed] a regulatory program that Congress ha[s] conspicuously and repeatedly declined to enact itself." *West Virginia v. EPA*, 597 U.S. at 724. Congress has considered and rejected (multiple times) legislation authorizing EPA to establish an electric vehicle mandate. *See, e.g.*, Zero-Emission Vehicles Act of 2020, S. 4823, 116th Cong. (2020); Zero-Emission Vehicles Act of 2020, H.R. 8635, 116th Cong. (2020); Zero-Emission Vehicles Act of 2019, S. 1487, 116th Cong. (2019); Zero-Emission Vehicles Act of 2019, H.R. 2764, 116th Cong. (2019); Zero-Emission Vehicles Act of 2018, S. 3664, 115th Cong. (2018).

Second, the waiver is politically significant because electrification of America's vehicle fleet "has

been the subject of an earnest and profound debate across the country." *West Virginia v. EPA*, 597 U.S. at 732 (internal quotation marks and citation omitted). One need only open a newspaper or social media to see this debate playing out in real time.

When the major-questions doctrine applies, the agency must point to a clear statement by Congress for the authority it claims. It is not enough that the agency's interpretation is textually "*plausible*." *West Virginia*, 597 U.S. at 723 (emphasis added). And general, "modest," or "vague" language will not do either. *Id.* EPA cannot point to a clear congressional statement that would authorize it to "grant[] California, alone among the States, the ability to set vehicle-emission standards to combat global climate change." Pet.14.

As the Petition and briefs of other amici ably explain, the statutory language EPA relies on here does not authorize the waiver.

The Clean Air Act authorizes the waiver for California only where the State "need[s] such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b). EPA does not even try to claim that the standards are "needed" to reduce global greenhouse gas emissions as EPA admits the standards will have little to no effect, though of course it knows the effect they will have on auto manufacturing and sales. And global emissions are by no means "compelling and extraordinary" *for California.* As EPA Administrator Stephen L. Johnson recognized in denying California's first greenhouse gas emissions regulation waiver, the standards are distinguishable because they do not address local or regional air pollution problems as the standards have

in every waiver since 1984. Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 Greenhouse Gas Emissions Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12160 (Mar. 6, 2008). *See also* David R. Wooley & Elizabeth M. Morss, *Clean Air Act Handbook: A Practical Guide to Compliance* § 5:38 (33d ed. 2023) (noting that 2007 was the first time EPA denied California a waiver because "climate change is a national problem that requires a national solution," though EPA then changed course two more times, granting the waiver in 2009 and then revoking it in 2019).

Administrator Johnson argued that the factors considered in the past to establish "compelling and extraordinary conditions," such as the unique "geography and climate of California, and the large motor vehicle population in California," do not perform the same causal function for greenhouse gas emissions. 73 Fed. Reg. at 12160. This is because those "elevated atmospheric concentrations of greenhouse gases . . . are well-mixed throughout the global atmosphere, such that their concentrations over California and the U.S. are, for all practical purposes, the same as the global average." *Id.* Thus, California greenhouse gas emissions do not affect California any differently than those same emissions from or in any other part of the world.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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