No. 12-

IN THE
Supreme Court of the United States

GROCERY MANUFACTURERS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prudential standing is jurisdictional, as the D.C., Second, and Sixth Circuits have held, or whether it is non-jurisdictional and can be conceded or waived by a defending party, as the Fifth, Seventh, Ninth, Tenth, and Federal Circuits have held.

2. Whether, when Congress enacts a comprehensive and integrated statute governing a single subject matter, a group of petitioners whose interests Congress expressly identified and protected are in the "zone of interests" of that statute and therefore have prudential standing to challenge an agency decision issued under it.

3. Whether regulated industries have constitutional standing to challenge a rule that, as an integral part of a comprehensive regulatory scheme, imposes substantial new burdens on those industries.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings before the U.S. Court of Appeals for the District of Columbia Circuit:

1. Grocery Manufacturers Association, American Petroleum Institute, 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, and Snack Food Association, petitioners on review, were petitioners below.

2. Additional petitioners in the consolidated proceedings before the court below that are not joined in this petition are Alliance of Automobile Manufacturers, Association of Global Automakers, Inc., National Marine Manufacturers Association, Outdoor Power Equipment Institute, American Fuel and Petrochemical Manufacturers (formerly the National Petrochemical and Refiners Association), International Liquid Terminals Association, and Western States Petroleum Association.

3. The United States Environmental Protection Agency, respondent on review, was the respondent below.

4. Growth Energy, respondent on review, was an intervenor in support of respondent below.

RULE 29.6 DISCLOSURE STATEMENT

All petitioners are trade associations, none have parent companies, and no publicly held companies have a ten percent or greater ownership interest in any of the associations.

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OPINIONS BELOW

The decision of the court of appeals is reported at 693 F.3d 169 and is reprinted in the appendices

hereto (Pet. App.) at 1a-45a. That court's denial of rehearing en banc is designated for publication, is currently available at 2013 WL 163744, and is reprinted at Pet. App. 119a-128a. The Environmental Protection Agency's first "partial waiver" decision is published at 75 Fed. Reg. 68,094, and pertinent parts are reprinted at Pet. App. 46a-103a. Its second "partial waiver" decision is published at 76 Fed. Reg. 4,662, and pertinent parts are reprinted at Pet. App. 104a-118a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 17, 2012. Petitioners' petition for rehearing and suggestion for rehearing en banc were denied on January 15, 2013. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article III, Section 2, Clause 1 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority * * * .

2. The "right of review" section of the Administrative Procedure Act (APA), 5 U.S.C. § 702, states in relevant part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by

agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

3. The relevant portions of Section 211 of the Clean Air Act, 42 U.S.C. § 7545, are reprinted at Pet. App. 129a-157a.

INTRODUCTION

This Court has admonished that "[c]larity would be facilitated if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick* v. *Ryan*, 540 U.S. 443, 455 (2004). To that end, this Court has taken up a number of cases in recent years to "decide whether a procedural rule is 'jurisdictional.'" *See Henderson ex rel. Henderson* v. *Shinseki*, __ U.S. __, 131 S. Ct. 1197, 1202 (2011) (citing six cases). This case presents another such issue—an important, recurring threshold question of prudential standing that has divided the circuits, and divided the panel below.

The panel majority treated the "zone of interests" test for agency review cases as a jurisdictional requirement that could not be conceded by the agency. Five other circuit courts recently have addressed the question whether prudential standing is jurisdictional, and concluded that it is not. *See* Pet. App. 29a-31a (citing cases from the Fifth, Seventh, Ninth, Tenth, and Federal Circuits). The D.C. Circuit's opposite view is shared by the Second and Sixth Circuits. *See Lewis* v. *Alexander*, 685 F.3d 325, 340 n.14 (3d Cir. 2012) (recognizing the circuit split). Review by this Court is necessary to resolve

the "deep and important circuit split on this important issue." Pet. App. 32a; *see also* S. Ct. R. 10(a).

Review is warranted for two additional and independent reasons. *First*, the majority's prudential standing analysis conflicts with decisions of this Court, such as *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, __ U.S. __, 132 S. Ct. 2199 (2012), instructing that a plaintiff's interests must only be "arguably within the zone of interests to be protected or regulated by the statute" giving rise to the claim. *Id.* at 2210 (citation omitted). A majority of the panel below determined that one petitioner group—dubbed the "food petitioners"—lacked prudential standing to seek review of the challenged agency decisions because they were not within the "zone of interests" of the relevant provision of the Clean Air Act. Pet. App. 17a-19a. As Judge Kavanaugh observed in his dissent from rehearing en banc, however, "[u]nder *Match-E*, * * * the food producers are well within the zone of interests." Pet. App. 125a. Review is warranted on this issue to realign the D.C. Circuit "with the Supreme Court's recent decisions on jurisdiction and prudential standing." Pet. App. 126a; *see also* S. Ct. R. 10(c).

Second, the decision below concluded that the two other petitioner groups—the "petroleum petitioners" and the "engine products petitioners"—lacked Article III standing to challenge the agency decisions under review, again in conflict with multiple decisions from this Court. The Clean Air Act's "regulation of fuels" program, set forth in Section 211 of the Act, 42 U.S.C. § 7545, includes a number of integrated components, two of which are the subsection on "new fuels and fuel additives," *id.* § 7545(f), and the sub-

section on the "renewable fuel program," *id.* § 7545(*o*). The challenged agency decisions were rendered under the "new fuels and fuel additives" subsection; they permit increased amounts of ethanol—a renewable fuel—to be used in gasoline. When coupled with the "renewable fuel program" and its accompanying volume mandates, the agency's overall program requires the petroleum petitioners to make massive infrastructural changes to accommodate a new fuel blend—or exit that part of the market. Yet the majority concluded that the petroleum petitioners lacked constitutional standing to challenge the decisions here. In declining review of an agency decision with profound impacts on multiple national industries, the majority departed from basic Article III principles harkening back to *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), *see* Pet. App. 126a-127a, as well as the Court's more recent elaborations on Article III in *Monsanto Co.* v. *Geertson Seed Farms*, __ U.S. __, 130 S. Ct. 2743 (2010); *Massachusetts* v. *EPA*, 549 U.S. 497 (2007); and *Clinton* v. *City of New York*, 524 U.S. 417 (1998). This Court's review is needed on this "important question of federal law" because it was decided "in a way that conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

The D.C. Circuit is the sole federal appellate host to many high-profile agency challenges. Its split decision in this case hit the trifecta of certworthiness. It cemented a "deep and important circuit split" on the "important issue" whether prudential standing is jurisdictional. Pet. App. 32a. It ignored this Court's most recent pronouncements on Article III and prudential standing. Pet. App. 27a-29a, 32a. And it did all this in a case of indisputable national importance—one with "significant economic ramifica-

tions for the American food and petroleum industries, as well as for American consumers who will ultimately bear some of the costs" of the agency's regulatory overreach. Pet. App. 127a. Review should be granted to ensure that an agency decision that "ran roughshod over the relevant statutory limits," Pet. App. 42a, is not insulated from judicial review. The Court should grant the writ and reverse.

STATEMENT

This case involves two decisions by the United States Environmental Protection Agency (EPA) that fundamentally alter the nature of gasoline that may be introduced into commerce and the manner in which gasoline is sold and used. Previously all gasoline produced and offered for sale in the United States could include no more than 10% ethanol by volume, a fuel known as "E10." E10 is approved for use in all gasoline-powered vehicles and engines in the United States. EPA's challenged decisions increase the maximum amount of ethanol that may be blended into gasoline to 15%, or "E15."

But EPA did not approve E15 for use in *all* gasoline-powered vehicles and engines. Instead, in two separate actions, EPA issued what it characterized as "partial waivers" allowing E15 to be used only in light-duty cars and trucks manufactured since 2001. EPA did not approve E15 for use in other types of vehicles and engines, because it concluded that the data failed to demonstrate that E15 would not cause or contribute to violations of the emissions standards for those vehicles and engines.

EPA's decision to increase by 50% the amount of ethanol that may be blended into transportation fuel will directly affect those who build and maintain the

nation's internal combustion engines; those who make and sell the gasoline on which these engines run; and those who produce a substantial portion of what we eat, for whom costs will rise as more and more corn is diverted from food to fuel. When all of these groups challenged the partial waivers in the D.C. Circuit as exceeding EPA's statutory authority, however, a majority of the panel hearing the case found that *none* of them had demonstrated standing.

Approval of Fuels and Fuel Additives. The Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, strictly regulates the fuels and fuel additives that may be introduced into U.S. commerce. Section 211(f)(1)(B) of the Act, 42 U.S.C. § 7545(f)(1)(B), states that no fuel or fuel additive may be introduced into commerce unless the fuel or fuel additive is substantially similar to one already used in the certification of vehicles or engines subject to federal emissions standards. Section 211(f)(4) of the Act allows EPA to waive the "substantially similar" requirements of Section 211(f)(1)(B) for a particular fuel or fuel additive if the Administrator determines that "the emission products of such fuel or fuel additive * * * will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified * * * ." 42 U.S.C. § 7545(f)(4).

EPA's "Partial Waivers." In March 2009, a group of 53 ethanol producers, led by intervenor-respondent Growth Energy (Growth), submitted an E15 waiver application under Section 211(f)(4), as amended by the Energy Independence and Security

Act of 2007 (EISA), Pub. L. No. 110-140 (Dec. 19, 2007). To support its application, Growth relied on another provision of the same statutory section that was also substantially amended by EISA: Section 211(*o*), the renewable fuel program (also called the renewable fuel standard, or RFS). 42 U.S.C. § 7545(*o*). Growth explained that the RFS, as amended by EISA, "*requires* 36 billion gallons of renewable fuel be blended into our domestic fuel supply" *every year* by the year 2022. CADC Joint App. 85 (emphasis added). But, according to Growth, there was an obstacle to meeting this mandate: the E10 " 'blend barrier' that places an artificial ceiling on the ethanol market, which, at current rates of production, will be mathematically saturated within months." *Id.* Growth contended that "[f]ailure to remove the blend barrier will result in an insufficient supply of ethanol to meet the renewable fuel mandates of EISA 2007." *Id.*; *see also* CADC Joint App. 88 ("the mandates of EISA 2007 are effectively unreachable * * * because EPA long-ago elected to limit the base blend of ethanol in gasoline to only 10 percent"). Therefore, Growth claimed, a waiver for E15 under Section 211(f)(4) was necessary to meet the goals set forth in Section 211(*o*). CADC Joint App. 85, 88, 97; *see also* Pet. App. 127a (Kavanaugh, J., dissenting from denial of rehearing) (observing that "the ethanol producers who sought the E15 waiver specifically argued to EPA that the E15 waiver was 'necessary' for petroleum producers to meet the renewable fuel mandate").

EPA agreed with Growth. Over petitioners' detailed objections, the agency issued two "partial waiver" decisions in October 2010 and January 2011 approving E15 for use in certain—but not all—light-

duty motor vehicles: model years 2001 and newer. And when it issued its "partial waivers," EPA made repeated references to the RFS as amended by EISA. *See* Pet. App. 49a-50a n.2, 65a n.12, 70a, 71a n.59, 107a n.4, 113a.

The Petition for Review and Panel Decision. A coalition of seventeen petitioners from three major industry groups—engine products, petroleum, and food production—filed six separate petitions for review of EPA's decisions; the petitions were later consolidated. Growth, the private proponent of the E15 waiver, intervened in support of the agency.

EPA did not challenge any of the petitioners' standing, in any respect—constitutional or prudential—to seek judicial review of the "partial waiver." To the contrary, EPA conceded the appellate court's jurisdiction over the petitions in its brief and reiterated that concession at oral argument. Growth, however, argued that all petitioners lacked Article III and prudential standing.

A panel majority concluded that *no* petitioner had standing to challenge the E15 partial waivers. Judge Sentelle, joined by Judge Tatel, determined that the engine products and petroleum petitioners had failed to demonstrate Article III standing. Pet. App. 9a-17a. Specifically concerning the petroleum petitioners, the majority concluded that "[w]e cannot fairly trace the petroleum group's asserted injuries in fact—the new costs and liabilities of introducing and dealing with E15—to the administrative action under review in this case." Pet. App. 13a. Instead, as the majority saw it, "the only real effect of EPA's partial waivers is to provide fuel manufacturers the *option* to introduce a new fuel, E15." *Id.* (emphasis added). And according to the majority, "if the inju-

ries of refiners and importers are traceable to anything other than their own choice to incur them, it is to the RFS, not to the partial waivers they challenge here." Pet. App. 14a.

As for the third group, the food petitioners, a majority of the panel agreed that they had Article III standing. *See* Pet. App. 17a & n.1, 24a, 27a. But a different two-judge combination concluded that the food petitioners lacked *prudential* standing, *see* Pet. App. 17a—even though EPA had never raised a challenge to any petitioner's prudential standing, *see* Pet. App. 6a-7a, 24a, 27a.

The effect of that decision—treating prudential standing as an unwaivable jurisdictional requirement—was not lost on the court. Indeed, in a separate concurring opinion, Judge Tatel offered that he "agree[d] with those circuits that have held that prudential standing is non-jurisdictional." Pet. App. 20a. But he joined the majority because he concluded that there had not yet been a sufficiently clear directive from the Supreme Court to permit a three-judge panel "to depart from our clear prior holdings that prudential standing is jurisdictional—no matter how much we may think those decisions are wrong or that the Supreme Court may be preparing to hold otherwise." Pet. App. 20a.

Judge Kavanaugh dissented on three separate issues. First, Judge Kavanaugh concluded that prudential standing was a non-jurisdictional requirement that had been conceded or waived by EPA and, under circuit precedent, therefore could not be raised separately by intervenors. Pet. App. 32a & n.5.[1] For

[1] The D.C. Circuit has held that "[a]n intervening party may join issue only on a matter that has been brought before

support, Judge Kavanaugh pointed to recent Supreme Court decisions narrowing the treatment of threshold inquiries as "jurisdictional," prior decisions of this Court, and the rulings of at least five other circuits that prudential standing was not jurisdictional and could be conceded or waived. Pet. App. 27a-32a.

Second, Judge Kavanaugh found that even if prudential standing were jurisdictional, the food petitioners had established it: They fell within the "zone of interests" of the overall statutory regime, as required by *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2210-12. Pet. App. 32a-37a. As Judge Kavanaugh explained, "[t]he food producers' case for being within the zone of interests is especially strong here because Congress *expressly* took account of the interests of food producers, among others, in this ethanol-related statute." Pet. App. 125a.[2] Separately, the food petitioners also had competitor standing because they

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the court by another party." *Illinois Bell Tel. Co.* v. *FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990). In reaching this conclusion, the *Illinois Bell* court relied on this Court's reasoning in *Vinson* v. *Washington Gas Light Co.*, 321 U.S. 489, 498 (1944), that "an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues." *See Illinois Bell Tel. Co.*, 911 F.2d at 786 (quoting *Vinson*).

[2] The rising price of corn was the injury that the food petitioners asserted to support their claim of standing: "As a result of the E15 waiver, there is likely—indeed, nearly certain in the current market—to be a significant increase in demand for corn to produce ethanol. The extra demand means that corn producers can charge a higher price. Therefore, the E15 waiver will likely cause higher corn prices, and members of the food group that depend on corn will be injured." Pet. App. 25a.

competed in the market for corn directly against ethanol producers. Pet. App. 37a-38a.

Third and finally, Judge Kavanaugh concluded that the petroleum group petitioners plainly had demonstrated Article III standing: their injury is "directly caused by the agency action under review in this case." Pet. App. 40a. As he explained, "the combination of the renewable fuel mandate *and* the E15 waiver will force gasoline producers to produce E15." *Id.*

Judge Kavanaugh closed out his thorough dissent with a brief discussion of the merits, which he found were "not close": EPA had exceeded its statutory authority. Pet. App. 42a. But a majority of the court below—over the statements even of EPA itself—had just sweepingly waved off any challenge to it. As Judge Kavanaugh put it, "[d]espite the fact that two enormous American industries will be palpably and negatively affected by EPA's allegedly illegal E15 waiver, the majority opinion tosses the case for lack of standing." Pet. App. 22a.

Rehearing Denied. All three petitioner groups sought rehearing en banc. The court called for responses from both EPA and Growth, who both obliged.[3] A vote was requested, but a majority of eli-

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[3] In its response to the petitions for rehearing, Growth argued that one of petitioners' arguments—that the court should overrule its prior precedent holding that prudential standing is jurisdictional—had not properly been raised before the merits panel. But that is of no moment here because the issue was most certainly "passed on" by the court below. As this Court has explained, "[i]t suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance

gible judges did not vote in favor of rehearing. Pet. App. 122a.

Judge Kavanaugh dissented from the denial of rehearing en banc. He reiterated that "[t]he circuits are split on whether the zone of interests requirement is jurisdictional" and that under "recent Supreme Court precedents, * * * the zone of interests requirement is not jurisdictional." Pet. App. 124a. He identified this Court's *Match-E* decision as recent and relevant prudential-standing precedent, explaining that "Justice Kagan's opinion for the Supreme Court in *Match-E*—the Supreme Court's first comprehensive analysis of the prudential standing zone of interests requirement in 25 years—made clear that the zone of interests test poses a very low additional bar to an otherwise permissible APA suit by a party with Article III standing," such that "the food producers easily meet the requirements set forth in" that case. Pet. App. 125a. Finally, Judge Kavanaugh reiterated that the majority's decision had flouted *Lujan* in denying the petroleum petitioners Article III standing; that these petitioners "are directly regulated parties"; and they "have shown, at a minimum, the requisite 'substantial probability' that the E15 waiver will require them to refine and sell E15." Pet. App. 126a-127a.

This petition followed.

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to the administration of federal law." *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (internal citations and quotation marks omitted). Just so here.

REASONS FOR GRANTING THE PETITION

This case is an ideal candidate for certiorari review. It raises the question whether a commonly litigated doctrine is jurisdictional—an issue this Court has taken up several times in recent years. It presents an oft-recurring federal issue that has deeply divided the circuits: whether prudential standing is a jurisdictional doctrine. And it involves a decision from the D.C. Circuit—a court that hears nearly *half* of the nation's APA agency-review cases—that conflicts with this Court's precedents and establishes unduly restrictive standards for both Article III and prudential standing.

These are all, separately or together, strong doctrinal reasons to grant the writ. But there is more. This case concerns EPA's decision to allow the introduction of a new gasoline blend into commerce—a decision affecting a wide swath of industries and consumers, and of such national concern that multiple states joined petitioners' efforts below (as *amici*) to overturn the agency's decision. The introduction of E15 into commerce will require billions of dollars of infrastructural changes in the transportation and petroleum industries, will cause food prices to climb, and will result in damage to untold numbers of gasoline engines. In addition to its doctrinal bona fides, then, this case is compelling in its consequences.

The petition should be granted.

I. THE D.C. CIRCUIT'S DECISION PERPETUATES AN ACKNOWLEDGED CIRCUIT CONFLICT OVER WHETHER PRUDENTIAL STANDING IS JURISDICTIONAL.

The decision below deepened a 5-3 split on a recurring and important issue: the nature of prudential

standing. *See* S. Ct. R. 10(a). This petition thus invokes "[o]ne of the primary purposes of the certiorari jurisdiction": "to bring about uniformity of decisions * * * among the federal courts of appeals." Eugene Gressman *et al.*, *Supreme Court Practice*, § 4.4, at 242 (9th ed. 2007). Just as in *Gonzalez* v. *Thaler*, __ U.S. __, 132 S. Ct. 641 (2012), the Court should grant the writ to decide a question that "implicate[s] [a] split[ ] in authority" over whether a threshold rule rises to the level of a "jurisdictional bar." *Id.* at 647 & n.1.

The Majority Approach. The Fifth, Seventh, Ninth, Tenth, and Federal Circuits—a majority of the federal courts of appeals to have considered the issue—all have held that prudential standing is not jurisdictional and therefore may be conceded or waived by the defending party.[4]

The Fifth Circuit has addressed the issue in the past year. In *Board of Mississippi Levee Commissioners* v. *EPA*, 674 F.3d 409, 417-418 (5th Cir. 2012), the court of appeals concluded that EPA had waived any argument on appeal that a state agency lacked prudential standing to challenge EPA action under the Clean Air Act, because the agency had failed to raise the issue before the district court. For

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[4] In at least one case, the Eleventh Circuit stated that "prudential standing is flexible and not jurisdictional in nature." *American Iron & Steel Inst.* v. *OSHA*, 182 F.3d 1261, 1274 n.10 (11th Cir. 1999); *see also Bonillo* v. *Secretary, U.S. Dep't of Homeland Sec.*, 2012 WL 5835202, at *2 (11th Cir. 2012) (quoting *American Iron*). But it later treated the issue as an open question and declined to reach "the question of whether purely prudential standing arguments are waivable." *Wolff* v. *Cash 4 Titles*, 351 F.3d 1348, 1358 (11th Cir. 2003).

support, the court relied on an earlier Fifth Circuit case, *Ensley* v. *Cody Resources, Inc.*, 171 F.3d 315, 320 (5th Cir. 1999), which had distinguished between limits on the court's "jurisdiction" and "the prudential limitation on our *exercise* of that jurisdiction," and had concluded that objections concerning the latter could be conceded or waived. *Id.*

The other circuits rounding out the majority view follow a similar path. The Seventh Circuit, for instance, has held that "prudential limitations on a federal court's power to hear cases" are "*[i]n addition to* jurisdictional limits on standing," and "are subject to waiver." *RK Co.* v. *See*, 622 F.3d 846, 851 (7th Cir. 2010) (emphasis added).

The Ninth Circuit likewise has held that "[u]nlike the Article III standing inquiry, whether [the plaintiff] maintains prudential standing 'is not a jurisdictional limitation on our review.' " *Independent Living Ctr. of S. Cal., Inc.* v. *Shewry*, 543 F.3d 1050, 1065 n.17 (9th Cir. 2008) (quoting *Board of Natural Res.* v. *Brown*, 992 F.2d 937, 945-946 (9th Cir.1993)). Accordingly, "these requirements, commonly referred to as 'prudential' standing, 'can be deemed waived if not raised in the district court.' " *City of Los Angeles* v. *County of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) (quoting *Brown*, 992 F.3d at 946).

The Tenth Circuit has reached the same conclusion: "prudential standing is not a jurisdictional limitation and may be waived." *The Wilderness Soc'y* v. *Kane County*, 632 F.3d 1162, 1168 n.1 (10th Cir. 2011) (en banc). So too with the Federal Circuit, which has determined in several cases that "the zone of interests test is not jurisdictional, and therefore that the government waived that argument by failing to raise it." *Gilda Indus., Inc.* v. *United States*,

446 F.3d 1271, 1280 (Fed. Cir. 2006) (citing *Duty Free Int'l, Inc.* v. *United States*, 88 F.3d 1046, 1048 (Fed. Cir. 1996)).

The Minority View. Three circuits—the Second, Sixth, and D.C. Circuits—have taken the contrary approach.[5]

The Second Circuit has held that "the concept of standing, * * * in both its constitutional *and prudential* dimensions, is a prerequisite to federal subject matter jurisdiction." *Wight* v. *BankAmerica Corp.*, 219 F.3d 79, 89 (2d Cir. 2000) (emphasis added) (citing *Thompson* v. *County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994)). Therefore, the Second Circuit claims "an independent obligation to examine" whether a claimant has prudential standing, even if that issue is not raised by the parties. *Thompson*, 15 F.3d at 248.

The same holds true for the Sixth Circuit. It has held that prudential standing "is a qualifying hurdle that plaintiffs must satisfy even if raised *sua sponte* by the court." *Community First Bank* v. *National Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994).

The D.C. Circuit agrees. In *Animal Legal Defense Fund, Inc.* v. *Espy II*, 29 F.3d 720 (D.C. Cir. 1994), the D.C. Circuit held that "[s]tanding, whether con-

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[5] In its response to petitioners' request for rehearing en banc, Growth identified the Eighth Circuit as another court following the minority rule. But the statement on the nature of prudential standing in the case cited by Growth is ambiguous: "A party invoking federal jurisdiction must establish that he has met the requirements of both constitutional and prudential standing." *Delorme* v. *United States*, 354 F.3d 810, 815 (8th Cir. 2004).

stitutional or prudential, is a jurisdictional issue which cannot be waived or conceded." *Id.* at 723 n.2. Accordingly, in the D.C. Circuit, "we treat prudential standing as akin to jurisdiction, an issue we may raise on our own." *American Immigration Lawyers Ass'n* v. *Reno*, 199 F.3d 1352, 1357-58 (D.C. Cir. 2000) (quoting *Animal Legal Def. Fund, Inc.* v. *Espy I*, 23 F.3d 496, 499 (D.C. Cir. 1994)).

In the years since the D.C. Circuit's *Animal Legal Defense Fund* decisions, this Court repeatedly has "encouraged federal courts and litigants to facilitate clarity by using the term 'jurisdictional' only when it is apposite." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, __, 130 S. Ct. 1237, 1244 (2010) (internal brackets, citations, quotation marks omitted). But the panel majority declined to reconsider its prior precedent, hewing to the conclusion that prudential standing is jurisdictional and thus could be neither waived nor conceded. *See* Pet. App. 2a, 6a-7a, 17a-19a. The majority was the thinnest conceivable on this score; Judge Tatel in concurrence noted that he "agree[d] with those circuits that have held that prudential standing is non-jurisdictional," but concluded that the panel was bound by circuit precedent absent a clear directive to the contrary from this Court. Pet. App. 20a. And as noted, Judge Kavanaugh dissented. Pet. App. 21a-45a.

* * *

As the Third Circuit observed nearly 20 years ago, "it is uncertain whether prudential standing may be waived," in part because "[t]he Supreme Court has given mixed signals." *UPS Worldwide Forwarding, Inc.* v. *USPS*, 66 F.3d 621, 626 n.6 (3d Cir. 1995). Those signals have become far less mixed in the in-

tervening years. As Judge Kavanaugh explained in his dissent below, "recent Supreme Court cases have significantly tightened and focused the analysis governing when a statutory requirement is jurisdictional." Pet. App. 28a. Judge Kavanaugh also observed that "although the Supreme Court has not yet directly addressed whether prudential standing is jurisdictional, the Court has suggested that it is not." Pet. App. 29a (citing *Tenet* v. *Doe*, 544 U.S. 1, 7 n.4 (2005)); *see also Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991) ("The judicial review provisions of the APA are not jurisdictional, so a defense based on exemption from the APA can be waived by the Government." (citation omitted)).

It is time for the Court to settle the disagreement. The question whether prudential standing is jurisdictional has been percolating in the courts of appeals for nearly two decades, and it is an active issue that continues to divide the circuits. *See Lewis*, 685 F.3d at 340 n.14 (recognizing split); *City of Los Angeles*, 581 F.3d at 845 n.3 (same); *see also* Pet. App. 29a-31a (citing recent cases). A grant of certiorari will enable the Court "to address a matter of some importance: We can reduce confusion, clouding court * * * decisions, over matters properly typed 'jurisdictional.' " *Union Pac. R.R.* v. *Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 558 U.S. 67, __, 130 S. Ct. 584, 596 (2009).

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS AND FUNDAMENTAL PRINCIPLES OF STANDING.

This case separately warrants review because it involves "important federal question[s]" resolved in a

way that "conflicts with relevant decisions of this Court." S. Ct. R. 10(c).

A. Prudential Standing

1. Last Term, this Court in *Match-E* addressed a challenge to the Secretary of Interior's decision to acquire land in trust pursuant to 25 U.S.C. § 465 for the Match-E Indian tribe, which intended to use the land to open a casino. The lawsuit was brought by respondent David Patchak, a neighboring landowner, who claimed that the Secretary was not authorized to acquire the land for the tribe because the tribe was not federally recognized when § 465 was enacted. The tribe challenged Patchak's standing, arguing "that the relationship between § 465 and Patchak's asserted interests is insufficient * * * because the statute focuses on land *acquisition*, whereas Patchak's interests relate to the land's *use* as a casino." *Match-E*, 132 S. Ct. at 2210. The Court rejected the tribe's contention, emphasizing that the prudential standing test "is not meant to be especially demanding"; it requires only that the claimant show that he is "*arguably* within the zone of interests to be protected or regulated by the statute that he says was violated." *Id.* (emphasis added; citations and internal quotation marks omitted). The Court further explained that "we have always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff." *Id.* Under this framework, the *Match-E* Court found Patchak to be sufficiently within the land-acquisition statute's zone of interests: "when the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather, she takes title to properties with at least one eye directed toward how tribes will

use those lands to support economic development." *Id.* at 2211.

This Court's *Match-E* decision was issued after oral argument in this case and before the D.C. Circuit's decision. Pet. App. 125a. The panel majority addressed it only briefly, concluding that it lacked "any particular applicability to the facts here." Pet. App. 19a. Judge Kavanaugh thought otherwise. *See* Pet. App. 35a-37a, 125a. Just as in *Match-E*, he explained, when EPA issued its "partial waiver" decisions under 42 U.S.C. § 7545(f)(4), it did so "with 'at least one eye' toward the renewable fuel mandate" in 42 U.S.C. § 7545(*o*). Pet. App. 36a. In fact, the agency had *both* eyes focused squarely on the RFS: its waiver decisions are festooned with references to the renewable-fuels mandate. *See, e.g.*, Pet. App. 49a-50a n.2; Pet. App. 65a n.12; Pet. App. 70a, 71a n.59, 107a n.4, 113a.

The agency's focus on RFS makes perfect sense; after all, Growth, the private proponent of the waivers for E15, had "specifically argued to EPA that the E15 waiver was 'necessary' for petroleum producers to meet the renewable fuel mandate." Pet. App. 127a. Thus, the fuel-waiver portion of Congress's "regulation of fuels" program has "far more to do with" the RFS mandates than the court below acknowledged. *Match-E*, 132 S. Ct. at 2210-11. And the panel majority's decision created a far more demanding standard for prudential standing than *Match-E* allows.

2. The conflict with this Court's precedents is not limited to *Match-E*; it extends to earlier decisions as well. The panel majority failed to read the fuel-waiver provision of the statute in the context of the

program of which it is a part, contrary to precedents dating back to the origin of the zone-of-interests test.

In *Association of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150 (1970), this Court recognized that the APA defined the standard as referring to " 'relevant' statutes." *Id.* at 157 (quoting 5 U.S.C. § 702). The Court determined that two separate statutes were "relevant" in that case: the Bank Service Corporation Act and the National Bank Act. *Id.* And in reviewing those statutes, the Court determined that "their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Acts are easily identifiable." *Id.* The Court provided further guidance in *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987), where it warned that the zone-of-interests inquiry should not "focus[ ] too narrowly on" the particular statutory provision giving rise to the action, particularly at the expense of "plac[ing] [that provision] in the overall context of the" relevant statutory scheme. *Id.* at 401.

The D.C. Circuit, however, declined to place the fuel-waiver provision "in the overall context" of the Clean Air Act. Judge Kavanaugh explained exactly how that decision flouted *Data Processing* and *Clarke*:

> [EISA] imposes a renewable fuel mandate that requires introducing increasing amounts of renewable fuel into the market every year. *See* 42 U.S.C. § 7545(*o*)(2)(B)(i)(I). The Act's renewable fuel mandate expressly commands EPA to take account of the effect on "food prices"—that is, the price of corn. 42 U.S.C. § 7545(*o*)(2)(B)(ii)(VI). The balance Congress struck in the renewable fuel mandate thus ex-

> pressly incorporates effects on food prices. At the same time, another statutory provision—in the same section of the U.S. Code—requires EPA to review and approve renewable fuel additives such as ethanol to make sure the fuel complies with clean air standards. Those statutory provisions together reflect a balance among the interests of corn farmers, the petroleum industry, the food industry, and the environment, among other interests. Because the E15 waiver is necessary—at least in the current market—to effectuate the statutory renewable fuel mandate, and because the food group is explicitly within the zone of interests for the renewable fuel mandate, the food group is in the zone of interests for purposes of this suit. [Pet. App. 34a.]

The decision below cannot be squared with this Court's precedents. And as we discuss at greater length below, its overly restrictive view of the "zone of interests" test has wide-ranging ramifications given the D.C. Circuit's uniquely heavy administrative-law caseload.[6]

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[6] The majority departed from both *Data Processing* and *Clarke* for an additional reason: both of those cases recognized businesses have an interest in preventing illegal regulation of their competitors. As Judge Kavanaugh explained, "the food group has prudential standing because it is complaining about an agency's allegedly illegal decision to loosen restrictions on a competitor of the food group—namely, the petroleum group, which competes against the food group in the upstream market for purchasing corn." Pet. App. 37a (citing *Data Processing* and *Clarke*).

B. Article III Standing

The third and equally important question presented in this case asks whether the court of appeals reached a holding that is in conflict with this Court's cases that establish the standards for *constitutional* standing. The answer is yes, for two reasons.

1. First, the decision below conflicts with this Court's cases on traceability. The panel majority concluded that "[w]e cannot fairly trace the petroleum group's asserted injuries in fact—the new costs and liabilities of introducing and dealing with E15—to the administrative action under review in this case." Pet. App. 13a. According to the majority, the petroleum petitioners' harm was caused by the RFS, not the fuel-waiver provision, and therefore their injury was not fairly traceable to the partial E15 waivers. Pet. App. 13a-14a, 16a-17a.

Judge Kavanaugh explained how the majority's decision broke with basic Article III principles. *See* Pet. App. 126a (citing *Lujan*). To remain consistent with this Court's jurisprudence, Judge Kavanaugh observed, "we cannot consider the E15 waiver in some kind of isolation chamber." Pet. App. 39a. But that is precisely what the majority did: it declined to view the statutory and regulatory scheme as a whole to determine the effect of the challenged agency action.

The majority's decision directly conflicts with, for example, *Clinton* v. *City of New York*, 524 U.S. 417, 431 & n.19 (1998), where this Court determined that the existence of an injury, and the cause of that injury, depends not only on the particular government action challenged, but also on the effects of that action *in conjunction with existing law*. President

Clinton had exercised his authority under the Line Item Veto Act to cancel Congress's waiver of New York's multibillion-dollar tax debt. *Id.* at 422-423. The result of reinstating this debt was that "[u]nder New York statutes that [were] already in place," the City of New York and certain healthcare providers would "be assessed by the State for substantial portions of any recoupment payments that the State may have to make to the Federal Government." *Id.* at 431. The City and the healthcare providers therefore had standing; their injuries were fairly traceable to the challenged Line Item Veto Act. *Id.* at 431 n.19. The Court rejected the contention that the petitioners' injury in that case was traceable to other government action (for example, the state statutory recoupment process), not the challenged action. It instead held that "Appellees' injury in this case * * * does not turn on the independent actions of third parties, as existing New York law will automatically require that appellees reimburse the State." *Id.*

So too here. The existing RFS mandates will *require* the petroleum petitioners to sell E15 to meet the mandate's requirements. Yet the majority below treated "existing * * * law" as irrelevant to its standing analysis. *Compare id. with* Pet. App. 13a-14a. Its decision therefore conflicts with *Clinton*.

The decision below also conflicts with *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). In *Massachusetts*, as here, a group of petitioners claimed that an EPA decision violated the Clean Air Act. EPA challenged those petitioners' constitutional standing. The Court characterized EPA's argument to be that "a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." *Id.* at 524. But the Court squarely rejected that assertion: "ac-

cepting that premise would doom most challenges to regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop." *Id.*

That same reasoning applies here. Congress and EPA have used a varied arsenal of measures to comprehensively address the regulation of fuels and renewables, creating a comprehensive and integrated scheme that functions as a cohesive whole. As Growth itself acknowledged in its waiver application, one step under that scheme—*e.g.*, mandating increased use of renewables—creates problems that must be solved in future steps—like finding ways to introduce increased volumes of renewables into engine fuel. Although one can separately identify each "step" in the process, *see id.*, these individual steps must be viewed together to determine their ultimate effect. And when that effect is substantially likely to cause injury, such as here, the injured party has standing to sue. *See id.*

2. The D.C. Circuit also departed from this Court's Article III precedents when it dismissed the petroleum petitioners' asserted injuries as "self-inflicted." Pet. App. 13a. According to the panel majority, the petroleum petitioners' expenditure of resources to accommodate E15 would be caused by their voluntary responses to "economic" pressures, not the partial E15 waivers themselves. Pet. App. 13a-14a, 16a. This holding directly conflicts with this Court's recent decision in *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010).

In *Monsanto*, this Court concluded that an agency's decision to deregulate a certain type of genetically modified alfalfa plant "gives rise to a significant risk of gene flow" from the genetically modified variety

"to non-genetically-engineered varieties of alfalfa." *Id.* at 2755. This, in turn, created a "substantial risk" of harm to farmers growing organic and conventional alfalfa who wished "to continue marketing their product to consumers who wish to buy non-genetically-engineered alfalfa," because they "would have to conduct testing to find out whether and to what extent their crops have been contaminated." *Id.* at 2754-55. The farmers in *Monsanto* were *voluntarily* taking on additional costs in order to *voluntarily* sell organic alfalfa. But the Court nevertheless concluded that their asserted harms were both "sufficiently concrete to satisfy the injury-in-fact prong of the constitutional standing analysis" and "readily attributable to [the agency's] deregulation decision." *Id.*

The petroleum petitioners in this case manufacture and produce transportation fuels. A regulation that causes a 50% increase in the amount of ethanol that may be blended into such fuels changes the nature of the product those petitioners make, move, and sell. Thus, these petitioners assert an injury indistinguishable from that asserted by the farmers in *Monsanto*: they must take on additional costs to remain economically viable players in the fuel market. Of course they could avoid the harm by completely ceasing the regulated activity. But if that were the rule, practically no regulated business could ever establish standing: the medical care providers in *Sebelius* v. *Auburn Regional Medical Center*, __ U.S. __, 133 S. Ct. 817 (2013), could have avoided the purportedly unfair Medicare reimbursement scheme by declining to treat Medicare patients; the member organizations of the National Meat Association could have ceased operating slaughterhouses in California and

avoided application of the statute in *National Meat Association* v. *Harris*, __ U.S. __, 132 S. Ct. 965 (2012); the Chamber of Commerce and the businesses it represents could have avoided the Legal Arizona Workers Act of 2007 in *Chamber of Commerce* v. *Whiting*, __ U.S. __, 131 S. Ct. 1968 (2011), by shutting down operations in Arizona; and so on. The court of appeals' holding irreconcilably conflicts with *Monsanto*.[7]

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The D.C. Circuit's decision thus presents "one of the strongest possible grounds for securing the issuance of a writ of certiorari," because it runs directly afoul of this Court's prior precedents in more ways than one. Gressman, *Supreme Court Practice*, § 4.5, at 250. This Court should grant review on this basis as well.

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[7] This Court recently granted certiorari in a case involving similar logic in the preemption context. In *Bartlett* v. *Mutual Pharmaceutical Co.*, 678 F.3d 30 (1st Cir.), *cert. granted*, 133 S. Ct. 694 (2012), the First Circuit held that there was no conflict between the federal regulatory regime governing generic drugs and state "design defect" tort laws because a generic manufacturer "can choose not to make the drug at all" and thereby avoid any conflict. *Id.* at 37. This Court granted review of the question "[w]hether the First Circuit erred when it * * * held * * * that federal law does not preempt state law design-defect claims targeting generic pharmaceutical products because the conceded conflict between such claims and the federal laws governing generic pharmaceutical design allegedly can be avoided if the makers of generic pharmaceuticals simply stop making their products." http://www.supremecourt.gov/qp/12-00142qp.pdf.

III. THE QUESTIONS PRESENTED RAISE IMPORTANT AND RECURRING ISSUES THAT SHOULD BE DECIDED BY THIS COURT.

1. The questions presented in this case involve threshold issues of standing applicable to every case brought in federal court by a regulated entity or individual. They are indisputably important. This Court has already recognized as much. The issue whether prudential standing is jurisdictional is precisely the type of question this Court has described as being "of considerable practical importance for judges and litigants." *Henderson*, 131 S. Ct. at 1202 (addressing another recent jurisdictional-or-not question). That is why the Court of late has taken up so many cases to clarify the line between jurisdictional doctrines and mandatory rules. *See, e.g.*, *Henderson*, 131 S. Ct. 1197; *Reed Elsevier, Inc.*, 130 S. Ct. 1237; *Union Pacific R.R.*, 130 S. Ct. 584; *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006); *Eberhart* v. *United States*, 546 U.S. 12 (2005) (per curiam); *Scarborough* v. *Principi*, 541 U.S. 401 (2004); *Kontrick*, 540 U.S. 443.

The second question presented—the metes and bounds of prudential standing—has also repeatedly been recognized by this Court as a certworthy issue. In each of the past two Terms, in fact, this Court took up questions about the scope of the prudential standing doctrine. *See Match-E*, 132 S. Ct. 2199; *Bond* v. *United States*, __ U.S. __, 131 S. Ct. 2355 (2011); *Thompson* v. *North Am. Stainless, LP*, __ U.S. __, 131 S. Ct. 863 (2011).

The same holds true for the third question presented, on Article III standing. As this Court has stated, "the threshold issue of standing" is "an essential and unchanging part of the case-or-controversy require-

ment of Article III." *Horne* v. *Flores*, 557 U.S. 433, 445 (2009) (citation omitted). And as is to be expected for such a fundamental jurisprudential issue, this Court frequently takes up cases to decide questions concerning Article III standing. *See, e.g.*, *American Elec. Power Co.* v. *Connecticut*, __ U.S. __, 131 S. Ct. 2527 (2011); *Monsanto Co.*, 130 S. Ct. 2743; *Summers* v. *Earth Island Inst.*, 555 U.S. 488 (2009).

2. The questions presented also are, of course, recurring, and they recur at a clip arguably unlike any other issue. Standing plays a particularly important role in agency review; in the past three years alone, it was raised in over 1,500 such cases (a number that naturally does not count the cases in which standing was conceded by an agency and *not* raised sua sponte). And of all the federal circuits, the D.C. Circuit hears more agency-review cases than any other—indeed, it has exclusive jurisdiction over certain agency challenges.[8]

This Court has long taken into account the D.C. Circuit's special role when granting certiorari in cases from that court raising important administrative-law-related questions: "Since the vast majority of challenges to administrative agency action are brought to the Court of Appeals for the District of Columbia Circuit, the decision of that court in this

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[8] In 2011—the most recent year for which data are available—the D.C. Circuit heard a whopping 44.7% of *the nation's* non-immigration-related administrative appeals. *See* Administrative Office of the United States Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts* 74 (2012) (Table B-3), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/B03Sep11.pdf.

case will serve as precedent for many more proceedings for judicial review of agency actions than would the decision of another Court of Appeals." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 535 n.14 (1978). The importance of the D.C. Circuit in shaping standing law has similarly been recognized by scholars: "The D.C. Circuit's standing test is important because the circuit has exclusive or concurrent jurisdiction for many regulatory statutes and hears more regulatory cases than any other circuit." Bradford Mank, *Standing & Statistical Persons: A Risk-Based Approach to Standing*, 36 ECOLOGY L.Q. 665, 695-696 (2009); *see also* Amy J. Wildermuth & Lincoln L. Davies, *Standing, on Appeal*, 2010 U. ILL. L. REV. 957, 991 (2010) ("because the D.C. Circuit hears more non-immigration administrative cases than other circuits, their docket would seem to be most instructive on the question of the overall trend of direct appellate review of administrative decisions" (footnote omitted)). It is therefore no surprise that this Court has heard over fifty agency-review cases from the D.C. Circuit in the past decade—*seventeen* of which involved questions of standing.

3. The context of this case likewise makes it an important one for this Court to decide. EPA's challenged decision allows a dramatic increase in the amount of ethanol that may be blended with transportation fuel. To say that the merits issue is important is a gross understatement. The Clean Air Act is a "far-reaching statute" affecting the daily lives of all Americans. David P. Currie, *Air Pollution: Federal Law and Analysis* § 1.14 (1981). That is why several states from across the Nation—Alabama, Alaska, Oklahoma, and Virginia—joined

petitioners' effort to overturn the partial E15 waivers by filing an *amici* brief below.

Both the federal government and affected industries have recognized the serious potential consequences of a fuel waiver. EPA, the Department of Energy, and the Coordinating Research Council, Inc.—a nonprofit organization supported by the petroleum and automotive equipment industries, many of whom were petitioners below—provided approximately $51 million in funding for research on the effects that intermediate ethanol blends such as E15 would have on automobiles and engines. Government Accountability Office, No. GAO-11-513, *BIOFUELS: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends* 31 (June 2011).[9] "EPA estimated that the necessary spending on transportation infrastructure due to increased ethanol consumption would be approximately *$2.6 billion*." *Id.* at 14 (emphasis added). Fuel retailers would have to spend up to $200,000 *per facility* in order to carry the new fuel blend. *See id.* at 27-28. The increased demand for corn caused by E15 and the resulting diversion of food to fuel will increase prices for feed and food across the board. *See* CADC Joint App. 613-615. The risk that the use of E15 in motor vehicles for which it was approved will cause catastrophic engine failure is a real one; the likelihood that it will cause such failures in vehicles and engines for which it was *not* approved is a near certainty. And the chances of misfueling are high. *See* CADC Joint App. 2.

Because a panel majority dismissed the claims of all seventeen petitioners on standing grounds, how-

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[9] Available at http://www.gao.gov/new.items/d11513.pdf.

ever, EPA's partial E15 waivers will be insulated from judicial review—never mind their sweeping reach. This is all the more troubling because, as Judge Kavanaugh put it, the decisions "plainly run[ ] afoul of the statutory text. EPA's disregard of the statutory text is open and notorious—and not much more needs to be said." Pet. App. 43a.

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"The Administrative Procedure Act was framed against a background of rapid expansion of the administrative process as a check upon Administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices. It created safeguards even narrower than the constitutional ones, against arbitrary official encroachment on private rights." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 644 (1950). The D.C. Circuit has substantially curtailed the force of the APA by denying standing to the seventeen petitioners in this case. Left undisturbed, the panel's ruling will cast doubt on the standing of regulated entities under all other EPA—indeed all other government regulatory—programs. After all, under the decision below, even where the government has conceded standing, a court may nonetheless decide for itself whether petitioners have not just constitutional, but *prudential*, standing. Under the decision below, an agency can insulate its decisions from review by unfolding a regulatory scheme piece by piece, with no single rule causing the quantum of injury necessary to allow for judicial review. And under the decision below, if every entity impacted by an agency rule hypothetically could avoid harm simply by *ceasing to participate* in

the regulated activity, none of them would be able to muster standing to challenge the rule.

This Court's review is needed to harmonize the circuits' treatment of prudential standing and to correct a departure from this Court's precedents that establishes an unduly restrictive view of both constitutional and prudential standing.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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