Nos. 12-1055 and 12-1167

In the Supreme Court of the United States

GROCERY MANUFACTURERS ASSOCIATION *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondents.

ALLIANCE OF AUTOMOBILE MANUFACTURERS *et al.*,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA *ET AL.* AS *AMICI CURIAE* SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the nation's largest business federation. It directly represents three hundred thousand members and indirectly represents the interests of over three million companies and professional organizations of every size, in every sector, and from every region of the country. The Chamber regularly represents the interests of its members by filing *amicus* briefs and directly intervening in cases implicating issues of concern to American business.

The National Association of Home Builders ("NAHB") is a trade association with the mission of enhancing the climate for housing and the building industry. About one-third of NAHB's one hundred forty thousand members are home builders or remodelers, and its builder members construct about eighty percent of the new homes built each year in the United States.

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[1] This brief supports two related petitions for a writ of certiorari: one by the Grocery Manufacturers Association and others docketed as No. 12-1055 ("GMA Pet."), and another by the Alliance of Automobile Manufacturers and others docketed as No. 12-1167 ("AAM Pet.").

On March 14, 2013, *amici curiae* informed counsel of record for all parties in No. 12-1055 of their intent to file this brief. *See* S. Ct. R. 37.2(a). *Amici* provided similar notices to the parties in No. 12-1167 on March 26. *See id.* As demonstrated by the letters accompanying this brief, all parties consented to its filing. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. *See id.* R. 37.6.

The remaining members are associates working in closely related fields within the housing industry, such as mortgage finance and building products and services.

The National Automobile Dealers Association ("NADA") is a trade organization, the members of which hold franchises to sell at retail new cars and trucks (and related goods and services) as authorized dealers of the various motor vehicle manufacturers and distributors doing business in the United States. Nearly sixteen thousand new car and truck dealers—with almost thirty-two thousand separate franchises—in the United States are members of NADA, representing approximately ninety percent of the new motor vehicle dealer industry.

The National Federation of Independent Business ("NFIB") is the nation's leading small business association. Its mission is to promote and protect the rights of its members to own, operate, and grow their businesses. NFIB represents three hundred fifty thousand businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. The typical NFIB member employs ten people and reports gross sales of approximately $500,000 per year.

Business Roundtable ("BRT") is an association of chief executive officers of leading U.S. companies. Together, those companies have over 7.3 trillion dollars in annual revenues and nearly sixteen million employees. The BRT's members believe that the U.S. economy would be healthier and the public interest would be served better if the business sector is able to play an

active and effective role in the formation of public and regulatory policy.

Amici's members are directly affected by the rules and regulations promulgated by federal agencies. Accordingly, *amici* have an interest in ensuring that agency action receives appropriate judicial review.

SUMMARY OF THE ARGUMENT

I. The lower court's decision on Article III standing threatens to erode effective judicial review of administrative agencies in the D.C. Circuit. Because the D.C. Circuit has exclusive jurisdiction over many agency appeals, and is the preferred court for resolution of many cases appealed from agencies to the federal courts of appeals, review of improper constraints on Article III is of critical importance to the business community. Further, the lower court's decision warrants review because it is internally inconsistent and departs from precedent.

II. The lower court's decision on prudential standing provides an opportunity for this Court to resolve a conflict among the circuits about whether prudential standing is jurisdictional, and to clarify the appropriate scope and use of prudential standing.

ARGUMENT

The presumption of judicial review serves as a critical check on the power of administrative agencies. This check is especially important in this era of pervasive regulatory action affecting a broad range and number of business activities. Because it decides a large portion of federal administrative appeals, and has exclusive jurisdiction to hear many of them, the United States Court of Appeals for the D.C. Circuit "is a court

of special importance for administrative law,"[2] and is "sometimes called the nation's 'administrative law court.' "[3]

The D.C. Circuit's decision in this case places severe limits on effective judicial review of agency action. The decision does so by denying standing to three industry groups directly impacted by an Environmental Protection Agency rulemaking that will affect tens of billions of gallons of gasoline sold and used in the United States every year. *Amici* take no position on the merits of EPA's decision and discuss the impact of the rules on various entities only for the purpose of addressing the standing issue.

The need for review by this Court is amply shown by the fragmented decision itself—one judge found no Article III standing for any group, one judge found Article III standing but not prudential standing for one of the groups, and one judge found Article III and prudential standing for at least two of the three groups. Because D.C. Circuit review of agency action is critical to the American business community, the Chamber, NAHB, NADA, NFIB, and BRT strongly urge the Court to grant the petitions in Nos. 12-1055 and 12-1167.

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[2] Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1310 (1975).

[3] Susan Low Bloch & Ruth Bader Ginsberg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 Geo. L.J. 549, 575 (2002).

I. THE D.C. CIRCUIT'S RULING ON ARTICLE III STANDING THREATENS TO ERODE EFFECTIVE JUDICIAL REVIEW OF AGENCY REGULATORY ACTION.

A. Effective Agency Review in the D.C. Circuit Is Critical.

Long ago this Court observed that "the Administrative Procedure Act . . . embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.' 5 U.S.C. § 702." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *see also Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (recognizing "presumption in favor of judicial review" unless congressional intent to preclude review is "fairly discernible in the statutory scheme" (internal quotation marks omitted)). Judicial review to redress a grievance already suffered is critically important to assure fairness and regularity. Moreover, the very prospect of meaningful judicial review has a salutary effect on administrative agencies, encouraging them to follow proper procedures, carefully review the facts, and employ sound judgment in promulgating and enforcing their many rules and regulations. *See, e.g.*, *Bowen v. Massachusetts*, 487 U.S. 879, 908 n.46 (1988) (judicial review constrains the exercise of discretionary power by administrative agencies and promotes fidelity to statutory requirements).[4] As the regulatory apparatus becomes larger

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[4] *See also, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (requiring agencies to justify their choices and support their policy decisions (continued...)

and more active, the importance of judicial review increases.

For a broad range of agency regulatory actions, the right of review is vested by statute in the courts of appeals.[5] For a narrower but very important range of agency actions, including EPA's action at issue here, review is vested exclusively in the D.C. Circuit.[6] In

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[4](...continued)
with reliable data and on the public record); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 950 (1988) ("[C]ompelling normative and doctrinal arguments require the reviewability of at least some issues decided by legislative courts and administrative agencies.").

[5] *See, e.g.*, National Labor Relations Act § 10(f), 29 U.S.C. § 160(f) (2006); Natural Gas Act § 19(b), 15 U.S.C. § 717r(b) (2006); 49 U.S.C. § 46110(a) (2006) (review of FAA); Federal Credit Union Act § 206(j)(2), 12 U.S.C. § 1786(j)(2) (2006); Securities Act of 1933 § 9(a), 15 U.S.C. § 77i(a) (2006); Securities Exchange Act of 1934 § 25(a)(1), 15 U.S.C. § 78y(a)(1) (2006); Federal Food, Drug, and Cosmetic Act § 505(h), 21 U.S.C. § 355(h) (2006); Occupational Safety and Health Act of 1970 § 11(a), 29 U.S.C. § 660(a) (2006); 49 U.S.C. § 1153(a) (2006) (review of NTSB).

[6] Clean Air Act § 307(b)(1), 42 U.S.C. § 7607(b)(1) (2006); *see also, e.g.*, Solid Waste Disposal § 7006(a)(1), 42 U.S.C. § 6976(a)(1) (2006); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 113(a), 42 U.S.C. § 9613(a) (2006); Oil Pollution Act of 1990 § 1017(a), 33 U.S.C. § 2717(a) (2006); Safe Drinking Water Act § 48(a)(1), 42 U.S.C. § 300j-7(a)(1) (2006); Endangered Species Act of 1973 § 7(n), 16 U.S.C. § 1536(n) (2006); Surface Mining Control and Reclamation Act of 1977 § 526(a), 30 U.S.C. § 1276(a) (2006). Section 2 of the Administrative Orders Review Act of 1950 (also known as the Hobbs Administrative Orders Review Act), either directly or by cross reference to the agency's statutes also confers exclusive jurisdiction of challenges (continued...)

these highly important administrative law cases, whether review is vested in the courts of appeals generally or in the D.C. Circuit in particular, an aggrieved party is guaranteed only one level of review, with only the thinnest prospect of discretionary review by this Court.

The D.C. Circuit decides more administrative cases than any other circuit. GMA Pet. 30 & n.8 (citing federal judicial data). About one-third of the D.C. Circuit's appeals are from agency decisions, compared to less than twenty percent in the other circuits. John G. Roberts, Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 Va. L. Rev. 375, 376–77 (2006). Unsurprisingly, even when not required to do so, many litigants prefer to tap the D.C. Circuit's expertise and take advantage of its more developed body of administrative law. Roberts, *supra*, at 389; Friendly, *supra*, at 1310–11.

The high threshold for Article III standing erected by the lower court in this case is of grave concern to the business community because businesses in recent years have confronted a higher threshold for standing than consumer and environmental groups. Between FY1995 and FY2010, of the cases in which EPA was the lead agency, the largest category of lead plaintiffs (25%)

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[6](...continued)
to certain orders to the D.C. Circuit specifically, including orders of the Federal Communications Commission, U.S. Department of Agriculture, Federal Maritime Commission, Atomic Energy Commission, and the Surface Transportation Board. *See* 28 U.S.C. § 2342 (2006).

were business challengers like *amici*.[7] Yet, a recent analysis of 1,935 environmental decisions between 1976 and 2009 found that businesses and trade associations were far more likely to be denied standing than environmental groups.[8] If business entities face higher hurdles to obtain review than consumer and environmental groups, it takes little imagination to predict that agencies will employ their discretion to favor those with greater perceived access to the courts. Unless reviewed and corrected by this Court, the D.C. Circuit's decision will constrain review of all administrative actions brought in the D.C. Circuit, including those cases over which the D.C. Circuit has exclusive jurisdiction.

Further, the D.C. Circuit is influential among other courts of appeals. Because the D.C. Circuit "handles the vast majority of significant rulemaking appeals," it "has been the leader" among the circuits in developing rules and procedures governing those appeals, including rules and procedures used to determine standing. *See* Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 348 (1978); *see also* Patricia M. Wald, *The Distinctive Contribution of the D.C. Circuit to Administrative Law*, *in* 40 Admin. L. Rev. 507, 508–14 (1988) (noting the prominence of the D.C. Circuit in the field

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[7] U.S. Gov't Accountability Off., GAO-11-650, *Environmental Litigation: Cases against EPA and Associated Costs over Time* 16–17 (2011).

[8] Christopher Warshaw & Gregory E. Wannier, *Business as Usual? Analyzing the Development of Environmental Standing Doctrine Since 1976*, 5 Harv. L. & Pol'y Rev. 289, 300–02, 313 (2011).

of administrative law). Indeed, "[t]he D.C. Circuit—more than any other court of appeals—has influenced the nature of judicial review of agency decisions." Bloch & Ginsberg, *supra*, at 575. Thus, the decision below will directly affect the availability of judicial review in "the vast majority of significant rulemaking appeals." Scalia, *supra*, at 348. And even though five sister circuits have adopted a different view of prudential standing (*see* Part II.A below), the D.C. Circuit's decision on Article III standing in this case has great potential to influence other circuits on constitutional standing. Review of the Article III standing ruling is critical.

B. The D.C. Circuit's Ruling on Article III Standing Raises Issues of National Concern.

The D.C. Circuit's analysis of Article III standing cries out for review. None of the judges agreed on the rationale. And Judge Kavanaugh issued a compelling dissent.

1. The Lower Court Decision Dramatically Restricts Article III Standing for Businesses.

This Court recently summarized the requirements for Article III standing: "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2752 (2010). The relief requested by petitioners—vacatur of the E15 waiver—would redress their grievances about E15, so redressability is not seriously in dispute in this case.

Two judges below correctly concluded that the food group has Article III standing to challenge the E15 waiver. GMA Pet. App. 20a (Tatel, J.); *id.* at 24a–26a (Kavanaugh, J.). As Judge Kavanaugh explained, the E15 waiver will allow an additional seven billion gallons of ethanol into the United States gasoline supply, resulting in higher corn prices and directly impacting purchasers and users of corn in the food group. GMA Pet. App. 25a. He also noted that the food group has competitor standing. *Id.* at 25a–26a. Although Chief Judge Sentelle disagreed, he set forth no rationale for denying the food group Article III standing. *Id.* at 17a n.1.

But the court's denial of Article III standing to the petroleum group and the engine manufacturers group will, unless corrected by this Court, prove highly detrimental to future business litigants and, therefore, to the effective judicial review of agency action. The lower court rejected the petroleum group's standing because the E15 waiver gave the group "the option to introduce a new fuel," *id*. at 13a, reasoning that they are "forced" to use E15 only "by the [Renewable Fuel Standard ("RFS")], which obliges manufacturers to introduce certain volumes of renewable fuel," *id.* at 14a.[9] To the degree petroleum refiners and importers use E15 because of cost, that is "a choice . . . grounded in economics," not by the RFS or the waiver. *Id.* at 15a. The court suggested that the petroleum group might petition the Administrator "to waive the RFS." *Id.* The

[9] The lower court further noted that "refiners and importers may use only a capped amount of corn-based ethanol to meet their RFS obligations, and they are already nearing that cap." *Id.* at 14a. No evidence suggests the petroleum group has *reached* the cap.

downstream parties also face only "economic" pressure to accommodate E15, and again their injury derives from "the RFS, competitive pressures, or some combination thereof." *Id.* at 17a.

The lower court decision threatens a fundamental change in the law of Article III standing. The E15 waiver causes direct injury to the petroleum group because it will be required by the RFS to expend substantial resources mixing, transporting, and distributing E15 in gasoline. The waiver applicant itself "specifically argued to EPA that the E15 waiver was 'necessary' for petroleum producers to the meet the renewable fuel mandate." *Id.* at 127a. This Court has held that standing must be analyzed based on the entire statutory and regulatory context, not the new regulation taken in isolation. *See Clarke*, 479 U.S. at 401 (criticizing agency for focusing "too narrowly on" a specific provision and "not adequately" placing the provision "in the overall context" of the regulatory framework); *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (rejecting "the erroneous assumption that a small incremental step . . . can never be attacked in a federal judicial forum"); *Clinton v. City of New York*, 524 U.S. 417, 431 (1998) (the challenged action, coupled with "New York statutes that are already in place" demonstrated injury). Petitioners must take the E15 waiver in the legal and competitive environment in which it was issued. They cannot ignore the combined effect of the new E15 waiver with existing laws such as the RFS, and the D.C. Circuit was wrong to do so.

Further, in an integrated economy, it is inconceivable that introduction of E15 will not alter the market for gasoline. *Cf. Monsanto*, 130 S. Ct. at 2755 (organic alfalfa farmers had standing to challenge regulation

allowing genetically altered alfalfa based in part on the costs they would incur to protect their alfalfa from the genetically altered strain and to test their alfalfa for contamination); *see also* Stephen Breyer, *Judicial Review: A Practicing Judge's Perspective*, 78 Tex. L. Rev. 761, 768 (2000) (judges should not ignore the real world effects of their decisions). EPA and the waiver applicant expect and intend that E15 will be used; why else would they bother to seek and enact the E15 waiver? The expense to the petroleum group of adapting to an E15 marketplace could be billions of dollars.[10] But even if it were possible for every last member of the petroleum group to avoid E15, the law of standing should not depend on the ability of businesses to run away from problems. If allowed to stand, the lower court decision will turn standing analysis into a game of speculation about whether, if they are truly creative and willing to make the right sacrifices, businesses affected or even targeted by a regulation can restructure their operations to avoid its impact.

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[10] Handling and delivery of E15 requires expensive infrastructure investments including adding new underground-storage tanks, updating their leak-detection equipment to prevent groundwater and fuel contamination, and engineering a vapor-recovery system able to work effectively with ethanol blends over ten percent. *See* D.C. Cir. J.A. 576–77. The costs of adjusting to E15 will have a material impact on the petroleum group's small-business members that are less able to absorb the new costs. *See id.* at 576; *see also* Haitao Yin et al., *Do Environmental Regulations Cause Firms to Exit the Market? Evidence from Underground Storage Tank (UST) Regulations*, 35 (2007) (concluding that small firms encounter greater difficulties to bear the costs of compliance with EPA UST regulations).

The lower court imposed a similarly unrealistic Article III burden on the engine manufacturers. Ignoring numerous studies in the record,[11] it asserted that there was "almost no support" for the engine manufacturers' position that E15 would damage newer engines for which it has been approved. It rejected concerns about "misfueling" in older engines because misfueling "depends upon the acts of third parties [i.e., vehicle owners] not before the court." GMA Pet. App. 11a. It deemed the threat of lawsuits insufficient because it was a mere "theoretical possibility" that owners will "misfuel . . . then bring the lawsuits, then prevail." *Id.* "The last link is particularly problematic; the engine producer petitioners have failed to point to any grounds for a *meritorious* suit against them." *Id.*

Again, the lower court's analysis would create an unprecedented burden on businesses seeking to challenge agency action. To begin, EPA's rejection of the engine manufacturers' substantial evidence of harm is no basis to deny standing. Indeed, as explained below, even EPA understands that its assessment of harm on the merits does not negate standing. (*See* pp. 16–17 below.) An agency cannot insulate itself from review by purporting to find that no one is injured by its regulations. Permitting such tactics would conflate the agency's view of the merits with the separate question of an Article III court's review. For this reason, presentation of record evidence or affidavits that, if believed, would show injury, should be sufficient to confer standing. *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563–64 (1992) (standing conferred by affidavits or other evidence showing how agency action will produce

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[11] *See* AAM Pet. 12.

injury to plaintiffs' interests). To be sure, the court may ultimately decide *on the merits* that the petitioning party faces no redressable injury, but when there is bona fide evidence of injury, the standing threshold is met and judicial review is permissible.

Tellingly, EPA itself was seriously concerned about misfueling, D.C. Cir. J.A. 59–60, 1793, 1799–800, 1842, 1845, 1883–84, 1891–92, 1899–901, and the court's assertion that injury from misfueling is well nigh impossible cannot stand. As for the threat of litigation, this Court has held that the mere risk of litigation is sufficient to confer standing. *See Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013) (genuine threat of litigation confers standing). Further, even non-meritorious claims require a defense, if only a motion for dismissal, often at great expense. *See id.*

2. The Lower Court Decision Is Internally Inconsistent.

The lower court's Article III analysis is riddled with inconsistencies and contradictions. First, the lower court determined that the food group petitioners were sufficiently injured to possess Article III standing. GMA Pet. App. 20a; *id.* at 24a–26a. This ruling accepts that E15 will, in fact, be used to such an extent that competition for corn, from which ethanol is made, will intensify between the ethanol manufacturers and the food group petitioners. Yet simultaneously the lower court ruled that the petroleum group need not distribute E15. GMA Pet. App. 16a ("Neither the RFS nor the partial E15 waivers 'require' downstream entities to have anything to do with E15."); *id*. at 17a ("If anything is 'forcing' these entities to incur the costs of introducing a new fuel, it is the obligations set by the RFS,

competitive pressures, or some combination thereof."). It is unlikely that the ethanol manufacturers petitioned and fought for, or that EPA issued, a totally superfluous regulation. If *any* more ethanol is used in gasoline due to the E15 waiver, and especially enough ethanol to create competition for corn with the food group, then *someone* will need to incur the costs of mixing and distributing the E15. The petroleum group's injury is no more hypothetical than the food group's, and in fact the injuries to both are very real.

Further, EPA exempted engines produced before 2001 from the E15 waiver because those engines were not designed to accommodate its higher combustion temperatures. Yet, the lower court proclaimed "almost no support for [the engine manufacturers'] assertion that E15 'may' damage the engines they have sold" since 2001. GMA Pet. App. 10a–11a. Putting to the side the compelling evidence in the record of just such damage to the newer engines,[12] it is hardly speculative, or even much of a stretch, to believe that a fuel deemed by EPA to be highly damaging to an engine manufactured on December 31, 2000, might also cause *some* damage to an engine manufactured on January 1, 2001.[13]

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[12] *See* AAM Pet. 16–19.

[13] The concept of "model year" means that some engines subject to the rule may have been manufactured before December 31, 2000. Whatever the date dividing model years, however, the notion that *every* pre-2001 engine, but *no* post-2001 engine, would be damaged is highly suspect.

And, in any event, the engine manufacturers will certainly need to study and account for the effect of E15 on all engines they produce going forward. This Court has recently held such costs of study and compliance to be sufficient for Article III standing. In *Monsanto*, farmers seeking injunctive relief against genetically modified alfalfa contended that they "would have to conduct testing to find out whether and to what extent their crops have been contaminated." 130 S. Ct. at 2755. The Court held: "Such harms, which respondents will suffer *even if their crops are not actually infected* with the Roundup ready gene, *are sufficiently concrete* to satisfy the injury-in-fact prong of the constitutional standing analysis." *Id.* (emphasis added).[14]

Notably, EPA elected not to contest the standing of any of the industry groups challenging the E15 regulation. EPA is known for aggressively asserting standing objections whenever it believes them appropriate. *See* GMA Pet. App. 25a (Kavanaugh, J., dissenting); *NRDC v. EPA*, 643 F.3d 311, 313 (D.C. Cir. 2011) ("Firing nearly all the arrows in its jurisdictional quiver, EPA

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[14] *See also Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (landlords' association had standing to challenge rent control ordinance where it demonstrated a "realistic danger" of direct injury by reducing rental income below what members would otherwise be able to obtain); *Blum v. Yaretsky*, 457 U.S. 991, 1000–01 (1982) (nursing home residents had standing to challenge the "quite realistic" threat of transfer to lower level of care); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation.").

argues that petitioner lacks standing . . . .").[15] Against this background, EPA's silence on the issue of standing before the D.C. Circuit was, as Judge Kavanaugh wrote in dissent, "telling." GMA Pet. App. 126a–127a.

II. THE D.C. CIRCUIT'S PRUDENTIAL STANDING DECISION ALSO WARRANTS REVIEW.

The standing doctrine guarantees that the court has a true "case or controversy," in which the litigants have a sufficient "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Flast v. Cohen*, 392 U.S. 83, 99 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962). Because the prudential standing requirements are judge-imposed limits on the exercise of federal jurisdiction, rather than constitutional limits, courts should impose them sparingly. By contrast, the D.C. Circuit has broadly construed prudential standing in a way that is incompatible with precedent and congressional intent.

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[15] *See also, e.g.*, *City of Waukesha v. EPA*, 320 F.3d 228, 231 (D.C. Cir. 2003) (per curiam) (upon EPA's challenges to the standing of petitioners—a city, a water utility customer, a nuclear trade association, a mining trade association, and an advocacy group—court found only the advocacy group lacked standing); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 456 (D.C. Cir. 1998) (rejecting EPA's contention that petitioners lacked standing to challenge the deemed-to-comply rule).

A. Review Would Allow Resolution of a Circuit Conflict on Whether Prudential Standing Is Jurisdictional.

As shown by Petitioners, the D.C. Circuit's view of prudential standing as jurisdictional represents the minority view among the circuits. GMA Pet. 15–19 (explaining circuit split); AAM Pet. 26–29 (same). Review to resolve that conflict is warranted.

B. Review Would Allow Clarification of the Proper Scope and Use of Prudential Standing.

The prudential standing test "is not meant to be especially demanding." *Clarke*, 479 U.S. at 399. Courts should apply the test in accord with Congress's "evident intent" when enacting the APA "to make agency action presumptively reviewable." *Id.* Thus, "[t]he test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (internal quotation marks omitted). Petitioners' interests need be only "arguably" within the zone-of-interests protected or regulated by the statute. *Id.*; *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998). Denial of prudential standing to the food group is particularly pernicious because the statutory framework plainly expresses concern for the conflict between biofuels and food supplies. *See* Clean Air Act § 211(o)(2)(B)(ii)(VI), 42 U.S.C. § 7545(o)(2)(B)(ii)(VI) (Supp. IV 2010). The D.C. Circuit

disregarded not only EPA's concession of standing but also the statutory and regulatory context.

Review is also warranted to clarify the limits of prudential standing with the goal of developing a clearer process for courts to follow. Even though the Court has recognized the challenge of stating clear standards for prudential standing,[16] this frustrating process causes courts to expend an inordinate proportion of their time and attention to the resolution of standing disputes. *See, e.g.*, *Ctr. for Auto Safety v. Thomas*, 847 F.2d 843, 843–87 (D.C. Cir.) (per curiam) (en banc) (devoting forty-four pages to standing issue and producing an indecisive five-to-five division), *vacated en banc*, 856 F.2d 1557 (D.C. Cir. 1988) (per curiam) (holding that agency decision was to remain in effect because a majority of the court was unable to satisfy itself that the court had jurisdiction).

The prudential standing doctrine vests great discretion in the courts but lacks clear standards. This case presents an opportunity for the Court to clarify the appropriate use of prudential standing and counsel the lower courts to use it carefully and sparingly.

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[16] *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970) ("Generalizations about standing to sue are largely worthless as such."); *see also Clarke*, 479 U.S. at 400 n.16 (doubting the ability to "formulate a single inquiry" for prudential standing).

CONCLUSION

For the foregoing reasons, and those presented in the petitions filed in Nos. 12-1055 and 12-1167, *amici* strongly urge the Court to issue a writ of certiorari to the D.C. Circuit.

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Respectfully submitted,

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