

# SUPREME COURT OF THE UNITED STATES

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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. )  
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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Wall.

ORAL ARGUMENT OF JEFFREY B. WALL  
ON BEHALF OF THE PETITIONERS

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

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

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

Second, even setting aside that clear rule, this Court recognized in Department of 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 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 and the party sues to have that  
17 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 -- you show it by the nature of the injury.  
11 So just like in a competitor standing case, like  
12 in National Credit Union, if you come in and you  
13 say the government is under-regulating one of my  
14 competitors, right, this Court said that's  
15 competitor standing. Government agrees with  
16 that. That's Footnote 2 of their brief.

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

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

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

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

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

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

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

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

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

1 marketplace. You're discriminated against no  
2 matter what would happen in the marketplace  
3 itself.

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

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

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

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

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

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

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

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

1 production right now. And this rule expires.

2 They made a mistake on that. It's conceded.

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

12 So why isn't it always a factual  
13 dispute?

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

19 The importance of the rule is that  
20 absent the rule, if you walk in and you put a  
21 market restriction on at a time when you think  
22 the restriction doesn't matter or at least you  
23 can debate whether it matters, then the other  
24 side will always say: A-ha, you don't have  
25 predictable effects. You can't satisfy

1 Department of Commerce. You can't satisfy  
2 Warth.

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

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

9 MR. WALL: Justice Sotomayor, I want  
10 to be very clear.

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

14 MR. WALL: I do not want an advisory  
15 opinion. They now acknowledge --

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

23 MR. WALL: I -- I look forward to  
24 hearing them do it. But I just -- I want to say  
25 quickly, in this case, everybody now

1 acknowledges the greenhouse-gas standards  
2 persist into the future indefinitely if nothing  
3 changes from now to the end of time.

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

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

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

22           Do you still win? Can't change it,  
23 won't change it. You're the fuel people, but  
24 it's not going to affect you because they're  
25 going to follow it no matter what.

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

4                   JUSTICE SOTOMAYOR: Well, but that's  
5 the point.

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

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

18                   And it's no different than the  
19 examples we give in our brief.

20                   JUSTICE BARRETT: What if, in Justice  
21 Sotomayor's example, the manufacturers stand  
22 with, you know, the California regulators and  
23 with EPA on the very first day the regulation is  
24 rolled out and say: We support this. You know,  
25 we want a greener earth, we want to prevent

1 climate change, and this is going to be cheaper  
2 for our business anyway.

3 So there's no question of a time lag.  
4 You know, they're just fully onboard.

5 And so kind of as Justice Sotomayor's  
6 hypothetical was saying, but I want to imagine  
7 it happens on day one. Why should you have  
8 standing and redressability at that point?

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

18 We still are harmed in a direct way.  
19 The government has tilted the playing field and  
20 foreclosed us from being able to freely sell our  
21 product. And we -- we ought to be able to make  
22 our arguments on the merits and get our day in  
23 court regardless of whether the directly  
24 regulated industry cuts a deal or not.

25 We have an injury. We have been

1 locked out of a marketplace. That injures us  
2 financially. It's caused by the regulation. I  
3 don't take anybody to be disputing that.

4 So the only question is  
5 redressability, and that should be easy in a  
6 case like this one. If everybody grants that  
7 the regulation is causing your injury, vacating  
8 the regulation or California's standards that --  
9 that they're allowed to adopt redresses the  
10 injury.

11 JUSTICE ALITO: Well, in light of all  
12 that, why do you think you need a special rule?  
13 Why -- why isn't the -- in the situation that's  
14 present here and in others like it, there's a  
15 strong inference that this is likely to have an  
16 effect.

17 Now maybe there could be situations in  
18 which, by the submission of affidavits like the  
19 ones that have been discussed or statements by  
20 all the carmakers, it could be shown that, no,  
21 contrary to what one would normally think, this  
22 is not going to have any effect, in which case  
23 you -- you might lose on standing. But I'm not  
24 sure why you think you need a special rule in  
25 this situation.

1                   MR. WALL: Justice Alito, I don't want  
2 to fight it too hard. If the Court says: Look,  
3 you had far more here than we had before us in  
4 Department of Commerce, you can have a  
5 common-sense inference, it's predictable under  
6 Department of Commerce --

7                   JUSTICE ALITO: There are many  
8 situations in which standing depends on a  
9 probabilistic inquiry, and those are very  
10 fact-specific. So, you know, you'd ask: What  
11 is the -- what is the probability in a  
12 particular situation?

13                   When someone says I'm threatened  
14 with -- you know, I expect that this will harm  
15 me, we assess the -- the -- the -- the degree of  
16 the risk.

17                   MR. WALL: So I'll -- I'll say two  
18 things, Justice Alito.

19                   First, what I'm worried about is that  
20 we've been ping-ponged around for going on 15  
21 years, trying to get a determination on the  
22 merits. And if we get sent back for a  
23 predictable effects analysis or all the rest in  
24 this and future cases, I worry about where we  
25 end up.

1           But, second, and -- and I -- more  
2           logically, doctrinally, in the competitor  
3           standing cases, the Court doesn't say: Well, if  
4           we leveled the playing field, would the  
5           customers that you seek to compete for fairly  
6           come to you rather than the other guy?

7           And I think that's the wrong -- I  
8           think that would be the wrong way to look at  
9           those cases.

10           Your injury isn't just what happens in  
11           the marketplace when you are allowed to compete  
12           and you think some dollars are taken out of your  
13           pocket. You don't really know because the point  
14           is you've been locked out of the marketplace.

15           And that's why I think the rule is  
16           important. I think it's the same logic here as  
17           in the competitor standing cases. And it's not  
18           like the Court doesn't do that in other areas.

19           California is here saying: If we are  
20           prevented from enforcing our standards -- and  
21           this Court said it many times -- that is injury,  
22           indeed, irreparable injury, to the state.  
23           Without knowing what it will do under the  
24           statutes, whether it will work, whether we'll  
25           get a penalty or a conviction, the Court often

1 says: If the sovereign doesn't get to enforce  
2 its statute, that is injury, and the state's got  
3 standing to come in regardless.

4 JUSTICE ALITO: I would think that  
5 you -- you would have injury in fact under our  
6 cases if the effect of this is to cause your  
7 clients to be unable to sell one car. Wouldn't  
8 that be correct?

9 MR. WALL: Well, sell one gallon of  
10 liquid fuel. Yes.

11 JUSTICE ALITO: I'm sorry, one gallon  
12 of liquid fuel.

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

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

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

18 The court of appeals said: All right,  
19 we're not going to contest that there's injury  
20 in fact and causation. We're not going to say  
21 there is, but we're not going to say there  
22 isn't. We're going to assume that you've got  
23 injury in fact that you sell one gallon less of  
24 gasoline, and we're going to assume it's caused  
25 by the regulation. But we think you haven't

1 shown redressability.

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

4 One was what Justice Sotomayor said,  
5 that they were -- that they were mistaken about  
6 the end date of the regulation. The other, you  
7 know, honestly, was that you didn't put on much  
8 evidence.

9 You know, and here, too, your sort of  
10 common-sense inference -- it is a common-sense  
11 inference, but if it's such a common-sense  
12 inference, it should be easy to put on evidence.  
13 And -- and, here, there wasn't a lot of it.

14 MR. WALL: So, Justice Kagan, I don't  
15 think that's fair. We had an on-point decision  
16 from the D.C. Circuit dealing with this very  
17 industry, fuel producers. We had our own  
18 declarations. We had California's expert  
19 declarations filed after we brought this case.

20 So, when California intervened, if you  
21 look at pages 110 and 115 of the JA, California  
22 put in declarations from two CARB experts, and  
23 in both of them, their own experts -- these are  
24 not statements in the brief --

25 JUSTICE KAGAN: I -- I agree with you.

1 I think it would be easy to read those  
2 declarations back to California and say: What  
3 do you make of those? But -- but your side  
4 didn't really make that argument.

5 MR. WALL: Well, we pointed to our  
6 declarations. We pointed to California's  
7 statement in 2021, at page 66 of the JA, saying  
8 these standards are critical -- their word -- to  
9 reducing fuel consumption. We pointed to EPA's  
10 statements in adopting the waiver saying they  
11 need their own standards.

12 We pointed to the intervenor  
13 automakers' admission saying: Hey, we've  
14 invested a lot in electrification. If you don't  
15 make them meet the same standard, we might be at  
16 a "competitive disadvantage."

17 And I guess my point back, Justice  
18 Kagan, is, look, if --

19 JUSTICE KAGAN: I think my point to  
20 you was, surely, if that's all in the record,  
21 you deserve to go forward.

22 MR. WALL: Oh, I agree. I -- I --  
23 I -- I agree.

24 JUSTICE JACKSON: So then why do we  
25 need the rule? Why do we need a bright-line

1 rule if you satisfy the regular evidence  
2 standard?

3 MR. WALL: First, because I think it's  
4 logically the correct inquiry. It's not what  
5 happens in the market. It is, as Justice  
6 Kavanaugh said in Energy Future Coalition, your  
7 inability to get into the marketplace in the  
8 first instance. That's a key part of the  
9 injury, and not adopting the rule misses that  
10 part. But even --

11 JUSTICE JACKSON: But I thought  
12 your -- I thought the point of the rule was that  
13 you didn't want to have to provide the evidence,  
14 that -- that -- that you say: Yes, we have the  
15 evidence, but we don't need it because, under  
16 this rule that I'd like for you to adopt, we  
17 have redressability.

18 MR. WALL: I don't think that evidence  
19 is relevant for the same reasons it's not in  
20 competitor standing cases. But, if the Court  
21 disagrees on our rule, I agree, we should win on  
22 a standard Department of Commerce, what is the  
23 likely effect here.

24 And we put in far more evidence than  
25 you would typically see in a case like this.

1 And with all respect to the court below, we got  
2 dinged not because we didn't do enough. Any  
3 lawyer looking at what we had done at the time  
4 would have said we had redressability. We got  
5 dinged, in fairness, because the court below  
6 moved the goalposts. We had Energy Future  
7 Coalition and plenty of evidence to satisfy it,  
8 and the court below, without citing any --

9 JUSTICE SOTOMAYOR: That is really  
10 unfair, Mr. Wall. They were under a mistaken  
11 understanding, partly because of the submissions  
12 in this case where you were just complaining in  
13 your papers about this rule being in effect only  
14 until 2025.

15 MR. WALL: So, Justice Sotomayor, that  
16 is part of the mistake that the court of appeals  
17 made, but its error was more fundamental. When  
18 it looked at standing, it should have said: We  
19 have Energy Future Coalition. It tells us that  
20 we have redressability in the same industry,  
21 fuel producers, if the regulation locks them out  
22 of the marketplace.

23 It didn't say that. It turned to the  
24 evidence, and then, rather than on the evidence  
25 saying, well, this is more than enough to

1 satisfy cases like Department of Commerce or  
2 Alliance of Hippocratic Medicine, it -- it said,  
3 ah, not enough here.

4           And what that really amounts to at the  
5 end of the day is we couldn't get an affidavit  
6 from an automaker who didn't intervene. They  
7 sat on the sidelines. They didn't want to  
8 participate. And because we couldn't get them  
9 to stick their hand up, we couldn't -- we didn't  
10 have someone saying here is how I will change my  
11 fleet absent the waiver. And that's what we  
12 didn't have.

13           And if that's what it's really going  
14 to take for an indirectly regulated party to get  
15 into court, it's going to be far more difficult  
16 to challenge governmental action, and these  
17 cases are going to become more expensive and,  
18 frankly, arbitrary, because it will turn on  
19 whether the directly regulated industry likes  
20 the rule or they don't. And as far as my  
21 clients are concerned, that shouldn't matter one  
22 whit.

23           JUSTICE BARRETT: Why will you be  
24 ping-ponged around? It -- you know, you want  
25 the categorical rule. Imagine that I am not

1 sympathetic to the categorical rule but think  
2 that your clients could demonstrate standing  
3 based on the common-sense inferences.

4           You said that you've been pinged --  
5 ping-ponged around for 15 years and so that's  
6 why you want the categorical -- categorical  
7 rule. But, if we just said you had standing,  
8 how can you be ping-ponged around?

9           MR. WALL: Oh, if -- if this Court  
10 declares that there's a common-sense inference  
11 and applies Department of Commerce and says they  
12 met it here, you are right, we should be able  
13 then to get a determination on the merits.  
14 And -- and, as I say, I think the rule is right,  
15 but on either of those views, as long as the  
16 Court says what we say about Department of  
17 Commerce, you are right, we would be able to get  
18 a determination on the merits, which we've been  
19 trying to do for a very long time.

20           JUSTICE BARRETT: So why do you care  
21 as between the -- on that view of the world, why  
22 would you care, other than you want to go for  
23 the big win --

24           MR. WALL: It -- it's --

25           JUSTICE BARRETT: -- as between them?

1           MR. WALL: The win is the same either  
2 way. I think the rule is right. I think it  
3 squares with the competitor standing cases. And  
4 I think the logic of it is right.

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

14           And so, as here, even though, in the  
15 real world, everyone knows that California's  
16 standards have affected automakers, we have a  
17 whole debate now about whether, in fact, as a  
18 matter of common sense, they actually affected  
19 people, and even if they were affecting them in  
20 2019, well, did things change in 2020 and 2021  
21 in a way that by the time you sued in 2022, you  
22 might have had standing before but now you no  
23 longer do?

24           Yes, I think we're right about that  
25 debate, but I don't think we should have to have

1 it in every case.

2 JUSTICE JACKSON: Can I understand the  
3 rule better? Because I -- I had appreciated  
4 from your briefs that you had different  
5 theories, so I'm just trying to appreciate  
6 what's happening.

7 Are you advocating for the direct  
8 regulatory impediment species of this? Is that  
9 what -- is that the rule that you're now  
10 articulating and it has something to do with  
11 being completely locked out of the market?

12 MR. WALL: That's our front-line rule.  
13 If the government locks you out of a marketplace  
14 or tilts it against you and you come in to sue  
15 to have the playing field leveled, you have  
16 standing. That's our front-line rule.

17 And then, obviously, our  
18 second-line --

19 JUSTICE JACKSON: But you see how  
20 that's a little bit different than saying -- if  
21 there's a direct regulatory impediment, that's  
22 different than saying you have to be completely  
23 locked out of the market.

24 MR. WALL: Well, by direct regulatory  
25 impediment, I mean sort of a lockout or, as

1 here, a cap, right? It's not that we can't sell  
2 any fuel at all. It's that we can only sell so  
3 much fuel in California and the other 17 states  
4 that have adopted these standards because the  
5 automakers have to make a certain number of cars  
6 that don't run on the product we manufacture.

7 JUSTICE JACKSON: But where does that  
8 end? I mean, I -- I guess I'm trying to figure  
9 out -- I appreciate your argument that the  
10 regulation is on the automakers and, as a result  
11 of it being on the automakers, the fuel  
12 producers are going to make less fuel.

13 But what about the convenience store  
14 operators who are also part of this? They say  
15 there are fewer people stopping into the  
16 convenience store as a result. Are they in your  
17 rule or not?

18 MR. WALL: I think that they come much  
19 closer to the Department of Commerce, but, of  
20 course, all I need is some Petitioners --

21 JUSTICE JACKSON: No, but I'm just  
22 trying to understand how --

23 MR. WALL: Yeah.

24 JUSTICE JACKSON: -- your rule works.  
25 So they -- so this splits your Petitioner --

1 your plaintiffs' class here because convenience  
2 store operators are in. They're not complete --  
3 in your class. They're not completely locked  
4 out of the market, so your direct regulatory  
5 impediment rule doesn't have them.

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

15 JUSTICE KAGAN: But the way you --  
16 you -- when you answered Justice Jackson, you  
17 said your rule is if the government tilts the  
18 market against you. And, here, that seems like  
19 a easy thing to show and not one that would  
20 cause a lot of debate. But, in many other  
21 cases, does the -- did the government tilt the  
22 market against you? Did it not? How much?

23 That would be a hard thing to show.  
24 And -- and why shouldn't we just stick with a  
25 rule that says we're going to look in each case

1 as to the -- the facts and the evidence, and  
2 then we're going to apply reasonable inferences  
3 and we're going to reach a decision, rather than  
4 try to stick everybody -- do you fit the  
5 categorical rule or do you not fit the  
6 categorical rule?

7 MR. WALL: Justice Kagan, two things.  
8 First, it hasn't been a problem on the  
9 competitor standing side, and it's not a problem  
10 here. We drew a very narrow rule. We took the  
11 language of the D.C. Circuit that it had lived  
12 with for quite a while.

13 JUSTICE KAGAN: See, I think that the  
14 question are you a competitor seems a lot easier  
15 to answer in a lot more cases than the question  
16 has the government tilted the market against  
17 you.

18 MR. WALL: Well --

19 JUSTICE KAGAN: I'll bet there are a  
20 thousand people in every regulation who can come  
21 in and say this regulation tilt the market --  
22 tilted the market against me.

23 MR. WALL: I take the point. That --  
24 that language was a shorthand for what we're  
25 saying in our brief, which is the language of

1 the D.C. Circuit, a direct regulatory  
2 impediment. And as we explained, what we meant  
3 by that and what the D.C. Circuit meant is, are  
4 you preventing someone from selling or placing  
5 into a market? If it is a direct regulatory  
6 impediment, you could sell yesterday, but you  
7 can't sell today, you qualify for the rule. So  
8 I think it's quite a narrow rule.

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

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas, anything further?

20 Justice Alito?

21 Justice Kagan?

22 Justice Gorsuch?

23 Justice Kavanaugh?

24 JUSTICE KAVANAUGH: I'm not sure  
25 there's a huge amount of difference between the

1 rule and the -- and the backup position. I  
2 mean, the rule is based on a common-sense -- the  
3 common-sense predictable effects in a particular  
4 context. But, either way you go, you get to the  
5 same destination. I'm -- I guess I'm not seeing  
6 a huge gap.

7 MR. WALL: I agree, Justice Kavanaugh.  
8 We should win no matter what the Court says.  
9 But --

10 (Laughter.)

11 MR. WALL: -- I -- you know, I do  
12 think that a case like this, it's not that  
13 there's day -- there should be daylight in the  
14 right outcomes. It's that once we make it about  
15 evidence, right, we're going to have to come in  
16 every case and there's going to be a debate,  
17 like, well, what do you have to show to trigger  
18 a common-sense inference and how common is that  
19 common sense? Here --

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

24 MR. WALL: I would have thought so  
25 too, Justice Kavanaugh, but here we are. But

1 I -- look, I'll be the first to grant that if  
2 you take that paragraph in Alliance for  
3 Hippocratic Medicine and you say, look, even if  
4 we're not going to call it a rule, there are  
5 certain categories where we've said the effects  
6 seem awfully predictable and this falls into one  
7 of the categories, that starts to look pretty  
8 much like a rule to me, but I'll grant that if  
9 that's language that the Court thinks squares  
10 more comfortably with its standing precedents in  
11 general, it gets us to the -- it should get us  
12 to the same place.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch, anything?

16 I'm sorry. Justice Jackson?

17 JUSTICE JACKSON: Yeah. So what --  
18 what about corn and soybean growers? Are they  
19 in or out?

20 MR. WALL: They're in. They --  
21 they --

22 JUSTICE JACKSON: They're in?

23 MR. WALL: Yes. They make liquid  
24 fuel, various kinds of liquid fuel, ethanol and  
25 all the rest. And this rule says, no, can't go

1 try to convince the automakers to use your fuel.

2 They have to use -- make a certain --

3 JUSTICE JACKSON: So, I mean, what --

4 what about the ones that aren't quite the fuel

5 producers, but they're earlier in the chain?

6 MR. WALL: It's --

7 JUSTICE JACKSON: I mean, it sounds to

8 me like your rule is conferring standing on

9 anyone in the chain of production in a product

10 that gets affected as a result of government

11 regulation.

12 MR. WALL: I don't mean to reach down

13 the road to all the inputs and suppliers,

14 Justice Jackson.

15 JUSTICE JACKSON: But how do you stop

16 reaching down the road?

17 MR. WALL: Are you the producer? We

18 make and sell liquid fuel, and the government

19 says you could sell to them yesterday, but you

20 can only sell a certain amount today. That is a

21 direct restriction on the product we make and

22 sell. That -- we, by any account, ought to have

23 standing.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. WALL: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Kneedler.

4 ORAL ARGUMENT OF EDWIN S. KNEEDLER

5 ON BEHALF OF THE FEDERAL RESPONDENTS

6 MR. KNEEDLER: Mr. Chief Justice, and

7 may it please the Court:

8 Petitioners contend that there should  
9 be a categorical rule establishing  
10 redressability whenever the plaintiff challenges  
11 government action that poses an impediment to  
12 the use of its product without any need for an  
13 evidentiary basis for that categorical rule or  
14 prediction.

15 That proposal is inconsistent with  
16 this Court's decisions which require a factual  
17 basis for standing.

18 My friend refers to Department of  
19 Commerce and the idea of a predictable or  
20 common-sense outcome. And in Department of  
21 Commerce, there was an evidentiary record.  
22 There was evidence submitted. There were  
23 factual findings that undergirded the prediction  
24 or -- or the result in Department of Commerce,  
25 where the Court could then conclude that people

1 who were answering a survey about -- or asked to  
2 answer a census about the -- their citizenship  
3 would be deterred from doing it. It wasn't just  
4 a -- common sense.

5 And that runs throughout this Court's  
6 standing law. And it's especially important  
7 here because this Court has indeed said that if  
8 -- if the plaintiff is subject -- is the subject  
9 of the regulation, it may be easy to prove.

10 But, when the plaintiff is not, the  
11 Court has said repeatedly it's more difficult to  
12 establish standing because whether you -- your  
13 injury is caused by or will be redressed by the  
14 Court's decision depends on decisions by third  
15 parties, which may or may not be -- be true, and  
16 you need evidence to support a conclusion that  
17 that would be true.

18 I welcome the Court's questions.

19 JUSTICE THOMAS: Mr. Kneedler, wasn't  
20 the -- a goal of the California regulations to  
21 reduce the use of Petitioners' fuel?

22 MR. KNEEDLER: Certainly, in 2013,  
23 when the -- when it was adopted -- I think this  
24 is an important point. In 2013, where the fuel  
25 producers were already selling in the market, it

1 would have been, I think, quite easy to show  
2 that their injury derived from this new  
3 regulation, it was caused by that regulation,  
4 and it would be redressed by lifting it.

5           It's now 10 years later, though. The  
6 manufacturers -- and no one else challenged the  
7 waiver in 2013. In the meantime, there has been  
8 10 years of practical experience in which  
9 manufacturers have adjusted and quite without  
10 regard -- or without resting upon the California  
11 rule have --

12           JUSTICE KAGAN: But, when EPA  
13 reinstated the rule in 2022, was it intended to  
14 do nothing at all?

15           MR. KNEEDLER: No, not at all. And --  
16 and the -- I think -- on that point, I think  
17 it's important to understand the legal rationale  
18 or the legal analysis that EPA brought to bear.  
19 And this is something on which there has been  
20 changes from one administration to the next, and  
21 that's under review.

22           But the -- a -- a waiver in the -- in  
23 the approach that EPA was taking is for the  
24 entire California program, not just these two  
25 particular standards. So the -- a -- a -- a

1 waiver is for the entire program. And if the  
2 entire program is necessary to address  
3 compelling and extraordinary circumstances,  
4 that's sufficient.

5 But the other -- another important  
6 point is that --

7 JUSTICE KAGAN: But, in 2022, didn't  
8 the EPA, in fact, in its submissions to the  
9 courts say that the effect of the reinstatement  
10 was going to be to reduce gasoline emissions?

11 MR. KNEEDLER: They -- they said that  
12 in -- in -- in 2021 based, frankly, I think, on  
13 2019 projections. A lot happened in the --  
14 especially in the zero-emission vehicle market  
15 between --

16 JUSTICE KAGAN: So we shouldn't take  
17 the EPA's own representations seriously?

18 MR. KNEEDLER: Oh, it's California,  
19 but --

20 JUSTICE KAGAN: I think both EPA and  
21 California made those representations in its  
22 papers.

23 MR. KNEEDLER: Well, yes, but -- but  
24 was that sufficient to -- I -- the evidence, as  
25 you said, is pretty thin. And it's also

1 important to recognize what the --

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

5 MR. KNEEDLER: Well --

6 JUSTICE KAGAN: Or -- and -- and if --  
7 you know, if it's so thin, why did you say what  
8 you say in your briefs, and why did California  
9 say what it said in its briefs? Because both  
10 parties, I think, said in -- in their briefs,  
11 yes, this is going to reduce gasoline emissions.

12 MR. KNEEDLER: Well, what -- what EPA  
13 did in -- or the -- the reason -- the principal  
14 reason that it did what it did in 2022 was  
15 because it concluded that the withdrawal of the  
16 previous waiver was unlawful. It was correcting  
17 an error before it was not -- it was not a new  
18 waiver.

19 What -- what EPA did was conclude that  
20 what it had done in 2019 was unlawful for a  
21 variety of reasons. It rested on an erroneous  
22 interpretation of the statute, the one that I  
23 was just mentioning to you about do you look at  
24 the whole program or do you look at -- at -- at  
25 particular standards.

1           So they were -- they were going back  
2 without -- without making a -- a -- a brand-new  
3 assessment. And that's why I think it's  
4 important to recognize that between 2013 --  
5 there's no doubt that in 2013 that the -- that  
6 fuel producers were injured and that that would  
7 have been redressed by rescinding the rule.

8           But that's not the case now because  
9 the manufacturers have adjusted and the market  
10 now reflects the fact that they are -- that  
11 there's no particular reason to assume -- or at  
12 least there is objective evidence contradicting  
13 the proposition that the manufacturers would  
14 change their behavior in a material way.

15           JUSTICE SOTOMAYOR: Mr. Kneedler, the  
16 California intervenors said that California's  
17 regulation would mitigate competitive  
18 disadvantage by ensuring "a level playing field"  
19 for manufacturers who wanted to produce more  
20 fuel-efficient vehicles.

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

23           MR. KNEEDLER: Well --

24           JUSTICE SOTOMAYOR: Meaning if it --  
25 what it's doing is mitigating a competitive

1 level -- or -- or supporting a competitive  
2 system, isn't that a negative effect on them?

3 MR. KNEEDLER: Let me make one other  
4 point because I think it's responsive to that,  
5 and that is that the D.C. Circuit was relying on  
6 both FRAP and the local rule, Rule 28, that  
7 addresses how standing -- an assertion of  
8 standing should be raised on a direct petition  
9 for review. It has to be raised in the  
10 petition -- excuse me -- in the opening brief,  
11 with any supporting materials.

12 The only thing that was -- that was  
13 submitted here were the 14 declarations that, in  
14 a conclusory matter -- manner, said that their  
15 injuries would be -- the Petitioners here, their  
16 injuries would be ameliorated if --

17 JUSTICE SOTOMAYOR: But now we have a  
18 full record.

19 MR. KNEEDLER: Well, but --

20 JUSTICE SOTOMAYOR: And if -- if --  
21 let's --

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

23 JUSTICE SOTOMAYOR: -- address  
24 Mr. Wall's concern, which is, if we reverse for  
25 the D.C. Circuit to look at this again, vacate

1 and remand only, correcting their 2025 ending  
2 date misperception, are you saying that we -- we  
3 should not just say they have standing on what  
4 we have before us now?

5 MR. KNEEDLER: No, I think that --  
6 I -- I think, if the Court is uncertain, it  
7 should vacate and --

8 JUSTICE SOTOMAYOR: No, if we're not  
9 uncertain.

10 MR. KNEEDLER: Well, but what you have  
11 here is effectively a summary judgment ruling in  
12 favor of -- of EPA.

13 If -- if you think that there was --  
14 that there are disputed issues of fact going to  
15 the question of whether -- what the effect of  
16 the reinstatement was, then just like any other  
17 situation, it go -- should go to the trier of  
18 fact to determine what the effect would be.

19 There should not -- otherwise, you're  
20 effectively relying on the categorical rule  
21 or -- or prediction that we think is wrong.

22 We -- we agree --

23 JUSTICE KAVANAUGH: In the -- in the  
24 D.C. --

25 MR. KNEEDLER: -- that it should be

1 fact-based.

2 JUSTICE KAVANAUGH: Sorry to  
3 interrupt.

4 In the D.C. Circuit, EPA did not  
5 challenge standing.

6 MR. KNEEDLER: That's correct.

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

9 MR. KNEEDLER: The -- it -- it did  
10 not. And it -- and it -- I think maybe it -- it  
11 should have, I think, particularly in  
12 retrospect. But the issues of standing --

13 JUSTICE KAVANAUGH: Isn't that a tell  
14 here? I mean, EPA, as you, of course, know,  
15 routinely raises standing objections when  
16 there's even -- even a hint of a question about  
17 it.

18 MR. KNEEDLER: But -- but when --  
19 when -- later on, after the government filed its  
20 brief, that's when California made its standing  
21 submission in it -- in its later-filed brief.

22 And then it should have been incumbent  
23 on Petitioners to respond to that with something  
24 beyond the conclusory affidavits that they did,  
25 and -- and they really didn't come back with

1 anything substantial in their reply brief, and  
2 they sought to file a supplemental brief, which  
3 the D.C. Circuit rejected, and they haven't  
4 sought review of that here.

5           So I -- I -- but I want to stress  
6 that -- that we agree with the observation by a  
7 number of the Justices that this should be a  
8 factual inquiry. There may be many situations  
9 in which it should be easy, and I think that  
10 that would cover the category -- most of the  
11 categories that Mr. Wall is -- is mentioning.

12           In -- in a direct regulate -- if you  
13 have a directly regulated party, the -- the --  
14 this Court has said repeatedly it's probably  
15 going to be pretty easy to establish standing.

16           But, when -- when the redressability  
17 turns on decisions by a -- by a third party not  
18 before the Court, I think it's -- I think it's  
19 not a good idea to establish effectively a -- a  
20 categorical or common-sense or predictive rule  
21 because there are a number of situations in  
22 which the Court has concluded that the fact that  
23 they're independent decision-makers defeats  
24 standing.

25           JUSTICE JACKSON: So, Mr. Kneedler, is

1 this really about -- I'm just trying to think  
2 back to your conversation with Justice Thomas  
3 and Justice Kagan. Is this really about the  
4 sort of development of facts on the ground?  
5 That it sounds to me like what you're saying is  
6 that originally, back in 2013, when this  
7 regulation was initially enacted and everybody  
8 knew and said it was to reduce fuel emissions,  
9 that a lawsuit brought at that moment has  
10 injury, causation, and redressability, noting  
11 that causation and redressability are actually  
12 two different factors with respect to standing,  
13 but that, you know, however many years later, in  
14 2022, because the auto industry has actually on  
15 the ground adjusted to the regulation and no  
16 longer has a demand for the fuel products, you  
17 might have injury, you might have causation, but  
18 I think you're saying you no longer have  
19 redressability in that situation, that this  
20 might be one of the rare instances in which  
21 these things aren't lining up 10, 12 years later  
22 in the same way they would at the beginning.

23 And, therefore, a bright-line rule  
24 that just has us thinking about the initial  
25 scenario, like, was there injury, was there --

1 is it common sense, that is not going to work  
2 because what we're really supposed to be  
3 thinking about in redressability land is the  
4 facts on the ground and whether or not this --  
5 changing this regulation is going to make any  
6 difference?

7 MR. KNEEDLER: I think that's exactly  
8 right. And this is a situation where  
9 redressability gets separated. And may -- maybe  
10 it would be helpful if I illustrated this in  
11 another way. If a manufacturer had brought a  
12 challenge to this regulation, of course, no  
13 manufacturer had done so, the manufacturer would  
14 have been required to say, if this waiver is set  
15 aside, I will engage in the conduct that the  
16 regulation prohibits, which is producing a fleet  
17 that doesn't comply with the California  
18 measures.

19 JUSTICE JACKSON: At the beginning,  
20 we'd be predicting that the manufacturer would  
21 be -- at the beginning, we'd be predicting. The  
22 manufacturer would say that if they were the  
23 plaintiff, and we'd be looking at evidence to  
24 see if that was going to happen.

25 Here, it's already happened that

1 they've changed their results, right?

2 MR. KNEEDLER: Right. And -- and  
3 there's certainly no evidence as far as I can  
4 see that there would be an -- an immediate  
5 material change in what -- in what manufacturers  
6 would do, or at least that was the conclusion  
7 the district -- or the court of appeals drew  
8 from the record. Maybe down the road, five, 10  
9 years ago -- or, in the future someday, the  
10 manufacturers might decide that they want to  
11 change their conduct.

12 But this Court has said some -- such  
13 someday intentions down the road are not  
14 sufficient to establish standing. It's too  
15 contingent, it's too speculative. So, a  
16 fortiori, the same thing should be true of the  
17 fuel producers, who are not the directly  
18 regulated parties, and they should -- they  
19 should be required to show that the  
20 manufacturers would change their behavior here  
21 and now, not sometime in -- in the future. So I  
22 think that lines up with what this Court has  
23 said in *Defenders of Wildlife* and other cases.

24 And what may seem odd here is I think  
25 precisely the mismatch that Justice Jackson was

1 referring to. And I don't think the Court  
2 should adopt a -- a categorical or new rule or  
3 new principles of standing to deal with this  
4 particular case because this is actually the --  
5 the quintessential case in which there should be  
6 a factual determination because there is --  
7 there is evidence that what one might think  
8 about common sense or prediction or the way the  
9 market might react is not so in this case.

10 And so there should at least be an  
11 opportunity for the government to show that it's  
12 not so and for the court of appeals in this case  
13 to determine what -- what do -- what does the  
14 evidence in the -- in the case show.

15 JUSTICE ALITO: Suppose there were an  
16 affidavit by one carmaker saying that if this  
17 waiver is rescinded, we will manufacture one  
18 additional car. Would that be enough? We  
19 absolutely commit ourselves, we will manufacture  
20 one more car.

21 MR. KNEEDLER: I -- I think there are  
22 many situations in which, you know, one person  
23 saying that would be enough. One of the things,  
24 again, that is -- that is, I think, cautionary  
25 in this case is that that begins to look a lot

1 like the probability from some of the Court's  
2 other cases, like if one member of the Sierra  
3 Club could say surely one member will -- will be  
4 injured and, therefore, we should have standing.

5 The question here isn't what one  
6 manufacturer would do, but do any of the  
7 individual plaintiffs benefit from what that one  
8 manufacturer will do by producing an additional  
9 car? That's why I think the Court ought to  
10 think about this in broader terms, whether there  
11 will be a material change in the industry.  
12 Otherwise, you're -- you're allowing the corn  
13 farmer or -- or a small liquid fuel producer to  
14 have standing because one car might be produced.

15 JUSTICE ALITO: Yeah. Okay.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 Justice Thomas?

19 Anything further?

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

23 MR. KNEEDLER: Yes, I think that's  
24 right.

25 JUSTICE ALITO: So what is the

1 probability that there will not be a fifth?

2 MR. KNEEDLER: Well, it is under --  
3 the -- the president in an executive order  
4 directed EPA to examine issue -- measures that  
5 might have an effect, and EPA is undertaking  
6 that. So I -- I can't say what EPA will decide,  
7 but this is one of those that has, indeed,  
8 gone -- gone back and forth.

9 But I don't think that should affect  
10 the standing analysis because, despite that  
11 back-and-forth, the manufacturers have gone  
12 forward with their own plans because of their  
13 own sustainability concerns or looking to the  
14 future, where they're -- they're making  
15 investments and they want to stick by that path.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Sotomayor?

18 JUSTICE SOTOMAYOR: You're not a  
19 betting man, are you?

20 MR. KNEEDLER: Pardon me?

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

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

25 JUSTICE SOTOMAYOR: I -- I --

1 MR. KNEEDLER: -- the administrative  
2 process. I know, but --

3 (Laughter.)

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: I mean, just out of  
6 curiosity, is there anything you can say about  
7 the timing of that process?

8 MR. KNEEDLER: Not -- not at -- at  
9 this point. I -- I think the -- the general  
10 tenor of the executive order was to, you know,  
11 do this, you know, expeditiously or with due  
12 consideration. But, no, I don't have anything  
13 specific.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Gorsuch?

16 Justice Kavanaugh?

17 Justice Barrett?

18 Justice Jackson?

19 Thank you, counsel.

20 Mr. Klein.

21 ORAL ARGUMENT OF JOSHUA A. KLEIN

22 ON BEHALF OF THE STATE RESPONDENTS

23 MR. KLEIN: Mr. Chief Justice, and may  
24 it please the Court:

25 Federal courts don't assume there's

1 standing. The presumption runs the other way.  
2 The party who brings a case must establish that  
3 it, in fact, meets each element of standing.  
4 That may be easier or harder depending on the  
5 case, and Petitioners' case had unique problems.

6 EPA first approved this waiver in  
7 2013, and the automakers quickly started working  
8 to meet the standards. But this case started in  
9 2022. The technology and market had changed.

10 Petitioners relied on decade-old  
11 predictions from the original waiver  
12 proceedings, but the only up-to-date evidence  
13 showed surging consumer demand for clean cars  
14 and automakers' sales well above any regulatory  
15 requirements.

16 Petitioners failed their burden to  
17 establish a non-speculative likelihood that  
18 automakers would sell more gas cars, and  
19 Petitioners sell more fuel, without the waiver.  
20 And there is no basis for inventing categorical  
21 rules that would have courts exercise Article  
22 III power where the elements of standing don't,  
23 in fact, exist.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Well, if you're

1 accurate about where the auto manufacturers are  
2 now, are you willing to say your rules are  
3 unnecessary?

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

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

9 MR. KLEIN: They're not necessary for  
10 our emissions goals. The statutory meaning of  
11 need in Section 209(b) is very precise. It  
12 refers to -- as this EPA decision correctly  
13 interpreted it, it refers to the need for  
14 California to have a separate vehicle emissions  
15 program as a whole, at all, not the need for  
16 each successive individual waiver or standard.  
17 And we do have a need for our entire program as  
18 a whole.

19 JUSTICE THOMAS: So can you -- can you  
20 say that each element of the automotive  
21 industry -- or manufacturing industry is  
22 satisfied or making -- adjusting to your rules?

23 Let's say, for example, can you say  
24 that heavy trucking or medium trucking or large  
25 RVs all could -- accepting of your rule and

1 complying with it?

2 MR. KLEIN: Well, I guess I haven't  
3 thought about that because this standard affects  
4 light-duty vehicles, which include pickup  
5 trucks, I think --

6 JUSTICE THOMAS: Yeah.

7 MR. KLEIN: -- but not the other  
8 things that you've mentioned.

9 But, as a -- as a broader question --  
10 if the question is about the broader market as a  
11 whole, I -- I think, you know, the Court had  
12 nothing to do but speculate as to whether some  
13 set --

14 JUSTICE THOMAS: Okay. Well, let's  
15 just take the trucks then. Let's take the light  
16 trucks. Are you willing to say that without  
17 your rules, the light truck industry would  
18 continue marketing the mix of vehicles it's  
19 currently marketing or manufacturing?

20 MR. KLEIN: Your Honor, we can't  
21 guarantee that, but I can say it was  
22 Petitioners' burden to create a non-spec -- to  
23 establish a non-speculative likelihood under  
24 this Court's precedent.

25 JUSTICE THOMAS: But why would you

1 expect that of them if you're not willing to  
2 say: Your rules are unnecessary at this point,  
3 or ineffectual?

4 MR. KLEIN: Well, Your Honor, this  
5 Court's cases have always put the burden on a  
6 plaintiff or the party who invokes federal  
7 jurisdiction to support with facts.

8 Now we did address the only facts they  
9 brought, which were facts about the California  
10 market with 2012/2013 predictions, but it was  
11 not our burden to disprove every possible  
12 likely -- every possible --

13 JUSTICE KAGAN: Mr. -- Mr. Klein,  
14 I'm -- I'm wondering, actually, whether you, in  
15 fact, made their case for them. So I'm thinking  
16 here of the Vanderspek declaration, which was  
17 submitted in support of your motion to  
18 intervene, and here's one of the things it says.  
19 There are a couple more, but it says: Should  
20 EPA's restoration of California's waiver for the  
21 state's existing light-duty vehicle  
22 greenhouse-gas emission and ZEV standards be  
23 overturned -- should those be overturned -- it  
24 would result in higher criteria pollutant and  
25 greenhouse-gas emissions.

1                   Doesn't that just sort of make their  
2 case?

3                   MR. KLEIN: Well, it would --

4                   JUSTICE KAGAN: That's out of your own  
5 mouth.

6                   MR. KLEIN: It was, Your Honor. And  
7 let me place it in context. That declaration  
8 was filed within days of the petitions for  
9 review and to support one basis of our  
10 intervention, not our independent basis as a  
11 sovereign whose laws would be preempted, to  
12 support one basis.

13                   It -- the declarations relied on and  
14 cited preexisting analyses which were themselves  
15 based on 2019 DMV data. And it turned out that  
16 when the parties had the burden to really  
17 address standing before the court could exercise  
18 its power on the merits, we presented evidence  
19 that that 2019 data was no longer representative  
20 of the actual market.

21                   The market had dramatically changed.  
22 And we did promptly bring that to the court's  
23 attention. And Petitioners never responded  
24 about the condition of the market in 2022. They  
25 doubled down on presumptions and assumptions and

1 categorical rules.

2           And they cited -- and I -- I want to  
3 be clear about this. Mr. Wall cited JA 66. And  
4 if you look at that page, it addressed the 2013  
5 and 2019 records that EPA had because, by the  
6 time the 2022 restoration decision was coming  
7 around, our focus and EPA's focus was that the  
8 2019 recission had been substantively and  
9 procedurally wrong because the -- the 2013  
10 record adequately supported the 2013 findings  
11 and the 2019 record didn't give a basis to -- to  
12 overturn that.

13           And you can see that, for instance,  
14 from the full discussion in the appendix to the  
15 petition, around pages 226 to 227 of the EPA  
16 decision, not the executive summary that their  
17 briefs cite, which shows EPA's focus on the 2013  
18 record and whether that record was deficient, as  
19 the 2019 recission decision had found.

20           And that's, of course, on top of what  
21 was really our fundamental argument and EPA's  
22 fundamental position, which is longstanding and  
23 from administrators throughout the life of this  
24 provision, except for this very brief period,  
25 which is that the need criterion in Section

1 209(b) refers to the need for California to have  
2 a separate vehicle emissions program at all,  
3 with all the standards we've enacted, you know,  
4 which it's a program we've had since, frankly,  
5 before the Clean Air Act was enacted.

6 And I -- I also want to --

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

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

13 And I think the cleanest thing to look  
14 at is the non-speculative part because, if there  
15 aren't facts supporting a -- a --

16 JUSTICE BARRETT: So what kind of  
17 facts would you have wanted them to introduce?  
18 Like affidavits from car manufacturers?

19 MR. KLEIN: They could have, but it  
20 certainly didn't need to be that. The D.C.  
21 Circuit opinion didn't say that. And we would  
22 not say that.

23 Anything in the -- in an  
24 administrative record which shows how the  
25 directly regulated third party is likely to act.

1 There could be additional material.

2 JUSTICE BARRETT: But don't you think  
3 the affidavit that Justice Kagan read you or --  
4 I mean, I think -- I -- I don't think it's  
5 speculation or wild speculation if you're  
6 relying on common-sense inferences.

7 I mean, at some point, if you think  
8 that they've carried the burden -- I'm not  
9 saying that you couldn't poke holes in that,  
10 but, you know, at some point, don't you think  
11 that California could have tried to poke holes  
12 that might take them down -- it's just -- it's  
13 not that high a burden.

14 I guess I'm having a hard time seeing  
15 why the affidavits and common-sense inferences  
16 wouldn't just get them over that mark.

17 MR. KLEIN: Let me compare it to two  
18 of this Court's cases, Lujan versus National  
19 Wildlife Federation and the recent Carney case  
20 on Delaware judicial selection.

21 In the Lujan case, the plaintiffs  
22 submitted a declaration which maybe on its face  
23 would have seemed sufficient: We recreate in  
24 the area of -- I think it was Green Mountain --  
25 and this mining will occur in the Green Mountain

1 Reserve.

2 But the United States submitted  
3 evidence that the Green Mountain Reserve was  
4 hundreds of thousands of acres and only a small  
5 percentage was subject to the mining.

6 This Court held there was no APA  
7 standing because the -- once the plaintiff's  
8 affidavit was understood with what it actually  
9 was and wasn't saying, it was insufficient.

10 Now, in Carney more recently, the  
11 plaintiff said: If this judicial selection  
12 criterion was -- was set aside, then I would  
13 apply for any Delaware judicial spot.

14 And the defendants showed evidence  
15 that: No, there were several spots that were  
16 open recent -- recently that -- where this  
17 criterion did not apply and you would have been  
18 eligible, and you did not submit an application.

19 And, again, it showed that what the  
20 plaintiff was saying was insufficient.

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

23 And our evidence and -- showed: No,  
24 that's not obvious, and there's no reason to  
25 think that's correct because the technology had

1 already improved, maybe thanks to our standards  
2 back during the preceding years and years. The  
3 market had already developed. Maybe it was our  
4 standards that -- and -- as well as other things  
5 that made auto manufacturers invest in  
6 developing that market.

7 But the -- the point is that by 2022,  
8 the cake was baked. Or at least Petitioners  
9 presented no evidence that there was -- that  
10 there would be any likelihood of a change if  
11 this regulation were struck down.

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

15 MR. KLEIN: No, Your Honor. We -- we  
16 think that would --

17 JUSTICE KAVANAUGH: So how does the  
18 court of appeals then evaluate the affidavits?

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

20 JUSTICE KAVANAUGH: Doesn't it have to  
21 use some kind of common-sense understanding of  
22 how markets work if it's not going to have  
23 witnesses and what have you?

24 MR. KLEIN: Your Honor, I think the  
25 court -- as the United States' brief said,

1 courts are quite accustomed to making decisions  
2 about whether the particular inferences from  
3 some evidence has a gap.

4 Not a credibility question. This  
5 wasn't is our expert smarter than their expert.  
6 This was a fundamental gap in the reasoning  
7 which made them not having -- which left them  
8 nothing but speculation.

9 And -- and so I think that -- now,  
10 again, this -- this situation will -- will not  
11 arise that frequently. I mean, this is a kind  
12 of unheard-of nine-year gap.

13 And, in fact, Petitioners have pending  
14 challenges to newer waiver that -- they raise  
15 many of the same issues, I assume. And -- and  
16 for those, there will be Article III standing  
17 because, for those, the newer waiver is for  
18 standards that will require automakers to change  
19 what they're doing so that the -- the  
20 unregulated party, the fuel sellers, will change  
21 how much fuel they sell.

22 But that was not the case here.

23 JUSTICE JACKSON: So is your --

24 JUSTICE KAVANAUGH: How --

25 JUSTICE JACKSON: -- answer to -- oh,

1 I'm sorry, go ahead.

2 JUSTICE KAVANAUGH: Go ahead. Go  
3 ahead.

4 JUSTICE JACKSON: Is your answer to  
5 Justice Kavanaugh that common sense does play a  
6 role when evidence is being presented on both  
7 sides, but what you hear the other side to be  
8 saying is we should substitute where there --  
9 there doesn't need to be evidence, they're  
10 saying, we can just draw these common-sense  
11 inferences as a general matter?

12 MR. KLEIN: I think that's basically  
13 right, Your Honor. The -- I mean, our point is  
14 the inferences have to be based on evidence that  
15 permits the inference. That's -- you know, in  
16 Department of Commerce, there was no prediction  
17 just from the air from this Court's or the  
18 district court's --

19 JUSTICE JACKSON: Right.

20 MR. KLEIN: -- feeling --

21 JUSTICE JACKSON: So that's -- that's  
22 your argument to the bright-line rule. Mr. Wall  
23 says, but we did have evidence, and he points to  
24 these declarations. And you're saying in your  
25 view those declarations were insufficient

1 because they were based on old or outdated  
2 information?

3 MR. KLEIN: Well, Petitioners'  
4 declarations as to remedy were entirely  
5 speculative. And -- sorry. Not speculative,  
6 but conclusory, right? They just said this  
7 would be redressed if you strike down the law.

8 I -- I want to make sure the Court  
9 understands the one piece of evidence that we  
10 haven't talked about, which is Minnesota. The  
11 -- the Petitioners do not appear to contest the  
12 United States' point, and I think it's at page  
13 38 of their brief, that the Minnesota report  
14 that was buried in one of the 14 declarations  
15 and not cited in the court of appeal, did not  
16 actually say that there would be any -- that  
17 automakers would have to change what they were  
18 doing in response to the standard. That just  
19 compared what if automakers do the bare minimum  
20 that's required under the federal standard  
21 versus what if they do the bare minimum that's  
22 -- would be required in the state standard and  
23 did not address what's really the question in  
24 this case, which is how can there be an injury  
25 that's redressable if automakers, for their own

1 reasons and their own motives, are doing more  
2 than either set of regulatory requirements?

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas, anything further?

6 Justice Alito?

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

11 MR. KLEIN: Right. Your Honor, we --  
12 this waiver makes no difference right now to  
13 California's emissions control. So as to this  
14 particular waiver, if we were applying for it  
15 now, I -- well, I don't think we would apply for  
16 it now because that's why we superseded this  
17 with a new waiver that will require automakers  
18 to make a change. We achieved our goals faster  
19 and to a larger extent than we had expected, but  
20 there's just no sign anything would change now  
21 if the waiver were struck down.

22 JUSTICE ALITO: So your -- do I  
23 understand your answer to say you don't need  
24 this waiver?

25 MR. KLEIN: Your Honor, no -- I mean,

1 we don't need the waiver for emissions control.  
2 We -- we are glad that the 2019 rescission was  
3 struck down because of its erroneous substantive  
4 and procedural rulings, but this waiver is not  
5 making a difference on the ground now.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Sotomayor?

9 Justice Kagan?

10 Justice Gorsuch? No?

11 Justice Barrett?

12 Justice Jackson?

13 Thank you, counsel.

14 Rebuttal, Mr. Wall?

15 REBUTTAL ARGUMENT OF JEFFREY B. WALL

16 ON BEHALF OF THE PETITIONERS

17 MR. WALL: Just a few points, Your  
18 Honor.

19 The first, Mr. Kneedler says, look,  
20 who knows what will happen in the market five,  
21 ten years down the road. Just so, that's why  
22 the Court should adopt our front-line rule. We  
23 should be allowed to compete in this marketplace  
24 because we don't know exactly what will happen  
25 down the road.

1           But let's say that the Court isn't  
2 persuaded by the front-line rule. I think  
3 you're right, Justice Kavanaugh, as long as the  
4 Court repeats the language of Alliance for  
5 Hippocratic Medicine, says there are certain  
6 categories in which there are predictable  
7 effects, and says this case is one of them  
8 because it's in the upstream or downstream  
9 category, I think that comes very close to being  
10 the same thing.

11           Why is this case one of them? Justice  
12 Alito, you're right, all we have to show is that  
13 one EV would make one fewer electric vehicle in  
14 any of 18 states. It's not just California.  
15 Mr. Klein is looking only at California. There  
16 are 18 states here that -- 17 others that have  
17 adopted California's standards.

18           So what was the record on that? We  
19 had California's statement in 2021, that's at JA  
20 66, saying this is critical to reduce emissions.  
21 Then you have the EPA, when it regrants the  
22 waiver, saying in 2022, California needs these  
23 standards. That's at pages 154 and 155 and  
24 footnote 180 of the Petition Appendix, also  
25 pages 64, 65, 180, and 202. It says it again

1 and again.

2 Now, I take Mr. Kneedler's point. The  
3 EPA did speak out of both sides of its mouth.  
4 It said on the one hand we're not going to  
5 really go back and look at whether they need the  
6 standards. We're just looking at whether we  
7 messed up a few years ago. But they also say  
8 we've looked at the whole record and California  
9 needs the standards. I don't know exactly how  
10 to square those statements, but either they  
11 abdicated their statutory responsibility or they  
12 said California does, in fact, need the  
13 standards.

14 And then in 2022, the two CARB  
15 declarations come in. I think the Scheehle  
16 statement at page 115 of the JA is -- is as good  
17 or better than the Vanderspek statement,  
18 California itself saying we need the waiver  
19 because otherwise we get fewer electric vehicles  
20 and more gasoline-powered vehicles.

21 Now, I thought that the one thing they  
22 would not clearly say -- and I can't tell  
23 whether California is just saying it doesn't  
24 need the waiver now or that was also true back  
25 in 2022. But I didn't think that either of the

1 -- either the United States or California would  
2 say if we had not gotten the waiver in '22, no  
3 automaker would have done anything from that day  
4 forward to the end of time, because I thought it  
5 was something that couldn't credibly be said by  
6 anybody to the case because whatever would  
7 happen in California, there are lots of other  
8 states out there that are not close to the same  
9 numbers on EV penetration as California.

10 California seemed to hedge on that,  
11 Justice Thomas, but wherever California is on  
12 that, I don't think it's right. And I -- the  
13 one thing is Mr. Kneedler didn't go near it, and  
14 I am a betting man, Justice Sotomayor, and I bet  
15 my bottom dollar that the reason he didn't is  
16 that in some number of months, the EPA will  
17 withdraw the waiver and will say this waiver has  
18 been having an effect from the time it was  
19 reinstated and it is compelling automakers to  
20 make more EVs than would otherwise be produced  
21 in response to consumer demand. If the EPA says  
22 that in a number of months, it will be right.

23 The last thing is I would say the  
24 Court shouldn't just vacate and remand. That  
25 does pose the risk that we get ping-ponged

1 because it doesn't correct the court of appeals'  
2 legal errors. Even if it tells them that the  
3 standards last forever, it doesn't do anything  
4 on our front-line rule, and it doesn't do  
5 anything to correct their misunderstanding of  
6 how the predictable effects test work.

7 It is important for standing purposes,  
8 not just for us but, as our amici explain, for  
9 lots of challengers in lots of different  
10 settings. It is important that the Court  
11 correct the court of appeals' legal errors so  
12 that we can get our day in court and finally  
13 have an opportunity to make our case for why EPA  
14 and California have wrongly interpreted the  
15 Clean Air Act.

16 Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 The case is submitted.

20 (Whereupon, at 11:10 a.m., the case  
21 was submitted.)

22

23

24

25

## Official - Subject to Final Review

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