No. 24-7

In the Supreme Court of the United States

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

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

REPLY BRIEF FOR PETITIONERS

ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

MICHAEL BUSCHBACHER
JARED M. KELSON
BOYDEN GRAY PLLC
800 Connecticut Ave NW
Suite 900
Washington, DC 20006

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

LESLIE B. ARFFA
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004

(Additional counsel on signature page)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Cases—Continued:

Statutes:

Regulations:

Other authorities:

In the Supreme Court of the United States

No. 24-7

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

REPLY BRIEF FOR PETITIONERS

In respondents' telling, the entire waiver proceeding and hard-fought litigation over it have been pointless. EPA flipped back and forth with each Presidential Administration; the agency eventually issued an order that it heralded as a "critical step to confront the climate crisis" and California praised as "a major victory for the environment";[*] the parties spent nearly 70,000 words briefing challenges to that order; and 59 amici and 37 States weighed in. "What chumps!"

[*] EPA, News Release, Restoration of California Waiver Will Support State Climate Action, Improve Air Quality, and Advance our Electric Vehicle Future (Mar. 11, 2022), https://www.epa.gov/news-releases/what-they-are-saying-epa-restoration-california-waiver-will-support-state-climate.

Arizona State Legislature v. *Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 825 (2015) (Roberts, C.J., dissenting). None of that mattered, because the automobile market would not have changed by a *single* car if EPA had never bothered to act in 2022.

That position, which the court of appeals also embraced, defies common sense. Far from "[a]pplying settled standing principles," EPA Br. 10, the decision below upended prevailing legal rules and will have significant consequences. The first question presented—whether courts can use basic common sense in deciding redressability, or must instead demand specific evidence—thus warrants this Court's review.

The Court should grant review on the second question presented, too. Respondents offer a laundry list of supposed vehicle problems, but do not identify any sound reason for this Court to avoid a pure question of law dictating the direction of the Nation's automobile and energy industries, particularly when the Court already has interrelated questions before it.

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

Respondents try to defend the decision below as correct and record-specific. It is neither. What's more, EPA now asserts (at 13) that its waiver "does not terminate with model-year 2025"—eliminating any conceivable redressability objection and underscoring the importance of this Court's review.

1. As petitioners have explained, their (undisputed) injuries are redressable for two independent reasons. Pet. 15-21. First, a favorable decision would remove a regulatory hurdle to the use of their products, which alone establishes redressability. *See Bennett* v. *Spear*,

520 U.S. 154, 169 (1997). While EPA ignores *Bennett*, California attempts (at 17-18) to distinguish it because it arose on a motion to dismiss. That misses the point. The stage of litigation changes the burden of proof; it does not change the thing to be pleaded or proved. And nobody disputes that there is a regulatory hurdle here, only whether its coercive effect alone establishes standing.

Second, even apart from the removal of a regulatory barrier, petitioners were entitled to rely on "the predictable effect of Government action on the decisions of third parties." *Department of Commerce* v. *New York*, 588 U.S. 752, 768 (2019). Respondents assert that *Department of Commerce* is distinguishable because New York produced "historical evidence" of non-citizens' likely responses to changes to the census. EPA Br. 16; *see* Cal. Br. 16-17. But no one here has disputed that automakers have historically responded to California's greenhouse-gas and zero-emission-vehicle standards by selling fewer conventional vehicles. *See* Pet. 8-9; *see also* 78 Fed. Reg. 2,112, 2,141-2,142 (Jan. 9, 2013). Yet the court below demanded more. It required petitioners to submit affidavits as to automakers' likely *future* response to a government action, Pet. App. 23a—precisely the evidence this Court found unnecessary in *Department of Commerce*.

Respondents also suggest that *Murthy* v. *Missouri*, 144 S. Ct. 1972 (2024), eliminates parties' ability to rely on the predictable consequences of government regulation. EPA Br. 11; *see* Cal. Br. 18. Not at all. In *Murthy*, the Court found that the effect of government action was uncertain precisely because the government was *not* acting in a binding, regulatory capacity, as it is here. 144 S. Ct. at 1993.

2. Multiple courts of appeals have faithfully applied this Court's standing principles in ways that conflict with the decision below. Respondents try to distinguish those decisions in two ways. For some, respondents again emphasize that they were decided on motions to dismiss. Cal. Br. 18-19; EPA Br. 17; *see General Land Office* v. *Biden*, 71 F.4th 264 (5th Cir. 2023); *Wieland* v. *Department of Health & Hum. Servs.*, 793 F.3d 949 (8th Cir. 2015). As with *Bennett*, however, the procedural posture does not change the fact that parties and courts can rely on the "coercive effect" of government action. *Wieland*, 793 F.3d at 954 (quoting *Bennett*, 520 U.S. at 169).

For other decisions, respondents emphasize that there was "record evidence," such as parties' previous practices. EPA Br. 17; Cal Br. 19; *Skyline Wesleyan Church* v. *California Dep't of Managed Health Care*, 968 F.3d 738 (9th Cir. 2020); *NRDC* v. *NHTSA*, 894 F.3d 95 (2d Cir. 2018). But again, the question here is how to predict *future* behavior. And in answering that question, the Second, Fifth, Eighth, and Ninth Circuits have relied on "[c]ommon sense and basic economics," rather than requiring affidavits from regulated parties. *NRDC*, 894 F.3d. at 105; *see National Infusion Center Ass'n* v. *Becerra*, 2024 WL 4247856, at *5 (5th Cir. Sept. 20, 2024) (relying on "predictable effect of Government action" on third parties premised on "basic economic self-interest").

3. Respondents try to minimize the importance of the decision below in three ways. None cabins the damage.

First, respondents urge that this case turns on the "distinctive characteristics of the automobile-manufacturing industry." EPA Br. 19; *see* Cal. Br. 13. That is

not what the court of appeals said. It found that "unsupported assumptions regarding the future actions of third-party market participants are insufficient to establish Article III standing"—full stop. Pet. App. 29a. Nor should particular features of the automobile market matter if, as petitioners contend, the removal of a regulatory hurdle targeting the use of petitioners' products suffices to establish redressability.

Second, respondents promise that the court of appeals' demand for record evidence can be satisfied in various ways, not just through third-party affidavits. EPA Br. 15; Cal. Br. 15-16. Yet they struggle to identify any other evidence that could suffice. Indeed, they repeatedly fall back to the proposition that fuel manufacturers (the directly targeted entities) are at the mercy of automakers (the directly regulated entities). *See*, *e.g.*, EPA Br. 15 (rejecting evidence that "conflict[s] with automakers' own representations"); *id.* at 18 (distinguishing *Energy Future Coalition* v. *EPA*, 793 F.3d 141 (D.C. Cir. 2015), because of automakers' position); Cal. Br. 20 (same).

Third, EPA emphasizes (at 11) that it "has promulgated federal greenhouse-gas emissions standards" that will "outpace California's." But that is irrelevant because petitioners also have challenged the federal standards. *See Khodara Env't, Inc.* v. *Blakely*, 376 F.3d 187, 194 (3d Cir. 2004) (Alito, J.).

Finally, respondents fail to grapple with the perverse incentives the decision below creates. It encourages agencies to act over shorter time horizons and shields agency flip-flopping from oversight. *Cf.* Cal. Br. 13 ("[W]hen EPA *first* granted the waiver . . . [it] would likely alter automaker decisions.") (emphasis added). It rewards gamesmanship, because an agency

can avoid judicial review by placating directly regulated parties while targeting other industries. And it creates a one-way ratchet favoring the regulators over the regulated. As California claims (at 14 n.5), it can challenge any waiver *denial* without showing the denial would affect the "mix of cars sold." But directly targeted industries have no such luck. *See* Pet. 25; *see also* Chamber of Commerce Amicus Br. 18-20; API Amicus Br. 14-15; Western States Petroleum Association Amicus Br. 15-16.

4. If there were any doubt about the correctness or importance of the decision below, EPA's response removes it. EPA never contested standing below. In this Court, while initially calling the court of appeals' decision "correct" (at 10), EPA turns around and explains (at 12-13) that the court's key premise was wrong. The court below relied on the supposedly "short duration of the waiver that [p]etitioners challenge." EPA Br. 12 (quoting Pet. App. 22a). But, EPA says, the waiver at issue "*does not expire after model-year 2025*," and California's greenhouse-gas emission standards in fact "remain in force thereafter." *Id.* at 12-13 (emphasis added).

That admission should put to rest any question of petitioners' standing. *See Massachusetts* v. *EPA*, 549 U.S. 497, 526 (2007) (relying on agency statements about effects of its rules). No one could deny with a straight face that a perpetual waiver allowing California to set stringent greenhouse-gas standards for vehicle fleets will at *some point* in the future have *some effect*. It does not matter if that effect may "diminish[]" over time. EPA Br. 13. All that matters is that petitioners would make "a single dollar" more if EPA's order were vacated. *Uzuegbunam* v. *Preczewski*, 141 S.

Ct. 792, 801 (2021). Under EPA's explanation of its own decision, that proposition is unassailable.

II. THIS COURT SHOULD ALSO REACH THE MERITS

Petitioners have explained (at 35-36) why the question of whether California alone may set its own vehicle-emission standards in an effort to address global climate change is important; and why, if the Court grants the constitutional question that Ohio presents, it makes sense also to grant the antecedent statutory question. EPA does not dispute either of those things. It argues only that (A) it is right on the merits and (B) this case is a poor vehicle. Both arguments are incorrect.

A. EPA's Decision Is Wrong

1. EPA may grant a waiver if California "need[s]" its own standards "to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b)(1)(B). As petitioners have explained (at 27-32), that text requires California to show that its standards will meaningfully address unusual *local* pollution problems. Remarkably, EPA has no substantive response to the meaning of statutory terms like "need" and "extraordinary." EPA now appears to accept (at 21) that California's standards must address localized conditions. EPA simply says (*ibid.*) that California is uniquely affected by climate change. But EPA found as a factual matter in rescinding the waiver in 2019 that other States experience the same or even worse effects. 84 Fed. Reg. 51,310, 51,342-51,343 & n.265 (Sept. 27, 2019). EPA did not reexamine that factual finding during its latest flip in position. Up to and including its response in this Court, EPA has never explained its about-face. *See*

FCC v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

Perhaps because of that problem, California turns away from greenhouse gases, arguing that its standards are "needed" to address criteria pollution. That is not what California said the standards were for. *See* News Release, *supra*. California argues now (at 24) that zero-emission vehicles are "importan[t]" for "reducing criteria pollutants." But California was clear in its waiver application that the zero-emission-vehicle mandate has "*no criteria emissions benefit*." Pet. App. 144a (emphasis added). Moreover, under EPA's own reasoning, California's standards will not affect criteria pollutants. EPA pointed to the "logical link" between reducing temperatures and reducing criteria pollutants, but it failed to find the standards will reduce temperatures in the first place. 87 Fed. Reg. 14,332 (Mar. 14, 2022); *see* 89 Fed. Reg. at 51,341 (finding waiver would likely produce "no change in temperatures or physical impacts resulting from anthropogenic climate change in California.").

2. Aside from this misdirection, EPA rests (at 25) on its "whole-program" approach. EPA argues that even if California does not need its greenhouse-gas standards and zero-emission-vehicle mandate, California needs *other* standards to address local problems—and so the State may add *anything* it wants to its "program." That approach obviously renders the criteria in Section 209(b)(1)(B) meaningless. *See* Pet. 33. EPA does not even try to argue otherwise.

EPA's textual hook for this astonishing reading is Section 209(b)(1)'s requirement that the Administrator find California's standards are, "in the aggregate, at least as protective" as the federal standards. Section

209(b)(1)(B) requires the Administrator to find that California needs "such State standards" to meet "compelling and extraordinary conditions." Subsection (b)(1)(B) does not contain the same "in the aggregate" language, which alone indicates that need is not measured wholesale. But EPA says (at 24) that the aggregate qualifier is incorporated through the reference to "such" State standards. That is plainly wrong. The reference to "such State standards" means the *type* of "State standards" referred to in the two immediately preceding provisions: "standard[s] relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a); *id.* § 7543(b)(1).

As confirmation, the very next provision, Section 209(b)(1)(C), requires the Administrator to find that manufacturers have sufficient lead time to meet California's standards. EPA says (at 25) that it also makes that finding in the aggregate. It is not clear that EPA actually has such a practice because there are examples to the contrary. *See* 84 Fed. Reg. at 51,345; 40 Fed. Reg. 30,311 (July 18, 1975). But assuming so, two wrongs do not make a right. It makes no sense to say that the Administrator may approve a package of State standards if manufacturers have sufficient lead time to comply with only some of them.

EPA counters that petitioners' reading would be unworkable. According to EPA (at 26), it would be "impossible" for a less stringent standard to be individually necessary to meet compelling and extraordinary conditions. But stringency on one dimension is not dispositive. For example, a "less stringent CO standard" could be necessary to combat "ozone." 73 Fed. Reg. 12,156, 12,161 (March 6, 2008). Past practice bears that out. Even when applying its whole-program approach,

EPA has conducted an alternative analysis to determine whether California needs the individual standards under consideration, and approved standards have passed both tests. App. 75a.

3. At the least, clear-statement rules require petitioners' reading. EPA asserts (at 27) that the major-questions doctrine does not apply because *California* is the one making the important policy decision. But on EPA's view, Section 209(b) turns the *agency* into the arbiter of whether California can impose emission standards to tackle climate change and transform the composition of the Nation's vehicle fleet. That is undeniably an authority over issues of "vast economic and political significance." *Alabama Ass'n of Realtors* v. *HHS*, 141 S. Ct. 2485, 2489 (2021).

EPA also says (at 26) that constitutional avoidance has no role here because Ohio's equal-sovereignty claim is not "serious." The extent of EPA's merits briefing says otherwise. EPA Br. 10-18; EPA C.A. Br. 31-53. EPA attacks Ohio's theory, claiming that Ohio would not allow any room for Congress to treat California differently. That is wrong, Ohio Pet. 26, and ignores Ohio's as-applied challenge to the specific way in which Section 209, under EPA's reading, impermissibly elevates California to junior-EPA Administrator for nationwide problems. For similar reasons, respondents cannot avoid the federalism canon. True, *one* State has more power, but that is a gross departure from "the usual constitutional *balance* between the States and the Federal government." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460-461 (1991) (emphasis added).

B. This Case Is An Appropriate Vehicle

EPA desperately does not want this Court to consider its tortured statutory reading, so it presents a laundry list of supposed vehicle problems. None withstands scrutiny.

1. EPA asserts (at 20) without any explanation that its 2019 withdrawal decision was procedurally flawed. But EPA did not rely on procedural error as a basis for its 2022 waiver reinstatement, so there is no need for this Court to reach the question. *See* Pet. C.A. Br. 55-57. In any event, there was nothing wrong with the 2019 withdrawal. *Ibid.* EPA is grasping at straws to avoid this Court's review.

2. Although the Court can reach the statutory question, EPA argues that the Court should not be the first to do so. But this Court's "practice of declining to address issues left unresolved" by lower courts "is not an inflexible rule." *Boumediene* v. *Bush*, 553 U.S. 723, 772 (2008). EPA knows (at 20) exactly *why* "no court has ever passed on the statutory question." For years, California deemed automakers' compliance with federal standards to satisfy its greenhouse-gas standards, so the D.C. Circuit held that no party had standing to challenge California's waiver. *Chamber of Commerce* v. *EPA*, 642 F.3d 192, 206 (D.C. Cir. 2011). California argues (at 23) that petitioners could have challenged California's zero-emission-vehicle mandate, but California has asserted that the mandate does not have an independent effect on emissions. *See* 78 Fed. Reg. at 2,130. Of course, California no longer deems compliance with federal standards as sufficient, so petitioners sued—only to have the challenge dismissed again by the D.C. Circuit for lack of standing.

EPA pledges (at 22-23) that there is an appropriate vehicle years away in *Western States Trucking Ass'n, Inc.* v. *EPA*, No. 23-1143 (D.C. Cir. Nov. 3, 2023), but it acknowledges in a footnote that *Western States Trucking* has been held in abeyance without briefing for *Texas* v. *EPA*, No. 22-1031—a case which itself was argued more than a year ago and in which EPA has asserted multiple reasons why the D.C. Circuit should not reach the merits. Rest assured: EPA has no intention of stopping this merry-go-round. Meanwhile, California will continue to reshape the direction of the Nation's automobile and energy industries.

3. Finally, EPA argues (at 22) that because the waiver may only apply through model-year 2025, "this Court's intervention can do little." But elsewhere EPA says (at 13) the waiver "does *not* terminate with model-year 2025" (emphasis added). By EPA's own admission, there is plenty the Court can do. Regardless, proving mootness is *EPA's* burden, and it has not submitted evidence that manufacturers will not make any changes by the end of model-year 2025 if petitioners prevail. If it had, petitioners could offer evidence to the contrary—that if California's emission standards were eliminated, "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." Pet. C.A. Supp. Br. 8 (emphasis added). This Court could thus render effective relief, even if it issues a decision next summer.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ERIC D. MCARTHUR
SIDLEY AUSTIN LLP
1501 K Street NW
Washington, DC 20005

Counsel for American Fuel & Petrochemical Manufacturers, Domestic Energy Producers Alliance, Energy Marketers of America, and National Association of Convenience Stores

MICHAEL BUSCHBACHER
JARED M. KELSON
BOYDEN GRAY PLLC
800 Connecticut Ave NW
Suite 900
Washington, DC 20006

Counsel for Clean Fuels Development Coalition, ICM, Inc., Illinois Corn Growers Association, Kansas Corn Growers Association, Michigan Corn Growers Association, Missouri Corn Growers Association, and Valero Renewable Fuels Company, LLC

JEFFREY B. WALL
Counsel of Record
MORGAN L. RATNER
SULLIVAN & CROMWELL LLP
1700 New York Avenue NW
Suite 700
Washington, DC 20006
(202) 956-7660
wallj@sullcrom.com

LESLIE B. ARFFA
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004

Counsel for Valero Renewable Fuels Company, LLC

BRITTANY M. PEMBERTON
BRACEWELL LLP
2001 M Street NW
Suite 900
Washington, DC 20036

Counsel for Diamond Alternative Energy, LLC and Valero Renewable Fuels Company, LLC

RICHARD S. MOSKOWITZ
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1800 M Street NW
Suite 900 North
Washington, DC 20036

Counsel for American Fuel & Petrochemical Manufacturers

MATTHEW W. MORRISON
SHELBY L. DYL
PILLSBURY WINTHROP SHAW PITTMAN LLP
1200 Seventeenth Street NW
Washington, DC 20036

Counsel for Diamond Alternative Energy, LLC, Iowa Soybean Association, The Minnesota Soybean Growers Association, and South Dakota Soybean Association

SEPTEMBER 23, 2024