**ORAL ARGUMENT NOT YET SCHEDULED**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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| ALLIANCE OF AUTOMOBILE MANUFACTURERS, ASSOCIATION OF GLOBAL AUTOMAKERS, INC., NATIONAL MARINE MANUFACTURERS ASSOCIATION, and OUTDOOR POWER EQUIPMENT INSTITUTE,<br><br>Petitioners,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,<br><br>Respondent.<br><br>GROWTH ENERGY,<br><br>Intervenor-Respondent. | No. 11-1334 (Consolidated with No. 11-1344) |

**UNOPPOSED MOTION TO FURTHER GOVERN**

In accordance with this Court's orders, issued herein on December 14, 2011 and September 17, 2012, which granted the motions of Petitioners (in Case No. 11-1334) the Alliance of Automobile Manufacturers, Association of Global Automakers, Inc. (f/k/a Association of International Automobile Manufacturers), National Marine Manufacturers Association, and Outdoor Power Equipment Institute (collectively "Engine Products Group"), to hold these consolidated cases

in abeyance, but which ordered the parties to file motions to further govern within 30 days of disposition by this Court of *Grocery Manufacturers Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *reh'g denied*, No. 10-1380, 2013 U.S. App. LEXIS 912 (D.C. Cir. Jan. 15, 2013), the Engine Products Group and American Petroleum Institute ("API") (Petitioner in No. 11-1344) hereby move to continue to hold these consolidated cases in abeyance, pending the final disposition of *Grocery Manufacturers Ass'n v. EPA*, No. 10-1380, *et al*.

Background

These consolidated cases challenge the "misfueling mitigation rule" issued by the Environmental Protection Agency ("EPA"). The "misfueling mitigation rule" was adopted to attempt to prevent misfueling with "E15," *i.e.*, gasoline combined with up to 15 percent ethanol, in vehicles (*e.g.*, MY2000 and older vehicles, heavy-duty trucks, and motorcycles) and in non-road engines (*e.g.*, lawnmowers, leaf blowers, chainsaws, and vessels), for which EPA did not grant a waiver for use of E15 due to the likelihood of failures of such vehicles and engines.

The "misfueling mitigation rule" under challenge in these consolidated cases is directly related to EPA's E15 waiver, both legally and in practice. If, for example, EPA's E15 waiver were determined to be invalid, the challenges to EPA's "misfueling mitigation rule" in these consolidated cases would become

moot, because distribution and sale of E15 would not be lawful, and misfueling with E15 could not thereafter occur.

The Engine Products Group and API seek to continue to hold these consolidated cases in abeyance because, on February 21, 2013, Grocery Manufacturers Association, American Frozen Food Institute, American Meat Institute, National Chicken Council, National Council of Chain Restaurants of the National Retail Federation, North American Meat Association (formerly National Meat Association), National Pork Producers Council, National Turkey Federation, the Snack Food Association, and API, Petitioners in No. 10-1380, filed a Petition in the United States Supreme Court for a writ of certiorari (No. 12-1055) from this Court's decision and judgment, issued in No. 10-1380, *et al.* on August 17, 2012, and other Petitioners in No. 10-1380, *et al.* intend to either support that Petition, file for certiorari as well, or both. As this Court is of course aware, such petitions may be filed within 90 days of the date of denial of timely filed rehearing petitions under Rule 13.3 of the Rules of the Supreme Court of the United States. Timely filed petitions for rehearing *en banc* in No. 10-1380, *et al.* were denied on January 15, 2013, and therefore petitions for a writ of certiorari to review this Court's decision and judgment in No. 10-1380, *et al.* may be filed on or before April 15, 2013. It is likely that the Supreme Court will decide whether to grant or deny such

petitions near the end of the current term or early in its term beginning in October 2013.

There Is a Reasonable Likelihood That Certiorari Will Be Granted[1]

There is reasonable likelihood that the Supreme Court will grant a writ of certiorari from this Court's decision and judgment in No. 10-1380, *et al.* because, as Judge Kavanaugh's dissent from the denial of rehearing *en banc* therein stated (at 2), "[t]he circuits are split on whether the zone of interests requirement is jurisdictional; some other circuits disagree with the conclusion of the panel here."[2] Given Judge Kavanaugh's statement and the reasonable likelihood that the Supreme Court would grant a petition for certiorari due to a circuit split on such an important issue, challenges to EPA's waiver for E15 may yet go forward if the Supreme Court rules that the petitioners have standing.

Moreover, as Judge Kavanaugh noted, it may be "outcome determinative" if the Supreme Court were to agree with Petitioners in No. 10-1380, *et al.* that prudential standing is not jurisdictional, because, on the merits, he stated that the statute is clear that EPA could not grant a "partial waiver," as it did in the E15

[1] Movants submit these representations in support of this Motion to demonstrate that they have a good-faith basis for seeking certiorari and that certiorari is not being pursued out of bad faith or to cause delay in the disposition of these cases.
[2] *See also Grocery Manufacturers Ass'n v. EPA*, No. 10-1380, 2013 U.S. App. LEXIS 912, at *4 (D.C. Cir. Jan. 15, 2013) (Judge Kavanaugh's dissent from the Panel's August 17, 2012 decision in No. 10-1380, *et al.*, listing decisions of several other circuits that hold that prudential standing is not jurisdictional).

waiver, especially in light of EPA's concession that there would be failures of MY2000 and earlier vehicles.[3]

The question whether the Engine Products Group or other Petitioners in No. 10-1380, *et al.*, such as the Petroleum Producers[4], have Article III standing may also be heard by the Supreme Court if it grants certiorari to address the prudential standing issue, because first, as Judge Kavanaugh noted, the Petroleum Producers are directly regulated by the E15 waiver, and in any event would be harmed by it. Second, Judge Kavanaugh noted, there is substantial evidence in the record of engine failures in MY2000-and-earlier vehicles, which would cause economic harm to members of the Engine Products Group, giving them Article III standing.[5] Moreover, members of the Engine Products Group are now obliged to take steps to test with E15 and take actions to prevent E15 contamination of vehicles and engines not designed for E15, causing them further economic harm under

[3] The record in No. 10-1380, *et al.* also contains evidence of a number of failures of MY2000-to-present vehicles, and EPA's concession of failures of non-road engines generally. However, if this Court agrees with Petitioners and Judge Kavanaugh that EPA may not grant a waiver for E15 if it would cause a failure of any post-1974 MY vehicle, it would not be necessary to resolve Petitioners' claim that there would also be failures in MY2000-to-present vehicles.

[4] "Petroleum Producers" include the following: API, American Fuel and Petrochemical Manufacturers (formerly National Petrochemical and Refiners Association), International Liquid Terminals Association, and Western States Petroleum Association.

[5] Judge Kavanaugh's dissent from denial of rehearing also cited the American Automobile Association's recent warning that E15 should not be used in MY2012-and-older vehicles, demonstrating that the likelihood of vehicle and engine failures only grows as more testing is performed.

*Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743, 2754-56 (2010) (a "reasonable probability," "substantial risk," or "likelihood" that unregulated parties will incur economic costs for testing and other measures to preserve the supply and marketability of unmodified seed products from genetic contamination, constitutes "sufficiently concrete" imminent injury to satisfy Article III standing).

Reasons for Granting This Motion

If the Petitioners in No. 10-1380, *et al.* prevail in their challenge to EPA's E15 waiver, these consolidated cases would become moot. Conversely, if the Supreme Court declined to grant a writ of certiorari to review this Court's judgment in No. 10-1380, *et al.*, that would clarify the issues herein[6] and allow Petitioners herein to make a more informed determination whether to pursue their challenges to EPA's "misfueling mitigation rule." Accordingly, holding these consolidated cases in abeyance will conserve judicial resources and the resources of the parties.

We are authorized by counsel for Respondent EPA and Intervenor-Respondent Growth Energy to state that Respondent EPA and Intervenor-Respondent Growth Energy do not oppose Petitioners' request that these consolidated cases should continue to be held in abeyance until 30 days after

[6] *See* Engine Products Group's Non-Binding Statement of Issues, No. 11-1334 (filed October 20, 2011); API Non-Binding Statement of Issues, No. 11-1344 (filed October 26, 2011).

disposition of any timely filed petitions for writ of certiorari in No. 10-1380, *et al.*, or 30 days after a decision by the Supreme Court following a grant of certiorari to Petitioners in No. 10-1380, *et al.*

## Conclusion

For the foregoing reasons, the Court should continue to hold these consolidated cases in abeyance until 30 days after the United States Supreme Court's disposition of timely filed petitions for writ of certiorari in *Grocery Manufacturers of America, et al. v. EPA*, No. 10-1380, *et al*., or, should the Supreme Court grant certiorari, 30 days after final decision by the Supreme Court.

Respectfully submitted,

*/s/ Michael F. McBride*

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February 27, 2013

## CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d) and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have this 27th day of February 2013, served the foregoing document upon counsel listed below and in the Service Preference Report via email through the Court's CM/ECF system or via first-class mail, postage prepaid.

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