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 AMICI CURIAE ADVANCING AMERICAN FREEDOM; AMERICAN ASSOCIATION OF SENIOR CITIZENS; AMERICAN CONSTITUTIONAL RIGHTS UNION; AMERICAN ENCORE; AMERICAN ENERGY INSTITUTE; AMERICAN LAND RIGHTS ASSOCIATION; AMERICAN LANDS COUNCIL; AMERICAN SECURITIES ASSOCIATION;

[LIST OF AMICI CONTINUED ON INSIDE COVER]

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QUESTIONS PRESENTED

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.

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law. [1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that the balance of powers between the States and the federal government must be struck with due respect for the coequal sovereignty of every State and of the liberty interests each of the people those States represent and serve. Advancing American Freedom files this brief on behalf of its 131,317 members.

Amici American Association of Senior Citizens; American Constitutional Rights Union; American Encore; American Energy Institute; American Land Rights Association; American Lands Council; American Securities Association; American Values; Americans for Limited Government; AMAC Action; E. Calvin Beisner, Ph.D., President, Cornwall Alliance for the Stewardship of Creation; Shawnna Bolick, Arizona State Senator, District 2; Center for Political Renewal; Center for Urban Renewal and Education (CURE); Daniel Darling; Eagle Forum; Eagle Forum

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[1] No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

[2] Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

of Georgia; JoAnn Fleming, Executive Director, Grassroots America - We the People PAC; Freedom Foundation of Minnesota; Frontline Policy Council; Representative Steven E. Galloway, District 24, Montana House of Representatives; Charlie Gerow; Allen J. Hebert, Chairman, American-Chinese Fellowship of Houston; Idaho Freedom Foundation; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, and Chairman, Missouri Center-Right Coalition; Men and Women for a Representative Democracy in America, Inc.; National Center for Public Policy Research; National Religious Broadcasters; Orthodox Jewish Chamber of Commerce; Project Sentinel; Melissa Ortiz, Principal & Founder, Capability Consulting; Project Sentinel; Project 21 Black Leadership Network; Rio Grande Foundation; Pamela S. Roberts, Immediate Past President, Kentucky Federation of Republican Women; Setting Things Right; 60 Plus Association; Stand for Georgia Values Action; Strategic Coalitions & Initiatives, LLC; Students for Life of America; Them Before Us; Tradition, Family, Property, Inc.; Truth in Energy and Climate; Women for Democracy in America, Inc.; Yankee Institute; Young America's Foundation; and Young Conservatives of Texas believe that the Constitution and the ideas that underly it are essential to the preservation of the freedom of the people.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution establishes three branches of government, setting them against one another in

numerous ways as safeguards against government abuse. The federal courts are often the last effective line of defense against government abuse and the inevitable harm it causes. The Court has established standing requirements in an effort to give effect to the language of Article III and to ensure that federal courts do not exceed their role in the constitutional system primarily as a backstop against illegal or excessive actions by the other branches. *Cf., Bush v. Vera*, 517 U.S. 952, 985 (1996) (noting, in relation to the States, federal courts' "customary and appropriate backstop role"). However, "[w]hile it is important that federal courts heed the limits of their constitutional authority, it is equally important that they carry out their 'virtually unflagging obligation . . . to exercise the jurisdiction given them."[3] *Parents Protecting Our Child., UA v. Eau Claire Area Sch. Dist.*, 604 U.S. ___ (2024), No. 23-1280, slip op. at 2 (2024) (Alito, J., dissenting from denial of certiorari) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

This case concerns an Environmental Protection Agency (EPA) statutory interpretation that, if upheld, would undermine the basic principle of the American federal system that each State in the Union possesses equal sovereignty to every other State. Under the Clean Air Act (CAA), "any State" may get a waiver to the EPA's motor vehicle emissions regulations, allowing that State to substitute its own

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[3] Brief of Amici Curiae Advancing American Freedom et al., *Parents Protecting Our Child. v. Eau Claire Area School Dist.*, No. 23-1280, available at https://advancingamericanfreedom.com/parents-protecting-our-children-v-eau-claire-area-school-district/.

standards. 42 U.S.C. § 7543(b)(1). In practice, this waiver is available only to deep-blue California, the most regulatory State in the Union. *See* Exec. Order 14037, 42 U.S.C. § 7521, Sec. 6(c); H.R. Rep. No. 95-294, at 301–02 (1977); *Am. Auto. Mfrs. Ass'n v. Comm'r, Mass. Dept. of Env't Prot.*, 998 F. Supp. 10, 13 (D. Mass. 1997). Because "California is the only state that had adopted emissions standards prior to March 30, 1966, it is the only state eligible for a waiver of federal preemption under th[e] provision." *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011) (citing *Ford Motor Co. v. EPA*, 606 F.2d 1293, 1296 (D.C. Cir. 1979)). The waiver provision of the CAA was enacted largely to enable California to address geographically unique and local problems like Los Angeles smog. H.R. Rep. No. 90-728, at 22 (1967). The history of this waiver demonstrates that this scheme undermines the primary virtues of national regulation, uniformity and stability, while simultaneously undermining the virtues of federalism.

The EPA's waiver of preemption in this case is a perversion of the federal system adopted by the People with their ratification of the Constitution. The Constitution was designed to leave most powers to the States, as demonstrated both by the limited enumeration of federal powers and the express statement of reserved powers in the Tenth Amendment. The Framers knew that local control was preferable wherever it was possible,[4] and that

[4] *See* The Federalist No. 10 at 47 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001)

allowing each State to regulate most issues for itself would create what Justice Brandeis would later describe as laboratories of governance in which each State has the power to address the issues it faces in unique ways. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting). National regulation, on the other hand, may be desirable or even necessary where fifty different approaches to a particular issue would be untenable; a problem Congress can address where the Constitution grants it the power to do so. Assuming for the sake of argument that the federal government's current approach to the regulation of vehicular carbon emissions is within the scope of its constitutional power, the waiver at issue in this case creates the worst of both worlds.

On the one hand, most states are unable to pursue their own regulatory interests and agendas because they are required to follow the EPA's national standard. On the other hand, regulated parties have no reliable stability because the EPA has repeatedly granted and then revoked California's preemption waiver, depending on the occupant of the White

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(explaining that under the Constitution, "the great and aggregate interests" of the nation should be "referred to the national [legislature], the local and particular to the state legislatures."); The Federalist No. 17 at 80-81 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) ("The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.").

House.[5] In 2005, California applied for a waiver to allow it to implement its Low-Emission Vehicle Greenhouse Gas Program; in 2008, the EPA denied this waiver application.[6] Then in 2009, the EPA reversed its prior decision and granted the waiver.[7] In 2012, California applied for the waiver at issue here, and the EPA granted it early the next year.[8] In 2019, the EPA revoked that waiver.[9] In 2022 the EPA, again reversed itself, reinstating the 2012 waiver.[10]

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[5] Under *Chevron*, "courts" were "even . . . deferring to agencies when they *changed* their views about a statute's meaning." Neil Gorsuch, Janie Nitze, *Over Ruled: The Human Toll of Too Much Law* 90 (2024). Today, the Court should be skeptical of an agency's claim that the statute it interprets clearly means what the agency says it means where, as here, the agency's interpretation has repeatedly changed.

[6] *California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 73 Fed. Reg. 12156, 12159–63 (Mar. 6, 2008).

[7] *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32744, 32745–46 (July 8, 2009).

[8] *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years*, 78 Fed. Reg. 2112 (Jan. 9, 2013).

[9] *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51310 (Sept. 27, 2019).

[10] *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous*

Whatever the legitimacy of the statute in question here, this case seeks to challenge the EPA's interpretation of that statute. When agencies claim significant new regulatory power based on an existing statute, the major questions doctrine calls for judicial skepticism. *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (quoting *Utility Air Grp. v. EPA*, 573 U.S 302, 324 (2014)). With *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) overturned by this Court in *Loper Bright Enters. v. Raimondo*, No. 22-451 (June 28, 2024), when such interpretations are not based on a clear congressional statement, they should be struck down by the Courts as administrative overreach.[11] Because Congress never granted the EPA authority to waive preemption for California as it did in this case, the Court should grant certiorari and strike down that exemption.

California's ability to adopt an alternative standard and the inevitable back and forth of the EPA's granting and rescinding of the exemption creates the regulatory uncertainty that preemption of the States was supposed to address. Either carbon emissions are a national issue warranting federal standards or they are an issue that is better left to the States in general, not just one hyper-regulatory State.[12]

Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14332, 14332-33 (Mar. 14, 2022).

[11] Brief of Amici Curiae Advancing American Freedom et al., *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) available at https://advancingamericanfreedom.com/loper-v-bright/.

[12] California's inclination towards regulation is so severe that U-

As this case and others demonstrate, federal courts can only effectively fulfill their role in the constitutional system if the requirements of standing are not unduly restrictive on those courts' jurisdiction. Americans, whether individuals, organizations, or businesses, have a right to judicial redress at least when they can show reasonable likelihood of harm from government policy. In this case, the D.C. Circuit's interpretation of the standing requirements would insulate potentially illegal government policies from judicial review to the detriment of Americans and their interests. This Court should clarify standing to ensure that that does not happen.

ARGUMENT

I. The Supreme Court's Standing Doctrine Should Ensure that Fundamental Rights are Protected and Violations of Law are not Insulated from Review.

The Declaration of Independence, the fundamental document of American political philosophy, makes clear the purpose of government: "Governments are instituted among Men" to secure "certain unalienable Rights" among which "are Life, Liberty and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). However, even a government instituted as a protector

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Haul at one point could not keep up with demand for trucks for people to move out of the State. Dan McLaughlin, *U-Haul Literally Ran Out of Trucks Leaving California*, National Review (Jan. 14, 2022 11:23AM) https://www.nationalreview.com/corner/u-haul-literally-ran-out-of-trucks-leaving-california/.

of liberty will tend to violate that liberty because some people in the government will abuse the power they are given.

This problem can also result from a faction that manages to exercise control over government. As James Madison explained, a "faction" is "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[13]

According to Madison, if the faction is a majority of voters, "the popular form of government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens."[14] Madison argued that the republican form of government and the drawing of representatives from the whole country would help mitigate the dangers of faction.[15] Madison assumed that when the interests of a faction are counter to those of the majority, "the republican principle" will allow the majority to "defeat [the faction's] sinister views by regular vote."[16] Of course, neither Madison nor the state legislators who ratified the Constitution were counting on Congress's delegating significant legislative power to unelected bureaucrats, limiting the ability of even a majority to protect their interests from government overreach.

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[13] Madison, The Federalist No. 10 *supra* note 4 at 43.
[14] *Id*. at 45.
[15] *Id*. at 48.
[16] *Id*. at 45.

Article III courts supplement the republican structure of American government by checking government overreach. As Alexander Hamilton explained, "there ought always be a constitutional method of giving efficacy to constitutional provisions."[17] The Court's role is unchanged whether the policy challenged in any given case is the result of a majority or a minority faction. The rights of the people and the limitations on government power cannot be legitimately abused whether that abuse arises from a majority's preferred policy or the preferred policy of the few and powerful. This Court's standing doctrine has prevented federal courts from effectuating constitutional provisions.

The federal court system is often the last opportunity for Americans to protect their rights or hold government officials accountable. Both as a constitutional and a practical matter, the Supreme Court has implemented standing requirements that prevent lawsuits that are not based on a true case or controversy. However, that standard has allowed courts to close the door on legitimate claimants who may have no other meaningful opportunity for relief. Infamously, the humanity of a slave was overlooked because of an overly narrow and legalistic interpretation of standing. *See Dred Scott v. Sandford*, 60 U.S. 393 (1856).

The Court's decision in this case should clarify that the requirements of standing should not bar legitimate claims for relief. The Court's current standing doctrine, in practice, has made it difficult to

[17] The Federalist No. 80, at 411 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

challenge illegal or rights-violating government action in a number of areas.

The issue of abortion is another area where standing requirements make it very difficult to challenge government action that deprives voiceless members of our human community of their fundamental rights. At stake in abortion is the fundamental right to life. That right is the first right in the Declaration's triad for good reason. No other right can be exercised once someone is deprived of their right to life. The natural plaintiff challenging abortion would be the target of abortion and the most vulnerable among us: the unborn. However, the unborn cannot advocate for their own interests.

As a result, in the case of the abortion drug mifepristone, doctors sued on the basis of the harm they face from the drug's approval for use as an abortifacient. FDA approval of mifepristone was blatantly political and ignored the dangers of chemical abortion.[18] The protections initially required for the prescription of the drug were also later reduced not based on new evidence but for political reasons.[19] The FDA then acted to delay the doctor's lawsuit challenging the drug's approval. As the district court

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[18] Brief of Amici Advancing American Freedom et al., *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. ___ (2024), (No. 23-235) https://advancingamericanfreedom.com/fda-danco-laboratories-v-alliance-for-hippocratic-medicine/.
AAF Provides Written Testimony for Senate Hearing on Mifepristone, Advancing American Freedom, September 24, 2024, available at https://advancingamericanfreedom.com/aaf-provides-written-testimony-for-senate-hearing-on-mifepristone/.

[19] *AAF Provides Written Testimony for Senate Hearing on Mifepristone*, *supra* note 18 at 7-10.

in that case explained, "Why did it take *two decades* for judicial review [of mifepristone's approval] in federal court? After all, Plaintiffs' petitions challenging the 2000 Approval date back to the year 2002, right? Simply put, FDA stonewalled judicial review—until now." *Alliance for Hippocratic Medicine v. Food and Drug Administration*, No. 2:22-CV-223-Z at 1-2 (N.D. Tex. Apr. 7, 2023). After decades of delaying, the FDA was able to avoid review when this Court ruled that the doctors challenging the approval did not have standing. *Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. ___, No. 23-235, slip op. (June 13, 2024).

Parents, too, have faced the obstacle of narrowly read standing requirements in their efforts to vindicate their rights and the rights of their children. In *Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist.*, the Seventh Circuit found that parents lacked standing to challenge the school's policy that it would not inform parents that it is engaging in so-called "social gender transitioning" with their children. No. 23-1280, slip op. at 1, 604 U.S. ____ (Alito, J., dissenting from denial of certiorari). The school district in question had trained teachers that "parents are not entitled to know their kids' identities. That knowledge must be earned." *Id*. at 1-2. Despite this blatant anti-parent mentality, the Seventh Circuit held that the parents' harm was speculative and thus insufficient to confer standing. *Id*. at 2. Further, similar policies have been adopted across the country leaving millions of parents and children at risk.[20] *See id*. at 1. Because parents have a

[20] While school districts and activist teachers are focusing on inducing

right to direct their child's upbringing, government intervention through schools or otherwise without the parents' knowledge and consent is unconstitutional, except in extreme cases. Yet a narrow reading of this Court's standing doctrine was used to bar parents from obtaining relief when those rights were violated.

II. This Case is an Instance of Unconstitutional Government Overreach that Must be Allowed to Proceed to the Merits to Protect the Constitutional Interests of Petitioners.

The abuse of government power in this case also demonstrates the need for clear principles of standing that allow parties injured by government action to vindicate their rights.

The major questions doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, *OSHA*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring). The doctrine is implicated where "'the history and 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." *West Virginia*, 597 U.S. at 721 (alteration in original) (quoting *FDA v. Brown &*

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confusion among America's children regarding the basic fact that people are either male or female, almost 70 percent of fourth graders and 70 percent of eighth graders are not proficient readers according to the National Assessment of Educational Progress. NAEP Report Card: Reading, National Assessment of Educational Progress, https://www.nationsreportcard.gov/reports/reading/2024/g4_8/?grade=4 (last visited Jan. 31, 2025).

Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)). Where the doctrine is implicated, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 723 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). As Justice Gorsuch has explained, there are three circumstances in which the doctrine is implicated and thus that require the agency to show clear congressional direction.

First, the "doctrine applies when an agency claims the power to resolve a matter of great 'political significance.'" *West Virginia*, 597 U.S. at 743 (Gorsuch, J., concurring) (citing *NFIB v. OSHA*, 595 U.S. at 117 (some internal quotation marks omitted)). Second, it applies when "an agency . . . seeks to regulate 'a significant portion of the American economy.'" *Id.* at 744 (some internal quotation marks omitted) (citing *West Virginia*, 597 U.S. at 722) (majority opinion)). And finally, the doctrine applies when the agency "seeks to 'intrud[e] into an area that is the particular domain of State law.'" *Id.* (citing *Alabama Assn. of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. 758, 764 (2021)). The EPA's waiver of preemption for California in this case does all three.

The EPA's waiver, in effect, "claims the power to resolve a matter of great 'political significance.'" *Id.* at 743 (Gorsuch, J., concurring) (citing *NFIB v. OSHA*, 595 U.S. at 117 (some internal quotation marks omitted)). The waiver scheme at issue here reaches much further than California by design. Seventeen States, as well as the District of Columbia have adopted either California greenhouse-gas emission standards or California's zero-emission-vehicle

mandate.[21] Further, the goal of California's emissions restrictions is to affect global climate change.[22] Brief for Petitioners at 30 ("No one disputes that the express purpose of California's standards was to regulate global climate change."). Climate change and the best regulatory approach with respect to that issue are among the most contentious and debated issues in contemporary politics. By granting California this waiver, the EPA allows it to adopt policies designed to affect that issue globally, while other States that might prefer a different approach are left without any such authority. This favoritism allows one privileged, left-of-center State to set policy that will have a significant, nationwide impact on a politically contentious issue.

Second, the major questions doctrine is implicated when "an agency . . . seeks to regulate 'a significant portion of the American economy.'" *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (some internal quotation marks omitted) (citing *West Virginia*, 597 U.S. at 722) (majority opinion)). The States that have adopted at least some of California's

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[21] California Air Resources Board, *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.

[22] "The academic and author Edwin J. Feulner, Jr., once argued that Hayek's 'greatest contribution lay in the discovery of a simple yet profound truth: man does not and cannot know everything, and when he acts as if he does, disaster follows.'" Gorsuch, *supra* note 6 at 99. Icharus's hubris led to his downfall. That a State would take it upon itself to solve a global issue through burdensome regulation demonstrates a need to return to that story and imbibe its lesson once more.

standards in place of the EPA's, are together regulating markets that account for at least 40.2% of new "light-duty" vehicle registrations and 25.5% of new "heavy-duty" vehicle registrations in the United States.[23] Considering the national market for new light and heavy duty vehicle sales is a multi-billion dollar per year industry, the waivers at issue in this case allow for regulation of a sufficiently significant portion of the American economy to implicate the major questions doctrine. The property rights involved, including the right to engage freely in the market, are among those fundamental rights the Constitution was designed to ensure, and those rights are heavily impacted by the regulations here at issue.

Finally, agency action may implicate the major questions doctrine when it "seeks to 'intrud[e] into an area that is the particular domain of state law.'" *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (citing *Alabama Assn. of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. 758, 764 (2021)). Assuming the federal government's regulation of vehicular emissions is a legitimate exercise of its Commerce Clause power, the preemptive exercise of that power depends on the assumption that a national standard is necessary to avoid the patchwork of policies federalism creates. If so, and if States cannot be allowed to each adopt their own policies on this issue because of the need for uniformity, then it is an offense against all forty-nine other equally sovereign States to

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[23] 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.

grant special regulatory privileges to one. The EPA and California cannot have it both ways. This is not to say that States and localities could not be granted exemptions to adopt policies narrowly tailored to address unique local issues. But exemptions of that nature, which Congress intended to create here, are significantly different from policies that are designed to address global issues, and which will have a massive, nationwide economic and political impact.

"Other suggestive factors" that an agency interpretation implicates the major questions doctrine, are that the policy would cause an "aggressive transformation" of a significant economic sector or would "unquestionably ha[ve] an impact on federalism." *West Virginia*, 597 U.S. at 745-46 (Gorsuch, J., concurring). As the discussion above makes clear, California's unique preemption exemption does exactly that in this case. By allowing California and no other State to promulgate new motor vehicle emissions regulations, the EPA has given California the exclusive privilege not only to more fully exercise its own sovereignty, but also to be the only State that can propose emission rules that can have interstate reach and effect. 42 U.S.C. § 7543 (b), (c); *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011). Similarly, because equal State sovereignty is a cornerstone of the American federal system, *see Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013) (ruling based on "the principle that all States enjoy equal sovereignty."), this California-only waiver scheme "unquestionably has an impact on federalism" by placing California in a special position to propose legislation adoptable across the nation, in a way that is unavailable to other States. *Shelby Cnty., Ala. v.*

Holder, 570 U.S. 529, 544 (2013); *West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring); 42 U.S.C. § 7543(b)(3).

Because the preemption waiver here implicates political and economic issues of great importance and effect, intrudes on the domain of State law, aims to aggressively transform the automotive industry, and undermines the States' co-equal sovereignty, the EPA must show a clear statement from Congress allowing it to privilege a highly regulatory State with a power available to no other State.

Because the EPA's preemption waiver for California implicates the major questions doctrine, the agency must show that that waiver is based on a "clear congressional statement authorizing [its] action." *See West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring). Factors that help the Court determine whether there is clear congressional authorization include the statutory context of the provision, "the age and focus of the statute," and the agency's past interpretations of the statute. *Id*. at 746-47.

"First, courts must look to the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme.'" *Id*. (Gorsuch, J., concurring) (some internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). The EPA relies on the waiver provision of the Clean Air Act (CAA). *Ohio v. EPA*, No. 22-1081, slip op. at 9 (D.C. Cir. April 9, 2024). The CAA enables the Administrator of the EPA to promulgate rules governing the emissions standards for new vehicles. 42 U.S.C. § 7521(a)(1). To gain a waiver from these

rules, California must determine that its proposed regulations are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). The EPA must then deny California's waiver application if: "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a)." 42 U.S.C. § 7543(b)(1)(A)-(C). These limitations to the EPA's waiver authority reflect the reasons that Congress allowed this narrow exception—to allow States to adopt alternative regulations tailored to address local environmental needs, particularly the unique geography of the Los Angeles basin that creates a smog problem unlike any other area in the country. H.R. Rep. No. 90-728, at 22 (1967).

The Energy Policy and Conservation Act (EPCA) also has relevant provisions that adjusted the function of the CAA's vehicle emissions statutory scheme. The EPCA commands "the Secretary of Transportation [to] prescribe by regulation average fuel economy standards for automobiles." 49 U.S.C. § 32902(a). The EPCA further explicitly preempts State laws "relat[ing] to fuel economy standards." 49 USCA § 32919(a). At the very least, by its plain language—the preemption provision of the EPCA, enacted four years after the waiver provision of the CAA, put a limitation on the EPA's power to grant waivers under the CAA by precluding any State regulations on average fuel economy standards. 42 U.S.C. § 7543; 49 U.S.C. § 32919. Because the California regulations at issue here relate to average fuel economy standards,

the EPA was obligated to deny California's waiver. Cal. Code Regs. Tit. 13, § 1961.2(a); Cal. Code Regs. Tit. 13 § 1961.3(a)(2)(B)-(C).

"Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address." *West Virginia*, 597 U.S. at 747 (Gorsuch, J., concurring). The waiver provision of the CAA was enacted to enable California to address local pollution problems like smog in Los Angeles. H.R. Rep. No. 90-728, at 22 (1967). As Petitioners explain, the California regulations at issue here seek to curb global climate change, not alleviate any "compelling or extraordinary" local issues. *See* Brief for Petitioners at 28-29. *But see* 78 Fed. Reg. 2,112, 2,130. Neither the cause of global climate change nor its effects are local to California, and the State's regulations would not have a meaningful impact on global climate change. Brief for Petitioners at 29-31. This complete misalignment between the purpose of the preemption waiver and its use by the State here demonstrates that the EPA's grant of the waiver was not based on a clear statement from Congress.

"Third, courts may examine the agency's past interpretations of the relevant statute." *West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring) (citing *West Virginia*, 597 U.S. at 710-11). In this case, the agency's interpretation has oscillated repeatedly, suggesting that the agency itself cannot even decide what the statute clearly means. As has already been noted, after denying a California waiver application in 2008,

the EPA reversed itself a year later.[24] Again in 2013, the EPA granted the waiver,[25] and again in 2019 it revoked the waiver.[26] Then in 2022, the EPA reinstated the previous waiver.[27] If the EPA insists the statute is clear, it must provide a justification for its own apparent inability to construe it consistently. Given that the EPA's current interpretation would create a two-tiered federalism where one State is given preeminent authority compared to the others, and because such an arrangement violates the principle of equal State sovereignty, the courts should find that the EPA's interpretation exceeds the power granted to it by Congress.

The EPA's waiver of preemption for California in this case is not based on a clear statement of

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[24] *California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 73 Fed. Reg. 12156, 12159–63 (Mar. 6, 2008). *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32744, 32745–46 (July 8, 2009).

[25] *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California's Advanced Clean Car Program and a Within the Scope Confirmation for California's Zero Emission Vehicle Amendments for 2017 and Earlier Model Years*, 78 Fed. Reg. 2112 (Jan. 9, 2013).

[26] *The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program*, 84 Fed. Reg. 51310, (Sept. 27, 2019).

[27] *California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision*, 87 Fed. Reg. 14332, 14332-33 (Mar. 14, 2022).

authority from Congress. Instead, it violates both the express purpose of the waiver system and the basic constitutional principles of federalism and coequal State sovereignty. The Court should find that Petitioners have standing and remand for consideration on the merits.

CONCLUSION

The Court should find that Petitioners have standing.

Respectfully submitted,

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