No. 12-1229

IN THE

Supreme Court of the United States

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, INTERNATIONAL LIQUID TERMINALS ASSOCIATION, AND WESTERN STATES PETROLEUM ASSOCIATION,
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

REPLY BRIEF FOR PETITIONERS

RICHARD MOSKOWITZ
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, NW
Suite 700
Washington, DC 20006
(202) 457-0480

CLIFTON S. ELGARTEN
Counsel of Record
CHET M. THOMPSON
ROBERT MEYERS
DAVID Y. CHUNG
SHERRIE ARMSTRONG
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500
CElgarten@crowell.com

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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The Environmental Protection Agency's ("EPA") partial waivers for "E15" fuel are intended to, and by EPA's own account, will transform the Nation's fuel market. Because EPA approved E15 for only certain on-road vehicles (model years 2001 and newer), petroleum refiners and importers must modify their operations to produce and import both E10 and E15, or else surrender market share and also be exposed to mandatory monetary assessments in connection with the Renewable Fuel Standard Program ("RFS"), 42 U.S.C. § 7545(o). Downstream pipeline, shipping, storage, and retail facilities will be faced with a similar dilemma. They must either modify their transportation, storage, and dispensing operations to

handle and segregate the two blends and blendstocks or lose market share. Both choices result in injuries sufficient for Article III standing.[1]

Nevertheless, a divided panel of the D.C. Circuit held that Petitioners lacked standing to challenge the partial waivers. Although recognizing that certain of Petitioners' members "might lose business if they decline to blend or otherwise deal with E15," the court found that such injuries were "self-inflicted" or the result of RFS. The panel also found that Petitioners might avoid having to produce E15 through future technical innovations or by lobbying EPA to waive RFS mandates. For these reasons, the court held that Petitioners' injuries were not "fairly traceable" to the partial waivers. The result of the holding is that a decision of EPA that will affect Petitioners and consumers for years to come, escapes review entirely, even though the decision is, as the dissent put it, not even close to being authorized under the Clean Air Act.

Respondents do not dispute the practical significance of the E15 waivers. Nor do they deny the significance of the D.C. Circuit's rulings as setting new standards for "traceability" where the agency action at issue is non-"forcing." Indeed, Respondents' own briefs (EPA Br. 26-28; Growth Br. 27-30) all but concede in principle that the court below misapplied this Court's traceability and competitor standing precedents. Instead, Respondents principally argue that the legal issues are not well-presented for review

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[1] Petitioners in this case represent both upstream (refiners and importers) and downstream entities in the petroleum industry. Petitioners have standing if *either* their upstream or downstream members are injured by the partial waivers.

because the panel majority's decision ultimately rested on an alternative "fact-bound" conclusion that the petroleum suppliers failed to prove that the waivers will force them to introduce E15 into commerce.

As shown below, Respondents are, quite simply, wrong that the legal issues are not well-presented for review because of some alternative factual finding. The asserted "factual" finding to which Respondents point did not affect the panel majority's failure to consider the effect of the partial waivers on Petitioners, particularly downstream entities, through the operation of market forces. To the contrary, the panel majority acknowledged that Petitioners' members, particularly the downstream entities, would likely lose business if they decline to handle E15. The panel majority simply disregarded the coercive effect of the market forces and characterized the pressure on Petitioners as "economic." Pet. App. 16a. And it characterized the resulting injury—the loss of market share, or the substantial cost of handling E15—as reflecting actions in Petitioners' own "self-interest." While this pressure is unquestionably economic, it is generated by the waivers and provides Petitioners with real injury and standing.

Respondents are disingenuous in suggesting that there is a factual dispute about whether RFS will force refiners and importers to handle E15. The point was never in dispute and is plainly supported by the administrative record. Moreover, the so-called factual finding of the panel majority, relied on by Respondents, is legal error in itself. As demonstrated in the Petition, the panel majority's suggestion that refiners and importers failed to demonstrate that RFS would require them to handle E15 was based on its mistaken view that speculative possibilities that

some new technology might be developed as an alternative to E15, or that EPA would waive the requirements of the RFS, would defeat standing. Such speculation, deployed to *defeat* standing, is wholly incompatible with this Court's approach to the Article III standing inquiry.

I. THE D.C. CIRCUIT FAILED TO APPLY WELL-SETTLED PRINCIPLES IN CONCLUDING THAT PETITIONERS LACKED STANDING

Respondents assert that the D.C. Circuit's holding that Petitioners lack Article III standing "does not conflict with any decision of this Court." EPA Br. at 26; Growth Br. 30. Not true, and Respondents' briefs essentially acknowledge as much. EPA Br. 26-28; Growth Br. 27-28.

1. As discussed in the Petition, the court below materially distorted the "fairly traceable" requirement of Article III standing, transforming it into some form of proximate cause inquiry under which "but for" causation is to be rejected when the agency action at issue is not "forcing" or an exclusive cause of an injury. This Court has adopted a simple "fair traceability" requirement for standing to avoid incorporating principles of proximate causation, with resulting inquiries into primary or the forcing causes, into the Article III inquiry. Nonetheless, the D.C. Circuit held that even if the partial waivers would cause petitioners to handle both E10 and E15, that injury could not be traced to the partial waivers because it was more directly attributable to RFS. *See* Pet. App. 13a-14a. That approach is contrary to this Court's precedents finding traceability when the claimed injury is the product of a combination of legal requirements. *See* Pet. 18-22. The D.C. Circuit's

reasoning is also contrary to this Court's cases holding that injuries resulting from competitive disadvantage are traceable to agency action when such action contributes to a change in the market landscape. *See* Pet. 22-23.

2. Respondents acknowledge that under this Court's precedents, injury traceable to the combination of the challenged action and other, preexisting legal requirements, should be sufficient to ground a petitioner's standing. *See* EPA Br. 26-27, 28; Growth Br. 27. As EPA explains, "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." EPA Br. 26. Thus, EPA concedes, at least implicitly, that the D.C. Circuit erred in holding that Petitioners lacked standing to challenge the partial waivers because their injuries were traceable not solely to the partial waivers but also to RFS.

Growth Energy's argument (at 24-25) that the D.C. Circuit correctly concluded that any injury to refiners and importers arises from RFS, not the partial waivers, simply restates the D.C. Circuit's erroneous conclusion. Growth notes that RFS is what obligates refiners and importers to meet certain renewable fuel targets, and that these obligations existed before the waivers and will remain afterwards. *Id.* What Growth fails to acknowledge, however, is that RFS does not allow E15 to be introduced into commerce. That is the result of EPA's partial waivers.

Also perplexing is Growth's assertion (at 25) that Petitioners' claim to standing "turns on the wholly speculative assumption that EPA would have waived petitioners' RFS obligations if it had not authorized

the sale of E15." That is not what Petitioners argue. Rather, Petitioners' standing rests on the fact that the partial waivers, in combination with RFS and market forces, will require its members either to (1) incur the cost and burdens of producing and handling E15 in addition to E10, or (2) surrender market share to those competitors that choose to do so. *See* Pet. 18-22.

3. Respondents do not dispute that the influence of market forces is properly part of a "traceability" analysis, and that injury resulting from agency action, experienced through the operation of market forces, may be sufficient for standing. *See* EPA Br. 28-29; Growth Br. 30. As EPA explains (at 28), "changes to a governing legal regime, while equally applicable on their face to all market participants, conceivably could have the practical effect of shifting the competitive balance between rival firms." EPA's suggestion (at 28-29) that Petitioners "make no effort to demonstrate that EPA's E15 waivers create this sort of dynamic," is beside the point in light of the D.C. Circuit's decision. The panel majority itself viewed that dynamic as self-evident, acknowledging that Petitioners' *downstream* members, who store, transport, and sell fuel at the pump, will either have to deal in E15, or lose market share. *See* Pet. App. 16a. Because the court below itself applied conventional knowledge about how markets work, it is of no avail to suggest that Petitioners should be faulted for not offering affidavits on "Competition 101."[2] In any

[2] Equally unavailing is Growth's assertion (at 29) that Petitioners did not specifically invoke market pressures in their briefs below. Even if that were true, it is sufficient for purposes of reviewability that the Court of Appeals itself acknowledged those competitive pressures on Petitioners.

event, there can be no credible dispute, factual or otherwise, that Petitioners' downstream members must either incur substantial costs to handle E15 or lose business by declining to do so, unless one assumes that no one will use E15.

EPA fares no better with its assertion (at 28) that market forces need not be taken into account in analyzing standing here because the partial waivers are permissive and do not require "all participants in the marketplace * * * to market E15." The question is not, of course whether *all* downstream entities must handle E15. It is enough for standing purposes that the panel majority recognized that members who decline to handle E15 "very well might lose business" as a result. Pet. App. 16a.

Finally, Respondents assert that this Court's precedents on competitive injury as a basis for standing are distinguishable because they involve the entry of new market participants, as opposed to allowing the same participants to offer a new product. *See* EPA Br. 28; Growth Br. 30. Respondents offer no support for this distinction. This Court's cases have asked only whether increased competition authorized by a governmental action "might entail some future loss of profits" for petitioners. *See Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 152 (1970); *see also Inv. Co. Inst. v. Camp*, 401 U.S. 617, 620 (1971). Whether competition results from entry of a new competitor or entry of a new product does not change the injury. Growth's argument (at 28, 30) that Petitioners lack standing because the partial waivers are "deregulatory" fails for the same reason. All Article III requires is an injury fairly traceable to the challenged action. It matters not whether the action is regulatory or deregulatory.

In sum, the principles of traceability that the D.C. Circuit has prescribed here to agency actions that are not "forcing"—where the injury results from a combination of the challenged actions, economic pressures, and the effect of other laws—are fundamentally inconsistent with this Court's "traceability" precedents and will curtail standing in a wide range of cases affecting regulated injuries.

II. RESPONDENTS MISCHARACTERIZE THE D.C. CIRCUIT'S DECISION AS FACT-BOUND

Respondents also assert that the legal issues presented by this case are not suitable for review because of what they characterize as the panel majority's "fact-bound" statement that refiners and importers failed to show that they would "have to introduce E15 to meet their volume requirements under the RFS." *See, e.g.*, EPA Br. 7-8, 17-18, 24-25, 27; Growth Br. 25, 26. Respondents' assertion is incorrect.

1. First, the ostensible factual determination that supposedly cuts against *certiorari* is limited to the standing of petroleum-*suppliers*—refiners and importers—and the direct effects of RFS on them. EPA Br. at 23-25. EPA all but ignores the D.C. Circuit's findings with respect to Petitioners' *downstream* members—those that own the infrastructure involved in handling, storing, transporting, and retailing petroleum products. The panel majority acknowledged that the "[d]ownstream parties very well might lose business if they decline to blend or otherwise deal with E15." Pet. App. 16a. That in itself was—or rather should have been—a sufficient factual finding to ground Petitioners' standing to challenge the partial waivers.

2. But even with respect to the effects of RFS on refiners and importers, Respondents' current stance on "the facts" is disingenuous. The impetus that RFS supplies to employ E15 was clearly demonstrated in the record. And the D.C. Circuit's comments on what Petitioner's had failed to demonstrate was a reflection of the D.C. Circuit's view that standing could be defeated by the speculative possibility that alternative technologies could be invented, or legal requirements waived, thus avoiding recourse to E15 to meet RFS requirements.

a. While the type of proof a party provides will necessarily vary depending on the case, it should be clear, at the very least, that a party need not prove by separate affidavit what the opposing party concedes as basic fact in the administrative record.

Here, the only party that challenged the standing of Petitioners below (Growth) had itself urged EPA to allow the E15 waiver because approval of E15 was necessary to allow refiners and importers to meet their RFS obligations. Specifically, the first page of Growth's application for a waiver prominently featured the heading: "The Requested Waiver is Necessary to Meet Federal Law[.]" CADC Joint App. 84. Growth's application went on to declare unequivocally that: "[f]ailure to remove the blend barrier will result in an insufficient supply of ethanol to meet the renewable fuel mandates of [RFS]"; and "in order to * * * meet the production mandates of [RFS], it is crucial that we act now and take the first step of allowing E15." *Id.* at 85, 88. Thus, Growth's current effort to distance itself from these assertions, and to characterize this case as a failed attempt by Petitioners to provide sufficient facts in support of support standing, is not credible. *See* Growth Br. 26.

Moreover, upon receiving Growth's E15 waiver request, EPA also acknowledged that "[to] achieve [RFS] in future years, it is clear that ethanol will need to be blended into gasoline at levels greater than the current limit of 10 percent." CADC Joint App. 635.[3]

Petitioners were entitled to, and in fact did, present these facts in support of their standing below. *See* Pet. App. 163a, 168a-169a. And based on these materials, the panel majority acknowledged that "E10 alone will not meet the producers' obligations [under RFS] forever." Pet. App. 3a. Moreover, Judge Kavanaugh correctly observed that "members of the petroleum group now may – and as a factual matter, *must* – use E15 * * * in order to meet the renewable fuel mandate." Pet. App. 38a. EPA similarly conceded to the Court of Appeals that the petroleum petitioners' standing was "self-evident." *See* Pet. App. 129a.

b. In light of what was in the administrative record, and accepted by all parties, the cited statement from the D.C. Circuit opinion is legal error in itself. Pet. App. 14a. It was based on the panel majority's speculation about how Petitioners could potentially avoid the pressure to handle E15. The sentence relied on by Respondents as their "fact-

[3] EPA made identical statements in the context of a rulemaking to implement the RFS. *See* 75 Fed. Reg. 14670, 14759-60 (Mar. 26, 2010). At that time, EPA identified the need to grow E85 infrastructure to meet the RFS's requirements because it had not yet granted Growth's E15 waiver request. *See id.* But, as Petitioners' brief explains (at 12 n.7), and as Growth's waiver application confirmed, "[i]t will take years before there are enough [Flex Fuel Vehicles] on the road or adequate E85 infrastructure in place to have a meaningful impact on the production mandates of [the RFS]." CADC Joint App. 88.

bound" statement—"[i]n any event, Petitioners have not established that refiners and importers will indeed have to introduce E15 to meet their volume requirements under the RFS"—was followed in the very same paragraph by the panel's explanation why this was so: because Petitioners had not shown that with sufficient effort devoted to "research and development," they might not invent some alternative technology to meet RFS requirements, or that they could lobby EPA to waive the requirements. Pet. App. 14a-15a. As demonstrated in the Petition (at 26-28), it ought not be Petitioners' burden to negate such speculative possibilities[4] to demonstrate standing when the record is otherwise clear that the E15 waivers "will cause at least one of [Petitioners'] members to incur higher costs." Pet. App. 39a.

As Judge Kavanaugh recognized, "[i]n the current market, there is at least a 'substantial probability' that, in the wake of the E15 waiver, gasoline producers will have to use E15 in order to meet the renewable fuel mandate." Pet. App. 40a. To deny standing to importers and refiners based on speculative possibilities, as the panel majority did, is to raise the traceability requirement of Article III standing to unconquerable heights.

Finally, Respondents' reference to the cap on the amount of *corn-based* ethanol that may be used to meet RFS requirements is even more of a red herring. *See* EPA Br. 26 n.9; Growth Br. 26-27; Pet. App. 3a, 14a. E15 need not be blended using *corn-*

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[4] *See, e.g.*, *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (requiring only a "realistic and impending threat of direct injury"); *Blum v. Yaretsky*, 457 U.S. 991, 1001 (1982) ("quite realistic" threat sufficient to establish standing).

based ethanol. Besides, the pressure to use E15 to meet RFS will exist *until* the cap is reached, and no party has suggested that we have reached that point. Thus, the "cap" on *corn-based* ethanol is beside the point.

In sum, the alternative "factual" determination identified by Respondents does not limit or affect the D.C. Circuit's ruling on the standing of Petitioners' downstream entity members, and thus does not limit Petitioners' standing to challenge the partial waivers based on the injury to those members. Equally clearly, Petitioners' upstream members (refiners and importers) also have standing to challenge EPA's partial waivers, whether as a result of the competitive pressures upon them, or by virtue of their likely need to use E15 to meet their RFS obligations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD MOSKOWITZ
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1667 K Street, NW
Suite 700
Washington, DC 20006
(202) 457-0480

CLIFTON S. ELGARTEN
Counsel of Record
CHET M. THOMPSON
ROBERT MEYERS
DAVID Y. CHUNG
SHERRIE ARMSTRONG
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004
(202) 624-2500
CElgarten@crowell.com

Counsel for Petitioners

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