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,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE STATES OF OKLAHOMA AND ALABAMA AND THE COMMONWEALTH OF VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE STATES OF OKLAHOMA AND ALABAMA AND THE COMMONWEALTH OF VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF THE IDENTITY, INTEREST, AND AUTHORITY OF *AMICI* TO FILE[1]

The States of Oklahoma and Alabama and the Commonwealth of Virginia respectfully submit this brief as *amici curiae* in support of Petitioners. These States have an interest in this case because both the States and their citizens will be harmed by Environmental Protection Agency's (EPA's) unlawful "partial waiver" allowing a 50% increase in the amount of ethanol contained in certain fuels. The States and their citizens will be harmed both as consumers of transportation fuel and as consumers of food products containing corn, the price of which will increase if EPA's partial waiver is allowed. In addition, the partial waiver will do harm to the States' sovereignty by impairing the States' ability to exercise their police powers to protect the health and welfare of their citizens.

STATEMENT

The Clean Air Act (CAA), 42 U.S.C. §§ 7401 *et seq.*, sets ambitious goals to promote the introduction

[1] The parties were notified ten days prior to the due date of this brief of *amici's* intention to file.

of renewable fuels into the marketplace and to minimize Americans' reliance on fossil fuels. But the Act does not pursue these goals at all costs; it specifically instructs EPA to take into account renewable fuels' effect on "food prices" when setting the annual renewable fuel mandate, 42 U.S.C. § 7545(o)(2)(B)(ii)(VI), and it further limits permissible new fuels to those that "will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been certified," 42 U.S.C. § 7545(f)(4). EPA ignored both of these statutory requirements, however, when it issued its partial waiver, increasing by 50% the amount of ethanol that fuel manufacturers may blend into gasoline for sale to American consumers.

The problem is that this increased-ethanol fuel (known as "E15") poses a risk to fuel systems common in many vehicles on the road today, and most consumers who drive those cars are unaware of those risks. In fact, a recent survey by the AAA showed "a strong likelihood of consumer confusion and the potential for voided warranties and vehicle damage as a result of [EPA's] recent approval of E15 gasoline." *See*

"New E15 Gasoline May Damage Vehicles and Cause Consumer Confusion," AAA Newsroom Nov. 30, 2012.[2]

In these times of high gasoline prices and economic uncertainty, the average American consumer refueling their vehicle makes their fuel choice based largely on a single criteria: price.[3] And ethanol is cheaper than petroleum, so E15 will be cheaper than E10; therefore it is attractive. *See, e.g.*, Xiaodong Du & Dermot J. Hayes, Working Paper 12-WP 528. *The Impact of Ethanol Production on U.S. and Regional Gasoline Markets: An Update to 2012* (May 2012).[4] There is little reason to believe that the consumer knows and appreciates the risks they are incurring when they pull up to the pump and press the button for E15 fuel, including the risk of damage to their car's fuel system and the risk of voiding their vehicle's manufacturer's warranty.[5] So industry groups

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[2] http://newsroom.aaa.com/2012/11/new-e15-gasoline-may-damage-vehicles-and-cause-consumer-confusion/.

[3] *See, e.g.*, Phillip Reed, "Is Cheap Gas Bad for Your Car?," Edmunds.com, December 7, 2012 (recommending that consumers, "[b]uy the cheapest gas that is closest to you"), available at http://www.edmunds.com/car-care/is-cheap-gas-bad-for-your-car.html).

[4] http://www.card.iastate.edu/publications/dbs/pdffiles/12wp528.pdf.

[5] 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 in their entirety. *See* Gary Strauss, "AAA Warns E15 Gasoline Could Cause Car Damage," USA Today, November 30, 2012 (available at http://www.usatoday.com/story/news/nation/2012/11/30/aaa-e15-gas-harm-cars/1735793/).

have had to step in to challenge the partial waiver based on the serious risks posed by E15.

These risks are hard to justify in light of E15's inefficiency. It takes a huge amount of corn to create ethanol, yet it produces significantly less energy than gasoline, resulting in much lower fuel economy for cars running on E15. In fact, the federal government reports that in January 2013, while the price of E15 was on average $.12 per gallon less than regular gasoline, when compared on an energy-equivalent basis, E15 costs $1.19 per gallon *more* than regular gasoline. *See* "Clean Cities Alternative Fuel Price Report." January 2013, U.S. Dept. of Energy.[6]

And those costs do not stop at the pump. At present, an astounding 40 percent of the United States' corn crop is being used to create ethanol – something the federal government acknowledges diverts corn from the food supply and drives up the cost of food to the detriment of American consumers. *See* "The Great Ethanol Debate," ConsumerReports.org, January 2011;[7] *see also* Ronald D. White, "Calls to Lower Ethanol Quota Rise as U.S. Corn Crop Withers," Los Angeles Times, August 24, 2012.[8]

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[6] http://www.afdc.energy.gov/uploads/publication/alternative_fuel_price_report_jan_2013.pdf.

[7] http://www.consumerreports.org/cro/2011/01/the-great-ethanol-debate/index.htm.

[8] http://articles.latimes.com/2012/aug/24/business/la-fi-drought-ethanol-20120824.

Yet despite these well-documented harms, the court below dismissed this case on standing grounds. It determined that not one petitioner from three major industry groups – food production, petroleum, and automotive and engine products – had standing to challenge it. This means an agency decision that blatantly ignores Congress's statutory commands and that *will* cause harms to consumers and businesses will go unreviewed by any court. The decision below must not be allowed to stand.

ARGUMENT

I. The merits of the case "are not close"; EPA's "partial waiver" was not authorized by law.

EPA's unprecedented partial waiver was patently unlawful. In order to approve a waiver of Section 211(f)(1) of the CAA's prohibition on new fuels that are not "substantially similar" to existing fuels, 42 U.S.C. § 7545(f)(1)(B), EPA must find that the proposed new fuel will not cause any car model made after 1974 to fail emissions standards. 42 U.S.C. § 7545(f)(4). This makes good sense; if the new fuel causes a vehicle to fail its emission standards, then it is hardly contributing to the goals of the *Clean Air Act*. Here, EPA acknowledged that *over 200 million* 1975-2000 model year vehicles would likely fail emission standards if fueled with E15, yet it nonetheless

approved a waiver allowing E15 fuel to be sold.[9] As Judge Kavanaugh put it in dissent, "[t]he merits are not close. In granting the E15 partial waiver, EPA ran roughshod over the relevant statutory limits." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 190 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

It is particularly noteworthy that EPA had *never before* issued a waiver allowing the use of a fuel in only certain types of engines and vehicles. "The most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent," *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. ___, ___, 130 S.Ct. 3138, 3159 (2010) (quotations omitted). The lack of precedent for EPA's action here is "telling" of a severe *statutory* problem: namely, EPA lacks the statutory authority to issue a "partial" waiver. Its decision is contrary to law.

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[9] The waiver allows E15 to be used only in post-2000 model-year cars and light duty trucks. The use of E15 is forbidden in all other types of gasoline powered vehicles (e.g., older car and trucks, heavy duty trucks, boats) and in all gasoline-powered equipment (e.g., generators, lawn mowers). "Partial Grant of Clean Air Act Waiver Application Submitted by Growth Energy to Increase the Allowable Ethanol Content of Gasoline to 15 Percent; Decision of the Administrator," 76 Fed. Reg. 4662, 4682 (Jan. 26, 2011).

II. The unlawful "partial waiver" negatively affected compelling State interests.

The states and the federal government share responsibility under the CAA for protecting air quality in the United States. The CAA assigns to the states "primary responsibility" for "the prevention and control of air pollution at its source." CAA § 101(a)(3). The federal government (through EPA) is generally responsible for setting emissions control standards for mobile sources (e.g., motor vehicles) and fuels. *See generally* CAA §§ 201-250.

EPA's abuse of its authority to regulate the content of fuels is more than just an overstepping of its CAA role, it also impairs the States from fulfilling their broader responsibility to protect the health and welfare of their citizens. Implicated here are the States' roles in protecting against the distribution and sale of defective products and in preventing injuries and property damage that can result from the unintentional misuse of a product.

EPA simply rushed to judgment, refusing to wait for additional relevant studies to be completed (studies by the Coordinating Research Council and the government that provide further evidence of the harm caused by E15[10]), and failing to acknowledge that

[10] *See, e.g.*, "Intermediate-Level Ethanol Blends Engine Durability Study," Coordinating Research Council, April 2012, available at http://www.crcao.com/reports/recentstudies2012/CM-136-09-1B%20Engine%20Durability/CRC%20CM-136-09-1B%20Final%20Report.pdf (finding "that two popular gasoline engines

(Continued on following page)

"misfueling" (i.e., putting E15 in engines not approved for the use of E15) will be widespread, resulting in vehicle failures that will require costly repairs and could lead to personal injury.

As a result, the States' ability to ensure the health and welfare of its citizens has been compromised, and the States have little recourse. The police power of the states cannot be employed in protecting citizens from damages and personal injury caused by the use (and unintentional misuse through misfueling) of E15 because States are powerless to prohibit E15 from being sold and used.

III. Certiorari should be granted to ensure that the "partial waiver" is not insulated from judicial review.

The decision below effectively (and wrongly) insulated EPA's waiver decision from judicial review, and left the above-described State interests unprotected. Indeed, the D.C. Circuit determined that EPA's decision to grant the waiver is essentially

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used in light-duty automotive applications of vehicles from model years 2001 through 2009 failed with mechanical damage when operated on intermediate-level ethanol blends (E15 and E20)"); Government Accountability Office, No. GAO-11-513, BIO-FUELS: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends 31 (June 2011) ("EPA estimated that the necessary spending on transportation infrastructure due to increased ethanol consumption would be approximately $2.6 billion.").

unreviewable – "[d]espite the fact that two enormous American industries will be palpably and negatively affected by" the waiver – because none of the affected industries purportedly has standing to challenge the decision. This cannot, and should not, be so.

The petroluem petitioners represent those who produce, distribute, and market gasoline – including entities that are "responsible parties" under the Energy Independence and Security Act of 2007's Renewable Fuel Standards program (i.e., those who are directly responsible for ensuring that the renewable fuel blending mandates are met). Pub. L. No. 110-140 (Dec. 19, 2007). The record shows that these parties will be required to put E15 into the marketplace and will incur substantial costs and potential legal liabilities in doing so.

The automotive and engine products petitioners represent those who produce gasoline-powered vehicles and equipment. The record shows that E15 will cause engine failures for which they will be held accountable.

The food petitioners represent those who purchase corn as a food ingredient and as feed for livestock. The record shows that they will pay more for corn as more corn is used in the production of fuel ethanol.

Each of these groups of petitioners had Article III standing to challenge the illegal partial waiver. The court below erred when it concluded that the petroleum petitioners and automotive and engine products

petitioners lacked Article III standing, and it further erred by using a prudential standing doctrine to sidestep Article III and deny the food producers their day in court.

We take no position on whether prudential standing is jurisdictional because even if it is, the "zone of interests" doctrine should not have barred the food producers' suit. *See Match-E-Be-Nash-She-ish Band of Pottawatomi Indians v. Patchak*, ___ U.S. ___, 132 S.Ct. 2199 (2012). As this Court held in that case: "The prudential standing test . . . is not meant to be especially demanding. . . . The 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." *Id*. at 2210 (footnote, citation, and some internal quotation marks omitted). Here, Congress plainly contemplated the harms to food producers that might flow from diverting corn from food to fuel.[11] So when those food

[11] The Energy Independence and Security Act of 2007's "renewable fuel mandate" requires introducing increasing amounts of renewable fuel into the market every year. *See* 42 U.S.C. § 7545(o)(2)(B)(i)(I). In that statute, Congress commanded EPA to take account of the effect of the mandate on "food prices" – that is, the price of corn. 42 U.S.C. § 7545(o)(2)(B)(ii)(VI). As Judge Kavanaugh correctly concluded, "[b]ecause the E15 waiver is necessary – at least in the current market – to effectuate the statutory renewable fuel mandate, and because the food group is explicitly within the zone of interests for the renewable fuel mandate, the food group is in the zone of interests for purposes of this suit." *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d at 187 (Kavanaugh, J., dissenting).

producers complained that the illegal partial waiver would cause exactly the harm that Congress contemplated (increased corn cost), their suit was justiciable.

While the court's decision certainly perpetuated a circuit split over the jurisdictional nature of prudential standing, it also demonstrated just how standing doctrines can be misused in cases presenting challenging, but gravely important, merits issues. Indeed, a majority of the panel below concluded that the food petitioners had Article III standing. *Grocery Mfrs. Ass'n*, 693 F.3d at 182 (Kavanaugh, J., dissenting) ("A majority of the Court – Judge Tatel and I – agree that the food group has Article III standing."). So for purposes of the Constitution, the food petitioners were sufficiently injured and presented the court with a justiciable case. That should have ended the standing inquiry, but it didn't. Instead, the majority's conclusion that the food petitioners lacked prudential standing meant that no party had standing to reach the merits of the partial waiver decision – a decision that "plainly violates the statutory text." While we agree that it is vitally important for the courts to ensure that each case presents a justiciable case or controversy, the D.C. Circuit's holdings on both prudential standing and Article III standing were "outcome determinative" of an issue that will impact virtually every American. They were also contrary to this Court's precedents, as Petitioners explained in their certiorari petition. *See* Pet. at 19-28.

It is in this type of case, where the merits are not close, and the issue is one of national importance,

where a cramped view of standing can work the most mischief. In short, this case presents a compelling vehicle to bring the D.C. Circuit – a court that hears the vast majority of agency-review cases – in line with this Court's precedents on both Article III and prudential standing. It provides an excellent opportunity for this Court to resolve the jurisdictional versus non-jurisdictional circuit split on prudential standing. And it is a case of great practical importance for consumers, businesses, and States alike.

CONCLUSION

For these reasons, the petitions should be granted.

Respectfully submitted,

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