Nos. 24-7, 24-13

In the Supreme Court of the United States

DIAMOND ALTERNATIVE ENERGY, LLC, *et al.*,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATE OF OHIO, *et al.*,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

Section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b), directs EPA to waive preemption as to California's regulations of automobile emissions if certain requirements are met. This case concerns California emission standards that increased requirements for zero- and low-emission vehicle sales in the State over model years 2015 through 2025. California applied for a waiver for those standards in 2012, and EPA granted it in 2013. Nobody challenged the waiver at that time. EPA rescinded the waiver in 2019. When EPA reinstated the waiver in 2022, consumer demand for vehicles that satisfied the relevant standards had far surpassed earlier projections, as well as the standards' requirements. Two groups of petitioners challenged that reinstatement in the court of appeals. The questions they seek to present in this Court are:

1. Whether the court of appeals erred in dismissing the private petitioners' challenge for lack of standing.

2. Whether the 2022 reinstatement of the 2013 waiver contravened the Clean Air Act (a question the court of appeals did not reach).

3. Whether the court of appeals erred in rejecting the state petitioners' theory that Section 209(b) violates constitutional principles of equal sovereignty.

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STATEMENT

A. Legal Background

As originally enacted in 1963, the Clean Air Act did not regulate motor vehicle emissions. *See* Pub. L. No. 88-206, 77 Stat. 392 (1963). Federal regulation on that subject began when Congress amended the Act in 1965. Pub. L. No. 89-272, 79 Stat. 992 (1965). By that time, California had been regulating vehicle emissions for almost a decade. *See Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1109 & n.26 (D.C. Cir. 1979) (*MEMA I*).

In 1967, Congress struck a balance regarding the preemption of state vehicle-emission regulations. *MEMA I*, 627 F.2d at 1109-1110. Although California's existing program had proven the value of state-level innovation, *id.* at 1111, manufacturers "wanted to avoid the economic disruption" and "'economic strain'" that would come from "having to meet fifty-one separate sets of emission control requirements," *id.* at 1109. Congress therefore preempted state programs of emissions control for new vehicles, but instructed EPA to waive preemption for California under certain circumstances. *Id.*; *see* Pub. L. No. 90-148, § 208, 81 Stat. 485, 501 (1967). This ensured that manufacturers would face no more than two different sets of emission regulations.

The 1967 provision required each individual California standard to be "more stringent" than its federal counterpart. *MEMA I*, 627 F.2d at 1110 & n.32. But that limited California's ability to address a pressing public health need—reducing nitrogen oxides—because existing technological limitations made it impossible to tighten standards for those pollutants

without relaxing controls for others. *Id.* Congress responded in 1977 by specifying that a waiver is justified if the state standards would be, "in the aggregate," as "protective of public health and welfare" as "Federal standards." Pub. L. No. 95-95, § 207, 91 Stat. 685, 755 (1977).

As a result of the 1977 amendments, Section 209 of the Clean Air Act generally preempts States from enforcing standards concerning new motor vehicle emissions. 42 U.S.C. § 7543(a). Section 209(b) instructs EPA to "waive application" of that section "to any State which" had adopted qualifying vehicle emission standards "prior to March 30, 1966," if "the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." *Id.* § 7543(b)(1); *see* Ohio Pet. App. 11a (noting that California is the only State that had adopted qualifying standards by March 1966). But subsection (b) further provides that EPA shall not grant the waiver if it finds any of three circumstances met: that the State's protectiveness determination is "arbitrary and capricious," 42 U.S.C. § 7543(b)(1)(A); that the "State does not need such State standards to meet compelling and extraordinary conditions," *id.* § 7543(b)(1)(B); or that the standards are inconsistent with a separate provision requiring consideration of feasibility, *id.* § 7543(b)(1)(C); *see id.* § 7521(a).

The 1977 amendments also made "an effort to assist" other States by adding a new provision. *Motor Vehicle Mfrs. Ass'n v. N.Y. Dep't of Env't Conservation*, 17 F.3d 521, 527 (2d Cir. 1994). That provision allows other States to choose to adopt and enforce standards "identical to the California standards for which a waiver has been granted." 42 U.S.C. § 7507. But

States are under no compulsion to do so—and if they do not, then the California standards do not govern within their borders.

Since 1967, California has received more than 75 waivers.[1] Through those waivers, California has required increasingly better emissions performance, fostering development of new technologies ranging from catalytic converters to zero-emission vehicles. C.A. J.A. 347-349, 353-354. California received its first waiver for zero-emission vehicle standards three decades ago, 58 Fed. Reg. 4166 (Jan. 13, 1993), and has been requiring manufacturers to sell increasing percentages of those vehicles in California since model year 1998, *see* 78 Fed. Reg. 2112, 2119 (Jan. 9, 2013).

B. Factual and Procedural Background

1. In 2012, California applied for a waiver for the addition of Advanced Clean Cars standards to its emissions program. Those standards aimed to reduce both carbon dioxide emissions and "criteria pollutants" (particulate matter and smog-creating chemicals). C.A. J.A. 137. They included both low-emission and zero-emission vehicle requirements that gradually increased over model years 2015 to 2025. *Id.* at 151-154; Ohio Pet. App. 17a-18a.[2] EPA granted the waiver in

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[1] *See* EPA, Vehicle Emissions California Waivers and Authorizations, https://tinyurl.com/3rxscztw.

[2] Given how model years are defined, *see* 42 U.S.C. § 7521(b)(3)(A), model year 2025 could begin as soon as January 2, 2024. *See, e.g.*, This Is Why New-Car Model Years Aren't in Sync with the Calendar, Car & Driver (Nov. 11, 2016), https://tinyurl.com/ytu2s6vv (Kia "began selling its new 2016 Sorento in January 2015").

2013; no one challenged that action in court; and manufacturers "began making investments" to meet the future requirements. Ohio Pet. App. 18a.

In 2018, after manufacturers had already "adjusted their fleets," EPA proposed to withdraw the 2013 waiver as to zero-emission requirements and greenhouse gas requirements. Ohio Pet. App. 18a. EPA withdrew the waiver the following year, giving three reasons: First, EPA decided to depart from its longstanding approach of asking whether California needs its emissions program as a whole to "meet compelling and extraordinary conditions," and instead evaluate California's need for individual standards. *Id.* at 19a; *see infra* p. 25. Second, it concluded that standards involving greenhouse gases should not receive waivers because climate change is global rather than particular to California. Ohio Pet. App. 18a. Third, it observed that the National Highway Traffic Safety Administration at that time viewed the Energy Policy and Conservation Act (EPCA), 49 U.S.C. § 32919(a), as preempting state efforts to address greenhouse gas emissions from vehicles. *Id.* at 18a.[3]

EPA proposed to revisit its decision to withdraw the waiver in 2021. Ohio Pet. App. 19a. In March 2022 it issued a new decision reinstating the portions of the waiver it had withdrawn. *Id*. at 20a; 87 Fed. Reg. 14333. The reinstatement was based on three rationales. First, EPA concluded that the 2019 withdrawal had exceeded EPA's reconsideration authority and undercut important reliance interests. Ohio Pet.

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[3] California and others sought judicial review of EPA's waiver withdrawal. Those cases were later held in abeyance pending administrative reconsideration. Order, *Union of Concerned Scientists v. NHTSA,* No. 19-1230 (D.C. Cir. Feb. 8, 2021).

App. 20a. Second, it determined that the 2019 decision was wrong to reject EPA's traditional approach of considering California's need for its "whole program." *Id.* And third, it determined that its waiver decisions should be based on the statutory criteria in Section 209, which do not address EPCA preemption. *Id.*

2. In May 2022, two sets of petitioners sought review in the D.C. Circuit of EPA's 2022 decision to reinstate the 2013 waiver: private fuel companies, including Diamond Alternative Energy; and a group of States, led by Ohio. Ohio Pet. App. 20a. Another group of States and local governments, led by California, intervened in defense of the reinstatement. *Id.* So did four groups of private entities, including one comprising five major automobile manufacturers. *Id.* at 21a & n.6.

On the merits, the private petitioners principally argued that the reinstatement contravened Section 209(b)(1)(B). C.A. Diamond Br. 17-53. The state petitioners primarily argued that Section 209(b) is unconstitutional because it "leaves California with sovereign authority that the Act takes from every other State." C.A. Ohio Br. 1; *see id.* at 16-32. On reply, the state petitioners additionally argued that the statute was unconstitutional "as applied" to the particular waiver here, C.A. Ohio Reply Br. 10, because its "'disparate geographic coverage is' not 'sufficiently related to the problem that it targets,'" *id.* at 15.

Petitioners' opening briefs included short sections addressing standing. C.A. Diamond Br. 16-17; C.A. Ohio Br. 14-16. California challenged petitioners' failure to point to evidence about whether vacatur would affect sales of gasoline vehicles, C.A. Cal. Br. 9-15, and submitted a declaration disputing that manufacturers would "sell fewer zero-emission vehicles" if the waiver

decision were vacated, C.A. Cal. Br. Add. 85; *see id.* at 84-103. Petitioners did not point to contrary evidence on reply. *See* C.A. Diamond Reply Br. 3-5. After oral argument, the private petitioners sought leave to file a supplemental brief with attached declarations. C.A. Diamond Proposed Suppl. Br. 1. The brief mostly addressed mootness, *id.* at 4-13, but included a short section on standing, *id.* at 3-4.

3. The court of appeals rejected the challenges to EPA's 2022 reinstatement of the 2013 waiver.

With respect to the private petitioners, the court held that their submissions on standing fell "far short of meeting their burden of demonstrating a 'substantial probability' that their alleged injuries would be redressed by a favorable decision by this Court." Ohio Pet. App. 27a. The private petitioners had "assert[ed] . . . without explanation or citation—that this Court could redress their injuries 'by setting aside [EPA's] action.'" *Id.* Mere assertions were not enough, however, because any injuries "would be redressed only if automobile manufacturers"—the parties directly affected by the waiver—"responded to vacatur" by "producing and selling fewer non-conventional vehicles or by altering the prices of their vehicles such that fewer non-conventional vehicles—and more conventional vehicles—were sold." *Id.* at 27a-28a.

But manufacturers were "transition[ing] toward electric vehicles, irrespective of California's regulations," due to "'market forces'" in that State. Ohio Pet. App. 29a n.8. And evidence indicated that "manufacturers need years of lead time" to "make changes to their future model year fleets." *Id.* at 28a-29a. In the face of that reality, petitioners had not "attempt[ed] to

explain in any detail how their injuries are redressable." *Id.* at 30a. Because their showing on standing was "deficient from the start," *id.* at 31a, petitioners' primary contention at oral argument—that California had not demonstrated mootness—was non-responsive, *id.* at 30a-31a.

The court also denied the private petitioners' post-argument motion to file a supplemental brief and additional declarations. Ohio Pet. App. 35a-38a. It reasoned that petitioners had ample prior notice of the imperative to establish redressability given the waiver's timeframe, the record evidence, California's arguments against standing, and circuit precedent. *Id.* at 37a; *see also id.* at 31a-34a. Petitioners failed to demonstrate good cause for their late submissions. *Id.* at 36a-38a.

Turning to the state petitioners, the court held they had standing to raise their equal sovereignty claim. Ohio Pet. App. 38a-40a. But it rejected their claim on the merits. *Id.* at 41a-54a. It first recognized that the claim was facial in nature: The state petitioners argued that Section 209(b) violates "a categorical bar" that "prohibits Congress from enacting [commercial] legislation that leaves some states with more sovereign authority than others, regardless of Congress's reasons for doing so." *Id.* at 42a. The court of appeals held that petitioners forfeited any as-applied claim that the waiver at issue here was not "'sufficiently related to the problem that it targets'" by failing to raise it until reply. *Id.*

As to the facial theory, petitioners argued that under *Shelby County v. Holder*, 570 U.S. 529 (2013), Congress may not exercise its Commerce Clause power in a way that leaves States with unequal regulatory authority. As the court of appeals explained, however,

Shelby County emphasized that the unequal treatment of States under the Voting Rights Act was an "'extraordinary'" situation, involving a "'drastic departure from basic principles of federalism.'" Ohio Pet. App. 44a. Congress had "intruded on states' power to regulate elections, a 'sensitive area of state and local policymaking,' which 'the Framers of the Constitution intended the States to keep for themselves.'" *Id.* Any inequality in Section 209(b) was quite different, given that the Framers intended *Congress* to regulate interstate commerce. *Id.* at 44a-45a. Nor had *Shelby County* announced any "categorical bar" on Congress's authority to differentiate among States. *Id.* at 45a-46a.

The court concluded that the other precedents invoked by petitioners were also off-point. The "equal footing" cases, which prohibit Congress from "plac[ing] limits on new states as a condition of admission to the Union," "do not directly apply" outside "the admission context." Ohio Pet. App. 45a-46a. Indeed, those cases acknowledge that Congress *can* treat States differently "within the scope of its plenary powers over interstate commerce." *Id.* at 47a. And petitioners' contrary arguments were not supported by constitutional text, founding era history, or petitioners' analogy to the law of nations. *Id.* at 48a-53a.

ARGUMENT

The original waiver in this case authorized California to impose certain vehicle-emissions standards that gradually increased between model years 2015 and 2025. Ordinarily, challenges to such waivers are filed immediately after issuance. 42 U.S.C. § 7607(b)(1). But nobody challenged this waiver when it was granted in 2013, and automakers operated under it for years, until it was temporarily revoked in 2019. By

the time petitioners sought judicial review of the 2022 reinstatement of the waiver, sales of pertinent vehicles far exceeded any requirement of the challenged standards, due to consumer demand and the investments and plans already made by manufacturers. In light of those circumstances, the court of appeals held that private petitioners lacked standing for their statutory claim because they failed to demonstrate that judicial relief would have any real-world effect on fuel sales (the basis for their asserted injury). It also rejected the state petitioners' constitutional claim on the merits.

Both holdings are correct, and petitioners have not identified any persuasive reason for this Court to review either issue—or to tackle the statutory question that the court of appeals did not reach because it lacked jurisdiction. None of the questions implicates an actual conflict of authority. The standing question turns on the application of settled law to an unusual record involving market conditions in 2022, the atypical events following the 2013 waiver, and petitioners who forewent any genuine effort to establish redressability. Petitioners' flawed statutory arguments have not been squarely addressed by any lower court. And their constitutional theory lacks support in precedent—for good reason, because it is contrary to text, history, and longstanding congressional practice.

1. The private petitioners first argue that the D.C. Circuit erred in applying standing doctrine to the unique circumstances of their administrative challenge. There was no error: it was petitioners' burden to establish redressability as of the time they sought review in May 2022, but they failed to identify any particular basis for concluding that third-party automakers would respond to eliminating the 2013

waiver in ways that would redress their asserted injury. Petitioners' disagreement with the application of settled legal principles to specific facts would not warrant certiorari in any event—and this Court's review is especially unwarranted given the rapidly fading relevance of the order they seek to challenge.

a. There is no dispute over the general legal standards that apply to this question. *Compare* Diamond Pet. 15-16, *with* Ohio Pet. App. 22a-24a. To bring suit, a party must have "suffered an 'injury in fact'"; that injury must be "'fairly . . . trace[able] to the challenged action of the defendant'"; and it must be "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. At each "stage[] of the litigation," "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof." *Id.*; *see also* D.C. Cir. R. 28(a)(7) (when petitioners seek direct review of administrative action, if "standing is not apparent from the administrative record, the brief must include arguments and evidence establishing the claim of standing").

There is "ordinarily little question" about standing if the party invoking jurisdiction "is [it]self an object of the" challenged action. *Lujan*, 504 U.S. at 561. But "much more is needed" if that action regulates "*someone else*"—that is, where causation and redressability depend on choices "'made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or predict.'" *Id.* at 562. In that scenario, a plaintiff may not rest on "speculative" suppositions

about "how third parties would react to government action or cause downstream injury to plaintiffs." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024). Rather, it "must show that the third parties will likely react in predictable ways that in turn will likely injure the plaintiffs," *id.* (internal quotation marks omitted), which makes standing "substantially more difficult to establish," *id.* at 382 (internal quotation marks omitted).

b. The court of appeals faithfully applied those standards to the unique circumstances before it.

i. Petitioners' asserted "injuries 'hinge[] on' the actions of third parties—the automobile manufacturers who are subject to the waiver." Ohio Pet. App. 27a. To establish standing, petitioners needed to show that manufacturers would likely respond to a favorable judicial decision—in 2022—by changing their fleets in a way that alleviates petitioners' claimed injuries. *Id.* at 28a. Circuit precedent addressing analogous circumstances had refused to "presume redressability" and "expressed serious doubts that [prior litigants] had met their burden of demonstrating redressability." *Id.* at 32a (citing *Chamber of Com. v. EPA*, 642 F.3d 192, 205-206 (D.C. Cir. 2011)).

But the private petitioners treated the subject "as a foregone conclusion." Ohio Pet. App. 30a. They devoted just two paragraphs in their opening brief to standing—and a single sentence to redressability. C.A. Diamond Br. 16-17. They failed "to explain in any detail how their injuries are redressable," or point to any evidence (within or outside the record) bearing on that subject. Ohio Pet. App. 30a. The declarations petitioners referenced were "conclusory," *id.* at 27a: they simply stated declarants' "understand[ing]" that California's standards covered by the waiver reduced fuel

sales. *E.g.*, C.A. Diamond Br. Add. 15, 23, 31. None addressed whether automakers—starting in 2022—would alter plans or designs if the waiver reinstatement were vacated.

In contrast, California's expert declaration explained that, by 2022, the market share of vehicles in California that qualified for compliance "exceed[ed] what California's standards require." C.A. Cal. Br. Add. 88. Consumers were willing to pay premium prices for zero-emission vehicles, *id.*, and multiple manufacturers planned to "sell substantially more zero-emission vehicles in the future than the standards at issue in this litigation required," *id.* at 98. In short, petitioners had not "established any probability that manufacturers would change course if EPA's decision were vacated." C.A. Cal. Br. 15. Yet even after California's declaration was filed, petitioners failed to "meaningfully address[] the redressability of their economic injuries in their reply briefs." Ohio Pet. App. 34a.

That left the court of appeals without any "basis to conclude that Petitioners' claims are redressable" and deprived it of jurisdiction to consider the private petitioners' statutory claim. Ohio Pet. App. 34a; *see All. for Hippocratic Med.*, 602 U.S. at 383 ("speculation about the unfettered choices made by independent actors not before the courts" does not establish standing).

ii. The private petitioners contend that "the court of appeals blinded itself to the obvious," asserting that vacatur of the reinstatement would provide them redress because "automakers will make more vehicles that run on liquid fuel" or adjust prices in ways that increase fuel consumption. Diamond Pet. 14, 18. As the court of appeals recognized, however, *see* Ohio Pet. App. 28a-30a, the circumstances bely that assertion.

By the time this suit was filed, it was not "obvious" (Diamond Pet. 14) that vacatur would likely affect manufacturers' future behavior. Ohio Pet. App. 29a. To the extent petitioners' brief and declarations addressed that subject, they relied exclusively on predictions made in 2011 and 2012 that the standards would lessen consumption of gasoline products. *See, e.g.*, C.A. Diamond Br. 16. By 2022, those predictions were outdated. Manufacturers had "accelerat[ed their] transition to electrified vehicles"—even between 2018 and 2021, when the waiver was purportedly withdrawn. 86 Fed. Reg. at 74438, 74486. That trend was caused by investments that manufacturers "had already made in updating their fleets" (Ohio Pet. App. 19a) and by consumer demand (*id.* at 29a n.8): sales of the pertinent vehicles in California in 2022 exceeded any requirement of the standards imposed through this waiver, and consumers desired those vehicles enough to pay significant premiums. C.A. Cal. Br. Add. 87-88.[4]

No doubt, when EPA first granted the waiver in 2013, the waiver (or its vacatur) would likely alter automaker decisions. But standing is assessed as of the time a suit is filed. *Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024). Given the evidence about what was happening when petitioners filed these challenges in May 2022, the court of appeals could not simply assume that the reinstated waiver—rather than consumer choice and technologies created by manufacturers' intervening investments—would determine plans and

[4] Moreover, the standards at issue would cease increasing at model year 2026. Yet automakers, for their own reasons, planned to continue increasing their production of zero-emission vehicles afterwards. C.A. Cal. Br. Add. 98-99.

production in the years ahead. *See, e.g.,* Ohio Pet. App. 29a n.8.

Petitioners' remaining critiques of the court of appeals' analysis are unpersuasive. They argue that the missing link as to redressability was supplied by statements in the state respondents' motion to intervene. Diamond Pet. 11, 20 (citing C.A. Cal. Int. Mot. Scheehle Decl. ¶¶ 17-18 & Vanderspek Decl. ¶ 22). But petitioners never informed the court that those statements—supplied by a different party, in a different context, in one of five unopposed motions to intervene that were decided nearly two years earlier—should bear on petitioners' standing. *Cf. Murthy,* 144 S. Ct. at 1991 n.7 ("'[J]udges are not like pigs, hunting for truffles buried [in the record].'"). In any event, "expect[ations]" (C.A. Cal. Int. Mot. Vanderspek Decl. ¶ 22) that supported a preliminary motion to intervene could not substitute for the facts petitioners needed to establish jurisdiction for final relief on the merits.[5]

Petitioners also highlight (Diamond Pet. 12-13) the denial of their motion to file supplemental declarations after oral argument. *See* Ohio Pet. App. 35a-38a. But they do not seek review of that case-specific denial or argue that it was wrong, for good reason. The court of appeals reasonably determined that petitioners failed to show good cause for introducing new evidence and arguments so late in the game. *Id.* at 36a. Petitioners "should have been aware" from the outset that

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[5] By granting California's unopposed motion to intervene, the court of appeals did not necessarily find that reinstating the standards would affect the mix of cars sold. California's interest was "easy to establish" because California was a directly regulated party: with the waiver, its standards have *legal* force; without it, they do not. *All. for Hippocratic Med.*, 602 U.S. at 382.

redressability would be at issue given the nature of their challenge. *Id.* at 37a; *see supra* pp. 3-4, 10-11. And any suggestion that redressability was not raised until oral argument was simply "false": California's brief "explicitly argued that Fuel Petitioners had offered no evidence regarding the redressability of their injuries," Ohio Pet. App. 37a; *see* Diamond Pet. 11, yet petitioners failed to respond.[6]

Finally, petitioners portray the court of appeals' decision as instituting a new rule requiring affidavits from directly regulated parties to support challenges by unregulated parties. *See* Diamond Pet. 20 ("it appears that the only kind of evidence the court would have found sufficient is an affidavit *from an automaker itself*"); *see also id.* at 4, 14, 21. But the court imposed no such requirement. Petitioners could have pointed to secondary sources, or offered declarations from others about market conditions and automaker practices. *Cf.* Ohio Pet. App. 33a-34a (describing California's declaration). The court also demonstrated its willingness to consider comments, studies in the administrative record, and public statements from regulated entities. *Id.* at 29a, 33a.[7] The problem was that

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[6] Even their untimely, post-argument submission contained a noticeable gap: Petitioners argued only that automakers had the *ability* to adjust their offerings in reaction to a judicial decision—they disavowed any attempt to show that manufacturers would likely do so, or to address market conditions. C.A. Diamond Proposed Suppl. Br. 1-3.

[7] When describing the decision below to the D.C. Circuit in another matter, many of these petitioners indicated it does not pose the kind of barrier to standing that they profess here to be worried about. They stated that it "does not affect" unregulated challengers' ability to establish redressability where the federal (continued…)

petitioners failed to produce *any* evidence bearing on this topic when they were required to do so, and the court could not simply assume that evidence existed.

c. Petitioners contend that the decision below contravenes this Court's precedent and creates a conflict of lower court authority. Diamond Pet. 15-24. They are incorrect.

i. As to Supreme Court precedent, petitioners accuse the court of appeals of ignoring cases holding that "challengers to governmental action can rely on the 'predictable effect' of regulation on third parties to establish causation and redressability." Diamond Pet. 4; *see id.* at 16-20. They first point to *Department of Commerce v. New York*, 588 U.S. 752 (2019), which they describe as excusing them from any requirement to produce "robust record evidence." Diamond Pet. 17. But the state plaintiffs in that case supported their standing theory with specific and contemporaneous evidence—including expert testimony, comprehensive studies, and detailed memoranda—demonstrating that adding a citizenship question to the census would "result in noncitizen households responding to the census at lower rates than other groups," and thereby lead to reduced representation and funding. 588 U.S. at 767; *see New York v. Dep't of Commerce*, 351 F. Supp. 3d 502, 578-581 (S.D.N.Y. 2019). This Court's holding on standing rested on a district court's "findings of fact," following a bench trial with that evidence. 588

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agency projected an emission standard's effect on fuel consumption. Suppl. Br. for Intervenors in Support of Petrs., *NRDC v. NHTSA*, No. 22-1080, 2024 WL 3874762, at *3-4 (filed Aug. 19, 2024); *see* Suppl. Br. of Petr. Am. Fuel & Petrochemical Mfrs. & State Petrs., *NRDC v. NHTSA*, *supra*, 2024 WL 3888251, at *3 (filed Aug. 19, 2024) (similar).

U.S. at 767. The unsupported speculation advanced by petitioners here is not remotely comparable.

Next, petitioners imply that *Massachusetts v. EPA*, 549 U.S. 497 (2007), relied on an agency's "own statements" about how third parties would behave in response to the agency's action. Pet. 17. But even if that were true, there would be no conflict: here, as one of the private petitioners has acknowledged, "EPA had made no findings about how much fuel consumption would be displaced by its 2022 order reinstating California's preemption waiver."[8] Moreover, standing in *Massachusetts* was based not solely on the agency's "own statements and programs," Diamond Pet. 17, but also on "affidavits" submitted by the challengers, 549 U.S. at 526. And this Court's holding reflected a special solicitude for state plaintiffs—which "does not apply" to private litigants. *Murthy*, 144 S. Ct. at 1996 n.11; *see Massachusetts*, 549 U.S. at 520.

Petitioners assert that *Bennett v. Spear*, 520 U.S. 154 (1997), leaves "little question" that plaintiffs have standing to contest "'injur[ies] produced by determinative or coercive effect[s]' of the challenged regulation 'upon the action of someone else.'" Diamond Pet. 15-16. But that argument begs the question: it was petitioners' burden to *show* that California's decade-old standards would "determin[e] or coerc[e]" automakers' choices at the time petitioners filed their challenge. They failed to do so. What is more, *Bennett* was decided on a motion to dismiss, 520 U.S. at 167-168, a posture in which "general factual allegations" "suffice" and courts "'presum[e]'" that the allegations "'embrace those specific facts that are necessary to support

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[8] Suppl. Br. of Petr. Am. Fuel & Petrochemical Mfrs. & State Petrs, *NRDC v. NHTSA, supra*, 2024 WL 3888251, at *8.

the claim,'" *Lujan*, 504 U.S. at 561. Petitioners here sought to prevail on the merits, requiring them to establish (not presume) facts supporting redressability.[9]

A more relevant precedent is the recent decision in *Murthy*, where plaintiffs alleged that federal officials had pressured private internet platforms to remove users' posts. 144 S. Ct. at 1984. This Court held that the plaintiffs failed to establish causation and redressability. *Id.* at 1993-1996. One consideration was that the platforms had "independent incentives" to engage in content moderation, *id.* at 1987-1988, and in fact did so even absent governmental requests, *id.* at 1995. Likewise, automakers are independently motivated to respond to consumer demand, and produced vehicles that satisfy California's standards beyond any level required by those standards. *See supra* p. 13.

ii. Nor does the decision below "create[] a conflict among the courts of appeals." Diamond Pet. 21 (capitalization omitted).

Two of the decisions petitioners cite reviewed standing at the motion-to-dismiss stage. *See Gen. Land Office of Tex. v. Biden*, 71 F.4th 264 (5th Cir. 2023); *Wieland v. Dep't of Health & Hum. Servs.*, 793 F.3d 949 (8th Cir. 2015). Petitioners assert that *General Land Office* relied on a "commonsense" point that border walls affect migrant crossings. Diamond Pet. 22. But the Fifth Circuit made clear that its ruling was based on the "'presum[ptions]'" that apply "[a]t

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[9] *Bennett* is so different from this case that it is hardly surprising the court of appeals followed private petitioners' lead and did not cite it below. *Compare* Diamond Pet. 20 (criticizing court of appeals for not discussing *Bennett*), *with* C.A. Diamond Br. 16-17 (not discussing *Bennett*), C.A. Diamond Reply Br. 3-6 (same).

the pleading stage," and also reflected "'special solicitude'" for state standing. *General Land Office*, 71 F.4th at 272, 274. Neither consideration aids the Diamond petitioners here. The Eighth Circuit's decision in *Wieland* similarly turned on *Lujan*'s directive that "'general factual allegations'" suffice at the pleading stage. 793 F.3d at 954. The possibility that the regulated insurers in that case might not alter coverage in response to court action did not preclude the plaintiffs from proceeding, because the court was "accepting as true all factual allegations in the complaint and drawing all reasonable inferences in [the plaintiff's] favor." *Id.* at 953.

The decisions in *NRDC v. NHTSA*, 894 F.3d 95 (2d Cir. 2018), and *Skyline Wesleyan Church v. California Department of Managed Health Care*, 968 F.3d 738 (9th Cir. 2020), did not rest on mere "'common sense'" assumptions about how regulated parties would react to regulatory changes. Diamond Pet. 22-23. In *NRDC*, causation and redressability were "establish[ed]" by "the *record*"—including a sworn declaration about automakers' particular economic incentives, and agency analyses that showed no sign of having been superseded by time. *NRDC*, 894 F.3d at 104-105 (emphasis added); *see* Br. of NRDC, 2018 WL 1210650, at *28 (filed Mar. 6, 2018) (discussing calculations in declaration). In *Skyline*, the "determinative or coercive effect" of the challenged action—an agency's warning to insurers—was proven with evidence: "seven insurers" had "offered plans with abortion coverage restrictions," then "[a]ll seven" ceased doing so after receiving the regulator's warning that such restrictions were illegal. 968 F.3d at 750.

Finally, petitioners assert an intra-circuit conflict with *Energy Future Coalition v. EPA*, 793 F.3d 141,

143 (D.C. Cir. 2015), which concerned a rule that prohibited manufacturers from using certain fuels during emissions testing. It is "primarily the task of a Court of Appeals to reconcile its internal difficulties," *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam), but petitioners never sought rehearing based on the purported conflict. Perhaps because no conflict exists: *Energy Future* relied on evidence establishing "substantial reason to think that at least some vehicle manufacturers would use" the challengers' fuels if EPA changed its regulation. 793 F.3d at 144. The record included automakers' statements and an economist's explanation of how the regulation affected manufacturers' choices. *See id.* at 145; Br. for Petrs., 2015 WL 661314, at *32 (filed Feb. 12, 2015). Indeed, *Energy Future* distinguished its record from a case like this one, where "objective evidence" and "empirical studies" "undermined petitioners' theory of standing." 793 F.3d at 145 n.2; *cf.* Ohio Pet. App. 33a-34a.

2. The private petitioners argue that this Court should also grant certiorari as to whether EPA properly interpreted Section 209(b), a question that the court of appeals did not reach because of its jurisdictional holding. But this is a Court "'of review, not of first view.'" *Smith v. Arizona*, 144 S. Ct. 1785, 1801 (2024). That principle applies with special force where (as here) petitioners seek to raise an "issue[] of first impression" that no lower court has *ever* directly addressed. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 496 (2019) (Thomas, J., concurring). Petitioners identify no persuasive reason for this Court to depart from that principle here.

a. Petitioners argue that this Court should review the statutory question now because "California's

waiver expires at the end of model year 2025, [and] it is quite possible the D.C. Circuit will not decide the merits on remand in time for this Court's subsequent review." Diamond Pet. 26. But even if petitioners were correct in predicting that the D.C. Circuit would not have adequate time to reach the statutory merits on remand, another waiver case could come to this Court relatively soon. Requests for waivers covering model years well beyond 2025 are currently pending with EPA. *See, e.g.,* 88 Fed. Reg. 88908 (Dec. 26, 2023).[10] If one is granted and a proper challenge is filed within 60 days, *see* 42 U.S.C. § 7607(b)(1), the court of appeals can resolve the merits and this Court could consider whether to review that judgment. If the pending requests are not granted, it will work no harm for the issue to have been "resolved by the political branches" instead of this Court. *All. for Hippocratic Med.*, 602 U.S. at 380.

Petitioners fail to support their accusation that the D.C. Circuit has "contrived" over time to meet "each challenge to EPA's waiver determination[s] with a different jurisdictional barrier." Diamond Pet. 3, 14. Out of dozens of waivers granted under Section 209, petitioners identify only one other case in which the challenge was dismissed on jurisdictional grounds. *Id.* at 8 (citing *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192 (D.C. Cir. 2011) (Henderson, Garland, and Brown,

[10] Some of these petitioners are also challenging a 2023 waiver—covering model years through 2035—in *Western States Trucking Ass'n v. EPA*, No. 23-1143 (D.C. Cir.). That case is currently in abeyance but will revive once common issues are resolved in an earlier filed case.

JJ.)). Petitioners do not argue that dismissal was improper. Other challenges *have* been resolved on the merits.[11]

And this Court's ability to review petitioners' statutory question here could be complicated for reasons beyond the standing problem discussed above. Despite warning that this case could become "moot[]" if remanded to the court of appeals, Diamond Pet. 36, petitioners seem unconcerned about the possibility that similar complications might occur during *this* Court's review. They merely assert that "this case would fall within the capable-of-repetition exception because of the order's relatively short duration." *Id.* at 26. If correct, that undercuts petitioners' main argument for bypassing the D.C. Circuit, since the exception would equally allow that court to address the statutory issue on remand if this Court decided standing alone. But the applicability of that exception is uncertain—in either court—because waivers do *not* typically have such "short" durations: Had petitioners challenged this waiver when it was issued in 2013, there would have been more than enough time for judicial review.[12]

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[11] *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. EPA*, 600 F.3d 624 (D.C. Cir. 2010); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449 (D.C. Cir. 1998); *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996); *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095 (D.C. Cir. 1979); *Ford Motor Co. v. EPA*, 606 F.2d 1293 (D.C. Cir. 1979); *see also Dalton Trucking, Inc. v. EPA*, 846 F. App'x 442 (9th Cir. 2021). Other challenges did not result in judicial decisions because the parties withdrew them.

[12] Petitioners suggest they were prevented from challenging the 2013 waiver because "the D.C. Circuit held that" a prior challenge to California standards "was moot because California had 'deemed' compliance with federal standards to satisfy the State's

(continued…)

Finally, an immediate decision from this Court on the statutory question still would not settle the validity of the challenged reinstatement. EPA offered other grounds for its reinstatement decision, including the agency's failure to sufficiently consider reliance interests when it revoked the waiver in 2019. *See* Ohio Pet. App. 140a-151a; *supra* p. 4. Those additional grounds—which petitioners do not challenge here and which would not ordinarily play a role in review of a waiver—would need to be reviewed and rejected for the reinstatement to be overturned. Petitioners appear to seek immediate review of the statutory question less to settle a concrete dispute about the validity of the reinstatement than to obtain an advisory opinion as to different waivers in the future.

b. In any event, petitioners' statutory arguments (Diamond Pet. 27-34) are unpersuasive. Section 209(b) directs EPA to grant a waiver "if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare" as federal standards, 42 U.S.C. § 7543(b)(1), so long as that determination is not "arbitrary and capricious," *id.* § 7543(b)(1)(A), and there is no finding that the "State does not need such State standards to meet compelling and extraordinary conditions," *id.* § 7543(b)(1)(B); *see also id.* § 7543(b)(1)(C); *supra* p. 2. Petitioners only take issue with EPA's determination about that last proviso. *See* Diamond Pet. 27.

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standards." Diamond Pet. 8. But the main focus of petitioners' challenge—California's zero-emission vehicle requirements—never contained such a provision. C.A. J.A. 205-206 n.14. Petitioners fail to explain why they did not challenge that part of the 2013 waiver—or seek to overturn "the unfavorable D.C. Circuit standing precedent" (Diamond Pet. 9) that they perceived as a barrier to challenging other parts of that waiver.

As petitioners read it, the text demands a condition that is "'most unusual' as compared to other States," Diamond Pet. 28, and a California emission standard that "appreciably affect[s]" that condition, *id.* at 31. They argue that climate change is not "particular to California" and the standards here "will not materially reduce the impacts of climate change in California." *Id.* at 27. That is wrong, *see* Ohio Pet. App. 219a-227a; C.A. Cal. Br. 43-45; but even if it were correct, it would not help petitioners.

EPA found that these standards were needed to meet not just climate change problems, but also the severe pollution California specifically experiences from "criteria" pollutants such as particulate matter and emissions that produce ground-level ozone and smog. Ohio Pet. App. 207a-219a; *see* 42 U.S.C. § 7408(a). Petitioners do not deny that California has "compelling and extraordinary" criteria pollutant problems. And their assertion that these standards do not address those pollutants (Diamond Pet. 30) is incorrect. These standards extended a program that began decades earlier *as* a criteria pollution reduction program. *See* 58 Fed. Reg. 4166 (Jan. 13, 1993). California requested this waiver to reduce criteria pollutants as well as greenhouse gases. C.A. J.A. 151-152, 862, 876-877. Zero-emission vehicles produce zero tailpipe criteria pollution—and both Congress and EPA have recognized their importance in reducing criteria pollutants. 42 U.S.C. § 7586(f)(4); Ohio Pet. App. 147a-149a.[13]

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[13] Petitioners assert that EPA's reasoning relating these standards to ozone turned only on lowering temperatures as a way to reduce ozone formation. Diamond Pet. 30. That, too, is incorrect. Ozone forms from nitrogen oxides. EPA made findings that the

(continued…)

Moreover, petitioners' exclusive focus on the specific standards at issue here misunderstands Congress's plan. *See* Diamond Pet. 32-33. Waiver decisions under Section 209(b) turn on whether there are "compelling and extraordinary conditions" for which the State needs its emissions program as a whole, not on the particular need for each individual component of that program. That construction, long embraced by EPA, makes sense. Section 209(b)(1) directs that, after a waiver determination, preemption no longer "appl[ies] to [the] State," 42 U.S.C. § 7543(b)(1)—not that it no longer applies to individual standards. When the statute asks whether the State "need[s] *such State standards* to meet compelling and extraordinary conditions," *id.* § 7543(b)(1)(B) (emphasis added), the standards referred to are the same ones that (a few lines above) are assessed "in the aggregate" for protectiveness, *id.* § 7543(b)(1). That textual link was no accident: Congress adopted (b)(1)'s "in the aggregate" language and (b)(1)(B)'s "such State standards" reference in the same amendment. Pub. L. No. 95-95, § 207, 91 Stat. 685, 755 (1977). And California needs its regulatory program as a whole to address particular concerns stemming from both criteria pollution and climate change. *See* Ohio Pet. App. 286a.

Petitioners disagree, arguing that the "in the aggregate" phrase in Section 209(b)(1) cannot apply to subsection (b)(1)(B) because it does not apply to subsection (b)(1)(C). Diamond Pet. 32. But their premise is mistaken. Subsection (b)(1)(C) makes EPA's waiver determination contingent on whether "such State standards" are feasible "consistent with" 42 U.S.C.

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standards would reduce ozone formation by reducing nitrogen oxide emissions. *E.g.*, C.A. J.A. 805-807; Ohio Pet. App. 147a-148a & n.165.

§ 7521(a). Congress knew about the increased difficulty of implementing multiple standards together. *See supra* pp. 1-2. To protect automakers, as Congress intended, feasibility is determined based on ability to implement standards in the aggregate. Ohio Pet. App. 198a & n.265.

Petitioners next argue that evaluation of what California "need[s]" under Section 209(b)(1) must depend on each individual standard, because "Congress already determined that California 'need[s]'" its own "program" by enacting "the preemption exception in the first place." Diamond Pet. 33. Not so. The program-based "need" requirement of Section 209(b)(1)(B) forecloses new waivers if technological, regulatory, or other changes render California's separate program unnecessary. That is hardly "meaningless" (Diamond Pet. 33).

Finally, the "clear-statement rules" invoked by petitioners (Diamond Pet. 33-34) do not help them here. The major-questions doctrine applies, in "extraordinary cases," to require a federal agency to "point to 'clear congressional authorization' for the power it claims." *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). A key justification for the doctrine is protecting state authority from federal overreach. *Id.* at 740 (Gorsuch, J., concurring). But EPA is not claiming power here; it is getting out of the way of state authority. The "federalism canon" (Diamond Pet. 34) is similarly inapt. Its requirement for "unmistakabl[e]" clarity applies when Congress "interfere[s]" with States' "substantial sovereign powers" under "our constitutional scheme." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). But petitioners here are challenging an exemption from preemption that *preserves* state power. And "principles of constitutional avoidance" (Diamond

Pet. 33) are inapplicable because there is no serious constitutional issue to avoid. *See infra* pp. 27-33.

3. The state petitioners ask this Court to consider the constitutionality of Section 209(b). Ohio Pet. 9-36. But their novel constitutional theory lacks merit, and they identify no good reason for this Court to address it.

a. Although the Constitution contains a "fundamental principle of equal sovereignty," *Shelby Cnty. v. Holder*, 570 U.S. 529, 544 (2013), the court of appeals rightly rejected petitioners' sweeping contention that this principle forbids Congress from exercising its Article I powers to enact any statute that allows one State "a power [Congress] denied" to other States. Ohio Pet. 1-2; *see* Ohio Pet. App. 41a. That novel theory would upset Congress's longstanding practices, and nothing in constitutional text or history supports it.

The Framers were explicit about requiring equal treatment of States in some contexts: for example, they required "uniform" laws concerning bankruptcy, naturalization, and duties, U.S. Const. art. I, § 8, cl. 1, 4, and prohibited "preference" to the "Ports of one State over those of another," *id.*, art. I, § 9, cl. 6; *see* Ohio Pet. App. 49a. The lack of any constitutional text imposing equal sovereignty limits on Congress's exercise of its Commerce Clause power stands in contrast to those explicit equality requirements. *See id.*, art. I, § 8, cl. 3.

Petitioners contend that equality among States was part of the "original plan of the Constitution" and "the federal design." Ohio Pet. 11-12. As the court of appeals explained, however, the Framers' focus was on

political equality—implemented by equal representation for each State in the Senate and equal representation for each voter in the House. Ohio Pet. App. 50a-51a. Although petitioners (Ohio Pet. 15) cite the sovereign immunity reasoning of *Franchise Tax Board of California v. Hyatt*, 587 U.S. 230 (2019), as support for their atextual theory, the historical record there was different. The Framers publicly promised that the new Constitution would maintain States' immunity from suit. *Id.* at 242. Petitioners point to no founding-era authority indicating any similar intent as to the question they raise here.

And Congress has enacted laws that treat certain States differently since the founding, in diverse areas such as acquiring or ceding federal land, *see Alabama v. Texas*, 347 U.S. 272 (1954) (per curiam), or settling state authority as to Indian lands, *see Oklahoma v. Castro-Huerta*, 597 U.S. 629, 646 (2022). The nature of the commerce power, in particular, presupposes Congress's authority to adjust preemption based on particular States' commercial conditions or regulatory histories—as it has done repeatedly. *See, e.g.*, 16 U.S.C. §§ 824k(k), 824p(k), 824q(h), 824t(f) (Texas's unique authority over electric grid); 49 U.S.C. § 31113(a) (Hawaii's unique authority over truck-widths). Congress followed a similar approach here, authorizing California to craft alternative emission standards in certain circumstances in recognition of that State's experience regulating air pollution and its special pollution challenges. *See supra* p. 1. Indeed, Congress's approach increases options for *all* States, by giving other States an option to adopt identical standards where appropriate. *See* 42 U.S.C. § 7507; *supra* pp. 2-3.

Petitioners' arguments based on precedent (Ohio Pet. 21-25) are unavailing. They first invoke the proposition that each State is "'admitted into the union on an equal footing with the original states.'" *Id.* at 21. The leading case, *Coyle v. Smith*, 221 U.S. 559, 573 (1911), held that Congress could not prohibit Oklahoma from moving its seat of government as a condition of admission because Oklahoma was "admitted with all of the powers of sovereignty and jurisdiction [of] the original states." But *Coyle*'s holding about that invalid "term of admission" preserved Congress's ability to enact "regulation[s] of commerce." *Id.* at 574. The Commerce Clause transferred *that* sovereign authority from the States to Congress. Ohio Pet. App. 47a.

Petitioners say their "most significant case" (Ohio Pet. 22) is *Escanaba & Lake Michigan Transportation Co. v. Chicago*, 107 U.S. 678 (1883), which held that Illinois (admitted to the Union in 1818) "ha[d] the same power to regulate navigable waters within its borders that is possessed by other states of the Union," *Econ. Light & Power Co. v. United States*, 256 U.S. 113, 121 (1921). But *Escanaba* actually affirmed the primacy of congressional power under the Commerce Clause: Illinois's authority could be exerted only "until [C]ongress interferes and supersedes it." *Escanaba*, 107 U.S. at 683, 687; *see Econ. Light*, 256 U.S. at 121.

Nor does *Shelby County* imply that Section 209(b) is invalid. That case addressed the preclearance requirements of Section 5 of the Voting Rights Act, an "extraordinary" provision prohibiting some States and local governments from implementing any change in voting procedures "until it was approved by federal au-

thorities." 570 U.S. at 534, 537. The Court emphasized that the "Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Id.* at 543 (internal quotation marks omitted). In light of the "fundamental principle of *equal* sovereignty among the States," Congress could not single out nine States for such an extraordinary impingement on self-government based on "40-year-old data" that was belied by "today's statistics." *Id.* at 544, 556. But *Shelby County* does not remotely suggest a complete bar on differential treatment in the context of commercial regulation. Even as to States' power to regulate elections—a "'sensitive area[] of state and local policymaking'"—*Shelby County* recognized that a statute's "'disparate'" treatment could be justified if it were "'sufficiently related to the problem that it targets.'" *Id.* at 545, 551.

b. Petitioners do not assert that their theory implicates any conflict among lower courts. In the rare instances in which other parties have asserted similar arguments, lower courts have rejected them.

The Third Circuit rejected a claim that the "equal sovereignty of the states" was violated by a statute that "singl[ed] out Nevada for preferential treatment" by allowing it alone "to maintain broad state-sponsored sports gambling." *NCAA v. Governor of N.J.*, 730 F.3d 208, 237 (3d Cir. 2013), *cert. denied*, 573 U.S. 931 (2014) (Nos. 13-967, 13-979 & 13-980). The court saw "nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the

same force" in the "context of Commerce Clause legislation." *Id.* at 239.[14]

The First Circuit reached a similar conclusion regarding a law requiring only some States to cover young adults under their Medicaid programs. *Mayhew v. Burwell,* 772 F.3d 80, 83-84 (1st Cir. 2014). As that court observed, the argument that the new Medicaid requirement "affect[ed] [Maine's] 'ability to pass and implement laws, in the exercise of the fundamental police power over health and welfare,'" characterized the effect on sovereignty "at much too high a level of generality." *Id.* at 95. The same is true of petitioners' characterization of the affected sovereign powers here.

c. Finally, the circumstances here would complicate the Court's resolution of this question.

To begin with, the state petitioners' standing is not clear. Ohio and its fellow petitioners object to Section 209(b) because it allows "only California" to regulate vehicle emissions. Ohio Pet. 6. But none of the petitioner States has expressed any desire to impose its own emissions regulations. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 12 (2023) (Thomas, J., concurring) (plaintiff lacked standing to complain of discrimination by hotel she "disclaimed any intent to visit"). Although the court of appeals did not view that as a jurisdictional problem, Ohio Pet. App. 38a-40a, this Court would have to satisfy itself of petitioners' standing.

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[14] This Court later granted certiorari in a different lawsuit about the same statute, *Murphy v. NCAA*, 584 U.S. 453 (2018), but as to anticommandeering, not equal sovereignty. *See* Pet. i, *Murphy v. NCAA*, No. 16-476 (Oct. 7, 2016); Pet. i, *N.J. Thoroughbred Horsemen's Ass'n,* No. 16-477 (Sept. 29, 2016).

The petition also portends confusion as to the scope of the issues that are properly before the Court. It seeks to present (Ohio Pet. 31-32) not just a facial challenge to Section 209(b), but also a narrower, as-applied claim "that the waiver here" is not "sufficiently related to the problem that it targets." Ohio Pet. App. 42a. Petitioners do not contest that they never raised the as-applied claim in their opening brief in the court of appeals, which held that it was forfeited on that basis. Ohio Pet. 33. They instead assert that they could advance it before this Court on the theory that it is a "'separate *argument[]*' in support of" a "consistent claim." *Id.* That is incorrect. The as-applied claim—that it was unconstitutional to grant *this* waiver as to greenhouse gases because that problem is not tailored to California—is distinct from the original facial claim about Congress's inability to exempt California at all. And petitioners' failure to properly raise the narrower claim below deprived this Court of the benefits of "a reasoned opinion on [its] merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988). Such an opinion would be particularly valuable if this Court were ever to decide that type of claim, given the lengthy agency record and Congress's considered rationale for tailoring Section 209 preemption as it did.

If there were a genuine need for an immediate answer to the question presented, perhaps this Court might discount the features of this case that make it a poor candidate for plenary review. But petitioners do not contend that lower courts are confused or conflicted in ways only this Court can resolve. Nor do they claim that their equal sovereignty question arises with frequency—to the contrary, they identify just four other cases over the last quarter century, and acknowledge that "[a]nother case to test the equal-sovereignty doctrine may be a long time coming." Ohio

Pet. 3; *see id.* at 26 (citing *New York v. Yellen*, 15 F.4th 569, 583-584 (2d Cir. 2021); *Mayhew,* 772 F.3d at 94; *NCAA,* 730 F.3d at 1237-1238; *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990)).

Petitioners instead argue that the Court should grant their petition because it raises an "unanswered question[] of constitutional structure," Ohio Pet. 10; because they "have long wanted [the] question answered," *id.*; and because it would allow the Court to "address the criticism[s]" of scholars about *Shelby County*, *id.* at 3. In other words, they invite the Court to grant certiorari in order to engage in a largely academic exercise concerning a form of regulatory authority that they do not seek.

* * *

The meritless nature of petitioners' arguments, and the lack of any conflict of authority, is reason enough to deny certiorari. And the atypical nature of the challenge—involving a nine-year-old waiver that was temporarily revoked and recently reinstated—makes this a particularly unsuitable vehicle for further review. Indeed, the 2022 reinstatement decision rested in part on alternative grounds, not challenged here, that would not be a consideration in a direct challenge to the issuance of a waiver itself. *See supra* pp. 4, 23. If EPA grants future waivers, petitioners will presumably challenge them immediately, *see* 42 U.S.C. § 7607(b)(1), mindful of their responsibility to demonstrate standing, and could present their statutory and constitutional theories without the unusual complications inherent in this case.

CONCLUSION

The petitions for writs of certiorari should be denied.

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