No. 24-7

In the Supreme Court of the United States

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

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION
AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. LOWER COURTS STRAIN TO FIND STANDING DEFICIENCIES IN ORDER TO PREMATURELY DISMISS CASES AND CONTROVERSIES..................... 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970) 6

Cato Inst. v. SEC, 4 F.4th 91 (D.C. Cir. 2021)........... 3

Linda R.S. v. Richard D., 410 U.S. 614 (1973).......... 6

Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992).......... 6

Massachusetts v. EPA, 549 U.S. 497 (2007)................ 9

Uzuegbunam v. Preczewski, 592 U.S. 279 (2021) 5

Statutes

5 U.S.C. § 552(a)(6)(E)(iii) 6

Other Authorities

Advanced Clean Cars Program, CAL. AIR RES. BD. (last visited Jan. 26, 2025) 8

Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U.L. REV. 169 (2015) 6

Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism,"* 31 GEO. MASON L. REV. 893 (2024) 5, 6, 7

Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) 6

Tracey E. George & Robert J. Pushaw Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265 (2002).. 7

Regulations

17 C.F.R. § 202.5... 3

Constitutional Provisions

U.S. CONST. art. III, § 2, cl. 1....................................... 5

INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

This case interests Cato because the petitioners presented a clear "case or controversy" when they filed this lawsuit challenging the coercive effect of federal and state regulations on their businesses. Yet the lower court dismissed the suit, applying a flawed conception of Article III standing that defies common sense. Cato has experienced a similar fate, having had its own case dismissed by the D.C. Circuit on similar grounds. Cato wishes to highlight lower courts' misuse of standing doctrines to dismiss meritorious, viable challenges to government regulation. This overly strict interpretation of standing doctrine departs from the Constitution's original meaning and should be put to an end.

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[1] Rule 37 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Decades ago, Congress granted California special status under the Clean Air Act to remedy environmental concerns unique to California, such as high smog levels in the Los Angeles Basin. Pet. Br. 2. However, the U.S. Environmental Protection Agency (EPA) has given California excessive latitude—via regulatory waiver from federal law—to pass a series of regulations intended to reduce fuel emissions and the amount of fuel used in the state. Because a high percentage of automobile and fuel products are sold in California, these state regulations will have a national and global impact on the economy.

Diamond Alternative Energy and other producers of liquid fuel (and raw materials for liquid fuel) sued to block enforcement of and set aside an EPA waiver. The fuel producers filed declarations explaining that California's strict automobile emissions regulations would cause fewer fuel-producing cars to be sold, depressing fuel sales and harming them financially. However, the D.C. Circuit concluded that the fuel producers had failed to demonstrate that vacating the EPA waiver would change auto sales or increase fuel purchases. *See* Pet. Br. 13. Therefore, it held that the fuel industry's claimed injuries were not shown to be redressable and that they lacked standing to sue. *Id*. at 23a.

The decision below demonstrates that lower courts' application of standing doctrine too often has strayed unacceptably from this Court's precedents and from the original meaning of Article III's Case or Controversy Clause. Increasingly, invocations of standing doctrine have become a tool for judicial abdication,

even when important rights and issues are at stake. Standing has been used as a gating mechanism to avoid taking up difficult or unpalatable legal challenges.

Indeed, the Cato Institute recently fell victim to the D.C. Circuit's dubious redressability standards in a First Amendment case against the Securities and Exchange Commission (SEC). *See Cato Inst. v. SEC*, 4 F.4th 91, 92 (D.C. Cir. 2021). Many Americans have been subjected to SEC investigation, and one approached Cato about publishing criticisms of the SEC's prosecutorial tactics. *Id.* at 93. However, the SEC's longstanding requirement[2] that anyone settling an SEC investigation must agree to *never* publicly deny the SEC's (unproven) allegations prevented Cato from publishing its planned manuscript. *Id*. Cato therefore challenged the SEC's gag requirement as a violation of the First Amendment rights of the prospective author and of Cato as a publisher.

But the district court and D.C. Circuit held that Cato lacked standing to sue. *See id*. The D.C. Circuit's perplexing rationale was that Cato's free speech injury was not redressable. The court speculated that even if it declared the SEC gag policy unconstitutional and unenforceable, "a [district] court may institute criminal contempt proceedings against" Cato's commissioned authors "absent the SEC's consent." *Id*. at 95. This implausible conjecture—that a district court would enforce an unconstitutional, defunct policy—

[2] 17 C.F.R. § 202.5.

signals that some lower courts are misapplying the purpose and demands of standing doctrine.

In much the same way, the D.C. Circuit's decision below is perplexing and conjectural. The court cited ostensible standing deficiencies, obviating the need to evaluate the merits of petitioners' numerous claimed injuries. Notably, "redressability" is only the latest jurisdictional shield that has blocked review of the EPA's contested decision shaping the nation's energy consumption and car options. "[T]he 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." Pet. Br. 3.

That liquid fuel producers will suffer harm if the EPA waiver remains intact is obvious and predictable—California policy is intended to depress liquid fuel consumption. The petitioners have presented a legal "case or controversy," and both sides have spent significant time and resources litigating that controversy. A decision setting aside the waiver will mitigate the imminent future harm that liquid fuel producers anticipate. Therefore, Article III courts have not just the authority but the duty to rule on the legality of the EPA's waiver and California's regulations.

This Court should reverse and hold that plaintiffs like Diamond Alternative Energy and the other petitioners in this case have standing to sue. The courts below misconstrued precedent to search for and find a standing deficiency. The fuel producers are an obvious and intended target of California's onerous fuel regulations and their injury is redressable.

ARGUMENT

I. LOWER COURTS STRAIN TO FIND STANDING DEFICIENCIES IN ORDER TO PREMATURELY DISMISS CASES AND CONTROVERSIES.

Standing doctrine provides plaintiffs a threshold to meet to prevent "turning judges into advice columnists." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 296 (2021) (Roberts, C.J., dissenting). Unfortunately, in recent decades this doctrine has become increasingly muddled and subject to manipulation by the government, leaving injured plaintiffs like Diamond Alternative Energy no legal remedy for their injuries.

Modern standing doctrine bears little resemblance to the historical requirements derived from the Case or Controversy Clause of Article III. U.S. CONST. art. III, § 2, cl. 1. The original understanding of Article III set out three conditions for standing: a plaintiff must (1) "assert a legal right in a form prescribed by law," (2) not "deliberately manufacture a lawsuit," and (3) "present a legal question that called for interpretation by an independent federal judge who was an expert in federal law." Robert J. Pushaw, Jr., *The Court Continues to Confuse Standing: The Pitfalls of Faux Article III "Originalism,"* 31 GEO. MASON L. REV. 893, 895 (2024). For more than 150 years, the courts applied these elements to determine standing. *Id.*

Today's three-prong standing test—injury in fact, causation, and redressability—originated as a pragmatic judicial reaction to prevent courts from being overwhelmed by Americans' challenges to New Deal agencies' numerous encroachments into private life and commerce. *See id.* at 896; *Lujan v. Defs. of*

Wildlife, 504 U.S. 555, 560–61 (1992) (summarizing the standing test). The test "was fashioned out of other doctrinal materials largely through the conscious efforts of Justices Brandeis and Frankfurter." Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1374 (1988). This Court only formalized the three prongs of the modern standing test in the 1970s. *See* Pushaw, *The Court Continues to Confuse Standing*, *supra*, at 897, 906; *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152–54 (1970) (establishing the "injury-in-fact" requirement); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617–19 (1973) (introducing the "causation" and "redressability" prongs).

To the extent the modern prongs lead to the same outcomes as the original understanding of Article III, they can be relatively innocuous. Unfortunately, however, lower courts have too often used the modern prongs as opportunities to find standing deficiencies and prematurely dismiss cases.[3] Inquiries directed at the single core question, whether a suit presents a

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[3] Some lower-court opinions have protested that strict barriers to standing are compelled by the Constitution and that neither Congress nor the courts have discretion to lower them. These arguments are dubious considering the liberal standing requirements that Congress has established in areas like Freedom of Information Act (FOIA) litigation. Courts freely acquiesce to Congress's assertion that any citizen has a right to make FOIA requests for almost any reason, even simple curiosity. *See* Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U.L. REV. 169, 173 (2015); 5 U.S.C. § 552(a)(6)(E)(iii). No injury is required, and neither causation nor redressability must be established to have standing to bring an action under FOIA. If that is constitutional, then courts in many other areas of the law have applied a far stricter test for standing than the Constitution requires.

"case or controversy," are too often tossed aside. Standing has increasingly become a tool for judicial abdication, as courts use standing to create procedural roadblocks for plaintiffs with genuine injuries. *See* Pushaw, *The Court Continues to Confuse Standing*, *supra*, at 895.[4] By erecting high thresholds for standing, courts can dismiss complaints that do in fact raise a legal case or controversy, leaving plaintiffs who have valid claims without a remedy.

The use of standing doctrine to truncate litigation has grown particularly in environmental and regulatory cases. *See id.* at 894. In these contexts, standing requirements are often used to dismiss claims from industries or individuals who will suffer from government regulations but whose injuries are characterized as indirect or speculative. Even when plaintiffs suffer immediate and direct harm due to government regulations, they are still too often denied the opportunity to have their claims heard. *See id.*

These overly strict applications of standing doctrine are not just inconsistent with the original meaning of the Constitution, they are also inconsistent with this Court's precedent. This Court's decision in *Department of Commerce v. New York* makes plain that when regulations will have a "predictable effect," that effect can establish redressability. 588 U.S. 752, 768 (2019). The D.C. Circuit erred, then, in requiring plaintiffs to

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[4] The New Deal and Burger Courts used an early version of the modern standing test to deny relief to plaintiffs challenging government power, first to block "businesses challenging progressive legislation, then "to foreclose litigation by disadvantaged groups attacking conservative statutes." Tracey E. George & Robert J. Pushaw Jr., *How is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1274–75 (2002).

somehow "prove" that vacatur would increase the manufacture and sales of fuel-consuming vehicles. This Court's redressability standard permits plaintiffs to point to the predictable and likely effects of a legal remedy.

Properly applied, standing doctrine ensures that courts adjudicate only real-world disputes and that they do not issue advisory opinions. However, the D.C. Circuit's decision in this case illustrates that the doctrine is too often used as an arbitrary barrier for parties who have genuine grievances. California has been explicit about its desire to reduce the use of fuel through the passage of emissions regulations. *See Advanced Clean Cars Program*, CAL. AIR RES. BD. (last visited Jan. 26, 2025).[5] The primary purpose of these regulations is to reduce fuel use in the state. While the regulations bind vehicle manufacturers, those manufacturers are not the sole targets of California's regulations. And the current regulations are just the beginning of a scheme to eliminate all gas-powered vehicles and depress fuel consumption. *Id.* ("By 2035 all new passenger cars, trucks and SUVs sold in California will be zero emissions.").

California's regulations are designed to reduce emissions from vehicles, which will, by necessity, reduce fuel consumption. EPA and California's regulatory bodies have been explicit about the objective of the regulations, and they defend them because of their belief in the close nexus between emissions and climate change. As this Court said in *Massachusetts v. EPA*, "EPA would presumably not bother with such efforts if

[5] Available at https://tinyurl.com/4xtva7nf (last visited Jan. 26, 2025).

it thought emissions reductions would have no discernable impact on future global warming." 549 U.S. 497, 526 (2007) (internal quotations omitted). The same logic applies here.

Petitioners logically argue that strict emissions rules will depress demand for their products, thus harming their economic interests as a third party to the EPA's actions. That should be enough to show a redressable injury.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the D.C. Circuit.

Respectfully submitted,

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