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January 29, 2025

Via ECF

Scott S. Harris, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Diamond Alternative Energy, LLC, et al.* v. *EPA, et al.*, No. 24-7

Dear Mr. Harris:

I write on behalf of petitioners in the above-captioned case. Last week, the government moved to hold this case in abeyance while EPA reconsiders the underlying agency action at issue. Petitioners welcome that reconsideration, but the government's lengthy reconsideration process—which, together with subsequent litigation, will likely take years—has nothing to do with the standing question before this Court. The government says nothing at all about that question in their motion. Right now, there is an indisputably live case before the Court, it raises an independently important question about Article III standing and redressability, and the Court's consideration of that question will not be affected by the agency's reconsideration of the underlying waiver at issue. Indeed, it is critical that this Court correct the D.C. Circuit's erroneous standing decision, so that indirectly regulated entities will be able to litigate the merits of whatever EPA does.

As the government explains, this case concerns Section 209 of the Clean Air Act, which broadly preempts States from adopting their own motor-vehicle emission standards. *See* 42 U.S.C. § 7543(a). Section 209(b) contains an exception that allows EPA to grant a waiver to California alone if, among other things, the State demonstrates that it "need[s]" those emission standards to "meet compelling and extraordinary conditions." *Id.* § 7543(b)(1)(B). For many decades, California and EPA used that exception to address only localized conditions in California, like smog. Starting in the late 2000s, however, California sought a waiver to set emission standards intended to address global climate change. With each new presidential

Administration since then, EPA has flipped—thus far three times—on whether Section 209(b) permits California to be a junior-varsity EPA for global issues like climate change. EPA is apparently considering a fourth flip and a return to its (correct) original position.

The problem for petitioners and other indirectly regulated entities is that, for nearly 15 years, they have not been able to get a judicial determination of the merits of EPA's Section 209(b) authority. That is a hugely important question. Yet the D.C. Circuit—which is the exclusive venue for any Section 209(b) decision that EPA properly determines to have "nationwide scope or effect," *see* 42 U.S.C. § 7607(b)(1)—has rejected previous challenges on threshold grounds. *See Chamber of Commerce* v. *EPA*, 642 F.3d 192, 206 (D.C. Cir. 2011).

The same thing happened here. In 2022, EPA reinstated California's waiver for greenhouse-gas emission standards and a zero-emission-vehicle mandate, both aimed at global climate change. 87 Fed. Reg. 14,332 (Mar. 14, 2022). Those regulations compel automakers to change the kind of vehicles they produce so as to decrease the amount of liquid fuel consumed. Petitioners are entities (and associations of entities) that produce or sell liquid fuels and the raw materials used to make them. They are the effective targets of the California regulations. In the decision under review, however, the D.C. Circuit held that petitioners lacked standing because they purportedly failed to show that vacating the waiver would have any real-world effect on liquid-fuel consumption. Pet. App. 23a. As petitioners have explained, that decision was wrong, and obviously so. Br. 35-45. If California's mandatory standards were set aside, automakers would predictably make and sell at least one more liquid-fuel-powered vehicle.

Although petitioners applaud EPA's decision to reassess California's preemption waiver, the question EPA is now reconsidering—the validity of that waiver under Section 209(b)—is entirely distinct from the standing question pending before this Court. In fact, this Court denied certiorari on the Section 209(b) merits question, even as it granted review on the standing issue. The independent nature of the question presented distinguishes this case from those in which this Court has granted unopposed motions to hold pending cases in abeyance. *See* Motion 4 (citing *Biden* v. *Sierra Club*, No. 20-138; *Mayorkas* v. *Innovation Law Lab*, No. 19-1212). There, unlike here, the government was reconsidering the exact decisions the Court was called upon to review, so the cases would likely have become moot, practically

irrelevant, or both. Plus, in those cases the government was the *petitioner*, seeking to have the Court hold the cases without any opposition. *Cf.* S. Ct. Rule 46.

By contrast here, there is no chance that EPA's reconsideration will moot this case by the end of this Term. It will take time, as the government implicitly acknowledges in asking for an indefinite abeyance, for EPA to reevaluate its decision. Administrations typically spend at least a year reconsidering a waiver determination. *See, e.g.*, 84 Fed. Reg. 51,310 (Sept. 27, 2019) (two-year period to reconsider the 2013 waiver grant); 87 Fed. Reg. at 14,332 (over one-year period to reconsider the 2019 waiver revocation). And even if EPA were to withdraw the waiver, that decision would be subject to immediate legal challenge, which would itself likely take years to resolve. This Court will have decided the case long before any of that.

Nor is there any chance this case will become practically irrelevant, because the standing question is independently significant. The decision below is not limited to this waiver, nor to this industry. It creates an artificially high evidentiary barrier for establishing redressability that will apply to any parties that are targeted by government action, but that are not themselves the directly regulated entities. *See* Br. 36-38, 41-45. This Court's resources would be well spent in clearing away a manufactured justiciability hurdle that threatens all manner of commonplace administrative challenges.

Holding this case in abeyance would severely prejudice petitioners. If EPA withdraws the waiver, and if the D.C. Circuit ultimately vacates that withdrawal, then petitioners' challenge to the original reinstatement would be ripe for decision. But if the case is still pending in this Court, then the Court would first need to adjudicate the Article III standing question many years after the fact. And it would be even worse if the Court dismissed the writ rather than holding the case in abeyance for years on end. Then indirectly regulated entities could remain out of luck on standing grounds if the merits challenge eventually continued. Simply put, petitioners and other indirectly regulated entities have ping-ponged around the D.C. Circuit for years trying to get a decision on the merits. This Court should decide the justiciability of their challenge now. If this Court reverses the D.C. Circuit's standing decision, petitioners at least will be positioned to have their arguments heard on the merits, as soon as appropriate.

Meanwhile, hearing the case now will not prejudice the government. If petitioners were to prevail, the Court could remand the case to the D.C. Circuit. At that point, the D.C. Circuit could consider holding the case in abeyance pending EPA's reconsideration of its position and completion of any attendant litigation. But left uncorrected, the D.C. Circuit's standing decision will continue to impose a barrier to agency rule challenges generally, and it will end entirely petitioners' challenge to California's current waiver.

Because the case remains live and in need of this Court's intervention, the only reasonable alternative to hearing the case on the merits now would be to vacate the decision below and remand for further proceedings. The federal government has already conceded that the court of appeals' standing decision was premised on a critical factual error. Br. 45-46; EPA Br. in Opp. 13. And before its brief in opposition, the government never questioned petitioners' Article III standing here. Given the government's apparent agreement that the court of appeals erred in key aspects of its analysis, the government could have requested that this Court vacate and remand to the D.C. Circuit. But it has not done that—and absent that, the case should go forward. At the very least, the Court should explore these issues at oral argument before deciding whether to issue a decision or hold the case in abeyance.

Respectfully submitted,

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