

**TIME TO TAKE A STAND:  
GROCERY MANUFACTURERS ASSOCIATION v.  
ENVIRONMENTAL PROTECTION AGENCY**

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I. INTRODUCTION<sup>1</sup>

In 1978 the Environmental Protection Agency (EPA) approved the use of E10, a blend of gasoline with up to 10% ethanol, as a fuel for motor vehicles.<sup>2</sup> In hopes of reducing prices at the pump and supplying a portion of energy demand with an alternative renewable fuel,<sup>3</sup> the government offered several incentives to ethanol refiners, vehicle manufacturers, and gasoline blenders to encourage the use of the primarily corn-based fuel source.<sup>4</sup> However, as the

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1. After this case note was written, the EPA proposed a reduction in the volume of renewable fuel mandated by the Clean Air Act’s Renewable Fuel Standard, which is at issue in this note. The EPA has proposed to decrease the 2014 requirements back to the 2012 level. News Release, EPA Proposes 2014 Renewable Fuel Standards / Proposal Seeks Input to Address “E10 Blend Wall,” EPA (Nov. 15, 2013), available at <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceac8525735900400c27/81c99e6d27c730c485257c24005eecb0!OpenDocument>.

2. DAVID R. WOOLEY & ELIZABETH MORSS, CLEAN AIR ACT HANDBOOK: A PRACTICAL GUIDE TO COMPLIANCE § 5:61 (2013).

3. See, e.g., *Biofuels: Ethanol and Biodiesel Explained*, EIA, [http://www.eia.gov/energyexplained/index.cfm?page=biofuel\\_home](http://www.eia.gov/energyexplained/index.cfm?page=biofuel_home) (last visited Mar. 11, 2013); *Energy Policy and Conservation*, U.S. LEGAL, INC., <http://energylaw.uslegal.com/energy-policy-and-conservation/> (last visited Mar. 11, 2013).

4. PNC BANK, CORN AND ALTERNATIVE BIOFUELS FEEDSTOCK SOURCES 1 (2010), available at [http://content.pnmc.com/live/pnc/microsite/CFO/pdf/corn\\_and\\_alternative\\_biofuels\\_feedstock\\_sources.pdf](http://content.pnmc.com/live/pnc/microsite/CFO/pdf/corn_and_alternative_biofuels_feedstock_sources.pdf) (“next-generation” non-corn bioproducts comprise approximately only 0.4% of ethanol feedstock). Examples

annual vehicle miles traveled (VMT) increased more than 250% between 1970 and 2005,<sup>5</sup> Congress opted for a more aggressive approach, moved beyond mere incentives, and through implementation of the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007 (EISA) mandated that specified volumes of renewable fuel be used in the United States.<sup>6</sup>

Recognizing an opportunity to capitalize on the annually increasing requirements, ethanol manufacturers petitioned the EPA in 2009 to allow the introduction of E15—gasoline blended with up to 15% ethanol—into the fuel market.<sup>7</sup> In late 2010 and early 2011, the EPA granted this request for certain vehicles manufactured in 2001 and later<sup>8</sup> despite statutory language that prohibits the use of new fuels unless certain standards are met.<sup>9</sup> Believing the EPA abused its authority under the Clean Air Act (CAA), members of the engine manufacturing, petroleum, and food industries filed an action against the EPA in the United States Court of Appeals for the District of Columbia Circuit<sup>10</sup> in *Grocery Manufacturers Ass'n v. EPA (Grocery Manufacturers)*.<sup>11</sup>

In a 2-1 decision, the court dismissed all claims for lack of standing.<sup>12</sup> The court held that the Engine Products Group and Petroleum Group failed to establish Article III standing<sup>13</sup> while the Food Group did not satisfy prudential standing requirements.<sup>14</sup> Interestingly, the EPA did not raise any concerns over the Food Group's prudential standing.<sup>15</sup> Thus, the court's *sua sponte*

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of tax-based incentive programs included the Energy Tax Act of 1978, Energy Security Act of 1980, Alternative Motor Fuels Act of 1988, Budget Reconciliation Act of 1990, and Volumetric Ethanol Excise Tax Credit. *See, e.g.*, U.S. Dep't of Energy, *Key Federal Legislation*, ALTERNATIVE FUELS DATA CENTER, [http://www.afdc.energy.gov/laws/key\\_legislation](http://www.afdc.energy.gov/laws/key_legislation) (last updated Mar. 11, 2013); WALLACE E. TYNER, PURDUE UNIVERSITY, U.S. ETHANOL POLICY – POSSIBILITIES FOR THE FUTURE 1 (2006), *available at* <http://www.extension.purdue.edu/extmedia/ID/ID-342-W.pdf>.

5. Jennifer King, *How Does Car Pollution Affect the Environment?*, NAT'L GEOGRAPHIC, <http://greenliving.nationalgeographic.com/car-pollution-affect-environment-ozone-layer-20133.html> (last visited Nov. 24, 2013). According to the U.S. Federal Highway Administration, in 1970, automobiles in the United States covered 1,120,328 million VMT, and by 2005, that number had increased to 2,989,430 million VMT. *Highway Statistics Series*, U.S. FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/policyinformation/quickfinddata/qftravel.cfm> (last visited Nov. 24, 2013).

6. *Renewable Fuel Standard*, EPA, <http://www.epa.gov/otaq/fuels/renewablefuels/index.htm> (last updated Feb. 25, 2013). *See generally* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007).

7. Notice of Receipt of CAA Waiver Application to Increase Ethanol Content, 74 Fed. Reg. 18,228, 18,229 (Apr. 21, 2009) [hereinafter Notice of Waiver Application].

8. Clean Air Act Waiver Application Submitted by Growth Energy, 75 Fed. Reg. 68,094, 68,095 (Nov. 4, 2010) (partial grant and partial denial) [hereinafter First Partial Grant]; Clean Air Act Waiver Application Submitted by Growth Energy, 76 Fed. Reg. 4662, 4662-63 (Jan. 26, 2011) (partial grant) [hereinafter Second Partial Grant].

9. 42 U.S.C. § 7545(f)(1)(B), (4) (2012).

10. The CAA specifies that a petition for review of EPA action under the Regulation of Fuels section of the Act, at issue here, is to be brought exclusively to the D.C. Circuit Court of Appeals. *Id.* § 7607(b)(1).

11. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012); Amanda Peterka, *Court to Hear Arguments in Lawsuit Challenging EPA on E15 Approval*, GOVERNORS' BIOFUELS COALITION (Apr. 17, 2012), <http://www.governorsbiofuelscoalition.org/?p=2316>.

12. *Grocery Mfrs.*, 693 F.3d at 180.

13. *Id.* at 176, 178.

14. *Id.* at 179.

15. *Id.* at 185 (Kavanaugh, J., dissenting).

consideration of prudential standing and subsequent dismissal created a split in the circuits regarding whether prudential standing is jurisdictional and left open the question of whether the EPA's partial waivers allowing E15 into the market were in fact authorized.<sup>16</sup>

In general, jurisdiction speaks to a court's authority to hear and decide a case; without jurisdiction, a court cannot render an enforceable judgment.<sup>17</sup> Article III standing, stemming from the constitutional mandate of a "case" or "controversy,"<sup>18</sup> is essential to subject matter jurisdiction.<sup>19</sup> Additionally, federal courts have imposed prudential limitations on the exercise of jurisdiction for claims brought against agencies under the Administrative Procedures Act (APA).<sup>20</sup> The test for prudential standing is widely accepted—that is, whether the plaintiff's interest is "'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."<sup>21</sup> However, the circuits disagree over whether prudential standing acts as a jurisdictional bar.<sup>22</sup> On one side, in circuits where it is considered jurisdictional, a court is powerless to adjudicate a claim if the plaintiff does not establish prudential standing.<sup>23</sup> Many of these courts, like the D.C. Circuit in *Grocery Manufacturers*,<sup>24</sup> take the position that prudential standing is nonwaivable, meaning the court may still consider it even though a party may not have raised the issue.<sup>25</sup> On the other side, the Supreme Court has hinted and other circuits have held that prudential standing is not jurisdictional.<sup>26</sup> Following that line of authority, when the EPA failed to challenge the petitioners' prudential standing, it waived the objection, and, therefore, the claims in *Grocery Manufacturers* should not have been dismissed on prudential standing grounds.

This case note will examine the court's dismissal in *Grocery Manufacturers*. Section II will provide a brief overview of the legislation involved, and Section III will summarize the court's opinion. Section IV will

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16. Nicholas J. Wagner, *D.C. Circuit Creates a "Deep and Important Circuit Split" over Prudential Standing*, CIRCUIT SPLITS (Aug. 20, 2012, 5:40 AM), <http://www.circuitsplits.com/2012/08/-dc-circuit-creates-a-deep-and-important-circuit-split-over-prudential-standing-.html>; Press Release, *GMA Statement on E15 Supreme Court Petition*, Grocery Mfrs. Ass'n (Feb. 21, 2013), available at <http://www.gmaonline.org/news-events/newsroom/gma-statement-on-e15-supreme-court-petition/>.

17. *E.g.*, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010) ("Jurisdiction" refers to 'a court's adjudicatory authority'" (quoting *Kontrick v. Ryan*, 540 U.S. 443, 445 (2004))); *see generally* 21 C.J.S. *Courts* § 9 (2013).

18. U.S. CONST. art. III, § 2, cl. 2.

19. 35A C.J.S. *Federal Civil Procedure* § 60 (2013).

20. *See generally* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW 1726-27 (11th ed. 2011) (referencing section 10 of the APA, 5 U.S.C. § 702 (2012), and the "zone-of-interest" test articulated in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970)).

21. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 170 (D.C. Cir. 2012) (quoting *National Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam)) (alterations in original); *see also Association of Data Processing*, 397 U.S. at 153.

22. Wagner, *supra* note 16; *infra* Section IV.A.

23. *Infra* note 92 and accompanying text.

24. *Grocery Mfrs.*, 693 F.3d at 179.

25. *Infra* note 92 and accompanying text.

26. *Infra* note 91 and accompanying text.

then analyze the decision and support the dissent's position: Prudential standing is not jurisdictional, and, even if it were, the Food Group<sup>27</sup> satisfied prudential standing requirements.<sup>28</sup> With standing to bring suit, the court should have reached the merits of the case. Instead, the dismissal in *Grocery Manufacturers* left the EPA's partial waivers in place, allowing E15 to be used in vehicles model year 2001 and later, with no clear answer as to whether the EPA was authorized to issue such waivers.<sup>29</sup> This outcome places the petitioners' members and similar entities in a state of uncertainty as they try to determine how to proceed.

## II. BACKGROUND

### A. Legislation

In efforts to promote public health by protecting and improving the quality of air in the United States, Congress enacted the Clean Air Act of 1970 (CAA) to regulate emissions from mobile and stationary sources.<sup>30</sup> That same year, President Nixon created the EPA,<sup>31</sup> which was given, among other responsibilities, authority under the CAA to establish national air quality standards.<sup>32</sup> In its original form, the CAA relied heavily on states to develop their own implementation plans to achieve the EPA standards; however, as several states failed to meet those requirements by the statutory deadlines, Congress amended the CAA in 1977, and again in 1990, to set new goals.<sup>33</sup> The sweeping changes made in 1990 focused on pressing public health concerns such as acid rain, toxic air emissions, and air pollution in urban centers.<sup>34</sup>

Although the 1990 CAA amendments acknowledged the growing concern over the nation's dependence on foreign oil and the need to find grain-based alternative fuels,<sup>35</sup> the first nationwide standard requiring the use of renewable fuels was not adopted until President George W. Bush signed the Energy Policy Act of 2005.<sup>36</sup> The Energy Policy Act amended the CAA to include the Renewable Fuel Program, which required the EPA Administrator to promulgate regulations ensuring the total gasoline sold nationally contained a mandated volume of renewable fuel.<sup>37</sup> Congress initially set the standard at four billion

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27. The court referred to the petitioners representing members of the food industry that "produce, market, and distribute" products that contain or use corn as the "Food Group." *Grocery Mfrs.*, 693 F.3d at 179.

28. *Id.* at 181 (Kavanaugh, J., dissenting) (concluding that the court was not required to determine prudential standing because the issue was not raised by a party).

29. Press Release, *GMA Statement*, *supra* note 16.

30. *Summary of the Clean Air Act*, EPA, <http://www2.epa.gov/laws-regulations/summary-clean-air-act> (last updated July 26, 2013) [hereinafter *Summary of the CAA*]; 42 U.S.C. § 7401(b) (2012). The current version of the Clean Air Act is codified in its entirety at 42 U.S.C. §§ 7401-7671.

31. *EPA History*, EPA, <http://www.epa.gov/history> (last updated Feb. 15, 2013).

32. *Summary of the CAA*, *supra* note 31.

33. *Id.*

34. *Overview – The Clean Air Act Amendments of 1990*, EPA, [http://epa.gov/oar/caa/caaa\\_overview.html](http://epa.gov/oar/caa/caaa_overview.html) (last updated Aug. 15, 2013).

35. *Id.*

36. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005); *Renewable Fuel Standard (RFS)*, EPA, <http://www.epa.gov/otaq/fuels/renewablefuels/index.htm> (last updated Nov. 15, 2013).

37. Energy Policy Act § 1501.

gallons of renewable fuel for 2006, increasing annually to 7.5 billion gallons by 2012.<sup>38</sup>

As tensions overseas and rising fuel costs ignited the quest for alternative energy sources, Congress and President Bush enacted a more aggressive renewable fuel standard in the Energy Independence and Security Act of 2007 (EISA).<sup>39</sup> In addition to creating separate volume requirements for specific classes of renewable fuels, the EISA more than doubled the Energy Policy Act's original goal for 2012, mandating 15.2 billion gallons by the same year.<sup>40</sup> By 2022, the EISA will require thirty-six billion gallons of renewable fuel to be used in the United States.<sup>41</sup>

### *B. The Fuel Waiver Provision and the Renewable Fuel Standard*

Again amending the CAA through the incorporation of the EISA and its renewable fuel standard (RFS), Congress provided the EPA with the authority and responsibility to regulate the use of renewable fuels and to enforce the new mandates.<sup>42</sup> Under an existing provision of the CAA, manufacturers are prohibited from introducing any fuel or fuel additive into commerce that is not “substantially similar” to that used in the certification of the vehicle’s emission system.<sup>43</sup> However, the EPA Administrator may upon application “waive the prohibitions . . . if he determines that the applicant has established that such fuel . . . will not cause or contribute to a failure of any emission control device or system” used for testing compliance with the vehicle’s respective emission standards over the course of the vehicle’s useful life.<sup>44</sup> Consequently, if a manufacturer proposes the use of a renewable fuel that is not “substantially similar” to the fuel with which the emissions system of a vehicle already on the market was tested, the only way it may introduce that new fuel is to petition the EPA for a waiver under this provision.<sup>45</sup> Because gasoline blended with greater than 10% ethanol is not substantially similar to the gasoline used to test the emission systems of current motor vehicles,<sup>46</sup> the EPA must approve the new fuel blend before commercial use.

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38. *Id.*

39. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007) (declaring the Act’s goal is “to move the United States toward greater energy independence and security [and] to increase the production of clean renewable fuels”).

40. *Id.* § 201.

41. *Id.* § 201(B).

42. 42 U.S.C. § 7545(a), (o)(2) (2012).

43. *Id.* § 7545(f)(1)(B).

44. *Id.* § 7545(f)(4).

45. *See generally* BRENT D. YACOBUCCI, CONG. RESEARCH SERV., R40445, INTERMEDIATE-LEVEL BLENDS OF ETHANOL IN GASOLINE, AND THE ETHANOL “BLEND WALL” 6-7 (2010). For example, the EPA defines “gasoline” as containing up to 2.7% oxygen (by weight), which essentially limits the ethanol content of gasoline to 7.5% (by volume). *Id.* Therefore, selling gasoline with higher concentrations of ethanol requires a waiver from the EPA. *Id.*

46. *Id.*

### C. Response to the RFS Mandates

Since the enactment of the RFS, the petroleum industry has been able to satisfy the program's volume requirements through the sale of E10.<sup>47</sup> However, as 95% of all gasoline sold in the United States contains up to 10% ethanol, the market is saturated.<sup>48</sup> As elevated fuel prices and improved fuel economy vehicles have reduced demand for gasoline,<sup>49</sup> total ethanol consumption is limited by the gallons of gasoline sold at the pump.<sup>50</sup> This limit, referred to as the "blend wall," suggests that the use of E10 alone will soon be insufficient to meet the ever-increasing renewable fuel mandates.<sup>51</sup> As an answer to the problem, Growth Energy, a trade group representing the ethanol industry,<sup>52</sup> and fifty-four other ethanol manufacturers petitioned the EPA for a waiver under 42 U.S.C. § 7545(f)(4) to allow E15 to enter the fuel market.<sup>53</sup>

In its waiver request, Growth Energy claimed that based on its own studies and ethanol expertise, E15 will not cause or contribute to the failure of a vehicle's emission control system in a way that would put the vehicle out of compliance with its emissions standards.<sup>54</sup> In its notice announcing receipt of a waiver application, the EPA noted that the Department of Energy was also collecting test data on the effect of E15, which the EPA would review when making its decision.<sup>55</sup> Recognizing the possibility that the data might show that E15 does not cause emission problems in some vehicles but will result in the failure of the emission systems of others, the EPA indicated that one interpretation of 42 U.S.C. § 7454(f)(4) would allow the EPA to issue a partial waiver permitting the use of E15 in certain vehicles only.<sup>56</sup>

After more than 78,000 public comments regarding the requested waiver,<sup>57</sup> the EPA issued two partial waivers allowing E15 to be introduced for use in the

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47. U.S. Dep't of Energy, *Ethanol Blends*, ALTERNATIVE FUELS DATA CENTER, [http://www.afdc.energy.gov/fuels/ethanol\\_blends.html](http://www.afdc.energy.gov/fuels/ethanol_blends.html) (last updated Mar. 11, 2013).

48. *Id.*

49. *Estimated U.S. Gasoline Consumption Low*, EIA (Aug. 13, 2012), <http://www.eia.gov/todayinenergy/detail.cfm?id=7510> [hereinafter *Gasoline Consumption*].

50. Cindy Zimmerman, *USDA Experts Say Ethanol Blend Wall is Close*, DOMESTICFUEL.COM (Apr. 11, 2010), <http://domesticfuel.com/2010/04/11/usda-experts-say-ethanol-blend-wall-is-close/>.

51. *Id.* For example, since Grocery Manufacturers Ass'n filed its complaint, the EISA annual volume mandates have increased from 13.95 billion gallon of renewable fuel in 2011, to 15.2 billion in 2012, to 16.55 billion in 2013, continuing to 36.0 billion gallons by 2022. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1522 (2007).

52. *About Growth Energy*, GROWTHEENERGY.ORG, [growthenergy.org/about-growth-energy/who-we-are/](http://growthenergy.org/about-growth-energy/who-we-are/) (last visited Mar. 12, 2012).

53. Notice of Waiver Application, *supra* note 7.

54. *Id.* at 18,229.

55. *Id.*

56. *Id.* The EPA argued that the statute is ambiguous and then provided extensive explanation for why its interpretation that the agency may issue partial waivers under the fuel waiver provision was reasonable. First Partial Grant, *supra* note 8, at 68,144-46. While the EPA thoroughly discussed the statute's usage of the word "any" in reference to *any* motor vehicle and *any* emission control device, concluding Congress surely did not mean "every" vehicle manufactured after 1974, the agency made no mention of the fact that Congress elsewhere in the same section of the statute expressly authorizes partial waivers. *Id.* Such authorization is missing from the fuel waiver provision. See *infra* note 166.

57. Second Partial Grant, *supra* note 8, at 4662.

fuel market.<sup>58</sup> In the first waiver, the EPA allowed E15 to be used commercially in light-duty motor vehicles model year 2007 and newer, denied the waiver for model years 2000 and older, and deferred its decision regarding light-duty vehicles manufactured between 2001 and 2006 until more data became available.<sup>59</sup> This partial waiver was granted on the condition that merchants who wish to offer E15 submit to the EPA a plan for “misfueling mitigation conditions” that they will implement to reduce the risk that consumers will mistakenly use E15 in non-approved vehicles.<sup>60</sup> After reviewing more data, the EPA announced the second partial waiver in January 2011, which allowed the use of E15 for light-duty vehicles manufactured between 2001 and 2006.<sup>61</sup> Between the two waivers, the EPA approved E15 for use in vehicles manufactured after 2000.

In July 2012, a fueling station in Lawrence, Kansas, became the first to offer E15.<sup>62</sup> However, consumers were not lined up waiting for the new fuel choice.<sup>63</sup> Instead a number of protestors—members of the engine manufacturing, petroleum, and food industries—had already joined forces to challenge the EPA’s partial waivers allowing E15 into the market.<sup>64</sup>

### III. GROCERY MANUFACTURERS ASSOCIATION v. EPA

Three separate industry groups petitioned the D.C. Circuit Court of Appeals, seeking judicial review under the APA<sup>65</sup> of the two waivers the EPA granted permitting E15 to be used commercially.<sup>66</sup> The petitioners’ claims asserted (1) that the EPA lacked authority under 42 U.S.C. § 7454(f)(4) to grant “partial” waivers, (2) that the evidence was insufficient to issue a waiver for the introduction of E15, (3) that the EPA did not provide sufficient opportunity for public comment regarding certain portions of its waiver decisions, and (4) that the EPA did not adequately support its decisions regarding the waivers.<sup>67</sup> However, rather than considering the merits of the case, the divided panel dismissed all claims for lack of standing as to all petitioners.<sup>68</sup>

58. First Partial Grant, *supra* note 8; Second Partial Grant, *supra* note 8.

59. First Partial Grant, *supra* note 8, at 68,095. Light-duty vehicles “includes passenger cars, light-duty trucks, and medium-duty vehicles.” *Id.* The EPA denied the waiver for all heavy-duty engines and vehicles, all motorcycles, and all nonroad engines and equipment. *Id.*

60. *Id.*

61. Second Partial Grant, *supra* note 8, at 4662.

62. Matthew L. Wald, *In Kansas, Stronger Mix of Ethanol*, N.Y. TIMES (July 11, 2012), [http://www.nytimes.com/2012/07/12/business/energy-environment/at-kansas-station-e15-fuel-reaches-the-masses.html?pagewanted=all&\\_r=1&](http://www.nytimes.com/2012/07/12/business/energy-environment/at-kansas-station-e15-fuel-reaches-the-masses.html?pagewanted=all&_r=1&).

63. *Id.*

64. *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 172 (D.C. Cir. 2012), *reh’g denied*, 704 F.3d 1005, *petition for cert. filed*, No. 12-1055 (filed Feb. 21, 2013).

65. Administrative Procedures Act, 5 U.S.C. §§ 701-706 (2012).

66. *Grocery Mfrs.*, 693 F.3d 169.

67. *Id.* at 173-74.

68. *Id.* at 180. On January 15, 2013, the D.C. Circuit denied petitioners’ request for rehearing. 704 F.3d 1005 (D.C. Cir 2012). On February 21, 2013, Grocery Manufacturers Ass’n petitioned the U.S. Supreme Court for certiorari. *Petition for a Writ of Certiorari, Grocery Mfrs.*, No. 12-1055 (filed Feb. 21, 2013). On June 24, 2013, the Supreme Court denied the request. *Grocery Mfrs. Ass’n v. EPA*, 133 S. Ct. 288 (2013).

### A. *The Court's Standing Analysis*

Because the petitioners in *Grocery Manufacturers* were trade associations rather than directly affected individuals, the trade groups were required to satisfy both Article III and associational standing requirements.<sup>69</sup> To meet the requirements of Article III standing, the party seeking federal jurisdiction must present evidence demonstrating “(1) that the party has suffered an ‘injury in fact,’ (2) that the injury is ‘fairly traceable’ to the challenged action . . . , and (3) that it is ‘likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’”<sup>70</sup> Moreover, as an association suing on behalf of its members, the petitioners must also show that (1) at least one of its members would have standing to sue on his own behalf, (2) the association seeks to protect interests that are “germane to its purpose,” and (3) an individual member of the association is not required by either the nature of the claim or remedy to participate as a party to the suit.<sup>71</sup> Because each industry group brought identical claims against the EPA, the court stated that if it could find Article III standing for any one petitioner, it would have jurisdiction to hear the entire case for all petitioners.<sup>72</sup>

#### 1. Article III Standing of the Engine-Products and Petroleum Groups

The court analyzed each of the three petitioner groups—the Engine-Products Group, the Petroleum Group, and the Food Group—separately.<sup>73</sup> The Engine-Products group asserted that it would suffer injury because introduction of E15 puts them at risk of liability.<sup>74</sup> These petitioners claimed that customers might seek relief from engine manufacturers for damages to engines and emissions systems caused by using E15 in EPA-approved vehicles or by “misfueling” non-approved vehicles with E15.<sup>75</sup> The court held that the Engine-Products petitioners failed to satisfy the injury in fact prong of Article III standing, explaining that the group did not show that their alleged injury was

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69. *Grocery Mfrs.*, 693 F.3d at 174. See, e.g., RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 2.13(f)(iv)(3) (5th ed. 2012).

70. *Grocery Mfrs.*, 693 F.3d at 174 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). See, e.g., 32A AM. JUR. 2D *Federal Courts* § 592 (2012); *Federal Civil Procedure*, supra note 19, § 60 (2012). While the EPA did not challenge any petitioners' Article III standing, Growth Energy, an intervenor, alerted the court that the petitioners potentially lacked the standing necessary for the court to extend its jurisdiction to the case. *Grocery Mfrs.*, 693 F.3d at 174. However, even if Growth Energy had not objected, the court would still be required to ensure the parties had standing under Article III, which limits the federal courts to resolving only “Cases” and “Controversies.” *Id.*; U.S. CONST. art. III, § 2, cl. 1; *Federal Civil Procedure*, supra, § 68 (Standing, as part of the Article III case or controversy analysis, can serve as a constitutional bar to federal court jurisdiction.).

71. *Grocery Mfrs.*, 693 F.3d at 174-75 (citing *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)).

72. *Id.* at 175; see also 32A AM. JUR. 2D *Federal Courts* § 591 (2012) (The showing of standing as to one party is sufficient to establish the requisite Article III case or controversy.).

73. *Grocery Mfrs.*, 693 F.3d at 173. The Engine-Products Group represented members of the industry manufacturing engines or related products. *Id.* The Petroleum Group represented those producing or handling petroleum and renewable fuels. *Id.* The Food Group represented members of the livestock industry and those who sell foods using corn as an input to their processes. *Id.* Although the focus of this case note is on the Food Group, the majority's rationale in concluding each of the three trade associations lacked standing could provide guidance in future proceedings.

74. *Id.* at 175-76.

75. *Id.*

“‘concrete and particularized’ rather than abstract or generalized [or] ‘actual or imminent’ rather than remote, speculative, conjectural[,] or hypothetical.”<sup>76</sup>

Next, the court held that the Petroleum Group also lacked Article III standing because these petitioners failed to satisfy the second element that the injury be “fairly traceable” to the action challenged.<sup>77</sup> According to the Petroleum Group, they would be forced to use and supply E15 in order to meet the RFS mandates; therefore, the EPA waivers, they asserted, are to blame for the petroleum group’s increased costs and potential liability.<sup>78</sup> However, the court suggested that because the waivers do not require anyone to actually use E15, any injury would be “‘self-inflicted . . . as to break the causal chain.’”<sup>79</sup> The court further noted that the petroleum group was not without other options.<sup>80</sup> For example, the RFS does not mandate that the renewable fuel requirements be satisfied by ethanol only; the petroleum industry is free to use other renewable fuel sources.<sup>81</sup> Additionally, the RFS contains a waiver provision that allows persons or individual states to petition the EPA to request a waiver of the volume requirements under the RFS.<sup>82</sup> Because any injuries the Petroleum Group might suffer would be a result of their own choice to use E15, the court held that the EPA’s partial waivers were not the cause of those injuries.<sup>83</sup> Thus, the petitioners from the petroleum industry lacked Article III standing.

## 2. Prudential Standing of the Food Group

Finally, the court held that the Food Group also lacked standing; however, it elected to analyze these petitioners only under prudential rather than Article III standing.<sup>84</sup> The court explained that it was appropriate to consider prudential standing, which it considers to be a jurisdictional matter, without deciding the question of Article III standing.<sup>85</sup> Prudential standing requires that the interests a petitioner seeks to protect be “‘within the zone of interests to be protected or regulated by the statute . . . in question’ or by any provision ‘integrally related’

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76. *Id.* at 175 (quoting *In re Navy Chaplaincy*, 534 F.3d 756, 759-60 (D.C. Cir. 2008)).

77. *Id.* at 178.

78. *Id.* at 176-77.

79. *Id.* at 178 (quoting *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989)).

80. *Id.* at 177-78.

81. *Id.* at 177; *see also* 42 U.S.C. § 7545(o) (2012).

82. *Grocery Mfrs.*, 693 F.3d at 177-78; *see also* 42 U.S.C. § 7545(o)(7). In fact, in 2012 the governors of eight states petitioned the EPA for a waiver of the RFS requirements due to the economic strain on the livestock and poultry industries. *Call Renewed for RFS Waiver*, THE CROP SITE (Sept. 19, 2012), <http://www.thecropsite.com/news/12005/call-renewed-for-rfs-waiver>. These states claimed the increase in renewable fuel mandates drove up corn prices to the point farmers could not afford livestock feed and as a result were forced to cut jobs and increase prices to consumers. *E.g.*, Letter from Governor Beverly Eaves Perdue to Lisa Jackson, Adm’r, EPA (Aug. 14, 2012), *available at* <http://www.epa.gov/otaq/fuels/renewablefuels/documents/north-carolina-rfs-waiver-request.pdf> (North Carolina); Letter from Governor Mike Beebe to Lisa Jackson, Adm’r, EPA (Aug. 13, 2012), *available at* <http://www.epa.gov/otaq/fuels/renewablefuels/documents/arkansas-rfs-waiver-request.pdf> (Arkansas). The EPA denied these requests, concluding the injury asserted did not qualify as “severe economic harm” under the statute. Notice of Decision Regarding Requests for a Waiver of the Renewable Fuel Standard, 77 Fed. Reg. 70,752, 70,753 (Nov. 27, 2012) (emphasis added).

83. *Grocery Mfrs.*, 693 F.3d at 178.

84. *Id.* at 179.

85. *Id.* (citing *Grand Council of the Crees (of Quebec) v. FERC*, 198 F.3d 950, 954 (D.C. Cir. 2000)).

to it.”<sup>86</sup> The Food Group, the court held, failed to meet this test, and thus it dismissed all claims for lack of standing.<sup>87</sup>

The Food Group argued that its interests satisfy the prudential standing zone of interests test.<sup>88</sup> The group seeks to protect its members from the direct impact that increases in ethanol demand will have on the corn market.<sup>89</sup> As the demand for ethanol increases, the demand for and price of corn increases, and therefore the manufacturing and operating costs for food producers and the livestock industry, which depend on corn, will likewise increase.<sup>90</sup> The Food Group explained that the EISA protects these interests because it requires the EPA to review the effect of the renewable fuel market on jobs, rural economies, and *the price and availability of food and other agricultural products* when setting future RFS volume requirements.<sup>91</sup> The court, however, rejected this position.<sup>92</sup> Although the RFS possibly inspired the ethanol groups to apply for the E15 waiver in an attempt to meet the renewable fuel mandates, the court concluded that the petitioners’ complaint was not aimed at the EISA but instead attacking the CAA’s fuel waiver provision.<sup>93</sup> In the court’s view, the fact that the EISA and the CAA’s fuel waiver provision both contain provisions regarding fuel for motor vehicles was not sufficient to find that the EISA is “integrally related” to the statute in question.<sup>94</sup> Failing to fall within the zone of interests protected by the CAA’s fuel waiver provisions, the court held the Food Group lacked prudential standing.<sup>95</sup>

### B. *The Dissent*

In his dissenting opinion, Judge Kavanaugh disagreed with the majority on the standing obstacles and stated that he would have considered the merits.<sup>96</sup> Whereas the majority chose to analyze the Food Group’s prudential standing

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86. *Id.* (quoting *National Petrochemical & Refiners Ass’n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam); see also *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970) (explaining that aside from the case and controversy requirement, standing can be established when “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question”).

87. *Grocery Mfrs.*, 693 F.3d at 179-80.

88. *Id.* at 179.

89. *Id.*

90. See, e.g., Econ. Research Serv., *Corn: Background*, USDA.gov, <http://www.ers.usda.gov/topics/crops/corn/background.aspx#.UUHoBBxlnzI> (last updated Jan. 17, 2013). In the words of the dissent: “This is Economics 101.” *Grocery Mfrs.*, 693 F.3d at 182 (Kavanaugh, J., dissenting).

91. Econ. Research Serv., *supra* note 90; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1523-24 (requiring the EPA to review “the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices” when determining future RFS volume requirements).

92. *Grocery Mfrs.*, 693 F.3d at 179.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 181 (Kavanaugh, J., dissenting).

first rather than Article III standing,<sup>97</sup> the dissent rejected that approach. Judge Kavanaugh found support from other circuits and believed that unlike Article III standing, prudential standing is not jurisdictional.<sup>98</sup> If prudential standing were not jurisdictional, it would not bear on a court's ability to adjudicate a case, and the objection could be forfeited if not raised by a party.<sup>99</sup> Because the EPA did not assert that the petitioners lacked prudential standing, the dissent concluded that the objection was waived, and, therefore, the court should not have considered it.<sup>100</sup>

Moreover, the dissent argued that the Food Group also had Article III standing.<sup>101</sup> Because the approval of E15 could eventually translate into 50% increase in the ethanol used for transportation fuel, that demand for an extra seven billion gallons of ethanol per year will result in increased corn prices.<sup>102</sup> The dissent, therefore, felt the injury in fact and causation prongs of constitutional standing were satisfied.<sup>103</sup>

Finally, on the merits, the dissent viewed it as obvious that the EPA abused its discretion when it issued the statutorily unauthorized partial waivers allowing E15 into the market.<sup>104</sup> Judge Kavanaugh interpreted 42 U.S.C. § 7545(f)(4) to authorize the EPA to approve a new fuel only if it would not cause the failure of the emissions system of *any* vehicle made after 1974.<sup>105</sup> Because the EPA's own studies found that E15 would cause emission system failures in some vehicles made before 2001, the dissent would have vacated the EPA's waivers as contrary to the statutory text.<sup>106</sup>

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97. *Id.* at 179 (majority opinion) (explaining that the court may consider prudential standing while leaving Article III standing unanswered (citing *Grand Council of the Crees (of Quebec) v. FERC*, 198 F.3d 950, 954 (D.C. Cir. 2000))).

98. *Id.* at 183-85 (Kavanaugh, J., dissenting). In fact, the concurring opinion agreed with the dissent that prudential standing is not jurisdictional. *Id.* at 180 (Tatel, J., concurring). However, because the D.C. Circuit has issued opinions to the contrary, and because the suggestions by the Supreme Court that courts be careful with the "jurisdictional" label are "too thin a reed" on which to justify departure, Judge Tatel felt the court was bound by the D.C. Circuit's precedent. *Id.*

99. *Id.* at 183 (Kavanaugh, J., dissenting); *see also* *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (expressing the need to distinguish between "truly jurisdictional rules," which authorize a court to hear a case, and nonjurisdictional rules, which have no bearing on that authority).

100. *Grocery Mfrs.*, 693 F.3d at 185 (Kavanaugh, J., dissenting).

101. *Id.* at 182-83, 190. The concurring opinion also felt the Food Group had Article III standing. *Id.* at 180 (Tatel, J., concurring).

102. *Id.* at 182 (Kavanaugh, J., dissenting) (citing *ADVANCED ECON. SOLUTIONS, IMPLICATIONS FOR U.S. CORN AVAILABILITY UNDER A HIGHER BLENDING RATE FOR ETHANOL* (2009), available at <http://www.meatami.com/ht/a/GetDocumentAction/i/63764>).

103. *Id.*

104. *Id.* at 190 (describing the EPA's partial waiver as "[running] roughshod over the relevant statutory limits").

105. *Id.*

106. *Id.*

## IV. ANALYSIS

A. *Purpose of Standing Limitations*

Standing requirements have been ingrained in American jurisprudence since the drafting of the Constitution, but courts have since expanded those foundational principles.<sup>107</sup> While the framers standing limitations were intended to promote one of the principal concerns at that time—the separation of powers<sup>108</sup>—courts have developed self-imposed restrictions for more practical purposes.<sup>109</sup> Starting with the basic requirement of Article III of the Constitution, which limits the courts’ jurisdiction to “Cases” and “Controversies,”<sup>110</sup> the judiciary has created other prudential limitations intended to promote policies such as improved judicial decision-making, fairness, conservation of judicial resources, and of course, separation of powers.<sup>111</sup> Courts are cognizant of the impact their decisions can have on legislation and policy; therefore, the judiciary is cautious to ensure that the proper parties are before it such that the outcome of the case is tailored to the specific dispute rather than results in a broad disruption of legislative or administrative action.<sup>112</sup>

Procedurally, while it is universally accepted that a court may dismiss a case for lack of constitutional standing either at the request of a party or on its own,<sup>113</sup> the treatment of prudential standing is not so clear. Whereas a federal court is simply without authority to enter judgment if the parties do not establish constitutional standing,<sup>114</sup> prudential standing procedures, based on judge-made law, are applied inconsistently across the federal circuits.<sup>115</sup> This uncertainty has led to unpredictability, making it difficult for petitioners to know whether they should be prepared to establish prudential standing at the outset because the court might consider it *sua sponte*, or whether they should wait to see if the opposing party will even challenge their prudential standing in hopes that neither the opposing party nor the court raises the issue. Unfortunately, the Supreme Court has yet to settle the dispute.

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107. Patrick Lloyd Proctor, *No Generalized Grievances: The “Law of Rules” Approach to Standing*, 19 Ohio N.U. L. Rev. 927, 931 (1993). However, only in the last half century have courts attempted to articulate the theory. Kurt S. Kusiak, *Standing to Sue: A Brief Review of Current Standing Doctrine*, 71 B.U. L. Rev. 667, 669-77 (1991). For example, the test for Article III requiring injury-in-fact, causation, and redressability was first memorialized by the Supreme Court in 1970. *Id.* at 670 (citing *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970)).

108. *Allen v. Wright*, 468 U.S. 737, 752 (1984).

109. Proctor, *supra* note 107, at 933.

110. Kusiak, *supra* note 107, at 667.

111. Proctor, *supra* note 107, at 929-32; Kusiak, *supra* note 107, at 668.

112. *Id.* at 669-70 (citing *Baker v. Carr*, 369 U.S. 186 (1962) (applying the standing doctrine to ask whether the party has “alleged such a personal stake in the outcome . . . to assure that concrete adverseness which sharpens the presentation of [the] issues”); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (using standing as a means to ensure “federal courts do not infringe upon the sovereignty of the other branches of government”)).

113. FED. R. CIV. P. 12(b), (h)(3); *see, e.g.*, *City of Harper Woods Employees’ Ret. Sys. v. Olver*, 577 F. Supp. 2d 124, 128 (D.D.C. 2008).

114. *E.g.*, *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (explaining that because federal courts have limited jurisdiction, they are only authorized as provided by the Constitution or by statute, and that jurisdiction “may not be expanded by judicial decree” (citations omitted)).

115. *See infra* notes 115-19 and accompanying text.

### B. *The Circuits Are Divided over Prudential Standing*

As Judge Kavanaugh noted, “[t]he majority opinion thus creates a deep and important circuit split on this important issue” of whether prudential standing is a jurisdictional or nonjurisdictional matter.<sup>116</sup> With no direct answer from the Supreme Court on the jurisdictional nature of prudential standing under the APA, the circuits have taken divergent paths.<sup>117</sup> For example, the Federal, Fifth, Tenth, and Ninth Circuits have held prudential standing to be nonjurisdictional and waivable<sup>118</sup> while the D.C. and Second Circuits have considered prudential standing a jurisdictional matter that the courts must determine before reaching the merits of a case.<sup>119</sup> Further confounding the debate, some circuits have described prudential standing as nonjurisdictional but then continue to consider the issue despite the absence of a party’s objection.<sup>120</sup>

### C. *Prudential Standing Under the APA is Nonjurisdictional*

With the circuits in disarray and the Supreme Court yet to mediate, the language of the APA could provide insight. The Supreme Court recently held that unless Congress labels a statutory limitation as jurisdictional, courts should proceed as if it were *nonjurisdictional*.<sup>121</sup> Just as the statute at issue in that case

116. *Id.* at 185.

117. Wagner, *supra* note 15.

118. *See, e.g.,* Gilda Indus., Inc. v. United States, 446 F.3d 1271, 1279-80 (Fed. Cir. 2006) (holding that the court was not required to answer question of whether the plaintiff met the standing requirements of the APA because the government “did not contend . . . that [the] complaint should be barred by the zone of interests test. The government . . . waived that argument.”); Board of Miss. Levee Comm’rs v. EPA, 674 F.3d 409, 417 (5th Cir. 2012) (holding that the EPA forfeited its challenge to prudential standing when it waited until the appeal to raise the issue and explaining that “[u]nlike constitutional standing, prudential standing arguments may be waived”); *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) (declining to consider a challenge to prudential standing when first raised on appeal because unlike Article III standing, “questions relating to *prudential* standing . . . may be pretermitted in favor of a straightforward disposition on the merits” (alteration in original) (internal quotation marks omitted) (citing *Grubbs v. Bailes*, 445 F.3d 1275, 1280–81 (10th Cir. 2006)); *American Iron & Steel Inst. v. Occupational Safety & Health Admin.*, 182 F.3d 1261, 1274 (11th Cir. 1999) (concluding the court can “pretermitt” the issue whether plaintiffs’ members satisfy the zone of interest test “because prudential standing is flexible and not jurisdictional in nature”).

119. *Animal Legal Def. Fund, Inc. v. Espy*, 29 F.3d 720, 723 (D.C. Cir. 1994) (explaining that even in the absence of a challenge in the district court to a party’s standing, the court must determine the issue on its own because “[s]tanding, whether constitutional or prudential, is a jurisdictional issue which cannot be waived”); *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (finding a duty to address a standing issue even when not challenged in the lower court, and such “obligation . . . extends ‘to the prudential rules of standing’ . . . [which] constitute ‘limitations on [the court’s] jurisdiction’” (citations omitted)).

120. *Rawoof v. Texor Petroleum Co.*, 521 F.3d 750, 756-57 (7th Cir. 2008) (explaining that a court can reverse for lack of prudential standing “even though no party has noticed it and the error is not jurisdictional”); *City of Los Angeles v. County of Kern*, 581 F.3d 841, 846 (9th Cir. 2009) (stating the court may view a party’s failure to challenge prudential standing as ‘a ground for refusing to invoke it,’ but such failure to challenge does not bar the court’s ability to consider it on its own). Perhaps the Third Circuit has the safest approach: “We have . . . acknowledged the divide in our sister circuits, but we have thus far not decided the issue. . . . [W]e similarly decline to decide the issue now.” *Lewis v. Alexander*, 685 F.3d 325, 340 (3d Cir. 2012).

121. *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2012). Although *Reed Elsevier* was not decided under the APA, the general principle rests not in the particular statute but in Congress’ authority to define the jurisdiction of the federal courts. The Court held that the statutory language “no civil action for infringement . . . shall be instituted until” a copyright claim has been registered was not jurisdictional. *Id.* at 1245 (discussing 17 U.S.C. § 411(a) (2012)). While the majority looked at three factors to reach its holding, *id.*

did not “clearly state” that the restriction was jurisdictional, section 702 of the APA, the provision providing particular persons a right to judicial review of an agency action, contains no clear jurisdictional language.<sup>122</sup> In fact, section 702 contains a limitation on the section’s effect. “Nothing herein . . . affects other limitations on judicial review *or the power or duty of the court to dismiss* any action or deny relief on any other appropriate legal or equitable ground.”<sup>123</sup> Federal courts, which rely on the Constitution and Congress for the scope of their jurisdiction, must dismiss claims for which the court lacks subject matter jurisdiction.<sup>124</sup> Standing is generally understood to be an issue of subject matter jurisdiction.<sup>125</sup> Thus, according to the language of the APA, Congress did not intend for section 702 to alter the standing analysis.

Moving beyond the plain language of a statute, courts frequently look to the surrounding provisions to examine the overall context of the statute at issue.<sup>126</sup> Within the judicial review chapter of the APA,<sup>127</sup> sections 702 through 704 each contain language restricting particular aspects of judicial review of agency action.<sup>128</sup> However, only section 702 limits the effect of those restrictions.<sup>129</sup> For example, section 704 limits review to final agency action and is available only after all other adequate remedies have been exhausted.<sup>130</sup> Under the general canons of statutory construction, it is presumed Congress did not inadvertently omit from section 704 the qualifying language provided in section 702.<sup>131</sup> Therefore, Congress must have had some purpose for including the limiting

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at 1245-46, the concurring opinion, accounting for three of the four justices, found it sufficient to apply the “readily administrable bright line” test set out in *Arbaugh v. Y & H Corp*, *id.* at 1250 (Ginsburg, J., concurring) (citing *Arbaugh*, 546 U.S. 500, 515-16 (2006) (holding that “when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional”)).

122. In comparison, many statutes provide explicit jurisdictional language. *See, e.g.*, 28 U.S.C. § 1332 (2012) (“shall have original jurisdiction of all civil actions where the amount in controversy exceeds \$75,000”); *Id.* § 1331 (“shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States”); 42 U.S.C. § 2000e-5 (2012) (“shall have jurisdiction of actions brought under this subchapter”).

123. 5 U.S.C. § 702 (2012) (emphasis added).

124. FED. R. CIV. P. 12(b), (h)(3) (A court must dismiss a case, either upon a motion by a party or on its own, for lack of subject matter jurisdiction.). Thus, lack of subject matter jurisdiction gives a court the *duty* to dismiss an action.

125. *Federal Civil Procedure*, *supra* note 19, § 68.

126. *See generally* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 507 (5th ed. 2009) (Although no definitive set of interpretive rules exists, courts may look to the statute’s text, immediate context, overall context, background and purpose, and legislative history, as well as general canons of construction and public policy.)

127. 5 U.S.C. §§ 701-706.

128. *Id.* § 702 (“A person suffering legal wrong because of . . . or adversely affected or aggrieved by agency action . . . is entitled to judicial review . . .”); *Id.* § 704 (“Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to review.”).

129. *Id.* § 702.

130. *Id.* § 704.

131. *See, e.g.*, 82 C.J.S. *Statutes* § 386 (One of the fundamental canons of statutory construction is to construe a statute such that every “clause, sentence, or word” has meaning. However, courts should also presume that any words not present in a statute were omitted for a reason. “Thus, when a provision is expressly included in one section . . . but is omitted from another” it is reasonable to conclude that Congress intended that omission.)

language in section 702 yet omitting it in section 704.<sup>132</sup> From the statutory text, it appears Congress intended to distinguish the jurisdictional requirements in section 704<sup>133</sup> from the nonjurisdictional prudential requirements of section 702.<sup>134</sup>

#### D. The Food Group Has Standing

##### 1. Prudential Standing

Regardless of whether prudential standing is a jurisdictional matter, the Food Group had both prudential and Article III standing.<sup>135</sup> Under the APA, any “aggrieved” party may challenge an agency action, and prudential standing is established when the party’s injury falls “within the zone of interests to be protected by the statute” in dispute.<sup>136</sup> According to the Supreme Court, prudential standing is a “low bar.”<sup>137</sup> Moreover, the analysis need not be confined to the particular statute under attack but may extend to include any provision “integrally related” to that statute.<sup>138</sup> For comparison, courts have explained that a party lies outside of the zone of interests when his interests are “so marginally related” to the statute that it cannot be reasonably viewed as Congress’ intent to permit such suit.<sup>139</sup> Because of the interrelation of the RFS

132. See generally *id.*

133. E.g., *American Train Dispatchers Ass’n v. Interstate Commerce Comm’n*, 949 F.2d 413, 414 (D.C. Cir. 1991) (concluding that of the requirements of exhaustion, ripeness, and finality, “only finality is jurisdictional”); *LAWSON*, *supra* note 126, at 923.

134. Of course, Congress presumably intended the APA’s right to review provision to have some meaning. *Statutes*, *supra* note 131. If section 702 is not a jurisdictional threshold, it must be an element necessary to plaintiff’s claim for relief. For example, in *Lujan v. National Wildlife Fed’n*, the court first denied defendant’s motion to dismiss for lack of standing under APA section 702. *Lujan v. National Wildlife Fed’n*, 497 U.S. 871, 879-80 (1990). However, on remand the court granted summary judgment in favor of defendants on the grounds that there was no issue of material fact to indicate plaintiffs qualified as “persons aggrieved” under APA section 702. *Id.* at 880. Thus, the court was able to give meaning to Congress’ limit on right to review without treating such limit as a jurisdictional bar.

135. *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 181 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). The dissent proposed two independent explanations for finding the Food Group had prudential standing: as a party “aggrieved” under the APA, *id.* at 186-88, and as a direct competitor of the ethanol industry, *id.* at 188. The first theory is discussed in this note. Under the second theory, a group who alleges injury as a result of an agency’s change in regulation of the plaintiff’s competitor has prudential standing to bring suit. *Id.* (citing *Clarke v. Securities Indus. Ass’n*, 479 U.S. 388, 403 (1987), *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153-56 (1970)). This is precisely the case of the food industry that directly competes with gasoline blenders and ethanol refiners for corn as a raw material. See, e.g., *Econ. Research Serv.*, *supra* note 90. Therefore, the dissent concluded these petitioners had prudential standing. 693 F.3d at 187-88. Additionally, Judge Kavanaugh concluded that the Petroleum Group also had both Article III and prudential standing. *Id.* at 188-90. Those petitioners met the causation prong of Article III standing because, as the dissent opined, the combination of the EPA’s E15 waiver and the RFS will require some of its members to use E15. *Id.* at 190. Furthermore, the Petroleum Group could easily demonstrate prudential standing as it is directly regulated by the waiver provision in dispute. *Id.*

136. *Association of Data Processing*, 397 U.S. at 153; *Grocery Mfrs.*, 693 F.3d at 186 (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)).

137. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2210 (citing *Clarke*, 479 U.S. at 399); *Grocery Mfrs.*, 693 F.3d at 186.

138. *National Petrochemical & Refiners Ass’n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam).

139. *Motor & Equip. Mfrs. Ass’n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998).

and the fuel waiver provision, the Food Group's attack on the latter satisfies the zone of interest test.

The Supreme Court recently applied the prudential standing zone of interests test in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*.<sup>140</sup> In that case, the Court held Patchak, a neighbor to a tract of land allotted to the Band, had prudential standing to seek judicial review under the APA.<sup>141</sup> The Court explained that a person suing under the APA must satisfy the zone of interests test, but it also noted that such test "is not meant to be especially demanding" and that the presumption is in favor of reviewability.<sup>142</sup> The challenged statute was section 465 of the Indian Reorganization Act, on which the Secretary of the Interior based his authority to acquire the land at issue.<sup>143</sup> Although section 465 referred only to land *acquisition* whereas Patchak's purported injuries were related to land *use*, the Court found Patchak nonetheless satisfied the prudential standing test because the Secretary acquired the land "with at least one eye directed toward . . . [land] use."<sup>144</sup>

Likewise, the Food Group's alleged injury in *Grocery Manufacturers* is based on the effect of the E15 waivers and the resultant higher ethanol demand on the corn market.<sup>145</sup> Although the CAA fuel waiver provision does not directly require consideration of the effect of a waiver on the agriculture and food industries,<sup>146</sup> the EPA issued its partial fuel waivers "with at least one eye directed toward"<sup>147</sup> provisions that do.<sup>148</sup> Similar to *Match-E-Be-Nash-She-Wish* where the Department of the Interior published a notice stating it intended to acquire the land "for the *purpose* of construction and operation of a gaming facility,"<sup>149</sup> the EPA's notice of the fuel waiver to allow the use of E15 cited the RFS program for part of its justification:

This interpretation and approach is also appropriate as it furthers the goals of Congress in the recent amendments to the RFS. Congress purpose in enacting the EISA amendments to section 211(o) was to increase the volume of renewable fuel, including gasoline-ethanol blends, to improve the nation's energy and economic security. Granting a waiver for E15 is consistent with and advances these goals.<sup>150</sup>

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140. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. 2199. While the Court discussed the scope of the zone of interest test, it did not discuss the jurisdictional nature of prudential standing. *Id.* at 2210-12. Such an analysis was unnecessary because the Band had already asserted that the plaintiff lacked prudential standing. *Patchak v. Salazar*, 646 F. Supp. 2d 72, 76 (D.D.C. 2009).

141. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2202-03.

142. *Id.* at 2210 (quoting *Clarke*, 479 U.S. at 399) (internal quotation marks omitted).

143. 25 U.S.C. § 465 (2012); *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2202-03.

144. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2210-11.

145. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012); see also *New Study: Ethanol Major Factor in Corn Prices*, GROCERY MANUFACTURERS ASS'N (Apr. 24, 2011), <http://www.gmaonline.org/blog/?p=1189> (citing BRUCE A. BABCOCK & JACINTO F. FABIOSO, IOWA STATE UNIV., THE IMPACT OF ETHANOL AND ETHANOL SUBSIDIES ON CORN PRICES (2011)); Econ. Research Serv., *supra* note 90.

146. 42 U.S.C. § 7545(f)(4) (2012).

147. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2210-11.

148. Second Partial Grant, *supra* note 8.

149. Notice of Determination, 70 Fed. Reg. 25,596, 25,596 (Bureau of Indian Affairs May 13, 2005) (emphasis added).

150. Second Partial Grant, *supra* note 8, at 4680.

Just as the Court in *Match-E-Be-Nash-She-Wish* found the Department of Interior's consideration of land use sufficient to bring the plaintiff within the zone of interests to be protected by section 465 of the Indian Reorganization Act, the EPA's consideration of the EISA and RFS when issuing the waivers brought the Food Group in *Grocery Manufacturers* within the zone of interests to be protected by the fuel waiver provision.

Moreover, as the majority stated, the D.C. Circuit has defined the zone of interests to include those protected by the statute at issue or "by any provision 'integrally related to it.'"<sup>151</sup> The court, however, concluded that merely having fuel as a common subject matter was insufficient to establish an "integral relationship" between the fuel waiver provisions and the EISA.<sup>152</sup> Where the majority stopped short in its analysis, the dissent continued. The EISA and RFS require certain volumes of renewable fuels to be sold, yet due to the "blend wall,"<sup>153</sup> the goals and requirements of the EISA and RFS cannot be effectuated without first satisfying the CAA's fuel waiver provision.<sup>154</sup> Capped by the 10% ethanol limit and the declining consumption of transportation gasoline,<sup>155</sup> fuel manufacturers must find a way to integrate greater amounts of ethanol into transportation fuels to meet the annually-increasing EISA and RFS volume requirements.<sup>156</sup> However, the CAA's prohibition against new fuels stands in the way. The fuel waiver provisions, the only way around the prohibition, are integrally related to the renewable fuel mandates.

The prohibition against new fuels, section 7545(f)(1) of the CAA, explicitly bars any new fuel that is not "substantially similar" to that used to certify a vehicle's emissions system from being used or sold commercially without prior approval from the EPA.<sup>157</sup> The renewable fuels contemplated by the EISA and RFS—such as corn-based ethanol, animal and food waste ethanol, and cellulosic biofuel<sup>158</sup>—are simply not "substantially similar" to the fuels used to test engine emission systems; the parties do not argue otherwise.<sup>159</sup> To introduce these new fuels, a fuel manufacturer *must* petition the EPA for a waiver. The requirements of the RFS in section 7454(o) cannot be met without first obtaining a fuel waiver under section 7454(f)(4); therefore, these statutory provisions are "integrally related."

Because the Food Group's interests are expressly protected under the EISA and RFS, and the EISA and RFS are "integrally related" to the fuel waiver provision, the Food Group should have satisfied the zone of interests test.<sup>160</sup> The EISA and RFS both require the EPA to consider the effect of renewable fuel

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151. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012) (alteration in original) (emphasis added) (quoting *National Petrochem. & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002) (per curiam)).

152. *Id.* at 179.

153. *See supra* notes 47-51 and accompanying text.

154. *Grocery Mfrs.*, 693 F.3d at 186-87 (Kavanaugh, J., dissenting).

155. *Gasoline Consumption*, *supra* note 49.

156. Zimmerman, *supra* note 49.

157. 42 U.S.C. § 7545(f)(1) (2012).

158. *Id.* § 7545(o).

159. *Grocery Mfrs.*, 693 F.3d at 190 (Kavanaugh, J., dissenting).

160. *Id.* at 187.

usage on rural economies, agricultural jobs, the price and availability of agricultural products, and food prices when establishing renewable fuel volume requirements.<sup>161</sup> The Food Group alleged an injury due to elevated corn and livestock prices, placing the petitioner's claims squarely within the statutorily protected interests. Thus, the Food Group's interests are protected by provisions within the EISA and RFS, which are "integrally related" to the one at issue, the CAA fuel waiver provision. The petitioners had prudential standing.

## 2. Article III Standing

The Food Group also had Article III standing.<sup>162</sup> The majority did not reach this question regarding the Food Group, but it did so for the other two plaintiff groups, ending at the injury in fact and causation prongs.<sup>163</sup> However, the court's reasoning is inapposite to the Food Group. As the Food Group argued, increasing the allowable ethanol content in gasoline from 10% to 15% could result in a 7 billion gallon per year increase in ethanol demand.<sup>164</sup> An increased demand for ethanol necessarily requires greater amounts of corn, diverting resources from other agricultural commodities and driving up the cost of corn itself.<sup>165</sup> These inflated costs will be felt by consumers through higher-priced beef, pork, poultry, dairy, eggs, and the numerous processed foods filling grocery store shelves.<sup>166</sup> Of course, the claim that ethanol demand "could" increase by 50% is not "certain," but absolute certainty is not the test. As the majority stated, Article III injury in fact must be "concrete and particularized . . . and actual or imminent" rather than "abstract or generalized, and . . . remote, speculative, conjectural or hypothetical."<sup>167</sup>

The potential increase in food costs following an increase in the permissible ethanol content of gasoline is not "remote, speculative, or hypothetical." The RFS is a *mandate*; fuel producers must meet the renewable fuel volumes required by the statute.<sup>168</sup> However, because of the "blend wall," fuel producers

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161. 42 U.S.C. § 7545(o)(2)(B)(ii)(VI); Energy Independence and Security Act, Pub. L. No. 110-140, § 203, 121 Stat. 1492, 1528 (2007) (requiring a study of the RFS mandates' impact on industries associated with the production of, among others, livestock, livestock, feed, and food).

162. *Grocery Mfrs.*, 693 F.3d at 182-83 (Kavanaugh, J., dissenting). The dissent would have found the Food Group had Article III standing under both the traditional analysis of injury in fact, causation, and redressability as well as under the direct competitor theory. *Id.* The first theory is discussed in the text above. Under the second theory, the D.C. Circuit has held that an entity has standing under Article III when it alleges an agency illegally regulated its competitor in a manner which harmed the entity. *Id.* at 182. Accordingly, the Food Group has Article III standing as it claims the EPA, in violation of its authority under the CAA, has regulated the petroleum and ethanol industries, the Food Group's direct competitors, in a way that harms the plaintiff members by increasing corn prices. *Id.* at 183.

163. *Id.* at 175-78 (majority opinion).

164. *Id.* at 182 (Kavanaugh, J., dissenting). In fact, ethanol trade group Growth Energy touted this possibility. Tom Buis, *Another Big Step for E15*, ETHANOL PRODUCER (Mar. 5, 2012), <http://www.ethanolproducer.com/articles/8630/another-big-step-for-e15>.

165. Econ. Research Serv., *supra* note 90; BABCOCK, *supra* note 145, at 7-10.

166. BABCOCK, *supra* note 145, at 11. For further discussion on the pervasiveness of corn in the American food industry, see MICHAEL POLLAN, *THE OMNIVORE'S DILEMMA* (2007).

167. *Grocery Mfrs.*, 693 F.3d at 175.

168. 42 U.S.C. § 7545(o)(2)(A)(i) (2012).

will soon be unable to satisfy these requirements.<sup>169</sup> In fact, the statutorily mandated volume has already increased twice since this case was filed, requiring an additional 2.6 billion gallons of renewable fuel per year, and it will continue to increase in 2014, 2015, and every year through at least 2022.<sup>170</sup> Considering that ethanol production capacity in the United States tripled between 2006 and 2010, with little to no development in other biofuels capabilities, the most feasible way at this time to satisfy the increasing volume requirements is simply to incorporate greater volumes of ethanol into gasoline.<sup>171</sup> Fuel producers currently have no choice but to blend their fuel at the higher ethanol concentrations.<sup>172</sup> Because ethanol producers in the United States rely heavily on corn, it therefore follows that an increase in ethanol consumption will produce an increase in price of any product dependent on corn.<sup>173</sup> Thus, the Food Group, whose members rely on corn for feed or as a raw material, will be subjected to these higher prices, and therefore, satisfies the Article III element of injury in fact.<sup>174</sup>

Furthermore, the Food Group passes the causation test of Article III standing. Whereas the court held that the Petroleum Group failed this prong because when the petitioners choose to blend or offer E15, the injury asserted would be “self-inflicted, . . . so completely due to the complainants own fault as to break the causal chain,”<sup>175</sup> the same cannot be said of the Food Group. The waivers do not force the Petroleum Group to produce or handle E15; they are free to refuse to store or blend it. If a member of the Petroleum Group decides to use E15, it will likely be a business decision grounded in economics, not because the EPA’s waivers force them to bear risk of liability or increased costs to modify their operations.<sup>176</sup> In contrast, members of the Food Group cannot avoid the injurious higher prices because, while the focus here has primarily been on corn, the impact will be felt throughout the agriculture and livestock industries, leaving the Food Group with no option to avoid the increased costs.

When ethanol and petroleum producers demand larger quantities of corn to meet the RFS mandates, farmers will be willing to supply it, and the Food Group cannot avoid the ensuing financial injury. For example, it might be argued that farmers could use a feed source other than corn; however, while true, the increased need for corn for ethanol production would likely result in the conversion of existing farm lands into corn fields.<sup>177</sup> A diminished supply of the

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169. See *supra* notes 47-51 and accompanying text regarding the blend wall.

170. 42 U.S.C. § 7545(o)(2)(B)(i) (requiring 13.95 billion gallons in 2011 when *Grocery Manufacturers* was filed and requiring 16.55 billion gallons in 2013). However, as indicated *supra* note 1, just prior to printing, the EPA proposed to reduce the 2014 mandated volumes to the 2012 requirements.

171. PNC BANK, *supra* note 2, at 1-2.

172. John M. Mayes & Tom Hogan, *Market, Production Conditions Will Prevent Meeting RFS*, OIL & GAS J. (Oct. 1, 2012), <http://www.oilandgas.com/articles/print/vol-110/issue-10/processing/market-production-conditions-will-prevent.html>.

173. BABCOCK, *supra* note 145, at 1.

174. *Grocery Mfrs. Ass’n v. EPA*, 693 F.3d 169, 182 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

175. *Id.* at 176-78 (majority opinion) (quoting *Petro-Chem Processing, Inc. v. EPA*, 866 F.2d 433, 438 (D.C. Cir. 1989)).

176. *Id.*

177. Econ. Research Serv., *supra* note 90.

grains formerly produced in these fields equates again to higher prices for a feed source. Additionally, as more corn fields are planted, competition for other resources such as water will increase. As illustrated by those states that petitioned the EPA to reduce the RFS requirements or waive them altogether due to current drought conditions across the nation,<sup>178</sup> the increased cost and reduced availability of water will again impose an economic burden on the Food Group's members. Unlike the Petroleum Group, the Food Group has no control over these choices to increase corn production, and because crops and livestock require water and nutrients, the Food Group cannot escape the injuries.

Additionally, the court's rationale against finding causation for the Engine Products group, which focused on the fact that the injury alleged required the independent acts of third parties,<sup>179</sup> is also inapplicable to the Food Group. The majority concluded that the injuries to the Engine Products group would be caused by consumers when they mistakenly or purposefully used E15 in a vehicle for which the fuel was not approved, despite measures in place to warn the consumers of the risk of harm.<sup>180</sup> However, the injury at issue here would be inflicted when third parties, producers who choose to offer E15 to consumers and farmers who choose to grow more corn to supply the demand, act completely in accordance with the statutory and regulatory scheme. Moreover, the cases cited by the majority in its causation analysis, which were dismissed for lack of standing, found it uncertain that third parties would actually act in a way that injured the plaintiffs. For example, in *Florida Audubon Society v. Bentsen*, the D.C. Circuit dismissed the claim on the causation prong of Article III standing because it found it too speculative that an ethanol tax credit would in fact result in an increased demand for ethanol and thus corn.<sup>181</sup> However, that case involved an *incentive*;<sup>182</sup> here, the fuel industry is faced with a *mandate*.<sup>183</sup> The EPA's waiver lifted a restriction that had capped the demand for ethanol so that now producers can blend greater volumes of ethanol in order to comply with Congress' alternative fuel requirements.

Moreover, this same court has quickly and without discussion found Article III standing where the alleged injuries were dependent on the acts of third parties who were operating pursuant to an agency order. In *Patchak v. Salazar*, the case for which the Supreme Court granted certiorari and affirmed in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the D.C. Circuit held the plaintiff had Article III standing.<sup>184</sup> While the setting is quite different from *Grocery Manufacturers*, the situations of the challengers are analogous. The

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178. The states' petitions are discussed *supra* note 82.

179. *Grocery Mfrs.*, 693 F.3d at 176.

180. *Id.*

181. *Florida Audubon Soc'y v. Betsen*, 94 F.3d 659, 670-72 (D.C. Cir. 1996).

182. Alcohol Fuels Credit; Definition of Mixture, 55 Fed. Reg. 8946 (Mar. 9, 1990) (to be codified at 26 C.F.R. pt. 1).

183. 42 U.S.C. § 7545(o)(2) (2012).

184. *Patchak v. Salazar*, 632 F.3d 702, 704 (D.C. Cir. 2011) (stating that "[t]here is no doubt that Patchak satisfied [Article III] standing requirements. . . . [T]he impact of the Band's facility on Patchak's way of life constituted an injury in fact fairly traceable to the Secretary's [decision], an injury the court could redress with an injunction that would . . . prevent the Band from conducting gaming on the property"), *aff'd sub nom.* *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012).

plaintiff in *Patchak* alleged he would suffer injury when the Band built a casino near his property.<sup>185</sup> The casino had not been built, yet the court did not find that the injury was speculative.<sup>186</sup> Any injury the landowner alleged depended on third parties—crowds of people and heavy traffic—visiting the casino. However, the agency's action did not require the tribe to build the facility nor force anyone to go to the casino. The agency simply granted permission, yet the court found no problem with causation.<sup>187</sup>

Analogizing to *Patchak*, E15 is not yet widely available in gas stations across the country, but after the EPA's fuel waivers it is nearly certain that it will be.<sup>188</sup> Moreover, the EPA's waiver does not force producers to offer E15, nor does it force consumers to purchase it. However, as ethanol trade group Growth Energy asserted, E15 provides a lower cost alternative at the pump,<sup>189</sup> therefore, as the nation is already in disarray over ever-increasing gas prices, consumers will purchase lower-priced E15. Just as the casino in *Patchak*, which could not have been constructed without Interior approval under the Indian Reorganization Act, without the EPA's partial fuel waivers under the CAA, neither the offering for sale or the purchase of E15 would be possible.<sup>190</sup> Like the plaintiff-landowner in *Patchak*, the Food Group in *Grocery Manufacturers* satisfies the injury in fact and causation prongs.

Finally, the Food Group's injury is redressable by the court. Similar to the Court's holding in *Patchak* that the plaintiff's injury would be redressed if the court issued an injunction to prevent the band from building the casino,<sup>191</sup> the Food Group's injury would be redressed if the court vacated the EPA's partial waiver. Vacating the waivers would return the maximum allowable ethanol content of gasoline to 10%, which would eliminate the increased demand in corn for ethanol production. Because the court is authorized to review and set aside the EPA's waiver if the court finds the agency acted in excess of its authority, the Food Group's injury is therefore redressable.<sup>192</sup> For these reasons, the court should have found that the Food Group had Article III standing and decided the case on the merits.

## V. CONCLUSION

The court's decision in *Grocery Manufacturers* to dismiss the Food Group for lack of standing not only deepened the split in the circuits regarding the jurisdictional nature of prudential standing but also allowed a major change to the United States fuel market to remain in place without a clear answer as to whether the EPA's action was authorized. Although support for prudential

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185. *Match-E-Be-Nash-She-Wish*, 132 S. Ct. at 2202-04; *Patchak*, 632 F.3d at 703-04.

186. *Patchak*, 632 F.3d at 704.

187. *Id.*

188. The first fueling station to offer E15 made the product available only eighteen months after the EPA's second waiver. Wald, *supra* note 62. Multiple stations across Kansas, Iowa, and Nebraska have since begun selling E15. *E15 Station Locations*, CHOOSE ETHANOL, <http://www.chooseethanol.com/pages/e15-station-locations/> (last visited Mar. 15, 2013).

189. Buis, *supra* note 164.

190. 42 U.S.C. § 7545(f)(1), (4) (2012).

191. *Patchak*, 632 F.3d at 704.

192. 5 U.S.C. § 706 (2012); 42 U.S.C. § 7604(e).

standing as a nonjurisdictional limitation can arguably be found in the language of APA and in other Supreme Court and circuit cases, a more direct position from the Supreme Court could resolve this circuit split and provide greater procedural predictability for future parties challenging agency action.

More importantly with respect to the present parties, a decision on the merits of *Grocery Manufacturers* would have provided the food, agriculture, petroleum, engine manufacturing, and ethanol industries with more certainty on how to proceed in their business decisions in light of EPA's fuel waivers. A holding on the merits would reduce the risk that the industry might change its policies and practices to adapt to the new regulations, expending a considerable amount of capital, only to be overturned on a later judicial review. Instead, the claims were dismissed, and even though presented with the opportunity to take a position on prudential standing, the Supreme Court has again declined to take a stand.<sup>193</sup>

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193. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 2880 (2013).

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