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 FOR AMICUS CURIAE CONSERVAMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

ConservAmerica Inc. is a 501(c)(3) organization focused on addressing conservation, environmental, and energy challenges through market-based solutions.[1] Our core mission is to advocate for sound laws and public policies that produce clean air, clean and safe water, and healthy public lands. ConservAmerica promotes wise management of our nation's public lands and resources through responsible stewardship, rule of law, and holding polluters responsible for environmental pollution and degradation.

ConservAmerica promotes sound energy policies based on sound science and an understanding that policies that too narrowly focus on one goal or one market may not make sense or may be counter-productive when viewed and analyzed from a holistic environmental perspective. The most efficient way to achieve the nation's environmental goals is through policies that encourage competitive markets, private investment, and expanded trade. ConservAmerica opposes policies and approaches that impose centralized regulations that place an undue burden on the economy without delivering measurable environmental benefits.

1. Pursuant to Rule 37.6, *amicus curiae* states that no part of this brief was authored by counsel for any party and no person or entity other than *amicus curiae* made any monetary contribution to the preparation and submission of the brief.

SUMMARY OF ARGUMENT

The Court of Appeals erred in finding that Petitioners lacked Article III standing to challenge EPA's waiver under Section 209 of the Clean Air Act granting the State of California authority to impose its own emission standards. It is common sense, if not at least predictable, that California's regulations would adversely affect Petitioner's property and business interests, and that vacating EPA's waiver would have the opposite effect. Limiting standing to directly regulated auto manufacturers would fail to protect legitimate third party interests.

Petitioners' challenge to EPA's waiver should be heard on the merits in order to determine whether the waiver is lawful, or whether it is an overreach that unjustifiably injures the economy, private property rights, and consumer choice, all of which ConservAmerica believes are essential to responsible environmental stewardship.

ARGUMENT

I. Limiting Regulatory Challenges To Directly Regulated Parties Would Fail To Protect Legitimate Third Party Interests

The effects of the subject regulatory actions by EPA and California clearly extend well beyond directly regulated automobile manufacturers to liquid fuel manufacturers like Petitioner and other inextricably intertwined upstream and downstream American businesses. Indeed, that is, at least in part, their intended purpose, and Petitioners note that the record includes several such admissions by Respondents. *See*, *e.g.*,

Petitioners' Brief at 29 (" . . . California predicted that '[t]he oil and gas industry, fuel providers, and service stations are likely to be the most adversely affected by the proposed Advanced Clean Cars program due to substantial reductions in demand for gasoline.'")

This and other Courts have consistently applied common sense when determining third party standing and redressability. Article III standing requires that a plaintiff suffer a concrete injury that is fairly traceable to the challenged government action, and that the "injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *see also* Petitioners' Brief at 19. As Petitioners note, then-Judge Kavanaugh explained that if "the Government prohibits or impedes Company A from using Company B's product," there is "ordinarily little question" that Company B has standing, since Company B's product is the very "object" of the regulation. Petitioner's Brief at 28 (quoting *Energy Future Coal. v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015)). Petitioners describe several situations where courts have granted standing to third parties, such as ranchers challenging a U.S. Fish and Wildlife Service biological opinion that would obviously have resulted in reduced water flow from reservoirs, *Bennett v. Spear*, 520 U.S. 154, 159-60 (1997); private schools challenging an Oregon law that would have prohibited parents from sending their children to those schools, *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925); and a broadcasting network challenging a regulation that would have prohibited licensees from doing business with the network, *CBS v. United States*, 316 U.S. 407, 421-23 (1942).

The D.C. Circuit, however, seems to inconsistently apply its own strict redressability requirement. It fairly recently agreed that a conservation group established redressability where it petitioned the court to invalidate registrations that EPA granted to several pesticide manufacturers, reasoning that new labeling requirements would "pose less risk to the wildlife that [individual conservation group members] seek to study, observe, and appreciate." *Ctr. For Biological Diversity v. EPA*, 56 F.4th 55, 69 (D.C. Cir. 2022). *But see Food & Water Watch v. United States Dep't of Agric.*, 1 F.4th 1112 (D.C. Cir. 2021) (environmental group lacked standing in a NEPA challenge to USDA farm loan demanding an environmental impact statement for an already existing chicken farm). Indeed, this Court has taken a broad view of standing when it has been based on climate change, *see Massachusetts v. EPA*, 549 U.S. 497 (2007) (states have standing to force EPA to regulate motor vehicle emissions tied to global warming), and even injury to recreational and aesthetic interests, *see Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 201 (2000) (Scalia, J., dissenting) ("By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of 'concern' about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham."). Respondents here have demonstrated at least the same level of injury, causation, and redressability to satisfy Article III's standing requirements.

By contrast, continued ambiguity about California's regulatory emissions scheme is even more pronounced for Petitioners and similar third parties, including

ConservAmerica. California's effort to stuff the square peg of climate change into the round hole of California's Clean Air Act exemption meant to address local smog in the 1970s—and EPA's intermittent support of that effort depending on various Administrations—have translated to a game of ping-pong that deprives auto manufacturers and related upstream and downstream businesses of necessary stability and predictability.

ConservAmerica acknowledges that courts require injury, causation, and redressability in order to avoid speculative third party actions and advisory opinions. That is not the case here. Petitioners have established that the EPA's waiver grant would cause injury to their businesses—if not by Respondents' own admissions and obvious common sense, then as a predictable effect of governmental action. Limiting standing to the directly regulated automakers would deprive Petitioners of recourse.

II. The Challenged Regulatory Action Is Contrary To ConservAmerica's Interests

Petitioners' challenge to EPA's waiver is consistent with the interests of ConservAmerica, which promotes wise management of our nation's public lands and resources through responsible stewardship, rule of law, and holding polluters responsible for environmental pollution and degradation. ConservAmerica promotes sound energy policies based on sound science and a holistic approach to addressing our Nation's environmental issues. ConservAmerica opposes policies and approaches, such as EPA's waiver here, that impose centralized regulations and place an undue burden on the economy without delivering measurable environmental benefits.

There is a clear disconnect between California's regulatory overreach (and EPA's intermittent complicity) and its stated goal of reducing the impacts of global climate change. The available science does not show that the rapid increase in the use of electric vehicles in place of gas-powered vehicles is "needed" to reduce California's greenhouse gas emissions.

ConservAmerica recognizes that fully electric vehicles will likely play an important role in reducing emissions and fighting climate change, but it cautions that a rapid, wholesale move away from gasoline powered vehicles to fully electric vehicles may not achieve the benefits frequently touted.[2] In the short term, gasoline powered vehicles can achieve similar reductions to electric vehicles when the impacts of the additional emissions that occur in the production of electric vehicles is considered. Additionally, picking one technology now over all other technologies forecloses the possibility of more technological breakthroughs—through efficiency and fuels—that could have significant long-term impacts.

A rapid switch to electric vehicles may also cause detrimental environmental impacts that have not been adequately considered by California or the EPA. While electric vehicles may have zero tailpipe emissions, the activities necessary to produce electric vehicles generate significant greenhouse gas emission over their full

2. *See* Todd Johnston, "Slow Down: The Case for Technology Neutral Transportation Policy," ConservAmerica (Dec. 10, 2020), https://conservamerica.org/report-highlights-importance-of-policy-neutrality-in-decarbonizing-transportation-sector/.

lifecycle—meaning the emissions generated from mining metal ores to vehicle salvage.[3] Further, evidence of the widespread environmental impacts from meeting even the current demand for electric vehicles can already be seen. An electric vehicle mandate would require sharply increasing the demand for the raw materials needed in their production which could have detrimental global environmental impacts. Lithium and cobalt, the two minerals essential for the manufacture of these batteries, are found in only a limited number of locations globally.[4] More than 65 percent of global production of cobalt is concentrated in the Democratic Republic of the Congo. China dominates the global production of lithium-ion batteries and their precursor materials, especially graphite.[5] China's graphite production has notoriously contributed to significant pollution and health risks,

3. *See also* John Heywood & Don MacKenzie, On the Road Toward 2050: Potential for Substantial Reduction in Light-Duty Vehicle Energy Use and Greenhouse Gas Emissions, Massachusetts Institute of Technology, https://energy.mit.edu/wp-content/uploads/2015/12/MITEI-RP-2015-001.pdf.

4. Marcelo Azebedo et al., Lithium and Cobalt: A Tale of Two Commodities, McKinsey Consulting (Jun. 22, 2022), https://www.mckinsey.com/industries/metals-and-mining/our-insights/lithium-and-cobalt-a-tale-of-two-commodities.

5. Published on July 8, 2024, a peer-reviewed study also recognized that toxic per- and polyfluoroalkyl substances (PFAS) used in lithium ion batteries that are essential to the clean energy transition present a threat to the environment and human health as the nascent industry scales up. Guelfo, J.L., Ferguson, P.L., Beck, J. *et al.* Lithium-ion battery components are at the nexus of sustainable energy and environmental release of per- and polyfluoroalkyl substances. *Nat Commun* 15, 5548 (2024), https://doi.org/10.1038/s41467-024-49753-5

including airborne graphite dust and hydrochloric acid that can leak into streams and groundwater.

The full lifecycle environmental impacts from electric vehicle production should have been considered by EPA. California's reduced tailpipe emissions do not justify the widespread global environmental and societal impacts that will likely result if EPA's federal preemption waiver for California is upheld. Only by considering the merits of Petitioners' challenge can these important issues be decided.

ConservAmerica also champions conservation and private property rights as a means to promote responsible environmental stewardship, and it recognizes the self-evident fact that a strong and predictable economy promotes a healthy environment. Nearly all of the up to $900 million in annual funding for the U.S. Treasury's Land and Water Conservation Fund[6] that supports state conservation plans is derived from oil and gas lease revenues—funding that would be adversely affected by mandating electric vehicles. Allowing the government to put its thumb on the scale to force electric vehicles on American consumers is not only environmentally unjustified, it is detrimental to state conservation planning and projects, deprives consumers of choice in something as basic as what car to drive, and it adversely affects our economy and the valid business and property interests of directly regulated and clearly related third parties, alike.

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6. *See* Carol Hardy Vincent, Cong. Rsch. Serv., RL33531, Land and Water Conservation Fund: Overview, Funding History, and Issues (2019), https://crsreports.congress.gov/product/pdf/RL/RL33531

III. It Is Important That Petitioners Be Heard On the Merits

Courts should not invent additional jurisdictional bars to reviewing governmental regulatory action. In the opinion that is before this Court, the D.C. Circuit noted that in its earlier denial on mootness grounds of a challenge by automobile dealers to EPA's prior waiver grant to California for model years 2009 through 2016, it had "expressed serious doubt that the petitioners had met their burden of demonstrating redressability." *Ohio v. EPA*, 98 F.4th 288, 305 (D.C. Cir. 2024) (citing *Chamber of Commerce v. EPA*, 642 F.3d 192, 205 (D.C. Cir. 2011)). The Circuit explained that the auto dealers "were not directly subject to the waiver." *Id.* If the Court refuses to acknowledge the obvious reality that regulations dictating the types of cars that can be manufactured and sold have a direct impact on fuel sellers here—and even the car *dealers* who sell those cars—it is difficult to think of a third party that could possibly have standing to challenge the regulatory action.

Petitioners have clearly demonstrated that EPA's waiver has caused (or at a minimum predictably will cause) damage to their businesses, and it logically follows that removing that cause by vacating EPA's action will redress that harm. Invoking a tortured reading of Article III standing's redressability requirement to avoid consideration of the merits results in perpetual ambiguity that is in no one's interest.

CONCLUSION

This Court should require that the merits of Petitioners' challenge to EPA's waiver be fully heard and adjudicated.

Respectfully submitted,

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