No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 209(a) of the Clean Air Act generally preempts States from adopting emission standards for new motor vehicles. 42 U.S.C. § 7543(a). But under Section 209(b) of that Act, EPA may grant California—and only California—a waiver from federal preemption to set its own vehicle-emission standards. Before granting a preemption waiver, EPA must find that California "need[s]" its own emission standards "to meet compelling and extraordinary conditions." *Id.* § 7543(b)(1)(B).

In 2022, EPA granted California a waiver to set its own standards for greenhouse-gas emissions and to adopt a zero-emission-vehicle mandate, both expressly intended to address global climate change by reducing California vehicles' consumption of liquid fuel. Fuel producers challenged EPA's waiver as contrary to the text of Section 209(b). The D.C. Circuit rejected the challenge without reaching the merits, concluding that fuel producers' injuries were not redressable because they had not established that vacating EPA's waiver would have *any* effect on automakers.

The questions presented are:

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.

PARTIES TO THE PROCEEDING

Petitioners are Diamond Alternative Energy, LLC, American Fuel & Petrochemical Manufacturers, Clean Fuels Development Coalition, Diamond Alternative Energy, LLC, Domestic Energy Producers Alliance, Energy Marketers of America, ICM, Inc., Illinois Corn Growers Association, Iowa Soybean Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Minnesota Soybean Growers Association, Missouri Corn Growers Association, National Association of Convenience Stores, South Dakota Soybean Association, and Valero Renewable Fuels Company, LLC.

Respondents are the Environmental Protection Agency and Michael S. Regan, in his official capacity as Administrator of the Environmental Protection Agency.

Other petitioners in the court of appeals were the States of Ohio, Alabama, Arkansas, Georgia, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas, Utah, and West Virginia.

Intervenors on behalf of respondents in the court of appeals were Ford Motor Company, Volkswagen Group of America, Inc., American Honda Motor Co., Inc., BMW of North America, LLC, Volvo Car USA LLC, New York Power Authority, National Grid USA, Calpine Corporation, Advanced Energy Economy, Power Companies Climate Coalition, National Coalition for Advanced Transportation, State of Washington, District of Columbia, State of New Jersey, State of Maine, State of Hawaii, State of Illinois, State of

Maryland, State of Colorado, State of Nevada, State of New York, State of Connecticut, State of Vermont, State of Rhode Island, State of North Carolina, State of California, State of New Mexico, State of Minnesota, State of Delaware, State of Oregon, City of New York, Commonwealth of Pennsylvania, Commonwealth of Massachusetts, City of Los Angeles, Clean Air Council, Natural Resources Defense Council, Public Citizen, Center for Biological Diversity, Environmental Defense Fund, Sierra Club, National Parks Conservation Association, Union of Concerned Scientists, Conservation Law Foundation, and Environmental Law and Policy Center.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Diamond Alternative Energy, LLC, is a Delaware limited liability company that manufactures biomass-derived liquid fuels. It is a wholly owned direct subsidiary of Valero Energy Corporation, a Delaware corporation whose common stock is publicly traded on the New York Stock Exchange under the ticker symbol VLO.

Petitioner American Fuel & Petrochemical Manufacturers is a national trade association that represents American refining and petrochemical companies. The Association has no parent corporation, and no publicly held corporation has a 10% or greater ownership in it.

Petitioner Clean Fuels Development Coalition is a business league organization established in a manner consistent with Section 501(c)(6) of the Internal Revenue Code. Established in 1988, the Coalition works with auto, agriculture, and biofuel interests in support of a broad range of energy and environmental programs. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in the Coalition.

Petitioner Domestic Energy Producers Alliance is a non-profit, nonstock corporation organized under the laws of the State of Oklahoma. The Alliance has no parent corporation, and no publicly held company owns 10% or more of its stock.

Petitioner Energy Marketers of America is a federation of 47 state and regional trade associations representing energy marketers throughout the United States. It is incorporated under the laws of the Commonwealth of Virginia, has no parent corporation, and

no publicly held corporation has a 10% or greater ownership in it.

Petitioner ICM, Inc. is a Kansas corporation that is a global leader in developing biorefining capabilities, especially for the production of ethanol. It is a wholly owned subsidiary of ICM Holdings, Inc., and no publicly held company has a 10% or greater ownership interest in ICM Holdings, Inc.

Petitioner Illinois Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Petitioner Iowa Soybean Association is a non-profit trade association within the meaning of D.C. Circuit Rule 26.1(b). Its members are soybean farmers and supporters of the agriculture and soybean industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The Iowa Soybean Association does not have a parent company, it has no privately or publicly held ownership interests, and no publicly held company has ownership interest in it.

Petitioner Kansas Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Petitioner Michigan Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Petitioner the Minnesota Soybean Growers Association is a non-profit trade association. Its members are soybean farmers, their supporters, and members of

soybean industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The Minnesota Soybean Growers Association is a not-for-profit corporation that is not a subsidiary of any corporation and that does not have any stock which can be owned by a publicly held corporation.

Petitioner Missouri Corn Growers Association is an agricultural organization. It has no parent companies, and no publicly held company has a 10% or greater ownership interest in it.

Petitioner National Association of Convenience Stores is an international trade association that represents both the convenience and fuel retailing industries with more than 1,300 retail and 1,600 supplier company members. The United States convenience industry has more than 152,000 stores across the country, employs 2.74 million people, and had more than $859 billion in sales in 2023, of which more than $532 billion were fuel sales. The Association has no parent corporation, and no publicly held corporation has a 10% or greater ownership interest in it.

Petitioner the South Dakota Soybean Association is a non-profit trade association. Its members are soybean farmers, their supporters and members of soybean industries. It operates for the purpose of promoting the general commercial, legislative, and other common interests of its members. The South Dakota Soybean Association is a not-for-profit corporation, is not a subsidiary of any corporation, and does not have any stock which can be owned by a publicly held corporation.

Petitioner Valero Renewable Fuels Company, LLC, a Texas limited liability company that manufactures ethanol, is a wholly owned direct subsidiary of Valero Energy Corporation.

RELATED PROCEEDINGS

United States Court of Appeals (D.C. Cir.):

Ohio v. *EPA*, No. 22-1081 (Apr. 9, 2024)

Iowa Soybean Association v. *EPA*, No. 22-1083 (Apr. 9, 2024)

American Fuel & Petrochemical Manufacturers v. *EPA*, No. 22-1084 (Apr. 9, 2024)

Clean Fuels Development Coalition v. *EPA*, No. 22-1085 (Apr. 9, 2024)

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INTRODUCTION

Section 209 of the Clean Air Act is a remarkable provision. It starts off modestly enough: because both motor vehicles and air pollution often cross state borders, Section 209(a) entrusts EPA to enact nationwide vehicle-emission standards and preempts States from adopting their own. 42 U.S.C. § 7543(a); *see id.* § 7410. But then Section 209(b) does something unusual: it allows EPA to grant a waiver from preemption to a single State—California—to enforce its own vehicle-emission standards. To escape preemption, California must demonstrate to EPA that it "need[s]" its own emission standards "to meet compelling and extraordinary conditions." *Id.* § 7543(b)(1)(B). Other States

may not establish their own standards, but they may elect to follow EPA's or California's.

As a concurrent challenge of 17 States explains, there are serious constitutional concerns with a statute that allows only California to act as a junior-varsity EPA. Still, for its first several decades, Section 209 worked more or less as intended. EPA granted preemption waivers for California to tackle local problems like smog in the Los Angeles basin, where the pollution was both generated by and felt by Californians. But all sensibility stopped in 2009, when California began claiming that Section 209 authorized it to set standards to curb greenhouse gases in an effort to tackle global climate change. For the next decade, EPA flip-flopped under each new Presidential Administration about whether it could grant California such a waiver. In this latest order, EPA has again taken the position that Section 209 permits California to operate as a quasi-federal regulator on global climate change.

That vaunted role cannot be squared with the text, structure, or purpose of Section 209. First, climate change is not an "extraordinary" condition within California, and thus within the meaning of Section 209(b)(1)(B), because it is a global issue that is not localized to California. Second, California does not "need" its own emission standards to "meet" global climate-change conditions, as its standards would have no discernable effect on climate-change-related conditions in the State (or anywhere else). Global climate change is, in short, not the kind of California-specific condition that Section 209(b) carves out from preemption.

The question whether California may set greenhouse-gas emission standards for itself and other

States is undeniably major. California has mandated *100%* electric vehicles by 2036, and is forcing electrification of the country's vehicle fleet. And the Executive Branch intends exactly that. The National Highway Traffic Safety Administration and EPA have set their own fuel-economy and emission standards that impose *de facto* electric-vehicle mandates in violation of their governing statutes. The companion challenges to those rules are 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). But by granting California the authority to outstrip even those mandates, EPA has put in place a backstop to the unlawful federal rules. Simply put, the waiver and authority claimed here are key parts of a coordinated agency strategy to convert the Nation from liquid-fuel-powered vehicles to electric vehicles. If that strategy seems familiar, it should. *See West Virginia* v. *EPA*, 597 U.S. 697 (2022).

Despite the issue's importance, the D.C. Circuit has avoided the merits of EPA's interpretation for over 15 years. It has met each challenge to EPA's waiver determination with a different jurisdictional barrier. This time, the D.C. Circuit dodged the issue under the guise of redressability. Petitioners are entities and associations of entities that produce or sell liquid fuels and the raw materials used to make them. Facing a regulation designed to reduce the demand for their products, petitioners' standing is self-evident. They also introduced unrebutted standing declarations about how California's standards will increase the sales of electric vehicles and reduce the consumption of liquid fuel—which, after all, is their express purpose. *See* App., *infra*, 19a-20a. But in a per curiam opinion, the

D.C. Circuit held that petitioners had not established redressability because they had not submitted evidence, such as affidavits from third-party automakers, showing precisely how automakers would adjust their production or prices during the four years of the waiver. *Id.* at 30a.

The D.C. Circuit's standing decision is wrong and warrants this Court's review. Under precedents of this Court and even the D.C. Circuit, "remov[ing] a regulatory hurdle" to the sale of a challenger's product suffices to establish redressability. *Energy Future Coalition* v. *EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.); *see Bennett* v. *Spear*, 520 U.S. 154, 169 (1997). At a minimum, challengers to governmental action can rely on the "predictable effect" of regulation on third parties to establish causation and redressability. *Department of Commerce* v. *New York*, 588 U.S. 752, 768 (2019). Where, as here, the entire point of the challenged regulation is to reduce consumption of the plaintiffs' products, a decision vacating the regulation would obviously provide redress. Other courts of appeals applying these principles have thus found standing without relying on the sort of affidavits that the court below demanded. Left uncorrected, the decision below will impose an often insurmountable barrier to challenges in the court of appeals that is the primary home for administrative litigation.

This Court should also reach the merits of petitioners' challenge, and finally decide whether EPA has the authority to grant California a preemption waiver to address global climate change. The challenged California standards are in effect only through model year 2025, so merely correcting the D.C. Circuit's standing mistake may mean that no court considers the merits

before the waiver expires. And granting review of both questions presented is also the most reasonable way to resolve the States' concurrent challenge to the decision below. The States challenged EPA's waiver as unconstitutional because Section 209(b) violates the principle of equal sovereignty, and the court below rejected that constitutional argument on the merits. App., *infra*, 49a. Granting review of the merits would allow the Court to consider whether EPA's waiver is statutorily authorized before needing to reach the States' constitutional questions, raised in a separate petition. The Court should grant both this petition and the States', and reverse.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-49a) is reported at 98 F.4th 288. The EPA order under review (App., *infra*, 50a-285a) is available at 87 Fed. Reg. 14,332.

JURISDICTION

The court of appeals entered judgment on April 9, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 286a-290a.

STATEMENT OF THE CASE

A. Legal Background

Title II of the Clean Air Act makes EPA the Nation's primary regulator of motor-vehicle emissions.

42 U.S.C. § 7410. To effectuate a (mostly) uniform federal emissions regime, Section 209(a) of the Act prohibits States from "adopt[ing] or attempt[ing] to enforce any standard relating to the control of emissions from new motor vehicles." *Id.* § 7543(a). This preemption provision prevents "an anarchic patchwork of federal and state regulatory programs." *Motor & Equip. Mfrs. Ass'n* v. *EPA*, 627 F.2d 1095, 1109 (D.C. Cir. 1979).

Congress allowed only one exception to Section 209(a)'s broad preemption provision: Section 209(b), which authorizes EPA to "waive" preemption for California, under limited circumstances. 42 U.S.C. § 7543(b). Congress granted California this special status because of the State's "unique problems" with smog and other local issues caused by criteria pollutants like ozone and particulate matter. H.R. Rep. No. 90-728, at 22 (1967). California's atypical "geography and prevailing wind patterns," together with its unusually large number of vehicles, made smog a more persistent problem there than elsewhere. 49 Fed. Reg. 18,887, 18,890 (May 3, 1984) (citing 113 Cong. Rec. 30,948 (Nov. 2, 1967)).

Congress limited California's ability to separately regulate emissions in several ways. California may apply for a waiver only if it "determines that [its own] 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). EPA must then evaluate the application and deny a waiver if, among other things, it finds that California's protectiveness determination is "arbitrary and capricious," *id.* § 7543(b)(1)(A); or if California "does not need such

State standards to meet compelling and extraordinary conditions," *id.* § 7543(b)(1)(B).

In 1977, Congress amended the Clean Air Act to allow any other State to "adopt and enforce" California standards "for which a waiver has been granted," so long as the State has a federally approved plan to attain the air-quality standards EPA sets for criteria pollutants. 42 U.S.C. §§ 7507, 7408(a), 7409. The upshot of this unusual preemption system is that EPA sets nationwide emission standards; California may in limited circumstances set more stringent ones in California; and other States may either apply EPA's standards or adopt California's, but may not set their own.

B. Regulatory Background

1. For decades, California used its waiver authority as Congress intended, to set emission standards to combat local air-quality problems like smog. *See, e.g.*, 38 Fed. Reg. 10,235, 10,318 (Apr. 26, 1973); 59 Fed. Reg. 48,557, 48,626 (Sept. 22, 1994). In recent years, however, California has sought to transform this exception for tackling localized pollution into a tool for addressing global climate change through forced electrification of its vehicle fleet.

That effort initially failed. In 2008, EPA denied California's first application for a waiver allowing it to set emission standards to address climate change. EPA determined that Section 209(b)'s preemption waiver permitted California to enact standards only to address "local and regional" pollution where the "causal factors are local to California"—which obviously did not include global climate change. 73 Fed. Reg. 12,156, 12,163 (Mar. 6, 2008).

The day after President Obama took office, California sought reconsideration of EPA's denial of its waiver application for greenhouse-gas standards. EPA granted reconsideration, reversed itself, and issued the waiver. 74 Fed. Reg. 32,755, 32,783 (July 8, 2009). A number of affected parties challenged EPA's decision, but the D.C. Circuit held that the case was moot because California had "deemed" compliance with federal standards to satisfy the State's standards as well. *Chamber of Commerce* v. *EPA*, 642 F.3d 192, 206 (D.C. Cir. 2011).

2. In 2012, California applied for a new waiver to allow it to impose even more standards aimed at curbing greenhouse-gas emissions. This case concerns that 2012 waiver application and the "Advanced Clean Car" standards that it imposes. Those standards govern all new passenger cars, light-duty trucks, and medium-duty vehicles sold in California for model years 2015 through 2025.

As relevant here, the Advanced Clean Car standards have two key features that require a preemption waiver. First, California's greenhouse-gas emission standards limit carbon-dioxide emissions and thus effectively force manufacturers to produce and sell fewer cars that run on liquid fuel. 78 Fed. Reg. 2,112, 2,137 (Jan. 9, 2013). Second, the California standards include a "zero-emission vehicle" mandate, which requires each car manufacturer to produce and deliver for sale an increasing percentage of electric or fuel-cell vehicles (or purchase regulatory "credits" instead). Cal. Regs. tit. 13, § 1962.2(b). By model year 2025, the required percentage of zero-emission vehicles will rise to around 22%. *Ibid.* California explained that the mandated zero-emission vehicles "can dramatically reduce

petroleum consumption . . . compared to conventional technologies." Advanced Clean Cars Waiver Request 7-9 (May 2012), https://www.regulations.gov/document/EPA-HQ-OAR-2021-0257-0006.

3. In 2013, EPA granted a waiver for California's Advanced Clean Cars program. EPA concluded that California's standards met Section 209(b)'s criteria—including that they were "needed to meet compelling and extraordinary conditions"—because the threat of global climate change was itself "compelling." 78 Fed. Reg. at 2,130. Notably, EPA credited California's finding that the cost of its regulations would be "more than offset by consumer fuel savings over the life of the vehicles." 78 Fed. Reg. at 2,138. At the time, however, California had kept in place its "deemed to comply" provision, and so potential challengers were stuck with the unfavorable D.C. Circuit standing precedent. California maintained that provision until 2018, when EPA set less stringent standards during the Trump Administration.

4. After that change in Administration, EPA reverted to its original approach to Section 209. In a 2019 joint rulemaking with NHTSA, EPA rescinded the 2013 preemption waiver for California's greenhouse-gas standards and zero-emission-vehicle mandate, again reasoning that climate change is not the kind of "peculiar," California-specific condition covered by Section 209(b). 84 Fed. Reg. 51,310, 51,328, 51,339 (Sept. 27, 2019). In addition, EPA found that California did not "need" its standards to "meet" climate-change conditions because California's standards would likely result in "*no change* in temperatures or physical impacts resulting from anthropogenic climate change in California." *Id.* at 51,341 (emphasis added).

C. Proceedings Below

1. On his first day in office, President Biden signed Executive Order 13,990, directing EPA to consider "suspending, revising, or rescinding" the 2019 withdrawal of California's 2013 waiver. 86 Fed. Reg. 7,037 (Jan. 25, 2021). EPA dutifully followed the President's lead and reinstated California's waiver. App., *infra*, 57a.

In granting the waiver, EPA flipped back to its 2013 understanding of Section 209(b). It concluded that the waiver was justified in part because California needs its emission program *as a whole*—not the particular Advanced Clean Cars program that was the subject of the waiver—to address its criteria-pollution problems. *Id.* at 158a-166a. EPA also found that California needed its emission standards and zero-emission vehicle mandate because the effects of global climate change in California are "extreme," and because there is a "logical link" between local air-pollution problems and greenhouse-gas emissions. *Id.* at 207a, 215a.

To date, 17 States and the District of Columbia have adopted California's greenhouse-gas standards, its zero-emission-vehicle mandate, or both. CARB, *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. Together with California, those jurisdictions account for more than 40% of the Nation's new vehicle market. 87 Fed. Reg. 14,332, 14,358 (Mar. 14, 2022).

2. Petitioners are entities that produce or sell liquid fuels and the raw materials used to produce them, along with associations whose members include such entities. They challenged EPA's waiver reinstatement

in the D.C. Circuit. App., *infra*, 2a. Petitioners filed detailed standing declarations, explaining that the reinstatement of California's standards would depress demand for fuel, injuring them financially. *Id.* at 19a-20a. The State of Ohio, along with a coalition of 16 other States, separately challenged the reinstatement on the ground that California's unique exemption from nationwide preemption violates the constitutional equal-sovereignty principle.

In defending the waiver reinstatement, EPA did not contest petitioners' Article III standing. On the merits, it primarily relied on what it refers to as its "whole program" approach. Under this reading of the Clean Air Act, Section 209(b)(1)(B) is satisfied if "California needs its program *as a whole* to meet compelling and extraordinary conditions." C.A. EPA Br. 84 (emphasis added). In other words, EPA argued that California can tack on any emission standards it likes to its emissions "program," "so long as" the State's criteria-pollutant problems "persist." *Id.* at 66.

Unlike EPA, California and other state and local intervenors challenged petitioners' standing. They contended that automakers were independently increasing electric-vehicle production in response to consumer demand, and that petitioners had not "established any probability that manufacturers would change course if EPA's decision were vacated." C.A. California Br. 13-15. But their own intervention motion attached declarations asserting that "additional gasoline-fueled vehicles would be sold during these model years" if EPA's waiver were overturned. C.A. States' Int. Mot., Scheehle Decl. ¶¶ 17-18. In reply, petitioners further explained that they had standing because vacating the waiver would remove a "direct regulatory impediment"

to their products' use. C.A. Reply 4 (citing *Energy Future Coal.*, 793 F.3d at 144). They also noted that California itself had told EPA that the waiver was "critical for incentivizing production and deployment of zero-emission vehicles." *Id.* (quoting C.A. J.A. 237).

At oral argument, however, counsel for the state and local intervenors began making similar arguments under the rubric of mootness. California contended that automakers could no longer change their production and sales plans for vehicles covered by California's waiver—that is, through model year 2025. In response, petitioners moved to file a supplemental brief explaining why their petitions were not moot, along with supplemental declarations from individuals experienced in vehicle-emissions compliance, who explained that "automobile manufacturers could and likely would change their production, pricing, and/or distribution plans for Model Year 2025 as late as December 2025, but at a minimum well into 2025." C.A. Pet. Standing Addendum, Kreucher Decl. ¶ 5.

3. The court of appeals held that petitioners lack Article III standing to challenge EPA's waiver. App., *infra*, 30a. Although the court declined to "definitively decide" whether petitioners had established injury and causation, it did not question either showing. *Id.* at 21a. After all, petitioners had explained that "by requiring vehicle manufacturers to sell vehicles that use less or no liquid fuel, California's . . . requirements depress the demand for liquid fuel." *Id.* at 19a.

Instead, the court of appeals concluded that petitioners had failed to show that their injuries would be redressed if EPA's decision were set aside. App., *infra*, 30a. The court reasoned that petitioners' claims were not "mooted by the passage of time," but rather

that petitioners had lacked standing from the start. *Id.* at 25a. The court faulted petitioners for "fail[ing] to point to any evidence affirmatively demonstrating that vacatur of the waiver would be substantially likely to" prompt automakers to produce fewer electric vehicles or alter their prices so that fewer would be sold. *Id.* at 23a. According to the court, petitioners had thus failed to establish that—even if the waiver had been vacated at the moment it was reinstated *in 2022*—automakers would have changed *any* production or prices before the end of model year *2025*. *Id.* at 23a-24a.

The court of appeals also declined to consider petitioners' supplemental declarations. App., *infra*, 30a. The court reasoned that there was no "good cause" to supplement the record because petitioners could not "have reasonably believed" that "their standing was 'self-evident' from the record" when they filed their opening brief. *Id.* at 31a.

Finally, the court of appeals rejected the States' equal-sovereignty argument on the merits. App., *infra*, 49a. The court concluded that the "fundamental principle of equal sovereignty" does not operate "as a limit on the Commerce Clause or other Article I powers." *Id.* at 36a (citation omitted).

REASONS FOR GRANTING THE PETITION

When petitioners filed suit, EPA's waiver controlled for the next four years. As a matter of common sense, if that waiver were set aside and California were unable to require automakers to produce electric vehicles instead of liquid-fuel vehicles, automakers would make or sell at least one more liquid-fuel vehicle over the course of those four years. That is the whole point of this hard-fought litigation: that the waiver would do

something to reduce California vehicles' consumption of liquid fuel, which necessarily would shift at least a dollar of business away from liquid-fuel sellers. Indeed, the federal government—never one shy about raising standing objections—did not even contest petitioners' Article III standing. Yet the court of appeals blinded itself to the obvious, and faulted petitioners for failing to prove by affidavit how third-party automakers would naturally behave.

This Court should grant review to ensure that the court of appeals' contrived standing decision does not imperil future challenges to administrative action. The court of appeals' demand for record evidence of automaker behavior cannot be squared with this Court's standing decisions, and it conflicts with decisions from several courts of appeals. Especially concerning, it would chill many legitimate agency rule challenges that hinge on third-party action.

This Court should also resolve the merits of petitioners' challenge to EPA's statutory authority, together with the States' constitutional equal-sovereignty challenge. For over a decade, the D.C. Circuit has avoided resolving whether EPA has authority to grant a preemption waiver to allow California to address global climate change. The court of appeals' dodge of the merits here is just the latest installment. EPA's (current) position that Congress granted California, alone among the States, the ability to set vehicle-emission standards to combat global climate change is patently wrong, and raises serious constitutional issues for the reasons discussed in the States' anticipated petition. Without this Court's immediate review, California's unlawful standards will continue to

dictate the composition of the Nation's automobile market.

I. THE D.C. CIRCUIT'S STANDING DECISION WARRANTS THIS COURT'S REVIEW

A. The Decision Below Is Wrong

In the decision below, the D.C. Circuit erected barriers to demonstrating redressability that have no basis in this Court's Article III jurisprudence. These barriers are especially problematic in cases like this one, in which the agency action concerns a question of national importance. Such major questions should not be artificially insulated from judicial review.

1. To demonstrate Article III standing, a plaintiff must show that he suffered a concrete injury, that the injury is fairly traceable to the challenged action, and that his "injury will be redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (internal quotation marks omitted). A plaintiff seeking to demonstrate redressability does not need to establish that a favorable judicial decision would completely cure his injury. Rather, a judicial decision need only "take steps to *slow* or *reduce*" the injury. *Massachusetts* v. *EPA*, 549 U.S. 497, 525 (2007). Thus, when a plaintiff asserts an economic injury, he satisfies the redressability requirement if a favorable decision would put even one dollar back in his pocket. *Uzuegbunam* v. *Preczewski*, 592 U.S. 279, 292 (2021).

When a plaintiff is the direct object of the challenged regulation, there is usually little question that a favorable decision from the court would provide redress. *See Lujan*, 504 U.S. at 561-562. The same should be true when a plaintiff alleges an "injury pro-

duced by determinative or coercive effect" of the challenged regulation "upon the action of someone else." *Bennett* v. *Spear*, 520 U.S. 154, 169 (1997). Thus, as then-Judge Kavanaugh explained, if a plaintiff can show that a favorable decision "would remove a regulatory hurdle" to third-party conduct that would benefit the plaintiff, that is ordinarily "enough to demonstrate redressability." *Energy Future Coalition*, 793 F.3d at 141; *see Corner Post, Inc.* v. *Board of Governors of the Fed. Rsrv. Sys.*, 603 U.S. __ (2024) (Kavanaugh, J., concurring) (slip op., at 8) ("[E]ntire classes of administrative litigation . . . have traditionally been brought by unregulated parties.").

Even when a plaintiff's injury arises from "the unfettered choices made by independent actors," rather than a rule's "coercive or determinative effect," a plaintiff still may establish standing, as long as he can "adduce facts showing that" the third party will behave in such a way as to "permit redressability of injury." *Lujan*, 504 U.S. at 562. This Court has explained that a plaintiff may rely on "the *predictable effect* of Government action on the decisions of third parties," and has not required affidavits detailing how third parties will behave. *Department of Commerce*, 588 U.S. at 768 (emphasis added). For example, it is predictable that government regulation of one business "may cause downstream or upstream economic injuries to others in the chain." *FDA* v. *Alliance for Hippocratic Medicine*, 602 U.S. __ (2024) (slip op., at 12). By contrast, standing may not rest on "speculation about the decisions of independent actors" when those decisions would be unlawful or irrational. *Department of Commerce*, 588 U.S. at 768 (internal quotation marks omitted). Thus, when a plaintiff's standing theory relies on

"counterintuitive" assumptions about third-party behavior, the plaintiff may need to support that theory with "stronger evidence." *California* v. *Texas*, 593 U.S. 659, 678 (2021).

Department of Commerce illustrates the difference between predictable effects (which do not require robust record evidence) and counterintuitive effects (which do). There, the plaintiffs challenged the inclusion of a census question about citizenship, which they contended would injure them by causing third-party noncitizen households to decline to respond to the census. 588 U.S. at 766-767. This Court concluded that those effects were sufficiently predictable to establish the causation element of standing—which, like the redressability element, turns on the effect of government action (or its removal). *Id.* at 768; *see Alliance for Hippocratic Medicine*, 602 U.S. at __ (slip op., at 8) ("[C]ausation and redressability . . . are often flip sides of the same coin.") (internal quotation marks omitted). The Court did not hold that affidavits from noncitizens attesting that they did not plan to participate in the census were required. The Court found it sufficient that noncitizen households had responded to the census at lower rates in the past, and credited the plaintiffs' common-sense prediction that noncitizens would respond at even lower rates if the census asked about their citizenship. *See* 588 U.S. at 768.

An effect of agency action is "predictable," rather than "counterintuitive," when the agency itself intends or presupposes that effect. In *Massachusetts*, for example, this Court relied on EPA's own statements and programs to find that ordering EPA to set emission standards would redress petitioners' injuries. 549 U.S.

at 526. The Court observed that EPA promoted voluntary emissions-reductions programs, and "would presumably not bother with such efforts," unless it thought that emissions reductions would have some effect on the environment. *Ibid.* In other words, an agency's own assumptions about the design of its rule are strong evidence of the rule's predictable effects.

2. The decision below departs from this Court's sensible approach to redressability. First, petitioners' injury arises from the "determinative or coercive effect" of California's standards on third-party automakers. *Bennett*, 520 U.S. at 169. By requiring automakers to produce vehicles that consume less or no liquid fuel, California's standards and EPA's waiver pose a legal barrier to the use of petitioners' products that a favorable decision would redress. Under this Court's cases, no more is needed.

But even if petitioners had to show more, the predictable effect of EPA's waiver on automakers is obvious: automakers will make and sell more electric vehicles to comply with California's regulations. Otherwise, California and EPA "would presumably not bother with such efforts." *Massachusetts*, 549 U.S. at 526. If the regulations go away, then the government will no longer be forcing automakers to sell more electric vehicles than they would otherwise produce in response to market forces. So automakers will make more vehicles that run on liquid fuel, or they will adjust their prices in response to consumer demand. That is Economics 101, not a proposition that requires an affidavit for support.

The contrast with this Court's recent decision in *Murthy* v. *Missouri*, 603 U.S. __ (2024), further illus-

trates the point. *Murthy* involved several circumstances that may call redressability into question—none of which is present here. First, *Murthy* did not involve direct government regulation. Here, whatever independent incentives automakers may have to increase electric-vehicle production, compliance with California's standards is mandatory. Second, in *Murthy* the government's alleged influence might not have mattered at all. *Id.*, slip op., at 12. Here, the whole point of California's standards (and EPA's waiver) is to require electrification beyond what the market was demanding. Third, and what the Court in *Murthy* called the "key point," *id.* at 25 n.10, the government action there had concluded by the time suit was brought. There was no obvious ongoing harm for the courts to correct, and so this Court could only "speculat[e]" about redressability. *Id.* at 22, 24-25. Here, California's standards and mandate were reinstated just months before petitioners brought suit and are still in place today. Unlike *Murthy*, this is a case where redressability should be beyond question.

The court of appeals nevertheless demanded that the fuel-manufacturer petitioners supply additional evidence of automakers' plans. Although the court acknowledged that it was "possible" that automakers would change their plans and sell more liquid-fuel vehicles, it faulted petitioners for failing to supply "record evidence," such as "additional affidavits." App., *infra*, 24a (citation omitted). Petitioners' standing declarations already pointed out that *California itself* had projected that a waiver would "reduce emissions through reductions in fuel production." C.A. Pet. Standing Addendum, Swenton Decl. at 5-6 (citation

omitted). They further explained that petitioners' injuries would be ameliorated if the waiver were vacated. C.A. Pet. Standing Addendum, Swenton Decl. at 7. Another declaration from the California Air Resources Board projected that without the standards, "additional gasoline-fueled vehicles" would likely be "produced and sold during these model years." C.A. States' Int. Mot., Vanderspek Decl. ¶ 22. But that was not enough for the court of appeals. In context, it appears that the only kind of evidence the court would have found sufficient is an affidavit *from an automaker itself*, promising to change its production or pricing if the waiver were vacated.

That requirement is doubly wrong. First, the court of appeals did not even acknowledge *Bennett* or *Department of Commerce*, or recognize that this Court has allowed plaintiffs to draw logical inferences about rational economic behavior in assessing causation and redressability. The court below did not ask whether the withdrawal of a special regulatory license to California will have "predictable effects" on vehicle sales. *Department of Commerce*, 558 U.S. at 768. It simply assumed that every effect must match up to a line in an affidavit.

Second, making matters worse, the court of appeals appeared to require plaintiffs to obtain affidavits from the directly regulated parties—here, the automakers. But directly regulated parties may have good reasons for not wanting to participate in the litigation. Maybe they intend to pass on the costs, or the government has garnered their complicity with some carrot that makes up for the regulatory stick. Indeed, that is exactly what happened here, as several automakers entered into "California Framework Agreements" committing

themselves to acceding to California's standards in exchange for certain benefits, like additional lead time. C.A. Resp.-Int. Br. 4.

Petitioners' standing to challenge an agency action should not depend on automakers' current preferences to partner with them. The contrary rule adopted below creates an unworkable hurdle to establishing standing in agency rule challenges—one with no basis in precedent or logic.

3. The court's flawed approach could doom any challenge to a similar time-limited agency rule that requires some lead time to implement. Petitioners sued within 60 days of EPA's March 2022 order. Yet the court held that petitioners already could not obtain effective relief because of the waiver's "relatively short," four-year "duration." App., *infra*, 22a; *see Davis* v. *FEC*, 554 U.S. 724, 734 (2008) (standing is assessed as of the date "when the suit was filed"). Additionally, by grounding its determination in standing, rather than mootness, the court dismissed the case without even holding EPA to its burden of establishing mootness or considering exceptions.

B. The Decision Below Creates A Conflict Among The Courts Of Appeals

By imposing artificial hurdles on Article III's redressability requirement, the court of appeals split from several other courts of appeals. The Second, Fifth, Eighth, and Ninth Circuits—and even the D.C. Circuit in other cases—have all found standing based on a law's coercive or predictable effects on third parties, without requiring the sort of record evidence demanded below. Under the D.C. Circuit's approach in

this case, those cases would have been (wrongly) dismissed on standing grounds.

The Second Circuit has found standing based on a rule's predictable effects on third parties, without requiring third-party affidavits or similar evidence. In *NRDC* v. *NHTSA*, 894 F.3d 95 (2018), the court of appeals considered an environmental group's challenge to NHTSA's decision to delay a rule increasing civil penalties for violations of fuel-economy standards. The petitioners asserted an environmental injury based on the assumption that third-party automakers would be less compliant when civil penalties were lower. *Id.* at 104. In finding standing, the court relied on "common sense and basic economics," which "tell us that the increased cost of unlawful conduct will make that conduct less common." *Id.* at 105. Automaker intervenors there had posited that penalties "ha[d] the potential" to affect their decisions, *ibid.*, but the court did not demand affidavits *proving* how automakers would behave.

The Fifth Circuit has followed the same approach. In *General Land Office* v. *Biden*, 71 F.4th 264 (2023), the court of appeals considered Texas's challenge to the Department of Homeland Security's decision to divert funds appropriated for the construction of a wall along the United States–Mexico border. Texas asserted injuries premised on the assumption that the diversion of funds would cause more unlawful immigration. Without requiring affidavits from undocumented immigrants, the Fifth Circuit adopted the commonsense point that "[i]n the absence of longer walls, at least some illegal aliens who otherwise would have been prevented from entering Texas will seek" benefits from the State. *Id.* at 273.

The Eighth Circuit, too, has relied on the predictable effects on third parties to find an injury redressable, without requiring a third-party affidavit. *Wieland* v. *Department of Health & Human Services*, 793 F.3d 949 (2015), involved a challenge to provisions of the Affordable Care Act that required certain insurers to cover contraceptive services. Plaintiffs, who wanted a contraception-free option, satisfied the redressability requirement, because although an order enjoining those laws would not *require* insurers to offer a contraception-free option, it was "likely" that insurers would respond that way. *Id.* at 957.

The Ninth Circuit has applied similar reasoning. It found standing for plaintiffs challenging a California directive that required certain insurers to offer abortion coverage. *See Skyline Wesleyan Church* v. *California Dep't of Managed Health Care*, 968 F.3d 738, 750 (2020). The court of appeals did not demand affidavits from the insurers, concluding both that the directive had a "determinative or coercive effect" on the insurers, and that "the predictable effect" of a favorable judicial decision included that "at least one insurer would be willing to sell" a plan without abortion coverage. *Ibid.*

The decision below is not even faithful to the D.C. Circuit's own standing precedent. In *Energy Future Coalition*, 793 F.3d 141, a case with strikingly parallel facts to this one, the D.C. Circuit held that fuel producers had standing to challenge an EPA rule effectively banning vehicle manufacturers from using certain fuel in emissions testing. *Id.* at 144. In an opinion by then-Judge Kavanaugh, the court held that the plaintiffs had established redressability, reasoning that "if EPA permitted vehicle manufacturers to use" the contested test

fuel, "there is substantial reason to think that at least some vehicle manufacturers would use it." *Ibid.* The court credited the common-sense, predictable effects of EPA's rule on third parties. Yet here, after criticizing petitioners for believing their standing was "self-evident" under existing precedent, App., *infra*, 31a, the court below failed to even *address* this precedent on which petitioners' standing argument was based.

Ultimately, the court of appeals' decision in this case cannot be squared with any of the above decisions. In each of them, the court relied on common-sense inferences about how third parties behave in response to *legal* barriers to certain behavior. None of them demanded the specific factual showing that the court required here. This Court should correct the D.C. Circuit's outlier position before it sows significant confusion in this area.

C. The Question Presented Is Important And Warrants Review In This Case

The question presented is exceptionally important, and this case presents an appropriate vehicle to consider it.

1. The decision below threatens to chill legitimate challenges to agency action. The D.C. Circuit has traditionally served as the primary home for litigation under the Administrative Procedure Act, and it is the exclusive venue for challenges to emission standards under the Clean Air Act. That makes its new barrier to agency challenges especially problematic. As the decisions in the circuit split illustrate, there are many circumstances in which third parties directly regulated by an agency rule have different incentives from an in-

jured petitioner. Here, the preferences of car manufacturers and fuel manufacturers may diverge, including because car manufacturers have been offered some regulatory flexibility that benefits them but not fuel producers. In other cases, a similar dynamic may arise between businesses and consumers, insurers and insured parties, and any number of other sets of potential petitioners. If every regulatory petitioner in the D.C. Circuit must secure the cooperation of a directly regulated party to establish standing, a significant swath of challenges may be doomed from the start.

The D.C. Circuit's unnecessary and unprecedented hurdle also creates bad incentives for agencies. Under the D.C. Circuit's rule, agencies could intentionally structure their actions to placate directly regulated parties and thereby foreclose future litigation. Those actions would still have sweeping effect, but the directly regulated parties—who would be the only potential plaintiffs—would have no incentive to sue. The result is an agency roadmap of particular concern because it insulates even major decisions like this one from judicial review.

At bottom, the entire purpose of California's standards and EPA's waiver determination is to reduce liquid-fuel usage and mandate electrification. That goal is existential to the liquid-fuel industry, even if it does not immediately threaten car manufacturers. Fuel manufacturers are the obvious parties to challenge the regulations. The fact that fuel producers are not directly *regulated*, when they are the direct *target* of the regulations, should not prevent them from establishing their standing to sue.

2. This case presents an appropriate vehicle for addressing this important issue. The redressability question determines petitioners' standing, as neither the court of appeals nor EPA has questioned petitioners' showing of injury or causation. *See* App., *infra*, 20a.

EPA has raised concerns about mootness, *see id.* at 25a, but the Court can decide this case before it becomes moot. The party asserting mootness "bears the burden to establish" that the case "has become moot." *West Virginia*, 597 U.S. at 719. To meet that burden, EPA would have to show that "it is *impossible*" for the Court "to grant any effectual relief." *United States* v. *Washington*, 596 U.S. 832, 837 (2022) (emphasis added). It is far from impossible here: if this Court grants certiorari in October Term 2024, it will presumably render a decision before model year 2025 ends. And even if EPA could somehow establish mootness, this case would fall within the capable-of-repetition exception because of the order's relatively short duration and the likelihood that petitioners will be "subjected to the same action again" when EPA issues future waivers. *United States* v. *Sanchez-Gomez*, 584 U.S. 381, 391 (2018).

II. THIS COURT SHOULD ALSO REACH THE MERITS AND VACATE THE WAIVER

This Court should also grant the second question presented and decide whether EPA has the authority to grant California a preemption waiver to address global climate change. Because California's waiver expires at the end of model year 2025, it is quite possible the D.C. Circuit will not decide the merits on remand in time for this Court's subsequent review. This EPA will no doubt take the same approach to its next waiver

determinations, and petitioners will then spend years suffering ongoing injury from California's next set of unlawful standards and mandates. Reaching the merits now would avoid that serious unfairness. EPA is wrong on the merits, and there is no reason to wait additional years to resolve an issue the D.C. Circuit has punted for over a decade.

A. EPA's Decision Is Wrong

The Clean Air Act does not authorize the preemption waiver that EPA granted here. Section 209(a) establishes federal control over motor-vehicle-emission standards. 42 U.S.C. § 7543(a). Because of California's unique "smog problem," Section 209(b) gives that State alone the right to set its own emission standards. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *New York State Dep't of Env't Conservation*, 17 F.3d 521, 526 (2d Cir. 1994). But Congress's baseline was nationwide preemption, and it tailored California's special exemption accordingly. As a result, EPA must find that California's standards are "need[ed]" to "meet compelling and extraordinary conditions" *in California*. 42 U.S.C. § 7543(b)(1)(B).

The California regulations here do not meet the statutory criteria. First, California's standards do not target conditions "extraordinary" to California because they were created to address global climate change, which is by definition not a phenomenon particular to California. Second, California does not "need" its separate standards to "meet" those conditions because, by EPA's own admission, the standards will not materially reduce the impacts of climate change in California or anywhere else. And EPA's pri-

mary defense—that California needs its "whole program," even if not these particular standards—lacks any basis in the text or common sense.

1. Global climate change is not an "extraordinary" California condition within the meaning of Section 209

The Clean Air Act's text, structure, and history demonstrate that the phrase "compelling and extraordinary conditions" refers to California's distinctive local pollution problems; it does not encompass conditions with global cause and effect, like climate change.

a. California's separate emission standards must be needed to meet "compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). The plain meaning of "extraordinary" is "most unusual." *Webster's New International Dictionary* 807 (3d ed. 1961). On its own, that definition could mean "most unusual" *compared to ordinary pollution problems* or "most unusual" *compared to other States' problems*. In context, it must mean the latter. The Clean Air Act pairs "extraordinary" with "compelling," and "compelling" already captures a sense of magnitude. To avoid rendering "extraordinary" redundant, it must mean "most unusual" as compared to other States.

Related statutory provisions support reading the phrase "compelling and extraordinary" to encompass severe local conditions. For example, Section 177 authorizes other States to adopt California's standards as part of approved plans for combatting the six criteria pollutants that cause local pollution problems. *See* 42 U.S.C. § 7507. Congress thus plainly contemplated that the standards California would adopt under Sec-

tion 209(b)—that other States might copy under Section 177—would help States attain local ambient air-quality standards within their respective borders.

More generally, the structure of Section 209 makes clear that Section 209(b) is an *exception* from a uniform federal regulatory regime. *See* 42 U.S.C. § 7543(a). It would make little sense to permit California to function as a junior-varsity EPA and deviate from a national regulatory framework to address conditions that are broadly shared throughout the Nation.

Section 209(b)'s history and purpose confirm that it authorizes preemption waivers only for California standards aimed at local air-quality issues. In drafting Title II, Congress repeatedly identified California's "peculiar" circumstances: its "unique problems" resulting from local emissions and pollution concentrations interacting with the State's distinctive "climate and topography." H.R. Rep. No. 90-728, at 22 (1967). As the D.C. Circuit explained decades ago, "clearly the intent" of the waiver provision was to "focus on *local* air quality problems" that "may differ substantially from those in other parts of the nation." *Ford Motor Co.* v. *EPA*, 606 F.2d 1293, 1303 (1979) (emphasis added).

b. Global climate change is not a condition "extraordinary" to California. By definition, global climate change is neither unique to California nor uniquely felt by the State. As EPA found in 2019, when it comes to the effects of climate change, California is not "worse-positioned in relation to certain other areas." 84 Fed. Reg. at 51,348 n.278. In fact, "[m]any parts of the United States, especially western States, may have issues [caused by climate change] related to drinking water" and "wildfires, and effects on agriculture." *Id.* at

51,348. In other words, "effects related to climate change in California" are "not sufficiently different from the conditions in the nation as a whole to justify separate State standards." *Id.* at 51,344. EPA did not revisit that finding in 2022. The agency thus provided no basis to depart from its prior conclusion, let alone the heightened showing necessary for a reversal.

To be sure, EPA argued below that California's standards *do* address local conditions because they may have side effects on local criteria pollution. But that argument is wrong both legally and factually. As a legal matter, EPA cannot contrive a new goal for California's standards not presented in California's waiver application. No one disputes that the express purpose of California's standards was to regulate global climate change. Moreover, EPA's argument is not supported by the factual record. In the waiver reinstatement, EPA relied on the "logical link" between ozone pollution and greenhouse gases—namely, that ozone levels are "exacerbate[d]" by higher temperatures caused by global warming. App., *infra*, 207a-208a. But EPA previously found that the State's rules would produce "likely no change" to climate-change conditions—including rising temperatures—in California. 84 Fed. Reg. at 51,341. If California's standards will not change temperatures, then they cannot affect ozone levels under EPA's "logical link" theory either.

2. California does not "need" its own emission standards to "meet" climate-change conditions

Even if California faced "extraordinary" conditions within the meaning of Section 209(b) from global climate change, it does not "need" its greenhouse-gas

standards and zero-emission-vehicle mandate to "meet" those conditions. To the contrary, as EPA explained in 2019, California's standards "will not meaningfully address global air pollution problems of the sort associated with [greenhouse-gas] emissions." 84 Fed. Reg. at 51,347, 51,349.

a. A Section 209(b) waiver is authorized when "need[ed]" to "meet" conditions in California—that is, only if the proposed California emission standards would appreciably affect the conditions that warrant them. That accords with the ordinary meaning of the statutory terms "need" and "meet." The verb "need" means to "be necessary." *Webster's New International Dictionary, supra*, at 1512. And the term "necessary" typically means "essential; indispensable." *American Heritage Dictionary* 877 (1st ed. 1969). The verb "meet" is complementary. In this context, it means to "satisfy (a demand, need, obligation)." *Id.* at 816.

Putting the terms together, two things are clear. First, California must "need"—*i.e.*, require as essential or very important—specific standards that differ from federal standards. Second, California's standards must meaningfully address the conditions that give rise to California's need for separate standards. At a minimum, if the State's proposed standards have *no impact* on those conditions, then they cannot be said to be necessary, essential, or indispensable to "meet" the conditions the State faces.

b. Based on EPA's own undisturbed factual findings, California does not satisfy that standard for a preemption waiver. In vacating California's waiver, EPA previously found that California's greenhouse-gas standards would "lea[d] to little to no change" in "[greenhouse-gas] emissions at a national level," and

"would result in an *indistinguishable* change in global temperatures" and "likely *no change* in temperatures or physical impacts resulting from anthropogenic climate change in California." 84 Fed. Reg. at 51,341, 51,353 (emphases added). Critically, in reinstating the waiver, EPA did not disturb these findings about the futility of California's standards.

3. EPA's whole-program approach is wrong

In defending its reinstatement decision, EPA has primarily argued that Section 209(b)(1)(B)—which permits EPA to grant a preemption waiver only if "need[ed]" to "meet" "compelling and extraordinary conditions"—is effectively irrelevant. Under EPA's "whole program" approach, so long as California needs any separate standards *at all*—say, to combat smog—the State has satisfied the "need[s] . . . to meet" requirement. *See* 87 Fed. Reg. at 14,335. At that point, California can add on any other emission standards it wants and tackle global problems as it sees fit.

EPA's whole-program approach is atextual and defies common sense. EPA relies on language elsewhere in Section 209(b) requiring that California "determine[] 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) (emphasis added). But Section 209(b)'s "in the aggregate" language does not carry down to the rest of 209(b). For example, Subsection (b)(1)(C) requires EPA to ensure that manufacturers have sufficient lead time to meet California's standards. *See* 42 U.S.C. § 7521(a)(2). EPA does not assess whether manufacturers would have adequate lead time "in the aggregate"—that would make no sense. *See* 84 Fed.

Reg. at 51,332; *see also* C.A. Pet. Br. 46. Similarly, EPA has a separate duty in Section 209(b)(1)(B) to determine whether California "need[s] such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). That determination, like the neighboring lead-time determination, is not done "in the aggregate."

EPA's reading would also make the Section 209(b)(1)(B) criteria meaningless. Congress already determined that California "need[s]" its own emissions *program* by creating the preemption exception in the first place. On EPA's view, however, subsection (b)(1)(B) serves no independent purpose so long as California has any air-quality issues. This assertion cannot withstand minimal scrutiny, as the D.C. Circuit panel appeared to recognize at oral argument. *See* C.A. Oral Arg. Tr. 45:30 (Wilkins, J., criticizing EPA's "whole program" approach).

4. Clear-statement rules favor petitioners' reading

Even if EPA's interpretation were possible, several clear-statement rules require petitioners' reading.

First, principles of constitutional avoidance require petitioners' reading. The State petitioners have argued that Section 209(b) deviates from the "fundamental principle of equality of the states under the Constitution." *Bolln* v. *Nebraska*, 176 U.S. 83, 89 (1900). This equal-sovereignty question is at least a serious one, and this Court should adopt a more modest interpretation of California's waiver authority to avoid it. *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 160 (2001). Even if Congress could grant California the unique ability to address a

local problem, it would be a far graver intrusion on equal-sovereignty principles to grant California alone the ability to address *global* climate change. *Cf. South Carolina* v. *Katzenbach*, 383 U.S. 301, 328-329 (1964) ("The doctrine of the equality of States" does not bar "remedies for local evils which have subsequently appeared.").

Second, the major-questions doctrine applies to California's efforts to tackle global climate change and force a transition to electric vehicles. This Court "expect[s] Congress to 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). On EPA's view, Section 209 authorizes the agency to permit California to adopt vehicle-emission standards to tackle climate change, and to force a transition to electric vehicles that would have enormous repercussions for the national economy, the States' electric grids, and national security. This Court should "greet" EPA's "assertions of 'extravagant statutory power over the national economy' with 'skepticism.'" *West Virginia*, 597 U.S. at 724 (citation omitted).

Third, the federalism canon points in the same direction. Congress must be "unmistakably clear in the language of the statute" if it "intends to alter the 'usual constitutional balance between the States and the Federal government.'" *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (citation omitted). Yet 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.

B. The Question Presented Is Important, Is Implicated In The States' Petition, And Repeatedly Evades Review

The extent of EPA's authority to grant California a preemption waiver warrants this Court's immediate review. It is a question that shapes the direction of the entire country's automobile industry but that has repeatedly evaded judicial scrutiny. And it is a question antecedent to the constitutional issue that the court of appeals reached and that is the subject of the State petitioners' concurrent challenge.

1. Section 209(b), if construed to allow California to tackle nationwide issues like global climate change, becomes a huge source of power to regulate the country's economy. California is a significant market in its own right, and 17 States and the District of Columbia have opted into at least some of California's standards. *See supra*, p. 10. Additionally, both EPA and NHTSA have relied on California's standards in setting their respective (and unlawful) vehicle-emission standards aimed at forcing electrification. *See* 86 Fed. Reg. 74,434, 74,457-74,458 (Dec. 30, 2021); 87 Fed. Reg. 25,710, 25,762-25,765 (May 2, 2022). No wonder California's governor described its vehicle-emission rules as "one of the most significant steps to the elimination of the tailpipe as we know it." Coral Davenport et al., *California to Ban the Sale of New Gasoline Cars*, N.Y. Times (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/climate/california-gas-cars-emissions.html.

A wait-and-see approach would embolden California to stretch Section 209(b) even further. Since petitioners brought this case, California has adopted its so-called Advanced Clean Cars II standards, along with Advanced Clean Fleets and Advanced Clean

Trucks rules, which collectively mandate 100% electrification of every class of new vehicles by 2036. *See* CARB, *Public Hearing to Consider the Proposed Advanced Clean Cars II Regulations* 12 (Apr. 12, 2022), http://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/isor.pdf. EPA's waiver thus enables California to force automakers to electrify their *entire fleets* in California and any State that adopts its standards.

2. This Court should also grant review of the second question because the States' anticipated petition presents a serious constitutional question that should be considered together with petitioners' statutory challenge. The State petitioners are challenging the D.C. Circuit's decision holding that Section 209 does not violate the principle of equal sovereignty. Unless this Court grants review of both questions presented here, the Court will not have complete briefing on a narrower statutory alternative to resolving the States' constitutional challenge.

3. Finally, this Court should hear the second question presented because it has for too long evaded this Court's review and may otherwise continue to do so. The challenged waiver is in effect only through model year 2025. That means that there will likely be time for a merits decision in this Court, or a remand and potential merits decision in the court of appeals, but not both without having to litigate mootness issues that may complicate this Court's review.

Petitioners have endured decades of regulatory whiplash only for the D.C. Circuit to repeatedly reject any legal challenges on threshold grounds. Absent this Court's review, petitioners will be back at square one, having to litigate additional challenges to EPA's next waiver, all while suffering ongoing injury. Critical

American industries deserve the certainty that can only be provided by this Court's finally defining the extent of EPA's authority under Section 209(b).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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