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

BRIEF OF WESTERN STATES PETROLEUM ASSOCIATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC., CALIFORNIA ASPHALT PAVEMENT ASSOCIATION, WASHINGTON OIL MARKETERS ASSOCIATION, CALIFORNIA FUELS & CONVENIENCE ALLIANCE, ARIZONA PETROLEUM MARKETERS ASSOCIATION, ENERGY AND CONVENIENCE ASSOCIATION OF NEVADA, OREGON FUELS ASSOCIATION, AND AMERICAN TRUCKING ASSOCIATIONS, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI CURIAE

Western States Petroleum Association (WSPA) is a non-profit trade association that represents a large portion of the petroleum exploration, production, refining, transportation, and marketing companies in Arizona, California, Nevada, Oregon, and Washington.[1] Founded in 1907, WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible.

The National Federation of Independent Business, Inc. (NFIB) is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members. An affiliate of NFIB, the NFIB Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

California Asphalt Pavement Association is a nonprofit trade association that represents members of the asphalt pavement industry in California. The industry is a primary consumer of liquid asphalt, a

[1] In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief.

petroleum-based product that is produced as part of the oil refining process. Because there is no alternative for liquid asphalt, any reduction or elimination of the availability of this product as an indirect result of California's emissions standards will severely harm the industry. It will disrupt the ability of local, state, and federal agencies—the industry's largest customers—to build and maintain roads and highways. Beyond impacting the 15,735 men and women employed in manufacturing asphalt pavement mixtures, California's standards will put at risk the 343,000 American jobs involved in the construction of that infrastructure.

Washington Oil Marketers Association (WOMA) is a nonprofit trade association with individual and corporate members that market petroleum products in Washington State and associate members that sell products and services that support the petroleum industry. WOMA members account for nearly 80% of all petroleum products sold in Washington State, including 68,000,000 gallons of heating oil to residential and industrial users. WOMA is the only association in Washington State that focuses on all aspects of the petroleum marketing industry and monitors legislative and regulatory issues involving fuel, energy, alcohol, tobacco, transportation, the environment, and the state budget and taxes. WOMA also lobbies on behalf of petroleum marketers and oil heat dealers with state government agencies and the legislature in Olympia and stays engaged with related state and national associations.

The California Fuels and Convenience Alliance (CFCA) is the industry's statewide trade association representing the needs of small and minority

wholesale and retail marketers of gasoline, diesel, lubricating oils, motor fuels products, and alternative fuels, including but not limited to, hydrogen, compressed natural gas, ethanol, renewable and biodiesel, and electric charging stations; transporters of those products; and retail convenience store operators.

Since 1967, the Arizona Petroleum Marketers Association (APMA) has been the state's leading trade association representing the petroleum marketing, convenience store, and related industries. APMA's primary purpose is to protect and advance its members' legislative and regulatory interests in the states' and nation's capitols.

Energy and Convenience Association of Nevada is a statewide trade association that represents an extensive membership of liquid fuel and lubricant distributors, transporters, retailers, and convenience store owners. The fuel distribution, transportation, retailing, and convenience industry are critical components of Nevada's economy with stations and stores in every county. Nevada has more than 1,229 C-stores employing more than 18,000 employees. Annual gross sales are more than $4.7 billion with fuel sales accounting for $2.6 billion.

The Oregon Fuels Association (OFA) is the voice of Oregon's locally owned fuel stations, fuel distributors, and heating oil providers. OFA members are at the forefront of environmental stewardship within the industry as the leading suppliers of biodiesel and other low carbon fuels. Often multi-generational, family-owned businesses, members fuel Oregon's economy by providing career opportunities to thousands of employees across the state. OFA is a leading

advocate for common sense regulations that balance affordable fuels and environmental stewardship.

American Trucking Associations, Inc. (ATA), is the national association of the trucking industry. Its direct membership includes approximately 2,400 trucking companies and in conjunction with 50 affiliated state trucking organizations, it represents over 30,000 motor carriers of every size, type, and class of motor carrier operation. The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States and virtually all of them operate in interstate commerce among the states. ATA regularly represents the common interests of the trucking industry in courts throughout the nation, including this Court.

SUMMARY OF ARGUMENT

On its face it may appear that the D.C. Circuit carefully considered a question of standing and ultimately determined that Petitioners, fuel producers[2] challenging EPA's reinstatement of a Clean Air Act waiver for California's vehicle emissions standards and electric vehicle mandate, could not pursue their claims. However, smuggled within its analysis is actually a heightened standing requirement for indirectly regulated parties challenging agency action.

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[2] Petitioners constitute "entities (and trade associations whose members include entities) that produce or sell liquid fuels—gasoline, diesel, biodiesel, renewable diesel, and ethanol—and the raw materials used to make them," however, for brevity, they are simply referred to as "fuel producers" throughout this brief. *See, e.g.*, Pet. at 12.

This challenge is one of many seeking to invalidate regulations[3] that impermissibly control what kinds of cars and trucks consumers can be sold in the U.S. This broader regulatory initiative, driven by the Biden Administration and aided by California, includes regulations promulgated by California and authorized by the Environmental Protection Agency's (EPA's) Clean Air Act waivers, EPA's own emission standards, and the National Highway Traffic Safety Administration's (NHTSA's) corporate average fuel economy standards.

These regulations aim to electrify America's vehicle fleet, and by extension, reduce demand for liquid fuels. And although indirectly regulated parties like Petitioners are injured by EPA's waiver for California's regulations, they have not yet been able to obtain a ruling on the merits of their claims. Instead, the D.C. Circuit has to date avoided the question. In this case, it did so by by reconceiving well-established standing doctrine.

First, the D.C. Circuit's opinion alters the established standards for proving redressability, imposing upon Petitioners an unduly high burden. The court disregarded the fact that Petitioners demonstrated both the determinative and coercive effects of the challenged regulation, as well as the

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[3] The underlying agency action in this case is EPA's reinstatement of a Clean Air Act preemption waiver for California's Advanced Clean Cars I program. The Clean Air Act's preemption waiver provisions require inquiry into the substantive nature of the waiver, *see* 42 U.S.C. § 7543, so in granting the waiver, EPA is granting California the authority to regulate. For ease of reference, this brief refers to EPA's granting of the waiver as a "regulation."

predictable effects of the regulation—both sufficient to satisfy redressability.

Second, the D.C. Circuit's opinion creates confusion by muddling the distinction between mootness and standing. The court's approach is particularly problematic as it deviates from established standing jurisprudence and further engenders confusion as to how indirectly regulated parties may demonstrate standing.

Third, the court's misapplication of standing doctrine threatens adverse consequences beyond its result here. The decision below may make it exceedingly difficult for indirectly regulated and nevertheless injured parties to bring future regulatory challenges. The opinion also risks encouraging gamesmanship from courts, federal agencies, or directly regulated parties whose interests do not align with other injured parties. The consquence here is that the D.C. Circuit's opinion leaves undisturbed agency overreach that has authorized California to impose strict vehicle regulations outside the bounds of what is permissible under the Clean Air Act.

ARGUMENT

Under the longstanding three-part test for standing, a party must demonstrate: (1) an injury in fact, (2) that is "fairly traceable" to the agency's action, and (3) that is redressable by favorable judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (cleaned up). An injury-in-fact is "an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (cleaned up). And that injury-in-

fact is fairly traceable to an agency's action (i.e., causation) if the injury is actually and proximately caused by that action. Government action "requir[ing] or forbid[ding] some action by the plaintiff [will] almost invariably satisfy both the injury in fact and causation requirements." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024). And causation and redressability are "flip sides of the same coin." *Id.* at 380-81 (citation omitted). "If a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *Id.* at 381.

The constitutional underpinnings of this doctrine are rooted in Article III's requirement of an actual "case or controversy." U.S. Const. art. III. This principle ensures that federal courts do not issue advisory opinions but instead resolve concrete legal disputes with real-world implications. *See Carney v. Adams*, 592 U.S. 53, 58 (2020) ("We have long understood [the phrase 'case or controversy'] to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions."). Standing doctrine serves as a gatekeeping mechanism, preventing courts from overstepping their judicial role by engaging in abstract legal theorizing.

Traditionally, indirectly regulated parties can establish standing by demonstrating the predictable effects of government regulation on third parties. For example, in *Department of Commerce v. New York*, 588 U.S. 752, 768 (2019), the Court accepted standing based on commonsense inferences about how regulated parties might respond to government action. Similarly, in *Competitive Enterprise Institute v.*

NHTSA, 901 F.2d 107 (D.C. Cir. 1990), the court recognized that manufacturers' responses to regulatory changes can be reasonably predicted based on market forces and past experience.

This Court has repeatedly acknowledged the variety of circumstances where government regulation may injure indirectly regulated, or unregulated, plaintiffs. In *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, 603 U.S. 799, 826 (2024), Justice Kavanaugh noted that unregulated plaintiffs may challenge agency rules that regulate others but have adverse downstream effects, and indeed these challenges are in the heartland of regulatory challenges. *See, e.g.*, 603 U.S. at 833 (noting that "[e]liminating vacatur as a remedy would terminate entire classes of administrative litigation that have traditionally been brought by unregulated parties") (Kavanaugh, J., concurring). This approach acknowledges that injury from an agency regulation may extend beyond regulated parties. But in the case below, the D.C. Circuit altered that approach and raised the barriers to entry for indirectly regulated parties.

I. The D.C. Circuit's opinion sets an unworkable and incorrect standard for demonstrating redressability.

The D.C. Circuit departed from established precedent from the Supreme Court and courts of appeals by imposing an improper and overly stringent standard for demonstrating redressability in challenges to agency rulemaking. Rather than applying conventional redressability analyses, the court created an almost insurmountable barrier for indirectly regulated parties seeking to challenge federal agency actions. And in so doing, the court disregarded two

ways in which parties, and especially parties who are indirectly regulated, may prove standing. The court did not give due regard to Petitioners' demonstration that the waiver granted to California to mandate an increasing percentage of electric vehicles year over year imposed determinative or coercive effects upon them. Nor did it properly consider the predictable effects of the regulation and how those effects ultimately injure Petitioners.

A. The D.C. Circuit improperly ignored Petitioners' showing of the determinative and coercive effects of the regulation.

When government regulations create barriers to the use of a company's products, removing those regulations provides sufficient redress under Article III standing requirements. The Court has consistently held that the "determinative or coercive effect" of government regulation on third parties satisfies redressability. *Bennett v. Spear*, 520 U.S. 154, 169 (1997).

As Petitioners explain, in *Bennett v. Spear*, the Court unanimously ruled that ranchers could challenge a biological opinion that influenced their reservoir water levels by requiring the Bureau of Reclamation to maintain certain minimum water levels, even though the opinion directly regulated the Bureau of Reclamation rather than the ranchers themselves. Pet. at 25 (citing *Bennett*, 520 U.S. at 159-60). The Court found that removing the opinion's coercive impact alone established redressability, rejecting arguments that the Bureau might independently reduce water access. *Id*. at 26 (citing *Bennett*, 520 U.S. at 170-71).

And in *Energy Future Coalition v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015), the court held that biofuel producers, not subject to the EPA test-fuel regulation they were challenging, had standing. Quite simply, the regulation's imposition of a "regulatory impediment" to the use of biofuel, and the potential removal of that "regulatory hurdle" was sufficient to establish causation and redressability. *Id.* (Kavanaugh, J.).

This approach serves redressability's core purpose: ensuring a clear connection between the "requested relief" and the "alleged[] unlawful conduct." *California v. Texas*, 593 U.S. 659, 668-69 (2021) (citation omitted). Redressability "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.,* 454 U.S. 464, 472 (1982). But this is not a "high bar." *Texas v. United States*, No. 23-40653, 2025 WL 227244, at *10 (5th Cir. Jan. 17, 2025). Nor is it meant to be an overly complex one—when plaintiffs seek to remove coercive regulations that reduce demand for their products, there is a direct link between the harm (artificially reduced demand) and the remedy (eliminating that constraint).

As Justice Kavanaugh recently explained in *Corner Post*, "[a]n unregulated plaintiff . . . often will sue . . . to challenge an allegedly unlawful agency rule that regulates others but also has adverse downstream effects on the plaintiff." 603 U.S. at 826. And for the "unregulated plaintiff," the means of "obtain[ing] meaningful relief . . . [is] vacatur of the

agency rule, thereby remedying the adverse downstream effects of the rule on the unregulated plaintiff." *Id*. (noting the importance of vacatur as a remedy in Administrative Procedure Act cases like *Corner Post*). Redressability for indirectly regulated parties means removal of the regulation causing the injury or impediment to the indirectly regulated party—the ultimate effect on the indirectly regulated party's business establishes the necessary connection for redressability.

B. Similarly, the D.C. Circuit disregarded Petitioners' proof that they were injured via the predictable effects of the regulation.

If removal of a regulatory hurdle to Petitioners' products were insufficient to demonstrate standing (which it is not), Petitioners still amply demonstrated standing by relying on the predictable effects of EPA's waiver. Indeed, "[t]hirty years of D.C. Circuit caselaw illustrate how standing may rest on the predictable effect of Government action on the decisions of third parties." *Mass. Coal. for Immigr. Reform v. U.S. Dep't of Homeland Sec.*, No. 1:20-CV-03438 (TNM), 2024 WL 4332121, at *15 (D.D.C. Sept. 27, 2024) (internal quotation marks and citation omitted).

The fundamental principle is that a favorable judicial decision must "likely" redress injuries—a standard that prevents government actions targeting indirectly regulated parties from escaping judicial scrutiny. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 525 (2007) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He

need not show that a favorable decision will relieve his every injury." (citation omitted)).

The D.C. Circuit itself has readily applied this principle in past cases. For example, in *Competitive Enterprise Institute v. NHTSA*, 901 F.2d 107 (D.C. Cir. 1990), the court determined that a consumer group not subject to the regulation had standing to challenge NHTSA's fuel economy standards for passenger cars. Their standing claims rested on the connection between NHTSA's standards, which demanded greater fuel efficiency, and the consumer group's members' ability to "buy larger passenger vehicles." *Id.* at 112. The court found it sufficient that, without knowing exactly how manufacturers would respond to the standards, "past experience" demonstrated that manufacturers tend to respond to lower fuel efficiency standards by producing larger vehicles. *Id.* at 117. The court also noted that consumer demand was in favor of larger vehicles, so manufacturers would likely respond to "market forces" to "meet that consumer demand." *Id.*

Examples abound. In *Tozzi v. U.S. Department of Health & Human Services*, 271 F.3d 301 (D.C. Cir. 2001), the court found that a manufacturer had standing to challenge a Department of Health and Human Services action adding the substance dioxin to the category of "known" carcinogens. *Id.* at 303-04. In that case, the manufacturer primarily sold a plastic product that *released* dioxin when incinerated and demonstrated that it would be adversely affected by the classification of dioxin as a carcinogen. *Id.* at 307-08. Although the challenged agency action and the injury were interrupted by "independent actions of third parties," the court found it sufficient that "the

agency action [was] at least a substantial factor motivating the third parties' actions." *Id.* at 308-09 (citation omitted).

And in *Competitive Enterprise Institute v. FCC*, 970 F.3d 372 (D.C. Cir. 2020) the court determined that individual consumers had standing to challenge FCC conditions imposed on a merger of three cable broadband Internet service providers. One condition of the merger, for example, prohibited the new entity from engaging in certain types of interconnection agreements, which the consumers argued would raise prices for their broadband subscriptions. 970 F.3d at 382-83. The court explained that where standing depends in part on third-party behavior, it may consider "a variety of evidence, including . . . arguments firmly rooted in the basic laws of economics." *Id.* at 382 (internal quotation marks and citation omitted). And in that case, the court explained that while the consumers' injury—the increased internet prices—"turn[ed] on" voluntary third-party conduct, the court could find causation and redressability where such conduct was "reasonably predictable." *Id.* at 384.

The existing standing framework, unlike the one applied by the D.C. Circuit in the case below, provides a consistent and principled approach to standing. It recognizes that modern regulatory frameworks are complex, with wide-ranging and interconnected effects. The doctrine allows for judicial review when the connection between government action and potential harm is sufficiently clear and predictable, without requiring plaintiffs to prove every potential outcome with absolute certainty.

* * *

Applying either of these approaches to redressability, Petitioners more than adequately demonstrated that the requested relief would alleviate their injury. At bottom, California's Advanced Clean Cars I program mandates that car manufacturers produce fewer vehicles that consume liquid fuel. Petitioners produce, refine, or sell liquid fuels and the raw materials used to produce them. And their petition for review established that their injury—reduced demand for their products—could be redressed by the court's vacatur of EPA's authorization of California's Advanced Clean Cars I program. *Ohio v. EPA*, 98 F.4th 288, 301 (D.C. Cir. 2024) (noting that Petitioners supported redressability with "over a dozen declarations by individuals who are affiliated with Fuel Petitioner entities and organizations . . . explain[ing] that the entity or organization is involved with producing or selling fuel and that the waiver causes Fuel Petitioners economic injury by reducing the demand for fuel and related products.").

But instead of acknowledging that Petitioners sufficiently illustrated both the regulatory hurdle that the waiver imposes and the predictable effects it would have on their products, the D.C. Circuit raised the bar and demanded evidence from the regulated car manufacturers. *Id.* at 302-03, 306 (demanding "record evidence," or "additional affidavits" "affirmatively demonstrating that vacatur of the waiver would be substantially likely to result in any change to automobile manufacturers' vehicle fleets by Model Year 2025"). The D.C. Circuit's novel redressability standard asks far too much of indirectly regulated parties, who need only demonstrate that the third-

party conduct necessary to mitigate their injuries is "reasonably predictable." *See Competitive Enter.*, 970 F.3d at 384.

II. The D.C. Circuit's decision creates confusion in standing doctrine.

The D.C. Circuit framed its decision as one of redressability, but its analysis reveals that the court conflated redressability and mootness doctrines.

The D.C. Circuit's opinion contains two major errors. First, it raised Petitioners' burden to demonstrate standing by concluding that because the car manufacturers did not submit evidence indicating they would change their production, pricing, and distribution, standing could not be satisfied. Second, the court determined that Petitioners failed to show that manufacturers will alter their behavior "relatively quickly," given the date of the court's decision and the remaining regulatory timeframe (even though Petitioners timely filed their petition for review in May 2022). *Ohio*, 98 F.4th at 302.

The D.C. Circuit's second conclusion—that Petitioners failed to show that manufacturers would alter their behavior "relatively quickly"—seems to have confused the doctrines of standing and mootness, and as a result, confused their respective burdens. *Id.*

Perhaps tellingly, EPA did not contest Petitioners' standing (nor did it raise mootness) in the briefing. *See* Pet. at 13. California and other state and local intervenors, however, did raise standing, arguing that Petitioners had not shown that "manufacturers would change course if EPA's decision were vacated." *See* Pet. at 13, *see also* J.A. 187. At oral argument, counsel for state and local intervenors reiterated this

same argument as a matter of mootness. *See* Pet. at 13.

Even though it was the state and local intervenors' burden to demonstrate mootness, Petitioners filed supplemental briefing and supplemental declarations to further show standing and justiciability. *See* Pet. at 14.

Petitioners' included declarations from individuals who had worked in the compliance departments for major auto manufacturers for decades. C.A. Pet. Standing Addendum, Kreucher Decl. ¶ 1 (over thirty years' experience at Ford working on regulatory compliance); *see also* C.A. Pet. Standing Addendum, Modlin Decl. ¶ 1 (over forty years' experience working in emissions and fuel economy regulatory compliance at Chrysler). And they explained that although Advanced Clean Cars I imposed standards through model year 2025, manufacturers could, and would, change their production, pricing, and distribution plans, even as late as December 2025 with impacts extending even beyond that. C.A. Pet. Standing Addendum, Kreucher Decl. ¶ 5; *see also* C.A. Pet. Standing Addendum, Modlin Decl. ¶ 5 (same). But the D.C. Circuit ignored this information and focused on its novel conception of redressability. *Ohio*, 98 F.4th at 306.

The court looked to the short regulatory timeframe remaining and asked whether car manufacturers might still change their production, pricing, or distribution in the remaining time. *Id.* at 302-303. And then the court concluded (incorrectly) that manufacturers could or would no longer change their plans and thus, Petitioners no longer had an injury

that would be remedied by the court's decision. *Id.* at 303-04.

But the court made this "redressability" determination, not as of the initiation of the litigation, as is typically done for standing inquiries, but at the point of its decision. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (noting that standing asks whether "[t]he requisite personal interest . . . [exists] at the commencement of the litigation" (citation omitted); *Ohio*, 98 F.4th at 302 (stating that petitioners failed to show "that automobile manufacturers would [respond to a decision by this Court by changing their fleets] relatively quickly—by Model Year 2025"). And the court imposed no burden on the government or its intervenors to support their position that the claims are moot.

But as this Court has explained, mootness is "the doctrine of standing set in a time frame." *Laidlaw*, 528 U.S. at 189 (citation omitted). And the interconnectedness of the doctrines can sometimes cause lower courts to "conflate[] [the Court's] case law on initial standing . . . with [its] case law . . . mootness." *Id.* at 174. But the two doctrines are distinct. Mootness, not standing, "addresses whether an intervening circumstance has deprived the plaintiff of a personal stake in the outcome of the lawsuit." *West Virginia v. EPA*, 597 U.S. 697, 719 (2022) (cleaned up). But "[a] case is not moot . . . unless it is *impossible* for [the Court] to grant any effectual relief." *United States v. Washington*, 596 U.S. 832, 837 (2022) (cleaned up) (emphasis added). As a result, "the *heavy burden* of proving mootness falls with the party asserting a case is moot." *Maldonado v. D.C.*, 61 F.4th 1004, 1006 (D.C. Cir. 2023) (emphasis

added) (cleaned up). The petitioning party demonstrating redressability carries a somewhat lighter burden. *See, e.g.*, *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 604 (8th Cir. 2022) ("[T]he burden of proving mootness is higher than simply showing a lack of standing." (citation omitted)).

Stated another way, standing asks whether a party has "[t]he requisite personal interest that must exist at the *commencement* of the litigation," but mootness asks whether that personal interest "continue[s] throughout [the] existence [of the litigation]." *Laidlaw*, 528 U.S. at 189 (emphasis added) (cleaned up); *Louie v. Dickson*, 964 F.3d 50, 54 (D.C. Cir. 2020).[4] And while a plaintiff bears the burden of establishing the elements of standing, *Lujan*, 504 U.S. at 560-61, the party asserting mootness (typically the defendant) bears the burden of proving a case is moot.

And make no mistake, while the court below framed its discussion as standing and repressibility, what it really engaged in was a flawed mootness analysis. It looked to whether "intervening circumstance," *i.e.*, the time remaining in the Advanced Clean Cars I program since the waiver was granted, rescinded, and reinstated, had rendered Petitioners' claims moot (though again it did not use that word). *West Virginia*, 597 U.S. at 719 (citation omitted).

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[4] The Court might also take this opportunity to clarify a point of confusion in its standing doctrine. The Court has said *both* that standing is assessed *at the outset of litigation and* that each element of standing must be supported "with the manner and degree of evidence required at the *successive stages of the litigation*." *Murthy v. Missouri*, 603 U.S. 43, 58 (2024) (emphasis added) (quoting *Lujan*, 504 U.S. at 561).

Setting aside the fact that the D.C. Circuit's error added confusion to an area of the law already prone to confusion, *see supra* pp.15-18. The D.C. Circuit opinion risks engendering a host of unintended negative consequences. Without this Court's intervention, the D.C. Circuit's standing requirements are a moving goalpost, especially for indirectly regulated, injured parties.[5]

III. The D.C. Circuit's opinion below produces unintended consequences that will adversely affect indirectly regulated parties challenging agency regulations.

The D.C. Circuit's opinion creates a host of unintended negative consequences.

1. The D.C. Circuit's conflation of standing and mootness necessarily conflated the applicable burden of proof. Typically, the "party asserting a case is moot" bears the "*heavy burden*" of proving mootness. *Maldonado v. D.C.*, 61 F.4th 1004, 1006 (D.C. Cir. 2023) (emphasis added) (cleaned up). But in the decision below, the court essentially demanded that *Petitioners* prove that their claims were still live, i.e., that manufacturers would alter their behavior for model year 2025, thus relieving Respondents of their "heavy burden" to prove mootness. Applying the D.C. Circuit's analysis to future regulatory challenges could make it increasingly easy for agencies to evade judicial review—

[5] To the extent the Government's motion to hold the case in abeyance is still under the Court's consideration at the time of filing this brief, WSPA and its members, like Petitioners, oppose the motion. As Petitioners explain, the standing issues raised in this case may be resolved independently from EPA's reconsideration of the Clean Air Act waiver underlying the case.

create a regulation on a short time frame, argue mootness (disguised as redressability), and force challengers to prove that their claims are still live. Moreover, the court's reframing of a mootness issue as one of redressability deprived Petitioners of exceptions to mootness, like the voluntary cessation doctrine, or issues capable of repetition yet evading review.

2. The D.C. Circuit's opinion raises the bar for regulatory challengers to prove standing. This result is especially problematic because the D.C. Circuit hears the majority of administrative law cases in the country. The opinion also ignores the fact that the interests of regulated parties often differ sharply from the interests of parties who may be injured by the upstream or downstream effects of a regulation. And this occurred even though the D.C. Circuit recognizes that third parties often fall within the zone of interests of an underlying statute while not being directly regulated. To illustrate, in *Motor & Equipment Manufacturers Association v. Nichols*, 142 F.3d 449 (D.C. Cir. 1998), the court held that an association representing manufacturers of replacement auto parts fell within the Clean Air Act's zone of interest and could challenge an EPA regulation prohibiting mechanics from tampering with pollution monitors because their interest in selling replacement parts was "congruent with" the interests of the regulated mechanics. 142 F.3d at 458.

3. The opinion below also creates perverse incentives for agencies. This decision could encourage agencies to deliberately structure rules with increasingly compressed timelines to evade judicial review. For instance, the NHTSA is statutorily permitted to set average fuel economy standards for periods

ranging from one to five model years and must do so with 18-months' lead-time. 49 U.S.C. §§ 32902(a), (b)(3). An agency could strategically opt for the minimum one-year timeframe, effectively rendering potential challenges moot or "not redressable" before judicial proceedings could conclude.

In fact, this issue may already be rearing its head. In a parallel car regulation case, petitioners challenged the lawfulness of NHTSA's most recently promulgated corporate average fuel economy standards for passenger cars and light trucks for model years 2027 to 2031. The standards, promulgated on June 24, 2024, were met with a timely petition for review filed by August 9, 2024. In its response brief, NHTSA argues that in the event a remedy is necessary, the *only* appropriate remedy would be to remand *without vacatur* of the rule. *See* Brief for Respondents at 61-63, *In re: MCP No. 189*, *National Highway Traffic Safety Administration, Department of Transportation, Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027 and Beyond and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030 and Beyond, Fed. Reg. 52540, Published on June 24, 2024* (6th Cir.) NHTSA's rule sets standards beginning in model year 2027 (which apparently technically begins in October 2026), and the enabling statute requires that NHTSA establish its standards 18 months "before the beginning of each model year." *Id.* at 62. If the court were to vacate the final rule, NHTSA argues, it would then have to promulgate new standards for model year 2027 by April 2025. Following the D.C. Circuit's reasoning, NHTSA might next argue that the case will soon be

unredressable because NHTSA must fulfill its statutory obligation to promulgate its standards by April 2025.

4. The D.C. Circuit's erroneous redressability determination is especially problematic in the realm of regulatory challenges for vehicle emissions and fuel economy standards. Petitioners in this case, along with other similarly *indirectly regulated* parties, have challenged numerous EPA and NHTSA regulations that formed the Biden Administration's aggressive push to have 50% "zero-emission vehicles, including battery electric, plug-in hybrid electric, or fuel cell electric vehicles" in the U.S. new car market by 2030.[6] *See* Exec. Order 14037, 86 Fed. Reg. 43583

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[6] *See, e.g.*, *Kentucky v. EPA*, No. 24-1087 (D.C. Cir.) (challenge to EPA's "Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles"); *Nebraska v. EPA*, No. 24-1129 (D.C. Cir.) (challenge to EPA's "Greenhouse Gas Emissions Standards for Heavy-Duty Vehicles—Phase 3"); *In re: MCP No. 189*, *National Highway Traffic Safety Administration, Department of Transportation, Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027 and Beyond and Fuel Efficiency Standards for Heavy-Duty Pickup Trucks and Vans for Model Years 2030 and Beyond, Fed. Reg. 52540, Published on June 24, 2024* (6th Cir.) (challenge to NHTSA's fuel economy standards); *Western States Trucking Ass'n v. EPA,* No. 23-1143 (D.C. Cir.) (challenge to the California Advanced Clean Trucks waiver, titled "California State Motor Vehicle and Engine Pollution Control Standards; Heavy-Duty Vehicle and Engine Emission Warranty and Maintenance Provisions; Advanced Clean Trucks; Zero Emission Airport Shuttle; Zero Emission Power Train Certification; Waiver of Preemption; Notice of Decision); *Iowa v. Granholm*, No. 24-1721 (8th Cir.) (challenge to petroleum equivalency factor used to calculate fuel economy standards, "Petroleum-Equivalent Fuel Economy Calculation"); *see also Texas v. EPA,* No. 22-1031 (D.C. Cir.) (challenge to

(Aug. 5, 2021), Strengthening American Leadership in Clean Cars and Trucks (announcing Biden Administration's stated goal that "50 percent of all new passenger cars and light trucks sold in 2030 be zero-emission vehicles.").[7] And notably, the directly regulated vehicle manufacturers have yet to come forward as challengers in these cases. Nevertheless, Petitioners, and other fuel producers like them, are among the directly affected, but not directly regulated, parties injured by the Biden Administration's efforts to reduce the consumption of liquid fuels.

5. Finally, the D.C. Circuit's error is further compounded in this case where the underlying regulation evinces an ongoing abuse of regulatory power that has thus far evaded judicial review.

The EPA's grant of a waiver to California for its vehicle emissions standards and electric vehicle mandate raises significant concerns under the major questions doctrine. The waiver allows California to "assert[] highly consequential power beyond what Congress could reasonably be understood to have granted [in the Clean Air Act]." *West Virginia*, 597 U.S. at 724. And such "assertions of extravagant statutory power" are viewed "with skepticism," especially

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EPA's "Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards"); *Nat'l Res. Def. Council v. NHTSA,* No. 22-1080 (D.C. Cir.) (challenge to NHTSA's "Corporate Average Fuel Economy Standards for Model Years 2024-2026 Passenger Cars and Light Trucks").

[7] For reference, in 2023, new electric vehicles constituted 9% of sales in the United States. Anh Bui & Peter Slowik, *Market Spotlight: Electric Vehicle Market and Policy Developments in U.S. States, 2023*, The International Council on Clean Transportation (June 4, 2024), https://perma.cc/WS8Y-H5QF.

where "the breadth of the authority that the agency has asserted, and *the economic and political significance* of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* at 721, 724 (cleaned up) (emphasis added).

The waiver would have profound economic consequences. *See*, *id.* at 722 (noting that an issue is *economically significant* where an agency claims, for example, "power over a significant portion of the American economy" (cleaned up)). And here, the waiver exerts an enormous impact on the automobile and energy industries.

Amici, for example, represent members of the petroleum industry who will be indisputably harmed by California's standards, placing hundreds of thousands of jobs—and billions of dollars in tax revenue—at risk. *See* Br. of Amici Curiae Western States Petroleum Ass'n et al. at 1, *Ohio v. EPA,* No. 22-1081 (D.C. Cir.). And downstream industries will likewise be affected. The asphalt industry is reliant on oil refining for liquid asphalt, a petroleum-based product. *See id.* at 2-3. Curtailing petroleum production means the industry will be unable to meet its commitments to supply those who pave America's roads. *See id.* Hundreds of thousands of jobs nationwide are on the line, not to mention core elements of this country's infrastructure. *See id.* at 3.

The waiver is also of notable political significance, as evidenced by the national debate surrounding the electrification of America's vehicle fleet. *West Virginia*, 597 U.S. at 732 (explaining that an issue is politically significant where it "has been the subject of an earnest and profound debate across the country"

(cleaned up)). Tellingly, Congress has considered and rejected legislation establishing an electric vehicle mandate multiple times. *See, e.g.*, Zero-Emission Vehicles Act of 2020, S. 4823, 116th Cong. (2020); Zero-Emission Vehicles Act of 2020, H.R. 8635, 116th Cong. (2020); Zero-Emission Vehicles Act of 2019, S. 1487, 116th Cong. (2019); Zero-Emission Vehicles Act of 2019, H.R. 2764, 116th Cong. (2019); Zero-Emission Vehicles Act of 2018, S. 3664, 115th Cong. (2018). And this debate is further borne out in public discussion. *See, e.g.*, Wall Street Journal Editorial Board, Opinion, *The Electric Vehicle Transition that Isn't* (Aug. 22, 2024), https://www.wsj.com/opinion/electric-vehicles-ford-stellantis-biden-administration-subsidies-905ecfbb.

Where a regulation implicates the major questions doctrine, courts then look to see if there is a clear statement by which Congress authorized the action. *See West Virginia*, 597 U.S. at 723. But no such authorization exists for EPA to allow California to significantly alter the U.S. car market. The Clean Air Act states that EPA may grant California a waiver to regulate where the State "need[s] such State standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(b). But the standards imposed here move beyond California's asserted local needs and attempt to address global greenhouse gas emissions. As EPA Administrator Stephen L. Johnson recognized in denying California's first greenhouse gas emissions regulation waiver, the standards are distinguishable because they do not address local or regional air pollution problems as the standards have in every waiver since 1984. Notice of Decision Denying a Waiver of Clean Air Act

Preemption for California's 2009 Greenhouse Gas Emissions Standards for New Motor Vehicles, 73 Fed. Reg. 12156, 12160 (Mar. 6, 2008). *See also* David R. Wooley & Elizabeth M. Morss, *Clean Air Act Handbook: A Practical Guide to Compliance* § 5:38 (33d ed. 2023) (noting that 2007 was the first time EPA denied California a waiver because "climate change is a national problem that requires a national solution," though EPA then changed course two more times, granting the waiver in 2009 and then revoking it in 2019). In fact, the "elevated atmospheric concentrations of greenhouse gases" are so "well-mixed throughout the global atmosphere . . . that their concentrations over California and the U.S. are, for all practical purposes, the same as the global average." 73 Fed. Reg. at 12160. Quite simply, California fails to show that the regulations address "unique and localized" concerns that affect California any differently than those same emissions affect any other part of the world.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2025