No. 12-1167

IN THE

Supreme Court of the United States

ALLIANCE OF AUTOMOBILE MANUFACTURERS, ASSOCIATION OF GLOBAL AUTOMAKERS, INC., NATIONAL MARINE MANUFACTURERS ASSOCIATION, AND OUTDOOR POWER EQUIPMENT INSTITUTE,

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

PETITIONERS' REPLY BRIEF

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ARGUMENT

Respondents do not deny that EPA's "partial" waiver decision presents a substantive issue of national importance, nor do they defend the merits of EPA's decision (as Judge Kavanaugh put it in dissent below) to "[run] roughshod over the relevant statutory limits" (Pet. App. 42a). And their suggestion that the D.C. Circuit's standing analysis is narrow and fact-bound is belied by the fact that the Chamber of Commerce, Public Citizen, and three state Attor-

neys General have filed *amicus* briefs in support of certiorari, underscoring that the foreclosure of judicial review here has national significance for industry and consumers alike. Respondents' arguments for denying the petition are unavailing.

1. Respondents argue that the engine-manufacturer petitioners waived their arguments and adduced insufficient evidence of their injuries. But there was no waiver, and the administrative record itself furnishes ample evidence of imminent and non-speculative harm.

a. At the outset, respondents are wrong to contend (Gov't Opp. 20-21; Growth Energy ("GE") Opp. 17) that EPA's action harms petitioners "only indirectly" and that its decision merely regulates "someone else." See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). To the contrary, the relevant section of the Clean Air Act's regulatory scheme is designed to benefit engine manufacturers by protecting their products from engine-damaging fuels. See Pet. 14-15; 42 U.S.C. § 7545(f)(4). EPA's waiver directly injures engine manufacturers by stripping away that protection, with the undisputed (and intended[1]) effect that consumers will buy and use E15 in their engines. The direct result of such use will be to cause engine manufacturers injury. As Public Citizen's *amicus* brief explains (at 12), EPA "has failed to carry out its statutory mandate to protect [engine manufacturers] and has instead injured them."

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[1] "It is unlikely that the ethanol manufacturers [*i.e.*, Growth Energy] petitioned and fought for, or that EPA issued, a totally superfluous regulation." Chamber of Commerce *Amicus* Br. 15.

b. Petitioners' explanation of their injury is straightforward: As a result of EPA's waiver, consumers will purchase and use E15 in their engines, causing many of those engines to fail and/or to malfunction. Engine manufacturers will be forced to conduct costly testing to determine which engines remain safe, to recall unsafe products, and to face waves of lawsuits and massive litigation expenses. See Pet. 15-24. Respondents' answers fail.

i. Respondents first urge (see Gov't Opp. 21-22; GE Opp. 17-18, 20, 23 n.16) that the D.C. Circuit's decision should be upheld because petitioners effectively waived their current standing arguments. But respondents' waiver arguments fail on the facts, for the engine-manufacturer petitioners properly raised their arguments and evidence in the D.C. Circuit:

- Petitioners explained that "[t]hey are directly affected by the partial E15 waiver" because their "emission-control devices, systems, and engines may be harmed by the use of E15," because use of that fuel in the current fleet presents engine manufacturers with "serious risks of liability imposed by numerous state and federal laws, as well as operational performance and consumer satisfaction exposure." Pet. App. 231a. Petitioners then cited the relevant studies (Pet. App. 232a), and went on to elaborate on their likely injuries in their merits discussion (Pet. App. 234a-45a) and in reply (Pet. App. 247a-48a).[2]

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[2] The government's reliance (Opp. 22) on *Summers* v. *Earth Island Inst.*, 555 U.S. 488 (2009), is misplaced. Petitioners are not attempting to "remedy [a] defect retroactively" by presenting new evidence "[a]fter the District Court had entered judgment," *id.* at 495 n.*, but instead rely here (as in the court below) on the existing and ample administrative record.

- To demonstrate deleterious "operational performance" effects, petitioners discussed three studies that "revealed that certain vehicle models and engine types are much more likely to experience significant emissions increases when fueled with higher level ethanol blends than other vehicle and engine types with more advanced engine controls." Pet. App. 238a-39a (citing Pet. App. 71a-72a & n.27, 73a, 74a & n.30).
- To support their explanation that E15's introduction will harm their "emission-control devices, systems, and engines," petitioners pointed to EPA's "conclu[sion] that NOx tailpipe emissions are expected to increase by 5 to 10% with use of E15 in both 'newer Tier 2 motor vehicles as well as older motor vehicles,'" resulting in violations of EPA's emissions standards. Pet. App. 235a-36a (quoting Pet. App. 96a).[3]
- To buttress their argument that their products will suffer damage because "[n]one of the current vehicles *** were manufactured, certified, or warranted to use ethanol blends greater than E10" (Pet. App. 231a), petitioners highlighted the views of "[m]ultiple commenters" that "explained that there could be a likelihood of engine and vehicle emission-control system failures due to the use of E15" (Pet. App. 244a-45a). Such failures are especially likely in view of various studies (with whose conclusions EPA agrees) showing a

[3] Contrary to GE's argument (Opp. 22), the engine-manufacturer petitioners demonstrated that introduction of E15 will cause *both* exhaust emissions *and* evaporative emissions to increase beyond permissible limits. See Pet. 17; Pet. App. 96a, 102a-03a.

> substantial "potential for materials degradation [that] may make the emissions control and fuel systems more susceptible to corrosion and chemical reactions from E15." Pet. App. 112a-13a; see also Pet. App. 111a).

The evidence in the administrative record thus amply establishes that E15 will cause harm to engine manufacturers' products, and the engine-manufacturer petitioners diligently brought all of that evidence to the attention of the court of appeals.

ii. Even if petitioners had not done so, the court of appeals, like this Court, "must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson* ex rel. *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011). Part and parcel of this "independent obligation," *ibid.*, is to give due consideration to *all* the available evidence, and thus to carry out the "virtually unflagging obligation *** to exercise the jurisdiction given," *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817 (1976); see also, *e.g.*, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not"). In an administrative-review case like this one, the reviewing court is required to consider the full record in order to ascertain whether "the petitioner's standing *** is self-evident." *Sierra Club* v. *E.P.A.*, 292 F.3d 895, 899-900 (D.C. Cir. 2002); see also D.C. Cir. R. 28(a)(7) (detailed argument and additional evidence required only where the basis for a claim of standing is "not apparent from the administrative record"). Any other rule would allow judges "tempted by the prospect of making public policy," *City of Arlington* v. *F.C.C.*, 569 U.S. ---, No. 11-1545, slip op.

at 13 (May 20, 2013), to ignore inconvenient evidence in order to reach (or, as here, not to reach) a decision on the merits when it suits their preferences.[4]

Here, as counsel for the U.S. respondents agreed at oral argument in the court of appeals, the engine-manufacturer petitioners' "standing [is] self-evident" from the administrative record. Transcript of Oral Argument at 30, *Grocery Mfrs. Ass'n* v. *E.P.A.*, 693 F.3d 169 (D.C. Cir. 2012) (No. 10-1380). Thus, contrary to respondents' suggestions that the holding below is narrow and fact-bound (see Gov't Opp. 23; GE Opp. 15-16), the D.C. Circuit's disregard for evidence in the record supporting the engine manufacturers' standing raises a question of law warranting this Court's review.

iii. Respondents also fail to rebut the straightforward mechanisms by which E15 will harm the engine-manufacturer petitioners themselves.

First, as petitioners explained (Pet. 22-23), engine malfunctions caused by E15 will lead to innumerable warranty and personal-injury lawsuits, the very threat of which is enough to support Article III standing. See, *e.g.*, *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 727 (2013); *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007).

Growth Energy (like the D.C. Circuit, see Pet. App. 11a-12a) wrongly argues (GE Opp. 18-19) that the threat of warranty-related lawsuits will not support standing because some warranties could be voided by

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[4] This is not an onerous obligation: As the government notes (Gov't Opp. 18-19 n.7), at least one judge on the panel below was able to locate "a study submitted to the EPA by [other] petitioners (but not cited in [their] brief below" (citing Pet. App. 25a (Kavanaugh, J., dissenting)).

the use of E15. This argument ignores *MedImmune*: It does not matter, for standing purposes, that some or even all of the warranty claims may ultimately be resolved in the manufacturers' favor, because the mere threat of litigation is an Article III injury-in-fact. As the Public Citizen *amicus* brief explains (at 11), "engine manufacturers will suffer an inevitable injury" from the introduction of E15 whether or not they ultimately pay warranty claims.

Growth Energy likewise misapprehends petitioners' exposure to personal-injury lawsuits. It is far from "extraordinary" (GE Opp. 20) for petitioners to contend that E15's well-documented corrosive effect on their engines' fuel pumps (see Pet. App. 110a-11a) will lead to malfunctions of a type that could cause personal injury. There is a reason that "the American Automobile Association warned of the damage E15 will cause to car engines and took the extraordinary step of publicly asking EPA to block the sale of E15." Pet. App. 193a n.1 (Kavanaugh, J., dissenting from denial of rehearing en banc).

The government acknowledges (Gov't Opp. 22) that a "colorable" claim is sufficient, admitting that a threatened lawsuit need not ultimately prevail in order to give rise to Article-III injury, and nowhere contends that E15-injury lawsuits will be so frivolous as not to constitute a genuine threat. Instead, it asserts that "choices made by independent actors"—namely, the consumers who fuel their engines—break the chain of causation between EPA's decisions and the engine manufacturer petitioners' injuries. *Id.* at 23 (citation omitted); see also *id.* at 22-23 (suggesting that a purportedly attenuated causal chain defeats the threat of litigation); GE Opp. 18-20 (similar). These arguments ignore the facts: Once E15 is on

the market, it is a fair inference that consumers will purchase and use it, as EPA and Growth Energy intend, and the overwhelming evidence is that this will cause some engines to fail—leading to property damage and potentially to personal injuries. It requires no speculation to conclude that consumers suffering such harms as a result of unexpected engine malfunctions will seek compensation for their loss from the engines' manufacturers—who will appear, incorrectly, to be responsible for the problem. These lawsuits, the direct and readily foreseeable results of the release of E15 into the market, are "fairly traceable" to EPA's decision to permit that introduction. *Lujan*, 504 U.S. at 560 (citations and alterations omitted).

Second, the engine-manufacturer petitioners will face substantial costs in determining which of their vehicles are most susceptible to damage as a result of being fueled with E15. See Pet. 21-22; *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2755 (2010); see also *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1150 n.5 (2013). The government does not dispute this fact, but argues (Gov't Opp. 23 n.8) that it lacks an evidentiary basis because petitioners failed to submit "multiple declarations" in support. But no such declarations were needed because the evidentiary basis for standing is presented in the administrative record: Even EPA concluded that "actual vehicle durability testing is warranted." Pet. App. 116a. Growth Energy discounts (GE Opp. 18) this conclusion as limited to EPA's own testing, but ignores that the same record evidence supports both EPA's conclusion and petitioners' parallel need to conduct their own tests.

Third, the engine-manufacturer petitioners face massive costs arising out of a recall of their engines. Pet. 23-24. The government does not dispute this point, and thus implicitly concedes it. Growth Energy's insistence (GE Opp. 19) that this harm lacks support is belied by the extensive evidence showing that E15 will cause substantial harm to automobile manufacturers' engines—including to components, like fuel pumps, whose repeated failure would necessitate a recall. See Pet. 16-19.

c. Respondents are wrong to assert, as did the court below, that the engine-manufacturer petitioners' products will be damaged only if consumers "misfuel" by using E15 in engines for which it is not approved. See Gov't Opp. 22; GE Opp. 20 & n.9; Pet. App. 11a. These suppositions ignore petitioners' explanation that E15 will cause "direct engine harm" even when used in "*EPA-sanctioned fueling of MY2001 and later vehicles*." Pet. 21; see also Pet. App. 167a (EPA admission that up to 20% of MY2006 vehicles and 40% of MY2005 vehicles are not outfitted with systems that can withstand E15). Consumers who use the new fuel in such vehicles will inflict substantial damage on their engines even without misfueling.

Even if engine damage *were* caused only by misfueling, that still would not justify the D.C. Circuit's decision. EPA itself concluded that there is a serious risk of misfueling because "the average American consumer refueling their vehicle makes their fuel choice based largely on a single criteri[on]: price"—not on the basis of federal fueling regulations or injury risks of which they are likely unaware. States' *Amicus* Br. 3; see Pet. App. 228a ("a price differential as small as a few cents per gallon [between fuels] [i]s enough to cause some consumers to misfuel").

And the risk of inadvertent misfueling cannot be averted through adoption of new fuel-pump nozzles or some other new technology, because both approved and non-approved engines have already been built to accept the same size nozzle. See Public Citizen *Amicus* Br. 7 n.6.

d. Finally, both respondents argue that the engine-manufacturer petitioners cannot show injury because EPA did not find that MY2001 and later engines would be harmed by E15. Gov't Opp. 22; GE Opp. 20. This confuses the question of standing with the merits, see *Decker* v. *Nw. Env'tl Def. Ctr.*, 133 S. Ct. 1326, 1335-36 (2013); *Monsanto*, 130 S. Ct. at 2753 n.1, as does the decision below (see Pet. 19 n.6). A litigant's simple denial that injury will occur is not a basis to refuse jurisdiction. See *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("It is firmly established in our cases that the absence of a valid *** cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional power to adjudicate the case.").

2. The standing of the other two groups of petitioners to challenge EPA's "partial" waiver decision also warrants this Court's review.

a. The D.C. Circuit's holding (vis-à-vis the food producers) that statutory standing is a jurisdictional issue that cannot be waived is in direct conflict with the holdings of several other courts of appeals. See Pet. 26-28. Respondents do not deny either the existence or the importance of this conflict, and instead argue only that this case is an inopportune vehicle for resolution of the circuit split. But this case is in fact an excellent vehicle.

Respondents concede that EPA waived the prudential-standing argument but argue (Gov't Opp. 10-15; GE Opp. 8-13) that the court of appeals properly addressed it because petitioners waived objection, because Growth Energy put the issue before the court, or because the court was entitled to raise the issue *sua sponte*. But the court of appeals did not reach the prudential-standing issue for *any* of those reasons; it held only that the issue is "jurisdictional" in the same sense as Article III standing, such that it was *required* to consider the question. See Pet. App. 17a; see also Pet. App. 20a (Tatel, J., concurring); *Ass'n of Battery Recyclers* v. *E.P.A.*, No. 12-1129, slip op. at 10-11 (D.C. Cir. May 28, 2013) (per curiam); *id.* at 1 (Silberman, J., concurring) (because the D.C. Circuit treats "prudential standing as a jurisdictional issue that cannot be waived," the question whether the issue can be raised by an intervenor alone was not presented). That question alone is presented here, and none of the "vehicle problems" identified in respondents' opposition briefs is a barrier to certiorari.

Moreover, EPA's choice not to challenge the food-producer petitioners' statutory standing should not be overridden by an intervenor or by a court acting alone. Where, as here, a government agency responsible for administration of a statutory scheme has reasonably determined that a party is within the statute's "zone of interests," the courts should defer to that judgment. See Pet. 27-28 (citing *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council*, 467 U.S. 837, 844 (1984); *Am. Trucking Ass'ns, Inc.* v. *United States*, 627 F.2d 1313, 1320 n.25 (D.C. Cir. 1980)). Given such appropriate deference, EPA's concession that the food producers have prudential standing is a judgment that the courts should respect.

b. The D.C. Circuit's conclusion that the petroleum-manufacturer petitioners lack Article III standing is so clearly wrong that the government does not defend its merits, but concedes that the decision below is contrary to the established principle "that a plaintiff may have Article III standing to challenge one law, even though the causal chain between that law and the plaintiff's own injury depends in part on the existence of other legal requirements." Gov't Opp. 26-27 (citing *Clinton* v. *City of New York*, 524 U.S. 417 (1998)).

The government, however, discounts this error as *dicta*, claiming (Gov't Opp. 27) that the true basis of the D.C. Circuit's decision was its contention that the petroleum-manufacturer petitioners cannot show standing because they could select some other product to meet the RFS's requirements. This argument fails: As Judge Kavanaugh explained, the "option" of manufacturing another product is illusory: No other fuel on the market would permit the petroleum-manufacturer petitioners to satisfy the RFS requirement that they achieve annual production of *36 billion gallons* of renewable fuel by 2022. Pet. App. 38a-40a (Kavanaugh, J., dissenting); see 42 U.S.C. § 7545(o)(2)(B)(i)(I). The petroleum suppliers have no practical choice but to use E15 and to suffer the attendant injury, and they therefore have standing to seek redress for that harm.

CONCLUSION

The Court should grant certiorari and summarily reverse the decision below or set the case for plenary consideration.

Respectfully submitted,

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