No. 24-7

IN THE

# DIAMOND ALTERNATIVE ENERGY, LLC, ET AL., Petitioners,

V.

Т

ENVIRONME92 re6Da(T)-3A(L)-2()] TJETQq0.00000912 0 612 792 reW\* nBT/F3 12 Tf1 0 0 1 70

# TABLE OF CONTENTS

i

INTEREST OF THE AMICI CURIAE1
SUMMARY OF ARGUMENT4
ARGUMENT7
<ol> <li>The D.C. Circuit's decision imposes artificial barriers to judicial review of agency action</li></ol>
<ul> <li>A. Businesses should be able to obtain judicial review of agency action that predictably harms them.</li> </ul>

Α.

# TABLE OF AUTHORITIES

Page(s)

Cases:

Abbott Labs. v. Gardner, 387 U.S. 136 (1967)
Bennett v. Spear, 520 U.S. 154 (1997)
Bowen v. Massachusetts, 487 U.S. 879 (1988)

ii

<b>Kisor v. Wilkie</b> , 588 U.S. 558 (2019)	16
<b>Lujan v. Defs. of Wildlife</b> , 504 U.S. 555 (1992)	18
<b>Marbury v. Madison</b> , 5 U.S. (1 Cranch) 137 (1803)	16
<b>Massachusetts v. EPA</b> , 549 U.S. 497 (2007)	12
<b>Ohio v. EPA</b> , 98 F.4th 288 (D.C. Cir. 2024)	. 4
<b>Ohio v. EPA</b> , No. 2:15-cv-2467, 2022 WL 866273 (S.D. Ohio Mar. 23, 2022)	20
<b>Reno v. Cath. Soc. Servs., Inc.</b> , 509 U.S. 43 (1993)	17
<b>Richards v. Jefferson Cnty.</b> , 517 U.S. 793 (1996)	17
<b>Seila Law LLC v. CFPB</b> , 591 U.S. 197 (2020)	16
<b>Simon v. E. Ky. Welfare Rts. Org.</b> , 426 U.S. 26 (1976)	16
<b>Thole v. U.S. Bank N.A.</b> , 590 U.S. 538 (2020)	14
Statutes:	
42 U.S.C. § 7543(a)	22

42 U.S.C. § 7543(b)22
42 U.S.C. § 7543(b)(1)(B)22
42 U.S.C. § 7607(b)
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)21
Solid Waste Disposal Act § 7006(a)(1), 42 U.S.C. § 6976(a)(1)21
Regulations:
78 Fed. Reg. 2,112 (Jan. 9, 2013) 11
87 Fed. Reg. 14,332 (Mar. 14, 2022) 11, 12
Other Authorities:
Susan Low Bloch & Ruth Bader Ginsburg, Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia, 90 Geo. L.J. 549 (2002)
Cal. Air Res. Bd., Low-Emission Vehicle (LEV III) Program, https://ww2.arb.ca.gov/our- work/programs/advanced-clean-cars- program/lev-program/low-emission- vehicle-lev-iii-program

Cal. Air Res. Bd., <b>Zero-Emission Vehicle</b> <b>Program,</b> https://ww2.arb.ca.gov/our- work/programs/zero-emission-vehicle- program/about
National Archives, Federal Register & CFR Statistics, https://www.federalregister.gov/reader- aids/federal-register-statistics
Oral Argument Transcript, <b>United States v. Texas</b> , No. 22-58, 2022 WL 18033772 (U.S. Nov. 29, 2022)
Antonin Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345 (1978)
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, https://www.uscourts.gov/statistics- reports/caseload-statistics-data-tables (accessed, July 18, 2024)
Patricia M. Wald, <b>The Contribution of the</b> <b>D.C. Circuit to Administrative Law</b> , in 40 Admin. L. Rev. 507 (1988)

V

The Chamber of Commerce of the United States of A merica 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 functomers 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



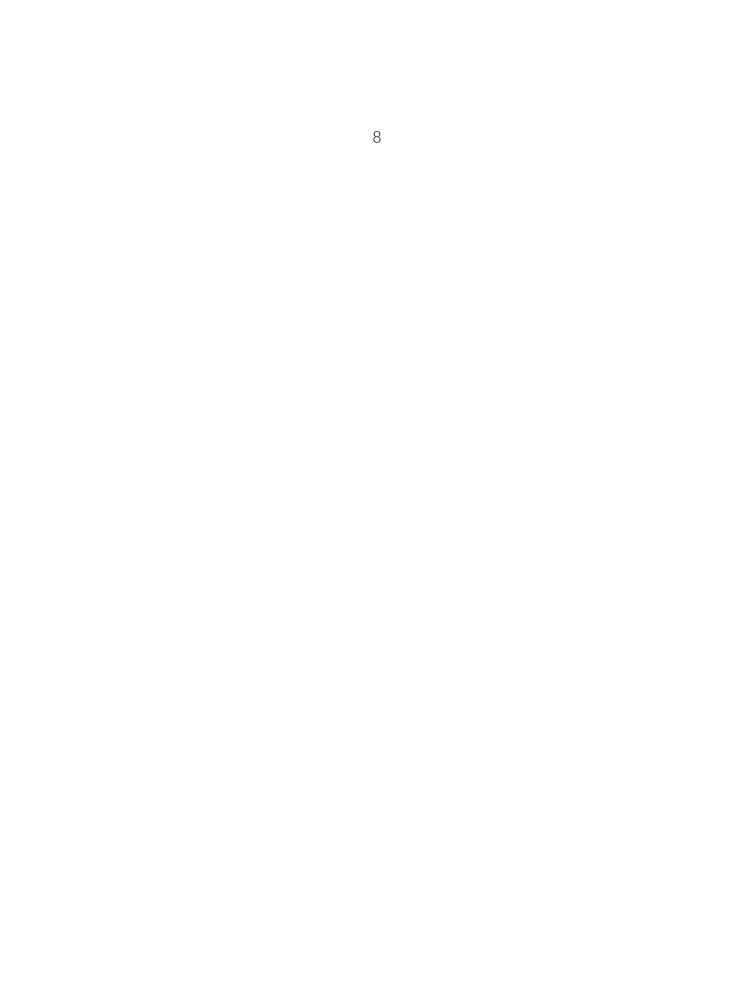
that would increase demand for petitioners' fuel products. That requirement imposes a substantial—often insurmountable—barrier to unregulated (or indirectly regulated) entities' ability to obtain judicial review of agency action that has injured them.

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 vanaugh, 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 E PA'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 envi-



The States' "theory of standing" appropriately "relie[d] ... on the **predictable effect** of Government action on nomic injury is the

Vehicle (LEV III) Program,<sup>3</sup> 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**<sup>4</sup>; **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

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 E PA'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 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 E PA's reinstatement of its waiver in March 2022, Pet. 21—at which point E PA's waiver would be in effect for several years more. If the limited time now remaining on E PA's waiver—two

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 actionencouraging 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) (judiciaes e(a)6le(a)-3()48(8(a)-3(q)7(a)-3(a)os(n)11()78()78(t)98()7x)78(o)10(v)7(e) 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).<sup>5</sup> This enormous expansion of the administrative state poses "a significant threat to individual liberty." **Seila Law LLC**, 591 U.S.



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 im-

parties may sometimes have powerful incentives to acguiesce 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

§ 7607(b) (Clean Air Act).<sup>7</sup> As a result, a greater proportion of the D.C. Circuit's dock et 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.<sup>8</sup> 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:

## CONCLUSION

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

Respectfully submitted.

JENNIFER B. DICKEY ANDREW R. VARCOE U.S. CHAMBER LITIGATION CENTER 1615 H Street, NW Washington, DC 20062 (202) 463-5337

## Counsel for the Chamber of Commerce of the United States of America

LEAH PILCONIS ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. 2300 Wilson Blvd. Suite 300 Arlington, VA 22201

### Counsel for Associated General Contractors of America, Inc.

August 7, 2024

JAIME A. SANTOS Counsel of Record WILLIAM M. JAY BENJAMIN HAYES GOODWIN PROCTER LLP 1900 N Street, NW Washington, DC 20036 jsantos@goodwinlaw.com (202) 346-4000

Counsel for Amici Curiae