

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DIAMOND ALTERNATIVE ENERGY, LLC, ET AL.,)

Petitioners,)

v.) No. 24-7

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,)

Respondents.)
- - - - -

Pages: 1 through 71

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3 DIAMOND ALTERNATIVE ENERGY, LLC, ET AL.,)
4 Petitioners,)
5 v.) No. 24-7
6 ENVIRONMENTAL PROTECTION AGENCY, ET AL.,)
7 Respondents.)
8 - - - - -
9
10 Washington, D.C.
11 Wednesday, April 23, 2025
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.
16
17 APPEARANCES:
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19 of the Petitioners.
20 EDWIN S. KNEEDLER, Deputy Solicitor General,
21 Department of Justice, Washington, D.C.; on behalf
22 of the Federal Respondents.
23 JOSHUA A. KLEIN, Deputy Solicitor General, Oakland,
24 California; on behalf of the State Respondents.
25

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument this morning in Case 24-7, Diamond
5 Alternative Energy versus the Environmental
6 Protection Agency.

7 Mr. Wall.

8 ORAL ARGUMENT OF JEFFREY B. WALL

9 ON BEHALF OF THE PETITIONERS

10 MR. WALL: Mr. Chief Justice, and may
11 it please the Court:

12 The EPA waiver here allows California
13 to limit the number of vehicles that run on
14 liquid fuel. Petitioners make and sell liquid
15 fuel, so vacating the -- waiver would redress
16 their injuries in two ways.

17 First, as Justice Kavanaugh explained
18 in Energy Future Coalition, part of the injury
19 in a case like this one is the denial even to
20 compete in the marketplace. Vacating the waiver
21 redresses that injury perfectly. Indeed, it's
22 the only thing that can.

23 Second, even setting aside that clear
24 rule, this Court recognized in Department of
25 Commerce that litigants may rely on common-sense

1 inferences about third-party behavior. It
2 doesn't take much common sense to figure out
3 that if California limits the number of cars
4 that can run on gas, automakers will make fewer
5 cars that run on gas.

6 Remember that we're here because
7 California asked for and EPA granted a waiver
8 because California said it needs its own
9 standards. California in -- even intervened by
10 telling the court below that its standards are
11 likely to reduce fuel consumption. The
12 common-sense inference is that this waiver
13 matters in the real world, not that it is
14 completely meaningless.

15 But, if we needed hard evidence, we
16 had plenty of it, five kinds: one, our
17 declarations showing that California's standards
18 have historically harmed us; two, California's
19 and EPA's actions and statements in 2021 and
20 2022 saying that their standards are likely to
21 reduce fuel consumption; three, California's two
22 expert declarations from CARB officials in 2022
23 saying that their standards are likely to
24 decrease fuel consumption; four, the intervening
25 automakers' admission that, without the waiver,

1 some of their competitors were likely to back
2 away from electrification; and, fifth, Toyota's
3 comment and public reporting also indicating
4 that some automakers would back away from
5 electrification without the waiver. Taken
6 together, that is more than enough evidence to
7 establish redressability.

8 I welcome the Court's questions.

9 JUSTICE THOMAS: Mr. Wall, taking a
10 step away -- back from the evidence you just
11 provided or the points you just made, what is
12 your rule? How would you articulate --
13 articulate your categorical rule?

14 MR. WALL: Our rule is that when the
15 government denies a party the ability to compete
16 in a marketplace the -- and the party sues to
17 have that market restriction lifted, there is
18 redressability because the party is asking for
19 the thing to be taken away that's causing its
20 injury.

21 JUSTICE THOMAS: Is there some degree
22 of hindrance to that party that has to be shown
23 to apply your rule?

24 MR. WALL: I don't think so because
25 we're not talking about just sort of some

1 indirect impediment. I'm talking about a market
2 restriction that directly tilts or forecloses
3 the playing field. It says you can't sell your
4 product, your good, your service into a
5 particular market either wholly or, here,
6 partially, up to some certain cap.

7 JUSTICE THOMAS: So how would you show
8 that?

9 MR. WALL: Well, what I'd say is
10 it's -- it's -- you show it by the nature of the
11 injury. So just like in a competitor standing
12 case, like in National Credit Union, if you come
13 in and you say the government is
14 under-regulating one of my competitors, right,
15 this Court said that's competitor standing.
16 Government agrees with that. That's Footnote 2
17 of their brief.

18 This is the same thing. It's just
19 that instead of picking winning and -- winners
20 and losers among particular market participants,
21 you're picking winners and losers as among
22 markets. So, if you come in and you say I have
23 something that yesterday I could freely sell and
24 today I cannot freely sell it as a result of a
25 government regulation that directly forecloses

1 me, you have standing on our view.

2 JUSTICE JACKSON: So, Mr. Wall, how --
3 how is that consistent with the Court's holding
4 in Warth versus Seldin?

5 I know you talk about it briefly in
6 one of your footnotes, but that seems to me to
7 map on exactly with what you're now saying.
8 There was an exclusionary zoning restriction
9 that prevented home builders and others from
10 building in a particular area, and the Court
11 found that that was not sufficient for
12 redressability.

13 MR. WALL: So the Court looked at it
14 more as a sort of predictable effects-type case
15 and said, well, we actually think it's very
16 speculative whether you could get into the
17 neighborhood at all. And so the Court saw it,
18 that case, through a very different lens, and,
19 of course, nobody was there on --

20 JUSTICE JACKSON: But I guess that
21 I -- I -- I guess I'm questioning whether or not
22 it really is a different lens. I mean, the
23 Court said -- if you're right that the rule is
24 just a common sense -- you don't really have to
25 have evidence, we just sort of infer based on

1 the relationships in the marketplace and
2 whatnot, that's exactly what was happening
3 there. The home builders said we aren't going
4 to be able to build our houses, our
5 single-family homes, in this zoned-off area.

6 And so we said, I think, when you look
7 at the case, that there's got to be evidence
8 that there actually would be home building in
9 this area absent that regulation. And I think
10 that's the same thing as saying here that you
11 can't just rely on the fact that we would think
12 that lifting this restriction would allow for
13 more cars to be built. There actually has to be
14 evidence that there would be more cars built,
15 you know, fuel-ingesting cars, in this
16 environment.

17 MR. WALL: So, Justice Jackson, what
18 I'd say is the Court has sort of two lines of
19 cases, and that's why we've made two arguments,
20 because we think we win under both lines.

21 You have some sets of cases, like the
22 equal protection cases or the competitor
23 standing cases, where you say that the nature of
24 the injury gives you causation or
25 redressability. It's the ability not -- it's --

1 you're denied the ability to compete in the
2 marketplace. You're discriminated against no
3 matter what would happen in the marketplace
4 itself.

5 And then you have certain lines of
6 cases, like Department of Commerce or Warth
7 v. Seldin, where you say, look, we're going to
8 look at what the likely predictable effects are
9 in the market and if you show --

10 JUSTICE JACKSON: And what
11 distinguishes the two? Is it that we have
12 corporations in one, that we have -- like,
13 what -- how would we know which line we're
14 supposed to apply in this situation?

15 MR. WALL: I think it depends on
16 whether the Court believes that the nature of
17 the injury gives you causation and --
18 redressability. So, as I understand the
19 competitor standing cases, and I think they're
20 correctly decided, if I'm in a market and I
21 allege or show that I am competing with, you
22 know, Mr. Klein in a market, and the government
23 comes in and tilts the playing field toward
24 Mr. Klein, I have standing because, by
25 definition, the nature of the injury is that the

1 government tilted the playing field and I have
2 redressability because I want the playing field
3 to be level again. That's what I'm asking for.

4 And we see our case as exactly the
5 same. We're -- and -- and -- and --- and I
6 think the D.C. Circuit got this exactly right
7 when --

8 JUSTICE SOTOMAYOR: I -- I'm sorry,
9 though, because I think what Justice Jackson may
10 be getting to is you want us to announce an
11 absolutist rule, which, in the standing area, is
12 very difficult to do because it really does rely
13 so much on facts.

14 You've marshaled many facts to support
15 your standing. In this case, the D.C. Circuit
16 thought erroneously -- it's been conceded by the
17 government -- that this regulation was expire in
18 2025. So let's assume you came in a month
19 before the expiration and that the rule was
20 never going to be renewed, okay? Why would you
21 have standing?

22 Under your rule, merely because the --
23 the -- the barrier exists, you have standing.
24 But what the court here said is you might have
25 standing, but you can't -- don't have

1 redressability because the manufacturers can't
2 change their production right now. And this
3 rule expires. They made a mistake on that.
4 It's conceded.

5 So isn't the issue whether the -- the
6 confluence of all the facts you put forth show
7 that this is more like the D.C. Circuit case
8 that Justice Kavanaugh relied upon or more like
9 the Chamber of Commerce versus EPA case, where
10 he said that the affidavits back and forth
11 showed that that particular set of claimants
12 wouldn't really be successful in selling their
13 products?

14 So why isn't it -- it always a factual
15 dispute?

16 MR. WALL: So here's the importance of
17 the rule, Justice Sotomayor. Here's why you
18 need one, and here's why I think the D.C.
19 Circuit was right to adopt one in Energy Future
20 Coalition.

21 The importance of the rule is that
22 absent the rule, if you walk in and you put a
23 market restriction on at a time when you think
24 the restriction doesn't matter or at least you
25 can debate whether it matters, then the other

1 side will always say: A-ha, you don't have
2 predictable effects. You can't satisfy
3 Department of Commerce. You can't satisfy
4 Warth.

5 And, here, it's even worse than that.
6 There is a 60-day time limit.

7 JUSTICE SOTOMAYOR: What you want then
8 is an advisory opinion. And at a certain point,
9 we move from giving -- giving you relief or not,
10 but that's not this case.

11 MR. WALL: Justice Sotomayor, I want
12 to be very clear.

13 JUSTICE SOTOMAYOR: Why would we
14 announce a rule that's not pertinent to this
15 case?

16 MR. WALL: I do not want an advisory
17 opinion. They now acknowledge --

18 JUSTICE SOTOMAYOR: So they now
19 acknowledge that they were wrong. They'll have
20 to answer as to why they're even defending the
21 rule if it has no effect, which is my logical
22 question. If it doesn't affect the market, why
23 have the rule at all? But we can go -- let them
24 answer that.

25 MR. WALL: I -- I -- I look forward to

1 hearing them do it. But I just -- I want to say
2 quickly, in this case, everybody now
3 acknowledges the greenhouse-gas standards
4 persist into the future indefinitely if nothing
5 changes from now to the end of time.

6 Absent a rule, they can come in and
7 say: The market is exceeding our standards
8 right now. You can't show that any automaker
9 will do anything. There's a 60-day time bar in
10 the statute. If we can't sue when we sued,
11 we're out of luck forever.

12 The advantage of our rule is that it
13 matches up with the injury perfectly, and it
14 makes sure that in the future, if the price of
15 electricity goes up or the availability of rare
16 earth minerals for batteries changes, we can
17 affect the market.

18 JUSTICE SOTOMAYOR: Let's assume that
19 they had affidavits from every single -- car
20 manufacturer. This is like Chamber of Commerce
21 versus EPA. Every car manufacturer, every
22 single one of them, says: Can't change it,
23 won't change it.

24 Do you still win? Can't change it,
25 won't change it. You're the fuel people, but

1 it's not going to affect you because they're
2 gonna follow it no matter what.

3 MR. WALL: Yes, we do. The evidence
4 here is actually to the contrary, pages 99 to
5 211.

6 JUSTICE SOTOMAYOR: Well, but that's
7 the point.

8 MR. WALL: But I -- I take the point.
9 Yes, because the question isn't what are
10 automakers doing today when we get locked out of
11 the market. It's, yes, we have a pocketbook
12 injury, we believe, but we have an injury that
13 occurs even earlier than that.

14 We are denied the ability to go out
15 and compete in the marketplace, to convince
16 automakers that they shouldn't be making as many
17 electric vehicles. They should be making more
18 vehicles that run on liquid fuel. And the
19 government has foreclosed us from doing that.

20 And it's no different than the
21 examples we give in our brief.

22 JUSTICE BARRETT: What if, in Justice
23 Sotomayor's example, the manufacturers stand
24 with, you know, the California regulators and
25 with EPA on the very first day the regulation is

1 rolled out and say: We support this. You know,
2 we want a greener earth, we want to prevent
3 climate change, and this is going to be cheaper
4 for our business anyway.

5 So there's no question of a time lag.
6 You know, they're just fully onboard and so kind
7 of as Justice Sotomayor's hypothetical was
8 saying, but I want to imagine it happens on day
9 one.

10 MR. WALL: I --

11 JUSTICE BARRETT: Why should you have
12 standing and red -- redressability at that
13 point?

14 MR. WALL: Because it seems to me,
15 Justice Barrett -- let's assume just for a
16 moment that -- that it's unlawful but that the
17 entire industry buys in. They cut a deal with
18 California. They accept the standards, they
19 want to abide by them, and they all agree and
20 they want to lock in the demand and force
21 consumers that way because they think it'll be
22 profitable for the auto-making industry.

23 It -- we still are harmed in a direct
24 way. The government has tilted the playing
25 field and foreclosed us from being able to

1 freely sell our product. And we -- we ought to
2 be able to make our arguments on the merits and
3 get our day in court regardless of whether
4 the -- the directly regulated industry cuts a
5 deal or not.

6 We have an injury. We have been
7 locked out of a marketplace. That injures us
8 financially. It's caused by the regulation. I
9 don't take anybody to be disputing that.

10 So the only question is
11 redressability, and that should be easy in a
12 case like this one. If everybody grants that --
13 that the regulation is causing your injury,
14 vacating the regulation or California's
15 standards that -- that they're allowed to adopt
16 redresses the injury.

17 JUSTICE ALITO: Well, in light of all
18 that, why do you think you need a special rule?
19 Why -- why isn't them -- the -- in the situation
20 that's present here and in others like it,
21 there's a strong inference that this is likely
22 to have an effect.

23 Now maybe there could be situations in
24 which, by the submission of affidavits like the
25 ones that have been discussed or statements by

1 all the carmakers, it could be shown that, no,
2 contrary to what one would normally think, this
3 is not going to have any effect, in which case
4 you -- you might lose on standing. But I'm not
5 sure why you think you need a special rule in
6 this situation.

7 MR. WALL: Justice Alito, I don't want
8 to fight it too hard. If the Court says: Look,
9 you had far more here than we had before us in
10 Department of Commerce, you can have a
11 common-sense inference, it's predictable under
12 Department of Commerce --

13 JUSTICE ALITO: There are many
14 situations in which standing depends on a
15 probabilistic inquiry, and those are very
16 fact-specific. So, you know, you'd ask: What
17 is the -- what is the probability in a
18 particular situation?

19 When someone says I'm threatened
20 with -- you know, I expect that this will harm
21 me, we assess the -- the -- the -- the -- the
22 degree of the risk.

23 MR. WALL: So I'll take -- I'll say
24 two things, Justice Alito.

25 First, what I'm worried about is that

1 we've been ping-ponged around for -- going on 15
2 years, trying to get a determination on the
3 merits. And if we get sent back for a
4 predictable effects analysis or all the rest in
5 this and future cases, I worry about where we
6 end up.

7 But, second, and -- and I -- more
8 logically doctrinally, in the competitor
9 standing cases, the Court doesn't say: Well, if
10 we leveled the playing field, would the
11 customers that you seek to compete for fairly
12 come to you rather than the other guy?

13 And I think that's the wrong -- I
14 think that would be the wrong way to look at
15 those cases.

16 Your injury isn't just what happens in
17 the marketplace when you are allowed to compete
18 and you think some dollars are taken out of your
19 pocket. You don't really know because the point
20 is you've been locked out of the marketplace.

21 And that's why I think the rule is
22 important. I think it's -- it -- the same logic
23 here as in the competitor standing cases. And
24 it's not like the Court doesn't do that in other
25 areas.

1 California is here saying: If we are
2 prevented from enforcing our standards -- and
3 this Court said it many times -- that is injury,
4 indeed, irreparable injury, to the state.
5 Without knowing what it will do under the
6 statutes, whether it will work, whether we'll
7 get a penalty or a conviction, the Court often
8 says: If the sovereign doesn't get to enforce
9 its statute, that is injury, and the -- state's
10 got standing to come in regardless.

11 JUSTICE ALITO: I would think that
12 you -- you would have injury in fact under our
13 cases if the effect of this is to cause your
14 clients to be unable to sell one car. Wouldn't
15 that be correct?

16 MR. WALL: Well, sell one gallon of
17 liquid fuel. Yes.

18 JUSTICE ALITO: I'm sorry, one gallon
19 of liquid fuel.

20 MR. WALL: Yes, that's true.

21 JUSTICE ALITO: So that doesn't seem
22 like very much to have to show.

23 MR. WALL: Justice Alito, I agree, but
24 that's what makes the case so odd.

25 The court of appeals said: All right,

1 we're not going to contest that there's injury
2 in fact and causation. We're not gonna say
3 there is, but we're not gonna say there isn't.
4 We're going to assume that you've got injury in
5 fact that you sell one gallon less of gasoline,
6 and we're going to assume it's caused by the
7 regulation. But we think you haven't shown
8 redressability.

9 JUSTICE KAGAN: But I think that the
10 reason for that was a combination of two things.

11 One was what Justice Sotomayor said,
12 that they were -- that they were mistaken about
13 the end date of the regulation. The other, you
14 know, honestly, was that you didn't put on much
15 evidence.

16 You know, and here, too, your sort of
17 common-sense inference, it is a common-sense
18 inference, but if it's such a common-sense
19 inference, it should be easy to put on evidence.
20 And -- and, here, there wasn't a lot of it.

21 MR. WALL: So, Justice Kagan, I don't
22 think that's fair. We had an on-point decision
23 from the D.C. Circuit dealing with this very
24 industry, fuel producers. We had our own
25 declarations. We had California's expert

1 declarations filed after we brought this case.

2 So, when California intervened, if you
3 look at pages 110 and 115 of the JA, California
4 put in declarations from two CARB experts, and
5 in both of them, their own experts -- these are
6 not statements in the brief --

7 JUSTICE KAGAN: I -- I agree with you.
8 I think it would be easy to read those
9 declarations back to California and say: What
10 do you make of those? But -- but your side
11 didn't really make that argument.

12 MR. WALL: Well, we pointed to our
13 declarations. We pointed to California's
14 statement in 2021, at page 66 of the JA, saying
15 these standards are critical -- their word -- to
16 reducing fuel consumption. We pointed to EPA's
17 statements in adopting the waiver saying they
18 need their own standards.

19 We pointed to the intervenor
20 automakers' admission saying: Hey, we've
21 invested a lot in electrification. If you don't
22 make them meet the same standard, we might be at
23 a "competitive disadvantage."

24 And I guess my point back, Justice
25 Kagan, is, look, if --

1 JUSTICE KAGAN: I think my point to
2 you is, surely, if that's all in the record, you
3 deserve to go forward.

4 MR. WALL: Oh, I agree. I -- I --
5 I -- I agree.

6 JUSTICE JACKSON: So then why do we
7 need the rule? Why do we need a bright-line
8 rule if you satisfy the regular evidence
9 standard?

10 MR. WALL: First, because I think it's
11 logically the correct inquiry. It's not what
12 happens in the market. It is, as Justice
13 Kavanaugh said in Energy Future Coalition, your
14 inability to get into the marketplace in the
15 first instance. That's a key part of the
16 injury, and not adopting the rule misses that
17 part. But even --

18 JUSTICE JACKSON: But I thought
19 your -- I thought the point of the rule was that
20 you didn't want to have to provide the evidence,
21 that -- that -- that you say: Yes, we have the
22 evidence, but we don't need it because, under
23 this rule that I'd like for you to adopt, we
24 have redressability.

25 MR. WALL: I don't think that evidence

1 is relevant for the same reason it's not in
2 competitor standing cases. But, if the Court
3 disagrees on our rule, I agree, we should win on
4 a standard Department of Commerce, what is the
5 likely effect here.

6 And we put in far more evidence than
7 you would typically see in a case like this.
8 And with all respect to the court below, we got
9 dinged not because we didn't do enough. Any
10 lawyer looking at what we had done at the time
11 would have said we had redressability. We got
12 dinged, in fairness, because the court below
13 moved the goalposts. We had Energy Future
14 Coalition and plenty of evidence to satisfy it,
15 and the court below, without citing any --

16 JUSTICE SOTOMAYOR: That is really
17 unfair, Mr. Wall. They were under a mistaken
18 understanding, partly because of the submissions
19 in this case where you were just complaining in
20 your papers about this rule being in effect only
21 until 2025.

22 MR. WALL: So, Justice Sotomayor, that
23 is part of the mistake that the court of appeals
24 made, but its error was more fundamental. When
25 it looked at standing, it should have said: We

1 have Energy Future Coalition. It tells us that
2 we have redressability in the same industry,
3 fuel producers, if the regulation locks them out
4 of the marketplace.

5 It didn't say that. It turned to the
6 evidence, and then, rather than on the evidence
7 saying, well, this is more than enough to
8 satisfy cases like Department of Commerce or
9 Alliance of Hippocratic Medicine, it -- it said,
10 ah, not enough here.

11 And what that really amounts to at the
12 end of the day is we couldn't get an affidavit
13 from an automaker who didn't intervene. They
14 sat on the sidelines. They didn't want to
15 participate. And because we couldn't get them
16 to stick their hand up, we couldn't -- we didn't
17 have someone saying here is how I will change my
18 fleet absent the waiver. And that's what we
19 didn't have.

20 And if that's what it's really going
21 to take for an indirectly regulated party to get
22 into court, it's going to be far more difficult
23 to challenge governmental action, and these
24 cases are going to become more expensive and,
25 frankly, arbitrary, because it will turn on

1 whether the directly regulated industry likes
2 the rule or they don't. And as far as my
3 clients are concerned, that shouldn't matter one
4 whit.

5 JUSTICE BARRETT: Why will you be
6 ping-ponged around? It -- you know, you want
7 the categorical rule. Imagine that I am not
8 sympathetic to the categorical rule but think
9 that your clients could demonstrate standing
10 based on the common-sense inferences.

11 You said that you've been pinged --
12 ping-ponged around for 15 years and so that's
13 why you want the categorical -- categorical
14 rule. But, if we just said you had standing,
15 how can you be ping-ponged around?

16 MR. WALL: Oh, if -- if this Court
17 declares that there's a common-sense inference
18 and applies Department of Commerce and says they
19 met it here, you are right, we should be able
20 then to get a determination on the merits.
21 And -- and, as I say, I think the rule is right,
22 but on either of those views, as long as the
23 Court says what we say about Department of
24 Commerce, you are right, we would be able to get
25 a determination on the merits, which we've been

1 trying to do for a very long time.

2 JUSTICE BARRETT: So why do you care
3 as between the -- on that view of the world, why
4 would you care, other than you want to go for
5 the big win --

6 MR. WALL: It -- it's --

7 JUSTICE BARRETT: -- as between them?

8 MR. WALL: The win is the same either
9 way. I think the rule is right. I think it
10 squares with the competitor standing cases. And
11 I think the logic of it is right.

12 The injury here is not just what
13 happens out there in the marketplace. We are
14 prevented from getting in at all. And my
15 concern, Justice Barrett, is that if you don't
16 adopt the rule, it will always be an argument
17 about what will happen in the marketplace. And
18 that's very difficult to show once you have a
19 governmental mandate because the governmental
20 regulation is skewing the entire market.

21 And so, as here, even though, in the
22 real world, everyone knows that California's
23 standards have affected automakers, we have a
24 whole debate now about whether, in fact, as a
25 matter of common sense, they actually affected

1 people, and even if they were affecting them in
2 2019, well, did things change in 2020 and 2021
3 in a way that by the time you sued in 2022, you
4 might have had standing before but now you no
5 longer do?

6 Yes, I think we're right about that
7 debate, but I don't think we should have to have
8 it in every case.

9 JUSTICE JACKSON: Can I understand the
10 rule better? Because I -- I had appreciated
11 from your briefs that you had different
12 theories, so I'm just trying to appreciate
13 what's happening.

14 Are you advocating for the direct
15 regulatory impediment species of this? Is that
16 what -- is that the rule that you're now
17 articulating and it has something to do with
18 being completely locked out of the market?

19 MR. WALL: That's our front-line rule.
20 If the government locks you out of a marketplace
21 or tilts it against you and you come in to sue
22 to have the playing field leveled, you have
23 standing. That's our front-line rule.

24 And then, obviously, our
25 second-line --

1 JUSTICE JACKSON: But you see how
2 that's a little bit different than saying -- if
3 there's a direct regulatory impediment, that's
4 different than saying you have to be completely
5 locked out of the market.

6 MR. WALL: Well, by direct regulatory
7 impediment, I mean sort of a lockout or, as
8 here, a cap, right? It's not that we can't sell
9 any fuel at all. It's that we can only sell so
10 much fuel in California and the other 17 states
11 that have adopted these standards because the
12 automakers have to make a certain number of cars
13 that don't run on the product we manufacture.

14 JUSTICE JACKSON: But where does that
15 end? I mean, I -- I guess I'm trying to figure
16 out -- I appreciate your argument that the
17 regulation is on the automakers and, as a result
18 of it being on the automakers, the fuel
19 producers are going to make less fuel.

20 But what about the convenience store
21 operators who are also part of this? They say
22 there are fewer people stopping into the
23 convenience store as a result. Are they in your
24 rule or not?

25 MR. WALL: I think that they come much

1 closer to the Department of Commerce, but, of
2 course, all I need is some Petitioners --

3 JUSTICE JACKSON: No, but I'm just
4 trying to understand how --

5 MR. WALL: Yeah.

6 JUSTICE JACKSON: -- your rule works.
7 So they -- so this splits your Petitioner --
8 your plaintiffs' class here because convenience
9 store operators are in. They're not complete --
10 in your class. They're not completely locked
11 out of the market, so your direct regulatory
12 impediment rule doesn't have them.

13 MR. WALL: That's right. It's just
14 like competitor standing, right? You can
15 harm -- you're harmed because they
16 under-regulate a competitor. That regulation
17 can harm lots of other people, people who supply
18 your inputs and all the rest. You have
19 competitor standing. Everybody else has to
20 satisfy predictable effects, Department of
21 Commerce, Warth. The same thing here.

22 JUSTICE KAGAN: But the way you --
23 you -- when you answered Justice Jackson, you
24 said your rule is if the government tilts the
25 market against you. And, here, that seems like

1 a easy thing to show and not one that would
2 cause a lot of debate. But, in many other
3 cases, does the -- did the government tilt the
4 market against you? Did it not? How much?

5 That would be a hard thing to show.
6 And -- and why shouldn't we just stick with a
7 rule that says we're going to look in each case
8 as to the -- the facts and the evidence, and
9 then we're going to apply reasonable inferences
10 and we're going to reach a decision, rather than
11 try to stick everybody -- do you fit the
12 categorical rule or do you not fit the
13 categorical rule?

14 MR. WALL: Justice Kagan, two things.
15 First, it hasn't been a problem on the
16 competitor standing side, and it's not a problem
17 here. We drew a very narrow rule. We took the
18 language of the D.C. Circuit that it had lived
19 with for quite a while.

20 JUSTICE KAGAN: See, I think that the
21 question are you a competitor seems a lot easier
22 to answer in a lot more cases than the question
23 has the government tilted the market against
24 you.

25 MR. WALL: Well --

1 JUSTICE KAGAN: I'll bet there are a
2 thousand people in every regulation who can come
3 in and say this regulation tilt the market --
4 tilted the market against me.

5 MR. WALL: I take the point. That --
6 that language was a shorthand for what we're
7 saying in our brief, which is the language of
8 the D.C. Circuit, a direct regulatory
9 impediment. And as we explained, what we meant
10 by that and what the D.C. Circuit meant is, are
11 you preventing someone from selling or placing
12 into a market? If it is a direct regulatory
13 impediment, you could sell yesterday, but you
14 can't sell today, you qualify for the rule. So
15 I think it's quite a narrow rule.

16 And the second thing is: Why do it?
17 It's the answer I gave to Justice Barrett:
18 Because, otherwise, we're going to have to have
19 this debate in every case. And, yes, I think I
20 win as a matter of common sense, but three
21 judges of the D.C. Circuit, as it turned out,
22 disagreed with me. And it seems to me we
23 shouldn't have that debate in every case.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?
2 Justice Alito?
3 Justice Kagan?
4 Justice Gorsuch?
5 Justice Kavanaugh?
6 JUSTICE KAVANAUGH: I'm not sure
7 there's a huge amount of difference between the
8 rule and the -- and the backup position. I
9 mean, the rule is based on a common-sense -- the
10 common-sense predictable effects in a particular
11 context. But, either way you go, you get to the
12 same destination. I'm -- I guess I'm not seeing
13 a huge gap.
14 MR. WALL: I agree, Justice Kavanaugh.
15 We should win no matter what the Court says.
16 But --
17 (Laughter.)
18 MR. WALL: -- I -- you know, I do
19 think that a case like this, it's not that
20 there's day -- there should be daylight in the
21 right outcomes. It's that once we make it about
22 evidence, right, we're going to have to come in
23 every case and there's going to be a debate,
24 like, well, what do you have to show to trigger
25 a common-sense inference and how common is that

1 common sense. Here --

2 JUSTICE KAVANAUGH: Well, what we said
3 last year in FDA versus Alliance for Hippocratic
4 Medicine, just summarizing what the standing law
5 should be, kind of gets at it, doesn't it?

6 MR. WALL: I would have thought so
7 too, Justice Kavanaugh, but here we are. But
8 I -- look, I'll be the first to grant that if
9 you take that paragraph in Alliance for
10 Hippocratic Medicine and you say, look, even if
11 we're not going to call it a rule, there are
12 certain categories where we've said the effects
13 seem awfully predictable and this falls into one
14 of the categories, that starts to look pretty
15 much like a rule to me, but I'll grant that if
16 that's language that the Court thinks squares
17 more comfortably with its standing precedents in
18 general, it gets us to the -- it should get us
19 to the same place.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch, anything?

23 I'm sorry. Justice Jackson?

24 JUSTICE JACKSON: Yeah. So what --
25 what about corn and soybean growers? Are they

1 in or out?

2 MR. WALL: They're in. They --
3 they --

4 JUSTICE JACKSON: They're in?

5 MR. WALL: Yes. They make liquid
6 fuel, various kinds of liquid fuel, ethanol and
7 all the rest. And this rule says, no, can't go
8 try to convince the automakers to use your fuel.
9 They have to use -- make a certain --

10 JUSTICE JACKSON: So, I mean, what --
11 what about the ones that aren't quite the fuel
12 producers, but they're earlier in the chain?

13 MR. WALL: It's --

14 JUSTICE JACKSON: I mean, it sounds to
15 me like your rule is conferring standing on
16 anyone in the chain of production in a product
17 that gets affected as a result of government
18 regulation.

19 MR. WALL: I don't mean to reach down
20 the road to all the inputs and suppliers,
21 Justice Jackson.

22 JUSTICE JACKSON: But how do you stop
23 reaching down the road?

24 MR. WALL: Are you the producer? We
25 make and sell liquid fuel, and the government

1 says you could sell to them yesterday, but you
2 can only sell a certain amount today. That is a
3 direct restriction on the product we make and
4 sell. That -- we, by any account, ought to have
5 standing.

6 JUSTICE JACKSON: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. WALL: Thank you.

10 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER

12 ON BEHALF OF THE FEDERAL RESPONDENTS

13 MR. KNEEDLER: Mr. Chief Justice, and
14 may it please the Court:

15 Petitioners contend that there should
16 be a categorical rule establishing
17 redressability whenever the plaintiff challenges
18 government action that poses an impediment to
19 the use of its product without any need for an
20 evidentiary basis for that categorical rule or
21 prediction.

22 That proposal is inconsistent with
23 this Court's decisions which require a factual
24 basis for standing.

25 My friend refers to Department of

1 Commerce and the idea of a predictable or
2 common-sense outcome. And in Department of
3 Commerce, there was an evidentiary record.
4 There was evidence submitted. There were
5 factual findings that undergirded the prediction
6 or -- or the result in Department of Commerce,
7 where the Court could then conclude that people
8 who were answering a survey about -- or asked to
9 answer a census about the -- their citizenship
10 would be deterred from doing it. It wasn't just
11 a -- common sense.

12 And that runs throughout this Court's
13 standing law. And it's especially important
14 here because this Court has indeed said that
15 if -- if the plaintiff is subject -- is the
16 subject of the regulation, it may be easy to
17 prove.

18 But, when the plaintiff is not, the
19 Court has said repeatedly it's more difficult to
20 establish standing because whether you -- your
21 injury is caused by or will be redressed by the
22 Court's decision depends on decisions by third
23 parties, which may or may not be -- be true, and
24 you need evidence to support a conclusion that
25 that would be true.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Kneedler, wasn't
3 the -- a goal of the California regulations to
4 reduce the use of Petitioners' fuel?

5 MR. KNEEDLER: Certainly, in 2013,
6 when -- when it was adopted -- I think this is
7 an important point. In 2013, where the fuel
8 producers were already selling in the market, it
9 would have been, I think, quite easy to show
10 that their injury derived from this new
11 regulation, it was caused by that regulation,
12 and it would be redressed by lifting it.

13 It's now 10 years later, though. The
14 manufacturers -- and no one else challenged the
15 waiver in 2013. In the meantime, there has been
16 10 years of practical experience in which
17 manufacturers have adjusted and quite without
18 regard -- or without resting upon the California
19 rule have --

20 JUSTICE KAGAN: But, when EPA
21 reinstated the rule in 2022, was it intended to
22 do nothing at all?

23 MR. KNEEDLER: No, not at all. And --
24 and the -- I think -- on that point, I think
25 it's important to understand the legal rationale

1 or the legal analysis that EPA brought to bear.
2 And this is something on which there has been
3 changes from one administration to the next, and
4 that's under review.

5 But the -- a -- a waiver in the -- in
6 the approach that EPA was taking is for the
7 entire California program, not just these two
8 particular standards. So the -- a -- a -- a
9 waiver is for the entire program. And if the
10 entire program is necessary to address
11 compelling and extraordinary circumstances,
12 that's sufficient.

13 But the other -- another important
14 point is that --

15 JUSTICE KAGAN: But, in 2022, didn't
16 the EPA, in fact, in its submissions to the
17 courts say that the effect of the reinstatement
18 was going to be to reduce gasoline emissions?

19 MR. KNEEDLER: They -- they said that
20 in -- in -- in 2021 based, frankly, I think, on
21 2019 projections. A lot happened in the --
22 especially in the zero-emission vehicle market
23 between --

24 JUSTICE KAGAN: So we shouldn't take
25 the EPA's own representations seriously because

1 they --

2 MR. KNEEDLER: Oh, it's California,
3 but --

4 JUSTICE KAGAN: I think both EPA and
5 California made those representations in its
6 papers.

7 MR. KNEEDLER: Well, yes, but -- but
8 was that sufficient to -- I -- the evidence, as
9 you said, is pretty thin. And it's also
10 important to recognize what the --

11 JUSTICE KAGAN: Well, if it was so
12 thin, I don't think that you had a grounds to --
13 to reinstate the waiver.

14 MR. KNEEDLER: Well --

15 JUSTICE KAGAN: Or -- and -- and if --
16 you know, if it's so thin, why did you say what
17 you say in your briefs, and why did California
18 say what it said in its briefs? Because both
19 parties, I think, said in -- in their briefs,
20 yes, this is going to reduce gasoline emissions.

21 MR. KNEEDLER: Well, what -- what EPA
22 did in -- or the -- the reason -- the principal
23 reason that it did what it did in 2022 was
24 because it concluded that the withdrawal of the
25 previous waiver was unlawful. It was correcting

1 an error before. It was not -- it was not a new
2 waiver.

3 What -- what EPA did was conclude that
4 what it had done in 2019 was unlawful for a
5 variety of reasons. It rested on an erroneous
6 interpretation of the statute, the one that I
7 was just mentioning to you about do you look at
8 the whole program or do you look at -- at -- at
9 particular standards.

10 So they were -- they were going back
11 without -- without making a -- a -- a brand-new
12 assessment. And that's why I think it's
13 important to recognize that between 2013 --
14 there's no doubt that in 2013 that the man --
15 that full -- fuel producers were injured and
16 that that would have been redressed by
17 rescinding the rule.

18 But that's not the case now because
19 the manufacturers have adjusted and the market
20 now reflects the fact that they are -- that
21 there's no particular reason to assume -- or at
22 least there is objective evidence contradicting
23 the proposition that the manufacturers would
24 change their behavior --

25 JUSTICE SOTOMAYOR: Mr. Kneedler --

1 MR. KNEEDLER: -- in a material way.

2 JUSTICE SOTOMAYOR: -- the California
3 intervenors said that California's regulation
4 would mitigate competitive disadvantage by
5 ensuring "a level playing field" for
6 manufacturers who wanted to produce more
7 fuel-efficient vehicles.

8 I just don't see how that statement
9 alone doesn't destroy everything you're arguing.

10 MR. KNEEDLER: Well --

11 JUSTICE SOTOMAYOR: Meaning if it --
12 what it's doing is mitigating a competitive
13 level -- or -- or supporting a competitive
14 system, isn't that a negative effect on them?

15 MR. KNEEDLER: Let me make one other
16 point because I think it's responsive to that,
17 and that is that the D.C. Circuit was relying on
18 both FRAP and the local rule, Rule 28, that
19 addresses how standing -- an assertion of
20 standing should be raised on a direct petition
21 for review. It has to be raised in the
22 petition -- excuse me -- in the opening brief
23 with any supporting materials.

24 The only thing that was -- that was
25 submitted here were the 14 declarations that, in

1 a conclusory matter -- manner, said that their
2 injuries would be -- the Petitioners here, their
3 injuries would be ameliorated if --

4 JUSTICE SOTOMAYOR: But now we have a
5 full record.

6 MR. KNEEDLER: Well, but --

7 JUSTICE SOTOMAYOR: And if -- if --
8 let's --

9 MR. KNEEDLER: But -- but the --

10 JUSTICE SOTOMAYOR: -- address
11 Mr. Wall's concern, which is, if we reverse for
12 the D.C. Circuit to look at this again, vacate
13 and remand only, correcting their 2025
14 ending-date misperception, are you saying that
15 we -- we should not just say they have standing
16 on what we have before us now?

17 MR. KNEEDLER: No, I think that --
18 I -- I think, if the Court is uncertain, it
19 should vacate and --

20 JUSTICE SOTOMAYOR: No, if we're not
21 uncertain.

22 MR. KNEEDLER: Well, but what you have
23 here is effectively a summary judgment ruling in
24 favor of -- of EPA.

25 If -- if you think that there was --

1 that there are disputed issues of fact going to
2 the question of whether -- what the effect of
3 the reinstatement was, then just like any other
4 situation, it go -- should go to the trier of
5 fact to determine what the effect would be.

6 There should not -- otherwise, you're
7 effectively relying on the categorical rule
8 or -- or prediction that we think is wrong.

9 We -- we agree --

10 JUSTICE KAVANAUGH: In the -- in the
11 D.C. --

12 MR. KNEEDLER: -- that it should be
13 fact-based.

14 JUSTICE KAVANAUGH: Sorry to
15 interrupt.

16 MR. KNEEDLER: Sorry.

17 JUSTICE KAVANAUGH: In the D.C.
18 Circuit, EPA did not challenge standing.

19 MR. KNEEDLER: That's correct.

20 JUSTICE KAVANAUGH: And that's unusual
21 in my experience. Why -- why not?

22 MR. KNEEDLER: The -- it -- it did
23 not. And it -- and it -- I think maybe it -- it
24 should have, I think, particularly in
25 retrospect. But the issues of standing --

1 JUSTICE KAVANAUGH: But isn't that a
2 tell here? I mean, EPA, as you, of course,
3 know, routinely raises standing objections when
4 there's even -- even a hint of a question about
5 it.

6 MR. KNEEDLER: But -- but when --
7 when -- later on, after the government filed its
8 brief, that's when California made its standing
9 submission in it -- in its later-filed brief.

10 And then it should have been incumbent
11 on Petitioners to respond to that with something
12 beyond the conclusory affidavits that they did,
13 and -- and they really didn't come back with
14 anything substantial in their reply brief, and
15 they sought to file a supplemental brief, which
16 the D.C. Circuit rejected, and they haven't
17 sought review of that here.

18 So I -- I -- but I want to stress
19 that -- that we agree with the observation by a
20 number of the Justices that this should be a
21 factual inquiry. There may be many situations
22 in which it should be easy, and I think that
23 that would cover the category -- most of the
24 categories that Mr. Wall is mentioning.

25 In -- in a direct regulate -- if you

1 have a directly regulated party, the -- the --
2 this Court has said repeatedly it's probably
3 going to be pretty easy to establish standing.

4 But, when -- when the redressability
5 turns on decisions by a -- by a third party not
6 before the Court, I think it's -- I think it's
7 not a good idea to establish effectively a -- a
8 categorical or common-sense or predictive rule
9 because there are a number of situations in
10 which the Court has concluded that the fact that
11 they're independent decision-makers defeats
12 standing.

13 JUSTICE JACKSON: So, Mr. Kneedler, is
14 this really about -- I'm just trying to think
15 back to your conversation with Justice Thomas
16 and Justice Kagan. Is this really about the
17 sort of development of facts on the ground?
18 That it sounds to me like what you're saying is
19 that originally, back in 2013, when this
20 regulation was initially enacted and everybody
21 knew and said it was to reduce fuel emissions,
22 that a lawsuit brought at that moment has
23 injury, causation, and redressability, noting
24 that causation and redressability are actually
25 two different factors with respect to standing,

1 but that, you know, however many years later, in
2 2022, because the auto industry has actually on
3 the ground adjusted to the regulation and no
4 longer has a demand for the fuel products, you
5 might have injury, you might have causation, but
6 I think you're saying you no longer have
7 redressability in that situation, that this
8 might be one of the rare instances in which
9 these things aren't lining up 10, 12 years later
10 in the same way they would at the beginning.

11 And, therefore, a bright-line rule
12 that just has us thinking about the initial
13 scenario, like, was there injury, was there --
14 is it common sense, is not going to work because
15 what we're really supposed to be thinking about
16 in redressability land is the facts on the
17 ground and whether or not this -- changing this
18 regulation is going to make any difference?

19 MR. KNEEDLER: I think that's exactly
20 right. And this is a situation where
21 redressability gets separated. And may -- maybe
22 it would be helpful if I illustrated this in
23 another way. If a manufacturer had brought a
24 challenge to this regulation -- of course, no
25 manufacturer had done so -- the manufacturer

1 would have been required to say, if this waiver
2 is set aside, I will engage in the conduct that
3 the regulation prohibits, which is producing a
4 fleet that doesn't comply with the California
5 measures.

6 JUSTICE JACKSON: At the beginning,
7 we'd be predicting that the manufacturer would
8 be -- at the beginning, we'd be predicting. The
9 manufacturer would say that if they were the
10 plaintiff, and we'd be looking at evidence to
11 see if that was going to happen.

12 Here, it's already happened that
13 they've changed their results, right?

14 MR. KNEEDLER: Right. And -- and
15 there's certainly no evidence as far as I can
16 see that there would be an -- an immediate
17 material change in what -- in what manufacturers
18 would do, or at least that was the conclusion
19 the district -- or the court of appeals drew
20 from the record. Maybe down the road, five, 10
21 years ago -- or, in the future someday, the
22 manufacturers might decide that they want to
23 change their conduct.

24 But this Court has said some -- such
25 someday intentions down the road are not

1 sufficient to establish standing. It's too
2 contingent, it's too speculative. So, a
3 fortiori, the same thing should be true of the
4 fuel producers, who are not the directly
5 regulated parties, and they should -- they
6 should be required to show that the
7 manufacturers would change their behavior here
8 and now, not sometime in -- in the future. So I
9 think that lines up with what this Court has
10 said in Defenders of Wildlife and other cases.

11 And what may seem odd here is I think
12 precisely the mismatch that Justice Jackson was
13 referring to. And I don't think the Court
14 should adopt a -- a categorical or new rule or
15 new principles of standing to deal with this
16 particular case because this is actually the --
17 the quintessential case in which there should be
18 a factual determination because there is --
19 there is evidence that what one might think
20 about common sense or prediction or the way the
21 market might react is not so in this case.

22 And so there should at least be an
23 opportunity for the government to show that it's
24 not so and for the court of appeals in this case
25 to determine what -- what do -- what does the

1 evidence in the -- in the case show.

2 JUSTICE ALITO: Suppose there were an
3 affidavit by one carmaker saying that if this
4 waiver is rescinded, we will manufacture one
5 additional car. Would that be enough? We
6 absolutely commit ourselves, we will manufacture
7 one more car.

8 MR. KNEEDLER: I -- I think there are
9 many situations in which, you know, one person
10 saying that would be enough. One of the things,
11 again, that is -- that is, I think, cautionary
12 in this case is that that begins to look a lot
13 like the probability from some of the Court's
14 other cases, like if one member of the Sierra
15 Club could say surely one member will -- will be
16 injured and, therefore, we should have standing.

17 The question here isn't what one
18 manufacturer would do, but do any of the
19 individual plaintiffs benefit from what that one
20 manufacturer will do by producing an additional
21 car? That's why I think the Court ought to
22 think about this in broader terms, whether there
23 will be a material change in the industry.
24 Otherwise, you're -- you're allowing the corn
25 farmer or -- or a small liquid fuel producer to

1 have standing because one car might be produced.

2 JUSTICE ALITO: Yeah. Okay.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas?

6 Anything further?

7 JUSTICE ALITO: Well, one more
8 question. By my count, the EPA has now changed
9 its mind on this four times. Am I right?

10 MR. KNEEDLER: Yes, I think that's
11 right.

12 JUSTICE ALITO: So what is the
13 probability that there will not be a fifth?

14 MR. KNEEDLER: Well, it is under --
15 the -- the president in an executive order
16 directed EPA to examine issue -- measures that
17 might have an effect, and EPA is undertaking
18 that. So I -- I can't say what EPA will decide,
19 but this is one of those that has, indeed,
20 gone -- gone back and forth.

21 But I don't think that should affect
22 the standing analysis because, despite that
23 back-and-forth, the manufacturers have gone
24 forward with their own plans because of their
25 own sustainability concerns or looking to the

1 future, where they're -- they're making
2 investments and they want to stick by that path.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 JUSTICE SOTOMAYOR: You're not a
6 betting man, are you?

7 MR. KNEEDLER: Pardon me?

8 JUSTICE SOTOMAYOR: You're not a
9 betting man that you don't want to guess that
10 there's going to be a fifth change?

11 MR. KNEEDLER: I -- I'm respecting --

12 JUSTICE SOTOMAYOR: I -- I --

13 MR. KNEEDLER: -- the administrative
14 process. I know, but --

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE KAGAN: I mean, just out of
18 curiosity, is there anything you can say about
19 the timing of that process?

20 MR. KNEEDLER: Not -- not at -- at
21 this point. I -- I think the -- the general
22 tenor of the executive order was to, you know,
23 do this, you know, expeditiously or with due
24 consideration. But, no, I don't have anything
25 specific.

1 CHIEF JUSTICE ROBERTS: Justice
2 Gorsuch?
3 Justice Kavanaugh?
4 Justice Barrett?
5 Justice Jackson?
6 Thank you, counsel.
7 Mr. Klein.
8 ORAL ARGUMENT OF JOSHUA A. KLEIN
9 ON BEHALF OF THE STATE RESPONDENTS
10 MR. KLEIN: Mr. Chief Justice, and may
11 it please the Court:
12 Federal courts don't assume there's
13 standing. The presumption runs the other way.
14 The party who brings a case must establish that
15 it, in fact, meets each element of standing.
16 That may be easier or harder depending on the
17 case, and Petitioners' case had unique problems.
18 EPA first approved this waiver in
19 2013, and the automakers quickly started working
20 to meet the standards. But this case started in
21 2022. The technology and market had changed.
22 Petitioners relied on decade-old
23 predictions from the original waiver
24 proceedings, but the only up-to-date evidence
25 showed surging consumer demand for clean cars

1 and automakers' sales well above any regulatory
2 requirements.

3 Petitioners failed their burden to
4 establish a non-speculative likelihood that
5 automakers would sell more gas cars, and
6 Petitioners sell more fuel, without the waiver.
7 And there is no basis for inventing categorical
8 rules that would have courts exercise Article
9 III power where the elements of standing don't,
10 in fact, exist.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Well, if you're
13 accurate about where the auto manufacturers are
14 now, are you willing to say your rules are
15 unnecessary?

16 MR. KLEIN: Well, Your Honor, we would
17 agree that the rule -- this set of standards is
18 not having an effect on emissions today.

19 JUSTICE THOMAS: No. I mean, would --
20 are you willing to say they're unnecessary?

21 MR. KLEIN: They're not necessary for
22 our emissions goals. The statutory meaning of
23 need in Section 209(b) is very precise. It
24 refers to -- as this EPA decision correctly
25 interpreted it, it refers to the need for

1 California to have a separate vehicle emissions
2 program as a whole, at all, not the need for
3 each successive individual waiver or standard.
4 And we do have a need for our entire program as
5 a whole.

6 JUSTICE THOMAS: So can you -- can you
7 say that each element of the automotive
8 industry or manufacturing industry is satisfied
9 or making -- adjusting to your rules?

10 Let's say, for example, can you say
11 that heavy trucking or medium trucking or large
12 RVs all could -- accepting of your rule and
13 complying with it?

14 MR. KLEIN: Well, I guess I haven't
15 thought about that because this standard affects
16 light-duty vehicles, which include pickup
17 trucks, I think --

18 JUSTICE THOMAS: Yeah.

19 MR. KLEIN: -- but not the other
20 things that you've mentioned.

21 But, as a -- as a broader question --
22 if the question is about the broader market as a
23 whole, I -- I think, you know, the Court had
24 nothing to do but speculate as to whether some
25 set --

1 JUSTICE THOMAS: Okay. Well, let's
2 just take the trucks then. Let's take the light
3 trucks. Are you willing to say that without
4 your rules, the light truck industry would
5 continue marketing the mix of vehicles it's
6 currently marketing or manufacturing?

7 MR. KLEIN: Your Honor, we can't
8 guarantee that, but I can say it was
9 Petitioners' burden to create a non-spec -- to
10 establish a non-speculative likelihood under
11 this Court's precedent.

12 JUSTICE THOMAS: Why would you expect
13 that of them if you're not willing to say: Your
14 rules are unnecessary at this point, or
15 ineffectual?

16 MR. KLEIN: Well, Your Honor, this
17 Court's cases have always put the burden on a
18 plaintiff or the party who invokes federal
19 jurisdiction to support with facts.

20 Now we did address the only facts they
21 brought, which were facts about the California
22 market with 2012/2013 predictions, but it was
23 not our burden to disprove every possible
24 likely -- every possible --

25 JUSTICE KAGAN: Mr. -- Mr. Klein,

1 I'm -- I'm wondering, actually, whether you, in
2 fact, made their case for them. So I'm thinking
3 here of the Vanderspek declaration, which was
4 submitted in support of your motion to
5 intervene, and here's one of the things it says.
6 There are a couple more, but it says: Should
7 EPA's restoration of California's waiver for the
8 state's existing light-duty vehicle
9 greenhouse-gas emission and ZEV standards be
10 overturned -- should those be overturned -- it
11 would result in higher criteria pollutant and
12 greenhouse-gas emissions.

13 Doesn't that just sort of make their
14 case?

15 MR. KLEIN: Well, it would --

16 JUSTICE KAGAN: That's out of your own
17 mouth.

18 MR. KLEIN: It was, Your Honor. And
19 let me place it in context. That declaration
20 was filed within days of the petitions for
21 review and to support one basis of our
22 intervention, not our independent basis as a
23 sovereign whose laws would be preempted, to
24 support one basis.

25 It -- the declarations relied on and

1 cited preexisting analyses which were themselves
2 based on 2019 DMV data. And it turned out that
3 when the parties had the burden to really
4 address standing before the court could exercise
5 its power on the merits, we presented evidence
6 that that 2019 data was no longer representative
7 of the actual market. The market had
8 dramatically changed. And we did promptly bring
9 that to the court's attention.

10 And Petitioners never responded about
11 the condition of the market in 2022. They
12 doubled down on presumptions and assumptions and
13 categorical rules, and they cited -- and I -- I
14 want to be clear about this. Mr. Wall cited JA
15 66, and if you look at that page, it addressed
16 the 2013 and 2019 records that EPA had because,
17 by the time the 2022 restoration decision was
18 coming around, our focus and EPA's focus was
19 that the 2019 recission had been substantively
20 and procedurally wrong because the -- the 2013
21 record adequately supported the 2013 findings
22 and the 2019 record didn't give a basis to -- to
23 overturn that.

24 And you can see that, for instance,
25 from the full discussion in the appendix to the

1 petition, around pages 226 to 227 of the EPA
2 decision, not the executive summary that their
3 briefs cite, which shows EPA's focus on the 2013
4 record and whether that record was deficient, as
5 the 2019 recission decision had found.

6 And that's, of course, on top of what
7 was really our fundamental argument and EPA's
8 fundamental position, which is longstanding and
9 from administrators throughout the life of this
10 provision, except for this very brief period,
11 which is that the need criterion in Section
12 209(b) refers to the need for California to have
13 a separate vehicle emissions program at all,
14 with all the standards we've enacted, you know,
15 which it's a program we've had since, frankly,
16 before the Clean Air Act was enacted.

17 And I -- I also want to --

18 JUSTICE BARRETT: Mr. Klein, can I ask
19 you a question? What is the burden of proof as
20 you see it here? Just more likely than not?

21 MR. KLEIN: Your cases haven't quite
22 said that, Your Honor. The language you've used
23 is a non-speculative likelihood.

24 And I think the cleanest thing to look
25 at is the non-speculative part because, if there

1 aren't facts supporting a -- a --

2 JUSTICE BARRETT: So what kind of
3 facts would you have wanted them to introduce?
4 Like affidavits from car manufacturers?

5 MR. KLEIN: They could have, but it
6 certainly didn't need to be that. The D.C.
7 Circuit opinion didn't say that. And we would
8 not say that.

9 Anything in the admin -- in an
10 administrative record which shows how the
11 directly regulated third party is likely to act.
12 There could be additional material.

13 JUSTICE BARRETT: But don't you think
14 the affidavit that Justice Kagan read you or --
15 I mean, I think -- I -- I don't think it's
16 speculation or wild speculation if you're
17 relying on common-sense inferences.

18 I mean, at some point, if you think
19 that they've carried the burden -- I'm not
20 saying that you couldn't poke holes in that,
21 but, you know, at some point, don't you think
22 that California could have tried to poke holes
23 that might take them down -- it's just -- it's
24 not that high a burden.

25 I guess I'm having a hard time seeing

1 why the affidavits and common-sense inferences
2 wouldn't just get them over that mark.

3 MR. KLEIN: Let me compare it to two
4 of this Court's cases, Lujan versus National
5 Wildlife Federation and the recent Carney case
6 on Delaware judicial selection.

7 In the Lujan case, the plaintiffs
8 submitted a declaration which maybe on its face
9 would have seemed sufficient: We recreate in
10 the area of -- I think it was Green Mountain --
11 and this mining will occur in the Green Mountain
12 Reserve.

13 But the United States submitted
14 evidence that the Green Mountain Reserve was
15 hundreds of thousands of acres and only a small
16 percentage was subject to the mining.

17 This Court held there was no APA
18 standing because the -- once the plaintiff's
19 affidavit was understood with what it actually
20 was and wasn't saying, it was insufficient.

21 Now, in Carney more recently, the
22 plaintiff said: If this judicial selection
23 criterion was -- was set aside, then I would
24 apply for any Delaware judicial spot.

25 And the defendants showed evidence

1 that: No, there were several spots that were
2 open recent -- recently that -- where this
3 criterion did not apply and you would have been
4 eligible, and you did not submit an application.
5 And, again, it showed that what the plaintiff
6 was saying was insufficient.

7 Well, here, the plaintiff was saying:
8 These 2012 predictions show that we are injured.

9 And our evidence and -- showed: No,
10 that's not obvious, and there's no reason to
11 think that's correct because the technology had
12 already improved, maybe thanks to our standards
13 back during the preceding years and years. The
14 market had already developed. Maybe it was our
15 standards that -- and -- as well as other things
16 that made auto manufacturers invest in
17 developing that market.

18 But the -- the point is that by 2022,
19 the cake was baked. Or at least Petitioners
20 presented no evidence that there was -- that
21 there would be any likelihood of a change if
22 this regulation were struck down.

23 JUSTICE KAVANAUGH: You don't expect
24 the court of appeals to have a trial when
25 there's affidavits that go both ways, do you?

1 MR. KLEIN: No, Your Honor. We -- we
2 think that would --

3 JUSTICE KAVANAUGH: So how does the
4 court of appeals then evaluate the affidavits?

5 MR. KLEIN: Well, I think it --

6 JUSTICE KAVANAUGH: Doesn't it have to
7 use some kind of common-sense understanding of
8 how markets work if it's not going to have
9 witnesses and what have you?

10 MR. KLEIN: Your Honor, I think the
11 court -- as the United States' brief said,
12 courts are quite accustomed to making decisions
13 about whether the particular inferences from
14 some evidence has a gap.

15 Not a credibility question. This
16 wasn't is our expert smarter than their expert.
17 This was a fundamental gap in the reasoning
18 which made them not having -- which left them
19 nothing but speculation.

20 And -- and so I think that -- now,
21 again, this -- this situation will -- will not
22 arise that frequently. I mean, this is a kind
23 of unheard-of nine-year gap.

24 And, in fact, Petitioners have pending
25 challenges to newer waiver that -- they raise

1 many of the same issues, I assume. And -- and
2 for those, there will be Article III standing
3 because, for those, the newer waiver is for
4 standards that will require automakers to change
5 what they're doing so that the -- the
6 unregulated party, the fuel sellers, will change
7 how much fuel they sell.

8 But that was not the case here.

9 JUSTICE JACKSON: So is your --

10 JUSTICE KAVANAUGH: How --

11 JUSTICE JACKSON: -- answer to -- oh,
12 I'm sorry, go ahead.

13 JUSTICE KAVANAUGH: Go ahead. Go
14 ahead.

15 JUSTICE JACKSON: Is your answer to
16 Justice Kavanaugh that common sense does play a
17 role when evidence is being presented on both
18 sides, but what you hear the other side to be
19 saying is we should substitute where there --
20 there doesn't need to be evidence, they're
21 saying, we can just draw these common-sense
22 inferences as a general matter?

23 MR. KLEIN: I think that's basically
24 right, Your Honor. The -- I mean, our point is
25 the inferences have to be based on evidence that

1 permits the inference. That's -- you know, in
2 Department of Commerce, there was no prediction
3 just from the air from this Court's or the
4 district court's --

5 JUSTICE JACKSON: Right.

6 MR. KLEIN: -- feeling --

7 JUSTICE JACKSON: So that's -- that's
8 your argument to the bright-line rule. Mr. Wall
9 says, but we did have evidence, and he points to
10 these declarations. And you're saying, in your
11 view, those declarations were insufficient
12 because they were based on old or outdated
13 information?

14 MR. KLEIN: Well, Petitioners'
15 declarations as to remedy were entirely
16 speculative and -- sorry, not speculative.
17 Conclusory, right? They just said this would be
18 redressed if you strike down the law.

19 I -- I want to make sure the Court
20 understands the one piece of evidence that we
21 haven't talked about, which is Minnesota. The
22 Petitioners do not appear to contest the United
23 States' point at I think it's page 38 of their
24 brief that the Minnesota report that was buried
25 in one of the 14 declarations and not cited in

1 the court of appeal did not actually say that
2 there would be any -- that automakers would have
3 to change what they were doing in response to
4 the standard. That just compared what if
5 automakers do the bare minimum that's required
6 under the federal standard versus what if they
7 do the bare minimum that would be required under
8 the state standard and did not address what's
9 really the question in this case, which is how
10 can there be an injury that's redressable if
11 automakers, for their own reasons and their own
12 motives, are doing more than either set of
13 regulatory requirements.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas, anything further?

17 Justice Alito?

18 JUSTICE ALITO: Well, just so I have
19 it fresh in mind, could you go back to the very
20 first question that Justice Thomas asked you:
21 Why do you need the waiver at this point?

22 MR. KLEIN: Right. Your Honor, we --
23 this waiver makes no difference right now to
24 California's emissions control. So, as to this
25 particular waiver, if we were applying for it

1 now, I -- well, I don't think we would apply for
2 it now because that's why we superseded this
3 with a new waiver that will require automakers
4 to make a change. We achieved our goals faster
5 and to a larger extent than we'd expected, but
6 there's just no sign anything would change now
7 if the waiver were struck down.

8 JUSTICE ALITO: So your -- do I
9 understand your answer to say you don't need
10 this waiver?

11 MR. KLEIN: Your Honor, no -- I mean,
12 we don't need the waiver for emissions control.
13 We -- we are glad that the 2019 recission was
14 struck down because of its erroneous substantive
15 and procedural rulings, but this waiver is not
16 making a difference on the ground now.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 Justice Kagan?

21 Justice Gorsuch? No?

22 Justice Barrett?

23 Justice Jackson?

24 Thank you, counsel.

25 Rebuttal, Mr. Wall?

1 REBUTTAL ARGUMENT OF JEFFREY B. WALL

2 ON BEHALF OF THE PETITIONERS

3 MR. WALL: Just a few points, Your
4 Honor.

5 The first, Mr. Kneedler says, look,
6 who knows what will happen in the market five,
7 10 years down the road. Just so, that's why the
8 Court should adopt our front-line rule. We
9 should be allowed to compete in this marketplace
10 because we don't know exactly what will happen
11 down the road.

12 But let's say that the Court isn't
13 persuaded by the front-line rule. I think
14 you're right, Justice Kavanaugh, as long as the
15 Court repeats the language of Alliance for
16 Hippocratic Medicine, says there are certain
17 categories in which there are predictable
18 effects, and says this case is one of them
19 because it's in the upstream or downstream
20 category, I think that comes very close to being
21 the same thing.

22 Why is this case one of them? Justice
23 Alito, you're right, all we have to show is that
24 one EV would make one fewer electric vehicle in
25 any of 18 states. It's not just California.

1 Mr. Klein's looking only at California. There
2 are 18 states here that -- 17 others that have
3 adopted California's standards.

4 So what was the record on that? We
5 had California's statement in 2021, that's at JA
6 66, saying this is critical to reduce emissions.
7 Then you have the EPA, when it regrants the
8 waiver, saying in 2022, California needs these
9 standards. That's at pages 154 and 155 in
10 Footnote 180 of the Petition Appendix, also
11 pages 64, 65, 180, and 202. It says it again
12 and again.

13 Now I take Mr. Kneedler's point. The
14 EPA did speak out of both sides of its mouth.
15 It said, on the one hand, we're not going to
16 really go back and look at whether they need the
17 standards. We're just looking at whether we
18 messed up a few years ago. But they also say
19 we've looked at the whole record and California
20 needs the standards. I don't know exactly how
21 to square those statements, but either they
22 abdicated their statutory responsibility or they
23 said California does, in fact, need the
24 standards.

25 And then, in 2022, the two C ARB

1 declarations come in. I think the Scheehle
2 statement at page 115 of the JA is -- is as good
3 or better than the Vanderspek statement,
4 California itself saying we need the waiver
5 because, otherwise, we get fewer electric
6 vehicles and more gasoline-powered vehicles.

7 Now I thought that the one thing they
8 would not clearly say -- and I can't tell
9 whether California's just saying it doesn't need
10 the waiver now or that was also true back in
11 2022. But I didn't think that either of the --
12 either the United States or California would
13 say, if we had not gotten the waiver in '22, no
14 automaker would have done anything from that day
15 forward to the end of time, because I thought it
16 was something that couldn't credibly be said by
17 anybody to the case because whatever would
18 happen in California, there are lots of other
19 states out there that are not close to the same
20 numbers on EV penetration as California.

21 California seemed to hedge on that,
22 Justice Thomas, but wherever California is on
23 that, I don't think it's right. And I -- the
24 one thing is Mr. Kneedler didn't go near it, and
25 I am a betting man, Justice Sotomayor, and I bet

1 my bottom dollar that the reason he didn't is
2 that in some number of months, the EPA will
3 withdraw the waiver and will say this waiver has
4 been having an effect from the time it was
5 reinstated and it is compelling automakers to
6 make more EVs than would otherwise be produced
7 in response to consumer demand. If the EPA says
8 that in a number of months, it will be right.

9 The last thing is I would say the
10 Court shouldn't just vacate and remand. That
11 does pose the risk that we get ping-ponged
12 because it doesn't correct the court of appeals'
13 legal errors. Even if it tells them that the
14 standards last forever, it doesn't do anything
15 on our front-line rule, and it doesn't do
16 anything to correct their misunderstanding of
17 how the predictable effects test works.

18 It is important for standing purposes
19 not just for us but, as our amici explain, for
20 lots of challengers in lots of different
21 settings. It is important that the Court
22 correct the court of appeals' legal errors so
23 that we can get our day in court and finally
24 have an opportunity to make our case for why EPA
25 and California have wrongly interpreted the

1 Clean Air Act.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 The case is submitted.

6 (Whereupon, at 11:10 a.m., the case
7 was submitted.)

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