

Nos. 24-7, 24-13

IN THE

Supreme Court of the United States

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

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

**On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia**

**BRIEF OF *AMICUS CURIAE*
SPECIALTY EQUIPMENT MARKET
ASSOCIATION & PERFORMANCE
RACING, INC.
IN SUPPORT OF PETITIONERS**

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae Specialty Equipment Market Association & Performance Racing, Inc. (“SEMA”) represents the automotive aftermarket, meaning all of those products and services provided after a vehicle’s initial sale. SEMA’s members include over 7,000 automobile equipment manufacturers, distributors, retailers, publishing companies, auto restorers, street-rod builders, restylers, car clubs, race teams, and myriad other related organizations. SEMA’s members do not oppose—indeed, they support—the Environmental Protection Agency’s (“EPA”) statutory authority. SEMA, along with its members, works closely with the California Air Resources Board (“CARB”) to ensure that aftermarket automotive parts meet applicable clean-air standards. Most importantly, SEMA does not oppose electric vehicles (“EVs”) or the adoption of other alternatives to traditional internal combustion engine (“ICE”) vehicles. To the contrary, SEMA is steadfastly technology neutral. And the specialty automotive aftermarket industry SEMA represents has led the way on alternative-fuel innovations, from replacing older engine technologies with newer, cleaner versions, to converting older ICE vehicles to new electric or hydrogen-powered vehicles.

SEMA and its members represent a wide range of businesses in the supply chain that are affected by the EPA’s granting to California a waiver to set its own standards for greenhouse-gas emissions (“ICE

¹ Counsel of record for all parties received timely notice of *amicus*’s intent to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity aside from *amicus* and its counsel funded its preparation or submission.

Waiver”) and to adopt a zero-emission vehicle mandate (“ICE Ban Waiver”).

SEMA has a substantial interest in this case because the ICE Waiver will kill, not foster, the innovation that historically has generated so many novel ways to drive the development of cleaner, safer automobiles. The specialty automotive aftermarket supports over 149,000 jobs and has a \$40 billion economic impact in California alone. The industry is a vital contributor to California’s economy. Products supplied by the industry are in demand not only in California, but across the United States, and throughout the world. Other options for reducing emissions—such as new synthetic fuels, improved braking systems and better tires—will be discarded, not because they do not work as well or better than EVs, but simply as a result of government fiat.

SUMMARY OF ARGUMENT

This Court should grant review to address a legal issue of critical nationwide importance: whether it is lawful for the EPA to grant California (and, by extension, sixteen states that have opted into California’s regulations) the authority to limit the sale of ICE vehicles from Model Year (“MY”) 2017 through 2025, and ultimately ban the sale of ICE vehicles by MY 2035.

As the petition correctly explains, the D.C. Circuit’s decision was wrong, and creates artificial roadblocks that insulate not just this important case from judicial review, but the ability of all litigants to obtain judicial redress for unlawful agency action that will cause them injury. *Amicus* writes separately to underscore the far-reaching impacts of an EPA waiver which permits an ICE limit to be imposed nationwide by one state, California. Moreover, it is clear from these impacts that a favorable decision would redress

petitioners' injury. Litigants who are themselves injured should not be at the whim of directly regulated parties in order to establish redressability.

I. California's non-technology-neutral decision to limit sales of ICE vehicles (on its way to a complete ban on ICE sales by 2035) signals to an industry as old as the automotive industry itself that it will be making a permanent pit stop by 2035. California has already declared the winner of the race, and by extension, begins to foreclose on the innovations and unique contributions to cleaner vehicles and parts that the aftermarket for years has been providing. The question presented is important not just to the specialty equipment aftermarket, but to consumers and the public at large who seek out these inventive products, and, as a result, the Court should grant the petition to address it.

II. Review is also warranted because the decision below on standing ignores the plain, common sense impacts of the EPA's regulation, which are sufficient to establish redressability, and sets up a roadblock to resolution of an issue of great national importance. The D.C. Circuit's treatment of the automakers as aircraft carrier-like ignores common sense, basic economics, and recent examples that instead demonstrate that automakers are in fact nimble, flexible, and reactive to the changing market. As such, the Court should grant certiorari to correct the continued distortion of standing law by the court of appeals so that the scope of the EPA's waiver authority can be addressed.

ARGUMENT**I. THE COURT SHOULD GRANT REVIEW BECAUSE THE QUESTION PRESENTED IS CRITICAL AND OF NATIONWIDE IMPORTANCE.**

The EPA is supposed to set technology-neutral performance standards for vehicles and fuels and leave the choice of engine designs and fuel specifications needed to reduce emissions to industry innovators. By abdicating this responsibility to California through its grant of the ICE Waiver, engine and fuel standards are not technology-neutral in California and in the sixteen states that have adopted California's ZEV and LEV standards. The government has picked a winner, to the detriment of the American public and an industry that is as old as the automobile itself.

The ICE Waiver will simultaneously destroy the livelihoods of hundreds of thousands of hardworking Americans. SEMA's members are primarily small businesses. They manufacture, distribute, and support hundreds of thousands of aftermarket products for ICE vehicles, from simple products like spark plugs, to advanced automotive parts such as turbochargers. SEMA's members also provide software such as diagnostic tools to assist in repairing vehicles. These products are often updated to support each new model year of ICE vehicles. Many of these products and jobs will disappear as the sale of ICE vehicles continues to decrease prior to the total ban. The associated fallout of the ICE Waiver will touch the many industries associated with motorsports, vehicle restoration, and automotive technology, each of which make immeasurable contributions to the nation from an innovation and cultural standpoint. For example, 33 percent of consumer spending on performance and accessory products goes toward upgrading ICE engines and

drivetrains. The ICE Waiver would adversely impact a segment of the industry that contributes \$112 billion annually to the U.S. economy.

The automotive aftermarket industry encompasses every business that touches a vehicle after it leaves the lot and supports directly and indirectly over 1.3 million workers and accounts for more than \$104 billion in annual wages. These businesses employ more than twice the number of people as the U.S. aircraft industry and more people than the entire motion picture and video production industry. The industry generates more than \$40 billion in taxes, including \$24 billion in federal taxes and \$16 billion in state and local taxes, all of which support the development of critical national and local infrastructure. The specialty equipment aftermarket industry also contributes more than \$336 billion to the American economy annually. The industry helps small businesses to grow, creates jobs, and builds partnerships that expand local economies across the United States. Consumers spent \$52 billion on specialty automotive aftermarket products in 2023.

As long as there have been automobiles, there have been creative entrepreneurs looking to improve upon, and customize, what rolls off the factory line. From its beginnings, the pioneering companies in the industry were as aggressive and progressive as their imaginations would allow, buoyed by the fact that there were no laws circumscribing their creativity. The early days of the industry saw California as the hub for the aftermarket industry given its good weather, proximity to wealthy movie stars and others looking for individuality with their automobiles.² As early as 1910,

² Rik Hoving, *The History of the Early Custom Car, Part One 1930's*, CUSTOMCARCHRONICLE.COM (November 12, 2017), <https://www.customcarchronicle.com/custom-history/history-of-the-early-custom-car/>.

Americans were seeking to streamline and add luxury and performance to the cars coming out of Detroit.³ But these innovators were not just modifying the look and style of the vehicles; as early as 1919, companies started to develop parts for vehicles, including the Model T Fords, which people needed to keep their cars running through the Great Depression.⁴ Since SEMA's founding over sixty years ago, the small number of entrepreneurial companies has grown to over 7,000 members strong. While the industry now includes diverse markets such as racing and performance, off-roading, overlanding, wheels and tires, mobile electronics, vehicle maintenance, sound and audio, and media companies, it also includes all ranks of businesses in the distribution chain: manufacturers, warehouse distributors, jobbers, independent retailers, volume retailers, specialty stores, sales agents, subcontractors, publishing companies, racing teams, car clubs, and special service organizations, all the while the industry has retained its entrepreneurial and innovative drive. Those jobs and wages, and that entrepreneurial vision, will be at serious risk as the ICE limits, and eventual bans, take effect across the country and negatively impact nearly everyone working in the specialty automotive aftermarket, which relies heavily on ICE vehicles.

The long relationship between the specialty automotive aftermarket and original equipment manufacturers ("OEMs") is complicated.⁵ SEMA's Tech Transfer program allows SEMA manufacturing members to

³ Hoving, *supra* note 2.

⁴ *Id.*

⁵ Jef White, *OEMs & the Automotive Aftermarket*, THE SHOP (May 13, 2024), <https://theshopmag.com/features/oems-the-aftermarket/>.

acquire participating OEM computer-aided design data in order to quickly produce parts that fit the latest models. OEMs engage in collaborations with aftermarket manufacturers.⁶ OEMs have received billions of taxpayers dollars to make the transition to EVs, money that is generally not available to the specialty automotive aftermarket industry.⁷ Despite the collaborations, OEMs do not speak for the auto industry as a whole.

Ninety-five percent of SEMA's members are small businesses. Those businesses dependent on ICE products such as superchargers, air intakes, catalytic converters, and spark plugs will be among the hardest hit by the deleterious effects of the ICE Waiver as automakers are forced to dramatically limit the number of ICE vehicles they manufacture.

EPA's ICE Waiver also robs consumers of the freedom to purchase vehicles that best suit their needs and the needs of their families. Unlike innovation and market-driven solutions, the ICE Waiver will force EVs to become the only option for automakers to produce- and thus the only option for consumers to purchase. This will be true regardless of local weather conditions, terrain, or road-way conditions, and accessibility of charging stations, all of which impact the utility of different vehicle choices. It will be true regardless of the robustness of the local power-grid or other

⁶ White, *supra* note 5.

⁷ Maxine Joselow, *Biden unveils \$1.7 billion to boost EV production at U.S. auto factories*, THE WASHINGTON POST (July 11, 2024), <https://www.washingtonpost.com/climate-environment/2024/07/11/ev-production-biden-electric-vehicle-factories/>; Joe Lancaster, *Taxpayers Bankroll Electric Vehicles Even as Fewer People Buy Them*, REASON.COM (Oct. 26, 2023), <https://reason.com/2023/10/26/taxpayers-bankroll-electric-vehicles-even-as-fewer-people-buy-them/>.

infrastructure necessary to support electric or other sorts of vehicles. And it will be true regardless of any impact on emergency, medical, and other services dependent on reliable and consistent vehicle performance.

To take just one example, in 2023, Stellantis, maker of Jeep products, publicly announced that it was reducing or eliminating shipments of ICE-powered vehicles to dealers in California and the 14 other states⁸ that had adopted California's ICE ban.⁹ In doing so, Stellantis said the production change was being made "in part because of the need to manage sales of the vehicles they produce to comply with California emissions regulations that are measured on a state-by-state basis."¹⁰ As a result, Stellantis cut one shift at its assembly plant and warned employees of possible job impacts.¹¹ The cost of traditional ICE vehicles across the country will skyrocket, with automakers forced to cross-subsidize their EV sales by raising prices of traditional ICE vehicles.

⁸ California and these 14 states (plus an additional 4 states in 2026) will compromise around 40 percent of new vehicle sales in the United States. John Voelcker, *The State You Live In May Affect the Powertrain of Your Next Car*, CAR AND DRIVER (Sept. 19, 2023), <https://www.caranddriver.com/features/a45000216/california-golden-state-for-emissions-regulation/>.

⁹ Assembly, *Stellantis Cuts Jeep Production in Detroit, Blames California*, ASSEMBLYMAG.COM (Dec. 15, 2023), <https://www.assemblymag.com/articles/98206-stellantis-cuts-jeep-production-in-detroit-blames-california>; *see also*, Sean Tucker, *Jeep Parent Stops Stocking Some Gas-Powered Cars in 14 States*, KELLY BLUE BOOK (June 19, 2023), <https://www.kbb.com/car-news/jeep-parent-stops-stocking-some-gas-powered-cars-in-14-states/>.

¹⁰ *Id.*

¹¹ *Id.*

Rather than remain technology-neutral in its approach to reducing vehicle emissions, California has dictated, through the EPA Waiver, 100 percent ZEVs by 2035, with 20 percent of that mandate able to be fulfilled by plug-in hybrid electric vehicles (PHEVs). This mandate ignores the many options on the road to zero emissions, such as American-grown biofuels, synthetic fuels, hydrogen combustion, carbon capture, and innovations in engine systems, parts, and fuels. The increasing limit on the sale of ICE vehicles up to a complete prohibition, squashes the specialty automotive aftermarket industry's long history of innovation in favor of electrification, which is not emission free.

Consistent with SEMA's technology-neutral stance and in furtherance of innovation, the organization supported California Senate Bill 301. Vehicular Air Pollution: Zero-Emission Aftermarket Conversion Project, CA S.B. 301 (2023-2024). The bill, which was vetoed by Governor Gavin Newsom, would have established the groundbreaking Zero-Emission Aftermarket Conversion Project under CARB. The innovative program would have provided rebates to California residents undertaking the conversion of eligible used vehicles, with stringent guidelines ensuring compliance with safety, range, and affordability criteria. This bill would have provided an incentive for consumers to use already existing products, thereby furthering recyclability and reuse, while still eliminating tailpipe emissions.

Instead of a technology-neutral approach, California has discarded ICE vehicles in favor of ZEVs based on the faulty premise that EVs are cleaner than ICE vehicles. That assumption is disingenuous.

Although ZEVs may have no tailpipe emissions during operation, they do contribute to emissions in other places in their life cycle, including during production

of the vehicle itself and its battery, as well as from the sources of electrical energy that ZEVs draw from for their power (fuel).¹² Yet, ICE vehicles are increasingly being shut out of the market without regard to whether ICE vehicles can meet zero-emissions levels, thereby stifling competition between different engine systems, fuels, and technologies, and the race to innovate.

A 2015 study by the Union of Concerned Scientists found that manufacturing a mid-sized electric vehicle would produce 15 percent more manufacturing-related emissions than an equivalent ICE vehicle, and longer-ranged ZEVs could result in manufacturing emissions of up to 68 percent higher.¹³ Further, battery EVs and PHEVs are reliant on electricity, which may be generated from fossil fuels associated with carbon emissions.¹⁴ Associated EV carbon emissions, depending upon how electricity is generated, can be comparable to that of ICE vehicles.¹⁵

Further, users' ability to charge their EVs' batteries can be negatively impacted by stresses on the power grid caused by increased number of EVs, weather-related demand for electricity, and reduction of other sources of energy because of wildfires, extreme heat,

¹² See Astoria Ho, Clara Hu, Josh Everts, *The Hidden Emissions of Electric Vehicles*, SCHOOL OF INFORMATION AT UNIVERSITY OF CALIFORNIA BERKELEY (2023) at 4, https://www.ischool.berkeley.edu/sites/default/files/sproject_attachments/eee_astoriaclarajosh_mimscapstonefinalpaper_0.pdf.

¹³ Ho, *supra* note 11.

¹⁴ *Id.* at 5.

¹⁵ *Id.*

and other factors.¹⁶ The emissions associated with a particular energy grid will vary from location-to-location, and especially from state to state.¹⁷ While the total emissions of an average battery EV are less than those of an average ICE vehicle, its production phase has more emissions than its ICE counterparts.¹⁸ As such, the consequences of emissions occurring at an out-of-state factory where the vehicle is built are not felt by the state where the vehicle is driven.

Electric vehicles are generally much heavier than their ICE vehicle counterparts. This increased weight on an EV results in up to 20 percent more tire wear and corresponding tire waste than that generated by ICE vehicles.¹⁹ Not only do heavier EVs increase wear and tear to streets and highways, they are responsible for increased tire-wear emissions, or tire and road-wear particulate pollution.²⁰

A ban on ICE vehicles in favor of only ZEVs squashes innovation and consumer choice. For example, some of the cutting-edge products and methods being explored by SEMA members include zero-emission hydrogen ICEs; alternative fuel innovations, including replacing older engine technologies with newer, cleaner versions; converting older ICE vehicles to electric,

¹⁶ Ho, *supra* note 11 at 6-7.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 11.

¹⁹ Paul Krantz, *EV tires wear down fast, and that's a pollution problem*, CANARY MEDIA (Oct. 3, 2023), <https://www.canarymedia.com/articles/electric-vehicles/ev-tires-wear-down-fast-and-thats-a-pollution-problem>.

²⁰ *Id.*

hydrogen ICE, and other alternative fuels; manufacturing systems that cut the cost and time for production of a carbon fiber chassis; and regenerative braking to decrease part wear and increase efficiency. Improving efficiencies of various parts of vehicles can impact emissions.²¹ There are other factors that contribute to a vehicle's emissions over time, including oil, fluids, and lubricants, as well as consumables such as brakes and tires.²² SEMA members are at the forefront of innovating in these and other areas, and fostering free market innovation remains the best path toward developing new vehicle technologies that can result in the meaningful reduction of emissions.

In service to its members' innovative spirit, in 2015 SEMA opened the first of two garages to assist manufacturers in developing compliant products. Today, the SEMA Garage Emissions Lab tests about 100 unique products each year, including exhaust system improvements, air induction systems, flex-fuel conversions, replacement fuel pumps, tuning devices, turbocharger and supercharger additions, and more. After-market products for on-road vehicles cannot increase emissions beyond government-allowed emissions levels. The vast majority of these products meet the established emissions standards that are applicable to the vehicles that they are intended to fit; in some cases, these products reduce emissions beyond the capabilities of the original vehicle.

²¹ Ho, *supra* note 11 at 35. Usage of brakes can cause higher emissions, and location can also determine usage-phase emissions. *Id.* Driving in hilly areas or in cities reduces efficiency since more energy is lost to breaking. *Id.*

²² Ho, *supra* note 11 at 11.

For example, one SEMA member tested a Flex-Fuel Conversion Kit on a 2020 ICE vehicle that was cleaner in every emissions category when running on E85 (a blend of 85 percent ethanol and 15 percent gasoline) compared to the vehicle running on standard pump gasoline blends. Another member tested an air intake system on a 2021 diesel pickup; this innovative product yielded less nonmethane hydrocarbons and nitrogen oxides (NMHC+NO_x) during the standard certification test cycle than those present in the Original Equipment Manufacturer's (OEM's) own certification data, and was comparable on all other results. Other recent examples include testing of a Tumble Generator Valve Housing system that demonstrated emissions nearly identical to the original OEM certification data on a 2020 ICE vehicle, an inline tuner that was cleaner than the OEM certification data, and an efficiency tuning product that improved fuel economy (reduced carbon dioxide (CO₂) emissions) by 15 to 21 percent.

As this sampling demonstrates, when the uniquely American specialty equipment aftermarket industry innovates, the results are not only cleaner, but provide consumers with a vast array of choices for what best suits their particular vehicle. These innovations often find their way into OEM applications.²³ The ICE Waiver not only threatens the future of small- and medium-size businesses in the specialty equipment aftermarket, but it will drastically shrink consumer choice, not only in California, but nationwide.

As the percentage of EVs required to be sold in California increases on its way to 100 percent, consumers also will be faced with reduced choices in

²³ White, *supra* note 5.

vehicles, particularly while contending with an insufficient infrastructure needed to sustain such broad EV usage.

A public infrastructure must be built up to handle the increased number of EVs being sold, and this infrastructure will also require an enhanced grid and expanded production of renewable energy.²⁴ From the stress of increased at-home charging on the power grid, to the cost of purchasing a charging station, to the lack of access to charging, the infrastructure is not ready to support a complete switch to EVs in time for the 2035 mandate. Given that the combined age of all light-duty vehicles is now 12.6 years, which is a record high because of a combination of reliability and economic factors, light-duty vehicles purchased today likely will still be on the road in 2035.²⁵

A one-size-fits-all approach dictated by California is at odds not just with America's long history with customization of a vehicle's appearance, but its performance and functionality as well. Consumers choose cars, trucks, and SUVs to fit their budgets, as well as their unique situation. Farmers, ranchers, contractors, and loggers may need vehicles that can tow. Consumers seek vehicles that can perform well

²⁴ Russell Hensley, Kevin Laczkowski, Timo Moller, Dennis Schwedhelm, *Can the automotive industry scale fast enough?*, MCKINSEY & COMPANY (May 12, 2022), <https://www.mckinsey.com/industries/automotive-and-assembly/our-insights/can-the-automotive-industry-scale-fast-enough>.

²⁵ Nishant Parekh and Todd Campau, *Average age of vehicles hits new record in 2024*, S&P GLOBAL (May 22, 2024), <https://www.spglobal.com/mobility/en/research-analysis/average-age-vehicles-united-states-2024.html>; *see also* Adrian Volenik, *Record-Breaking: The Average Age of U.S. Cars Hits 12.6 Years*, YAHOO.COM (June 5, 2024), <https://finance.yahoo.com/news/record-breaking-average-age-u-143417410.html>.

under their surrounding conditions, whether hot, cold, wet, dry, or hilly. The ICE Waiver will force consumers in rural areas to purchase an EV without the necessary range or infrastructure. Consumers in areas with adverse weather will not be able to choose an ICE vehicle over an EV in order to avoid EV battery range reduction from defrosting and heating, or towing. *See* H.R. Rep. No. 118-169 at 5 (2023).

The D.C. Circuit's decision also risks Americans' access to affordable automobiles. According to Kelley Blue Book, the average price of an EV is \$65,291, which is \$17,197 more than the average price of an ICE vehicle; these prices are rising faster than inflation. H.R. Rep. No. 118-169, at 3 (2023). Expenses associated with EVs are also higher than for an ICE vehicle; insurance for an EV is \$528 more expensive per year, and on average, EVs charged at home and in public cost more than fuel at a gas station. *Id.* at 3-5. On average, EV home charging stations cost between \$1,200 to \$2,500 per charger. *Id.* at 5. To replace an EV battery not covered under warranty, a consumer would pay between \$5,000 and \$20,000. *Id.*

This cascade of harmful effects and the loss of innovation and individual freedoms are the inevitable result of allowing the EPA's ICE Waiver. The Court should grant review and address this question of critical nationwide importance.

II. THE D.C. CIRCUIT IGNORES COMMON SENSE, BASIC ECONOMICS, AND EVIDENCE OF AUTOMOBILE MANUFACTURERS' ACTIONS.

The D.C. Circuit found that petitioners provided no record evidence "that manufacturers would, in fact, change course with respect to the relevant model years if this Court were to vacate the waiver", indicating

that “automobile manufacturers need years of lead time to make changes to their future model year fleets” and “to alter their product plans.” Pet.App.23a–24a. Although the court recognized that it was “possible that manufacturers could change their prices without modifying their production cycles, which may redress Petitioners’ injuries because pricing could affect the mix of conventional and electric vehicles purchased,” it dismissed this out of hand because Petitioners pointed to “no evidence that manufacturers would change their prices by Model Year 2025 either.” *Id.* at 24a.

The court of appeals supported its erroneous finding, relying upon a declaration by a California Air Resources Board (“CARB”) expert who stated that automakers have made a number of public commitments regarding both vehicle pricing and availability with respect to the remaining model years covered by the challenged waiver, and that those “public commitments would *tend to suggest* that neither group of Petitioners’ claims are redressable.” Pet.App.28a (emphasis added). Ironically, although Petitioners were faulted for not supplying evidence from the automakers themselves, a lack of redressability was found in part based on the statement of a California government official, rather than an automaker.

Based on a government expert’s supposition, the court of appeals extrapolated that auto manufacturers operate in a static environment, are inflexible and unlikely to modify “public commitments” and are unable and unwilling to quickly react to consumer demands in the market by adjusting pricing, distribution, and production. Automakers’ recent reductions in EV production numbers and reliance upon hybrid and ICE vehicles to offset EV losses by major automakers this Summer, *infra*, belie this.

An announcement in June 2024 by an automaker disproves the expert cited by the court of appeals. General Motors announced it was scaling back its 2024 EV production targets from between 200,000 and 300,000 vehicles to between 200,000 and 250,000, and that it needed to stay flexible with its plans to meet changing customer demand.²⁶ Noting the slower-than-expected demand growth for EVs, the automaker stated that the adjustment to production target is “100% demand-driven” based on the broader industry.²⁷ One auto analyst has predicted that other automakers will continue to adjust their EV production targets, given the fluctuation of the developing market and the EV demand at a plateau.²⁸ As the analyst noted, “Volume targets. . . are constantly getting amended while EVs are a small part of industry new auto sales each year.”²⁹ GM’s Chief Financial Officer underscored the flexibility in the automaker’s vehicle portfolio and said that with demand softening for EVs, it leans on its ICE vehicle portfolio for profit support.³⁰

Ford has lowered prices on EV vehicles and recently slowed production on EV vehicles as a result of a slowdown in sales of EV vehicles.³¹ Ford also sent a “call to

²⁶ Jamie L. LaReau, *GM lowers EV production targets amid slow down, says EVs will show ‘variable profit’*, DETROIT FREE PRESS (June 11, 2024), <https://www.freep.com/story/money/cars/general-motors/2024/06/11/gm-electric-vehicles-production-demand/74055964007/>.

²⁷ LaReau, *supra* note 25.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Nora Naughton, *Ford begs suppliers to help stem EV losses: ‘We will all win or lose together’*, BUSINESS INSIDER (May 17, 2024),

action” memo to its EV parts suppliers asking them to help come up with ways to cut EV manufacturing costs.³² Ford is also now leaning more heavily on its hybrid lineup, which has seen “impressive” sales in 2024.³³ Contrary to the D.C. Circuit’s picture of aircraft carrier-like automakers, GM, which had previously planned to skip production of hybrids, has reversed course and is planning to bring hybrid models to North America in the near future.³⁴

In 2023, Ford extended a self-imposed deadline to produce 600,000 EVs by the end of 2023 in part because EV production outpaced demand; Ford dealers began turning away allocations of the electric Mustang Mach-E after customer interest fell off.³⁵

Automakers regularly close for holidays “and in response to both supply and demand shocks.”³⁶ Automakers routinely offer incentives to dealers and/or consumers to stimulate demand and reduce a glut in

<https://www.businessinsider.com/ford-asks-suppliers-for-help-cutting-ev-costs-2024-5>.

³² Naughton, *supra* note 31.

³³ *Id.*

³⁴ *Id.*

³⁵ Nora Naughton, *Ford is going to miss its original EV production goals. Tesla’s price war is to blame*, BUSINESS INSIDER (July 28, 2023), <https://www.businessinsider.com/ford-ev-production-slow-thanks-to-tesla-price-war-2023-7>.

³⁶ Adam Copeland, Wendy Dunn, and George Hall, *Prices, Production and Inventories over the Automotive Model Year*, FINANCE AND ECONOMICS DISCUSSION SERIES, DIVISIONS OF RESEARCH & STATISTICS AND MONETARY AFFAIRS, FEDERAL RESERVE BOARD (March 2005) at 32, <https://www.federalreserve.gov/pubs/feds/2005/200525/200525pap.pdf>.

inventory.³⁷ For example, in January 2024, Ford announced plans to create 900 new jobs as part of a new third crew at an assembly plant to meet demand for four ICE vehicles.³⁸ In its press release, Ford noted that it was moving “nimble” to “capitalize on its balanced lineup and serve customers with the right mix of gas-powered, hybrid and electric vehicles, while optimizing financial returns.”³⁹ According to Ford, it has the “capacity available to scale production of gas-powered and hybrid F-150 trucks based on customer demand.”⁴⁰ In response to lower EV demand, Ford also scaled back EV battery production and other EV investments to better match lower-than-anticipated demand for EVs.⁴¹

Automakers can, and do, prioritize building specific makes and models, and one automaker representative acknowledged that during COVID, it did prioritize building a specific vehicle for its fleet customers

³⁷ Wolf Richter, *New-Vehicle Supply Turns to Glut for Many Brands. Automakers Roll out Incentives, but Not Nearly Enough*, WOLFSTREET.COM (May 21, 2024), <https://wolfstreet.com/2024/05/21/new-vehicle-supply-turns-to-glut-for-many-brands-automakers-roll-out-incentives-but-not-nearly-enough/>.

³⁸ FORD, *Ford Adds Third Crew to Meet Demand for Bronco and Ranger, Reduces F-150 Lightning Production*, Ford.com (Jan. 19, 2024), <https://media.ford.com/content/fordmedia/fna/us/en/news/2024/01/19/ford-adds-third-crew-to-meet-demand-for-bronco-and-ranger--reduc.html>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Nora Eckert, *Michigan lowers incentives for Ford EV battery plant to match reduced output*, REUTERS (July 10, 2024), <https://www.reuters.com/business/autos-transportation/michigan-lowers-incentives-ford-ev-battery-plant-match-reduced-output-2024-07-09/>.

(rental companies, government agencies, etc.) as much as possible but that “[a]ll vehicle line and trim mixes saw adjustments due to both customer preference as well as constrained microchip supply.”⁴² Clearly, it did not take years for this automaker to adjust to the pandemic by prioritizing, and adjusting to supply chain issues and customer preference.

As the court of appeals correctly noted, there are multiple ways that a vacatur of the waiver could redress Petitioners’ injuries – from changes to the model year fleets, to changes to the pricing and mixture of ICE vehicles and EVs. Therefore, to satisfy Article III’s redressability requirement, Petitioners need only show that the requested relief will remedy “*an* injury”, not “*every* injury.” *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982). And here, although changes to the model year fleet for 2024 may not be possible, removing the requirement that 22 percent of vehicles sold be ZEVs allows manufacturers the freedom to react to less than anticipated consumer demand for EVs and instead determine the mixture and pricing based on the market and supply and demand, which they routinely do. The recent reduction in production of EVs by automakers shows that automakers would likely proceed on a different course more favorable to the Petitioners if the waiver were vacated. As such, Petitioners have shown that their injuries specifically caused by the EPA Waiver will be redressed by a vacatur.

⁴² Matt Hardigree, *Trimflation*, THE AUTOPIAN (Aug. 9, 2023), <https://www.theautopian.com/trimflation-explaining-why-automakers-raised-prices-so-much-in-the-pandemic/>.

CONCLUSION

For the foregoing reasons and those stated in the petition, this Court should grant the petition for a writ of certiorari.

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