No. 24-7

In the

Supreme Court of the United States

DIAMOND ALTERNATIVE ENERGY, LLC, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

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

BRIEF OF AMICI PROFESSORS HEATHER ELLIOTT AND JONATHAN NASH IN SUPPORT OF RESPONDENTS

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici curiae are law professors who have taught, researched, and written extensively about justiciability and the standing doctrine. They have a strong interest in the development of sound rules governing federal jurisdiction and Article III standing in accordance with the Constitution.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

courses. His scholarship focuses on federal courts and jurisdiction, the study of courts and judges, and environmental law. He is a prolific scholar and has published articles on standing in the Notre Dame Law Review, the Northwestern University Law Review, and the Michigan Law Review.

Amici support respondents' argument that petitioners lack standing because they failed to demonstrate that a favorable judicial order would redress their alleged injuries. *Amici* submit this brief to further discuss the redressability prong of the Article III standing test.

SUMMARY OF THE ARGUMENT

This case is about the work that a party must do to secure standing. Time after time, this Court has held plaintiffs to their burden to prove each element of standing–injury-in-fact, causation, and redressability–with the manner and degree of evidence required at the applicable stage of the litigation. That burden is especially high when, as here, the plaintiff is challenging the government's regulation of a third party. And time and time again, this Court has declined to presume the elements of standing based on facts or theories that the plaintiff did not supply.

A straightforward application of those principles resolves this case. Petitioners did not identify record evidence or provide any evidence of their own to show that the relief they sought from the court of appeals would redress their alleged injury. And even when

respondents introduced evidence that undercut petitioners' unsupported assertions about redressability, petitioners did not meaningfully respond. The court of appeals correctly concluded that petitioners had failed to satisfy their burden.

Petitioners now insist that this Court's repeated refrains about a plaintiff's burden to prove each element of standing do not embrace redressability. According to petitioners, federal judges may presume that redressability is satisfied–even absent supporting evidence and even in the face of countervailing evidence–based on assumptions about the coercive effects of regulations on third parties and predictions about third-party behavior.

Unsurprisingly, the case law does not support petitioners' proposed loopholes. In the cases petitioners cite, the plaintiffs met their burdens to establish each element of standing as required for the applicable procedural posture. And in the many cases petitioners ignore, this Court has declined to draw even common sense inferences that might have supported standing where such inferences are unsupported.

This case illustrates why the inferences of individual judges cannot substitute for real evidence of standing. Particularly in challenges to governmental regulations of third parties, injury, causation, and redressability often depend on the counterintuitive economic dynamics of the regulated market. The party seeking federal jurisdiction is best positioned to

marshal evidence to show that judicial intervention will alleviate an alleged injury.

Taken to the limits of their logic, petitioners' proposed presumptions would drastically expand the scope of Article III standing and enable litigants to enlist federal courts as monitors of the political branches. This Court should reject petitioners' arguments and maintain the longstanding rule applied by the court of appeals: that the party seeking federal jurisdiction must do the work to secure standing.

ARGUMENT

I. Standing Is Not Presumed.

The "irreducible constitutional minimum of standing contains three elements:" (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). Injury-in-fact requires that the plaintiff has suffered an injury to "a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal quotation marks omitted). Causation requires that the injury be fairly traceable to the challenged action of the defendant, rather than the independent action of some third party. *Id.* And redressability requires that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (internal quotation marks omitted).

This case is about redressability. Redressability and causation are "often flip sides of the same coin" because "[i]f a defendant's action causes an injury, enjoining the action or awarding damages for the action will typically redress that injury." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380-81 (2024). But redressability, just like injury and causation, can "pose an independent bar" to justiciability. *Id*. at 381 n.1.

A. Parties Must Do the Work to Prove Standing.

The plaintiff (or, as here, petitioners) bears the burden of establishing each element of standing, *see Clapper v. Amnesty Int'l*, 568 U.S. 398, 411-12 (2013), and the evidence required to meet that burden increases as the case proceeds. Specifically, because standing is "an indispensable part of the plaintiff's case"–rather than a "mere pleading requirement"–each element must be supported "with the manner and degree of evidence required at successive stages of the litigation." *Lujan*, 504 U.S. at 561.

At no time is standing presumed. Even at the pleading stage, the plaintiff must "allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975). It is not enough to establish injury; the plaintiff must also demonstrate causation and redressability. *See, e.g.*, *id*. at 504 (denying standing where the plaintiffs failed to allege "facts from which it reasonably could be inferred that, absent the

respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of [plaintiffs] will be removed"). At subsequent stages of the litigation, the plaintiff must "set forth . . .specific facts" by affidavit or other evidence to support these allegations. *Lujan*, 504 U.S. at 561.

The rule that standing is never presumed parallels this Court's broader refusal to presume any aspect of subject-matter jurisdiction. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) ("'[W]e presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record.'") (quoting *Renne v. Geary*, 501 U.S. 312, 316 (1991)). As Justice Scalia explained, "[i]t is to be presumed that a cause lies outside" of the "limited jurisdiction" of the federal courts. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (citing *Turner v. Bank of N. Am.*, 4 U.S. 8, 11 (1799)). "[T]he burden of establishing the contrary rests upon the party asserting jurisdiction." *Id.* (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936)).

Moreover, the mere existence of evidence that might support standing is not enough. The plaintiff must affirmatively identify the relevant facts in the record and explain how they support each element of standing. The plaintiff cannot rely on the court to connect the dots. Just last term, for example, this Court declined to infer standing based on a theory

that might have been supported by the record but depended on "links that [the plaintiff] herself has not set forth" and injuries that the plaintiff "never claimed." *Murthy v. Missouri*, 603 U.S. 43, 67 n.7 (2024). Federal judges, after all, are not "like pigs, hunting for truffles buried [in the record]." *Id.* (quoting *Gross v. Cicero*, 619 F.3d 697, 702 (7th Cir. 2010)) (alteration in *Murthy*).

B. Indirectly Regulated Parties Have an Even Higher Evidentiary Burden.

The evidentiary standard for establishing standing is particularly stringent when the plaintiff is challenging the governmental regulation of a third party. No one disputes that government actions can inflict Article III injuries on parties that are not the direct object of regulations. *See, e.g.*, *Corner Post, Inc. v. Bd. of Governors of the Fed. Reserve Syst.*, 603 U.S. 799, 833 (2024) (Kavanaugh, J., concurring) (collecting cases). This Court has often held that "[w]hen the government regulates (or under-regulates) a business, the regulation (or lack thereof) may cause downstream or upstream economic injuries to others in the chain." *FDA*, 602 U.S. at 384.

But just as often, this Court has emphasized that standing is "substantially more difficult" for these 'downstream' and 'upstream' plaintiffs to establish, *Lujan*, 504 U.S. at 562, because their injury "depends on the unfettered choices" of the directly regulated parties, which federal judges "cannot [ordinarily] presume either to control or to predict," *ASARCO, Inc. v.*

Kadish, 490 U.S. 605, 615 (1989). This inherent attenuation poses issues for all three elements of standing—but redressability, in particular. *See Murthy*, 603 U.S. at 57 ("[I]t is a bedrock principle that a federal court cannot redress 'injury that results from the independent action of some third party not before the court'") (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)); *Clapper*, 568 U.S. at 414 (refusing to "endorse standing theories that rest on speculation about the decisions of independent actors"). To demonstrate redressability and secure standing, an indirectly regulated plaintiff must actually "show that the [regulated] third-party . . . will likely react in predictable ways" such that the alleged injury would be helped by the judicial relief the plaintiff seeks. *Murthy*, 603 U.S. at 57-58.

This Court has thus found redressability lacking where plaintiffs merely "specula[ted]" about how third parties might respond to judicial intervention. *See, e.g., Linda R.S. v. Richard D*, 410 U.S. 614, 618 (1973) (denying standing because it was "speculative" whether prosecution under a statute that required parents to pay child support would result in the petitioner receiving payments from the father of her child); *Simon*, 426 U.S. at 43-44 (denying standing because it was speculative whether hospitals would offer more services to plaintiffs if the IRS restored favorable tax treatment); *Allen v. Wright*, 468 U.S. 737, 738 (1984) (denying standing because it was speculative whether private schools would change discriminatory policies in response to tax incentives).

The degree of evidence required to establish the redressability of injuries caused by third-party behavior is further increased when there is countervailing evidence in the record. As then-acting Solicitor General Roberts explained in the opening brief for the United States in *Lujan v. National Wildlife Federation*, there is "nothing 'unfair'" about a dismissal for lack of standing when the opposing party "highlighted the insufficiency" of the evidence in support of standing and the plaintiff failed to supply any "new evidentiary materials" in response. Brief for the Petitioner ("*Lujan* Pet. Br."), *Lujan v. Nat'l Wildlife Fed'n*, 493 U.S. 1042 (1990) (No. 89-640), 1990 WL 505742, at *40.

For example, this Court has found redressability lacking when plaintiffs failed to rebut evidence that the requested relief held no sway over the third party's alleged harmful conduct. *See, e.g.*, *Lujan*, 504 U.S. at 568-69 (finding that it was an "open question" whether revisions to regulations would redress the plaintiffs' alleged injuries because the government had denied that the regulations were binding over the third-party funding agencies); *Haaland v. Brackeen*, 599 U.S. 255, 293 (2023) (denying standing because the plaintiffs conceded that no federal officials implemented the challenged provision and the third-party state officials who did were not parties to the lawsuit).

Similarly, this Court has rejected standing when the plaintiffs failed to overcome evidence that the alleged injury would continue even if the plaintiffs obtained judicial relief. *Warth v. Sedlin* and *Lujan v.*

Defenders of Wildlife are instructive. The plaintiffs in *Warth* alleged that a discriminatory zoning ordinance discouraged third parties from constructing affordable housing and thus shut the plaintiffs out of the housing market. 422 U.S. at 494. They submitted evidence that, before the ordinance came into place, the third parties had attempted to build subsidized housing on two prior occasions. *Id.* at 505. Nevertheless, the Court found causation and redressability lacking because there was evidence that the economics of the housing market would not support such projects, and the plaintiffs did not allege that the builders would construct new houses at specific prices they could afford. *Id.* at 506-07. Similarly, in *Lujan*, a plurality of the Court found that redressability was not satisfied–despite allegations that reverting the challenged regulation would decrease funding for allegedly harmful foreign projects–because there was evidence that agencies "generally supply only a fraction of the funding" for the projects, and plaintiffs "produced nothing" to indicate the relevant projects would in fact actually be suspended. 504 U.S. at 571. Whereas "general allegations" would otherwise suffice, *Bennett v. Spear*, 520 U.S. 154, 168 (1997), countervailing evidence (economic realities in *Warth*, and agency funding patterns in *Lujan*) increased the plaintiffs' burdens.

II. Petitioners' Proposed Presumptions of Redressability Do Not Exist.

Petitioners invite the Court to create two loopholes in the well-established pleading and evidentiary requirements described above. First, petitioners

advance a "categorical rule" that courts may presume redressability if judicial intervention would remove the coercive effect of government action on the relevant third parties. Pet. Br. at 25-29. Second, petitioners assert that–"even in the absence of a categorical rule"–courts can presume redressability based on "common sense" inferences about the "predictable effects" of judicial action on third-party behavior. *Id*. at 31-33.

Neither loophole exists. If they did, they would eviscerate not only the heightened evidentiary burden for indirectly regulated plaintiffs established by *Simon*, *Allen*, *Lujan*, and their progeny, but also the "hard floor" requirement that all plaintiffs (even directly regulated ones) must demonstrate standing with "factual evidence" instead of "mere allegations" after the pleading stage. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009); *Murthy*, 603 U.S. at 58 (*citing* Lujan, 504 U.S. at 561).

A. There Is No Presumption of Redressability for "Coercive" Regulations.

The Court should reject petitioners' proposed "coercion" presumption. Petitioners assert that redressability is satisfied whenever a challenged governmental regulation impedes a third party from using a plaintiff's product. According to petitioners, a federal court may assume, without evidence, that striking such a regulation will "remov[e] a regulatory hurdle to the use of [plaintiff's] product" and thereby restore the plaintiff's "ability to compete in the marketplace."

Pet. Br. at 27-28. As support for this proposition, petitioners cite three decisions of this Court containing language about "coercion" and "compulsion" (*Bennett*, *Pierce*, and *CBS*) and a D.C. Circuit opinion (*Energy Futures*) evaluating biofuel producers' ability to challenge test fuel regulation aimed at automakers. *Id.* at 26-28

There are three problems with petitioners' reading of these cases. First, these cases cannot stand for the proposition that courts may presume redressability because, in each case, the plaintiff had affirmatively established standing as required for the applicable procedural posture. In *Energy Futures*, the plaintiffs provided a declaration by the directly regulated car manufacturer that it would use the plaintiffs' banned biofuel if it were available and expert testimony explaining how the challenged regulation affected manufacturer's choices. *Energy Futures Coal. v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015). In *CBS*, the plaintiff submitted affidavits stating that "it receive[d] indications that its affiliates will cancel and repudiate their contracts" in response to the challenged regulation. *CBS v. United States*, 316 U.S. 407, 414 (1942). And in *Bennett* and *Pierce*, the plaintiffs alleged that the relevant third parties had behaved consistently prior to the challenged government actions and that the third parties would revert to that behavior if the actions were reversed. *Bennett*, 520 U.S. at 170-71 (finding that the third-party agency had acted consistently "throughout the 20th century"); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 532-33 (1925)

(finding that the plaintiffs adequately alleged that the challenged law had already "caused the withdrawal from [their] schools of children who would otherwise continue"). That the plaintiffs in *CBS*, *Bennett*, and *Pierce* stood on "allegations" of third-party behavior, rather than evidence, reflects that those decisions arose from motions to dismiss made at the pleading stage, where, unlike here, there was no burden to provide evidence and no factual challenges to the allegations that supported standing. *Bennett*, 520 U.S. at 160, 171 (explaining that the plaintiffs only need to "allege" each element of standing on a motion to dismiss); *CBS*, 316 U.S. at 414 (same); *Pierce*, 268 U.S. at 529-30 (describing the procedural posture). Those cases do not, as petitioners insist, entitle litigants to a presumption of redressability later in the litigation process, or in the face of countervailing evidence.

Second, and relatedly, petitioners misinterpret the import of this Court's discussion of "coercion." Establishing that the government "coerced" the relevant third party may be necessary to prove redressability, as it was in *Bennett*—but it is not sufficient. *Bennett* itself makes this distinction clear. In analyzing causation and redressability, the *Bennett* Court first asked whether the challenged Biological Opinion issued by the Fish and Wildlife Service was functionally binding ("coercive") on the third-party agency at issue, even though the Opinion technically only served an "advisory function" under the regulations. *Bennett*, 520 U.S. at 168-69. But the mere fact that the Opinion had a "powerful coercive effect" on the agency did not establish redressability. *Id.* at 169-70. The

Court also relied on a second piece of information: the plaintiffs' allegation that the agency had "previously operated [the project implicated by the Biological Opinion] in the same manner throughout the 20th century." *Id.* at 170-71. That was because the key redressability question was not, "why did the agency initially change its policy?" (*i.e.*, was it coerced?) but rather, "what would the agency do if the Biological Opinion were set aside by the Court?" The agency's prior behavior allowed the Court to find that the plaintiffs' injury would "'likely' be redressed–*i.e.*, the [agency] will not impose such water level restrictions–if the Biological Opinion [were] set aside." *Id.* at 171.

Finally, even if allegations of coercion were sufficient to prove redressability in *Bennett*, *CBS*, and *Pierce* (they were not), that was only because the plaintiffs' burdens to allege facts in support of standing were "relatively modest." *Bennett*, 520 U.S. at 171. As discussed above, all three of these cases were decided at the motion to dismiss stage, when the evidentiary requirements to show standing are at their lowest ebb. *Id.* at 160; *CBS*, 316 U.S. at 414; *Pierce*, 268 U.S. at 529-30. Thus, they do not (and cannot) contradict this Court's repeated requirement that plaintiffs "set forth by affidavit or other evidence 'specific facts'" to show standing after the pleading stage. *Lujan*, 504 U.S. at 561. Indeed, the *Bennett* Court explicitly recognized that the plaintiffs' allegations might be insufficient unless supported by specific facts as the case went on. *Bennett*, 520 U.S. at 168 (citing *Lujan*, 504 U.S. at 561).

B. Judges Cannot Presume Redressability Based on "Predictable Effects."

Petitioners' gloss on the "predictable effects" test fares no better. Petitioners claim that courts may presume redressability based on "common sense inferences" about "basic economics" and third-party behavior. But, again, there are three fundamental flaws with this analysis.

First, petitioners' "common sense" theory is not supported by the cases they cite. In both *Department of Commerce* and *Massachusetts v. EPA*, the plaintiffs adduced significant evidence to prove that a favorable judicial decision would remedy their alleged injuries. The district court in *Department of Commerce* relied on the "overwhelming evidence" presented at trial – including multiple "comprehensive" studies, expert witness testimony, and memoranda from the Census Bureau–that residents would be less likely to respond to the census if there were a citizenship question, thus leading to undercounting of the states' populations and harm to the states, where funding, based on population, would be reduced by undercounting. *New York v. United States Dep't of Com.*, 351 F. Supp. 3d 502, 578-581, 620-21 (S.D.N.Y. 2019). By the time this Court held that those findings were not clearly erroneous, there was "no dispute that a ruling in favor of [the states] would redress that harm." *Dep't of Com. v. New York*, 588 U.S. 752, 767 (2019). If anything, the result in *Department of Commerce* defied common sense because it depended on a prediction that residents would likely break the law by not

answering the census based on fears that the government would "itself break the law by using noncitizens' answers against them for law enforcement purposes." *Id.* at 767-68. Similarly, the plaintiff states in *Massachusetts v. EPA* submitted "unchallenged" affidavits tying their alleged injuries to global warming, as well as expert testimony that reductions in emissions would "delay and moderate many of the adverse impacts of global warming." 549 U.S. 497, 515-16, 522 (2007).

Second, petitioners ignore the cases where this Court declined to rely on common sense inferences to find standing. One could say it is "basic economics," for example, that businesses will endeavor to pay fewer taxes, or that "when something becomes more expensive, less of it will be purchased." *Allen*, 468 U.S. at 788 (J. Stevens, dissenting). But the Court in *Allen* refused to "speculate" about whether racially discriminatory private schools would change their policies if denied tax-exempt status by the IRS, or whether private school parents would transfer their children in response to either policy changes or increased tuition due to schools' higher tax liability. *Id.* at 759; *see also id.* at 788 (J. Stevens, dissenting) (pointing out that it was "elementary" that discriminatory schools will need to raise prices if they lose IRS grants, leading to less of their services being purchased, and thus greater integration). Same with *Simon*, where the Court refused to speculate about how third-party hospitals would respond to favorable tax treatment. 426 U.S. at 41-43. Petitioners have pointed to no case where "common sense" inferences

were sufficient to prove redressability, and *Allen* and *Simon* stand for the opposite proposition. Such presumptions "taken to the limits of [their] logic" "could transfigure established standing doctrine, root and branch." *Lujan* Pet. Br., 493 U.S. at *33 n.24.

Finally, petitioners offer no argument that predictions about third-party behavior could govern here, where there is countervailing evidence of third-party behavior in the record. Indeed, petitioners' own case–*Department of Commerce*–demonstrates that evidence trumps intuition. The government in that case appealed to the Court's "common sense" in resisting standing, arguing that the plaintiffs' theory depended on the improbable event of "third parties choosing to violate their legal duty to respond to the census." *Dep't of Com.*, 588 U.S. at 767-68. But the Court held that the evidence supporting redressability ultimately outweighed any rule-following intuition. *Id.*

C. Petitioners' Proposed Presumptions Would Undermine the Purposes of Standing.

Petitioners insist that federal judges can ignore real-world complexities and intuit standing based on their own assumptions about coercion, the predictable effects of regulation, and basic economics. That is both legally unsupported and undemocratic. Put simply, "[t]he federal courts are not commissioned do to that much work for the parties." *Lujan* Pet. Br., 493 U.S. at *32. Rather, the federal courts are tasked with resolving cases and controversies "in a concrete

factual context conducive to a realistic appreciation of the consequences of judicial action." *FDA*, 602 U.S. at 379. That is why the burden of establishing each element of standing falls on "[t]he party invoking federal jurisdiction." *Lujan*, 504 U.S. at 561.

This Court has repeatedly held that standing is fundamental to the separation of powers and the "distinct constitutional role" of the federal courts. *Lujan*, 504 U.S. at 576. The tripartite standing test was developed to preserve the "proper–and properly limited–role of [federal] courts in a democratic society." *Warth*, 422 U.S. at 498. Following an era of expansive interpretations of standing, the Court, in the 1970s, held litigants to their burden to demonstrate that a favorable judicial ruling was likely to alleviate the alleged harm. *See, e.g.*, *Linda R.S.*, 410 U.S. at 618 (denying standing because it was "speculative" whether the requested relief would redress the claimed injury); *Warth*, 422 U.S. at 505-06 (same); *Simon*, 426 U.S. at 41 (same).

These cases crystallized the requirement that a plaintiff seeking to invoke federal jurisdiction must show that it would likely "benefit in a tangible way from the court's intervention." *Warth*, 422 U.S. at 508. Otherwise, there is no "real need to exercise the power of judicial review." *Id.* That is because an affirmative showing that "an acceptable Article III remedy" will "redress a cognizable Article III injury" assures that a federal court has an actual case or controversy to decide. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). The redressability

requirement thereby "guards against" threats "to grant unelected judges a general authority to conduct oversight of decisions of the elected branches of government." *California v. Texas*, 593 U.S. 659, 673 (2021); s*ee also Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 80 (2019) (Gorsuch, J., concurring) ("If individuals and groups could invoke the authority of a federal court to forbid what they dislike for no more reason than they dislike it, we would risk exceeding the judiciary's limited constitutional mandate and infringing on powers committed to the other branches of government").

Redressability, like the other requirements of standing, thus "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 568 U.S. at 508. Redressability is not, as petitioners would have it, a "simply technical" matter that judges may presume. *California*, 593 U.S. at 673.

D. Judges Cannot, and Should Not, Intuit Redressability on Their Own.

Plaintiffs must do the work to establish the elements of standing so that federal courts can stay within their "properly limited" role. *Warth*, 422 U.S. at 498. The inferences and assumptions that an individual judge might draw about likely third-party behavior and economic effects cannot and should not substitute for real evidence.

As this case and many others demonstrate, markets do not always behave according to basic economic principles. Instead, redressability can depend on the complex–and often unintuitive–economic dynamics of a regulated market. In *Sierra Club v. U.S. Department of Energy*, for example, a petitioner could not rely on the "'basic economic principles' of supply and demand" to secure standing to challenge the removal of a restriction on exports of liquified natural gas ("LNG"). 107 F.4th 1012, 1017 (D.C. Cir. 2024) (Katsas, J.). The petitioner claimed that the removal of the restriction caused increased demand for LNG and thus increased shipping traffic that would harm the aesthetic and recreational interests of a Sierra Club member who lived near the export facility. *Id.* But the court of appeals explained that "while increased demand generally causes increased output, it may cause only higher prices if the relevant supply curves are price inelastic," and "the supply curves for exported LNG are inelastic to the extent that exporters may supply only amounts previously approved by the government." *Id.* In other words, "an increase in demand might cause prices but not output to increase," so the petitioner had not established standing. *Id.*

Similarly, in *Utility Workers Union of America Local 464 v. FERC*, the D.C. Circuit declined to presume standing based on "conclusory assertions" that the non-participation of one large supplier in the electricity market "would exert some upward pull on auction prices." 896 F.3d 573, 578-79 (D.C. Cir. 2018). Although that conclusion might have seemed "intuitive,

given the laws of supply and demand," the theory was undercut by the economics of "New England's forward capacity markets" which have "a cycle of annual auctions conducted three years before generators assume the resulting obligations" that "are spaced so as to permit the market to account and correct for the events of the previous auction"—including the non-participation of a large supplier. *Id.* at 579.

III. The Doctrine's Application to This Case Is Straightforward.

The Court need look no further than the familiar *Lujan v. Defenders of Wildlife* decision to resolve this case. In *Lujan*, environmentalists challenged the Secretary of the Interior's funding of foreign construction projects. However, the record established that the relevant American agencies provided just ten percent of the total funding for the projects. A plurality of the Court found that the plaintiffs thus failed to demonstrate redressability because they "produced nothing to indicate" that the foreign construction projects would "either be suspended, or do less harm to listed species," if a court "eliminated" the fraction of funding from agency activity. *Id.* at 571.

The same reasoning applies here. The court of appeals did not conclude (nor did it have to conclude) that automakers would make the same number of low-emission or zero-emission vehicles absent the reinstatement of the 2022 waiver. *Ohio v. EPA*, 98 F.4th 288, 302-03 (D.C. Cir. 2024) (finding that "[t]he record evidence provides no basis for us to conclude

that manufacturers would, in fact, change course" absent the waiver). After respondents demonstrated the existence of facts that posed an impediment to redressability, *see id*. at 304-05, it was incumbent on petitioners to produce evidence to indicate that the "nonagency activity" (i.e., the manufacturing decisions of automakers) would be "altered or affected by the agency activity they seek to achieve," *Lujan*, 504 U.S. at 571. Petitioners did not do that. They did not even allege how automakers would respond to elimination of the 2022 reinstatement of the waiver, much less submit evidence to support their theory of redressability. *Ohio*, 98 F.4th at 301-02.

It was only when the court of appeals raised the question of redressability during oral argument that petitioners attempted to respond and submit evidence of standing. *Id*. at 305. The court of appeals was well within its discretion to reject that delayed submission. *Id*. at 306.

Contrary to petitioners' argument, Pet. Br. at 19, the court of appeals' decision in no way constrains acceptable evidence of standing to affidavits from the directly regulated party. As *Massachusetts v. EPA*, *Department of Commerce*, *Energy Futures*, and countless other cases demonstrate, petitioners could have obtained expert testimony to support their theory of redressability. Petitioners could have marshalled public sources of information, such as industry news reports and public disclosures by the directly regulated parties in securities and court filings, to show how automakers were likely to respond to the removal of the

challenged waiver. Petitioners could have looked to the agency's own documents because regulatory actions frequently include a contemporaneous analysis of anticipated costs, including "any adverse effects on the efficient functioning of the economy [and] private markets." Exec. Order No. 12866, 58 Fed. Reg. 51, 741 (Oct. 4, 1993). Instead, petitioners did nothing.

Petitioners have not explained why they abdicated their well-established burden to adduce evidence of standing. It might be that, when the time came (and passed) to produce evidence of redressability, petitioners realized that they had slept on their rights. There is no dispute that the same waiver was in place from 2013 to 2019. *Ohio*, 98 F.4th at 297-98. Had petitioners filed their lawsuit in 2013, before the low emission and zero emission vehicle market took off, they may well have been able to demonstrate that elimination of the waiver could redress their alleged injury. But by the time petitioners filed suit in 2022, the market dynamics had changed dramatically.

That it may have been impossible for petitioners to show redressability in the 2022 market conditions is not a reason to craft new presumptions of standing. On the contrary, it confirms that the D.C. Circuit was correct in rejecting petitioners' argument. This Court has long rebuffed such "if not us, who?" arguments in favor of expansions to the standing doctrine. *FDA*, 602 U.S. at 396. If petitioners could not supply evidence of injury-in-fact, causation, and redressability when they filed suit in 2022, then their dispute was properly "left to the political and democratic process."

Id.; *see also Warth*, 422 U.S. at 508 n.18 (holding that "dissatisfied" citizens who lack standing "need not overlook the availability of the normal democratic process").

CONCLUSION

This ought to be an easy case. This Court has reiterated the requirements of standing and the work a plaintiff must do to secure it. Petitioners did not do that work. The Court should accordingly reject petitioners' proposed presumptions and maintain the rule "[t]he party invoking federal jurisdiction bears the burden of establishing" injury-in-fact, causation, and redressability "with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561.

Respectfully submitted,

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