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 AMICI CURIAE ADVANCING AMERICAN FREEDOM; RICHARD ALLEN, JCCWATCH.ORG; AMAC ACTION; AMERICAN CONSTITUTIONAL RIGHTS UNION; AMERICAN ENCORE; AMERICAN ENERGY INSTITUTE;

(For Continuation of Midline See Inside Cover)

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QUESTIONS PRESENTED

1. Whether a party may establish the redressability component of Article III standing by relying on the coercive and predictable effects of regulation on third parties.

2. Whether EPA's preemption waiver for California's greenhouse-gas emission standards and zero-emission-vehicle mandate is unlawful.

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STATEMENT OF INTEREST OF AMICI CURIAE

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

Amici Richard Allen, JCCWatch.org; AMAC Action; American Constitutional Rights Union; American Encore; American Energy Institute; American Land Rights Association; American Lands Council; Americans for Limited Government; American Securities Association; American Values; Saulius "Saul" Anzius, President, The American Association of Senior Citizens; E. Calvin Beisner, Ph.D., President, Cornwall Alliance for the Stewardship of Creation; Shawnna Bolick, Arizona State Senator, District 2; Center for Political Renewal; Daniel Darling; Eagle Forum; JoAnn Fleming, Executive Director,

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

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

Grassroots America-We the People PAC; Freedom Foundation of Minnesota; Frontline Policy Council; Representative Steven E. Galloway, District 24, Montana House of Representatives; Charlie Gerow; Allen J. Hebert, Chairman, American-Chinese Fellowship of Houston; Idaho Freedom Foundation; International Conference of Evangelical Chaplain Endorsers; Tim Jones, Fmr. Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; James L. Martin, Founder/Chairman, 60 Plus Association; Men and Women for a Representative Democracy in America, Inc.; National Center for Public Policy Research; Project Sentinel; Project 21 Black Leadership Network; Rio Grande Foundation; Pamela S. Roberts, Immediate Past President- Kentucky Federation of Republican Women; Setting Things Right; Stand for Georgia Values Action; Strategic Coalitions & Initiatives, LLC; Tradition, Family, and Property, Inc.; Truth in Energy and Climate; Women for Democracy in America, Inc.; Young America's Foundation; and Young Conservatives of Texas believe that the Constitution and the ideas that underly it are essential to the preservation of the freedom of the people.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns an Environmental Protection Agency (EPA) statutory interpretation that, if upheld, would undermine the basic principle of the American federal system that each State in the Union possesses equal sovereignty to every other State. Under the Clean Air Act (CAA), "any State" may get a waiver to the EPA's motor vehicle emissions regulations, allowing that State to substitute its own standards. 42 U.S.C. § 7543 (b)(1).

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

The EPA's waiver of preemption in this case is a perversion of the federalist system adopted by the People in the Constitution. The Constitution was designed to leave most powers to the States, as demonstrated both by the limited enumeration of federal powers and the express statement of reserved powers in the Tenth Amendment. The Framers knew that local control was preferable wherever it was possible,[3] and that allowing each State

3. *See* The Federalist No. 10 at 47 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) (explaining that under the Constitution, "the great and aggregate interests" of the nation should be "referred to the national [legislature], the local and particular to the state legislatures."); The Federalist No. 17 at 80-81 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001) ("The administration of private justice between the citizens of the same

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

On the one hand, most states are unable to pursue their own regulatory interests and agendas because they are required to follow the EPA's national standard. On the other hand, regulated parties have no reliable stability because the EPA has repeatedly granted and then revoked California's preemption waiver.[4] In 2005, California applied for a waiver to allow it to implement its Low-Emission Vehicle Greenhouse Gas Program; in

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State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.")

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

2008, the EPA denied this waiver application.[5] Then in 2009, the EPA reversed its prior decision and granted the waiver.[6] In 2012, California applied for the waiver at issue here, and the EPA granted it early the next year.[7] In 2019, the EPA revoked that waiver.[8] In 2022 the EPA, again reversed itself, reinstating the 2012 waiver.[9]

Whatever the legitimacy of the statute in question here, this case challenges the EPA's interpretation of that statute. When agencies claim significant new regulatory

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

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

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

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

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

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

California's ability to adopt an alternative standard and the inevitable back and forth of the EPA's granting and rescinding of the exemption creates the regulatory uncertainty that preemption of the States was supposed to address. Either carbon emissions are a national issue warranting federal standards or they are an issue that is better left to the States in general, not just one hyper-regulatory State.[10] The federal government and California should not be allowed to have it both ways. The current preemption waiver harms regulated entities and related business interests, the States that would adopt policies more conducive to free enterprise, and the people who would elect representatives to pursue those policies. The Court should grant certiorari and rule for Petitioners, thus

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

preserving the equal sovereignty of every State against federal favoritism.

ARGUMENT

I. The EPA's Granting of an Exemption to California Under the CAA Implicates the Major Questions Doctrine.

The major questions doctrine "ensures that the national government's power to make the laws that govern us remains where Article I of the Constitution says it belongs—with the people's elected representatives." *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., OSHA*, 595 U.S. 109, 124 (2022) (Gorsuch, J., concurring). The doctrine is implicated where "'the history and the 'breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *West Virginia*, 597 U.S. at 721 (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)). Where the doctrine is implicated, "[t]he agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 723 (quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014)). As Justice Gorsuch has explained, there are three circumstances in which the doctrine is implicated and thus that require the agency to show clear congressional direction.

First, the "doctrine applies when an agency claims the power to resolve a matter of great 'political significance.'" *Id.* at 743 (citing *NFIB v. OSHA*, 595 U.S. at 117 (some internal quotation marks omitted)). Second, it applies when

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

The EPA's waiver, in effect, "claims the power to resolve a matter of great 'political significance.'" *Id.* at 743 (Gorsuch, J., concurring) (citing *NFIB v. OSHA*, 595 U.S. at 117 (some internal quotation marks omitted)). The waiver scheme at issue here reaches much further than California by design. Seventeen States, as well as the District of Columbia have adopted either California greenhouse-gas emission standards or California's zero-emission-vehicle mandate.[11] Further, the goal of California's emissions restrictions is to affect global climate change.[12] Brief for Petitioners at 30 ("No one disputes that the express purpose of California's standards was to regulate global

11. California Air Resources Board, *States that Have Adopted California's Vehicle Regulations* (June 2024), https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations.

12. "The academic and author Edwin J. Feulner, Jr., once argued that Hayek's 'greatest contribution lay in the discovery of a simple yet profound truth: man does not and cannot know everything, and when he acts as if he does, disaster follows.'" Gorsuch, *supra* note 4 at 99. Icharus's hubris led to his downfall. That a State would take it upon itself to solve a global issue through burdensome regulation demonstrates a need to return to that story and imbibe its lesson once more.

climate change."). Climate change and the best regulatory approach with respect to that issue are among the most contentious and debated issues in contemporary politics. By granting California this waiver, the EPA allows it to adopt policies designed to affect that issue globally, while other States that might prefer a different approach are left without any such authority. This favoritism allows one privileged, left of center State to set policy that will have a significant, nationwide impact on a politically contentious issue.

Second, the major questions doctrine is implicated when "an agency . . . seeks to regulate 'a significant portion of the American economy.'" *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (some internal quotation marks omitted) (citing *West Virginia*, 597 U.S. at 722) (majority opinion)). The States that have adopted at least some of California's standards in place of the EPA's, are together regulating markets that account for at least 40.2% of new "light-duty" vehicle registrations and 25.5% of new "heavy-duty" vehicle registrations in the United States.[13] Considering the national market for new light and heavy duty vehicle sales is a multi-billion dollar per year industry, the waivers at issue in this case allow for regulation of a sufficiently significant portion of the American economy to implicate the major questions doctrine. The property rights involved, including the right to engage freely in the market, are among those fundamental rights the Constitution was designed to

13. CARB, *States that Have Adopted California's Vehicle Regulations* (June 2024), https://ww2.arb.ca.gov/our-work/programs/advanced-clean-cars-program/states-have-adopted-californias-vehicle-regulations.

ensure, and those rights are heavily impacted by the regulations here at issue.

Finally, agency action may implicate the major questions doctrine when it "seeks to 'intrud[e] into an area that is the particular domain of state law.'" *West Virginia*, 597 U.S. at 744 (Gorsuch, J., concurring) (citing *Alabama Assn. of Realtors v. Dep't of Health and Hum. Servs.*, 594 U.S. 758, 764 (2021)). Assuming the federal government's regulation of vehicular emissions is a legitimate exercise of its Commerce Clause power, the preemptive exercise of that power depends on the assumption that a national standard is necessary to avoid the patchwork of policies federalism creates. If so, and if States cannot be allowed to each adopt their own policies on this issue because of the need for uniformity, then it is an offense against all forty-nine other equally sovereign States to grant special regulatory privileges to one. The EPA and California cannot have it both ways. This is not to say that States and localities could not be granted exemptions to adopt policies narrowly tailored to address unique local issues. But exemptions of that nature, which Congress intended to create here, are significantly different from policies that are designed to address global issues, and which will have a massive, nationwide economic and political impact.

"Other suggestive factors" that an agency interpretation implicates the major questions doctrine, are that the policy would cause an "aggressive transformation" of a significant economic sector or would "unquestionably ha[ve] an impact on federalism." *West Virginia*, 597 U.S. at 745-46 (Gorsuch, J., concurring). As the discussion above makes clear, California's unique preemption exemption does exactly that in this case. By allowing California

and no other State to promulgate new motor vehicle emissions regulations, the EPA has given California the exclusive privilege not only to more fully exercise its own sovereignty, but also to be the only State that can propose emission rules that can have interstate reach and effect. 42 U.S.C. § 7543 (b), (c); *Chamber of Com. of U.S. v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011). Similarly, because equal State sovereignty is a cornerstone of the American federal system, *see Shelby Cnty. v. Holder*, 570 U.S. 529, 535 (2013) (ruling based on "the principle that all States enjoy equal sovereignty."), this California-only waiver scheme "unquestionably has an impact on federalism" by placing California in a special position to propose legislation adoptable across the nation, in a way that is unavailable to other States. *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 544 (2013); *West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring); 42 U.S.C. § 7543 (b)(3).

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

II. The EPA's Granting of a Preemption Waiver to California in this Case is Not Based on a Clear Statement of Authority from Congress.

Because the EPA's preemption waiver for California implicates the major questions doctrine, the agency must show that that waiver is based on a "clear congressional

statement authorizing [its] action." *See West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring). Factors that help the Court determine whether there is clear congressional authorization include the statutory context of the provision, "the age and focus of the statute," and the agency's past interpretations of the statute. *Id*. at 746-47.

"First, courts must look to the legislative provisions on which the agency seeks to rely 'with a view to their place in the overall statutory scheme.'" *Id*. (Gorsuch, J., concurring) (some internal quotation marks omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). The EPA relies on the waiver provision of the Clean Air Act (CAA). *Ohio v. EPA*, No. 22-1081, slip op. at 9 (D.C. Cir. April 9, 2024). The CAA enables the Administrator of the EPA to promulgate rules governing the emissions standards for new vehicles. 42 U.S.C. § 7521(a)(1). To gain a waiver from these rules, California must determine that its proposed regulations are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards." 42 U.S.C. § 7543(b)(1). The EPA must then deny California's waiver application if: "(A) the determination of the State is arbitrary and capricious, (B) such State does not need such State standards to meet compelling and extraordinary conditions, or (C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a)." 42 U.S.C. § 7543(b)(1)(A)-(C). These limitations to the EPA's waiver authority reflect the reasons that Congress allowed this narrow exception—to allow States to adopt alternative regulations tailored to address local environmental needs, particularly the unique geography of the Los Angeles basin that creates a smog problem unlike any other area in the country. H.R. Rep. No. 90-728, at 22 (1967).

The Energy Policy and Conservation Act (EPCA) also has relevant provisions that adjusted the function of the CAA's vehicle emissions statutory scheme. The EPCA commands "the Secretary of Transportation [to] prescribe by regulation average fuel economy standards for automobiles." 49 U.S.C. § 32902(a). The EPCA further explicitly preempts State laws "relat[ing] to fuel economy standards." 49 USCA § 32919(a). At the very least, by its plain language—the preemption provision of the EPCA, enacted four years after the waiver provision of the CAA, put a limitation on the EPA's power to grant waivers under the CAA by precluding any State regulations on average fuel economy standards. 42 U.S.C. § 7543; 49 U.S.C. § 32919. Because the California regulations at issue here relate to average fuel economy standards, the EPA was obligated to deny California's waiver. Cal. Code Regs. Tit. 13, § 1961.2(a); Cal. Code Regs. Tit. 13 § 1961.3(a)(2)(B)-(C).

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

of the preemption waiver and its use by the State here demonstrates that the EPA's grant of the waiver was not based on a clear statement from Congress.

"Third, courts may examine the agency's past interpretations of the relevant statute." *West Virginia*, 597 U.S. at 746 (Gorsuch, J., concurring) (citing *West Virginia*, 597 U.S. at 710-11). In this case, the agency's interpretation has oscillated repeatedly, suggesting that the agency itself cannot even decide what the statute clearly means. As has already been noted, after denying a California waiver application in 2008, the EPA reversed itself a year later.[14] Again in 2013, the EPA granted the waiver,[15] and again in 2019 it revoked the waiver.[16] Then in

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

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

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

2022, the EPA reinstated the previous waiver.[17] If the EPA insists the statute is clear, it must provide a justification for its own apparent inability to construe it consistently. Given that the EPA's current interpretation would create a two-tiered federalism where one State is given preeminent authority compared to the others, and because such an arrangement violates the principle of equal State sovereignty, the Court should find that there is no clear congressional authorization to do so.

The EPA's waiver of preemption for California in this case is not based on a clear statement of authority from Congress. Instead, it violates both the express purpose of the waiver system and the basic constitutional principles of federalism and coequal State sovereignty. The Court should grant certiorari, find that Petitioners have standing, and rule for Petitioners on the merits.

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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