DIAMOND ALTERNATIVE ENERGY, LLC, ET AL., Petitioners, v. ENVIRONMENTAL PROTECTION AGENCY, ET AL., Respondents

Oral Argument - April 23, 2025

John G. Roberts, Jr.

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

Mr. Wall.

Jeffrey B. 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 inferences about third-party behavior.

It doesn't take much common sense to figure out that if California limits the number of cars that can run on gas, automakers will make fewer cars that run on gas.

Remember that we're here because California asked for and EPA granted a waiver because California said it needs its own standards.

California even intervened by telling th e court below that its standards are likely to reduce fuel consumption.

The common -sense inference is that this waiver matters in the real world, not that it is completely meaningless.

But, if we needed hard evidence, we had plenty of it, five kinds: one, our declarations showing that California's standards have historically harmed us; two, California's and EPA's actions and statements in 2021 and 2022 saying that their standards are likely to reduce fuel consumption; three, California's two expert declarations from CARB officials in 2022 saying that their standards are likely to decrease fuel consumption; four, the intervening automakers' admission that, without the waiver, some of their competitors were likely to back away from electrification; and, fifth, Toyota's comment and public reporting also indicating that some automakers would back away from electrification without the waiver.

Taken together, that is more than enough evidence to establish redressability.

I welcome the Court's questions.

Clarence Thomas

Mr. Wall, taking a step away -- back from the evidence you just provided or the points you just made, what is your rule? How would you articulate -- articulate your categorical rule?

Jeffrey B. Wall

Our rule is that when the government denies a party the ability to compete in a marketplace and the party sues to have that market restriction lifted, there is redressability because the party is asking for the thing to be taken away that's causing its injury.

Clarence Thomas

Is there some degree of hindrance to that party that has to be shown to apply your rule?

Jeffrey B. Wall

I don't think so because we're not talking about just sort of some indirect impediment.

I'm talking about a market restriction that directly tilts or forecloses the playing field.

It says you can't sell your product, your good, your service into a particular market either wholly or, here, partially, up to some certain cap.

Clarence Thomas

So how would you show that?

Jeffrey B. Wall

Well, what I'd say is it -- it's --you show it by the nature of the injury. So just like in a competitor standing case, like in National Credit Union, if you come in and you say the government is under-regulating one of my competitors, right, this Court said that's competitor standing.

Government agrees with that.

That's Footnote 2 of their brief.

This is the same thing.

It's just that instead of picking winning and -- winners and losers among particular market participants, you're picking winners and losers as among markets.

So, if you come in and you say I have something that yesterday I could freely sell and today I cannot freely sell it as a result of a government regulation that directly forecloses me, you have standing on our view.

Ketanji Brown Jackson

So, Mr. Wall, how -- how is that consistent with the Court's holding in Warth versus Seldin? I know you talk about it briefly in one of your footnotes, but that seems to me to map on exactly with what you're now saying. There was an exclusionary zoning restriction that prevented home builders and others from building in a particular area, and the Court found that that was not sufficient for redressability.

Jeffrey B. Wall

So the Court looked at it more as a sort of predictable effects-type case and said, well, we actually think it's very speculative whether you could get into the neighborhood at all.

And so the Court saw that case through a very different lens, and, of course, nobody was there on --

Ketanji Brown Jackson

But I guess that I -- I -- I guess I'm questioning whether or not it really is a different lens.

I mean, the Court said, if you're right that the rule is just a common sense -- you don't really have to have evidence, we just sort of infer based on the relationships in the marketplace and whatnot, that's exactly what was happening there.

The home builders said we aren't going to be able to build our houses, our single-family homes, in this zoned-off area. And so we said, I think, when you look at the case, that there's got to be evidence that there actually would be home building in this area absent that regulation.

And I think that's the same thing as saying here that you can't just rely on the fact that we would think that lifting this restriction would allow for more cars to be built.

There actually has to be evidence that there would be more cars built, you know, fuel-ingesting cars, in this environment.

Jeffrey B. Wall

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

You have some sets of cases, like the equal protection cases or the competitor standing cases, where you say that the nature of the injury gives you causation or redressability.

It's the ability not --you're denied the ability to compete in the marketplace.

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

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

Ketanji Brown Jackson

And what distinguishes the two? Is it that we have corporations in one, that we have -- like, what --how would we know which line we're

supposed to apply in this situation?

Jeffrey B. Wall

I think it depends on whether the Court believes that the nature of the injury gives you causation and redressability.

So, as I understand the competitor standing cases, and I think they're correctly decided, if I'm in a market and I allege or show that I am competing with, you know, Mr. Klein in a market, and the government comes in and tilts the playing field toward Mr. Klein, I have standing because, by definition, the nature of the injury is that the government tilted the playing field and I have redressability because I want the playing field to be level again.

That's what I'm asking for.

And we see our case as exactly the same.

We're -- and -- and -- and --- and I think the D.C. Circuit got this exactly right when --

Sonia Sotomayor

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

You've marshaled many facts to support your standing.

In this case, the D.C. Circuit thought erroneously -- it's been conceded by the government -- that this regulation would expire in 2025.

So let's assume you came in a month before the expiration and that the rule was never going to be renewed, okay? Why would you have standing? Under your rule, merely because the -- the -- the barrier exists, you have standing. But what the court here said is you might have standing, but you don't have redressability because the manufacturers can't change their production right now.

And this rule expires. They made a mistake on that.

It's conceded.

So isn't the issue whether th e -- the confluence of all the facts you put forth show that this is more like the D.C. Circuit case that Justice Kavanaugh relied upon or more like the Chamber of Commerce versus EPA case, where he said that the affidavits back and forth showed that

that particular set of claimants wouldn't really be successful in selling their products? So why isn't it always a factual dispute?

Jeffrey B. Wall

So here's the importance of the rule, Justice Sotomayor.

Here's why you need one, and he re's why I think the D.C. Circuit was right to adopt one in Energy Future Coalition.

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

You can't satisfy Department of Commerce.

You can't satisfy Warth.

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

Sonia Sotomayor

What you want then is an advisory opinion.

And at a certain point, we move from giving -- giving you relief or not, but that's not this case.

Jeffrey B. Wall

Justice Sotomayor, I want to be very clear.

Sonia Sotomayor

Why would we announce a rule that's not pertinent to this case?

Jeffrey B. Wall

I do not want an advisory opinion.

They now acknowledge --

Sonia Sotomayor

So they now acknowledge that they were wrong.

They'll have to answer as to why they're even defending the rule if it has no effect, which is my logical question.

If it doesn't affect the market, why have the rule at all? But we can go -- let them answer that.

Jeffrey B. Wall

I -- I look forward to hearing them do it.

But I just --I want to say quickly, in this case, everybody now acknowledges the greenhouse-gas standards persist into the future indefinitely if nothing changes from now to the end of time.

Absent a rule, they can come in and say: The market is exceeding our standards right now.

You can't show that any automaker will do anything.

There's a 60-day time bar in the statute.

If we can't sue when we sued, we're out of luck forever.

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

Sonia Sotomayor

Let's assume that they had affidavits from every single car manufacturer.

This is like Chamber of Commerce versus EPA.

Every car manufacturer, every single one of them, says: Can't change it, won't change it.

Do you still win? Can't change it, won't change it.

You're the fuel people, but it's not going to affect you because they're going to follow it no matter what.

Jeffrey B. Wall

Yes, we do.

The evidence here is actually to the contrary, pages 99 to 211.

Sonia Sotomayor

Well, but that's the point.

Jeffrey B. Wall

But I -- I take the point. Yes, because the question isn't what are automakers doing today when we get locked out of the market.

It's, yes, we have a pocketbook injury, we believe, but we have an injury that occurs even earlier than that.

We are denied the ability to go out and compete in the marketplace, to convince automakers that they shouldn't be making as many electric

vehicles.

They should be making more vehicles that run on liquid fuel.

And the government has foreclosed us from doing that.

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

Amy Coney Barrett

What if, in Justice Sotomayor's example, the manufacturers stand with, you know, the California regulators and with EPA on the very first day the regulation is rolled out and say: We support this.

You know, we want a greener earth, we want to prevent climate change, and this is going to be cheaper for our business anyway.

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

Why should you have standing and redressability at that point?

Jeffrey B. Wall

Because it seems to me, Justice Barrett -- let's assume just for a moment that -- that it's unlawful but that the entire industry buys in.

They cut a deal with California.

They accept the standards, they want to abide by them, and they all agree and they want to lock in the demand and force consumers that way because they think it'll be profitable for the auto-making industry. We still are harmed in a direct way. The government has tilted the playing field and foreclosed us from being able to freely sell our product.

And we -- we ought to be able to make our arguments on the merits and get our day in court regardless of whether the directly regulated industry cuts a deal or not.

We have an injury.

We have been locked out of a marketplace.

That injures us financially.

It's caused by the regulation.

I don't take anybody to be disputing that.

So the only question is redressability, and that should be easy in a case like this one.

If everybody grants that the regulation is causing your injury, vacating the regulation or California's standards that -- that they're allowed to adopt redresses the injury.

Samuel A. Alito, Jr.

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

Now maybe there could be situations in which, by the submission of affidavits like the ones that have been discussed or statements by all the carmakers, it could be shown that, no, contrary to what one would normally think, this is not going to have any effect, in which case you -- you might lose on standing.

But I'm not sure why you think you need a special rule in this situation.

Jeffrey B. Wall

Justice Alito, I don't want to fight it too hard.

If the Court says: Look, you had far more here than we had before us in Department of Commerce, you can have a common -sense inference, it's predictable under Department of Commerce --

Samuel A. Alito, Jr.

There are many situations in which standing depends on a probabilistic inquiry, and those are very fact-specific.

So, you know, you'd ask: What is the -- what is the probability in a particular situation? When someone says I'm threatened with -- you know, I expect that this will harm me, we assess the -- the --the --the degree of the risk.

Jeffrey B. Wall

So I'll take -- I'll say two things, Justice Alito.

First, what I'm worried about is that we've been ping-ponged around for going on 15 years, trying to get a determination on the merits.

And if we get sent back for a predictable effects analysis or all the rest in this and future cases, I worry about where we end up. But, second, and -- and I -- more logically doctrinally, in the competitor standing cases, the Court doesn't say: Well, if we leveled the playing field, would the customers that you seek to compete for fairly come to you rather than

the other guy? And I think that's the wrong -- I think that would be the wrong way to look at those cases.

Your injury isn't just what happens in the marketplace when you are allowed to compete and you think some dollars are taken out of your pocket.

You don't really know because the point is you've been locked out of the marketplace.

And that's why I think the rule is important.

I think it's the same logic here as in the competitor standing cases.

And it's not like the Court doesn't do that in other areas.

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

Samuel A. Alito, Jr.

I would think that you -- you would have injury in fact under our cases if the effect of this is to cause your clients to be unable to sell one car.

Wouldn't that be correct?

Jeffrey B. Wall

Well, sell one gallon of liquid fuel.

Yes.

Samuel A. Alito, Jr.

I'm sorry, one gallon of liquid fuel.

Jeffrey B. Wall

Yes, that's true.

Samuel A. Alito, Jr.

So that doesn't seem like very much to have to show.

Jeffrey B. Wall

Justice Alito, I agree, but that's what makes the case so odd.

The court of appeals said: All right, we're not going to contest that there's injury in fact and causation.

We're not going to say there is, but we're not going to say there isn't.

We're going to assume that you've got injury in fact that you sell one gallon less of gasoline, and we're going to assume it's caused by the regulation.

But we think you haven't shown redressability.

Elena Kagan

But I think that the reason for that was a combination of two things.

One was what Justice Sotomayor said, that they were -- that they were mistaken about the end date of the regulation.

The other, you know, honestly, was that you didn't put on much evidence.

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

Jeffrey B. Wall

So, Justice Kagan, I don't think that's fair.

We had an on-point decision from the D.C. Circuit dealing with this very industry, fuel producers.

We had our own declarations.

We had California's expert declarations filed after we brought this case.

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

Elena Kagan

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

Jeffrey B. Wall

Well, we pointed to our declarations.

We pointed to California's statement in 2021, at page 66 of the JA, saying these standards are critical --their word -- to reducing fuel

consumption.

We pointed to EPA's statements in adopting the waiver saying they need their own standards.

We pointed to the intervenor automakers' admission saying: Hey, we've invested a lot in electrification.

If you don't make them meet the same standard, we might be at a "competitive disadvantage." And I guess my point back, Justice Kagan, is, look, if --

Elena Kagan

I think my point to you is, surely, if that's all in the record, you deserve to go forward.

Jeffrey B. Wall

Oh, I agree.

I -- I -- I -- I agree.

Ketanji Brown Jackson

So then why do we need the rule? Why do we need a bright -line rule if you satisfy the regular evidence standard?

Jeffrey B. Wall

First, because I think it's logically the correct inquiry.

It's not what happens in the market.

It is, as Justice Kavanaugh said in Energy Future Coalition, your inability to get into the marketplace in the first instance.

That's a key part of the injury, and not adopting the rule misses that part.

But even --

Ketanji Brown Jackson

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

Jeffrey B. Wall

I don't think that evidence is relevant for the same reason it's not in competitor standing cases.

But, if the Court disagrees on our rule, I agree, we should win on a standard Department of Commerce, what is the likely effect here.

And we put in far more evidence than you would typically see in a case like this. And with all respect to the court below, we got dinged not because we didn't do enough.

Any lawyer looking at what we had done at the time would have said we had redressability.

We got dinged, in fairness, because the court below moved the goalposts.

We had Energy Future Coalition and plenty of evidence to satisfy it, and the court below, without citing any --

Sonia Sotomayor

That is really unfair, Mr. Wall.

They were under a mistaken understanding, partly because of the submission s in this case where you were just complaining in your papers about this rule being in effect only until 2025.

Jeffrey B. Wall

So, Justice Sotomayor, that is part of the mistake that the court of appeals made, but its error was more fundamental.

When it looked at standing, it should have said: We have Energy Future Coalition.

It tells us that we have redressability in the same industry, fuel producers, if the regulation locks them out of the marketplace.

It didn't say that.

It turned to the evidence, and then, rather than on the evidence saying, well, this is more than enough to satisfy cases like Department of Commerce or Alliance of Hippocratic Medicine, it -- it said, ah, not enough here.

And what that really amounts to at the end of the day is we couldn't get an affidavit from an automaker who didn't intervene.

They sat on the sidelines.

They didn't want to participate.

And because we couldn't get them to stick their hand up, we couldn't -- we didn't have someone saying here is how I will change my fleet absent the waiver.

And that's what we didn't have.

And if that's what it's really going to take for an indirectly regulated party to get into court, it's going to be far more difficult to challenge governmental action, and these cases are going to become more expensive and, frankly, arbitrary, because it will turn on whether the directly regulated industry likes the rule or they don't.

And as far as my clients are concerned, that shouldn't matter one whit.

Amy Coney Barrett

Why will you be ping-ponged around? It --you know, you want the categorical rule.

Imagine that I am not sympathetic to the categorical rule but think that your clients could demonstrate standing based on the common-sense inferences. You said that you've been pinged -- ping-ponged around for 15 years and so that's why you want the categorical -- categorical rule.

But, if we just said you had standing, how can you be ping-ponged around?

Jeffrey B. Wall

Oh, if --if this Court declares that there's a common -sense inference and applies Department of Commerce and says they met it here, you are right, we should be able then to get a determination on the merits. And -- and, as I say, I think the rule is right, but on either of those views, as long as th e Court says what we say about Department of Commerce, you are right, we would be able to get a determination on the merits, which we've been trying to do for a very long time.

Amy Coney Barrett

So why do you care as between the -- on that view of the world, why would you care, other than you want to go for the big win --

Jeffrey B. Wall

It --it's --

Amy Coney Barrett

-- as between them?

Jeffrey B. Wall

The win is the same either way.

I think the rule is right.

I think it squares with the competitor standing cases.

And I think the logic of it is right.

The injury here is not just what happens out there in the marketplace.

We are prevented from getting in at all.

And my concern, Justice Barrett, is that if you don't adopt the rule, it will always be an argument about what will happen in the marketplace.

And that's very difficult to show once you have a governmental mandate because the governmental regulation is skewing the entire market.

And so, as here, even though, in the real world, everyone knows that California's standards have affected automakers, we have a whole debate now about whether, in fact, as a matter of common sense, they actually affected people, and even if they were affecting them in 2019, well, did things change in 2020 and 2021 in a way that by the time you sued in 2022, you might have had standing before but now you no longer do? Yes, I think we're right about that debate, but I don't think we should have to have it in every case.

Ketanji Brown Jackson

Can I understand the rule better? Because I --I had appreciated from your briefs that you had different theories, so I'm just trying to appreciate what's happening.

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

Jeffrey B. Wall

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

That's our front-line rule. And then, obviously, our second -line --

Ketanji Brown Jackson

But you see how that's a little bit different than saying -- if there's a direct regulatory impediment, that's different than saying you have to be completely locked out of the market.

Jeffrey B. Wall

Well, by direct regulatory impediment, I mean sort of a lockout or, as here, a cap, right? It's not that we can't sell any fuel at all.

It's that we can only sell so much fuel in California and the other 17 states that have adopted these standards because the automakers have to make a certain numbe r of cars that don't run on the product we manufacture.

Ketanji Brown Jackson

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

But what about the convenience store operators who are also part of this? They say there are fewer people stopping into the convenience store as a result.

Are they in your rule or not?

Jeffrey B. Wall

I think that they come much closer to the Department of Commerce, but, of course, all I need is some Petitioners --

Ketanji Brown Jackson

No, but I'm just trying to understand how --

Jeffrey B. Wall

Yeah.

Ketanji Brown Jackson

-- your rule works. So they --so this splits your Petitioner -- your plaintiffs' class here because convenience store operators are in.

They're not complete -- in your class.

They're not completely locked out of the market, so your direct regulatory impediment rule doesn't have them.

Jeffrey B. Wall

That's right.

It's just like competitor standing, right? You can harm --you're harmed because they under-regulate a competitor.

That regulation can harm lots of other people, people who supply your inputs and all the rest.

You have competitor standing.

Everybody else has to satisfy predictable effects, Department of Commerce, Warth.

The same thing here.

Elena Kagan

But the way you -- you -- when you answered Justice Jackson, you said your rule is if the government tilts the market against you.

And, here, that seems like a easy thing to show and not one that would cause a lot of debate.

But, in many other cases, does the -- did the government tilt the market against you? Did it not? How much? That would be a hard thing to show. And -- and why shouldn't we just stick with a rule that says we're going to look in each case as to the -- the facts and the evidence, and then we're going to apply reasonable inferences and we're going to reach a decision, rather than try to stick everybody -- do you fit the categorical rule or do you not fit the categorical rule?

Jeffrey B. Wall

Justice Kagan, two things. First, it hasn't been a problem on the competitor standing side, and it's not a problem here.

We drew a very narrow rule.

We took the language of the D.C. Circuit that it had lived with for quite a while.

Elena Kagan

See, I think that the question are you a competitor seems a lot easier to answer in a lot more cases than the question has the government tilted the market against you.

Jeffrey B. Wall

Well --

Elena Kagan

I'll bet there are a thousand people in every regulation who can come in and say this regulation tilt the market -- tilted the market against me.

Jeffrey B. Wall

I take the point.

That -- that language was a shorthand for what we're saying in our brief, which is the language of the D.C. Circuit, a direct regulatory impediment.

And as we explained, what we meant by that and what the D.C. Circuit meant is, are you preventing someone from selling or placing into a market? If it is a direct regulatory impediment, you could sell yesterday, but you can't sell today, you qualify for the rule.

So I think it's quite a narrow rule.

And the second thing is: Why do it? It's the answer I gave to Justice Barrett: Because, otherwise, we're going to have to have this debate in every case.

And, yes, I think I win as a matter of common sense, but three judges of the D.C. Circuit, as it turned out, disagreed with me.

And it seems to me we shouldn't have that debate in every case.

John G. Roberts, Jr.

Thank you, counsel.

Justice Thomas, anything further? Justice Alito? Justice Kagan? Justice Gorsuch? Justice Kavanaugh?

Brett M. Kavanaugh

I'm not sure there's a huge amount of difference between the rule and the --and the backup position.

I mean, the rule is based on a common-sense -- the common -sense predictable effects in a particular context.

But, either way you go, you get to the same destination.

I'm -- I guess I'm not seeing a huge gap.

Jeffrey B. Wall

I agree, Justice Kavanaugh. We should win no matter what the Court says. But -- (Laughter.)

Jeffrey B. Wall

--I -- you know, I do think that a case like this, it's not that there's day -- there should be daylight in the right outcomes.

It's that once we make it about evidence, right, we're going to have to come in every case and there's going to be a debate, like, well, what do you have to show to trigger a common-sense inference and how common is that common sense.

Here --

Brett M. Kavanaugh

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

Jeffrey B. Wall

I would have thought so too, Justice Kavanaugh, but here we are.

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

Brett M. Kavanaugh

Thank you.

John G. Roberts, Jr.

Justice Gorsuch, anything? I'm sorry.

Justice Jackson?

Ketanji Brown Jackson

Yeah.

So what -- what about corn and soybean growers? Are they in or out?

Jeffrey B. Wall

They're in.

They -- they --

Ketanji Brown Jackson

They're in?

Jeffrey B. Wall

Yes.

They make liquid fuel, various kinds of liquid fuel, ethanol and all the rest.

And this rule says, no, can't go try to convince the automakers to use your fuel. They have to use -- make a certain --

Ketanji Brown Jackson

So, I mean, wha t -- what about the ones that aren't quite the fuel producers, but they're earlier in the chain?

Jeffrey B. Wall

It's --

Ketanji Brown Jackson

I mean, it sounds to me like your rule is conferring standing on anyone in the chain of production in a product that gets affected as a result of government regulation.

Jeffrey B. Wall

I don't mean to reach down the road to all the inputs and suppliers, Justice Jackson.

Ketanji Brown Jackson

But how do you stop reaching down the road?

Jeffrey B. Wall

Are you the producer? We make and sell liquid fuel, and the government says you could sell to them yesterday, but you can only sell a certain amount today.

That is a direct restriction on the product we make and sell.

That --we, by any account, ought to have standing.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Jeffrey B. Wall

Thank you.

John G. Roberts, Jr.

Mr. Kneedler.

Edwin S. Kneedler

Mr. Chief Justice, and may it please the Court: Petitioners contend that there should be a categorical rule establishing redressability whenever the plaintiff challenges government action that poses an impediment to the use of its product without any need for an evidentiary basis for that categorical rule or prediction.

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

My friend refers to Department of Commerce and the idea of a predictable or common -sense outcome.

And in Department of Commerce, there was an evidentiary record. There was evidence submitted.

There were factual findings that undergirded the prediction or -- or the result in Department of Commerce, where the Court could then conclude that people who were answering a survey about -- or asked to answer a census about the -- their citizenship would be deterred from doing it.

It wasn't just a -- common sense. And that runs throughout this Court's standing law.

And it's especially important here because this Court has indeed said that if -- if the plaintiff is subject -- is the subject of the regulation, it may be easy to prove.

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

I welcome the Court's questions.

Clarence Thomas

Mr. Kneedler, wasn't the -- a goal of the California regulations to reduce the use of Petitioners' fuel?

Edwin S. Kneedler

Certainly, in 2013, when --when it was adopted -- I think this is an important point.

In 2013, where the fuel producers were already selling in the market, it would have been, I think, quite easy to show that their injury derived from this new regulation, it was caused by that regulation, and it would be redressed by lifting it.

It's now 10 years later, though.

The manufacturers -- and no one else challenged the waiver in 2013.

In the meantime, there has been 10 years of practical experience in which manufacturers have adjusted and quite without regard -- or without resting upon the California rule have --

Elena Kagan

But, when EPA reinstated the rule in 2022, was it intended to do nothing at all?

Edwin S. Kneedler

No, not at all.

And -- and the -- I think -- on that point, I think it's important to understand the legal rationale or the legal analysis that EPA brought to bear. And this is something on which there has been changes from one administration to the next, and that's under review.

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

So the -- a -- a -- a waiver is for the entire program.

And if the entire program is necessary to address compelling and extraordinary circumstances, that's sufficient.

But the othe r -- another important point is that --

Elena Kagan

But, in 2022, didn't the EPA, in fact, in its submissions to the courts say that the effect of the reinstatement was going to be to reduce gasoline emissions?

Edwin S. Kneedler

They -- they said that in -- in --in 2021 based, frankly, I think, on 2019 projections.

A lot happened in th e -- especially in the zero -emission vehicle market between --

Elena Kagan

So we shouldn't take the EPA's own representations seriously because they --

Edwin S. Kneedler

Oh, it's California, but --

Elena Kagan

I think both EPA and California made those representations in its papers.

Edwin S. Kneedler

Well, yes, but -- but was that sufficient to -- I --the evidence, as you said, is pretty thin.

And it's also important to recognize what the --

Elena Kagan

Well, if it was so thin, I don't think that you had a grounds to -- to reinstate the waiver.

Edwin S. Kneedler

Well --

Elena Kagan

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

Edwin S. Kneedler

Well, what --what EPA did in -- or the -- the reason -- the principal reason that it did what it did in 2022 was because it concluded that the withdrawal of the previous waiver was unlawful.

It was correcting an error before.

It was not -- it was not a new waiver.

What -- what EPA did was conclude that what it had done in 2019 was unlawful for a variety of reasons.

It rested on an erroneous interpretation of the statute, the one that I was just mentioning to you about do you look at the whole program or do you look at -- at --at particular standards.

So they were -- they were going back without --without making a -- a --a brand-new assessment.

And that's why I think it's important to recognize that between 2013 -- there's no doubt that in 2013 that the man -- that full -- fuel producers were injured and that that would have been redressed by rescinding the rule.

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

Sonia Sotomayor

Mr. Kneedler --

Edwin S. Kneedler

-- in a material way.

Sonia Sotomayor

-- the California intervenors said that California's regulation would mitigate competitive disadvantage by ensuring "a level playing field" for manufacturers who wanted to produce more fuel-efficient vehicles. I just don't see how that statement alone doesn't destroy everything you're arguing.

Edwin S. Kneedler

Well --

Sonia Sotomayor

Meaning if it -- what it's doing is mitigating a competitive level -- or -- or supporting a competitive system, isn't that a negative effect on them?

Edwin S. Kneedler

Let me make one other point because I think it's responsive to that, and that is that the D.C. Circuit was relying on both FRAP and the local rule, Rule 28, that addresses how standing -- an assertion of standing should be raised on a direct petition for review.

It has to be raised in the petition --excuse me -- in the opening brief with any supporting materials.

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

Sonia Sotomayor

But now we have a full record.

Edwin S. Kneedler

Well, but --

Sonia Sotomayor

And if -- if -- let's --

Edwin S. Kneedler

But -- but the --

Sonia Sotomayor

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

Edwin S. Kneedler

No, I think that -- I -- I think, if the Court is uncertain, it should vacate and --

Sonia Sotomayor

No, if we're not uncertain.

Edwin S. Kneedler

Well, but what you have here is effectively a summary judgment ruling in favor of --of EPA. If -- if you think that there was -- that there are disputed issues of fact going to the question of whether -- what the

effect of the reinstatement was, then just like any other situation, it go -- should go to the trier of fact to determine what the effect would be.

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

Brett M. Kavanaugh

In the --in the D.C.

--

Edwin S. Kneedler

-- that it should be fact-based.

Brett M. Kavanaugh

Sorry to interrupt.

Edwin S. Kneedler

Sorry.

Brett M. Kavanaugh

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

Edwin S. Kneedler

That's correct.

Brett M. Kavanaugh

And that's unusual in my experience.

Why -- why not?

Edwin S. Kneedler

The -- it -- it did not.

And it -- and it -- I think maybe it -- it should have, I think, particularly in retrospect.

But the issues of standing --

Brett M. Kavanaugh

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

Edwin S. Kneedler

But -- but when -- when --later on, after the government filed its brief, that's when California made its standing submission in it -- in its later-filed brief. And then it should have been incumbent on Petitioners to respond to that with something beyond the conclusory affidavits that they did, and -- and they really didn't come back with anything substantial in their reply brief, and they sought to file a supplemental brief, which the D.C. Circuit rejected, and they haven't sought review of that here.

So I -- I -- but I want to stress that --that we agree with the observation by a number of the Justices that this should be a factual inquiry.

There may be many situations in which it should be easy, and I think that that would cover the category -- most of the categories that Mr. Wall is mentioning.

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

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

Ketanji Brown Jackson

So, Mr. Kneedler, is this really about -- I'm just trying to think back to your conversation with Justice Thomas and Justice Kagan.

Is this really about the sort of development of facts on the ground? That it sounds to me like what you're saying is that originally, back in 2013, when this regulation was initially enacted and everybody knew and said it was to reduce fuel emissions, that a lawsuit brought at that moment has injury, causation, and redressability, noting that causation and redressability are actually two different factors with respect to standing, but that, you know, however many years later, in 2022, because the auto industry has actually on the ground adjusted to the regulation and no longer has a demand for the fuel products, you might have injury, you might have causation, but I think you're saying you no longer have redressability in that situation, that this might be one of the

rare instances in which these things aren't lining up 10, 12 years later in the same way they would at the beginning.

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

Edwin S. Kneedler

I think that's exactly right.

And this is a situation where redressability gets separated.

And may -- maybe it would be helpful if I illustrated this in another way.

If a manufacturer had brought a challenge to this regulation --of course, no manufacturer had done so --the manufacturer would have been required to say, if this waiver is set aside, I will engage in the conduct that the regulation prohibits, which is producing a fleet that doesn't comply with the California measures.

Ketanji Brown Jackson

At the beginning, we'd be predicting that the manufacturer would be -- at the beginning, we'd be predicting.

The manufacturer would say that if they were the plaintiff, and we'd be looking at evidence to see if that was going to happen.

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

Edwin S. Kneedler

Right.

And -- and there's certainly no evidence as far as I can see that there would be an -- an immediate material change in what --in what manufacturers would do, or at least that was the conclusion the district --or the court of appeals drew from the record.

Maybe down the road, five, 10 years ago -- or, in the future someday, the manufacturers might decide that they want to change their conduct.

But this Court has said some -- such someday intentions down the road are not sufficient to establish standing.

It's too contin gent, it's too speculative.

So, a fortiori, the same thing should be true of the fuel producers, who are not the directly regulated parties, and they should -- they should be requ ired to show that the manufacturers would change their behavior here and now, not sometime in --in the future.

So I think that lines up with what this Court has said in Defenders of Wildlife and other cases.

And what may seem odd here is I think precisely the mismatch that Justice Jackson was referring to.

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

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

Samuel A. Alito, Jr.

Suppose there were an affidavit by one carmaker saying that if this waiver is rescinded, we will manufacture one additional car.

Would that be enough? We absolutely commit ourselves, we will manufacture one more car.

Edwin S. Kneedler

I -- I think there are many situations in which, you know, one person saying that would be enough.

One of the things, again, that is -- that is, I think, cautionary in this case is that that begins to look a lot like the probability from some of the Court's other cases, like if one member of the Sierra Club could say surely one member will --will be injured and, therefore, we should have standing.

The question here isn't what one manufacturer would do, but do any of the individual plaintiffs benefit from what that one manufacturer will do by producing an additional car? That's why I think the Court ought to think about this in broader terms, whether there will be a material change in the industry. Otherwise, you're -- you're allowing the corn

farmer or -- or a small liquid fuel producer to have standing because one car might be produced.

Samuel A. Alito, Jr.

Yeah.

Okay.

John G. Roberts, Jr.

Thank you, counsel.

Justice Thomas? Anything further?

Samuel A. Alito, Jr.

Well, one more question.

By my count, the EPA has now changed its mind on this four times.

Am I right?

Edwin S. Kneedler

Yes, I think that's right.

Samuel A. Alito, Jr.

So what is the probability that there will not be a fifth?

Edwin S. Kneedler

Well, it is under -- the -- the president in an executive order directed EPA to examine issue -- measures that might have an effect, and EPA is undertaking that.

So I --I can't say what EPA will decide, but this is one of those that has, indeed, gone --gone back and forth. But I don't think that should affect the standing analysis because, despite that back-and-forth, the manufacturers have gone forward with their own plans because of their own sustainability concerns or looking to the future, where they're -- they're making investments and they want to stick by that path.

John G. Roberts, Jr.

Justice Sotomayor?

Sonia Sotomayor

You're not a betting man, are you?

Edwin S. Kneedler

Pardon me?

Sonia Sotomayor

You're not a betting man that you don't want to guess that there's going to be a fifth change?

Edwin S. Kneedler

I -- I'm respecting --

Sonia Sotomayor

I --I --

Edwin S. Kneedler

-- the administrative process.

I know, but -- (Laughter.)

John G. Roberts, Jr.

Justice Kagan?

Elena Kagan

I mean, just out of curiosity, is there anything you can say about the timing of that process?

Edwin S. Kneedler

Not -- not at -- at this point.

I --I think the -- the general tenor of the executive order was to, you know, do this, you know, expeditiously or with due consideration.

But, no, I don't have anything specific.

John G. Roberts, Jr.

Justice Gorsuch? Justice Kavanaugh? Justice Barrett? Justice Jackson? Thank you, counsel. Mr. Klein.

Joshua A. Klein

Mr. Chief Justice, and may it please the Court: Federal courts don't assume there's standing.

The presumption runs the other way. The party who brings a case must establish that it, in fact, meets each element of standing. That may be

easier or harder depending on the case, and Petitioners' case had unique problems.

EPA first approved this waiver in 2013, and the automakers quickly started working to meet the standards.

But this case started in 2022.

The technology and market had changed.

Petitioners relied on d ecade-old predictions from the original waiver proceedings, but the only up-to-date evidence showed surging consumer demand for clean cars and automakers' sales well above any regulatory requirements.

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

I welcome the Court's questions.

Clarence Thomas

Well, if you're accurate about where the auto manufacturers are now, are you willing to say your rules are unnecessary?

Joshua A. Klein

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

Clarence Thomas

No.

I mean, would -- are you willing to say they're unnecessary?

Joshua A. Klein

They're not necessary for our emissions goals.

The statutory meaning of need in Section 209(b) is very precise.

It refers to -- as this EPA decision correctly interpreted it, it refers to the need for California to have a separate vehicle emissions program as a whole, at all, not the need for each successive individual waiver or standard. And we do have a need for our entire program as a whole.

Clarence Thomas

So can you --can you say that each element of the automotive industry or manufacturing industry is satisfied or making -- adjusting to your rules? Let's say, for example, can you say that heavy trucking or medium trucking or large RVs all could -- accepting of your rule and complying with it?

Joshua A. Klein

Well, I guess I haven't thought about that because this standard affects light-duty vehicles, which include pickup trucks, I think --

Clarence Thomas

Yeah.

Joshua A. Klein

--but not the other things that you've mentioned.

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

Clarence Thomas

Okay.

Well, let's just take the trucks then.

Let's take the light trucks.

Are you willing to say that without your rules, the light truck industry would continue marketing the mix of vehicles it's currently marketing or man ufacturing?

Joshua A. Klein

Your Honor, we can't guarantee that, but I can say it was Petitioners' burden to create a non-spec -- to establish a non-speculative likelihood under this Court's precedent.

Clarence Thomas

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

Joshua A. Klein

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

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

Elena Kagan

Mr. -- Mr. Klein, I'm -- I'm wondering, actually, whether you, in fact, made their case for them.

So I'm thinking here of the Vanderspek declaration, which was submitted in support of your motion to intervene, and here's one of the things it says. There are a couple more, but it says: Should EPA's restoration of California's waiver for the state's existing light -duty vehicle greenhouse -gas emission and ZEV standards be overturned -- should those be overturned -- it would result in higher criteria pollutant and greenhouse -gas emissions. Doesn't that just sort of make their case?

Joshua A. Klein

Well, it would --

Elena Kagan

That's out of your own mouth.

Joshua A. Klein

It was, Your Honor.

And let me place it in context.

That declaration was filed within days of the petitions for review and to support one basis of our intervention, not our independent basis as a sovereign whose laws would be preempted, to support one basis.

It --the declarations relied on and cited preexisting analyses which were themselves based on 2019 DMV data.

And it turned out that when the parties had the burden to really address standing before the court could exercise its power on the merits, we presented evidence that that 2019 data was no longer representative of the actual market.

The market had dramatically changed.

And we did promptly bring that to the court's attention.

And Petitioners never responded about the condition of the market in 2022.

They doubled down on presumptions and assumptions and categorical rules, and they cited -- and I --I want to be clear about this.

Mr. Wall cited JA 66, and if you look at that page, it addressed the 2013 and 2019 records that EPA had because, by the time the 2022 restoration decision was coming around, our focus and EPA's focus was that the 2019 recission had been substantively and procedurally wrong because the -- the 2013 record adequately supported the 2013 findings and the 2019 record didn't give a basis to -- to overturn that.

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

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

And I -- I also want to --

Amy Coney Barrett

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

Joshua A. Klein

Your cases haven't quite said that, Your Honor.

The language you've used is a non-speculative likelihood. And I think the cleanest thing to look at is the non-speculative part because, if there aren't facts supporting a -- a --

Amy Coney Barrett

So what kind of facts would you have wanted them to introduce? Like affidavits from car manufacturers?

Joshua A. Klein

They could have, but it certainly didn't need to be that.

The D.C. Circuit opinion didn't say that.

And we would not say that.

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

Amy Coney Barrett

But don't you think the affidavit that Justice Kagan read you or -- I mean, I think -- I --I don't think it's speculation or wild speculation if you're relying on common-sense inferences. I mean, at some point, if you think that they've carried the burden --I'm not saying that you couldn't poke holes in that, but, you know, at some point, don't you think that California could have tried to poke holes that might take them down -- it's just -- it's not that high a burden.

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

Joshua A. Klein

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

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

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

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

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

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

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

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

And our evidence and -- showed: No, that's not obvious, and there's no reason to think that's correct because the technology had already improved, maybe thanks to our standards back during the preceding years and years.

The market had already developed.

Maybe it was our standards that -- and --as well as other things that made auto manufacturers invest in developing that market.

But the -- the point is that by 2022, the cake was baked.

Or at least Petitioners presented no evidence that there was -- that there would be any likelihood of a change if this regulation were struck down.

Brett M. Kavanaugh

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

Joshua A. Klein

No, Your Honor.

We -- we think that would --

Brett M. Kavanaugh

So how does the court of appea ls then evaluate the affidavits?

Joshua A. Klein

Well, I think it --

Brett M. Kavanaugh

Doesn't it have to use some kind of common-sense understanding of how markets work if it's not going to have witnesses and what have you?

Joshua A. Klein

Your Honor, I think the court -- as the United States' brief said, courts are quite accustomed to making decisions about whether the particular inferences from some evidence has a gap. Not a credibility question.

This wasn't is our expert smarter than their expert. This was a fundamental gap in the reasoning which made them not having -- which left them nothing but speculation.

And -- and so I think that -- now, again, this --this situation will --will not arise that frequently.

I mean, this is a kind of unheard -of nine-year gap. And, in fact, Petitioners have pending challenges to newer waiver that --they raise many of the same issues, I assume.

And -- and for those, there will be Article III standing because, for those, the newer waiver is for standards that will require automakers to change what they're doing so that the -- the unregulate d party, the fuel sellers, will change how much fuel they sell. But that was not the case here.

Ketanji Brown Jackson

So is your --

Brett M. Kavanaugh

How --

Ketanji Brown Jackson

-- answer to -- oh, I'm sorry, go ahead.

Brett M. Kavanaugh

Go ahead.

Go ahead.

Ketanji Brown Jackson

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

Joshua A. Klein

I think that's basically right, Your Honor.

The --I mean, our point is the inferences have to be based on evidence that permits the inference.

That's -- you know, in Department of Commerce, there was no prediction just from the air from this Court's or the district court's --

Ketanji Brown Jackson

Right.

Joshua A. Klein

-- feeling --

Ketanji Brown Jackson

So that's --that's your argument to the bright-line rule.

Mr. Wall says, but we did have evidence, and he points to these declarations.

And you're saying, in your view, those declarations were insufficient because they were based on old or outdated information?

Joshua A. Klein

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

I -- I want to make sure the Court understands the one piece of evidence that we haven't talked about, which is Minnesota.

The Petitioners do not appear to contest the United States' point at I think it's page 38 of their brief that the Minnesota report that was buried in one of the 14 declarations and not cited in the court of appeal did not actually say that there would be any -- that automakers would have to change what they were doing in response to the standard.

That just compared what if automakers do the bare minimum that's required under the federal standard versus what if they do the bare minimum that would be required under the state standard and did not address what's really the question in this case, which is how can there be an injury that's redressable if automakers, for their own reasons and their own motives, are doing more than either set of regulatory requirements.

John G. Roberts, Jr.

Thank you, counsel.

Justice Thomas, anything further? Justice Alito?

Samuel A. Alito, Jr.

Well, just so I have it fresh in mind, could you go back to the very first question that Justice Thomas asked you: Why do you need the waiver at

this point?

Joshua A. Klein

Right.

Your Honor, we -- this waiver makes no difference right now to California's emissions control.

So, as to this particular waiver, if we were applying for it now, I -- well, I don't think we would apply for it now because that's why we superseded this with a new waiver that will require automakers to make a change.

We achieved our goals faster and to a larger extent than we'd expected, but there's just no sign anything would change now if the waiver were struck down.

Samuel A. Alito, Jr.

So your -- do I understand your answer to say you don't need this waiver?

Joshua A. Klein

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

Samuel A. Alito, Jr.

Thank you.

John G. Roberts, Jr.

Justice Sotomayor? Justice Kagan? Justice Gorsuch? No? Justice Barrett? Justice Jackson? Thank you, counsel. Rebuttal, Mr. Wall?

Jeffrey B. Wall

Just a few points, Your Honor.

The first, Mr. Kneedler says, look, who knows what will happen in the market five, 10 years down the road.

Just so, that's why the Court should adopt our front-line rule.

We should be allowed to compete in this marketplace because we don't know exactly what will happen down the road.

But let's say that the Court isn't persuaded by the front -line rule.

I think you're right, Justice Kavanaugh, as long as the Court repeats the language of Alliance for Hippocratic Medicine, says there are certain categories in which there are predictable effects, and says this case is one of them because it's in the upstream or downstream category, I think that comes very close to being the same thing.

Why is this case one of them? Justice Alito, you're right, all we have to show is that one EV would make one fewer electric vehicle in any of 18 states.

It's not just California. Mr. Klein's looking only at California.

There are 18 states here that -- 17 others that have adopted California's standards.

So what was the record on that? We had California's statement in 2021, that's at JA 66, saying this is critical to reduce emissions. Then you have the EPA, when it regrants the waiver, saying in 2022, California needs these standards.

That's at pages 154 and 155 in Footnote 180 of the Petition Appendix, also pages 64, 65, 180, and 202.

It says it again and again.

Now I take Mr. Kneedler's point.

The EPA di d speak out of both sides of its mouth. It said, on the one hand, we're not going to really go back and look at whether they need the standards.

We're just looking at whether we messed up a few years ago.

But they also say we've looked at the whole record and California needs the standards.

I don't know exactly how to square those statements, but either they abdicated their statutory responsibility or they said California does, in fact, need the standards.

And then, in 2022, the two CARB declarations come in.

I think the Scheehle statement at page 115 of the JA is -- is as good or better than the Vanderspek statement, California itself saying we need the waiver because, otherwise, we get fewer electric vehicles and more gasoline -powered vehicles. Now I thought that the one thing they would not clearly say -- and I can't tell whether California's just saying it doesn't need the waiver now or that was also true back in 2022.

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

California seemed to hedge on that, Justice Thomas, but wherever California is on that, I don't think it's right.

And I -- the one thing is Mr. Kneedler didn't go near it, and I am a betting man, Justice Sotomayor, and I bet my bottom dollar that the reason he didn't is that in some number of months, the EPA will withdraw the waiver and will say this waiver has been having an effect from the time it was reinstated and it is compelling automakers to make more EVs than would otherwise be produced in response to consumer demand.

If the EPA says that in a number of months, it will be right.

The last thing is I would say the Court shouldn't just vacate and remand.

That does pose the risk that we get ping-ponged because it doesn't correct the court of appeals' legal errors.

Even if it tells them that the standards last forever, it doesn't do anything on our front-line rule, and it doesn't do anything to correct their misunderstanding of how the predictable effects test works.

It is important for standing purposes not just for us but, as our amici explain, for lots of challengers in lots of different settings.

It is important that the Court correct the court of appeals' legal errors so that we can get our day in court and finally have an opportunity to make our case for why EPA and California have wrongly interpreted the Clean Air Act.

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

The case is submitted.