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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN AUTOMOTIVE LEASING ASSOCIATION, AMERICAN CAR RENTAL ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., AND TRUCK RENTING AND LEASING ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The American Automotive Leasing Association ("AALA") is a national trade organization that represents commercial automotive fleet leasing companies. AALA members own and manage more than 3.5 million vehicles, which are leased to small businesses, nonprofit organizations, government entities, and corporations that usually have smaller divisions or franchises in all 50 states. These vehicles range from passenger cars to cargo vans and trucks that are customized and outfitted to fit business purposes, from electrical and plumbing repair and telecommunications installation to wholesale food and beverage distribution and fuel delivery. Fleet leasing companies make businesses of all sizes more competitive by allowing cus-

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties received timely notice of *amici*'s intent to file this brief.

tomers to focus on their core business activities rather than managing their vehicle fleets.

The American Car Rental Association ("ACRA") is the national representative for over 98% of our nation's car rental industry. ACRA's membership consists of more than 300 car rental companies, including nationwide rental car companies, along with many system licensees and franchisees and mid-size, regional and independent car rental companies. ACRA members have over 2.1 million registered vehicles in service in the United States, with fleets ranging in size from ten cars to one million cars, and employ more than 160,000 workers at rental locations in nearly every county and in every State across the nation.

The Associated General Contractors of America, Inc. ("AGC of America") is the nation's largest and most diverse trade association in the commercial construction industry, now representing more than 28,000 member companies, that include general contractors, specialty contractors, and service providers and suppliers to the industry through a nationwide network of chapters in all 50 states, the District of Columbia, and Puerto Rico. AGC of America represents both union- and open-shop employers engaged in building, heavy, civil, industrial, utility, and other construction for both public and private property owners and developers. AGC of America works to ensure the continued success of the commercial construction industry by advocating for federal, state, and local measures that support the industry; providing education and training for member firms; and connecting member firms with resources needed to be successful businesses and responsible corporate citizens. The association also strives to maintain its members' longstanding commitment to skill, integrity and responsibility.

The Truck Renting and Leasing Association ("TRALA") is a voluntary non-profit trade association founded in 1978 to serve as the unified and focused voice for the truck renting and leasing industry. TRALA's mission is to foster a positive legal and regulatory climate within which companies engaged in leasing and renting vehicles and trailers, as well as related businesses, can compete without discrimination in the North American marketplace. TRALA's nearly 500 members engage primarily in commercial truck renting and leasing, vehicle finance leasing, and consumer truck rental. Its members also include companies with motor-carrier operations and more than one hundred supplier member companies that offer equipment, products, and services to TRALA renting and leasing company members. TRALA members purchase approximately 30% of all over-the-road Class 2-8 trucks and tractors in the United States annually, and today approximately one in every four trucks on the road, regardless of size, is a rented or leased vehicle.

Amici's members are frequently injured by agency action that does not directly regulate them but that has a significant impact, often by design, on their operations and revenues. In those situations, *amici* and their members often seek redress for such injuries in federal court, including the D.C. Circuit. *Amici* therefore have an interest in ensuring that artificial barriers to obtaining judicial review of agency actions that cause their members harm are not erected under the guise of Article III standing doctrine.[2]

SUMMARY OF ARGUMENT

The decision below distorts Article III's redressability requirement beyond recognition—ignoring common-sense inferences based on predictable economic consequences. Review and reversal by this Court is urgently needed to avoid foreclosing judicial review for a significant portion of everyday legal challenges to agency overreach.

The Constitution requires parties suing in federal court to establish the "irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Under this doctrine, parties that are indirectly injured by agency action may bring suit in federal court to secure redress of their injuries. Indeed, agencies frequently issue rules that have damaging effects on parties who are not the target or immediate subject of those regulations, and those parties often may be well positioned to assert legal challenges that help to ensure that agencies do not stray beyond their statutory authority. In such cases, courts assess standing by drawing common-sense inferences about the "predictable effect" of agency action on private conduct. *Dep't of Commerce v. New York*, 588 U.S. 752, 768 (2019). If agency action directly coerces regulated

[2] This brief takes no position on the second question presented in the petition for certiorari. Relatedly, *amici* note that affected businesses do not have a unified view of the questions presented. For example, various vehicle manufacturers and other business entities intervened in support of respondents in this case, opposing various arguments that petitioners made in attacking the regulatory decision at issue here. *Ohio v. EPA*, 98 F.4th 288, 299 & n.6 (D.C. Cir. 2024).

entities in a way that injures other parties, common sense dictates that an order vacating that agency action will redress those parties' injuries—to at least some degree.

Those straightforward principles require reversal here. EPA issued a preemption waiver for California's low-emission and zero-emission vehicle regulations, which had the goal of cutting emissions through a reduction in the consumption of the fuels that petitioners (or their members) produce and distribute. *See* pp. 10-11, *infra*. Manufacturers were thereby required to comply with California's mandates by adjusting their production and pricing of low-emission or zero-emission automobiles. Basic principles of supply and demand dictate that if EPA's waiver is vacated—and vehicle manufacturers are free to make and price their vehicles according to market forces—those manufacturers will produce or sell *fewer* low-emission or zero-emission vehicles. Demand for the fuels petitioners (or their members) produce and distribute will thus increase. If that were not the natural economic consequence of vacating the agency's decision, then there would have been no reason for the agency to issue its preemption waiver to begin with. It is therefore "likely" that vacating EPA's waiver will redress at least some of petitioners' (or their members') injuries. *Dep't of Commerce*, 588 U.S. at 766 (citation omitted). That is all redressability requires.

The D.C. Circuit refused to credit those commonsense inferences. It instead adopted a constrained view of redressability that effectively required petitioners to obtain affidavits from vehicle manufacturers attesting that, if EPA's waiver were vacated, they would alter their vehicle production or pricing in a way that would increase demand for petitioners' fuel products. That requirement imposes a substantial—often insurmountable—barrier to unregulated (or indirectly regulated) entities' ability to obtain judicial review of agency action that has injured them.

This Court's intervention is needed now to ensure that judicial review continues to serve its indispensable role as a check on unlawful agency action. By requiring the petitioners in this case to secure the cooperation of directly regulated third parties in order to mount a legal challenge, the D.C. Circuit's decision distorts standing doctrine, insulates overreaching agency decisions, and creates superficial barriers to judicial review. It also rewards the bait-and-switch tactics employed by California, which insisted that EPA's waiver was *necessary* to lower emissions by reducing fossil-fuel consumption in California, but now seeks to evade review by claiming that vacating the waiver will have no impact on fossil-fuel consumption at all.

Unless corrected, the D.C. Circuit's rule threatens to preclude a substantial number of injured parties from obtaining judicial redress of their injuries. Directly regulated parties may have numerous valid reasons not to assist with a legal challenge to an action brought against their regulator. To require their participation as a precondition for federal courts to adjudicate actions by unregulated—but concretely harmed—entities will foreclose such challenges in a significant swath of cases. And the effects of the lower court's draconian rule will be widespread, as there are "entire classes of administrative litigation that have traditionally been brought by unregulated parties"—and frequently in the D.C. Circuit. *Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2464 (2024) (Kavanaugh, J. concurring). The Court should grant certiorari now to ensure the continued availability of a judicial forum to evaluate the lawfulness of agency action.

ARGUMENT

I. The D.C. Circuit's decision imposes artificial barriers to judicial review of agency action.

The decision below effects a dramatic distortion of Article III jurisprudence that will close the door to a significant portion of challenges to agency action in the court that is most frequently tasked with reviewing agency decisions (and reining in agency overreach)—unless this Court promptly intervenes. The D.C. Circuit held that to show Article III redressability, petitioners had to prove what actions regulated third-party automobile manufacturers would take if EPA's waiver were vacated. The lower court's decision ignores both common sense and basic principles of supply and demand. When an agency writes a rule that depresses demand for a product, common sense dictates that vacating that rule will cause demand to rebound. That is precisely the case here: EPA and California envisioned and understood that EPA's waiver would cause economic injury to petitioners by promoting low-emission or zero-emission vehicles that use less of the fuels that petitioners (or their members) sell and distribute. Vacating EPA's waiver will likely redress that injury, at least in part—which is all Article III requires.

The decision below disregards that common-sense inference and, in so doing, erects a substantial barrier to judicial review of a wide array of agency actions. And the fact that this position has been adopted by the

D.C. Circuit makes the need for this Court's intervention *now* all the more acute. Congress has centralized judicial review of so many agency actions in that court that it encounters APA actions like this one "five times before breakfast." Oral Argument Transcript, *United States v. Texas*, No. 22-58, 2022 WL 18033772, at *35 (U.S. Nov. 29, 2022) (Roberts, C.J.). This Court should grant review.

A. Businesses should be able to obtain judicial review of agency action that predictably harms them.

Article III requires petitioners to show that their injuries are "likely" to be "redressed by a favorable ruling" from a federal court. *Dep't of Commerce*, 588 U.S. at 766 (citation omitted). This standard can be met by drawing common-sense inferences from the natural, predictable effects of government action or its removal. Such common-sense inferences appropriately ensure that judicial review is limited to actual cases or controversies, but without closing the courthouse doors to those injured by agency action.

This Court illustrated this understanding of redressability in *Department of Commerce*. There, the Court held that States had standing to challenge the reinstatement of a citizenship question on the census questionnaire. 588 U.S. at 766-768. Reinstating the question would deter some noncitizens from responding to the census, and in turn cause States "a number of injuries," including the loss of federal funds "distributed on the basis of state population." *Id*. at 766-767. The Court rejected the argument that this injury was too "speculat[ive]" because it "depend[ed] on the independent action of third parties choosing to violate their legal duty to respond to the census." *Id*. at 767-768.

The States' "theory of standing" appropriately "relie[d] … on the *predictable effect* of Government action on the decisions of third parties"—if the citizenship question is asked, fewer noncitizens will respond. *Id.* at 768 (emphasis added). And because that injury was "sufficiently concrete and imminent," there was "no dispute that a ruling in favor of [the States] would redress that harm," *id.* at 767—*i.e.*, more noncitizens would respond to the census and the States would receive more federal funds.

The "effect" of vacating an agency action is even more "predictable" when the injury is the *intended* or *obviously foreseen* consequence of that action—not just collateral damage. Suppose, for example, that in an effort to curb consumption of high-sugar beverages, California banned retailers from selling soft drinks in cups bigger than 20 ounces, despite significant customer demand for Big Gulps. The effect would be obvious: soft-drink producers would sell less soda syrup in California. If the ban were promptly overturned, then at least *some* retailers would naturally be expected to again offer larger-sized sodas—given customer demand—which would repair at least some of the soft-drink producers' injuries. *Accord Bennett v. Spear*, 520 U.S. 154, 168-171 (1997) (finding injury-in-fact and redressability when the unregulated plaintiff's injury followed from the "coercive effect" of government action "upon the action of someone else").

Whether soft-drink producers or fuel suppliers, unregulated entities that are economically injured by agency action should be able to challenge it—particularly if the decreased consumer demand that harmed them was the explicit goal or clearly foreseeable outcome of the government regulation. That economic injury is the *sine qua non* of standing. It would make no sense to forbid these injured parties from coming into court unless they could convince their customers—U.S. retailers—to submit declarations attesting to the business decisions those customers would make if the government action were vacated. Nor has this Court ever required such an unreasonably high evidentiary showing to establish redressability.

In cases like these, redressability is not rocket science; it is basic economics. Once economic injury caused by regulation is established, redressability is a light lift, given that it is the mirror image of the injury that the unregulated entity experienced. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380-381 (2024) (explaining that "[i]f a defendant's action causes an injury, enjoining the action … will typically redress that injury," and "[s]o the two key questions in most standing disputes are injury in fact and causation"). That is why the split at issue here is so lopsided—most courts of appeals have had no trouble applying that principle to find that an unregulated party had Article III standing. *See* Pet. 22-24.

B. Common sense and basic economics confirm that an order vacating EPA's waiver will redress petitioners' injuries.

This case is an ideal vehicle for the Court to resolve the circuit split because common sense confirms that an order vacating EPA's waiver will redress petitioners' injuries. California's Low Emission Vehicle ("LEV") and Zero Emission Vehicle ("ZEV") programs require manufacturers of certain vehicles to meet "stringent emission standards" for vehicles up through model year 2025, *see* Cal. Air Res. Bd., *Low-Emission*

Vehicle (LEV III) Program,[3] and dictate that a minimum percentage of total vehicles sold into California by certain manufacturers must be zero-emission, *see* Cal. Air Res. Bd., *Zero-Emission Vehicle Program*[4]; *see also* 78 Fed. Reg. 2,112, 2,114, 2,119 (Jan. 9, 2013). A reduction in demand for the fuels made or distributed by petitioners was not an unforeseen byproduct of California's programs. California confirmed as much when it requested that EPA grant the permission necessary for it to adopt these requirements—representing that "net upstream emissions [would be] reduced through the increased use of electricity *and concomitant reductions in fuel production*." 87 Fed. Reg. 14,332, 14,364 (Mar. 14, 2022) (emphasis added) (quoting 2012 Waiver Request, EPA-HQ-OAR-2012-0562-0004, at 15-16). Predictably, automakers responded to California's mandates by altering their production plans and vehicle pricing to conform to California's quotas. Pet. App. 12a.

Basic economics and common sense dictate that a court order vacating EPA's waiver would redress the injury that the waiver foreseeably inflicted. Without EPA's waiver, the government compulsion that forced automakers to alter their production and pricing to adhere to California's requirements disappears. And without that market-altering compulsion, it is "likely" that at least some automakers would move back toward the market-driven production and pricing they set before California's artificial targets took effect. *Dep't of Commerce*, 588 U.S. at 766. Demand for the

[3] https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/lev-program/low-emission-vehicle-lev-iii-program.

[4] https://ww2.arb.ca.gov/our-work/programs/zero-emission-vehicle-program/about.

fuels petitioners produce and distribute would therefore increase as consumers purchase more conventional vehicles than they would have if EPA's waiver remained in place.

To be sure, it may not be *certain* that *all* automakers would reduce production of low-emission or zero-emission vehicles or raise those vehicles' prices if EPA's waiver were vacated. But redressability does not require a certain return to the *status quo ante*; it simply requires that it be "likely" that vacatur would restore *some* of the demand for petitioners' fuels that was suppressed due to EPA's waiver. *Dep't of Commerce*, 588 U.S. at 766; *see also Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (finding redressability when injury "would be reduced *to some extent* if petitioners received the relief they seek" (emphasis added)). Both common sense and basic market forces compel that conclusion here.

The case for redressability is thus even stronger here than it was in *Department of Commerce*. There, the States established standing—both injury and redressability—without having to prove that the agency added a citizenship question to the census with the goal of suppressing census responses, or that fewer census responses was the necessary consequence of adding a citizenship question. *See* 588 U.S. at 766-768. Where, as here, a "reduction[] in fuel production" *is* the necessary (and, indeed, intended) consequence of California's mandates, 87 Fed. Reg. at 14,364, standing should be even easier to establish. The natural and logical consequence of an order blocking California's mandates (by vacating EPA's waiver) is the reversal of that reduction.

The court of appeals, however, eschewed common-sense inferences in favor of a rigid and heightened evidentiary standard. It held that petitioners had not shown redressability because they did not produce evidence proving what vehicle manufacturers would do in the event EPA's waiver is vacated. In essence, the court held that petitioners should have solicited affidavits from these automakers attesting to their future business plans if EPA's waiver is vacated. Pet. App. 24a-25a; *see* Pet. 20. Yet the D.C. Circuit identified no decision of this Court imposing such a heightened evidentiary burden—and there is none. *See* Pet. 15-21. At the same time, the court noted EPA's statement that some, but not all, vehicle manufacturers had voluntarily agreed to comply with California's requirements after EPA's 2013 waiver was rescinded, *see* Pet. App. 13a-14a, and it conceded the "possib[ility] that manufacturers could change their prices *without* modifying their production cycles," which "may redress Petitioners' injuries." Pet. App. 24a (emphasis added). But the court of appeals ignored the common-sense inferences that follow from these facts.

Instead, the D.C. Circuit premised its standing decision in part on its belief that automobile manufacturers would not have sufficient time to alter their vehicle specifications even if EPA's waiver were vacated, because the waiver only applies up through Model Year 2025 vehicles. *See* Pet. App. 22a-23a. But standing is determined at the time suit is filed, *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000), not at the time of a court's decision years later. And here, petitioners filed their petition for review 60 days after EPA's reinstatement of its waiver in March 2022, Pet. 21—at which point EPA's waiver would be in effect for several years more. If the limited time *now* remaining on EPA's waiver—two years after suit was filed—has jurisdictional implications, EPA could seek dismissal of the action by showing that the case is moot, but it has not done so. EPA cannot leverage such post-filing events to contest standing. And there are strong arguments that this case is not moot and would not be mooted by the expiration of EPA's waiver. *See* Pet. 26.

* * *

"Courts sometimes make standing law more complicated than it needs to be." *Thole v. U.S. Bank N.A.*, 590 U.S. 538, 547 (2020). That is precisely what the D.C. Circuit's decision did here. By ignoring commonsense inferences derived from basic principles of supply and demand, the court departed from this Court's precedents and split from the approach of its sister circuits. EPA granted California a waiver with the acknowledged consequence of reducing demand for the fuels petitioners make and distribute—causing petitioners injury. A court order vacating that agency action is likely to redress at least some of that injury going forward. That is more than sufficient for redressability.

II. The D.C. Circuit's cramped view of redressability erodes effective judicial review of agency action and warrants this Court's reversal now.

The D.C. Circuit's decision not only misapplies the law, it also undermines the fundamental value of judicial review of agency action. Unless this Court intervenes now, the D.C. Circuit's rationale threatens to insulate broad swaths of agency action from judicial scrutiny and, indeed, will incentivize the manipulation of federal courts' jurisdiction.

A. Judicial review of agency action is vitally important. Well over two centuries ago, this Court proclaimed that "[t]he very essence of civil liberty … consists in the right of every individual to claim the protection of the laws." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Congress later enshrined that principle in the APA's judicial review provision, which establishes a "'basic presumption' that anyone injured by agency action should have access to judicial review." *Corner Post, Inc.*, 144 S. Ct. at 2459 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). This review serves both a corrective and prophylactic purpose: It enables courts to overturn unlawful agency action (and redress injuries those actions caused), and it serves as a deterrent against errant agency action—encouraging agencies to stay within their statutory authority, follow proper procedures, carefully review the facts, and employ sound judgment in promulgating and enforcing their many rules and regulations. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (judicial review constrains the exercise of discretionary power by administrative agencies and promotes fidelity to statutory requirements).

The need for meaningful judicial review of agency action is especially acute in light of the extraordinary growth in the size and power of the administrative state. The national government now houses a "vast and varied federal bureaucracy" that "wields vast power … touch[ing] almost every aspect of daily life," *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010), and has "expan[ded] … into new territories the Framers could scarcely have imagined," *Seila Law LLC v. CFPB*, 591 U.S. 197, 231 (2020).

Much of the federal government's operation now consists of "hundreds of federal agencies poking into every nook and cranny of daily life." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). To accomplish this, agencies "produce[] reams of regulations—so many that they dwarf the statutes enacted by Congress." *Kisor v. Wilkie*, 588 U.S. 558, 629 (2019) (Gorsuch, J., concurring in the judgment) (quotations marks omitted). And they "add thousands more pages of regulations every year." *Id.*; *see* National Archives, Federal Register & CFR Statistics (showing that the CFR was less than 10,000 pages in 1950, and now tops 188,000).[5] This enormous expansion of the administrative state poses "a significant threat to individual liberty." *Seila Law LLC*, 591 U.S. at 240 (Thomas, J., concurring in part and dissenting in part) (citation omitted).

Judicial review is an essential check against this threat. *Marbury*, 5 U.S. (1 Cranch) at 163; *see also Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 65 (1976) (Brennan, J., concurring in the judgment) ("In our modern-day society, dominated by complex legislative programs and large-scale governmental involvement in the everyday lives of all of us, judicial review of administrative action is essential both for protection of individuals illegally harmed by that action and to ensure that the attainment of congressionally mandated goals is not frustrated by illegal action." (citations omitted)). Accordingly, this Court has consistently rejected attempts to undermine the effectiveness of judicial review of agency action.

Most directly, the Court has refused to interpret

[5] https://www.federalregister.gov/reader-aids/federal-register-statistics.

statutes to displace the APA's judicial review provision without "'clear and convincing evidence' of congressional intent to preclude judicial review." *Guerrero-Lasprilla v. Barr*, 589 U.S. 221, 229 (2020) (quoting *Reno v. Cath. Soc. Servs., Inc.*, 509 U.S. 43, 64 (1993)). It has also resisted efforts to undermine the *effectiveness* of judicial review of agency action. In *Corner Post*, for example, the Court adopted an injury-accrual rule for the APA's six-year statute of limitations, in part because that rule "vindicates the APA's 'basic presumption' that anyone injured by agency action should have access to judicial review," and "respects our 'deep-rooted historic tradition that everyone should have his own day in court.'" 144 S. Ct. at 2459 (quoting *Abbott Labs.*, 387 U.S. at 140, and *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)); *see also id.* at 2463 (Kavanaugh, J., concurring) ("[v]acatur is … essential to fulfill the 'basic presumption of judicial review' for parties who have been 'adversely affected or aggrieved' by federal agency action" (citation omitted)).

The Court has also resisted efforts to use Article III to shield agency action from judicial review by disregarding the real-world effects of vacating the agency's action. In *Bennett v. Spear*, the Court held that two irrigation districts had standing to challenge a Biological Opinion by the Fish and Wildlife Service that would affect the amount of water available to them. 520 U.S. at 157, 159, 167-168. The government argued that the plaintiffs had not shown causation or that their injury would be redressed by vacating the Biological Opinion, because the Bureau of Reclamation, not the Service, was the ultimate decisionmaker. *Id.* at 168-169. The Court rejected that argument: Although the Biological Opinion "theoretically serve[d] an 'advisory function,'" the Court looked to the real-life "coercive effect" it had on the Bureau of Reclamation's decisionmaking to conclude that vacating the Biological Opinion would redress the plaintiffs' injuries. *Id*. at 169-171 (citation omitted).

B. The D.C. Circuit's decision undermines this important safeguard against unlawful agency action. To be sure, Article III's requirements—including redressability—must be satisfied before any suit may be brought in federal court. *Lujan*, 504 U.S. at 560. But the paramount importance of judicial review of agency action counsels strongly against infusing standing doctrine with heightened and (often) insurmountable evidentiary burdens that are divorced from common sense and logic. Such burdens are entirely unnecessary to prevent "mere bystander[s]" who lack "a personal stake in the dispute" from filing suit in federal court, or to "assure that the legal questions presented to the court will be resolved … in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *All. for Hippocratic Med.*, 602 U.S. at 379-380 (citations and quotation marks omitted). They instead erect a barrier to judicial redress for entities that have clearly been harmed by agency action.

Forcing unregulated or indirectly regulated entities to rely on *directly* regulated entities' cooperation to challenge agency action will shield a vast swath of agency action from judicial scrutiny. Sometimes businesses that are *not* directly regulated by agency action are the most harmed by it, but those that *are* so regulated may have no intention of mounting a challenge of their own or facilitating one brought by others.

After all, the interests of regulated entities do not always align with those that are not directly regulated but nonetheless harmed. *See* Pet. 20-21. Regulated parties may sometimes have powerful incentives to acquiesce in agency regulations that an unregulated entity wishes to challenge. Such regulations may be preferable to other likely alternatives (including potential legislative alternatives). Some regulations will be leavened by a valuable benefit or incentive (like federal funding). Other regulations will have impacts on competitors that may dissuade regulated parties from bringing suit, such as barriers to entry by competitors, effects on the marketability of a competitor's product or service, and other effects on incumbents' market advantages. *Accord Corner Post, Inc.*, 144 S. Ct. at 2464-2465 (Kavanaugh, J., concurring) (collecting examples of lawsuits challenging agency action favorable to competitors). And in many cases, the simple act of expressing public opposition to a government regulation may impose heavy political or other costs on a company.

Under any of those circumstances, regulated entities may have limited or no capacity or appetite for challenging (or facilitating the challenge of) the agency action, especially with regard to harm suffered by unregulated entities. Nonetheless, the logic of the D.C. Circuit's ruling requires those plainly injured entities to obtain the active, overt support of companies—sometimes their own customers—who have chosen, often for good reason, not to assert a challenge themselves. That poses a substantial barrier to judicial review that is not compelled by the Constitution or this Court's precedents.

If not corrected, that barrier to judicial review will block a substantial number of challenges to agency action. Lawsuits by unregulated entities are not uncommon; to the contrary, unregulated parties "often will sue under the APA to challenge an allegedly unlawful agency rule that regulates others but also has adverse downstream effects on the plaintiff." *Corner Post, Inc.*, 144 S. Ct. at 2460 (Kavanaugh, J., concurring). In fact, there are "entire classes of administrative litigation that have traditionally been brought by unregulated parties." *Id.* at 2464 (collecting examples). The D.C. Circuit's decision thus strikes at the heart of agency litigation, threatening to "insulate a broad swath of agency actions from any judicial review." *Id.* at 2463.[6]

Worse still, the decision below was issued by the court of appeals that exerts the greatest influence on the development of administrative law, including cases involving EPA. By statute, Congress has given the D.C. Circuit exclusive jurisdiction over a range of administrative agency actions, including a significant amount of rulemaking by EPA. *See, e.g.*, 42 U.S.C.

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[6] The risk of that insulation is especially high for agencies whose policies fluctuate dramatically when partisan control of the Executive Branch shifts. This is a case in point: EPA has flip-flopped between denying a waiver and granting a waiver each time control of the White House has shifted from one political party to another. Pet. App. 11a-14a. This dynamic can help shield agency action from judicial review, as legal challenges can be mooted by a subsequent administration's repeal or modification of a challenged rule. *See, e.g.*, Order 1-2, *In re Clean Water Act Rulemaking*, No. 3:20-cv-06137 (N.D. Cal. Jan. 24, 2024), ECF No. 46 (dismissing as moot challenge to EPA 2020 Clean Water Act rule because "the 2020 Rule is no longer in effect and has since been superseded by the 2023 Rule"); *Ohio v. EPA*, No. 2:15-cv-2467, 2022 WL 866273, at *1-4 (S.D. Ohio Mar. 23, 2022) (dismissing as moot challenge to 2015 EPA "navigable waters" rule in light of repeal by subsequent administration), *appeal dismissed*, No. 22-3292, 2023 WL 6458954 (6th Cir. Sept. 18, 2023).

§ 7607(b) (Clean Air Act).[7] As a result, a greater proportion of the D.C. Circuit's docket consists of agency litigation than is the case for any other regional circuit court. *See* U.S. Courts, *U.S. Courts of Appeals – Cases Commenced, Terminated, and Pending, by Circuit and Nature of Proceeding, During the 12-Month Period Ending March 31, 2024*, tbl. B-1.[8] And because the D.C. Circuit "handles the vast majority of significant rulemaking appeals," it "has been the leader" among the circuits in developing rules and procedures governing those appeals, including rules and procedures used to determine standing. Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 348 (1978); *see also* Patricia M. Wald, *The Contribution of the D.C. Circuit to Administrative Law*, in 40 Admin. L. Rev. 507, 508-514 (1988). Indeed, "the D.C. Circuit—more than any other court of appeals—has influenced the nature of judicial review of agency decisions." Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 Geo. L.J. 549, 576 (2002). Given its prominent role in reviewing agency action, the D.C. Circuit's decision is poised to have an outsized influence on agency litigation.

Compounding these problems, the D.C. Circuit's rule rewards government bait-and-switch tactics, allowing overreaching agencies to manipulate federal-court ju-

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[7] *See also, e.g.*, Solid Waste Disposal Act § 7006(a)(1), 42 U.S.C. § 6976(a)(1); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 113(a), 42 U.S.C. § 9613(a); Safe Drinking Water Act § 1448(a)(1), 42 U.S.C. § 300j-7(a)(1).

[8] https://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables (accessed, July 18, 2024).

risdiction to insulate themselves from any meaningful judicial review. In this case, for example, the Clean Air Act authorizes EPA to issue a waiver for California's LEV and ZEV programs only if the State shows it has a "need" for its own "standards to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(a)-(b); *see* Pet. App. 3a-6a. So to request and grant the waiver, California had to argue (and EPA had to conclude) that the waiver was *necessary* to reduce fossil-fuel consumption sufficient "to meet compelling and extraordinary conditions" in California. 42 U.S.C. § 7543(b)(1)(B); C.A. J.A. 237 (California informed EPA that the waiver was "*critical* for incentivizing production and deployment of zero-emission vehicles") (emphasis added). And to demonstrate that they had standing to intervene in this case, California and States that chose to be bound by California's emissions standards submitted evidence explaining that if the waiver were overturned, "additional gasoline-fueled vehicles would be sold" during the relevant period. Pet. 11 (quoting Scheehle declaration).

But now that it is trying to shield that same decision from judicial review, California has changed its tune. Despite previously explaining why, in its view, an EPA waiver was necessary, California now proclaims that the agency's action was not needed after all, because industry will voluntarily comply with California's emissions restrictions even if they are not in effect. California cannot have it both ways. Erecting artificially high evidentiary burdens would simply bless efforts, like these, to insulate agency action from judicial scrutiny and would deprive injured parties, like petitioners here, of their day in court.

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Without this Court's intervention, the D.C. Circuit's flawed decision on Article III redressability risks closing the courthouse doors to numerous entities that have undeniably been injured by agency action. That outcome, which would undermine the important function of judicial review, is not consistent with this Court's standing jurisprudence. At least four circuits have rejected the D.C. Circuit's flawed view of redressability. *See* Pet. 21-24. This Court should resolve the split now.

CONCLUSION

The Court should grant the petition as to the first question presented.

Respectfully submitted.

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