Nos. 12-1055, 12-1167 and 12-1229

In the Supreme Court of the United States

GROCERY MANUFACTURERS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ALLIANCE OF AUTOMOBILE MANUFACTURERS, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
JESSICA O'DONNELL
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

BRENDA MALLORY
Acting General Counsel
SUSAN STAHLE
Attorney
Environmental Protection Agency
Washington, D.C. 20460

QUESTIONS PRESENTED

1. Whether the court of appeals permissibly considered whether certain food-producer petitioners had prudential standing to challenge certain agency decisions, when the federal agency whose decisions petitioners sought to challenge did not contest their standing to sue, but the issue of prudential standing was raised by an intervenor.

2. Whether the court of appeals correctly concluded that the food-producer petitioners are outside the zone of interests of agency decisions, made pursuant to a statutory provision that addresses fuel requirements, to permit the sale as fuel of a particular ethanol-gasoline mixture.

3. Whether the court of appeals correctly con-cluded that engine-product-manufacturer and petroleum-supplier petitioners had not demonstrated Article III standing to challenge agency decisions that allow (but do not require) the sale of a particular type of fuel, when those petitioners did not submit any evidence specifically supporting their standing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rules:

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 12-1055

GROCERY MANUFACTURERS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 12-1167

ALLIANCE OF AUTOMOBILE MANUFACTURERS, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

No. 12-1229

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 693 F.3d 169. The decisions of the Envi-

[1] Citations to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 12-1055.

ronmental Protection Agency (Pet. App. 46a-118a) are published at 75 Fed. Reg. 68,094 and 76 Fed. Reg. 4662.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2012. Petitions for rehearing were denied on January 15, 2013 (Pet. App. 121a-128a). The petitions for writs of certiorari were filed on February 21, 2013 (No. 12-1055), March 25, 2013 (No. 12-1167), and April 10, 2013 (No. 12-1229). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Clean Air Act (CAA) authorizes the Environmental Protection Agency (EPA) to establish emission standards and fuel controls for various categories of motor vehicles. See 42 U.S.C. 7521 *et seq.* The CAA generally prohibits fuel manufacturers from "introduc[ing] into commerce, or * * * increas[ing] the concentration in use of, any fuel or fuel additive for use by any person in motor vehicles manufactured after model year 1974" unless the new fuel is "substantially similar" to fuels used to certify model year 1975 and later vehicles and engines as compliant with federal emission standards. 42 U.S.C. 7545(f)(1)(B); see 42 U.S.C. 7525. The EPA may waive that prohibition, however, and allow a new fuel to be marketed, if the agency determines that the new fuel "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) (Supp. V 2011).

In 2009, respondent Growth Energy, a trade association representing the ethanol industry, applied for a waiver for E15, a blend of unleaded gasoline that contains up to 15% ethanol. Pet. App. 4a. After a "careful analysis" of Department of Energy and other testing data, as well as public comments submitted to the agency, the EPA determined that use of E15 in model year 2007 and newer light-duty motor vehicles (such as passenger cars) would satisfy the statutory standard. See EPA, *Partial Grant and Partial Denial of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator*, 75 Fed. Reg. 68,094, 68,095 (Nov. 4, 2010). About three months later, after further "analysis of the available information, including [Department of Energy] and other test data and public comments," the EPA also allowed the sale of E15 for use in model year 2001-2006 light-duty motor vehicles. EPA, *Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator*, 76 Fed. Reg. 4662, 4662 (Jan. 26, 2011).

2. a. Petitioners are trade associations representing three different industries—food production, engine-product manufacturing, and petroleum supply—who sought review in the D.C. Circuit of the EPA's E15 waiver decisions. Pet. App. 6a; see 42 U.S.C. 7607(b)(1) (Supp. V 2011). The court of appeals consolidated the petitions, and Growth Energy intervened in defense of the agency's actions. Pet. App. 6a.

D.C. Circuit Rule 28(a)(7) requires a petitioner directly challenging an agency action to "set forth the basis for the claim of standing" to do so, which must

include "arguments and evidence establishing the claim," unless standing is "apparent from the administrative record." Petitioners did not provide any specific evidence in support of their standing, but instead relied on the administrative record and included a four-page argument on standing in their opening brief. Pet. C.A. Br. 17-21.

b. The EPA did not contend in the court of appeals that petitioners had failed to establish their standing to challenge the agency's waiver decisions. Growth Energy argued, however, that petitioners had failed to demonstrate either Article III standing or prudential standing. See Pet. App. 6a; Growth Energy C.A. Br. 3-19. The court of appeals largely agreed with Growth Energy's arguments, and it dismissed the petitions for lack of jurisdiction. Pet. App. 1a-19a.

The court of appeals observed that the "party seeking to invoke the jurisdiction of the federal court bears the burden of establishing" the elements of standing, Pet. App. 7a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)), and must "support each element of its claim to standing by affidavit or other evidence," *ibid.* (quoting *Sierra Club* v. *EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002) (quoting *Defenders of Wildlife*, 504 U.S. at 561)). The court of appeals explained in particular that, to "establish Article III standing, a party must establish three constitutional minima: (1) that the party has suffered an 'injury in fact,' (2) that the injury is 'fairly traceable' to the challenged action of the defendant, and (3) that it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Ibid.* (quoting *Defenders of Wildlife*, 504 U.S. 560-561). The court noted that, although a petitioner whose standing is "self-evident" from the admin-

istrative record need not offer additional evidence supporting standing, "when the administrative record fails to establish a substantial probability as to any element of standing, 'the petitioner must supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review.'" *Id.* at 8a (quoting *Sierra Club*, 292 F.3d at 900).

In this particular case, the court of appeals determined that standing was "not self-evident" for any of the petitioners because the E15 waiver decisions "do not on their face directly impose regulatory restrictions, costs, or other burdens on" the entities that petitioners represent. Pet. App. 9a.[2] The court then observed that "standing is 'substantially more difficult to establish' where, as here, the parties invoking federal jurisdiction are not 'the object of the government action or inaction' they challenge." *Ibid.* (quoting *Public Citizen, Inc.* v. *NHTSA*, 489 F.3d 1279, 1289 (D.C. Cir. 2007) (quoting *Defenders of Wildlife*, 504 U.S. at 562)). The court ultimately found that none of the petitioners had carried its burden to prove itself a proper party to challenge the particular agency actions at issue in this case.

The engine-product-manufacturer petitioners. The court of appeals first concluded that the "convoluted theory of standing" asserted by the engine-product-manufacturer petitioners did not satisfy Article III's requirement to show an "actual or imminent" and "concrete and particularized" injury that could be traced with "substantial probab[ility]" to the challenged agency actions. Pet. App. 9a-10a (internal quotation marks and

---

[2] The court of appeals concluded that, if the individual industry members of the petitioner trade associations had standing, petitioners would have standing to represent those members' interests in this case. Pet. App. 8a.

citations omitted). The engine-product-manufacturer petitioners asserted that certain of their engines had not been designed for anything greater than a 10% ethanol-gasoline mixture known as E10; that the EPA waivers would cause E15 to enter the market and consumers to use it in their engines; and that this use "may" harm their equipment, leading to warranty or other liability claims and/or government recall of their products. *Id.* at 10a-11a. The court of appeals found, however, that "the engine manufacturers provide almost no support for their assertion that E15 'may' damage the engines they have sold." *Id.* at 10a. The court explained that these petitioners had not submitted sufficient evidence to prove that E15 would harm the post-2000 engines for which it had been approved, and that a theory of injury stemming from use of E15 in unapproved engines improperly "depend[ed] upon the acts of third parties not before the court"—namely, that "consumers use [E15] in engines for which it is neither designed nor approved, suffer damages to those engines as a result, and bring successful warranty or other liability lawsuits." *Id.* at 11a; see *id.* at 12a (determining that petitioners had "failed to establish any probability that the government would recall engines because third parties had misfueled").

The petroleum-supplier petitioners. The court of appeals found that the petroleum-supplier petitioners had likewise failed to show an injury traceable to the EPA's E15-waiver decisions. Pet. App. 12a-17a. The petroleum-supplier petitioners asserted that the E15 waivers "effectively force[] refiners and importers to actually introduce E15 into commerce because they are obligated to meet" the requirements of the Renewable Fuel Standard (RFS) program first established by the

Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 1067. Pet. App. 12a. Those petitioners further asserted that dealing with E15 would impose substantial production, transportation, and other costs on various entities in the fuel-distribution chain. *Id.* at 12a-13a. The RFS program requires qualifying refiners and importers of gasoline or diesel fuel to use annually increasing volumes of specific categories of renewable fuels, a requirement that refiners and importers currently meet primarily through the sale of E10. 42 U.S.C. 7545(*o*) (Supp. V 2011); see Pet. App. 3a.

The court of appeals determined that the petroleum-supplier petitioners' "attempt to draw a causal link between the E15 waivers they challenge and the costs they would incur by introducing E15 ultimately rings hollow." Pet. App. 17a. The court observed that the "EPA's approval of the introduction of E15 for use in certain vehicles and engines, does not force, require, or even encourage fuel manufacturers or any related entity to introduce the new fuel; it simply permits them to do so by waiving the [CAA]'s prohibition on introducing a new fuel." *Id.* at 13a. The court found that, because "the only real effect" of the EPA's actions was "to provide fuel manufacturers the option to produce a new fuel, E15," any costs incurred in introducing that fuel would be "self-inflicted harm not fairly traceable to the challenged government conduct." *Ibid.* (internal quotation marks and citation omitted). The court of appeals similarly concluded that downstream entities in the fuel-distribution chain could choose whether to do business with suppliers offering E15. *Id.* at 15a-16a.

The court of appeals determined that the petroleum-supplier petitioners had "not established that refiners and importers will indeed have to introduce E15 to meet

their volume requirements under the RFS." Pet. App. 14a. The court noted that refiners and importers were "already nearing" a statutory cap on the amount of corn-based ethanol that can be used to satisfy the RFS, and that petitioners had "provided no reason why they could not instead use a different type of fuel," other than E15, "to meet [their RFS] obligations." *Ibid.*; see *id.* at 15a ("Petitioners have not demonstrated that the partial E15 waivers provide refiners and importers with a Hobson's choice (introduce E15 or violate the RFS) rather than a real one."). The court also reasoned that, even if it were to "consider the refiners' and importers' decision to introduce E15 as forced rather than voluntary, it would be 'forced' (under their theory) not by the availability of E15 (which is the only effect of the partial waivers) but rather by the RFS." *Id.* at 14a.

The food-producer petitioners. The court of appeals concluded that the food-producer petitioners had failed to establish prudential standing because they had not shown themselves to be "arguably within the zone of interests to be protected or regulated by the statute in question or by any provision integrally related to it." Pet. App. 18a (internal quotation marks, citation, and alterations omitted).[3] The food-producer petitioners had asserted that the EPA's actions would "increase the demand for corn, which is currently used to produce most ethanol on the market," and that such heightened demand would "increase the prices" that food producers "have to pay for corn." *Id.* at 17a. In arguing that they fell within the zone of interests protected or regulated by the governing law, the food-producer petitioners

[3] The opinion of the court of appeals stated that "Chief Judge Sentelle would hold that the [food-producer petitioners] ha[d] neither Article III nor prudential standing." Pet. App. 17a n.1.

relied on a provision of the RFS program statute that requires the EPA to analyze, as one of six considerations in setting renewable-fuel volume targets after 2022, the "impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices." 42 U.S.C. 7545(*o*)(2)(B)(ii)(VI); see Pet. App. 18a.

The court of appeals concluded that the food-producer petitioners' "[h]ypothetical prudential standing to challenge action under [the RFS program statute] does not give [them] prudential standing to petition for review of action taken" under the CAA's separate fuel-waiver provision. Pet. App. 18a-19a. The court recognized that "[b]oth statutes may have fuel as their subject matter, and the RFS may have even incentivized Growth Energy to apply for a waiver" under the CAA. *Id.* at 18a. The court concluded, however, that "more is required to establish an integral relationship between the statute a petitioner claims is protecting its interests and the statute in question." *Ibid.*

c. Judge Tatel filed a concurring opinion. Pet. App. 20a. Although he joined the majority opinion, which held that the food-producer petitioners lacked prudential standing in this case, he expressed the view that those petitioners had Article III standing. *Ibid.* He also stated that, while he "agree[d] with those circuits that have held that prudential standing is non-jurisdictional," he viewed D.C. Circuit precedent as establishing a contrary rule. *Ibid.*

d. Judge Kavanaugh dissented. Pet. App. 21a-45a. With respect to the food-producer petitioners, he would have held that prudential standing is non-jurisdictional; that the EPA had forfeited the issue by failing to raise

it; and that Growth Energy was precluded from raising the issue as an intervenor. *Id.* at 27a-32a & n.5. He also concluded that the food-producer petitioners had prudential and Article III standing, and that the petroleum-supplier petitioners had Article III standing. *Id.* at 25a-27a, 32a-42a. Finally, Judge Kavanaugh stated that he would have ruled against the EPA on the merits. *Id.* at 42a-45a.

3. The court of appeals denied rehearing and rehearing en banc. Pet. App. 122a. Judge Kavanaugh dissented from the order, largely reiterating the views that he had previously expressed in his dissent from the panel opinion. *Id.* at 123a-128a.

ARGUMENT

Based on its application of well-settled standing principles to the particular facts of this case, the court of appeals concluded that petitioners had not made a sufficient showing that they were proper parties to challenge the EPA's E15-waiver decisions. That fact-bound conclusion does not conflict with any decision of this Court or any other court of appeals. To a large extent, moreover, petitioners ask this Court to grant review, and ultimately to reverse the judgment of the court of appeals, based on evidence and arguments that were never presented to that court. Further review is not warranted.

1. Petitioners contend (12-1055 Pet. 14-19; 12-1167 Pet. 26-28) that this Court should grant certiorari to decide whether a potential challenge to a plaintiff's prudential standing is forfeited or waived if the defendant fails to raise it. The D.C. Circuit has previously stated that prudential standing "is a jurisdictional issue which cannot be waived or conceded." *Animal Legal Def. Fund, Inc.* v. *Espy*, 29 F.3d 720, 723 n.2 (1994). Petitioners correctly explain (*e.g.*, 12-1055 Pet. 15-18)

that other circuits have reached a contrary conclusion. This case, however, would be an unsuitable vehicle for resolving that circuit conflict.

a. Petitioners did not timely preserve their current contention that the prudential-standing issue was waived. After receiving the responsive briefs of Growth Energy and the EPA—the former, but not the latter, of which argued that petitioners lacked prudential standing, see Growth Energy C.A. Br. 13-19—petitioners did not contend that a prudential-standing objection had been forfeited or waived. Rather, petitioners simply argued that they had prudential standing. Pet. C.A. Reply Br. 5-6.

Petitioners appear to acknowledge (12-1055 Pet. 12 n.3) that they did not affirmatively raise the forfeiture issue until their petition for rehearing. They assert, however, that this Court's review is appropriate because "the issue was most certainly 'passed on' by the court below." *Ibid.* The majority opinion below stated that the court "dismiss[ed] all petitions for lack of jurisdiction," Pet. App. 2a, 19a, and that prudential standing could be considered before Article III standing because "there is no mandated sequencing of jurisdictional issues," *id.* at 17a (citation and quotation marks omitted). Although the majority opinion contains no sustained discussion of the matter, the court's references to "jurisdiction" and "jurisdictional issues" imply that the court viewed the question of prudential standing as not subject to waiver or forfeiture.[4]

---

[4] Judge Tatel's concurring opinion expressed the view that the panel was bound by circuit precedent describing the issue of prudential standing as jurisdictional. See Pet. App. 20a. Judge Kavanaugh's dissenting opinion, by contrast, discussed the question at significant length and concluded that a prudential-standing challenge is subject

Those aspects of the court of appeals' opinion, however, do not mean that petitioners' own failure to assert all their current arguments in a timely fashion should be disregarded. Like most potential arguments in litigation, the contention that one's adversary has forfeited or waived a potential challenge is itself subject to forfeiture or waiver. See, *e.g.*, *Fox* v. *District of Columbia*, 83 F.3d 1491, 1496 (D.C. Cir. 1996) ("It is not clear whether Fox ever voiced this complaint to the district court, but the District makes no objection here and so has waived any waiver of the point by Fox."); see also, *e.g.*, *United States* v. *Bonilla-Mungia*, 422 F.3d 316, 319 n.1 (5th Cir.) (collecting cases), cert. denied, 546 U.S. 1070 (2005). Rules of waiver and forfeiture promote efficiency and finality by creating strong incentives for litigants to bring their best arguments forward in a timely fashion, and by limiting litigants' ability to seek appellate reversal based on arguments they did not timely advance. Those concerns are directly implicated where, as here, the underlying issue is itself one of forfeitability.

Indeed, it would be particularly anomalous to excuse petitioners' forfeiture in the present case. Petitioners fault the court of appeals for considering a prudential-standing argument that the EPA did not make, and urge this Court to grant discretionary review to correct that purported error. Petitioners simultaneously contend, however, that the court below should have adopted a waiver theory that no party to the case advanced. If (as petitioners contend) the question whether prudential-standing arguments may be waived or forfeited is suffi-

---

to forfeiture or waiver. *Id.* at 27a-32a. Judge Kavanaugh concluded that prior D.C. Circuit decisions treating the issue as jurisdictional had been superseded by intervening decisions of this Court. See *id.* at 31a n.4.

ciently important to warrant this Court's review, that review should be conducted in a case where the petitioner presented its own arguments in a timely fashion.

b. Although the EPA's brief below did not contest prudential standing, Growth Energy's brief did so, and that brief was sufficient to place the issue before the court of appeals. Petitioners do not identify any decision of any circuit (or of this Court) holding that a court is precluded from addressing prudential standing when the issue is raised by an intervenor, rather than one of the original parties. Petitioners and the dissent below have cited the D.C. Circuit's decision in *Illinois Bell Telephone Co.* v. *FCC*, 911 F.2d 776 (1990), which states that "[a]n intervening party may join issue only on a matter that has been brought before the court by another party." *Id.* at 786; see Pet. App. 32a n.5; 12-1055 Pet. 10 n.1. But the D.C. Circuit has clarified that this is "a prudential restraint rather than a jurisdictional bar" and has found it to lack force when (as here) the intervenor was not the losing party in the administrative proceeding under review and when (as here) the issue it raises is "an essential predicate" to review of the agency's decision. *Synovus Fin. Corp.* v. *Board of Governors*, 952 F.2d 426, 434 (1991) (internal quotation marks and citation omitted).[5]

---

[5] *Vinson* v. *Washington Gas Light Co.*, 321 U.S. 489 (1944), briefly mentioned by petitioners (12-1055 Pet. 11 n.1), is not to the contrary. That decision notes that a particular agency rule at issue in the case had codified "one of the most usual procedural rules," namely, "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 or compel an alteration of the nature of the proceeding." *Vinson*, 321 U.S. at 498. The decision did not purport to address whether and how that rule might apply more generally, or how it might (or might not) apply to the specific circumstance at issue here.

c. Whether or not prudential standing is properly characterized as "jurisdictional," the court of appeals would have been *authorized* to consider the issue *sua sponte* even if Growth Energy had not raised it. Even some circuits that hold prudential standing to be forfeitable or waivable have held that courts may nevertheless exercise their discretion to address the issue on their own. See *RK Co.* v. *See*, 622 F.3d 846, 851 (7th Cir. 2010) ("The court can sua sponte address [prudential limits on justiciability] when it sees fit."); *City of L.A.* v. *County of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) ("[T]he choice to reach the question [of prudential standing] lies within our discretion."), cert. denied, 130 S. Ct. 3355 (2010); *National Solid Waste Mgmt. Ass'n* v. *Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498-501 (5th Cir. 2004) (considering *sua sponte* both constitutional and prudential standing arguments), cert. denied, 546 U.S. 812 (2005).

In that regard, the dissenting judge below erred in characterizing (Pet. App. 29a) the zone-of-interests test as simply a limitation on review under the Administrative Procedure Act (APA), rather than a limitation on "the power of the court to hear the case." Although the test originated in the APA context, "later cases * * * have specifically listed it among other prudential standing requirements of general application." *Bennett* v. *Spear*, 520 U.S. 154, 163 (1997). This Court has additionally explained that prudential standing, while not itself a constitutional doctrine, nevertheless "embodies 'judicially self-imposed limits on the exercise of federal jurisdiction.'" *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 11 (2004) (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). Indeed, this Court in *Newdow* dismissed the suit for lack of prudential standing even

though that issue had not been raised in the lower courts or in the parties' briefs in this Court. See *id.* at 12-18.[6]

d. Thus, the specific question presented here is not whether the court of appeals was *required* to address prudential standing *sua sponte*, as would be true of a purely "jurisdictional" issue. Rather, the question is whether the court could *permissibly* consider prudential standing (in part to avoid the Article III issue that the food producers' petition for review would otherwise have raised, see Pet. App. 17a & n.1; note 7, *infra*) in a case where the prudential-standing issue had been raised by an intervenor. The court of appeals did not address that specific question, presumably because petitioners did not urge the court to treat the prudential-standing challenge as forfeited or waived. This Court should not address it in the first instance. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

2. The food-producer petitioners separately contend (12-1055 Pet. 20-23) that the court of appeals erred in concluding that they failed to establish prudential stand-

---

[6] The dissenting judge below posited a false dichotomy in suggesting that prudential standing requirements are not jurisdictional because they are "not a limitation on a court's authority to hear a case, as opposed to a limitation on who may sue to challenge a particular agency action." Pet. App. 28a. Article III's requirement that a plaintiff establish the elements of standing, for example, is *both* a "limitation on who may sue" and a "limitation on a court's authority to hear a case." The fact that prudential standing turns on the plaintiff's own stake in the litigation, rather than on the inherent suitability or unsuitability of a particular contested issue for judicial resolution, is of little import in determining whether prudential standing is jurisdictional.

ing. That fact-bound contention likewise does not warrant further review.

The food-producer petitioners' principal argument is that the decision below conflicts with this Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2210 (2012). That argument lacks merit. The court of appeals correctly concluded that *Patchak* "neither changed the prudential-standing standard nor has any particular applicability to the facts here," because the food-producer petitioners' "interest in low corn prices is much further removed from a provision about cars and fuel" than the "neighboring land owner's interest" in *Patchak* was "from a statute about land acquisition." Pet. App. 19a. The food-producer petitioners emphasize *Patchak*'s statement that a claimant need only show "that he is '*arguably* within the zone of interests to be protected or regulated by the statute that he says was violated.'" 12-1055 Pet. 20 (quoting 132 S. Ct. at 2210). But the court below likewise recognized that the food-producer petitioners needed only to show that their interest was "arguably within the zone of interests to be protected." Pet. App. 18a (citation omitted). The court simply concluded that they had failed to make that showing. *Id.* at 18a-19a.

The food-producer petitioners are also wrong in contending (12-1055 Pet. 21-23) that the decision below conflicts with *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), and *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987). Petitioners rely on those decisions for the proposition that a court considering whether a particular party falls within the statutory zone of interests should consider "the overall context" of the statutory scheme, rather than

focusing exclusively on the particular statutory provision on which a claim is based. This Court has made clear, however, that courts should consider only those other statutes that have an "integral relationship" to the provision directly at issue. *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517, 530 (1991).

The court below accordingly recognized that the food-producer petitioners could show prudential standing by demonstrating that they were "arguably within the zone of interests" of "any provision integrally related to" the CAA fuel-waiver provision at issue in this case. Pet. App. 18a (internal quotation marks, citation, and brackets omitted). The court determined that the assertedly "related" statutory provision to which petitioners pointed—a provision of the RFS program statute that lists "the price and supply of agricultural commodities" and "food prices" among the factors that the EPA should consider in setting RFS quotas after 2022, 42 U.S.C. 7545(*o*)(2)(B)(ii)(VI)—did not have an "integral relationship" with the separate fuel-waiver provision of the CAA. Pet. App. 18a (internal quotation marks omitted).

That determination does not warrant further review. The food-producer petitioners attempt to conflate the RFS statute and the CAA fuel-waiver provision by suggesting (12-1055 Pet. 21) that the EPA's waiver decisions in this case were largely based on the RFS requirements. That suggestion is mistaken. Although petitioners assert that the E15 waiver decisions are "festooned with references to the renewable-fuels mandate" (*ibid.*), the citations they provide are simply instances in which the EPA acknowledged the existence of the RFS program; referred to studies undertaken in

light of amendments to that program in the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492; and noted that the Energy Independence and Security Act of 2007 had also separately amended the fuel-waiver statute. The food-producer petitioners identify no evidence in the record that the EPA accepted or adopted Growth Energy's view, in applying for an E15 waiver, that the waiver was "necessary" to enable refiners and others to meet the RFS mandate. Indeed, both the text and judicial interpretations of Section 7545(f)(4) make clear that the EPA is *precluded* from considering factors other than compliance with emission standards in determining whether to grant such a waiver. *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1063-1064 (D.C. Cir. 1995).

In any event, a "petition for a writ of certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Petitioners present no sound reason to deviate from that practice here.[7]

---

[7] It is also far from clear that the food-producer petitioners have met their burden to establish Article III standing. Petitioners' claim of Article III standing depends on the premise that corn prices will increase in the wake of the E15 waivers. In support of that hypothesis, however, petitioners' appellate brief cited only an EPA prediction, in an RFS rulemaking that pre-dated the waiver decisions at issue here, about the impact the RFS program will have on certain commodity prices *in 2022*, after the RFS program is fully implemented. Pet. C.A. Br. 20 (citing EPA, *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program*, 75 Fed. Reg. 14,670, 14,683 (Mar. 26, 2010)). That RFS-related prediction about conditions a decade away shows neither that a price increase is "imminent" (or "*certainly* impending"), *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013), nor that any increase would be "fairly traceable," *ibid.*, to the E15 waivers. And the only direct evidence cited in the dissent below to support the conclusion that the

3. Petitioners also seek review of the court of appeals' determinations that the engine-product-manufacturer petitioners and petroleum-supplier petitioners lack Article III standing. Petitioners do not take issue with the court of appeals' recognition (Pet. App. 7a-8a) that petitioners bore the burden of proving the elements of Article III standing, or with the court of appeals' description (*id.* at 7a) of what those elements are, which the court quoted directly from this Court's decision in *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The court below applied well-settled Article III standing principles to conclude that petitioners here—who did not submit any affidavits or other evidence specifically in support of their standing—failed to carry their burden. Petitioners identify no sound reason for the Court to deviate from its usual certiorari criteria by undertaking to review those fact-bound holdings.

The engine-product-manufacturer petitioners. The court of appeals concluded—and the dissenting judge did not dispute—that the engine-product-manufacturer petitioners had failed to support their "convoluted theory of standing," which hypothesized that consumer use of E15 "'may'" harm their products and lead to liability.

E15 waivers "likely" will cause commodity prices to increase was a study submitted to the EPA by the food-producer petitioners (but not cited in petitioners' brief below). Pet. App. 25a (citing C.A. J.A. 604). That study assumes, however, that certain economic incentives that increase the demand for corn-based ethanol—tax credits for refiners, a tariff limiting importation of sugar ethanol, slow development of alternative advanced biofuels, and high crude oil prices—will continue. C.A. J.A. 604, 606. "Speculative inferences" are insufficient to establish the requisite causal connection between challenged agency action and alleged injury. *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976).

Pet. App. 9a-10a (quoting Pet. C.A. Br. 17). The court of appeals observed that the engine-product-manufacturer petitioners had "provid[ed] almost no support for their assertion that E15 'may' damage the engines they have sold" in post-2000 vehicles. *Id.* at 10a. The court further observed that petitioners had failed to show that consumers would "misfuel" and use E15 in pre-2001 vehicles, let alone that such misfueling would lead to meritorious lawsuits or a recall of petitioners' products. *Id.* at 10a-12a; see *id.* at 5a (noting that E15 waivers are expressly conditioned on, *inter alia*, EPA approval of a program to mitigate the risk of misfueling).

The engine-product-manufacturer petitioners first contend (12-1167 Pet. 14-15) that they presumptively have standing because they are "objects of the relevant statutory regime." That contention lacks merit, as petitioners' own amicus recognizes. See Pub. Citizen Amicus Br. 12. The court of appeals correctly explained that the engine-product-manufacturer petitioners are not the object of the challenged agency action because the E15 waivers do not "directly impose regulatory restrictions, costs, or other burdens" on any of petitioners' members. Pet. App. 9a. Rather, the engine-product-manufacturer petitioners' "asserted injury"—which turns on the theory that allowing the sale of E15 will lead consumers to use E15 in ways that will harm engines—"arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," *Defenders of Wildlife*, 504 U.S. at 562. The engine-product-manufacturers' petition, which simply notes various ways in which the EPA regulates emissions from motor vehicles, fails to identify any way in which the E15 waivers directly regulate (or deregulate) petitioners themselves. See 12-1167 Pet. 14-15.

As the court of appeals recognized (Pet. App. 9a), it is "'ordinarily substantially more difficult'" for challengers to establish Article III standing with respect to agency actions that "neither require nor forbid" any conduct by the challengers, *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Defenders of Wildlife*, 504 U.S. at 562) (nested quotation marks omitted). When an agency action affects the challenger only indirectly, standing "depends on the unfettered choices made by independent actors not before the courts," and the challenger bears the burden "to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability." *Defenders of Wildlife*, 504 U.S. at 562. The engine-product-manufacturer petitioners accordingly are not entitled to any presumption of standing.

The engine-product-manufacturer petitioners also contend (12-1167 Pet. 15-24) that the court of appeals "plainly erred in disregarding virtually all of [their] evidence of injury in fact." That highly fact-specific contention does not warrant this Court's review. The engine-product-manufacturer petitioners' standing argument in the court of appeals, in both their opening and reply briefs, consisted of about two pages in total. Pet. C.A. Br. 17-18; Pet. C.A. Reply Br. 2-3. Petitioners did not specifically identify or discuss any of the evidence on which they now rely, but instead made the conclusory assertion that they "face[d] serious risks of liability," citing almost exclusively various federal laws (without precisely explaining their application to the circumstances here) and comments that certain engine manufacturers had made to the EPA (without explaining precisely what in those comments was relevant to standing). See Pet. C.A. Br. 18; see also Pet. C.A. Reply Br. 3

(also citing one page of the EPA's waiver decision). The court of appeals cannot be faulted for failing to anticipate and address, without meaningful assistance from petitioners themselves, the precise arguments and evidence on which petitioners now rely. Parties asserting standing have the "burden to prove their standing by pointing to specific facts," *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1149 n.4 (2013), and such parties must answer a "challenge to their standing at the time of judgment," rather than seeking to "remedy [a] defect retroactively," *Earth Island Inst.*, 555 U.S. at 495 n.*. The engine-product manufacturers cannot cure an insufficient effort to prove their standing in the court of appeals through an expanded presentation in their petition for a writ of certiorari.

The engine-product-manufacturer petitioners' newly expanded arguments are also mistaken in multiple respects. For example, contrary to their suggestion (12-1167 Pet. 16-19), although the EPA recognized the theoretical possibility of catalyst deterioration, NOx emissions violations, and materials compatibility issues, the agency did not find that those problems would occur in model year 2001 and newer motor vehicles using E15. See 76 Fed. Reg. at 4671-4673, 4681; 75 Fed. Reg. at 68,107-68,108, 68,111-68,112, 68,122. Also contrary to petitioners' suggestion (12-1167 Pet. 19-24), this Court has never held that an extended chain of causation like the one they advance—which hypothesizes that suppliers will market E15; that consumers will purchase E15 and that some will misfuel their vehicles with it; that consumers' use of the fuel will harm those vehicles; and that the consumers will then bring colorable lawsuits against the engine manufacturers for failing to support an unsuitable fuel—constitutes the sort of "genuine

threat" of legal action that can provide a basis for Article III standing. *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007); see *Already, LLC* v. *Nike, Inc.*, 133 S. Ct. 721, 727 (2013).[8]

The chain of causation that petitioners hypothesize involves "choices made by independent actors not before the courts," which "the courts cannot presume either to control or predict." *Defenders of Wildlife*, 504 U.S. at 562. Even if such a chain of causation could have been proved at the appropriate stage of the litigation, the engine-product-manufacturer petitioners did not attempt below to "adduce facts showing that" the relevant third parties' "choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Ibid.* In any event, the court of appeals' application of established Article III principles to the record in this case raises no issue of general importance warranting this Court's review.

The petroleum-supplier petitioners. The court of appeals concluded that the petroleum-supplier petitioners had failed to establish that any costs they might incur in dealing with E15 would be traceable to the E15 waivers. Pet. App. 12a-17a. The court explained that "approval of the introduction of E15 for use in certain vehicles and engines * * * does not force, require, or even encourage fuel manufacturers or any related entity to intro-

---

[8] The engine-product-manufacturer petitioners' comparison (12-1167 Pet. 21) of this case to *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010), is misconceived. The argument that they, like the plaintiffs in *Monsanto*, will incur costs from testing their products was never raised in the court of appeals. In any event, the plaintiffs in *Monsanto* submitted multiple declarations supporting that theory of Article III injury, see *id.* at 2755 & n.3, whereas the engine-product manufacturers here submitted none.

duce the new fuel; it simply permits them to do so by waiving the CAA's prohibition on introducing a new fuel that is not substantially similar to the fuel used to certify vehicles and engines under their applicable emission standards." *Id.* at 13a. The court further concluded that petitioners had "not demonstrated that the partial E15 waivers provide refiners and importers with a Hobson's choice (introduce E15 or violate the RFS)." *Id.* at 15a.

The petroleum-supplier petitioners primarily contend (12-1229 Pet. 17-26) that the court of appeals erred in "conclud[ing] * * * that 'traceability' could not be established because the agency's action was not the sole or proximate cause of the alleged harms." See 12-1055 Pet. 24-26 (making a related argument); 12-1167 Pet. 29-30 (making a similar argument). That contention misapprehends the court of appeals' traceability analysis. The court explained that, because the petroleum-supplier petitioners retained the option not to market E15 at all, any harm they might suffer from marketing the product would be "self-inflicted." Pet. App. 13a (citation omitted). The court determined, in that regard, that petitioners had "not established that refiners and importers will indeed have to introduce E15 to meet their volume requirements under the RFS," and that petitioners had "provided no reason why they could not instead use a different type of fuel to meet [their RFS] obligations." *Id.* at 14a.

The petroleum-supplier petitioners' argument to this Court effectively overlooks the court of appeals' determinations and expressly presupposes (12-1229 Pet. 17) that petitioners would, in fact, "be required as a result of EPA's 'partial waivers' to produce and handle E15 alongside E10." The other petitioners likewise presume

—contrary to the court of appeals' determination—that "existing RFS mandates will *require* the petroleum petitioners to sell E15 to meet the mandate's requirements" (12-1055 Pet. 25), and that the "EPA's decision to introduce E15 into the market will require petroleum suppliers to use the fuel, as it is now the only feasible option of complying with the RFS's escalating renewable fuel requirement" (12-1167 Pet. 29).

Petitioners offer no reason why this Court should review the court of appeals' fact-specific determination on this point. The petroleum-supplier petitioners briefly assert that the court of appeals improperly "speculated that [they] might avoid the need to produce and handle E15 because alternative ways to satisfy their RFS obligations might be found through 'research and development,' or [that they] might secure a modification of their RFS obligations by 'lobbying the Administrator of EPA.'" 12-1229 Pet. 26 (quoting Pet. App. 14a-15a) (brackets omitted); see *id.* at 26-29. But they do not directly contest the court of appeals' specific determination that they had "provided no reason why they could not instead use a different type of fuel to meet [their RFS] obligations." Pet. App. 14a.

It was undisputedly petitioners' burden to establish standing, and the only specific evidence they identified for the court of appeals on this issue was an EPA prediction that "to the extent it is used in the marketplace, E15 would likely replace the use of E10." Pet. C.A. Reply. Br. 4 (quoting 76 Fed. Reg. at 4680) (brackets omitted). By its terms, however, that was a prediction about what alternative fuel would lose sales "to the extent" that sales of E15 ultimately occurred, not a prediction about the likely extent of E15 sales. And the EPA did not specifically identify the RFS requirements—as

opposed to, say, a business judgment about what might sell best—as the reason why E15 might become popular. See 76 Fed. Reg. at 4680.[9]

Contrary to petitioners' contentions (10-1055 Pet. 24-28, 12-1229 Pet. 16-29), the court of appeals' determination that petitioners failed to make a sufficient showing of standing does not conflict with any decision of this Court. In *Clinton* v. *City of New York*, 524 U.S. 417 (1998), this Court found that certain plaintiffs had standing to challenge the constitutionality of the President's line-item veto when, as a result of that veto, "New York law w[ould] automatically require that [the plaintiffs] reimburse the State" for any amounts the State might owe to the federal government. *Id.* at 432 n.19; see *id.* at 426, 431. The Court thus recognized 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.

The court of appeals' conclusion that petitioners lacked standing, however, is fully consistent with that principle. To be sure, the court below did state that, "[e]ven if [it] were to consider the refiners' and importers' decision to introduce E15 as forced rather than voluntary," any injury petitioners might suffer would be "traceable * * * to the RFS" rather than to the EPA's

---

[9] As previously noted, see pp.17-18, *supra*, the EPA's waiver decisions did not adopt Growth Energy's argument that approval of E15 was necessary to meet RFS requirements. And in any event, E15 is at best an incomplete solution to meeting RFS obligations. As the court of appeals noted (Pet. App. 14a), and petitioners do not dispute, the amount of corn-based ethanol that can be used to satisfy RFS obligations is capped, and regulated entities are already very close to that limit.

E15 waivers. Pet. App. 14a. That statement was unnecessary to the court's decision, however, because the court further explained that "[p]etitioners have not established that refiners and importers will indeed have to introduce E15 to meet their volume requirements under the RFS." *Ibid.*; see *ibid.* (stating that "the RFS does not mandate that obligated parties use E15 or any other particular product to meet its requirements"). To the extent petitioners challenge that understanding of the RFS statute, the petitions raise no Article III issue of general importance. To the extent they accept that understanding, *City of New York* is readily distinguishable.

For similar reasons, the decision below does not conflict with decisions such as *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), and *Bennett* v. *Spear*, *supra*. Petitioners invoke those decisions to support their argument that a plaintiff may have standing to challenge an agency action even if the action is only one piece of the legal framework that causes the asserted harm. See 12-1229 Pet. 19 & n.11, 22; 12-1055 Pet. 25-26. That principle is inapplicable here, however, because the court of appeals found insufficient proof that the E15 waiver, even in combination with the RFS requirements, would require the sale of E15. Pet. App. 14a-15a. The court therefore viewed the sale of E15 as a voluntary choice, not as a legal requirement. *Id.* at 13a.

The petroleum-supplier petitioners are also wrong in contending (12-1229 Pet. 28) that the decision below conflicts with decisions such as *Defenders of Wildlife*, *supra*, and *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). Petitioners describe those decisions as "reject[ing] any approach that would allow mere speculation about future events or

impacts to defeat standing." 12-1229 Pet. 28. As explained above, the court of appeals here did not rely on "speculation about future events" in determining that the petroleum-supplier petitioners lacked standing. It instead found that petitioners had failed to establish that the EPA's actions would have the effect petitioners claimed.

Likewise misplaced is the petroleum-supplier petitioners' assertion (12-1229 Pet. 22) that the court of appeals' decision conflicts with decisions of this Court that purportedly find traceability "when the agency action contributes to [a] relevant change in the market landscape." As petitioners' own descriptions reveal, see *ibid.*, the relevant decisions all involved legal changes that invited a new set of entities to enter a particular field, thereby creating a new rivalry between firms that did not previously have to compete for market share. See *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 619-621 (1971) (challenge to decision allowing banks to operate collective investment funds); *Association of Data Processing Serv. Orgs.*, 397 U.S. at 151-152 (challenge to decision allowing national banks to offer data-processing services); see also *Securities Indus. Ass'n*, 479 U.S. at 391-392, 393 n.5 (noting, in a similar circumstances, that Article III standing was no longer being challenged).

Here, in contrast, the challenged agency action permits, but does not require, all participants in the marketplace (including petitioners) to market E15. To be sure, some 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. The petroleum-supplier petitioners, however, make no

effort to demonstrate that the EPA's E15 waivers create this sort of dynamic.

Finally, the food-producer petitioners are incorrect in asserting (12-1055 Pet. 26-27) that the court of appeals' decision conflicts with *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010). In that case, the plaintiff farmers, who wanted to sell organic and conventional alfalfa, challenged an agency decision to permit the sale of certain genetically engineered alfalfa. *Id.* at 2750-2751. No one disputed that the owner of the patent for the genetically engineered alfalfa (and its licensee), who had specifically requested the deregulation, intended to produce and sell the genetically engineered alfalfa. *Id.* at 2750. The plaintiff farmers did not claim (as the petroleum-supplier petitioners do here) that they would be forced to sell the newly approved product. Rather, they asserted that production of genetically-engineered alfalfa by others created a significant likelihood of contaminating their own existing product through cross-pollination. *Id.* at 2754-2755. The plaintiff farmers submitted multiple declarations to establish that they would have to take various countermeasures to prevent such contamination, and this Court specifically relied on those declarations—and on the findings of the district court—to conclude that the plaintiff farmers had standing. *Id.* at 2755 & n.3. Here, in contrast, the petroleum-supplier petitioners do not contend that E15 would contaminate existing products that they wish to continue to sell, or that countermeasures would be necessary to prevent such contamination; and they have submitted no declarations or other specific evidence in support of their claim to standing.

4. In asserting that the court of appeals has effected a sea change in standing law, petitioners and their amici

substantially overread the decision below. If petitioners had presented evidence to the court of appeals to support their claim of standing, or had even explained more precisely and thoroughly how specific materials within the EPA's administrative record demonstrated a likelihood of injury to themselves, the court of appeals might have found that they had standing to challenge the E15 waivers. The court concluded, however, that petitioners' limited standing arguments, which were based solely on underspecified references to the administrative record, did not carry their significant burden to prove standing to challenge an agency decision that does not directly regulate them. An opportunity to relitigate that fact-bound issue in this Court would be unwarranted.[10]

---

[10] Although the merits of the EPA's waiver decisions are not before this Court, the dissenting judge was incorrect in concluding (Pet. App. 42a-45a) that the statutory scheme precludes the EPA from issuing a waiver that allows E15 to be used only in post-2000 vehicles. Section 7545(f)(1)(B) of Title 42 prohibits the sale of certain kinds of fuels for use in post-1974 vehicles. That ban would apply to the sale of a new fuel, even if the fuel were intended and sold exclusively for use in post-2000 vehicles. Section 7545(f)(4) permits the EPA to waive Section 7545(f)(1)(B)'s ban when the EPA determines that the new fuel "will not cause or contribute to a failure of any emission control device or system * * * to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified." The EPA could, and here did, decide that E15 would satisfy that condition if sold only for use in post-2000 vehicles. The agency accordingly waived the application of Section 7545(f)(1)(B) to such sales.

CONCLUSION

The petitions should be denied.

Respectfully submitted.

BRENDA MALLORY
Acting General Counsel
SUSAN STAHLE
Attorney
Environmental Protection Agency

DONALD B. VERRILLI, JR.
Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
JESSICA O'DONNELL
Attorney

MAY 2013