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 D.C. Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts on a wide range of issues, and works for enactment and enforcement of laws protecting consumers, workers, and the public. Issues relating to the nation's energy supply have long been of great concern to Public Citizen, and the organization's Energy Program engages in research and advocacy with the goal of promoting affordable, clean, and sustainable energy.

This case directly implicates two of Public Citizen's interests. First, although Public Citizen often disagrees with the oil and automobile industries on matters of policy, it agrees with their opposition to allowing the sale of gasoline blended with 15% ethanol ("E15") for use in motor vehicles. Because of the negative impact on consumers of permitting E15 to enter the marketplace, Public Citizen, like the petitioners in this case, filed comments opposing the EPA's Clean Air Act waiver for E15 that is at issue in this case.[2]

Second, Public Citizen has a strong interest in the law of standing. Both Article III and prudential standing issues regularly arise in administrative law and

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[1] This brief was not authored in whole or part by counsel for a party. No one other than *amicus curiae* or its counsel made a monetary contribution to preparation or submission of this brief. Counsel for the parties received 10 days' notice of filing. Letters of consent to filing from counsel for all parties are on file with the Clerk.

[2] *See* http://www.citizen.org/documents/2009%20Jul%2020%20comments%20on%20E15%20waiver%20pttn.pdf.

other cases litigated by Public Citizen, and unduly narrow standing decisions—such as the decision in this case—threaten to impede the ability of litigants of all stripes to obtain judicial redress for unlawful agency action that will cause them injury.

Public Citizen recognizes that this Court's standing decisions aim to confine the federal courts to their legitimate function of resolving "actual cases or controversies" and "to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). But when, as in this case, a court denies standing to parties who are threatened with "certainly impending" injuries that are "fairly traceable" to an agency's action, *id.* at 1143—an action, moreover, that they claim violates a clear statutory limit on the agency's authority—the denial of standing constitutes an abdication of the judicial function of deciding cases. That abdication is all the more serious when, as in this case, it prevents adjudication of a legal issue that has profound national consequences.

REASONS FOR GRANTING THE WRIT

As acknowledged by two of the three judges on the panel below, the circuits are in conflict over one of the questions presented by this petition (as well as two related petitions, Nos. 12-1055 and 12-1229): whether the government's failure to contest the issue of prudential standing forfeited that issue. *See* Pet. App. 20a (Tatel, J., concurring); 29a-30a (Kavanaugh, J., dissenting). That question was dispositive below, because Judge Tatel found that no petitioners had standing only because he believed that the panel was bound by D.C. Circuit authority to hold that prudential standing is "jurisdictional" and not subject to forfeiture;

otherwise, his agreement with Judge Kavanaugh that the food industry petitioners have Article III standing would have led him to reach the merits of the case. Resolution of a potentially outcome-determinative issue over which there is an entrenched circuit conflict is reason enough for the Court to review the decision below.

The Court should not, however, limit itself to review of that issue. The great national importance of this case, and the significant departure from the principles established by this Court's decisions reflected in the court of appeals' holdings that the engine manufacturer and petroleum industry petitioners lack Article III standing and that the food industry petitioners lack prudential standing, counsel in favor of granting certiorari on all of the questions presented. Only through such comprehensive review can the Court provide itself an opportunity to correct the distortion of standing law wrought by the court of appeals' decision and ensure that the lower court can reach a decision on the merits of the important legal question of the scope of EPA's waiver authority. Moreover, granting this petition for certiorari, as well as the petition subsequently filed by petroleum industry petitioners (No. 12-1229), together with the earlier filed petition of the grocery manufacturers and American Petroleum Institute (No. 12-1055), will allow all of the petitioners' standing arguments to be considered by the Court.

I. EPA's Action Will Have Huge Nationwide Impacts.

The EPA decision at issue in this case sets the stage for a significant reshaping of the process of production and distribution of automotive fuel, to the

detriment not only of the various industry petitioners, but also of consumers, who ultimately will be faced with both greater costs and the threat of damage to vehicles not suited to the use of E15 fuel. Given the confluence of the statutory and factual circumstances against which EPA acted, these consequences will flow directly from the exercise of its purported authority to allow production and marketing of E15 fuel for some but not all motor vehicles.

The legal backdrop against which EPA acted is the Renewable Fuel Standard (RFS) established by the Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594, and expanded by the Energy Independence and Security Act of 2007, Pub. L. No. 110–140, 121 Stat. 1492. The RFS requires fuel producers to blend billions of gallons of renewable fuels into gasoline each year, but also provides for waiver of that requirement if the required volumes of renewable fuels cannot practicably be obtained. *See* 42 U.S.C. § 7545(o)(7)(A).

Currently, corn-derived ethanol is the only renewable fuel available in quantities significant enough to achieve the RFS's requirements. However, prior to the EPA action at issue here, the 10% limit on the amount of ethanol that could be blended with gasoline for use as motor vehicle fuel effectively placed an upper limit on the ability of fuel producers to meet the RFS's volumetric mandates. That is, given the total volume of fuel produced and sold in the United States, blending in ethanol subject to the 10% limit will not result in enough gallons of renewable fuel to meet the increasing quantities required by the RFS over the

next decade.[3] Increasing the permissible percentage of ethanol in motor fuels would remove that limit and thus effectively require fuel producers to use E15 in order to increase the volume of ethanol used in fuel enough to satisfy the RFS.

Under a separate section of the same U.S. Code provision that governs the RFS program, EPA could only approve E15 if it determined that increasing the permissible amount of ethanol "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 was unable to determine that E15 would not contribute to the failure of emission control devices for cars and other light-duty motor vehicles made before model year 2001, but nonetheless decided that it could approve E15 for use in vehicles from model years 2001 forward. In addition to representing a highly implausible construction of the plain language

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[3] In 2011, a total of 134 billion gallons of gasoline were sold in the United States. U.S. Energy Information Admin., *FREQUENTLY ASKED QUESTIONS: How much gasoline does the United States consume?*, http://www.eia.gov/tools/faqs/faq.cfm?id=23&t=10. If all of it were E10, that would amount to 13.4 billion gallons of ethanol. In 2013, the RFS requires 16.5 billion gallons of renewables, of which 13.8 billion may be corn-based ethanol, an amount that will rise to 15 billion gallons by 2015. Congressional Research Service, *Renewable Fuel Standard (RFS): Overview and Issues*, at 3 (2013), available at http://www.fas.org/sgp/crs/misc/R40155.pdf.

of § 7545(f)(4), *see* Pet. App. 42a-45a (Kavanaugh, J., dissenting), EPA's decision to approve E15 for some but not all vehicles has enormous practical consequences. Because the average age of a passenger car in the United States is currently about 11.1 years,[4] tens of millions of cars on the roads cannot be fueled by gasoline with an ethanol content greater than 10% under the terms of EPA's E15 waiver decision. The fuel industry will have to continue to supply fuel for those vehicles, and in doing so will be required to take mitigation measures imposed by EPA to try to prevent the use of E15 fuel in those vehicles. At the same time, to comply with RFS requirements, fuel producers will have to produce E15 fuel and promote its sale to drivers of those vehicles for which it is produced.

As a result, the industry will be required to develop a parallel infrastructure for producing, transporting, and distributing E15 fuel (infrastructure capable of withstanding the corrosive properties of fuel with a higher level of alcohol), while at the same time maintaining existing facilities for E10 production, transportation, and distribution. At the point of sale, the two types of fuel will have to be carefully segregated, and separate, distinctively labeled pumps will have to be provided. The costs of developing the required new facilities and of complying with EPA's requirements to prevent misfueling will be enormous.[5]

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[4] U.S. Dept. of Transp., Bur. of Transp. Statistics, *National Transportation Statistics*, Table 1-26, http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/publications/national_transportation_statistics/html/table_01_26.html.

[5] *See* Government Accountability Office, *BIOFUELS: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends* (2011), http://www.gao.gov/assets/320/319297.pdf.

Much of that cost, of course, will eventually be borne by consumers. In addition, consumers, who currently are unaware of the distinction between E15 and E10 and its significance for their vehicles, will inevitably misfuel older vehicles (particularly when, as may sometimes be the case, E15 is less expensive or more readily available), damaging their emissions systems and engines.[6] Leaving misfueling aside, E15 is also likely to damage many vehicles for which EPA has purported to approve its use, as the American Automobile Association recently reported:

> Only about 12 million out of the more than 240 million light-duty vehicles on the roads today are approved by manufacturers to use E15 gasoline, based on a survey conducted by AAA of auto manufacturers. AAA automotive engineering experts also have reviewed the available research and believe that sustained use of E15 in both newer and older vehicles could result in significant problems such as accelerated engine wear and failure, fuel-system damage and false "check

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[6] *See* American Automobile Ass'n, *New E15 Gasoline May Damage Vehicles and Cause Consumer Confusion* (Nov. 30, 2012), http://newsroom.aaa.com/2012/11/new-e15-gasoline-may-damage-vehicles-and-cause-consumer-confusion/. Unlike when unleaded gasoline was introduced in the 1970s, and misfueling was prevented by manufacturing new cars with fuel tank filler necks that would not accept leaded fuel nozzles and thus could only be filled from unleaded fuel dispensers, there is no way to make a nozzle that will fit into a model year 2013 car that will not also fit a model year 1990 vehicle, because those vehicles have already been built to accept fuel from the same size nozzles.

engine" lights for any vehicle not approved by its manufacturer to use E15.[7]

Consumers will be placed in a bind as E15 is marketed to drivers with newer vehicles in order to satisfy RFS requirements, while automobile manufacturers may contend that the use of such fuel voids the vehicles' warranties.[8]

The introduction of E15 will also harm consumers by significantly reducing their gas mileage. Ethanol has only about two thirds the "energy density" of gasoline. As a result, increasing the percentage of ethanol in fuel blends will proportionately reduce energy output per gallon of fuel, and hence miles per gallon.[9] Consumers who use E15 will have to refuel more frequently, and, unless E15 is consistently sold for a proportionately lower price than E10 (and there is no reason to think that it will be), they will incur greater fueling costs.

The increased corn-based ethanol production that will immediately result from the introduction of E15 will also add to the upward pressure on corn prices, which have already increased markedly as a result of ethanol production for motor fuel, and will further the conversion of cropland from use for food production to use for production of fuel stock.[10] Higher corn prices, in turn, contribute substantially to higher food prices

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[7] *Id.*

[8] *See id.*

[9] GAO, *BIOFUELS: Challenges*, *supra*, at 33.

[10] *See* Government Accountability Office, *BIOFUELS: Potential Effects and Challenges of Required Increases in Production and Use* 35-40 (2009), http://www.gao.gov/assets/160/157718.pdf.

generally, both in the United States and worldwide, and demand for corn for fuel purposes contributes to worldwide food shortages.[11] These effects will be exacerbated by the prospect of prolonged drought in United States corn-producing regions.[12]

Increased conversion of land from production of food crops to production of corn for ethanol also carries with it significant longer-term environmental consequences. Studies have suggested, for example, that the use of corn-based ethanol contributes substantially to greenhouse gas production.[13] One such study, though controversial, concluded that over a 30-year period, production and use of corn-based ethanol would generate twice as much greenhouse gas emissions as comparable quantities of gasoline.[14] The study's lead author stated that "We can't get to a result, no matter how heroically we make assumptions on behalf of corn ethanol, where it will actually generate greenhouse-gas benefits."[15]

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[11] *See id.* at 43-46; Marco Lagi, *et al.*, *The Food Crises: A quantitative model of food prices including speculators and ethanol conversion* (2011), http://necsi.edu/research/social/food_prices.pdf.

[12] *See* Marco Lagi, *et al.*, *UPDATE July 2012—The Food Crises: The US Drought* (2012), http://necsi.edu/research/social/foodprices/updatejuly2012/food_prices_july_2012.pdf.

[13] *See*, *e.g.*, Thomas W. Hertel, *et al.*, *Global Land Use and Greenhouse Gas Emissions: Estimating Market-mediated Responses*, 60 BioScience 223 (March 2010).

[14] *See* Timothy Searchinger, *et al.*, *Use of U.S. Croplands for Biofuels Increases Greenhouse Gases Through Emissions from Land Use Change*, 319 Science 1238 (Feb. 2008).

[15] Juliet Eilperin, *Studies Say Clearing Land for Biofuels Will Aid Warming*, Wash. Post (Feb. 8, 2008),

(*Footnote continued*)

In short, the underlying issues in this case are of great significance. The introduction of E15 fuel will have major consequences for the affected industries, for consumers, and for the national and world economies. The Court's consideration of this petition and the other petitions seeking review of the decision below should give appropriate weight to the significant consequences that turn on the resolution of the legal issue that the lower court allowed to go unresolved because of its determination that no petitioner had standing to obtain judicial review.

II. The Standing Issues Merit Review.

Of course, as this Court has emphasized, "generalized grievances" are not a basis for standing. *Lance v. Coffman*, 549 U.S. 437, 439 (2007). And we do not suggest that the fact that a policy, such as the E15 approval, may be harmful, even extremely harmful, means that the particular parties challenging it necessarily have standing. By the same token, however, the fact that a policy causes concrete harms to a great many people does not mean that those it harms do not have standing to challenge it. *See Federal Election Comm'n v. Akins*, 524 U.S. 11, 24-25 (1998). Here, the consequences of the E15 decision, as described above, inflict specific, concrete injuries on each of the groups of petitioners who sought review of the E15 waiver below—injuries that are more than sufficient under this Court's precedents to give rise to standing.

First, the petroleum industry petitioners will bear the initial brunt of the enormous outlays necessary to

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http://articles.washingtonpost.com/2008-02-08/news/36857966_1_biofuel-production-biofuel-crops-traditional-corn-based-ethanol.

convert to a dual E15/E10 fuel production, distribution, and sales regime. Such monetary outlays are classic injuries for Article III purposes, and the D.C. Circuit's view that those injuries are not "fairly traceable" to the E15 waiver decision is, in a word, nonsense. But for the waiver decision, those expenses would not be sustained; and the waiver decision has the effect of requiring them in light of the legal mandate of the RFS that compels increased use of renewables if it is possible—which, with the waiver decision, it is. The court's speculation that the industry could instead comply with the RFS through some unknown technological breakthrough that would obviate the need to rely on ethanol or could successfully lobby to get the RFS changed is just that—speculation. Even if that speculation were well-founded, those "alternatives" to the use of E15 would themselves require industry to incur costs that would not be incurred absent the waiver, and thus would meet Article III's injury requirement. *Cf. MedImmune, Inc. v. Genentech, Inc*, 549 U.S. 118, 129-30 (2007) (explaining that "self-avoidance" of imminent injury suffices to create a case or controversy).

Second, the engine manufacturers will suffer an inevitable injury when the expected damage to vehicles caused by the use of E15 results in warranty claims—claims that will impose costs on them regardless of whether they honor the warranty claims or deny coverage on the ground that the use of E15 voids their warranties. Unlike in *Clapper*, that impending injury is in no way speculative, nor is it unfair to trace it to the E15 waiver decision. Absent the introduction of E15, which would not be possible without the EPA's approval, the engine damage and resulting warranty claims would not occur.

We disagree with petitioners on one point with respect to the engine manufacturers' standing—namely, their argument that the engine manufacturers should be considered "regulated entities" for purposes of the standing inquiry in this case. Pet. 15. Unlike the petroleum industry petitioners, the engine manufacturers are not directly required (or permitted) to do anything either by the statutory provisions governing approval of fuel additives or by the RFS. As petitioners argue, the engine manufacturers are *beneficiaries* of the statutory scheme, which requires EPA to protect their interests by ensuring that its decisions about fuel additives do not damage their products. *See id.* (citing 42 U.S.C. § 7545(f)(4)). But there is a difference between being a *beneficiary* of regulation and being a *regulated entity*. Many if not most regulatory statutes are intended to benefit some people (users of public lands, drivers, consumers) by regulating others (polluters, automobile manufacturers, financial institutions). The engine manufacturers have standing here not because they are regulated entities, but for the same reason that beneficiaries of statutes often do when they challenge an agency's action: The agency has failed to carry out its statutory mandate to protect them and has instead injured them. To the extent, however, that there is uncertainty about the meaning and significance of the status of being a regulated entity for standing purposes, that is yet another reason to address the standing issues in this case.

Third, the food industry petitioners will, as the majority of the panel below acknowledged, directly bear increased costs attributable to the increased demand for corn that the E15 decision will inevitably cause. But for the panel's consideration of prudential

standing (which under the view taken by other circuits would have been forfeited because it is not a jurisdictional requirement) that injury would have sufficed to allow the challenge to the E15 waiver to be heard on the merits. Moreover, even if consideration of prudential standing were proper, the panel strayed far from the teachings of this Court in holding that the food industry petitioners do not meet the "not … especially demanding" zone-of-interests test that defines prudential standing. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012). The laws at issue here—the RFS and the Clean Air Act waiver provision—are closely intertwined and, indeed, are set forth in the same section of the U.S. Code, and the provisions establishing the RFS expressly provide that EPA must consider effects on food prices in making decisions concerning the RFS. 42 U.S.C. § 7545(o)(2)(B)(ii)(VI). That is more than enough to "arguably" bring petitioners complaining of injury through higher food costs within the zone of interests protected by the statute. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2210.

Review of the decision below, with its crabbed approach to both Article III and prudential standing, presents the Court with an opportunity not only to resolve the circuit conflict over whether prudential standing is jurisdictional, but also to further clarify standing principles. In light of the fact-specific nature of the standing inquiry, this Court has not infrequently taken cases to address the consistency of the lower courts' decisions with the principles established by the Court's standing case law even in the absence of square circuit conflict. *See*, *e.g.*, *Clapper*, 133 S. Ct. at

1146; *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009).

In those cases, the Court sought to bring greater clarity to the law of standing by correcting what the majority saw as overly broad extensions of standing in the absence of imminent injury. This case presents the opportunity for the Court to further elucidate standing principles by correcting the panel majority's denial of standing in the face of imminent injuries so apparent they led even the government to concede below that standing was "self-evident." Given this Court's historic emphasis that the federal courts have an unflagging obligation to decide cases when parties properly invoke their jurisdiction, *see Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821), explaining the circumstances in which the parties have a clear right to a merits decision is no less important than identifying cases in which there is no jurisdiction.

The disparate opinions of the panel majority and the dissenting judge below illustrate the need for such guidance. Academic commentators often describe standing doctrine as "confusing" to the lower federal courts.[16] Although the application of standing principles in this case actually appears relatively straightforward, that two judges who take standing doctrine as seriously as Judges Sentelle and Kavanaugh should come to such wildly different conclusions shows that further guidance from this Court would be very help-

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[16] *See*, *e.g.*, Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 Admin. & Reg. L. News 5, 14 (Spring 2009).

ful to the lower courts in achieving consistent and correct results. That the underlying merits issues are of such great national importance makes it all the more critical that the Court provide that needed guidance in this case. As in *Clapper*, this Court should grant certiorari "[b]ecause of the importance of the issue and the novel view of standing adopted by the Court of Appeals." 132 S. Ct. at 1146.

CONCLUSION

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

Respectfully submitted,

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