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

IN THE

Supreme Court of the United States

GROCERY MANUFACTURERS ASSOCIATION, ET AL.,
Petitioners,

v.

U.S. EPA AND GROWTH ENERGY, ET AL.,
Respondents.

ALLIANCE OF AUTOMOBILE MANUFACTURERS, ET AL.,
Petitioners,

v.

U.S. EPA AND GROWTH ENERGY, ET AL.,
Respondents.

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL.,
Petitioners,

v.

U.S. EPA AND GROWTH ENERGY, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION OF GROWTH ENERGY

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QUESTIONS PRESENTED

1. Did the court of appeals properly consider whether petitioners had prudential standing, where Growth Energy argued as an intervenor that they did not and where petitioners never questioned Growth Energy's right to present that argument?

2. Did the court of appeals err in applying settled doctrines of Article III and prudential standing to the facts of petitioners' case?

CORPORATE DISCLOSURE STATEMENT

Growth Energy is an Internal Revenue Code Section 501(c)(6) not-for-profit trade association of ethanol producers and supporters of the ethanol industry, organized under the laws of the District of Columbia. Growth Energy does not have a parent company, and no publicly held company has a 10% or greater ownership interest in Growth Energy.

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INTRODUCTION

In these cases, three groups of petitioners seek review of fact-bound determinations that petitioners failed to demonstrate standing to challenge EPA decisions permitting the entry into commerce of E15, a new fuel containing up to 15 percent ethanol. Petitioners do not dispute that the court of appeals identified the correct standards for Article III and prudential standing. They simply take issue with the court's application of those standards. The food industry petitioners (No. 12-1055) attempt to manufacture a legal issue worthy of review, but the question they seek to raise—whether prudential standing is a "jurisdictional" requirement—is not actually presented and was not properly raised below. The engine-products petitioners (No. 12-1167) implicitly recognize that their case-specific challenge is not one this Court ordinarily would entertain; they thus take the extraordinary step of seeking summary reversal based principally on arguments never raised before the panel below. In any event, their newly minted arguments relying on excerpts of the record taken wholly out of context cast no doubt on the correctness of the lower court's decision. Finally, the petroleum industry petitioners (No. 12-1229) challenge the court of appeals' conclusion that any injury to them from *electing* to produce E15 is either self-inflicted or traceable to the Renewable Fuel Standard, which mandates the production of specified amounts of renewable fuels. But contrary to petitioners' assertions, that conclusion—made in the unusual context of petitioners' challenge to agency *de*-regulation—conflicts with no decision of this Court and was eminently sound.

Thus, despite having filed six separate briefs challenging the D.C. Circuit's decision, petitioners have

failed to identify a single issue that merits review. The Court should deny certiorari.

STATEMENT

A. Statutory Background

The Clean Air Act provides that fuel producers may not "introduce into commerce … any fuel or fuel additive for use … in motor vehicles manufactured after model year 1974," unless the new fuel or additive is "substantially similar" to those used in federal emissions-standards certifications of such vehicles. 42 U.S.C. § 7545(f)(1)(B). This prohibition, however, is not absolute: If a producer wishes to introduce a fuel that is not "substantially similar" to those used in certification, it may seek a waiver under § 7545(f)(4). EPA will grant such a waiver upon determining that the proposed fuel or additive, or its "emission products … , 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." *Id.* § 7545(f)(4). EPA is also authorized to promulgate regulations removing fuels from commerce if they are shown to cause emissions failures. *See id.* § 7545(c)(1).

B. Agency Proceedings

Because E15 is not "substantially similar" to any certification fuel, it could not be introduced into commerce without a waiver under § 7545(f)(4). Respondent Growth Energy, an association of ethanol producers

and supporters of the ethanol industry, applied to EPA for a waiver in March 2009. Pet. App. 47a.[1]

After exhaustive review, EPA issued two decisions on Growth Energy's waiver application—one in November 2010 and one in January 2011. In the first, EPA approved the sale of E15 for use in light-duty motor vehicles of Model Year 2007 or later, while denying a waiver with respect to vehicles of Model Year 2000 and prior. Pet. App. 47a-48a. EPA deferred its decision on Model Year 2001-2006 vehicles while the Department of Energy conducted further tests. *Id.* at 48a. In the second decision, after analyzing these additional tests, EPA approved the sale of E15 for use in Model Year 2001-2006 vehicles. *Id.* at 106a.

C. Judicial Proceedings

Three industry groups petitioned for review of the waiver decisions in the D.C. Circuit: (1) manufacturers of engine products, (2) producers of food for which corn is an input, and (3) producers and handlers of petroleum and renewable fuels. Pet. App. 6a. As the successful applicant for the agency actions under review, Growth Energy moved to intervene. *See* D.C. Cir. Case No. 10-1380, Doc. No. 1281465 (Dec. 6, 2010). Petitioners did not oppose Growth Energy's motion, *id.* at 2, which the court granted, *id.*, Doc. No. 1298684 (Mar. 17, 2011).

Under the D.C. Circuit's rules, a party seeking direct review of agency action "must set forth the basis

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[1] Citations to "Pet. App." in the "Statement" section of this brief refer to the Appendix in No. 12-1055. Citations to "Pet." and "Pet. App." in the sections below refer to the Petition and Appendix filed by the petitioners whose arguments are being addressed in the respective sections.

for [its] claim of standing" in a distinct section of its opening brief. D.C. Cir. R. 28(a)(7). In addition, when the factual basis for that claim is not apparent, the party must submit affidavits or other evidence establishing standing. *Id.*; *see also Sierra Club* v. *EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002). Here, petitioners declined to offer any affidavits addressing their standing, resting instead on arguments raised in a short section of their brief. Pet. C.A. Br. 17-21. The engine-products petitioners argued that they "face[d] serious risks of liability imposed by numerous state and federal laws" because "engines may be harmed by the use of E15." *Id.* at 17-18. The petroleum petitioners argued that they would have "to expend enormous resources to blend and introduce E15 to the market." *Id.* at 19. And the food petitioners argued that the introduction of E15 would "increase[] demand for grains that produce ethanol," which would "result in a corresponding increase in grain prices." *Id.* at 20.

Although EPA did not address standing, Growth Energy devoted nearly half the argument section of its brief to challenging petitioners' Article III and prudential standing. Int. C.A. Br. 3-19. In their reply brief, petitioners addressed Growth Energy's standing challenges on the merits. Pet. C.A. Reply Br. 2-6. They did not contend that Growth Energy was precluded from raising prudential standing or that a challenge to their prudential standing had been waived.

At oral argument, Judge Kavanaugh questioned whether Growth Energy could challenge petitioners' prudential standing where EPA had not done so. In response, Growth Energy filed a post-argument letter explaining that as an intervenor it was allowed to challenge petitioners' prudential standing even if EPA did not. *See* D.C. Cir. Case No. 10-1380, Doc. No. 1369452

(Apr. 18, 2012). Petitioners did not respond to that letter.

On August 17, 2012, the court of appeals dismissed the petitions for lack of standing. Pet. App. 1a-19a.

First, the court held that the engine-products petitioners, who "provide[d] almost no support" for their arguments, failed to establish standing because they alleged only a "hypothetical chain of events" leading to potential injury: The use of E15 "'*may*' harm their engines and emission-control devices and systems," in which case "consumers *may* bring warranty and safety-related claims," and "the government *may* impose a recall of some engines or vehicles." Pet. App. 9a-10a (emphasis added).

Second, the court held that the petroleum petitioners lacked standing because the approval of E15 did "not force, require, or even encourage fuel manufacturers or any related entity to introduce the new fuel; it simply permit[ted] them to do so." Pet. App. 13a. The court concluded that any injury to petitioners would be "a 'self-inflicted harm' not fairly traceable to the challenged government conduct." *Id.* To the extent that the sale of E15 was in any sense "forced rather than voluntary," the court observed, "it would be 'forced' … not by the availability of E15 (which is the only effect of the partial waivers) but rather by the [Renewable Fuel Standard[2]], which obliges manufacturers to introduce certain volumes of renewable fuel." *Id.* at 14a.

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[2] The Renewable Fuel Standard ("RFS") requires EPA to "promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States … contains [a prescribed] volume of renewable fuel." 42 U.S.C. § 7545(o)(2)(A)(i).

Third, the court held that the food petitioners lacked prudential standing because they had not shown that their interests were "'arguably within the zone of interests to be protected or regulated by the statute … in question' or by any provision 'integral[ly] relat[ed]' to it." Pet. App. 18a (alterations in original).[3] Although the food petitioners argued that their interests are protected by one provision of the RFS (governing EPA's formulation of requirements for 2023 and beyond), the court held that this provision was not integrally related to § 7545(f)(4), the statutory provision that EPA applied in the waiver decisions under review. *Id.*

The majority opinion did not address the argument raised by Judge Kavanaugh—not by petitioners—that EPA's failure to challenge the food petitioners' prudential standing foreclosed the court from passing on that issue unless it was "jurisdictional." The majority opinion thus did not discuss whether prudential standing is jurisdictional, whether the issue had been properly raised by intervenor Growth Energy, whether petitioners had waived any challenge to Growth Energy's authority to raise the issue, or whether the issue could be considered by the court *sua sponte* even if not jurisdictional.

Judge Tatel filed a brief concurrence. He explained that he believed the food petitioners possessed Article III standing. Pet. App. 20a. He also indicated that he "agree[d] with those circuits that have held that prudential standing is non-jurisdictional," but he noted that the D.C. Circuit had "held to the contrary." *Id.*

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[3] Then-Chief Judge Sentelle would have held that the food petitioners lacked Article III standing as well. Pet. App. 17a n.1.

Judge Kavanaugh dissented. He would have held that both the food petitioners and the petroleum petitioners possessed Article III standing, Pet. App. 22a-23a; that the requirement of prudential standing was non-jurisdictional, *id.* at 27a-31a; that EPA had waived any challenge to it, *id.* at 32a; that Growth Energy could not raise the issue as an intervenor, *id.* at 32a n.5; that at any rate the food and petroleum petitioners possessed prudential standing, *id.* at 33a-42a; and that EPA's actions violated the Clean Air Act, *id.* at 42a-45a. Notably, Judge Kavanaugh did not dissent from the majority's holding that the engine-products petitioners lacked standing.

All three groups of petitioners sought rehearing by the panel and by the court en banc. At this point, petitioners for the first time embraced the dissent's position that the requirement of prudential standing is not jurisdictional and that Growth Energy lacked authority to raise prudential standing on its own. Both EPA and Growth Energy opposed the petitions for rehearing. In its response, EPA explained that "[t]he majority correctly held that the Food Petitioners lacked prudential standing" and that its "decision that the Engine Products Group and the petroleum industry petitioners … lack Article III standing adhered to longstanding and well-established legal standards." D.C. Cir. Case No. 10-1380, Doc. No. 1404249 at 7, 14-15 (Nov. 9, 2012). On January 15, 2013, the court denied the petitions for rehearing. Pet. App. 119a-122a. Judge Kavanaugh dissented from the denial of rehearing en banc. *Id.* at 123a-128a. No other judge dissented.

REASONS FOR DENYING THE PETITION

I. THE FOOD PETITIONERS PRESENT NO BASIS FOR REVIEW BY THIS COURT

A. This Case Does Not Present The Question Whether Prudential Standing Is Jurisdictional

The food petitioners (No. 12-1055) argue that the Court should grant review to resolve a split of authority regarding whether prudential standing is a jurisdictional requirement. But whether or not such a split exists, this case does not present an occasion for resolving it.

1. This case does not raise the question whether prudential standing is "jurisdictional" because intervenor Growth Energy properly challenged the food petitioners' prudential standing. Petitioners assert (at 10) that the "effect" of the court of appeals' decision was to treat prudential standing as "an unwaivable jurisdictional requirement." That assertion, however, rests on the unsupportable proposition—relegated by petitioners to a footnote (at 10-11 n.1)—that Growth Energy could not raise this issue on its own.

Intervenors typically may participate in litigation on the same terms as any other party. An intervenor before a trial court, for example, "normally has the right to appeal an adverse final judgment." *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987). By the same token, an intervenor before a court of appeals has the right "to participate in designating the record, … to file a brief, to engage in oral argument, [and] to petition for rehearing in the appellate court or to this Court for certiorari." *International Union, United Auto., Aerospace & Agric. Implement Workers of Am. AFL-CIO, Local 283* v. *Scofield*, 382

U.S. 205, 215 (1965). These "legal rights … are entitled to no less respect than the rights asserted by" the original parties. *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 765 (1989). If an intervenor can seek certiorari on its own, *see Scofield*, 382 U.S. at 214, it necessarily must be permitted to raise arguments not made by another party to the litigation.

Petitioners rely (at 10-11 n.1) on *Illinois Bell Telephone Co.* v. *FCC*, 911 F.2d 776 (D.C. Cir. 1990), but in that case, the court merely rejected an intervenor's attempt to *challenge* an element of an agency order not attacked by the petitioners. *See id.* at 785-786. The court held that an intervenor could "join issue only on a matter that has been brought before the court by another party," because "[o]therwise, the time limitations for filing a petition for review and a brief on the merits could easily be circumvented through the device of intervention." *Id.* at 786.[4]

In subsequent decisions, the D.C. Circuit confirmed that *Illinois Bell* is limited to the context of petitioner-side intervenors seeking to *challenge* an agency action on grounds not raised by the original petitioners and thus implicitly seeking to expand the time for filing a challenge. In *Village of Bensenville* v. *FAA*, 457 F.3d 52 (D.C. Cir. 2006), the court considered an argument presented by an intervenor in *defense* of an FAA action even though the agency had not raised the argument. The court noted that it was "particularly solicitous" of arguments raised by an intervenor in defense of an

[4] *Vinson* v. *Washington Gas Light Co.*, 321 U.S. 489 (1944), on which *Illinois Bell* relied for the first part of this proposition, is inapposite here. *Vinson* involved the scope of intervention before an agency, an issue governed by the agency's own rules. *Id.* at 494.

agency decision where "the intervenor's success before the agency forecloses it from petitioning for review and the issue raised logically precedes the issues in dispute between the principal parties." *Id.* at 61.

Similarly, in *Synovus Financial Corp.* v. *Board of Governors of Federal Reserve System*, 952 F.2d 426 (D.C. Cir. 1991), the court held that an intervenor who had prevailed before the Federal Reserve Board could argue on appeal that the Board had lacked jurisdiction to regulate it in the first place. Observing that the "general rule" of *Illinois Bell* was "a prudential restraint" rather than "a jurisdictional bar," the court found that case "readily … distinguishable" because: (1) "the intervenor in *Illinois Bell* was the losing party" before the agency, and (2) the issue raised by the intervenor in *Illinois Bell* was not an "'essential' predicate" to the question raised by the petition for review. *Id.* at 434; *see also United Gas Pipe Line Co.* v. *FERC*, 824 F.2d 417, 437 (5th Cir. 1987) (recognizing that "[w]ith regard to the issues raised in the petitions, intervenors may fully argue for or against the [agency's] position").[5]

Here, Growth Energy prevailed in relevant respects before the agency. It intervened before the court of appeals to defend the waivers it had obtained, not to evade the time limit for challenging them. And the prudential standing issue that it raised was a predicate to petitioners' challenges. *See Warth* v. *Seldin*, 422 U.S. 490, 517-518 (1975) ("The rules of standing," in-

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[5] *See also, e.g.*, *Core Commc'ns, Inc.* v. *FCC*, 592 F.3d 139, 146 (D.C. Cir. 2010); *AMSC Subsidiary Corp.* v. *FCC*, 216 F.3d 1154, 1161-1162 (D.C. Cir. 2000); *United States Tel. Ass'n* v. *FCC*, 188 F.3d 521, 531 (D.C. Cir. 1999); *National Ass'n of Regulatory Util. Comm'rs* v. *ICC*, 41 F.3d 721, 730 (D.C. Cir. 1994).

cluding "prudential considerations … , are threshold determinants of the propriety of judicial intervention."). Growth Energy was thus permitted to challenge petitioners' prudential standing on its own.

2. This case also does not present the question whether prudential standing is jurisdictional because petitioners failed to raise that question below. It is well established that waiver arguments can themselves be waived. *See, e.g.*, *United States* v. *Bonilla-Mungia*, 422 F.3d 316, 319 & n.1 (5th Cir. 2005) (collecting cases recognizing that waiver arguments are waived when not raised in briefs or when raised for first time at oral argument or in petition for rehearing). That is precisely what happened here.

Growth Energy challenged the food petitioners' prudential standing in its opposition brief. Petitioners responded to this argument on its merits. They did not argue that Growth Energy was foreclosed from raising the issue. Nor did they file a response to Growth Energy's post-argument letter demonstrating that it could properly raise prudential standing. *See supra* pp. 4-5.

Because petitioners did not timely argue below that Growth Energy was precluded from raising prudential standing on its own, they should not be permitted to rely on that argument here. *See, e.g.*, *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012); *United States* v. *Jones*, 132 S. Ct. 945, 954 (2012); *Sprietsma* v. *Mercury Marine*, 537 U.S. 51, 56 n.4 (2002); *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000). Petitioners suggest (in a footnote) that the Court should overlook their waiver because the court of appeals "most certainly 'passed on'" the issue. *See* Pet. 12 n.3. But as explained above, only the panel dissent thoroughly addressed whether prudential standing is

jurisdictional. The majority opinion did not discuss the issue. Judge Tatel touched on the issue in his brief concurrence, but he never addressed whether it was actually raised in this case: He did not indicate that he agreed with Judge Kavanaugh's assertion that Growth Energy could not raise prudential standing as an intervenor. Nor did he address petitioners' waiver of that argument. If petitioners are right that this issue "recur[s] at a clip arguably unlike any other," Pet. 30, the Court surely can wait for a case where the issue was properly raised and decided below.

3. Finally, whether prudential standing is "jurisdictional" is irrelevant in this case because the court of appeals was entitled to address petitioners' prudential standing on its own even if the requirement is not jurisdictional. The circuits that do not consider prudential standing to be jurisdictional have nonetheless recognized that a court may address it *sua sponte*. *See Adams ex rel. D.J.W.* v. *Astrue*, 659 F.3d 1297, 1299 (10th Cir. 2011); *City of Los Angeles* v. *County of Kern*, 581 F.3d 841, 846 (9th Cir. 2009); *Rawoof* v. *Texor Petroleum Co.*, 521 F.3d 750, 757 (7th Cir. 2008); *Main-Street Org. of Realtors* v. *Calumet City, Ill.*, 505 F.3d 742, 747 (7th Cir. 2007); *National Solid Waste Mgmt. Ass'n* v. *Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004); *Mentor H/S, Inc.* v. *Medical Device Alliance, Inc.*, 240 F.3d 1016, 1017 (Fed. Cir. 2001); *see also Mentor H/S, Inc.* v. *Medical Device Alliance, Inc.*, 244 F.3d 1365, 1373 (Fed. Cir. 2001).

This Court has strongly suggested the same. In *Tileston* v. *Ullman*, 318 U.S. 44, 46 (1943), for example, the Court *sua sponte* raised the question of third-party standing—a species of prudential standing, *see Warth*, 422 U.S. at 499-500. In another case, the Court unanimously affirmed the conclusion that the petitioner

lacked prudential standing, where the Fourth Circuit had raised that issue *sua sponte*. *See Director, Office of Workers' Comp. Programs, Dep't of Labor* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 125 (1995).

B. The Court Of Appeals Correctly Stated And Applied The Doctrine Of Prudential Standing

The food petitioners next contend (at 20-23) that the court of appeals' conclusion that they lack prudential standing conflicts with decisions of this Court. There can be no dispute, however, that the court of appeals correctly identified the applicable standard. *See* Pet. App. 18a. There is no difference between the court of appeals' articulation of the standard and this Court's formulation of it in *Ass'n of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970) (*ADAPSO*), *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388 (1987), and most recently *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199 (2012) (*Match-E*). Petitioners imply (at 20-21) that the court of appeals gave short shrift to *Match-E*, but the court expressly addressed that case and correctly held that it did not "change[] the prudential-standing standard." Pet. App. 19a; *see Match-E*, 132 S. Ct. at 2210 (quoting *ADAPSO*, 397 U.S. at 153; *Clarke*, 479 U.S. at 399-400).

Petitioners also argue that the court of appeals "failed to read the fuel-waiver provision of the statute in the context of the program of which it is a part." Pet. 21-22. But the court did account for this rule: It recognized that a party seeking to demonstrate prudential standing must show that its interest "'is arguably within the zone of interests to be protected or regulated by the statute … in question' *or* by any provision '*inte-*

gral[ly] relat[ed]' to it." Pet. App. 18a (emphasis added). The "integral relationship" language comes from this Court's decision in *Air Courier Conference of America* v. *American Postal Workers Union AFL-CIO*, 498 U.S. 517, 530 (1991), which *Match-E* does not purport to revise.

The food petitioners' only real dispute is with the panel's application of the doctrine to the facts of their case. Such a fact-bound dispute would not be worthy of certiorari even if it were well founded. *See* S. Ct. R. 10. Here, it is not worthy of a second glance. The food petitioners do not argue that their interests are within the zone protected by § 7545(f)(4), the provision that EPA applied here. That provision serves to regulate the sale of new fuels and fuel additives that could otherwise threaten to increase vehicle emissions. It applies to *any* new fuel, not just to biofuels. Nothing about § 7545(f)(4) has anything to do with corn farming. Nor do petitioners argue that their interests are generally within the zone protected or regulated by the RFS, which was added to the U.S. Code by the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1521-1528.

Instead, petitioners argue (at 22-23) that § 7545(f)(4) is "integrally related" to a single provision of the RFS: 42 U.S.C. § 7545(o)(2)(B)(ii)(VI). But that provision bears no connection to § 7545(f)(4). Moreover, this unrelated provision in the RFS will not even be relevant for another decade. The RFS requires EPA to "promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States … contains the applicable volume of renewable fuel determined in accordance with subparagraph (B)" of the relevant section. 42 U.S.C. § 7545(o)(2)(A)(i). That subparagraph, in turn, consists of a series of ta-

bles that specify the "applicable volume" of each type of "renewable fuel" (other than biomass-based diesel, not at issue here) for each year between 2006 and 2022. For years *after* 2022, the statute requires EPA to determine the required volume "based on a review of the implementation of the program during calendar years specified in the tables." *Id.* § 7545(o)(2)(B)(ii). It specifies six different factors for EPA to analyze in doing so, the last of which includes "food prices" among other economic considerations. *Id.* The food petitioners thus base their entire argument on two words in a provision that bears no plausible connection to EPA's waiver authority for new fuels and that is not even relevant until 2023.[6] The court of appeals did not err in rejecting this argument, and it certainly did not render a decision in conflict with any precedent of this Court.

II. THE ENGINE-PRODUCTS PETITIONERS PRESENT A FACT-BOUND CHALLENGE TO THE APPLICATION OF SETTLED STANDING LAW

The engine-products petitioners (No. 12-1167) also provide no basis for review of the court of appeals' fact-bound conclusion that they failed to meet their burden of establishing Article III standing. Petitioners do not contest that the court applied the correct standard. *See* Pet. App. 7a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)); *cf. Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138 (2013). Their only dispute is with the lower court's application of that standard.

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[6] To the extent that the food petitioners now seek to assert an argument based on so-called "competitor standing," *see* Pet. 23 n.6, this argument is not properly before the Court because petitioners failed to raise it below.

Such a dispute does not merit review by this Court. *See*, *e.g.*, *Kyles* v. *Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("[A]n intensely fact-specific case in which the court below unquestionably applied the correct rule of law and did not unquestionably err" in applying it is "the type of case" in which this Court is generally "*most* inclined to deny certiorari.").

In any event, the court of appeals' conclusion that the engine-products petitioners failed to demonstrate standing was entirely correct. The D.C. Circuit's rules and precedents make clear that a party challenging agency action directly in the court of appeals must set forth the basis for its standing in its opening brief and must "supplement the record to the extent necessary to explain and substantiate its entitlement to judicial review." Pet. App. 8a (internal quotation marks omitted); *see also* D.C. Cir. R. 28(a)(7). Here, the engine-products petitioners simply asserted without elaboration that emission-control devices, systems, and engines they manufacture "*may* be harmed by the use of E15" and that, as a result, they faced risks of liability and potential product recalls. *See* Pet. App. 231a (emphasis added); Pet. App. 248a.[7] The court of appeals properly concluded that petitioners' theory of standing—which depended on a "hypothetical chain of events"—was inadequate to meet their burden of establishing injury in fact traceable to EPA's waiver decisions. Pet. App. 9a-10a; *see also Clapper*, 133 S. Ct. at 1148. Indeed, it is telling that the otherwise vigorous

[7] Petitioners also claimed possible "operational performance and consumer satisfaction exposure," Pet. App. 231a, but they provided no basis for this claim and do not press it in their petition other than to reference it in a single sentence, *see* Pet. 20.

panel dissent did not dispute this conclusion by the majority. Pet. App. 23a n.1.

Petitioners now seek to raise new theories of standing, but neither those new arguments nor the "convoluted" liability and recall theories rejected by the court of appeals provide any basis to question—let alone summarily to reverse—the decision below.

1. Petitioners first argue (at 14-15) that their standing should be presumed because engine manufacturers "are objects of the … statutory regime" that EPA applied in this case. This argument fails. *Lujan* explains that "there is ordinarily little question" that a party that is the "object" of government regulation has standing but that when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." 504 U.S. at 561-562. Here, EPA's waiver decisions were not targeted at engine manufacturers and imposed no regulatory burdens on them; the waivers simply *permitted* fuel producers to introduce a new fuel into commerce. Implicitly recognizing that they are not regulated by the waivers, petitioners contend that they nonetheless should be presumed to have standing because "they are *beneficiaries* of" § 7545(f). Pet. 15 (emphasis added). But even if petitioners' unsupported claim to be the intended beneficiaries of § 7545(f) were true, it would not provide a basis to presume that they have standing. After all, the *Lujan* plaintiffs themselves were beneficiaries of the statute at issue in that case, yet the Court held them to their burden of proving injury in fact. Here, the engine manufacturers failed to carry that burden.

2. Petitioners also now argue (at 21) that the E15 "waiver decisions will require [them] to incur substan-

tial costs in determining which [car] models are at significantly higher risk of E15's corrosive effects." Petitioners did not assert this as a basis for standing below, and it therefore should not be considered here. In any event, petitioners point to no evidence in the record indicating that they have incurred or would need to incur any additional testing expense as a result of EPA's waiver decisions. Petitioners cite (at 22) EPA's statement that "vehicle durability testing is warranted," Pet. App. 116a, but the very next sentence of the waiver decision makes clear that EPA meant testing was necessary for *it* to complete *its analysis* regarding whether to grant a waiver for E15, not that manufacturers would need to test vehicles after E15 was approved. Petitioners rely on *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010), for the proposition that testing costs can establish standing, but unlike the farmers in that case, they have not presented "concrete evidence" to substantiate their asserted injury. *Clapper*, 133 S. Ct. at 1154.

3. The arguments petitioners actually raised below fare no better. Petitioners contend (at 22) that a party has standing when it "faces costs from the *risk* of litigation, meritorious or otherwise." But at a minimum, any such threat must be "genuine," *see, e.g.*, *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 129 (2007), and petitioners have shown no genuine threat here. They claim (at 22) that "automobile manufacturers face substantial liability under their warranties." But they have conceded that their vehicles are not warranted to use E15. *See, e.g.*, Pet. App. 231a ("None of the current vehicles … were … warranted to use ethanol blends greater than E10."). The newspaper article on which petitioners now rely (at 10)—which appears nowhere in the record—makes the same point: "BMW,

Chrysler, Nissan, Toyota and VW have said their warranties will not cover fuel-related claims caused by E15. Ford, Honda, Kia, Mercedes-Benz and Volvo have said E15 use will void warranties[.]" Strauss, *AAA Warns E15 Gasoline Could Cause Car Damage*, USA Today, Nov. 30, 2012.[8] As a result, warranty-based liability for E15 use in such vehicles is foreclosed. *See* 42 U.S.C. § 7541(b)(2)(A) (vehicle or engine must be maintained and operated in accordance with manufacturer's instructions to be eligible for warranty); 40 C.F.R. § 85.2104(a) ("An emission performance warranty claim may be denied on the basis of noncompliance by a vehicle owner with the written instructions for proper maintenance and use.").

Petitioners also claim (at 23) that they face a "substantial risk of … a massive recall of millions of post-MY2001 vehicles" under a regulation requiring automakers to report *safety-related* defects to the National Highway Traffic Safety Administration, 49 C.F.R. § 573.6. But petitioners have provided no evidence that automakers have reported, or intend to report, safety-related defects involving E15. Nor do they provide *any* support—in the record or otherwise—for their bald assertion (at 23-24) that "E15 will harm nearly all engines in numerous ways that directly affect safety, from extremely hot exhaust emissions to corroding fuel pumps."

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[8] At least two automobile manufacturers—Ford and General Motors—have approved E15 for use in 2013-model cars. *See* Schill, *GM, Ford Announce E15 Compatibility with New Models*, Ethanol Producer Magazine, Oct. 9, 2012. Petitioners do not contend that use of E15 in those cars will cause engine damage.

Petitioners also now profess fear of "[p]ersonal injury lawsuits," which they note (at 23) "are unaffected by warranty terms or limitations." But, once again, petitioners did not raise this contention below. Moreover, they point to no factual basis in the record to support the extraordinary claim that the use of E15 might injure anyone, much less that car manufacturers could conceivably be held liable for any such injuries.

4. There is also no support for the predicate for petitioners' liability claims—their assertion that use of E15 in vehicles for which EPA approved it will harm engines or cause emissions systems to fail.[9] In granting the waivers, EPA determined that allowing use of E15 in Model Year 2001 and newer light-duty vehicles would *not* cause or contribute to the failure of emission control devices or systems to achieve compliance with applicable emissions standards. *See* Pet. App. 50a-51a; 158a-163a. Petitioners provide no basis to question that determination. As the court of appeals explained, petitioners previously relied almost exclusively on limited internal testing by Mercedes-Benz purporting to find only "potential vehicle damage." Pet. App. 10a; *see also* Pet. App. 232a. Petitioners now change course and fault the court of appeals for failing to piece together evidence of their standing from other portions of the record that they failed to identify below. But even that exercise would have been in vain: Petitioners' arguments rest on snippets of the record taken out of con-

[9] Petitioners largely eschew any claim to standing arising from misfueling of E15 in vehicles for which it is not approved. Indeed, it is hard to fathom how engine manufacturers could be held liable for any harm caused by customers' improper use—in defiance of legally-mandated warnings—of a fuel not authorized for their engines.

text that do not, in fact, demonstrate a substantial risk of damage to engines.[10]

For example, petitioners incorrectly claim (at 11-12) that "EPA admitted that up to 20% of MY2006 vehicles and 40% of MY2005 vehicles would not contain systems that can withstand E15." *See also* Pet. 21. But what EPA actually said was merely that "more than 60% of MY2005, and more than 80% of MY2006, light-duty motor vehicles are certified *as complying with Tier 2 standards*." Pet. App. 167a (emphasis added). EPA did not conclude that non-Tier 2 vehicles would be harmed by E15; to the contrary, its second waiver decision thoroughly analyzed the effect of E15 on such vehicles and concluded that they would not be harmed.

Petitioners refer to studies regarding catalyst deterioration cited in their comments to EPA, *see* Pet. 16 (citing Pet. App. 75a[11]), and then quote (at 17) a portion of EPA's waiver decision noting "legitimate concerns" about catalyst deterioration. But, again, that was not EPA's conclusion: In the portion of EPA's decision containing its final analysis, EPA explained that the results of the Department of Energy's Catalyst Study "support[ed] the conclusion that E15 does *not* cause Tier 2 motor vehicles to exceed their exhaust emission standards over their useful life." 75 Fed. Reg. 68,094, 68,108 (Nov. 4, 2010) (emphasis added). And in its second waiver decision, EPA said the same thing with

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[10] The engine-products petitioners argued below that EPA's determinations could not be the basis for denying their standing. Here, however, petitioners themselves attempt to rely on EPA's determinations to demonstrate their standing. *See* Pet. 11-12, 17.

[11] The relevant quotation is actually on page 74a.

respect to pre-Tier 2 vehicles.[12] *See* 76 Fed. Reg. 4,662, 4,669 (Jan. 26, 2011).[13]

Similarly, petitioners incorrectly suggest that EPA concluded that the E15 waivers would cause vehicles to violate emissions standards by emitting too much NO_x. *See* Pet. 17.[14] In fact, EPA found that any rise in NO_x output would *not* cause newer (Tier 2-compliant) vehicles to exceed emissions standards. *See* Pet. App. 96a-97a. And it found "compelling support for the conclusion that the long-term use of E15 will not cause or contribute to MY2001-2006 light-duty motor vehicles exceeding their exhaust emission standards." Pet. App. 171a. In the course of making their NO_x argument, petitioners conflate EPA's analysis of *exhaust* emissions (including NO_x emissions) with its analysis of *evaporative* emissions. Pet. 17. But these are two separate issues: NO_x emissions result from combustion, not evaporation. *Compare* 76 Fed. Reg. at 4,666-4,673 (discussing exhaust emissions, including NO_x), *with id.* at 4,673-4,681 (discussing evaporative emissions). Moreover, EPA did not indicate that use of E15 "*will*" cause vehicles to exceed evaporative emissions standards. Pet. 17 (quoting Pet. App. 173a[15]) (emphasis added). To the contrary, it concluded that "the large majority of

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[12] "Tier 2 vehicles are those that meet the heightened emissions standards promulgated by EPA in 2000." Pet. App. 236a n.10. The Tier 2 standards were phased in beginning in 2004.

[13] These portions of the waiver decisions are not contained in the Appendix.

[14] Petitioners cite pages 89a and 97, but the quotes appear on pages 87a and 96a.

[15] The petition incorrectly cites Pet. App. 176a.

MY2001-2006 vehicle models have compliance margins adequate to meet their evaporative emissions standard when operated on E15," Pet. App. 175a, and indicated merely that "there *may* be some vehicles in the fleet with smaller compliance margins such that the impact of permeation *could* increase their total evaporative emissions beyond the standard to which they were certified," Pet. App. 173a (emphasis added). EPA expressed this uncertainty not because it believed that any vehicles actually would exceed standards but simply because the relevant testing had not included every type of vehicle. *See id.*

Petitioners also argue (at 17) that "E15's corrosive effects cause what EPA describes as 'materials compatibility issues.'"[16] In fact, EPA found no evidence to substantiate the likelihood of a materials compatibility problem. In the first waiver decision, it stated "that the durability testing performed by DOE … is sufficient to provide assurance that MY2007 and newer motor vehicles will not exhibit any serious materials incompatibility problems with E15." Pet. App. 116a. And in its second waiver decision, EPA concluded that it did "not expect that there will be materials compatibility issues with E15 that would cause MY2001-2006 light-duty motor vehicles to exceed their evaporative emission standards over their [full useful life]." *Id.* at 179a.[17]

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[16] Petitioners contend (at 18) that they raised this alleged harm in their briefing below. They did not. *See* Pet. App. 231a, 247a-248a (cited pages of petitioners' brief).

[17] Petitioners suggest (at 25 n.10) that the Court hold this case for a decision in *United States Forest Service* v. *Pacific Rivers*

III. THE COURT OF APPEALS' DETERMINATION THAT THE PETROLEUM PETITIONERS LACK ARTICLE III STANDING DOES NOT WARRANT REVIEW

Finally, the petroleum petitioners (No. 12-1229) and the American Petroleum Institute ("API"), a petitioner in No. 12-1055, argue that the court of appeals' conclusion that they lack Article III standing conflicts with decisions of this Court. But as explained below, the court of appeals' conclusions that any injury to petitioners was self-inflicted or at most traceable to the RFS are entirely consistent with this Court's precedents.

A. Petitioners Failed To Show Injury Traceable To The Waivers Rather Than The RFS

Petitioners argue that the E15 waivers effectively compelled them to sell E15 and that the court of appeals' conclusion that any injury to them was traceable to the RFS conflicts with decisions of this Court. Petitioners' argument is unworthy of review for multiple reasons.

1. The court of appeals was correct to conclude that any injury to the petroleum petitioners would arise from the RFS mandate rather than from the E15 waivers under review. As petitioners themselves acknowledge (at 11 n.6), it is the RFS that obligates them to meet certain renewable fuel targets, purchase "Renewable Identification Numbers," or "face the possibility of civil penalties." These obligations existed before EPA granted the E15 waivers, and they remain after issuance of the waivers. The E15 waivers simply

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Council, No. 12-623, but they provide no reason to believe a decision in that case will impact this factually distinct case.

give petitioners another option for attempting to meet their RFS obligations—they remove a regulatory *prohibition*.

Petitioners' argument turns on the wholly speculative assumption that EPA would have waived petitioners' RFS obligations if it had not authorized the sale of E15. *See* Pet. 21. But petitioners offer no support for the contention that *relief* from a regulatory burden can give rise to standing on the ground that a party might be able to obtain a discretionary waiver of a separate regulatory obligation if it were sufficiently burdened. Moreover, petitioners themselves argue (at 27) that it is wholly speculative whether EPA would grant a waiver of the RFS requirements in any given situation.[18] Petitioners cannot establish standing on the basis of pure speculation that without the E15 waivers, EPA would have declined to enforce the RFS mandate.

2. There is also no basis to review the court of appeals' conclusion that petitioners "have not established that refiners and importers will indeed have to introduce E15 to meet their volume requirements under the RFS." Pet. App. 14a. This case-specific question would not warrant review in any event. But here, petitioners present no reason to doubt the court of appeals' conclu-

[18] Indeed, EPA has interpreted the waiver provision of the RFS, 42 U.S.C. § 7545(o)(7), narrowly and cast doubt on whether concerns about the E10 "blendwall" can support a waiver. *See* 77 Fed. Reg. 70,752, 70,773 (Nov. 27, 2012) ("Stakeholders in the refining sector have been aware of the E10 blendwall since … December of 2007."); *id.* ("[I]f obligated parties choose to achieve their required RFS volumes using ethanol they should work with their partners in the vehicle and fuel market to overcome any market limitations on increasing the volume of ethanol that is used.").

sion. Indeed, they do not even address it—incorrectly contending (at 13) that the majority "acknowledged that, as a result of the partial waivers, the petitioners' members would have to produce and handle E15."

Petitioners' only sources of support for the contention that they will be *compelled* to produce E15 are (1) their own comments before EPA, *see* Pet. 11 (citing C.A.J.A. 227-228, 575-577); and (2) predictions by Growth Energy in its 2009 waiver applications about the ethanol "blendwall," *see* Pet. 10. But petitioners acknowledge that as of 2010, EPA estimated that the blendwall would not be hit until 2014. *See* Pet. 9. And the more recent EPA rulemaking notice that petitioners cite confirms that "there would be no dependence on significant volumes of E15–E85 in 2013" and indicates merely that "the situation *could* be different" in 2014. *See* 78 Fed. Reg. 9,282, 9,301 (Feb. 7, 2013) (cited in Pet. 9 n.4) (emphasis added).

Nor do petitioners demonstrate that the court of appeals erred when it concluded that they "provided no reason why they could not instead use a different type of fuel to meet [their RFS] obligations." Pet. App. 14a-15a. As petitioners themselves note, E85 (a gasoline-ethanol blend containing 85% ethanol) is a currently available renewable fuel. *See* Pet. 9 n.4 (quoting EPA notice). Petitioners assert in a footnote that E85 "does not provide a *viable* RFS compliance option." Pet. 12 n.7 (emphasis added). But they cite no record evidence to support this assertion.

Moreover, as the court of appeals explained, "refiners and importers may only use a capped amount of corn-based ethanol to meet their RFS obligations, and they are already nearing that cap." Pet. App. 14a. The cap is 13.8 billion gallons in 2013, and it will not rise be-

yond 15 billion. *See* Schnepf & Yacobucci, Cong. Research Serv., *Renewable Fuel Standard (RFS): Overview and Issues* 4 (Mar. 14, 2013) (hereinafter "CRS Report"). Those numbers are only barely above current levels of ethanol use: In 2012, 13.3 billion gallons of ethanol were produced and 12.9 billion consumed in the United States. *See* U.S. Energy Information Administration, *March 2013 Monthly Energy Review* tbl. 10.3. The introduction of additional corn-based ethanol will thus soon no longer even be an option for compliance with the RFS.

3. This case is thus nothing like *Clinton* v. *City of New York*, 524 U.S. 417 (1998), in which the Court held that the City of New York and various healthcare providers had standing to challenge the Line Item Veto Act because "New York law [would] *automatically* require that [they] reimburse the State" if the President were to exercise the veto and reimpose the State's liability. *Id.* at 431 n.19 (emphasis added). Whereas the plaintiffs' obligations in *City of New York* flowed unambiguously from the challenged action, as explained above, there is no comparable connection here between the E15 waivers and the injury petitioners claim.

Petitioners also cite (at 18) *Bennett* v. *Spear*, 520 U.S. 154 (1997), and *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59 (1978). But in both cases, the agency actions under review caused the plaintiffs' injuries in a vastly more direct manner than petitioners allege here. In *Bennett*, the plaintiffs challenged a biological opinion issued under the Endangered Species Act that did not itself cause the injury that plaintiffs feared (a regulation of water levels in certain reservoirs) but "ha[d] a powerful coercive effect on the agency action." 520 U.S. at 169. Similarly, in *Duke Power*, the statute at issue provided strong eco-

nomic incentives for the construction of nuclear power plants that would be the ultimate causes of the plaintiffs' alleged injuries. Here, by contrast, the E15 waivers have *no* place in the causal chain of the injuries that petitioners allege.

Petitioners argue (at 20-21) that when an agency is applying a given statutory provision, any resulting injury must be traceable to the agency action itself as well as to the underlying provision. But that contention is entirely beside the point. In adjudicating Growth Energy's application for a waiver under § 7545(f)(4), EPA was not considering whether to "maintain" or "lower[]" the RFS requirements; it was not applying the RFS at all.

Nor is this case like *Massachusetts* v. *EPA*, 549 U.S. 497 (2007), cited by API. In that case, the Court rejected the argument that "a small incremental step, because it is incremental, can never be attacked in a federal judicial forum." *Id.* at 524. But the reason that petitioners lack standing to challenge the E15 waiver is not that EPA's action is "small" or "incremental" but that it imposes no legal burden on them at all and, indeed, *removes* a regulatory burden.

B. Petitioners' Self-Inflicted Harm Does Not Give Rise To Standing

Petitioners also argue that the court of appeals' conclusion that "self-inflicted" harm does not give rise to standing conflicts with decisions of this Court. *See* Pet. (No. 12-1229) 22-26; Pet. (No. 12-1055) 26-28. But the contention that a deregulated party is injured by being given the opportunity to produce a previously restricted product finds no support in any decision of this Court.

1. The court of appeals correctly held that the petroleum petitioners lack standing because any costs incurred by electing to sell E15 would constitute "self-inflicted" harm. Pet. App. 13a. As the court of appeals explained, the approval of E15 "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." *Id.* Petitioners' choice to incur costs, so as to be able to sell E15, cannot support standing. *See, e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 228 (2003) (candidates lacked standing to challenge statute increasing contribution limit where their "alleged inability to compete stem[med] not from the operation of [the statute], but from their own personal 'wish' not to solicit or accept large contributions"), *overruled in part on other grounds by Citizens United* v. *FEC*, 558 U.S. 310 (2010); *Pennsylvania* v. *New Jersey*, 426 U.S. 660, 664 (1976) (plaintiff States lacked standing to challenge defendant States' taxation of income earned by nonresident employees, where the injury to plaintiff States was "self-inflicted" by the decision to offer credits for taxes paid to other states).

2. The petroleum petitioners argue that the court of appeals' decision conflicts with decisions of this Court recognizing standing where agency action "change[s] the market landscape." *See* Pet. 22-24. Petitioners, however, cannot invoke the doctrine of competitor standing in support of certiorari because they waived this argument before the court of appeals. They did not raise competitor standing in their opening brief. Moreover, Growth Energy noted in its opposition brief that petitioners were not relying on competitor standing, Int. C.A. Br. 17, and, in reply, petitioners neither disputed that statement nor attempted to raise the issue even at that late stage.

In any event, the argument fails on its own terms. In the decisions of this Court on which petitioners rely, the party bringing suit was injured when an agency lifted some restriction on its competitors. *See ADAPSO*, 397 U.S. 150 (providers of data processing services challenged agency ruling that national banks could offer such services); *Clarke*, 479 U.S. 388 (securities brokers challenged agency ruling that national banks could open discount brokerage offices); *Investment Co. Inst.* v. *Camp*, 401 U.S. 617 (1971) (mutual fund companies challenged agency ruling that national bank could operate mutual fund).

Here, in contrast, EPA did not deregulate petitioners' competitors; it deregulated petitioners *themselves*. Petitioners assert that "EPA's waiver decisions authorize [their] competitors in the transportation fuel industry to gain market share by using E15." Pet. 23. But as petitioners assert throughout their brief, *they* are the ones who allegedly will produce and distribute E15 (if they find it economically advantageous to do so). Petitioners do not cite any decision of this Court finding standing under a theory that a party has been injured by being permitted to take some action.

Petitioners, moreover, have failed to make the factual showing necessary to substantiate any injury from being allowed to produce E15. In *ADAPSO*, the petitioners' extensive factual showing left "no doubt but that" they suffered an "injury in fact" traceable to the agency action under review. 397 U.S. at 152. The Court thus dealt with the question of Article III standing only in passing, before moving on to prudential

standing.[19] Petitioners, in contrast, offer only vague and unsubstantiated concerns that they will be worse off financially if they are *permitted* to produce E15.

API argues that the court of appeals' decision conflicts with *Monsanto*, 130 S. Ct. 2743. Pet. (No. 12-1055) 26. But *Monsanto* presented a different situation. There, the Court held that conventional and organic alfalfa farmers had standing to challenge the deregulation of a type of genetically engineered alfalfa because "to continue marketing their product to consumers who wish to buy non-genetically-engineered alfalfa, [the farmers] would have to conduct testing to find out whether and to what extent their crops ha[d] been contaminated" by the genetically engineered variant and would have to take steps to avoid such contamination. 130 S. Ct. at 2755. The challenge was not brought by farmers complaining that they had been given the option to sell genetically engineered alfalfa. It was brought by farmers who did not want to sell genetically engineered alfalfa and would incur costs to avoid (and to monitor for) contamination of their crops. Moreover, unlike here, the plaintiffs in *Monsanto* substantiated their injuries with "concrete evidence." *See Clapper*, 133 S. Ct. at 1154.

IV. THESE CASES DO NOT PRESENT IMPORTANT QUESTIONS OF LAW

Contrary to petitioners' assertions, there is no pressing need for this Court to grant review. For the reasons explained above, any arguably important legal questions raised in the petitions are not actually pre-

[19] *Clarke* and *Investment Company Institute* both involved straightforward applications of *ADAPSO*'s holding on prudential standing, with no Article III implications. *Sierra Club* v. *Morton*, 405 U.S. 727 (1972), did not involve competitor standing at all.

sented in this case. The legal questions actually presented are fact-bound and would have little application beyond the particular circumstances here. The petitioners' professed fear of "arbitrary official encroachment on private rights" as a result of the D.C. Circuit's standing determinations (Pet (No. 12-1055) 33 (internal quotation marks omitted)) rings decidedly hollow in these challenges to EPA's *deregulatory* actions that merely *permit* a new product to be sold.

Moreover, as demonstrated above, any cognizable harm to petitioners is entirely speculative. The petroleum petitioners have not established that the E15 waivers have required them to produce E15. Ford and General Motors have approved use of E15 in new cars, *see supra* p. 19 n.8, and, as explained above, there is no evidence that use of E15 in vehicles for which it was approved by EPA will damage engines. Moreover, if petitioners' unsupported predictions that E15 will cause vehicles to exceed their emissions standards actually come to pass, EPA is fully authorized to take action. Under § 7545(c), it can by regulation foreclose further use of E15 at any appropriate time. *See supra* p. 2.

Finally, although the merits of EPA's waiver decisions are not before the Court, this is not a case where petitioners' lack of standing has left in place an erroneous ruling. Section 7545(f)(4) allows EPA to grant a waiver if a 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 E15 waivers at issue here are fully consistent with that provision: They allow E15 to be used only in vehicles and engines that EPA has determined will not fail to achieve compliance with emissions standards if they use that fuel. E15 is not permitted to

be used in vehicles and engines for which there has been no such determination. As a result, EPA reasonably concluded that E15 will not cause or contribute to a failure of any emission control devices or systems. Under *Chevron*, nothing more is required.[20]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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[20] Nor do provisions allowing for waivers "in part" indicate that partial waivers under § 7545(f)(4) are not permitted. Indeed, where Congress intends to foreclose partial waivers, it knows how to do so. *See* 42 U.S.C. § 7545(m)(3)(C)(ii) (prohibiting partial waivers of oxygenation requirement).