

No. 12-1167

IN THE
Supreme Court of the United States

ALLIANCE OF AUTOMOBILE MANUFACTURERS, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

**RESPONSE IN SUPPORT
OF CERTIORARI REVIEW**

WILLIAM L. WEHRUM
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave,
N.W.
Washington, D.C. 20037
(202) 955-1500

CATHERINE E. STETSON*
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

LEWIS F. POWELL III
HUNTON & WILLIAMS LLP
Riverfront Plaza, E. Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

*Counsel of Record

*Counsel for Respondents Grocery Manufacturers
Association, American Petroleum Institute, et al.*

(additional counsel listed on inside cover)

Additional Counsel:

HARRY NG
ERIK C. BAPTIST
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005-4070
(202) 682-8000

QUESTIONS PRESENTED

1. Whether the engine manufacturers have standing under Article III because they demonstrated that E15 will cause them injury in fact.

2. Whether prudential standing is non-jurisdictional and therefore can be waived by a government agency's (here, EPA's) failure to raise it.

3. Whether, in assessing a regulated entity's Article III standing to challenge regulatory action, an apparent "option" to comply with a statutory scheme should be viewed as coercive if use of the "option" is practically required.

These questions are substantially similar to those presented in the petition in case number 12-1055, which are incorporated in full here by reference. *See* 12-1055 Pet. at i.

PARTIES JOINED IN THIS RESPONSE

The following are joined in this response in support of certiorari review: 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. These respondents were petitioners below and are petitioners on review in case number 12-1055.

RULE 29.6 DISCLOSURE STATEMENT

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

The Grocery Manufacturers Association (GMA) is the largest association of food, beverage, and consumer product companies in the world. Its members are numerous and include Advanced Food Products, LLC, B&G Foods, Inc., Campbell Soup Company, ConAgra Foods, Dean Foods Company, General Mills, Inc., Hormel Foods Corporation, Kraft Foods Global, Inc., Safeway Inc., Target Corporation, and The Kroger Co. GMA's member organizations employ more than 2.5 million workers in all 50 States, with U.S. sales totaling over \$460 billion annually. GMA leads efforts to increase productivity and growth in the food and beverage industry, as well as industry efforts to promote the safety and security of the Nation's food supply. Because GMA's members produce and market a significant number of corn and other grain-based products, GMA has an interest in any rule or regulation that affects the availability or prices of these grains.

The American Petroleum Institute (API) is a nationwide, not-for-profit association representing over 500 member companies—including Chevron Corporation, Marathon Petroleum Corporation, ConocoPhillips Company, BP America Inc., ExxonMobil, and Shell Oil Company—engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. API promotes the general commercial, regulatory, legislative, and oth-

er interests of the membership. It was and is involved in research efforts to determine the effects of introducing new fuel blends such as E15 into the marketplace.

The American Frozen Food Institute (AFFI) is the national trade association that promotes and represents the interests of all segments of the frozen food industry. Among its many members are J.R. Simplot Co., NORPAC Foods, Inc., Frozen Specialties, Inc., Kellogg Co., and Pinnacle Foods. AFFI fosters industry development and growth, advocates on behalf of the industry before legislative and regulatory entities, and provides additional value-added services for its members and for the benefit of consumers. AFFI has an interest in rules or regulations that affect the availability or cost of grains—commodities that make up a large portion of its members' products.

The American Meat Institute (AMI) is the Nation's oldest and largest trade association representing packers and other processors of beef, pork, lamb, veal, chicken, and turkey products and their suppliers throughout North America. A small sample of its members are Smithfield Foods, Inc., Kraft Foods, Inc./Oscar Mayer, Hormel Foods, Boar's Head Provisions Co., Inc., Sara Lee Corporation, Omaha Steaks International, Inc., and Bob Evans Farms, Inc. Its members are directly affected by the E15 waiver.

The National Chicken Council (NCC) is a national, nonprofit trade association representing the poultry industry, including producers, processors, and distributors of chicken and chicken products—just two of whom are Tyson Foods and Perdue Farms. NCC's members account for more than 95 percent of the chicken produced in the United States. About 85 percent of chicken feed is corn and soybean meal.

The new demand for corn from the ethanol sector has serious consequences for the poultry and livestock industries due to the resulting sharply increased prices for feedstock.

The National Council of Chain Restaurants (NCCR) is a division of the National Retail Federation (NRF). NCCR, as a division of NRF, is the leading trade association exclusively representing the chain restaurant industry. NCCR's member companies include some of the nation's largest casual dining and quick-service restaurant brands, such as McDonald's Corporation, Burger King Corporation, and Denny's Inc. These restaurants purchase grain-based products as well as poultry and meat fed with grains, and are directly harmed by any regulation that diverts such grains from food and feed products.

The North American Meat Association (NAMA) is a national, nonprofit trade association representing meat packers and processors, equipment manufacturers and suppliers across the United States. Its members are numerous and include Jensen Meat Company, Preferred Beef Group, and Keystone Foods—entities that will be directly harmed by the diversion of grains to ethanol instead of to livestock feed.

The National Pork Producers Council (NPPC) is a nonprofit trade association. NPPC conducts public policy outreach on behalf of its 44 affiliated state association members, which represent most of the country's 67,000 pork producers. Like the other food production associations, its member organizations are harmed by increased corn prices caused by the increased demand for corn from the ethanol industry.

The National Turkey Federation (NTF) represents all segments of the U.S. turkey industry, including growers, processors, breeders, hatchery owners, and allied companies. Some of NTF's many members are Butterball Turkey LLC, Empire Kosher, Plainville Farms, Foster Farms, and Farbest Foods, Inc. NTF is the only national trade association representing the turkey industry exclusively, and its members are responsible for almost 100 percent of all turkey production in the United States. Because feed accounts for 70 percent of the cost of producing turkeys, and corn is the single largest ingredient in turkey feed, NTF's members have a direct interest in all legislation, regulation, and litigation that affects the distribution and availability of corn.

The Snack Food Association (SFA) is the international trade association for the manufacturers of and suppliers to the snack food industry. SFA's membership represents 90 percent of this over-\$40 billion industry worldwide. Among its many members are Better Made Snack Foods, Inc., Frito-Lay, Inc., Kettle Foods, Inc., Snyder's-Lance, Inc., Utz Quality Foods, Inc., and others. The vast majority of SFA member-products are made from corn, wheat, and other such commodities.

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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 respectfully support this Court's review of the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT

Seventeen petitioners representing three industries—petroleum, food production, and engine products—petitioned the D.C. Circuit to review two “partial waiver” decisions of the United States Environmental Protection Agency (EPA) purportedly promulgated under Section 211(f)(4) of the Clean Air Act, 42 U.S.C. § 7545(f)(4). These petitions were consolidated for briefing and argument below. Two judges on the panel concluded that *none* of the seventeen petitioners had standing to challenge EPA’s decisions and dismissed the case. Judge Kavanaugh dissented from this judgment, and from the D.C. Circuit’s subsequent decision not to rehear the case en banc.

All of the food-production petitioners and API, one of the petroleum-group petitioners, jointly filed a petition for certiorari review of this decision in February. The petition was docketed as case number 12-1055.

The engine-products petitioners also have sought review of the D.C. Circuit’s judgment, seeking summary reversal or certiorari review in a petition docketed as case number 12-1167. The engine-products-group’s petition explains that the D.C. Circuit majority clearly erred in holding that they lack Article III standing to challenge EPA’s partial waivers. The engine-products petitioners also seek review of the same questions raised by respondents in their petition: whether prudential standing is jurisdictional and whether a party has Article III standing to challenge a burdensome regulatory “option” that is in reality mandatory. The 12-1055 petitioners file this response in support.

REASONS FOR GRANTING REVIEW

As these respondents explained in their own petition for certiorari, this case is an ideal candidate for the Court's review. It squarely presents a recurring federal question that has sharply divided the circuits: whether prudential standing is jurisdictional. The D.C. Circuit's decision also departs from this Court's binding precedents on both prudential and Article III standing and is likely to have far-reaching effects in agency-review cases. And it is a case of considerable importance to businesses now barred under the D.C. Circuit's ruling from challenging regulations that will harm their interests. This is why a group of five business organizations, led by the Chamber of Commerce of the United States, have filed an amicus brief in support of this and respondents' petitions.

The Court should grant review to resolve the circuit split over whether prudential standing is jurisdictional. *Cf. Henderson ex rel. Henderson v. Shinseki*, __ U.S. __, 131 S. Ct. 1197, 1202 (2011) (citing six cases this Court took up in recent years to "decide whether a procedural rule is 'jurisdictional'"). The Court should grant review to correct the D.C. Circuit's sharp departure from the prudential-standing doctrine established by this Court in cases such as *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, __ U.S. __, 132 S. Ct. 2199 (2012); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970); and *Clarke v. Securities Industry Ass'n*, 479 U.S. 388 (1987). The Court should grant review to bring the D.C. Circuit in line with this Court's cases on Article III standing, such as *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). And the Court should grant review not only because of the important legal questions presented, but also because of the indisputable national importance of the case.

The engine-products-group’s petition reiterates and confirms each of these points. *See* 12-1167 Pet. at 3-4, 26-30. As these petitioners explain, EPA’s partial waivers will harm all three petitioner groups in ways that are both logical and intuitive. First, these partial waivers approve E15 for automobiles that were not designed to run on E15, which will result in harm to engines and increased costs to engine manufacturers. *Id.* at 3. Second, by allowing 50% more ethanol to be blended with gasoline, the partial waivers will greatly increase the demand for corn, and the prices that food producers will have to pay for that corn. *Id.* Third and finally, EPA’s partial waivers will require petroleum suppliers, distributors, and refiners to overhaul their production, transportation, and storage facilities and processes—at great cost—to accommodate the new fuel blend. *Id.*

The engine-products-group’s petition recognizes that the majority’s decision to dismiss their claims, as well as those of the petroleum group, due to a purported lack of Article III standing “is contrary to well-settled precedent of this Court.” *Id.* at 25; *see also id.* at 29-30. So too is the majority’s decision to dismiss the claims of the food producers due to a purported lack of prudential standing. *Id.* at 28. The dismissal of the food producers’ claims also deepens a circuit split on whether prudential standing is jurisdictional—an issue that “has important jurisprudential and practical consequences and

should be resolved by this Court.” *Id.* at 3; *see also id.* at 26-28.

The Court should grant the writ on all issues raised here and in respondents’ petition.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition in No. 12-1055, this Court should grant review of the decision below.

Respectfully submitted,

WILLIAM L. WEHRUM
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave,
N.W.
Washington, D.C. 20037
(202) 955-1500

CATHERINE E. STETSON*
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

LEWIS F. POWELL III
HUNTON & WILLIAMS LLP
Riverfront Plaza, E. Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

HARRY NG
ERIK C. BAPTIST
AMERICAN PETROLEUM
INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

*Counsel of Record

Counsel for Respondents Grocery Manufacturers Association, American Petroleum Institute, et al.

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