No. 24-7

IN THE

Supreme Court of the United States

DIAMOND ALTERNATIVE ENERGY, LLC, ET AL.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondent.

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

BRIEF OF *AMICUS CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

1. Whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties.
2. Whether EPA's preemption waiver for California's greenhouse-gas emission standards and zero emission-vehicle mandate is unlawful.

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INTEREST OF AMICUS CURIAE[1]

The **Competitive Enterprise Institute** (CEI) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since 1984, CEI has carried out its mission through policy analysis, commentary, and litigation.

SUMMARY OF ARGUMENT

This case highlights two problems. First, it concerns an agency rule of great national importance—whether California can eliminate commerce in gas-powered vehicles—that would force radical change in the Nation's economy. If this Court does not grant a reasonably rapid review of the merits of the agency's action, it is likely that California will unlawfully force gas-powered vehicles out of the market in large portions of the country before this Court encounters the case at hand again. Second, the lower court's standing analysis—which would deny the parties their opportunity to be heard by the tribunal—cannot be reconciled with this Court's precedents. This Court should grant review of both questions presented: the question of standing and the lawfulness of the underlying agency action.

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[1] Pursuant to Rule 37.6, *amicus* affirms that the parties recieved timely notice, no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus*, its members, or its counsel made such a monetary contribution.

If this Court examines the lawfulness of the agency's action, it will discover that the agency has made two fundamental mistakes. First, the position that the agency has taken cannot be reconciled with 42 U.S.C. § 7543(b)'s statutory requirement of "compelling and extraordinary conditions"; that is, the grant of a waiver requires California's circumstances to be both highly unusual and (with regard to the adoption of state-specific standards) highly persuasive. The EPA claims that smog—which is not created by greenhouse gasses—can be the basis for waiving preemption of greenhouse gasses for the extraordinary conditions of California. This is not only wrong as a matter of law; it is contrary to what the EPA argued just a few years ago.

Second, the EPA's claims about the state standard are indefensible because that standard is void *ab initio* due to EPCA preemption. The EPA claims that the state standards meet the statutory requirement of being "at least as protective of public health and welfare as applicable Federal standards," 42 U.S.C. § 7543(b)(1); nonetheless, if they're void, they can't be. EPCA preempts state regulations that are "related to" fuel economy standards, 49 U.S.C. 32919(a), and the EPA itself has taken the position that "a State regulation of all tailpipe greenhouse gas emissions from automobiles or prohibiting all tailpipe emissions is also 'related to' fuel economy standards and preempted by EPCA." The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program, 84 FR 51313 (Sept. 27, 2019). As the EPA noted, "EPCA does not provide NHTSA with

any waiver authority whatsoever." *Id*. This shows that California's standards that eliminate all greenhouse gas emissions are void, and of course void statutes cannot be protective at all. NHTSA now claims that it has no authority to determine EPCA preemption. However, EPA is required to determine if the state standards are void in this litigation, and it has failed to explain why EPCA preemption doesn't apply.

These questions present important questions of federal law that have not been settled by this Court. They should be. This Court should grant both questions presented.

ARGUMENT

I. THIS COURT SHOULD GRANT BOTH QUESTIONS SO THAT A MATTER OF ENORMOUS NATIONAL SIGNIFICANCE CAN BE RESOLVED

California policymakers' long-term goal is to end the use of fossil fuels by vehicles. They don't hide it, either: their express goal, by 2035, is to eliminate the sale of gas-powered vehicles in California. California Air Resources Board, *California moves to accelerate to 100% new zero-emission vehicle sales by 2035* (August 25, 2022), https://ww2.arb.ca.gov/news/california-moves-accelerate-100-new-zero-emission-vehicle-sales-2035.

California asserts that to eliminate fossil-fuel vehicles, it needs a preemption waiver from the EPA under the Clean Air Act. Pet.App. 6a. The fuel producers have brought this case to court: they're

challenging the issuance of the permit that is needed for the preemption waiver. Pet.App. 3a.

Do the fuel producers have standing? The lower court didn't think so. However, as discussed just below, the lower court's analysis of standing was mistaken in multiple respects.

First, the lower court manufactured an additional standing requirement with no basis in law. The lower court required Petitioners to prove that court action would be "substantially likely to result in any change to automobile manufacturers' vehicle fleets by Model Year 2025." Pet.App 23a. The lower court's insistence on this temporal condition was erroneous. There is no reason to artificially limit the harms the Petitioners might suffer only to only those that come about by Model Year 2025. Harm in any year from the agency action gives the Petitioners standing, and the remedy for such harm can be redressed by blocking the preemption waiver.

Indeed, the lower court acknowledged "that automobile manufacturers need years of lead time to make changes to their future model year fleets." Pet. App. 23a. This means the California preemption waiver issued by the EPA in this case would thus substantially affect future vehicle fleets several years later—even beyond the time that the waiver applies. That future harm creates standing; if the lower court rejected that waiver, it would redress that harm. The precedent established in this case, if correctly decided, will continue to protect Petitioners from such harm many years after the waiver expires.

Second, the lower court alleged that it is "the automobile manufacturers who are subject to the waiver." Pet. App. 22a. This is erroneous. It is *California* that is the subject of the waiver. California requested the waiver, and California's state standards would be preempted without the waiver. Those state standards prohibit the sale of gas-powered vehicles, and that prohibition harms the Petitioners—the vendors of the fuel.

Millions of consumers regularly purchase fossil fuels so that they can drive on the Nation's roads. The purpose of the California standards is to prevent these consumers from buying fuel from, among others, the Petitioners. Fuel manufacturers are thus harmed by California laws that prohibit their products. A denial of the waiver would redress this harm: indeed, that denial would prevent the harms that the California standards cause. There is no reason to believe that California's laws will end in 2025 or that the EPA will stop approving waivers. The operation of those state laws will continue to harm the Petitioners, and it is the laws' continued operation that will continue to create standing to challenge their enforcement well beyond 2025.

Third, the lower court's reasoning cannot be reconciled with the EPA's assessment of the effects of the state standards. Under federal law, the EPA is barred from granting a waiver if it determines that California "does not need such State standards to meet compelling and extraordinary conditions" to issue the waiver. 42 U.S.C. § 7543(b). The EPA asserts that California needs these standards; the Agency's theory

is that the standards will help remedy the conditions caused by Petitioners' fuel products by reducing their use. But for the EPA, this proves too much: it shows that the California standards reduce the use of Petitioners' product. Therefore, there is harm; therefore, there is standing.

Fourth, the lower court recognized that standing is determined when the lawsuit is filed, Pet.App. 25a, but it nonetheless failed to apply that principle to this case. That principle obliterates any possible claim of a failure of standing that would rest on the limited time remaining for manufacturers to change their fleet before the waiver expires. Had the court rejected the waiver immediately, no harm by California would have occurred. Of course lateness can create mootness as a general matter, but this case isn't moot because both California and the EPA recognize that such actions are continuing to occur and will do so in the future. In short, there is no mootness argument available here.

In short, the lower court's standing analysis is defective. If the lower court had gotten standing right, this Court would be positioned to take action on an issue of great national importance. It is hardly an exaggeration to say that the $1.5 trillion national automobile market rests on this case. Statista, Revenue from U.S. motor vehicle and parts advanced retail trade between 2000 and 2023 (July 25, 2024), https://www.statista.com/statistics/531522/revenue-of-us-motor-vehicle-and-parts-retail-trade/. In particular, if California is granted a waiver, then any other state could replicate California's program of gas-

powered vehicle elimination. 42 U.S.C. § 7507. This case is so important that it would qualify for certiorari before judgment. No other lower court can examine these issues: the jurisdiction is confined to the D.C. Circuit under the Clean Air Act. 42 U.S.C. § 7607(b).

We think this unusual situation is best framed in this fashion: what is the proper way for the Supreme Court to handle a case in which a lower court with exclusive jurisdiction issues a tremendously flawed procedural decision which involves an issue of great national importance?

This Court could just accept certiorari on the question of standing; it could then explain to the lower court why its standing analysis is flawed. Given the flaws in the standing analysis in the court below, the action seems likely to come back before this Court in a few years on some other basis than the merits—once again avoiding this Court's jurisdiction. Perhaps next time it will be mootness, or perhaps the lower court will discover that the petitioners lack prudential standing. One can imagine all sorts of other lower-court decisions that do not go to the merits of the action. Meanwhile, massive changes in the internal-combustion vehicles marketplace are occurring right now—just as many models are being unlawfully banished from the marketplace. If this Court grants certiorari solely on the question of standing, this larger problem will remain unsolved.

This Court could grant, vacate, and remand—while pointing to one of the numerous cases on standing that the lower court failed to consider. That would save this

Court some time, but it would not prevent the action at hand from returning to this Court for some reason that has nothing to do with the merits. Meanwhile, the national automobile market will continue to wither.

A better alternative is open to this court: it should grant both questions presented. The second question presented goes to the heart of the legality of the underlying agency action. In addition to the examination of that question, this Court could also evaluate whether the standing arguments adopted by the lower court are strong but incorrect. An evaluation with that result would allow this Court to issue an opinion that only addressed standing, and it could then remand the substantive question back to the D.C. Circuit. However, were this Court to find that the standing arguments adopted by the lower court lacked substantial merit, this Court could then reach the substantive question. This choice would send a message about proper judicial behavior: it would emphasize that, for cases that have substantial nationwide impact, this Court's jurisdiction cannot be indefinitely defeated by flimsy non-merits decisions from lower courts. It would also encourage lower courts to avoid conduct that resembles strategic behavior—more precisely, behavior that resembles an attempt to use legally unsound non-merits decisions to avoid this Court's jurisdiction.

Such curative choices by this Court would typically be unnecessary: normally, there are many circuit courts that could reach an issue with this kind of nationwide impact, even when one circuit is delaying action. However, the circumstances at hand are

atypical: no other circuit can hear this issue due to the venue restrictions in the Clean Air Act. Were this Court to adopt a new curative norm that would allow it to step in, its scope could be limited to cases of great national importance that have been canalized into a single circuit. The D.C. Circuit had the opportunity to weigh in on these merits questions: if its rejection of that opportunity is essentially unjustifiable, then this Court should not delay.

This Court should grant both questions presented.

II. THE EPE ESSENTIALLY IGNORED THE STATUTORY REQUIREMENT OF "COMPELLING AND EXTRAORDINARY CONDITIONS"

The proposed waiver is unlawful: it does not properly take the statutory requirement for the waiver—that the state face extraordinary conditions—into account. Such extraordinary conditions cannot exist, because the global warming at issue is *necessarily* ordinary: it affects all states. 42 U.S.C. § 7543(b) requires that "No such waiver shall be granted if the Administrator finds that such State does not need such State standards to meet compelling and extraordinary conditions." In other words, this waiver cannot pass the statute's test—by definition.

Despite this statutory requirement, the EPA claims that there's no need to show anything extraordinary about the impact of greenhouse gasses on California at all. The EPA's argument is that it only needs to find that the program "as a whole" is needed to satisfy the requirement of compelling and extraordinary

conditions. Pet.App. 281a. The EPA claims that California needs the program because there are criteria pollutants—such as smog—in that state, even though no such pollutants are caused by greenhouse gasses. Pet.App. 207a. That's the wrong way to read the statute's requirement.

This provision was added to ensure that before a state could be granted a waiver, it could show "compelling and extraordinary circumstances sufficiently different from the nation as a whole to justify standards on automobile emissions which may, from time to time, need to be more stringent than national standards." S. Rep. No. 403, 90th Cong. 1st Sess. 33 [1967].

This waiver was designed for local pollutants that cause harm near the place they are emitted. Greenhouse gasses do not cause such harm. The only accounts of such harm rest on claims that these gasses cause the entire planet to warm. Such claims of harm are necessarily non-extraordinary, because they are not confined to California.

This interpretation is not new. The EPA has not always taken the position that its new interpretation was an accurate reading of the Clean Air Act. According to the EPA in 2019, the Clean Air Act requires a "particularized nexus between the emissions from California vehicles, their contribution to local pollution, and the extraordinary impacts that that pollution has on California due to California's specific characteristics." 84 FR 51346. That is a much more faithful reading of the statutory requirement

than the one that the EPA now adopts, and this Court should determine that the 2019 interpretation by the EPA is correct. California should be required to prove that this standard, not some other one, is based on compelling and extraordinary conditions.

In short, application of the EPA's correct 2019 interpretation of the Clean Air Act shows that the waiver at issue is unlawful.

III. THE EPA'S PREEMPTION WAIVER FOR CALIFORNIA IS UNLAWFUL DUE TO EPCA PREEMPTION

This waiver is unlawful: the underlying state statutes are unlawful under EPCA preemption and therefore are necessarily void *ab initio*. It follows that those state statutes cannot be "at least as protective of public health and welfare as applicable Federal standard" as required in the Clean Air Act. 42 U.S.C. § 7543(b)(1).

EPCA is clear that:

> When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter.

49 U.S.C. 32919(a). As the EPA recognized when it revoked the California waiver:

> State or local requirement limiting tailpipe carbon dioxide emissions from automobiles has the direct and substantial effect of regulating fuel consumption and, thus, is "related to" fuel economy standards. Likewise, since carbon dioxide emissions constitute the overwhelming majority of tailpipe carbon emissions, a State regulation of all tailpipe greenhouse gas emissions from automobiles or prohibiting all tailpipe emissions is also "related to" fuel economy standards and preempted by EPCA.

84 FR 51313. There is no dispute that California's zero emission vehicle and greenhouse gas emissions standards would fall within the definition of what is preempted by EPCA—according to the EPA and to NHTSA's 2019 final rule.

The EPA had two responses:

(1) "EPA also believes that, based on the foregoing, EPA should not have deviated from its practice of limiting its waiver review to the criteria in section 209(b)(1)," and

(2) "Because the landscape of federal law has changed since SAFE 1 due to NHTSA's repeal of its regulatory text, appendix, and pronouncements regarding EPCA preemption in SAFE 1, EPA believes that it is appropriate to rescind its waiver withdrawal actions in SAFE 1 that were predicated

> on the federal law context created by NHTSA's SAFE 1 action."

California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 FR 14373-74 (Mar. 14, 2022) (reversing the order of the responses). These responses fail.

First, Section 209(b)(1) requires the EPA to determine that the state standards at issue are "at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). If those standards are void *ab initio*, as the EPA claimed in 2019, they cannot be as protective as the federal standards. Examining whether such state standards are void *ab initio* is thus a critical part of the review criteria that Congress required in section 209(b)(1).

Second, the EPA provided no explanation for why California's laws were not preempted and void *ab initio*. As the EPA noted, "EPCA does not provide NHTSA with any waiver authority whatsoever." 84 FR 51313. But even assuming the EPA adopted NHTSA's views entirely, NHTSA now chooses to remain silent about preemption. Corporate Average Fuel Economy (CAFE) Preemption, 86 FR 74242 (Dec. 29, 2021) ("EPCA at most only afforded NHTSA discretion to decide how or even whether to speak on matters of preemption. Thus,… EPCA still must be read to permit NHTSA to remain silent on EPCA preemption."). NHTSA now claims that "the Agency

lacked the authority to promulgate regulations on preemption." 86 FR 74245.

NHTSA does not claim that there has been any change in federal law based on its withdrawal of its opinion on EPCA preemption. Thus, the second reason given by the EPA is incorrect, according to NHTSA—which the EPA is relying upon.

In short, the EPA provides no reason to believe that the California statutes at issue are not preempted by federal law, as it previously held, and thus are not "at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). Because it has not met the statutory standard for a waiver, the EPA Clean Air Act preemption waiver is unlawful.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and consider both questions presented.

Respectfully submitted,

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