No. 12-1055

IN THE
Supreme Court of the United States

GROCERY MANUFACTURERS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

WILLIAM L. WEHRUM
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., N.W.
Washington, D.C. 20037
(202) 955-1500

LEWIS F. POWELL III
HUNTON & WILLIAMS LLP
Riverfront Plaza, E. Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

CATHERINE E. STETSON*
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

Counsel for Petitioners

*Counsel of Record

(additional counsel listed on inside cover)

Additional Counsel:

HARRY NG
ERIK C. BAPTIST
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005-4070
(202) 682-8000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. RESPONDENTS CONCEDE THE CIRCUIT SPLIT, AND THERE ARE NO IMPEDIMENTS TO REVIEW 3

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S STANDING PRECEDENTS 6

A. Prudential Standing 6

B. Article III Standing 9

III. REVIEW IS NECESSARY TO RESOLVE IMPORTANT, RECURRING ISSUES IN A CASE OF NATIONAL CONSEQUENCE 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES:

Association of Battery Recyclers, Inc. v. *EPA*,
--- F.3d ---, 2013 WL 2302713
(D.C. Cir. May 28, 2013) 2, 4, 5, 6

Association of Data Processing Serv. Orgs., Inc. v. *Camp*, 397 U.S. 150 (1970) 8

Bray v. *Alexandria Women's Health Clinic*,
506 U.S. 263 (1993) 5

Cibolo Waste, Inc. v. *City of San Antonio*,
--- F.3d ---, 2013 WL 2096394
(5th Cir. May 15, 2013) 6

Clarke v. *Securities Indus. Ass'n*,
479 U.S. 388 (1987) 7, 8

Clinton v. *City of New York*,
524 U.S. 417 (1998) 2, 11

Deutsche Bank Nat'l Trust Co. v. *FDIC*,
--- F.3d ---, 2013 WL 2157865
(D.C. Cir. May 21, 2013) 6

Gonzalez v. *Thaler*,
132 S. Ct. 641 (2012) 5

LaShawn A. v. *Barry*,
87 F.3d 1389 (D.C. Cir. 1996) 4

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. *Patchak*,
132 S. Ct. 2199 (2012) 2, 7

MedImmune, Inc. v. *Genentech, Inc.*,
549 U.S. 118 (2007) 4

TABLE OF AUTHORITIES—Continued

Page(s)

Monsanto Co. v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010) 2, 10

National Ass'n of Regulatory Util. Comm'rs v. *ICC*, 41 F.3d 721 (D.C. Cir. 1994) 4

United States v. *Day*, 700 F.3d 713 (4th Cir. 2012), *cert. denied*, S. Ct. No. 12-1155, 2013 WL 1193821 (Apr. 29, 2013) 6

U.S. Tel. Ass'n v. *FCC*, 188 F.3d 521 (D.C. Cir. 1999) 2

Virginia Bankshares, Inc. v. *Sandberg*, 501 U.S. 1083 (1991) 3

OTHER AUTHORITIES:

Government Accountability Office, No. GAO-11-513, *BIOFUELS: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends* (June 2011) 8

Eugene Gressman *et al.*, *Supreme Court Practice* (9th ed. 2007) 2

Brent D. Yacobucci, Cong. Research Serv. R40445, *Intermediate-Level Blends of Ethanol in Gasoline, and the Ethanol "Blend Wall"* (2010) 8, 11

IN THE

Supreme Court of the United States

No. 12-1055

GROCERY MANUFACTURERS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

SUMMARY OF ARGUMENT

1. The Solicitor General acknowledges that the circuits are split over whether prudential standing is jurisdictional. SG BIO 10-11. So does Growth. Growth BIO 12 (identifying the Fifth, Seventh, Ninth, Tenth, and Federal Circuits as "circuits that do not consider prudential standing to be jurisdictional"). Having conceded the split, Respondents are left to contend that this case is not the right vehicle to review and remedy it. But their vehicle arguments fail. The Solicitor General contends that petitioners "forfeited" the argument that prudential standing is non-jurisdictional—but admits that the D.C. Circuit passed upon the issue. SG BIO 11.

Growth argues that it raised prudential standing as an intervenor below—but it is settled D.C. Circuit law that an intervenor is "procedurally barred" from raising issues not raised by the parties themselves. *U.S. Tel. Ass'n* v. *FCC*, 188 F.3d 521, 530 (D.C. Cir. 1999); *see Association of Battery Recyclers, Inc.* v. *EPA*, --- F.3d ---, 2013 WL 2302713, at *5 (D.C. Cir. May 28, 2013). The issue was properly preserved and is squarely presented.

2. With respect to the second and third questions presented, Respondents argue that the majority cited the correct basic legal principles, so there is nothing out of order to review. *See* SG BIO 18; Growth BIO 13. Wrong. The decision below directly conflicts with this Court's precedents—"one of the strongest possible grounds for securing the issuance of a writ of certiorari." Eugene Gressman *et al.*, *Supreme Court Practice*, § 4.5, at 250 (9th ed. 2007). The majority adopted a prudential-standing rule that demands more of a petitioner than this Court ever has. The panel's rigid view of prudential standing cannot be squared with *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians* v. *Patchak*, 132 S. Ct. 2199, 2210 (2012), which instructs that "the benefit of any doubt goes to the plaintiff." And its categorical rejection of Article III standing for the Petroleum Petitioners runs afoul of *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743 (2010), and *Clinton* v. *New York*, 524 U.S. 417 (1998), both of which dictated a different result below.

3. The States of Alabama and Oklahoma, the Commonwealth of Virginia, the Chamber of Commerce, the Business Roundtable, the NFIB Small Business Legal Center, the National Association of Home Builders, the National Automobile Dealers As-

sociation, and Public Citizen (in No. 12-1167) *all* have weighed in as *amici* to point out the national significance of this case. Respondents do not argue otherwise. Instead, Growth hastens to reassure this Court that "this is not a case where petitioners' lack of standing has left in place an erroneous ruling." Growth BIO 32. We beg to differ. As Judge Kavanaugh explained, "the merits are not close. In granting the E15 partial waiver, EPA ran roughshod over the relevant statutory limits." Pet. App. 42a. Review is essential.

ARGUMENT

I. RESPONDENTS CONCEDE THE CIRCUIT SPLIT, AND THERE ARE NO IMPEDIMENTS TO REVIEW.

Respondents acknowledge that the circuits are split over whether prudential standing is jurisdictional. SG BIO 10-11; Growth BIO 12. They contend only that this case is an "unsuitable vehicle for resolving" the conceded split. SG BIO 11; *see* Growth BIO 8. But their objections are unfounded. This petition presents a threshold legal question unblemished by factual disputes or irregularities.

1. The Solicitor General's lead-off argument is that petitioners "waived" or "forfeited" their argument that prudential standing is not jurisdictional. SG BIO 11-13; *see* Growth BIO 11. Petitioners forfeited nothing. As the Solicitor General acknowledges (at 11), the panel "passed on" the jurisdictional issue, *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991), and the panel's conclusion on that score was outcome-determinative: A different panel majority would *not* have considered prudential standing were it not jurisdictional. *See* Pet. App. 20a

(Tatel, J., concurring); *id.* at 32a (Kavanaugh, J., dissenting). Petitioners also raised the issue before the first tribunal empowered to overturn circuit precedent: the en banc D.C. Circuit. As Judge Tatel pointed out, Pet. App. 20a, D.C. Circuit precedent treats prudential standing as jurisdictional. The first time the issue could properly have been raised thus was in a petition for rehearing en banc. *See id.*; *LaShawn A.* v. *Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996). *Cf. MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007) (no waiver where "[t]he Federal Circuit's *Gen-Probe* precedent precluded jurisdiction over petitioner's contract claims, and the panel below had no authority to overrule *Gen-Probe*").

2. Growth contends that this Court should decline review of this ripe circuit split because Growth raised prudential standing as an intervenor. Growth BIO 8; *see* SG BIO 13. But the panel majority did not address prudential standing because Growth raised it; it addressed prudential standing because the majority concluded it was *jurisdictional*. As Judge Silberman has since explained, the decision below "stands for the general principle that the zone-of-interests test is jurisdictional, and therefore must be considered by the court even when not raised by the parties." *Battery Recyclers*, 2013 WL 2302713, at *8 n.1.

Battery Recyclers also confirms that "[t]he general rule in th[e D.C. Circuit] is that 'intervenors may only argue issues that have been raised by the principal parties.' " *Id.* at *6 (quoting *National Ass'n of Regulatory Util. Comm'rs* v. *ICC*, 41 F.3d 721, 729 (D.C. Cir. 1994)); *accord id.* at *5 (per curiam op.). Growth maintains that, as an intervenor supporting the agency, it is immune from this rule. Growth BIO

9. But *Battery Recyclers* confirms that the "general rule" applies to intervenors in support of petitioners and respondents alike. *See* 2013 WL 2302713, at *5. Growth cannot stave off review of this pressing circuit split by questioning the wisdom of the D.C. Circuit's established rule on intervenor arguments. Respondents, after all, "[lack] the power to expand the questions presented." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 281 n.10 (1993).

3. Finally, Respondents argue that even if prudential standing is *not* jurisdictional, the court of appeals still "was entitled to address petitioners' prudential standing on its own." Growth BIO 12; *see* SG BIO 14. But even if true, that would only counsel *in favor* of review, not against it. This Court has in recent years taken great care to define the line between jurisdictional and non-jurisdictional doctrines. *See* Pet. 3, 15; *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 648 (2012) (noting Court's repeated efforts of late to " 'bring some discipline' to the use of the term 'jurisdictional' ") (citation omitted). This case presents another such opportunity to supply some much-needed "clear guidance." *Battery Recyclers*, 2013 WL 2302713, at *8 (concurring op.). Prudential standing either is jurisdictional or it is not; and if the Court concludes that prudential standing falls into some rare quasi-jurisdictional category of issues that are not classically "jurisdictional" but still may be raised at any time by a court on its own volition, all federal courts should speak with one voice on that development.[1]

---

[1] Judge Silberman's concurrence in *Battery Recyclers* suggests that some strains of prudential standing would be more aptly described as "statutory" standing, rendering them "simi-

4. With those weak vehicle arguments dispatched, Petitioners' core argument bears repeating: Six circuits now have held that prudential standing is not jurisdictional. Pet. 15-17; *United States* v. *Day*, 700 F.3d 713, 721 (4th Cir. 2012). Three have held it is. Pet. 17-18. The split deepens by the week. *Compare Deutsche Bank Nat'l Trust Co.* v. *FDIC*, --- F.3d ---, 2013 WL 2157865, at *4 n.4 (D.C. Cir. May 21, 2013) (describing "[p]rudential standing" as "a threshold, jurisdictional concept"), *with Cibolo Waste, Inc.* v. *City of San Antonio*, --- F.3d ---, 2013 WL 2096394, at *3 n.4 (5th Cir. May 15, 2013) (prudential standing is "not jurisdictional," but "affects justiciability"), *and Day*, 700 F.3d at 721 ("issues of prudential standing are non-jurisdictional"). It requires resolution now.

II. THE D.C. CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S STANDING PRECEDENTS.

A. Prudential Standing

1. The majority applied an overly rigid standard for determining whether two statutes are "integrally related" for purposes of prudential standing. It is not enough, according to the majority, that two statutory provisions cover the same subject matter, are housed in the same Code section, and work together to create reinforcing incentives; "more is required" for them to be integrally related. Pet. App. 18a. *Match–*

---

lar to subject-matter jurisdiction." *See* 2013 WL 2302713, at *6-*8. But Judge Silberman also recognized the caveats and provisos that necessarily attend this description. *See id.* at *7 n.4 (acknowledging that this Court has "indicate[d] that a merits question could be decided before a statutory standing issue") & *8 n.6 (equating prudential standing to "prudential ripeness," but acknowledging that the Court has suggested that "prudential ripeness may be waived").

E–Be–Nash–She–Wish, 132 S. Ct. 2199, shows otherwise. *Match-E* instructs that the prudential standing test "is not meant to be especially demanding." *Id.* at 2210 (quoting *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987)). It "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.' " *Id.* (quoting *Clarke*, 479 U.S. at 399).

As Judge Kavanaugh pointed out, *Match-E* is the Court's first "comprehensive analysis" of the zone-of-interests test in twenty-five years. Pet. App. 125a. Yet the panel majority cursorily dismissed *Match-E*'s significance, finding it to have no "particular applicability" to the prudential-standing issue, apparently because these facts do not look sufficiently like *Match-E*'s facts. Pet. App. 19a. Respondents take a similar tack. *See* SG BIO 16; Growth BIO 13-14. Respondents' attempts to evade *Match-E* are telling; there is no way to reconcile that case's expansive treatment of prudential standing with the panel majority's cramped analysis of petitioners' standing below. The D.C. Circuit's decision directly conflicts with *Match-E*. *See also Clarke*, 479 U.S. at 401 (admonishing courts not to "focus[ ] too narrowly on" the particular statutory provision at the expense of the statute's "overall context").

2. In a further attempt to distance the E15 partial waiver from the renewable-fuel mandates animating it, the Solicitor General contends that Petitioners "identify no evidence in the record that the EPA accepted or adopted Growth Energy's view * * * that the waiver was 'necessary' to enable refiners and

others to meet the RFS mandate." SG BIO 18. That is not so. Here is EPA on the topic:

> To achieve the renewable fuel requirements in future years, it is *clear* that ethanol will *need* to be blended into gasoline at levels greater than the current limit of 10 percent. To help address this so-called "blend wall" issue, EPA has been evaluating the request from Growth Energy to allow for the use of up to 15 percent ethanol in gasoline (E15). [CADC Joint App. 635 (emphases added).]

Petitioners *and* EPA cited that document to the panel below. *See* Pet'rs CADC Opening Br. 10; EPA CADC Br. 7, 43. EPA's and Growth's record statements, as well as multiple government studies cited below, establish the integrally related nature of the fuel-waiver decision and the RFS.[2] The Court should reject the Government's effort to recast the second question presented as a factual dispute.

3. The decision below also conflicts with the competitor-standing principles in *Clarke*, 479 U.S. 388, and *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150 (1970). The Government ignores this issue, and Growth mentions it only to claim that it is waived. *See* Growth BIO 15 n.6. Growth is wrong. The increased competition for corn caused by the E15 waiver is the very basis for the Food Petitioners' asserted injury: rising prices due to the diversion of corn from food to fuel. *See*

---

[2] *See, e.g.*, Brent D. Yacobucci, Cong. Research Serv. R40445, *Intermediate-Level Blends of Ethanol in Gasoline, and the Ethanol "Blend Wall"* (2010); Gov't Accountability Office, GAO-11-513, *BIOFUELS: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends* (June 2011).

Pet'rs CADC Opening Br. 20; Pet'rs CADC Reply Br. 4-5. The majority's departure from this Court's competitor-standing case law was amply preserved for review.[3]

B. Article III Standing

In their final question presented, Petitioners seek review of the question whether regulated entities have Article III standing to challenge a rule that imposes "substantial new burdens on those industries." Pet. i. Respondents frame this question as fact-bound, and thus not susceptible to plenary review. SG BIO i; Growth BIO i. They are incorrect.

Selectively quoting the decision below, Respondents argue that the majority opinion rested on a factual determination that the Petroleum Petitioners had not sufficiently proven that they would be coerced into selling E15. *See* SG BIO 23-27; Growth BIO 25-27. Not so. The majority made two rulings, both on matters of law, and both of which conflict with this Court's precedents.

1. The majority held that the Petroleum Petitioners' standing theory—that the partial E15 waiver and the resulting market shifts caused by the waiver and the RFS would require them to incur costs to accommodate E15 in upstream and downstream com-

---

[3] In a footnote (at 18 n.7), the Government challenges the Food Petitioners' Article III standing. But the Food Petitioners presented ample record evidence supporting their standing, *see, e.g.*, Pet'rs CADC Opening Br. 20-21 (citing record), which both Judges Tatel and Kavanaugh accepted, Pet. App. 20a, 25a-27a. As Judge Kavanaugh explained, the Food Petitioners' standing involves "Economics 101 and requires no elaborate chain of reasoning." Pet. App. 25a.

merce—was legally insufficient to establish traceability. Pet. App. 14a-16a. According to the majority, the cost to industry of introducing E15 into commerce is not traceable to the E15 partial waiver; as the majority would have it, costs relating to producing, introducing, transporting, or selling E15 are because of a "decision grounded in economics, not * * * forced on them by the RFS and most certainly not by the partial waivers." Pet. App. 15a; *see* Pet. App. 16a ("Downstream parties very well might lose business if they decline to blend or otherwise deal with E15, but that makes the choice to handle E15 one they make in their own self-interest, not one forced by any particular administrative action.").

Monsanto says otherwise. *See* 130 S. Ct. 2743. The alfalfa farmers who challenged an agency decision to de-regulate a type of genetically modified alfalfa plant could equally have made a "decision grounded in economics" to modify the product they carried—conventionally grown alfalfa—rather than incur the costs associated with testing their alfalfa to ensure it remained free of genetically engineered strains. Pet. App. 15a. This Court had no difficulty finding standing there. 130 S. Ct. at 2754-55. *See also* Pet. 27-28 (listing other examples). The D.C. Circuit's "self-inflicted harm" rule, which treats as "voluntary" any decisions made by market participants to maintain their business, cannot be squared with *Monsanto*.

2. The majority next held that "if the injuries of refiners and importers are traceable to anything other than their own choice to incur them, it is to the RFS, not to the partial wavers they challenge here." Pet. App. 14a. This holding conflicts directly with *Clinton*, where this Court "recognized that a plaintiff

may have Article III standing to challenge one law, even though the causal chain between the law and plaintiff's own injury depends in part on the existence of other legal requirements." SG BIO 26.

The Solicitor General recognizes as much, *id.*, but argues that the majority's clear holding was merely dictum. *See id.* at 26-27. What the majority actually held, according to the Solicitor General, is that Petitioners had not established as a factual matter that they would have to sell E15 in order to meet their RFS obligations.

That is wrong. As quoted above, EPA *conceded* that it was *clear* that a waiver would be necessary for obligated parties to meet their RFS obligations. CADC Joint App. 635.[4] Growth made that same concession many times. CADC Joint App. JA85, JA88, JA97. And Petitioners cited record comments from petroleum-group members to the same effect. Pet'rs CADC Opening Br. 20. As counsel for EPA stated at oral argument, the Petroleum Petitioners' standing was "self-evident." Arg. Tr. 30. The Government should not now be heard to argue otherwise.

The conflict with *Clinton* is plain: The majority concluded as a matter of law that other legal requirements *break* the causal chain between the challenged agency action and a petitioner's harm. *See* Pet. App. 14a. Review should be granted.

---

[4] *See also* Yacobucci, *supra*, at 3 ("Although the RFS is not an explicit ethanol mandate, it has been widely interpreted as an effective mandate given the current market and technology conditions.").

III. REVIEW IS NECESSARY TO RESOLVE IMPORTANT, RECURRING ISSUES IN A CASE OF NATIONAL CONSEQUENCE.

Neither Respondent disputes that this case raises issues "critical to the American business community," Chamber *Amici* Br. 4, or that it is "of great practical importance for consumers, businesses, and States alike," States' *Amici* Br. 12. The breadth of entities supporting review of the decision below, from the Business Roundtable to Public Citizen (in No. 12-1167), confirms the national importance of this case.

In the face of this tremendous support for review, all Respondents can muster are tepid assurances that "this is not a case where petitioners' lack of standing has left in place an erroneous ruling." Growth BIO 32; *see also* SG BIO 30 n.10 (defending EPA's partial waiver). Not exactly. Judge Kavanaugh could hardly have been more blunt: "The merits are not close." Pet. App. 42a. And, later: "EPA's E15 waiver is flatly contrary to the plain text of the statute." Pet. App. 45a. And on dissent from rehearing: "The E15 waiver plainly violates the statutory text." Pet. App. 128a. And to close: "EPA's action simply cannot be squared with the statutory text." *Id.* Yet the panel majority declined to consider the merits at all.

Certiorari should be granted and the decision below reversed.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

CATHERINE E. STETSON*
MARY HELEN WIMBERLY
HOGAN LOVELLS US LLP
555 13th Street, N.W.
Washington, D.C. 20004
(202) 637-5491
cate.stetson@hoganlovells.com

WILLIAM L. WEHRUM
HUNTON & WILLIAMS LLP
2200 Pennsylvania Ave., N.W.
Washington, D.C. 20037
(202) 955-1500

LEWIS F. POWELL III
HUNTON & WILLIAMS LLP
Riverfront Plaza, E. Tower
951 East Byrd Street
Richmond, VA 23219
(804) 788-8200

HARRY NG
ERIK C. BAPTIST
AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Counsel for Petitioners

*Counsel of Record

June 2013