ORAL ARGUMENT NOT YET SCHEDULED
No. 19-1124 and consolidated cases

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

INITIAL BRIEF OF PETITIONERS AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN MOTORCYCLIST ASSOCIATION, AMERICAN PETROLEUM INSTITUTE, CITIZENS CONCERNED ABOUT E15, COALITION OF FUEL MARKETERS, AND NATIONAL MARINE MANUFACTURERS ASSOCIATION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Petitioners hereby certify as follows:

A. Parties, Intervenors, and *Amici Curiae*:

Petitioners: American Fuel & Petrochemical Manufacturers (19-1124); Small Retailers Coalition (19-1159); American Petroleum Institute, American Motorcyclist Association, National Marine Manufacturers Association; Coalition of Fuel Marketers, Citizens Concerns About E15 (19-1160); and Urban Air Initiative, Inc., The Farmers' Educational Cooperative Union of America, d/b/a National Farmers Union, Farmers Union Enterprises, Inc., Big River Resources, LLC, Glacial Lakes Energy, LLC, Clean Fuels Development Coalition, Fagen, Inc., Jackson Express, Inc., Jump Start Stores, Inc., Little Sioux Corn Processors, LLC, South Dakota Farmers Union (19-1162).

Respondents: Environmental Protection Agency; Andrew Wheeler.

Intervenors: American Fuel & Petrochemical Manufacturers; Growth Energy; Renewable Fuels Association; National Corn Growers Association.

B. Rulings Under Review:

The agency action under review is the Final Rule issued by the United States Environmental Protection Agency, titled "Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations," 84 Fed. Reg. 26,980 (June 10, 2019).

C. Related Cases:

The agency action challenged in these consolidated cases has not previously been before this Court or any other court.

The following pending cases involve various related aspects of EPA's Renewable Fuel Standard Program:

- *Renewable Fuels Ass'n v. EPA*, Nos. 18-1154 *et al.*, relating to a petition submitted to EPA regarding small-refinery exemptions under the RFS program.
- *Growth Energy v. EPA*, Nos. 19-1023 *et al.*, challenging EPA's RFS 2019 rule.
- *RFS Power Coalition v. EPA*, Nos. 20-1046 *et al.*, challenging EPA's RFS 2020 rule.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners submit the following statements:

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members comprise most U.S. refining and petrochemical manufacturing capacity. AFPM has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in AFPM. AFPM is a "trade association" within the meaning of Circuit Rule 26.1. AFPM is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its members.

American Petroleum Institute ("API") is a nationwide, not-for-profit association representing over 600 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. API has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in API. API is a "trade association" within the meaning of Circuit Rule 26.1. API is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its members.

American Motorcyclist Association ("AMA") is a 501(c)(4) nonprofit membership organization that sanctions motorsport competition and motorcycle recreational events with a Code of Regulations. The mission of the American Motorcyclist Association is to promote the motorcycle lifestyle and protect the future of motorcycling. As the world's largest motorcycling organization at about 220,000 members, the AMA advocates for motorcyclists' interests in the halls of local, state and federal government and the committees of international governing organizations. Through the AMA Motorcycle Hall of Fame it preserves the heritage of motorcycling for future generations. Its members receive discounts from well-known suppliers of motorcycle services and equipment. AMA has no parent companies, and no publicly-held company has a ten percent or greater ownership interest in AMA. AMA is a "trade association" within the meaning of Circuit Rule 26.1.

National Marine Manufacturers Association ("NMMA") is a nationwide, not-for-profit trade association representing nearly 1,300 member companies engaged in all aspects of the recreational maritime industry, including boat, engine, trailer and accessory manufacturing. NMMA has no parent companies, and no publicly-held company has a ten percent or greater ownership interest in NMMA. NMMA is a "trade association" within the meaning of Circuit Rule 26.1. NMMA is dedicated to advocating for and promoting the strength of marine manufacturing,

the sales and service networks of its members, and the boating lifestyle. NMMA is a continuing association operating for the purpose of promoting the general commercial, professional, legislative and other interests of its members.

Coalition of Fuel Marketers ("CFM") is an unincorporated association whose membership is limited to independent fuel marketers in the United States. CFM was organized for the sole purpose of representing the interests of independent fuel marketers in connection with the EPA rulemaking expanding Reid Vapor Pressure waivers to fuel blends containing gasoline and up to 15 percent ethanol. CFM has no parent companies, and no publicly-held company has a ten percent or greater interest in CFM. No member of CFM has issued shares or debt securities to the public.

Citizens Concerned About E15 is an unincorporated association whose membership is limited to individuals in the United States who are concerned about the use of E15 as transportation fuel. These citizens' concerns include harm to the environment and an increased risk of damage to their vehicles from misfueling. No members of this association have issued shares or debt securities to the public.

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GLOSSARY*

AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
E0	Gasoline that contains no ethanol, 40 C.F.R. § 80.1500
E10	A gasoline-ethanol blend that contains at least 9 and no more than 10 percent ethanol by volume, *see* 40 C.F.R. § 80.1500
E15	A gasoline-ethanol blend that contains greater than 10 percent ethanol and not more than 15 percent ethanol by volume, *see* 40 C.F.R. § 80.1500
E15 Rule or Rule	Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 26,980 (June 10, 2019)
EPA	Environmental Protection Agency
JA	Joint Appendix
psi	Pounds per square inch
RFS	Renewable Fuel Standard
RTC	EPA Response to Comments (EPA-HQ-OAR-2018-0775-1174, *reprinted at* JA__)
RVP	Reid Vapor Pressure
SA	Standing Addendum

* Pursuant to the Court's Notice regarding abbreviations, the terms listed here are either in common usage or have been used by the Court in opinions.

JURISDICTION

These cases challenge final agency action taken by EPA on June 10, 2019. Petitioners timely sought review in this Court, which has jurisdiction under 42 U.S.C. §7607(b)(1).

STATEMENT OF ISSUES

When transportation fuel evaporates, it creates ozone, an air pollutant. To reduce the formation of ozone during the summer, the Clean Air Act limits fuel volatility—a fuel's tendency to cause evaporative emissions—to 9.0 pounds per square inch Reid Vapor Pressure (RVP) between June 1 and September 15. 42 U.S.C. §7545(h)(1). The sole exception to this volatility limit is for fuels "containing gasoline and 10 percent … ethanol," for which Congress provided a 1-psi waiver of the otherwise-applicable 9.0-psi limit. *Id.* §7545(h)(4). Fuels that qualify for the §7545(h)(4) waiver may be sold at 10.0 psi, even though they cause greater evaporative emissions than comparable fuels at 9.0 psi.

Beyond volatility, the Act also seeks to ensure that new fuels do not damage existing vehicles' emission controls, by prohibiting the sale of fuel that "is not substantially similar to any fuel … utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine." *Id.* §7545(f)(1)(A)-(B).

EPA long interpreted these provisions in a way that impeded the sale of E15—a gasoline-ethanol blend containing between 10% and 15% ethanol by volume—during summer months.

In the rule challenged here, EPA abandoned its longstanding interpretation and construed the Act to permit year-round sales of E15 at 10.0 psi. The rule concludes that §7545(h)(4)'s 1-psi waiver applies to E15, even though E15 contains more than "10 percent … ethanol." The rule likewise determines that E15 satisfies §7545(f)(1), based on a conclusion that E15 at 9.0 psi is substantially similar to E10, a fuel used to certify model-year 2017 and newer vehicles. EPA took that step despite (i) recognizing that E15 is not substantially similar to E0, the fuel used to certify the overwhelming majority of the vehicle fleet, (ii) concluding that E15 is not substantially similar to E10 when used in tens of millions of pre-2001 model year vehicles, and (iii) failing to evaluate whether the fuel actually authorized by the rule—E15 at 10.0 psi—is substantially similar to E10.

The questions presented are:

1. Whether EPA erred by extending §7545(h)(4)'s waiver to fuels containing between 10% and 15% ethanol.

2. Whether EPA erred in applying §7545(f)(1)'s substantial-similarity requirement.

3. Whether EPA erred by reopening and retaining EPA's prior decisions conditionally authorizing the sale of E15 at 9.0 psi.

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the Addendum.

STATEMENT OF THE CASE

Ethanol is a gasoline additive regulated under the Clean Air Act. In addition to increasing the oxygen content of gasoline, ethanol increases its corrosivity. Most light-duty vehicles on the road and most of the refueling infrastructure in the United States are not equipped to handle gasoline with ethanol content higher than 10%. JA_, _[84_Fed._Reg._at_27,005,_27,009-10]. This case concerns two provisions of the Act that impose restrictions on (1) the volatility of fuel blends that contain ethanol and (2) the introduction of new fuel blends.

I. THE CLEAN AIR ACT PROHIBITS NEW FUELS NOT "SUBSTANTIALLY SIMILAR" TO CERTIFICATION FUELS

In 1977, Congress prohibited the sale of fuel that "is not substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine." 42 U.S.C. §7545(f)(1)(A).[1] Congress adopted this approach to protect the existing light-duty vehicle fleet by "prevent[ing] the use of any new or recently introduced additive in … gasoline"

[1] Unless otherwise noted, all statutory citations are to Title 42, U.S. Code.

that "may impair emission performance of" "1975 and subsequent model year automobiles."[2] JA_[S._Rep._No._95-127_at_90_EPA-HQ-OAR-2018-0775-1161]; *see also* JA_[84_Fed._Reg._at_26,984] (statute bars sale of fuels "that would degrade the emission performance of the existing fleet"). A provision enacted in 1990 extended this prohibition to all "motor vehicles." §7545(f)(1)(B). Because the "section [7545](f)(1) prohibition is designed to protect the emissions control systems for the breadth of motor vehicles in the fleet, whether they are within or outside the regulatory useful life of an applicable emissions standard," 75 Fed. Reg. at 68,147, the substantial-similarity provision requires new fuels to be "backwards compatible" with older vehicles. JA_[AFPM_Comments_23_EPA-HQ-OAR-2018-0775-0809].

"In making a 'substantially similar' determination, EPA generally evaluates the … composition of the new fuel" compared to "certification fuels" to determine the new fuel's "emissions effects." 75 Fed. Reg. at 68,143; *see also* JA_[AFPM_Comments_28].[3] This analysis assesses "all certification fuels used for the broad range of motor vehicle model years, not just the current model

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[2] Light-duty vehicles are "passenger car[s]" "capable of seating 12 passengers or less." 40 C.F.R. §86.1803-01.

[3] Certification fuels are used when vehicles are tested to certify their compliance with EPA emissions standards. JA_[84_Fed._Reg._at_26,994].

years," because "the 'substantially similar' definition affects roughly 300 million motor vehicles." 75 Fed. Reg. at 68,143.

The strict prohibition in §7545(f)(1) is tempered by one limited exception: EPA may waive the "substantially similar" requirements if "the emission products of [a] fuel … will not cause or contribute to a failure of *any* emission control device or system … to achieve compliance … with [EPA] emission standards." §7545(f)(4) (emphasis added). This exception "establishes a clear burden on the waiver applicant to establish that the new fuel will not cause or contribute to the failure of any emission control device to achieve compliance with emission standards over the useful life of a vehicle." *Motor Vehicle Mfrs. Ass'n v. EPA*, 768 F.2d 385, 387 n.4 (D.C. Cir. 1985). Analysis under subsection (f)(4) focuses on the real-world performance of the fuel, evaluating criteria including emissions, materials compatibility, and drivability. JA_[84_Fed._Reg._at_26994].

From the 1970s until 2015, pure gasoline, also known as E0, was the only fuel used to certify gasoline-powered vehicles' emissions compliance—such that any new fuel had to be substantially similar, *i.e.*, similar in composition, to E0 to enter the market, or receive a §7545(f)(4) waiver. *See* JA_[84_Fed._Reg._at_26994], _[RTC_42].

As originally enacted, §7545(f)(4) required EPA to act on a waiver request within 180 days or it would be "treated as granted." *Ethyl Corp. v. EPA* 51 F.3d

1053, 1059 (D.C. Cir. 1995). In 1979, a waiver request for fuel blends containing 10% ethanol was deemed granted under §7545(f)(4) due to EPA inaction, legalizing E10. 44 Fed. Reg. 20,777 (Apr. 6, 1979).[4] EPA has *never* made an affirmative determination that E10 is substantially similar to E0 under subsection (f)(1) *or* satisfies subsection (f)(4).

II. EPA'S FUEL VOLATILITY REGULATIONS & ETHANOL

A. EPA's Initial Fuel Volatility Regulations

Because the 1979 waiver was granted by default, "no constraints were imposed on the volatility of" E10, a situation EPA later sought to remedy. 52 Fed. Reg. 31,272, 31,292 (Aug. 19, 1987). "'Volatility' is a measure of gasoline's tendency to evaporate … [and] is measured in terms of Reid Vapor Pressure ('RVP'): the greater the RVP, the greater the volatility of the gasoline and the larger the amount of ozone formed." *Nat'l Tank Truck Carriers, Inc. v. EPA*, 907 F.2d 117, 179 (D.C. Cir. 1990). RVP, in turn, is expressed in pounds per square inch (psi), with a higher psi equating to a higher RVP. 40 C.F.R. §80.27(a)(2).

In 1987, EPA proposed regulating the RVP of fuels. 52 Fed. Reg. at 31,278. EPA explained that higher RVP fuels increase evaporative emissions of volatile

[4] EPA later interpreted this waiver to encompass blends containing *up to* 10% ethanol. 47 Fed. Reg. 14,596 (Apr. 5, 1982).

organic compounds and contribute to formation of ozone, both of which are regulated air pollutants.[5] *Id.* at 31,275, 31,280-82.

Vehicles powered by "gasoline mixed with about 10 percent ethanol" "have significantly higher evaporative emissions than" equivalent vehicles powered by E0. *Id.* at 31,292-94. Nevertheless, given concerns about "serious economic impacts on the fuel-alcohol industries" if E10 and E0 were subject to "the same RVP requirements," EPA evaluated setting a 1.0-psi-higher RVP limit for gasoline-ethanol blends. *Id.* at 31,293.

EPA's 1989 regulations required pure gasoline RVP to be 9.0-10.5 psi, "depending on the area of the country and the month." 54 Fed. Reg. 11,868, 11,869 (Mar. 22, 1989). EPA provided for a 1.0-psi-higher limit for gasoline that "contain[s] at least 9% ethanol (by volume)," so long as the ethanol level did not "exceed any applicable waiver conditions under" §7545(f)(4), *id.* at 11,885, which at the time imposed a "10 percent maximum ethanol content," 52 Fed. Reg. at 31,305 n.22. Thus, fuel blends containing "at least" 9% but no more than 10% ethanol received a 1.0-psi-higher RVP limit than E0—meaning that such blends

[5] "Evaporative emissions" are caused by the evaporation of fuel, for example due to temperature changes, and are distinct from "exhaust" emissions generated by combustion of fuel to power the vehicle. JA_, _[84_Fed._Reg._at_26,982_n.4,_27,001].

could continue to be sold during the summer ozone season, despite their higher RVP.

B. The Clean Air Act Amendments of 1990

In 1990, Congress enacted §7545(h), requiring EPA to promulgate regulations limiting gasoline RVP to 9.0 psi during the annual June 1 to September 15 "high ozone season." §7545(h)(1). A "waiver" applies to fuels "containing gasoline and 10 percent denatured anhydrous ethanol," which are subject to a limit "one pound per square inch (psi) greater than the" 9.0 psi limitation "established under paragraph (1)." §7545(h)(4).[6] This waiver allows fuels containing gasoline *and* 10% ethanol to continue to be sold during the summer without the need to use lower volatility gasoline blendstock. JA_[84_Fed._Reg._at_26,987-88].

EPA revised its regulations to implement the statute, explaining that, "consistent with Congressional intent," it was "not proposing any change to the current requirement that the blend contain between 9 and 10 percent ethanol (by volume) to obtain the one psi allowance." 56 Fed. Reg. 24,242, 24,245 (May 29, 1991). EPA explained that it would not require blends to contain "exactly 10 percent" ethanol, due to the unavoidably imprecise "nature of the blending

[6] Ethanol—the intoxicating substance in alcoholic beverages—is "denatured" with a substance to prevent human consumption. 72 Fed. Reg. 23,900, 23,920 (May 1, 2007).

process," so blends containing 9-10% ethanol continued qualifying for the waiver for gasoline "containing … 10 percent … ethanol." *Id.* at 24,245. EPA thus limited the RVP waiver to fuel containing ethanol "at least 9% and no more than 10% (by volume) of the gasoline." 56 Fed. Reg. 64,704, 64,710 (Dec. 12, 1991).

III. EPA'S 2010-2014 ETHANOL REGULATIONS

The combination of EPA's 1979 subsection (f)(4) waiver and its 1991 volatility regulations implementing subsection (h)(4) meant that fuels with less than 10% ethanol could be sold, with only those blends containing 9-10% ethanol receiving a 1-psi waiver.

That changed in 2010 and 2011, when EPA granted a partial §7545(f)(4) waiver for fuels containing *more* than 10% but not more than 15% ethanol—E15—for model-year 2001 and later vehicles. EPA did "not mak[e] a finding of [E15] being substantially similar" to any certification fuel. 75 Fed. Reg. 68,094, 68,146 (Nov. 4. 2010).

That waiver was subject to three key limitations. *First*, EPA did not authorize E15 for use in *any* vehicle or equipment other than post-2000 light-duty vehicles, finding that E15 use would cause emission standards violations or engine damage. 75 Fed. Reg. at 68,097. These waivers were thus "partial." *Id.* at 68,143.

Second, EPA conditioned the sale of E15 on meeting the 9.0-RVP summertime limit, finding that post-2000 light-duty vehicles can "meet

evaporative emission standards when operated on E15 so long as the fuel does not exceed a RVP of 9.0 psi in the summertime volatility control season." 76 Fed. Reg. 4,662, 4,665 (Jan. 26, 2011).

EPA rejected requests to extend the 1-psi waiver to E15. 76 Fed. Reg. 44,406, 44,433-35 (July 25, 2011); JA_[2011_Response_to_Comments_at_73-92_EPA-HQ-OAR-2010-0448-0118]. Specifically, EPA concluded that "the text of [§7545(h)(4)] and [its] legislative history supports EPA's interpretation, adopted in the 1991 rulemaking, that the 1 psi waiver only applies to gasoline blends containing 9-10 vol% ethanol." 76 Fed. Reg. at 44,434; JA_[2011_Response_to_Comments_at_80-87_EPA-HQ-OAR-2010-0448-0118]. EPA explained that E15, with its higher RVP, creates a "significant potential for increased evaporative emissions." *Id.* at 4,675. Accordingly, "without that condition [limiting RVP], E15 would not meet the test under [§7545(f)(4)] for granting fuel waivers," meaning that E15 could not be sold. JA_[2011_Response_to_Comments_at_77_EPA-HQ-OAR-2010-0448-0118]. E15 could therefore be sold year-round, but, unlike E10, would not receive the RVP waiver. EPA acknowledged that the lack of an RVP waiver could limit the availability of E15 during the summer, because ethanol would need to be blended with lower-RVP gasoline blendstock to comply with the 9.0 psi limit. JA_[2011_Response_to_Comments_at_75_EPA-HQ-OAR-2010-0448-0118].

Third, EPA conditioned these waivers on compliance with "misfueling mitigation" measures, such as ensuring proper labeling of gasoline dispensers. *See* 75 Fed. Reg. at 68,095; 76 Fed. Reg. 4,662 (Jan. 26, 2011).

Numerous parties challenged these waivers, but this Court did not reach the merits. *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012). The one judge to reach the merits found EPA's waivers unlawful. *Id.* at 190-92 (Kavanaugh, J., dissenting).

In 2014, EPA allowed E10 at 9.0 psi to be a light-duty-vehicle certification fuel. 79 Fed. Reg. 23,414, 23,476 (Apr. 28, 2014). EPA expressly rejected using E10 at 10.0 psi as a certification fuel and reaffirmed that E15 was not covered by the subsection (h)(4) volatility waiver. *Id.* at 23,526.

IV. EPA'S 2019 E15 RULE

In 2018, pro-ethanol advocacy groups urged EPA to extend the RVP waiver to E15, claiming that doing so would "mean an additional 1.3 billion gallons of ethanol demand within five years." JA_[Prime_the_Pump_EPA-HQ-OAR-2018-0775-1152].

In October 2018, President Trump "direct[ed]" EPA "to initiate a rulemaking to consider expanding … waivers for fuel blends containing gasoline and up to 15 percent ethanol," which would allow E15 "to be sold year round

rather than just eight months of the year." JA_[White_House_Fact_Sheet_EPA-HQ-OAR-2018-0775-0042].

EPA proposed a rule to effectuate "the Presidential Directive to provide E15 the 1-psi waiver" in March 2019. JA_[84_Fed._Reg._at_26,983]. To accomplish the President's objective, EPA would have to authorize the sale of E15 at 10.0 psi, despite previously concluding in the 2010-11 partial waivers that E15 "*must* have a Reid Vapor Pressure not in excess of 9.0 psi during the time period from May 1 to September 15." 76 Fed. Reg. at 4,682. But EPA did not propose to rescind or modify the subsection (f)(4) partial waivers. Instead, EPA proposed to determine that E15 at either 10 or 9.0 psi is "substantially similar" to E10 at 9.0 psi for certain model-year vehicles, and to extend the §7545(h)(4) 1-psi waiver to E15. Collectively, these actions would allow parties to "make and distribute E15 made with the same conventional blendstock … used to make E10" during the summer. JA_[84_Fed._Reg._10584,_10,585-86_(Mar._21,_2019)].

Commenters challenged EPA's proposal, arguing that it exceeded EPA's statutory authority, would increase emissions, and departed without adequate explanation from EPA's past interpretations. JA_[AFPM_Comments_6-26], JA_[API_Comments_EPA-HQ-OAR-2018-0775-0799]. Commenters also explained that EPA had effectively reopened the prior partial E15 waivers. JA_[AFPM_Comments_30-31].

In the final E15 Rule, EPA adopted a "new interpretation" of §7545(h)(4) "that would allow the 1-psi waiver for gasoline containing *at least* 10 percent ethanol." JA_[84_Fed._Reg._26,991] (emphasis added). EPA acknowledged it was changing its longstanding interpretation, but argued that the "lack of modifiers in the phrase 'fuel blends containing gasoline and ten percent ethanol'" rendered the statute sufficiently ambiguous that it could be re-interpreted as a "floor on the minimum ethanol content." JA_[*Id.*_at_29,991-92] (punctuation omitted).

As for its substantial-similarity proposal, EPA did not determine that E15 *at 10.0 psi* is substantially similar to any fuel used in the certification of existing vehicles—i.e., to E0 or E10 at 9.0 psi. Instead, EPA declared that it "need not look at the emissions impacts of E15 at 10.0 psi," even though EPA was authorizing sales of E15 at 10.0 psi for the first time. JA_[84_Fed._Reg._at_26,998]. EPA reached this conclusion despite recognizing that the "volatility of fuels can have a significant impact" on emissions—a factor "EPA has analyzed under [its substantially similar analysis] historically." *Id.*

Instead, EPA determined that a *different* fuel—E15 at *9.0 psi*—is substantially similar to E10 at 9.0 psi, even though the Rule has no practical effect on E15 at 9.0 psi, which could already be sold due to prior EPA actions. *Id.* EPA made that finding "*solely* in order to provide E15 produced by fuel and fuel

additive manufacturers the [§7545](h)(4) 1-psi waiver." JA_[*Id.*_at_26,993] (emphasis added).

The E15 Rule came with a major caveat: to avoid potential damage to the tens of millions of vehicles not designed to run on E15, EPA had to limit its determination to model-year 2001 light-duty vehicles or newer. JA_[84_Fed._Reg._at_26,994]; _[*id.*_at_27,005] (E15 "could damage the emission controls and lead to increased emissions" in pre-2001 vehicles).

Finally, EPA stated that all the Rule's E15-related actions, including the substantial-similarity determination and the 1-psi waiver reinterpretation, "constitute a single, cohesive effort," such that "these individual actions" are not "severable." JA_[*Id.*_at_26,983]. EPA thus directed that if "any element of this program" is set aside, "the other elements of the program cannot be justified in isolation." JA_[*Id.*].

SUMMARY OF ARGUMENT

EPA's E15 Rule violates the Clean Air Act's 1-psi waiver provision, §7545(h)(4), and substantial-similarity requirement, §7545(f)(1).

I. EPA's re-interpretation of the phrase "containing gasoline and 10 percent … ethanol" as encompassing blends containing *more* than 10% ethanol fails at *Chevron* Step One. The statutory text and ordinary tools of statutory construction resolve the issue: "containing gasoline and 10 percent … ethanol"

establishes a specific requirement that a blend contain 10% ethanol, not a minimum of 10%.

EPA's re-interpretation, which treats fuel blends between 10-15% ethanol as "containing … 10 percent … ethanol," contravenes settled interpretive principles. *First*, the 1990 Clean Air Act Amendments use specific "at least" language, or the equivalent, when setting minimum percentages relating to fuel blends. *Second*, earlier statutes use similar "at least" language to address gasoline-ethanol blends, most notably a 1987 statute addressing "the quantity of motor fuels that contain *at least* 10 percent ethanol." Pub. L. No. 100-203, §1508(a)(6) (1987) (emphasis added). Absence of this language in §7545(h)(4) precludes EPA's interpretation. *Third*, the 1990 amendments conspicuously departed from EPA's prior regulatory language extending the waiver to blends "contain[ing] *at least* 9% ethanol." 40 C.F.R. §80.27(d)(2) (1989) (emphasis added). *Fourth*, Congress did not adopt the House version of the 1990 amendments, which would have applied the 1-psi waiver to blends containing "at least 10 percent ethanol," and the legislative history indicates that Congress intended to apply the waiver to "gasoline containing at least 9 but not more than 10 percent ethanol (by volume)." JA_[H.R._Rep._101-490_at_312_EPA-HQ-OAR-2018-0775-0033].

In short, the statutory text and tools of statutory construction resolve the issue: "containing … 10 percent" does not merely set a floor, but establishes a

specific requirement that a blend contain 10% ethanol, subject only to the unavoidable imprecision of the blending process. Even if the statute had some ambiguity, interpreting 10% to extend to blends containing 15% ethanol is unreasonable at *Chevron* Step Two.

II. EPA also erred in declaring that E15, a fuel incompatible with tens of millions of vehicles on the road and *all* nonroad engines and vehicles, is "substantially similar" to E10.

First, EPA lacks authority to compare E15 to just one certification fuel. By prohibiting new fuels that are not substantially similar to "any" certification fuel, the statute requires EPA to find that a new fuel is substantially similar to *all* post-1974 certification fuels.

Second, the statute requires a new fuel to be substantially similar when used in *all* post-1974 light-duty vehicles, and does not allow EPA to ignore backwards compatibility and limit its determination to model-year 2001 and newer vehicles.

Third, EPA violated the statute by not making *any* substantial-similarity determination for the new fuel it allowed—E15 *at 10.0 psi*.

Fourth, EPA's conclusion that E15 at 9.0 psi is substantially similar to E10 at 9.0 psi is unreasonable because EPA relied on erroneous assumptions, incomplete and speculative analysis, and disregarded the emissions effects of its action.

III. Finally, EPA reopened the 2010-2011 partial E15 waivers by revisiting their legal and factual foundations, seeking and responding to comments, and ultimately leaving the waivers in place. Subject to renewed scrutiny, they fail.[7]

STANDING

Petitioners have standing because the E15 Rule injures them, and their injuries are fairly traceable to the Rule and redressable by its vacatur. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[8] Petitioners' interests are also "within the zone of interest … protected or regulated by" the statutes at issue. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012).

1. The Rule Will Result in Increased E15 Use. Petitioners will be harmed by the Rule's authorization of year-round E15 sales and the resulting increased use of E15. Although EPA initially asserted the Rule would not meaningfully increase E15 use, JA_[84_Fed._Reg._at_27,011], EPA later acknowledged that the year-round availability of E15 *will* significantly increase E15 sales, by approximately 16%, JA_[RFS_2020_Response_to_Comments_97_EPA-HQ-OAR-2019-0136-

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[7] The Petitioners in No. 19-1160 do not join Part III.

[8] This brief asserts claims on behalf of six Petitioners; the Court "need only find one party with standing" to reach the merits. *AFPM v. EPA*, 937 F.3d 559, 596 (D.C. Cir. 2019).

2157]. This is so even without "account[ing]" for additional sales generated by infrastructure changes spurred by the Rule. JA_[*Id.*]; *see also* SA018-021.[9] Others project the Rule will increase E15 sales by 1.3 billion gallons. SA006 ¶¶6-7.

This is unsurprising, because the Rule was *designed* to increase E15 use. President Trump stated that authorizing year-round E15 sales would "provide a boost to America's farmers," JA_[EPA-HQ-OAR-2018-0775-0042], and that "E15 sales are projected to more than double" due to the Rule, SA056. EPA Administrator Wheeler likewise stated the Rule would "expand[] the market for ethanol in transportation fuel." SA070.

2. Petroleum Petitioners. American Fuel & Petrochemical Manufacturers and American Petroleum Institute ("Petroleum Petitioners") have competitor standing to challenge the E15 Rule because it allows a product their members generally do not produce (ethanol) to displace one of their main products (gasoline).[10] *See Save Jobs USA v. Dep't of Homeland Security*, 942 F.3d 504, 508-509 (D.C. Cir. 2019) ("[W]hen regulations illegally structure a competitive

[9] Declarations and other materials documenting Petitioners' standing are included in the Standing Addendum ("SA").

[10] Petroleum Petitioners have associational standing because their members have standing to sue in their own right, the interests Petitioners seek to protect are germane to their purposes, and Petitioners' claims do not require participation by individual members. *See Am. Inst. of Certified Pub. Accountants v. IRS*, 804 F.3d 1193, 1197 (D.C. Cir. 2015).

environment … parties defending concrete interests in that environment suffer legal harm under Article III." (cleaned up)). Because E15 uses more ethanol and less gasoline than E10, increased E15 use will result in decreased gasoline use: Every additional gallon of E15 sold as a result of the Rule will contain more ethanol, and less gasoline, due to the Rule. By permitting expanded use of E15, the Rule will decrease demand for gasoline sold by the Petroleum Petitioners' members, causing them economic harm. *See* SA005-007; SA024-028; SA038-041; SA046-048.

This Court has held that petitioners have competitor standing in similar circumstances. In *Energy Future Coalition v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015), the Court held that ethanol producers had standing to challenge an EPA regulation preventing use of E30 as a certification fuel. Although the regulation was not "technically directed" at ethanol producers, the Court nevertheless recognized that limiting the market for ethanol was a concrete injury sufficient for Article III standing. *Id.* Similarly, in *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 665 (D.C. Cir. 2019), the Court held that the National Biodiesel Board had standing to challenge a rule that "incentivized competition with NBB's members' domestic production." Here, as in *Alon*, Petroleum Petitioners have standing because they "'compete with' the other industry players EPA's [E15] rule is designed to affect." *Id.*

Grocery Manufacturers is not to the contrary. There, the Court held that petroleum industry associations lacked standing because their injuries were caused by the RFS program rather than EPA's partial approval of E15. 693 F.3d at 177-178. But the *Grocery Manufacturers* petitioners did not brief (and the Court thus had no occasion to consider) any argument that their competitive interests were harmed by E15 sales. *See United States v. West*, 393 F.3d 1302, 1313 (D.C. Cir. 2005). Irrespective of the RFS program's requirements, Petroleum Petitioners have standing based on harm to their competitive interests.

Petroleum Petitioners' interest in avoiding competition with an unlawfully-authorized product falls within the zone of interests of subsections 7545(f) and (h). A competitor satisfies the zone-of-interest test so long as it "possess[es] an interest that is arguably to be protected by" the statute, *Nat'l Credit Union Admin. v. First Nat. Bank & Tr. Co.*, 522 U.S. 479, 489-91, 499 (1998) (cleaned up); "the benefit of any doubt" "goes to the" petitioner, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014). Petitioners satisfy that minimal burden here. By limiting the amount of ethanol that may be blended in transportation fuel, subsections 7545(f) and (h) account for the interests of parties involved in producing the primary component of the fuel blend: gasoline.

Honeywell International Inc. v. EPA, 374 F.3d 1363 (D.C. Cir. 2005), illustrates the point. There, the Court evaluated whether a petitioner could

challenge EPA's approval of a competing product under §7671k(c). *Id.* at 1365-66. The Court held that the petitioner satisfied the zone-of-interests test because it was seeking "to enforce a [statutory] restriction." *Id.* at 1370. As the Court observed, a "substitute product is either permitted to compete in the market for approved substitutes or it is not." *Id.* Because the petitioner's challenge focused on "whether EPA properly decided which substances should be allowed to compete in the market for approved substitutes," *id.* at 1371, the claim satisfied the zone-of-interests test. So too here: the Petroleum Petitioners are challenging EPA's removal of a restriction on the sale of a substitute for the gasoline they produce, and seeking to enforce statutory restrictions governing whether that substitute may compete in the market.

3. Citizens Concerned About E15. Petitioner Citizens Concerned About E15, an association of individuals who face adverse effects from increased E15 use, also has standing. Citizens Concerned's members include individuals who live and recreate near gas stations that sell E15, where the Rule is most likely to increase E15 use. *See* SA030 ¶¶4-5; SA050 ¶¶4-5. These members regularly engage in outdoor activities—such as hiking, swimming, and attending festivals—in areas where the Rule allows expanded E15 sales and plan to continue those activities. *See* SA031 ¶12; SA051-052 ¶11. The members thus have a strong interest in preventing environmental harm caused by the Rule, and there is a clear

"geographic nexus" between areas of increased E15 use and the communities where these individuals live and recreate. *Center for Biological Diversity v. EPA*, 861 F.3d 174, 183-184 (D.C. Cir. 2017).

That interest is "undeniably cognizable … for purposes of standing." *AFPM*, 937 F.3d at 593 (cleaned up). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183 (2000). That is the case here. As EPA has acknowledged, increased E15 use is expected to result in increased emissions of non-methane organic gases ("NMOG"), nitrogen oxides ("NO_x"), and particulate matter ("PM"). *See* JA_[84_Fed._Reg._at_27,012] (showing increases in NO_x and PM emissions in all scenarios, and an increase in NMOG emissions in certain scenarios); JA_[RTC_58]; SA051 ¶6. Environmental groups submitted comments raising these air-quality concerns. JA_[EPA-HQ-OAR-2018-0775-0890_at_11-15]. The E15 Rule will thus have a concrete, adverse impact on Citizens Concerned members' enjoyment of the environment. *See* SA031-032 ¶¶11-13; SA051-052 ¶¶6-12.

This danger is particularly acute for members who live in communities with impaired air quality. Citizens Concerned member B.M. resides near and recreates

within Kenosha County, Wisconsin, which is not in attainment with EPA's air-quality standards for ozone. SA031 ¶7. Likewise, Citizens Concerned member J.V. resides in Dauphin County, Pennsylvania, which was in nonattainment for ozone until 2006 and for PM2.5 until 2013. SA051 ¶8.

As Citizens Concerned explained, there is a substantial risk that the air quality in these communities will deteriorate due to the Rule, which would adversely affect their enjoyment of outdoor activities. *See* SA031 ¶12; SA051-052 ¶11. This Court has repeatedly held that individuals asserting similar environmental harms have standing. *See, e.g.*, *Nat. Res. Defense Council v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020); *AFPM*, 937 F.3d at 593-596.[11]

Citizens Concerned satisfies the zone-of-interests test because its challenge focuses on the Rule's detrimental effect on the air quality in members' communities—a concern protected by the Clean Air Act. *See Cal. Communities Against Toxics v. EPA*, 928 F.3d 1041, 1048-49 (D.C. Cir. 2019); *Ass'n of Battery Recyclers, Inc. v. EPA*, 716 F.3d 667, 672-73 (D.C. Cir. 2013).

4. American Motorcyclist Association and National Marine Manufacturers Association. These organizations ("Engine Manufacturers"), which advocate on behalf of motorcyclists and boating manufacturers, respectively, have associational

[11] Citizens Concerned and the remaining petitioners have associational standing for the same reasons as the Petroleum Petitioners. *See* note 10, *supra*.

standing. *See* SA033 ¶3. The Rule's expanded authorization for E15 presents a significant risk of harm to their members because E15 is incompatible with most motorcycles and boat engines. Fueling motorcycles with E15 can increase the heat of the engine by 30%, resulting in damage to the engine, reduced performance, safety risks to motorcyclists, and loss of warranty protection. *See* SA034 ¶8 (citing JA_[EPA-HQ-OAR-2018-0775-1112_at_51-52]). E10, by contrast, is safe for motorcycle use. *Id.* ¶11. Use of E15 in marine engines presents similar risks. JA_[NMMA_Vasilaros_Comment_EPA-HQ-OAR-2018-0775-0534_at_2].

The risk of misfueling is substantial. A 2019 survey found that only 20% of Americans notice ethanol content when fueling. *See* SA036 ¶15. Moreover, a substantial majority of survey participants reported confusion regarding the labeling of E15 and E10. SA036-037 ¶17. This confusion creates a substantial risk of harm if expanded sale of E15 is authorized. *See Attias v. Carefirst, Inc.*, 865 F.3d 620, 627 (D.C. Cir. 2017) ("substantial risk of future injury" satisfies injury-in-fact requirement (cleaned up)). And because the harm caused by misfueling will adversely affect motorcyclists and marine manufacturers (e.g., through increased warranty and repair costs), the risk presented by the E15 Rule supports the Engine Manufacturers' standing.

Finally, because subsections 7545(f) and (h) regulate the transportation-fuel market, and §7545(f) ensures backwards compatibility for new fuels used in

engines these organizations' members fuel and manufacture, the Engine Manufacturers also satisfy the zone-of-interests requirement.

5. Coalition of Fuel Marketers. The Coalition of Fuel Marketers, an association of fuel wholesalers, has standing because its members supply fuel to gas stations that will be harmed by year-round E15 sales. Similarly, some of Petroleum Petitioners' members will suffer the same harm. To sell E15, a gas station must be equipped with special tanks and other equipment. SA001 ¶5. Some of the Coalition's and Petroleum Petitioners' members supply fuel to stations not equipped with this infrastructure. *See* SA002 ¶7; *see generally* SA038-042. It would require significant investments to equip those stations to sell E15. SA002 ¶8; SA039 ¶7. And because ethanol-blended fuel can often be sold at a lower price than conventional fuel, *see* SA003 ¶12; SA041 ¶22, authorizing year-round sale of E15 would inflict competitive harm on these stations and their suppliers. One company estimates that it will lose significant revenue due to the Rule. SA040 ¶13.

The Coalition satisfies the zone-of-interests test. Like the Petroleum Petitioners, the Coalition's members are regulated by §7545(h)(4) and their interest in lawful regulation of the transportation-fuel market arguably "fall[s] within" the statute's purview. *Match-E*, 567 U.S. at 225 n.7.

STANDARD OF REVIEW

"EPA's interpretation of the Clean Air Act" is governed by the *Chevron* framework, under which EPA receives deference only "if the statutory text is ambiguous and the EPA's interpretation is reasonable." *AFPM*, 937 F.3d at 574. This Court does not "apply *Chevron* reflexively," finding "ambiguity only after exhausting ordinary tools of the judicial craft." *Mozilla Corp. v. FCC*, 940 F.3d 1, 20 (D.C. Cir. 2019) (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414-15 (2019)).

The Court also reviews whether EPA's actions are "arbitrary, capricious, [or] an abuse of discretion." *AFPM*, 933 F.3d at 574. Arbitrary action includes "fail[ing] to consider an important aspect of the problem" and failing to articulate "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). EPA's action is likewise unlawful when it fails to "provide a reasoned explanation" for changing existing policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

ARGUMENT

I. THE RVP WAIVER DOES NOT APPLY TO BLENDS WITH MORE THAN 10% ETHANOL.

A. EPA's Reinterpretation Is Inconsistent with the Statutory Text, Context, and History

The statute limits the RVP waiver to "fuel blends containing gasoline and 10 percent denatured anhydrous ethanol." §7545(h)(4). Under a plain, common-sense reading, "containing" 10% means 10%—no more or less (subject only to accommodation recognizing that it is impossible for blends to contain precisely 10% ethanol). EPA's contrary conclusion that the statute establishes a "floor," and thus allows a waiver for blends containing significantly more than 10% ethanol, JA_[84_Fed._Reg._at_26,992], is untenable.

1. EPA's Reinterpretation Conflicts with Ordinary Usage.

EPA's interpretation is inconsistent with ordinary usage of the word "containing" in this context. When a mixture is identified as containing a certain percent of a substance, the percent identified is the *specific* percent it contains. For example, it would be highly unusual to describe an alcoholic beverage that is 50% alcohol as "containing 10% alcohol." One could just as well say the product contains 11% alcohol, 12% alcohol, and so on, but such statements would deviate from common usage. Although comments pointed this out, *e.g.*, JA_[API_Comments_6_EPA-HQ-OAR-2018-0775-0799];

JA_[AFPM_Comments_8-10]; JA_[Sierra_Club_Comments_4_EPA-HQ-OAR-2018-0775-0890], EPA did not identify any ordinary English usage in line with its capacious new interpretation.

EPA's re-interpretation of §7545(h)(4) is inconsistent with usage of the word "containing" by courts and EPA itself. For example, in a recent criminal case, the Tenth Circuit noted that the victim "had four drinks … containing eight percent alcohol." *United States v. A.S.*, 939 F.3d 1063, 1067 (10th Cir. 2019). No one would interpret that sentence as indicating that the victim had four drinks that contained anywhere between 8% and 100% alcohol. Similarly, EPA recently noted that "nearly all gasoline used for transportation purposes contains 10 percent ethanol (E10)." 85 Fed. Reg. 7,016, 7,017 (Feb. 6, 2020). As the reference to E10 shows, EPA meant that nearly all gasoline contains 10% ethanol, not *at least* 10% ethanol. But under EPA's novel interpretation, its statement could mean that gasoline contains 15%, 20%, or 49% ethanol.

Common-usage considerations are essential in statutory interpretation. *E.g.*, *Honeycutt v. United States*, 137 S. Ct. 1626, 1632 (2017) (looking to "the common usage of the word"); *Animal Legal Defense Fund, Inc. v. Perdue*, 872 F.3d 602, 616-17 (D.C. Cir. 2017) (same). The Supreme Court recently relied on common usage in interpreting a statute addressing whether information was "contained in" certain forms, and rejected a novel and overbroad interpretation of that phrase.

Kansas v. Garcia, 140 S. Ct. 791 (2020). The Court evaluated whether the proffered usage of "contained" was "customary" and consistent with "ordinary speech," and whether that usage would be "natural to say." *Id.* at 802-03. Here, it would be contrary to ordinary usage to describe a blend made up of 15% (or 49%) ethanol as "containing 10% ethanol."

Pertinent dictionary definitions support this common-usage understanding. Dictionaries define "contain" as "to keep within limits."[12] Under that definition, EPA's interpretation is invalid: the RVP waiver applies specifically to blends "containing" (1) gasoline, "and" (2) 10% ethanol. JA_[AFPM_Comments_9-10]. A blend comprising 15% or more ethanol thus is not "within" those "limits" because ethanol makes up more than 10% of the blend. Indeed, EPA concedes that its rule would be impermissible under this definition. JA_[RTC_6-7].

Instead, EPA relies on an alternative definition: "to have within; hold." JA_[84_Fed._Reg._at_26,992]. That definition is inapposite because the statute refers to a *percentage*, which specifically denotes parts out of 100 and thus refers to a specific proportion.[13] EPA's reliance on an alternate definition thus conflicts with the statutory text as a whole. *See Taniguchi v. Kan Pacific Saipan, Ltd.*, 566

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[12] *See, e.g.*, Contain, *Merriam Webster's Collegiate Dictionary* 249 (10th ed. 1993).

[13] *See* Percent, *Merriam Webster's Collegiate Dictionary* 861 (10th ed. 1993).

U.S. 560, 568 (2012) ("That a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense.").

2. EPA's Reinterpretation Is Foreclosed by Provisions That Expressly Set a Floor.

At *Chevron* Step One, "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *New York v. EPA*, 443 F.3d 880, 884 (D.C. Cir. 2006). Courts must exhaust all "ordinary tools of statutory construction" to discern the statute's meaning. *Mozilla*, 940 F.3d at 20. Thus, courts must consider "the text, structure, history, and purpose" of the statute, and may find ambiguity only if, "when that legal toolkit is empty," the interpretive question remains unresolved. *See Kisor*, 139 S. Ct. at 2415.

Those considerations foreclose EPA's interpretation. *First*, the 1990 Clean Air Act Amendments, which included §7545(h)(4), used specific language to prescribe minimum percentages elsewhere in the statute. Those Amendments (all emphases added):

- define "methanol" as "any fuel *which contains at least* 85 percent methanol." Pub. L. No. 101-549, §227.
- define "clean alternative fuel" as encompassing alcohols, "including any mixture thereof *containing 85 percent or more* by volume of such alcohol." *Id.* §229.
- require that in certain areas gasoline contain "*not less than* 2.7 percent oxygen by weight." *Id.* §219.

- require the oxygen content of gasoline to "*equal or exceed* 2.0 percent by weight." *Id.*

When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (cleaned up); *see also, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018) ("Courts are required to give effect to Congress' express inclusions and exclusions, not disregard them.").

Second, earlier statutes relating to ethanol-gasoline blends used similar "at least" language when specifying a minimum percentage. A 1987 statute addressing ethanol-gasoline blends referred to "the quantity of motor fuels that contain *at least* 10 percent ethanol." Pub. L. No. 100-203, §1508(a)(6) (1987) (codified at §7545 Notes) (emphasis added). Thus, just three years prior to the enactment of §7545(h)(4), Congress demonstrated it understood the difference between fuel containing "10 percent ethanol" and fuel containing "at least" 10% ethanol.

Other statutes addressing fuel blends also use similar "at least" language:

- The Energy Tax Act of 1978 prohibited certain taxes on gasoline-alcohol mixtures if "at least 10 percent" of the mixture consisted of alcohol. Pub. L. No. 95-618 §221.
- The Energy Security Act of 1980 required the Secretary of Agriculture to prepare a plan for "alcohol production … equal to at

least 10 percent of the level of gasoline consumption within the United States." Pub. L. No. 96-294 §211(b)(1).

- A statute enacted just 10 days before the 1990 Amendments adjusted taxes for certain fuel mixtures "at least 10 percent of which [are] alcohol." Pub. L. No. 101-508 at 104 Stat. 1388-424; *see also id.* at 1388-433 ("at least 10 percent of such mixture consists of alcohol"); *id.* at 435 ("any mixture at least 10 percent of which is alcohol").

These provisions are relevant because "[c]ourts presume that Congress legislates against the backdrop of existing statutes." *Orton Motors, Inc. v. HHS*, 884 F.3d 1205, 1214 (D.C. Cir. 2018).

EPA's interpretation violates its "duty to refrain from reading a phrase into a statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). EPA's new interpretation also violates "the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014) (*UARG*).

EPA's Final Rule ignores the pre-1990 provisions discussed above. Although EPA addressed certain other Clean Air Act provisions, EPA drew a false dichotomy by framing the interpretative choice as between whether the statute "establish[es] a lower limit, or floor, on the minimum ethanol content for the 1-psi waiver" or "an upper limit on the ethanol content." JA_[RTC_6]. That framing

overlooks an obvious third possibility: that "containing 10 percent" establishes a specific requirement, rather than simply a floor or ceiling.

3. EPA's Reinterpretation Disregards the Statutory History.

Section 7545(h)'s history confirms that the "containing … 10%" language sets a specific requirement, not just a floor.

First, although EPA considers §7545(h) "largely a codification of [EPA's] prior RVP regulations," JA_[84_Fed._Reg._at_26,988], the statute departs from EPA's regulations in a critical respect: Whereas EPA's regulations provided a higher RVP limit for "gasoline … contain[ing] *at least* 9% ethanol," 40 C.F.R. §80.27(d)(2) (1989) (emphasis added); 54 Fed. Reg. at 11,879, the statute conspicuously does *not* include EPA's "at least" language.

Second, Congress did not adopt the House version of what eventually became §7545(h)(4), which would have applied to blends "containing at least 10 percent ethanol." S. 1630 §216 (as passed by House, May 23, 1990). Instead, Congress enacted the Senate version, which omitted "at least." *See* 136 Cong. Rec. 36,069 (Oct. 27, 1990) (Conference Report).

Accordingly, as EPA determined in 1991 and 2011, "the legislative history indicates that Congress envisioned continuation of the 9 to 10 percent requirement." 56 Fed. Reg. at 24,245; JA_[2011_Response_to_Comments_at_83_EPA-HQ-OAR-2010-0448-0118] ("this legislative history supports EPA's

interpretation, adopted in the 1991 rulemaking, that the 1.0 psi waiver in section 211(h)(4) only applies to gasoline blends containing 9-10 vol% ethanol").

EPA dismisses this change in language, arguing that the legislative history does not explain the basis for the change. JA_[84_Fed._Reg._at_26,993]; JA_[RTC_11]. But the change is highly relevant even without a specific explanation. Moreover, there *was* an explanation: The House Report explained that the provision was designed to apply the waiver to "gasoline containing at least 9 but not more than 10 percent ethanol (by volume)." JA_[H.R._Rep._101-490_at_312_EPA-HQ-OAR-2018-0775-0033]. The text of the House version (gasoline containing "*at least* 10 percent" ethanol) contravened that stated intent. The statutory language reflects the intent expressed in the House Report, as EPA recognized in 1991. 56 Fed. Reg. at 24,245.

EPA also argues that the "deletion of a word or phrase" in the legislative process "without more" may not "ordinarily" evidence a specific legislative intent. JA_[84_Fed._Reg._at_26,992-93]. But "more" exists here, including (1) usage of the "at least" language throughout the 1990 amendments and in earlier statutes addressing the same subject, (2) the statute's departure from EPA's pre-existing regulatory text on this precise issue, and (3) the legislative history discussed above.

EPA speculates that Congress may have "felt that 'containing' was sufficiently specific," but EPA's new interpretation inherently contradicts this

argument. JA_[84_Fed._Reg._at_26,993]. EPA also asserts that perhaps "the nature of the blending process was likely to make a requirement of 'at least' ten percent difficult to meet in practice." *Id.* But that makes no sense: a requirement of "at least" 10% would provide *more* flexibility to blenders.

EPA also argues that in 1987 the Senate considered a predecessor bill that would have applied the waiver only if the "ethanol portion does not exceed 10 percent," arguing that this history renders the statute ambiguous. JA_[RTC_11]. EPA misstates the legislative history: The "does not exceed 10 percent" language was not in the proposed statutory text, which instead provided that the 1-psi waiver would apply to "ethanol/gasoline blends containing 10 percent ethanol." JA_[S._Rep._No._100-231_at_581_EPA-HQ-OAR-2018-0775-0056]. That the Senate interpreted this language as requiring the blend not to exceed 10% ethanol thus weighs *against* EPA's interpretation.

This history also demonstrates why EPA's longstanding interpretation—that blends containing 9-10% ethanol are within the meaning of "containing 10 percent"—is valid: As EPA explained, "interpreting this provision to provide a one psi allowance only if the blend contains exactly 10 percent ethanol would place a next to impossible burden on ethanol blenders," due to the "nature of the blending process itself," which does not allow for such precision. 56 Fed. Reg. at 24,245; 52 Fed. Reg. at 31,305 n.22 (same). For this reason, as the House Report

stated, the statute was designed to apply the 1-psi waiver to "gasoline containing at least 9 but not more than 10 percent ethanol (by volume)." JA_[H.R._Rep._101-490_at_312_EPA-HQ-OAR-2018-0775-0033].

That does not render the statute ambiguous in the way EPA asserts; it simply acknowledges the reality that blending exactly 10% ethanol is not practicable. *See, e.g.*, *United States Home Concrete & Supply, LLC*, 566 U.S. 478, 493 n.1 (2012) (Scalia, J., concurring in part) ("It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"). Thus, even accepting that §7545(h)(4) "establishe[s] an ambiguous line," precedent dictates that EPA "can go no further than the ambiguity will fairly allow." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). Here, reading 10% as including 9-10%, particularly given the history of the statue and EPA's predecessor rules, is reasonable; reading 10% as including 15% is foreclosed by the text, context, and history of the statute.

B. EPA's Purpose-Based Argument Fails

As a final fallback, EPA invokes the "purpose" of §7545(h)(4), arguing that it is designed to "promot[e] the use of ethanol." JA_[84_Fed._Reg._at_26,993]. This argument fails for three reasons.

First, as EPA admits, this point "does not speak to the meaning of the word 'containing.'" JA_[84_Fed._Reg._at_26,993]. Moreover, "no statute … pursues

its stated purpose at all costs"; "limitations expressed in statutory terms" are "often the price of passage." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). This is particularly true when a statute contains "unambiguous numerical thresholds." *UARG*, 134 S. Ct. at 2446.

Second, EPA cites no evidence that §7545(h)(4) was designed to promote additional use of ethanol. The Senate Report indicates that the RVP waiver was designed to "allow ethanol blending to continue to be a viable alternative fuel," not to maximize ethanol use. JA_[S._Rep._101-228_at_110,_EPA-HQ-OAR-2018-0775-0057110]; JA_[84_Fed._Reg._at_26,993]. That is consistent with EPA's predecessor regulations, which were designed only to "avoid a major impact" on the ethanol industry. 52 Fed. Reg. at 31,293.

Third, EPA ignores another statutory purpose demonstrating why the RVP waiver does not extend to blends containing more than 10% ethanol—the environmental risks posed by such blends. The main purpose of §7545(h) is to limit emissions, not promote ethanol use. JA_[S._Rep._101-228_at_110_EPA-HQ-OAR-2018-0775-0057]. Congress codified a *limited* exception for E10 to facilitate its continued use, but reserved to itself authority to approve higher blends, particularly given concerns about their environmental effects.

As was well understood when the 1990 amendments were enacted, "[b]lending an alcohol into gasoline increases the volatility of the final product,

making the potential increase in evaporative and exhaust emissions a special concern." 52 Fed. Reg. at 31,292. Congress and the President extended a limited waiver to blends containing 10% ethanol because evaporative emissions at the 10% level were understood, and would be offset by reduced exhaust emissions. JA_[S._Rep._101-228_at_110_EPA-HQ-OAR-2018-0775-0057].

In testimony on an earlier version of the 1990 bill, renewable-fuel groups argued that "[t]he certainty of physical chemistry provide[d] the assurance that the addition of 10-percent ethanol to the base gasoline will not exceed 1.0 psi RVP," thus "alleviat[ing] any concern that the addition of ethanol to gasoline will result in different volatility levels than already recognized by EPA as adding less than 1.0 psi RVP to gasoline." JA_[Clean_Air_Act_Amendments_Hearings_on_H.R._2521_Before_the_Subcomm._on_Health_and_the_H._Comm._on_Env't_and_Comm._On_Energy_and_Commerce,_100th_Cong._1st_Sess._at_366_(1987)_(Statement_of_Eric_Vaughn,_President_and_CEO_of_Renewable_Fuels_Association),_EPA-HQ-OAR-2018-0775-0031]; *see also* JA_[2011_Response_to_Comments_at_82-83_EPA-HQ-OAR-2010-0448-0118] (citing this testimony).

Around the time of the 1990 amendments, there was ample evidence that "the addition of ethanol to gasoline has the effect of increasing VOC emissions from motor vehicles."

JA_[Clean_Air_Act_Amendments_Hearings_on_H.R._2521_Before_the_Subcomm._on_Health_and_the_H._Comm._on_Env't_and_Comm._On_Energy_and_Commerce,_100th_Cong._1st_Sess._at_368_(1987)_(Statement_of_Eric_Vaughn,_President_and_CEO_of_Renewable_Fuels_Association)]. And EPA explained in implementing the 1990 amendments, "[i]n the case of RVP, as the ethanol percentage gets larger, the RVP becomes larger (worse for the environment)." 57 Fed. Reg. 13,416, 13,451 (Apr. 16, 1992). EPA cited these environmental concerns when it declined to extend the 1-psi waiver to E15 in 2011. JA_[2011_Response_to_Comments_at_77_EPA-HQ-OAR-2010-0448-0118]; *see also* 75 Fed. Reg. at 68,096 (noting "the significant potential for increased evaporative emissions at higher gasoline volatility levels, and the lack of data to resolve how this would impact compliance with the emissions standards"). As EPA explained, declining to extend the RVP waiver to E15 "reasonably balances the various interests Congress was addressing in these provisions—controlling the RVP of gasoline and ethanol blends in a way that facilitates the practical downstream blending of ethanol." 76 Fed. Reg. at 44,435.

C. EPA's Change of Position Is Arbitrary and Capricious.

For nearly 30 years, EPA interpreted the statute as applicable only to blends that are "between 9 and 10 percent ethanol." 56 Fed. Reg. at 24,245; *see also* 76

Fed. Reg. at 44,434; 78 Fed. Reg. 36,042, 36,061 (June 14, 2013) ("Congress allowed a 1-psi waiver for E10 gasoline.").

EPA's rationale for its new approach is internally inconsistent. EPA states that it is adopting a "new interpretation" that departs from its "previous interpretation." JA_[84_Fed._Reg._at_26,991]. Yet, EPA claims that nothing in "prior EPA interpretations … sheds light on how the Agency is to read 'containing.'" JA_[RTC_8].

EPA is incorrect: in 2010-2011, EPA addressed "whether section [7545](h) could be interpreted such that E15 would also be eligible for the RVP provisions in section [7545](h)(4)." 76 Fed. Reg. at 44,433. EPA's 2011 rule and Response to Comments reviewed virtually all the interpretive material EPA considered in the E15 Rule, concluding that "containing 10 percent" imposes a specific requirement. For example, EPA explained that "the text of section [7545](h)(4) and th[e] legislative history supports EPA's interpretation, adopted in the 1991 rulemaking, that the 1.0 psi waiver in section [7545](h)(4) only applies to gasoline blends containing 9-10 vol% ethanol." JA_[2011_Response_to_Comments_at_83_EPA-HQ-OAR-2010-0448-0118]. EPA made clear that subsection (h)(4) does not "apply[] to blends above or below the range of 9-10%." JA_[*Id.*_at_85]. EPA rejected "commenters' reading" that "the 1.0 psi waiver would apply to fuels that

contain a minimum of 10% ethanol." JA_[*Id.*_at_86]; *see also* 76 Fed. Reg. at 44,433-35.

Because EPA failed to adequately address its previous interpretation and explain its change in legal interpretation, the E15 Rule "constitutes an inexcusable departure from the essential requirement of reasoned decisionmaking." *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

II. EPA'S SUBSTANTIAL-SIMILARITY DETERMINATION IS UNLAWFUL.

A. E15 Is Not Compatible with *All* Existing Light-Duty Vehicles' Certification Fuels.

Congress enacted §7545(f)(1) to ensure backwards compatibility for new fuels in previously-manufactured vehicles, "banning fuels and fuel additives which were not 'substantially similar' to *existing products*." *Ethyl Corp.*, 51 F.3d at 1055 (emphasis added). Section 7545(f)(1) thus mandates that new fuels be substantially similar to *all* existing certification fuels, a test E15 undisputedly fails. As with the 1-psi RVP waiver, EPA cannot dispense with the statutory text to expand E15 sales.

1. The Text, History, and Purpose of Subsection (f)(1)(A) Require a New Fuel to Be Compatible With All Existing Vehicles' Certification Fuels.

Section 7545(f)(1)(A) prohibits the sale of "*any* fuel … for general use in light duty motor vehicles manufactured after model year 1974 which is not substantially similar to *any* fuel … utilized in the certification of *any* model year 1975, or subsequent model year, vehicle or engine." §7545(f)(1)(A) (emphasis added). Subsection (f)(1)(B) expanded this prohibition to fuel for use in all post-1974 motor vehicles, not just "light duty motor vehicles." §7545(f)(1)(B). Thus, if a fuel seeking entry into commerce is "not" substantially similar to "any" certification fuel used in "any" model-year, it may not be sold. In short, a new fuel must be substantially similar to *all* certification fuels to satisfy §7545(f)(1).

A gasoline-blend fuel may be authorized under §7545(f)(1) only if it is substantially similar to *both* E0, used for certification for most light-duty vehicles on the road, and E10 at 9.0 psi, a recently-added certification fuel used to certify a smaller set of model-year 2017 and later vehicles. JA_[84_Fed._Reg._at_26,994]. EPA acknowledges that E15 is not substantially similar to E0 or E10 when used in pre-2001 model-year vehicles. JA_[RTC_26]. Subsection (f)(1) thus prohibits introduction of E15 into commerce.

That new fuels must be substantially similar to all certification fuels follows from the statutory text. "Any" has "expansive meaning;" if a new fuel is not

substantially similar to *any* (i.e., any one) certification fuel, it may not be sold. *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (quoting *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006)); *accord NRDC v. EPA*, 489 F.3d 1250, 1257-60 (D.C. Cir. 2007) (rejecting restrictive interpretation of "any"). The statute's repeated use of the term "any" confirms that §7545(f)(1)(A) broadly prohibits the sale of *any* new fuel if it fails the substantial-similarity test with respect to *any* certification fuel. *See NRDC v. EPA*, 755 F.3d 1010, 1019 (D.C. Cir. 2014) ("repeated use of 'any' makes the mandate broadly inclusive—reaching *all* fuels produced from *all* listed hazardous wastes"); *Sierra Club v. EPA*, 758 F.3d 968, 978 (D.C. Cir. 2014) (repeated use of "all-embracing adjective 'any'" "drive[s] the provision's comprehensiveness home"). As the Supreme Court observed in *SAS Institute Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018), "[i]n this context, as in so many others, 'any' means 'every.'"

Moreover, the statute is framed in the negative. EPA contends that a new fuel may be sold so long as it *is* substantially similar to "any" certification fuel. JA_[RTC_26]. But that is not what the statute says; instead, a new fuel may *not* be sold if it "is *not* substantially similar" to *any* certification fuel. §7545(f)(1)(A) (emphasis added). A dictionary definition of "any" in such a "negative context[]"

is "even a single."[14] Thus, a new fuel is prohibited if it fails the substantial-similarity test regarding "even a single" certification fuel.

Murray Energy Corp. v. EPA, 936 F.3d 597 (D.C. Cir. 2019) is instructive. There, the Court interpreted a similarly-structured provision that prohibited construction of new facilities "unless" the new facility would "*not* cause, or contribute to air pollution in excess of *any*" air quality standard. §7475(a)(3) (emphasis added). The Court explained that "any" had an expansive meaning, such that if construction of a new facility would cause an exceedance of a single air-quality standard, it was prohibited, even if the facility was in compliance with all other air-quality standards. 936 F.3d at 626. Subsection (f)(1) should be interpreted in the same way.

Notably, this Court has already suggested this interpretation, explaining that §7545(f)(1) "prohibits the introduction into commerce of new fuels … which are not 'substantially similar' to existing *fuels*,"—meaning that it is not sufficient to be substantially similar to one certification fuel, but not another. *Ethyl Corp.*, 51 F.3d at 1054 (emphasis added); *see also id.* at 1055 (§7545(f)(1) prohibits fuels "which were not 'substantially similar' to existing *products*" (emphasis added)); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1148 (D.C. Cir. 2003) (§7545(f)(1) "prohibits use of

[14] Oxford English Dictionary Online, https://www.oed.com/view/Entry/8973.

any fuel … that is not 'substantially similar' to the *fuels* used to certify vehicles" (emphasis added)).

This reading is logical, because in enacting §7545(f)(1)(A) "Congress adopted a preventative approach to the regulation of fuels." *Ethyl Corp.*, 51 F.3d at 1055. Previously, EPA could prohibit new fuels only through an after-the-fact rulemaking, meaning "that emissions systems currently in use could not be adequately protected … due to the delay associated with statutory procedural safeguards." JA_[S._Rep._No._95-127,_at_90_EPA-HQ-OAR-2018-0775-1161]. Subsection (f)(1) preemptively addresses the possibility "that new fuel … would impair the performance of emission control devices in cars." *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 829 (D.C. Cir. 1984).

EPA has emphasized the protective purpose of §7545(f)(1), explaining that it "effectively protect[s] [model-year] 1975 and newer motor vehicles from using fuels … that could detrimentally impact their ability to meet their emission standards." 75 Fed. Reg. at 68,147. Congress "prohibited entry into commerce of fuels or fuel additives that could interfere" with normal operation, "no matter how old the motor vehicle." *Id.*

Indeed, EPA previously rejected a claim that 12% ethanol blends satisfied the substantial-similarity test, explaining that "EPA considered *all certification fuels used for the broad range of motor vehicle model years*, not just the current

model years … because the 'substantially similar' definition affects roughly 300 million motor vehicles which represent thousands of different designs by a wide range of manufacturers from around the world." *Id.* at 68,143 (emphasis added). Likewise, EPA has explained that §7545(f)(1)'s purpose "is to protect the emissions control systems of motor vehicles, not to promote innovation or promote consumer acceptance in the market for fuels." JA_[RTC_24].

EPA's new interpretation is contrary to this protective purpose. Having recognized the heterogeneity of the nation's light-duty-vehicle fleet, EPA unreasonably reinterpreted §7545(f)(1) as not requiring a comparison of E15 to E0, the fuel used to certify the vast majority of the nation's fleet, including vehicles as recent as model-year 2019. *See Fox Television*, 556 U.S. at 515. By interpreting §7545(f)(1)(A) to allow a fuel to be sold provided it is substantially similar to a single certification fuel, EPA places at risk all vehicles certified on fuel *not* substantially similar to the new fuel (here, *most* vehicles)—the precise risk §7545(f)(1)(A) seeks to prevent. Indeed, EPA's interpretation would permit the agency to continue to approve new certification fuels for a small subset of vehicles and declare as substantially similar higher-ethanol blends that can be used in ever-fewer model-years, resulting in a balkanized fuel supply that would be overwhelmingly confusing for the consumer.

2. EPA's Diesel Counterargument Fails.

EPA asserts that this plain-language interpretation is unworkable because "[u]nder a reading where 'any' broadly refers to 'any fuel utilized in certification,' E15 would need to be [substantially similar] to diesel fuel or E85, two fuels utilized in the certification of particular subsets of vehicles and engines (i.e., diesel powered vehicles and engines, and flex fuel vehicles)." JA_[RTC_27]. This response fails.

EPA's response is inapplicable to §7545(f)(1)(A), which applies only to gasoline—the only fuel "for general use in light duty motor vehicles." *See* 75 Fed. Reg. at 68,145 (§7545(f)(1)(A) applies "only to the subset of motor vehicles designed to be operated on unleaded gasoline"). EPA's claimed absurdity is thus a mirage: Subsection (f)(1)(A) merely requires gasoline fuels to be substantially similar to all fuels used to certify gasoline-powered vehicles, including E0—a test E15 fails.

The Court thus need not address the later-enacted, separate prohibition in §7545(f)(1)(B); regardless, EPA has unreasonably interpreted any ambiguity in §7545(f)(1)(B)'s application to multiple fuel types. Here, as with §7545(h), EPA may "go no further than the ambiguity" permits, *Arlington*, 569 U.S. at 307; *see also Energy Future Coal.*, 793 F.3d at 1476 (rejecting similar "catch-22 argument" relating to subsection (f)(1) and noting that any "so-called catch-22 … is the result

of the statutory scheme adopted by Congress"). EPA's own regulations creating a "grouping system" of six "fuel families," which include gasoline (including E15), diesel, and ethanol blends containing more than 50%, 40 C.F.R. §79.56(e), already demonstrate how to reconcile the potential "absurdity" EPA invokes: EPA could compare a new fuel only to all certification fuels within its "fuel family." Indeed, when creating these groupings, EPA observed that its approach was "consistent with Congress' intent in [§7545(f)(1)(B)] to preclude introduction into commerce of new aftermarket additives which do not fit the 'substantially similar' criteria." 59 Fed. Reg. 33,042, 33,050 (June 27, 1994). EPA's rewriting of the statute to allow it to make a substantial-similarity determination based on a comparison to a single certification fuel extends far beyond the absurdity EPA claims would exist if comparing a new fuel to multiple distinct fuel types were required. EPA lacks authority to take that step. *See UARG*, 573 U.S. at 328.

B. The Clean Air Act Prohibits EPA From Making a Substantial-Similarity Finding for a Subset of Model Years.

EPA's substantial-similarity determination fails for a second, independent reason: EPA incorrectly claims authority "to limit [its] [substantial-similarity] finding for E15 to [model-year] 2001 and newer light-duty vehicles." JA_[RTC_43]. As EPA admits, it adopted this approach because "E15 is not

substantially similar to E10" when used in pre-2001 vehicles, and "tens of millions" of such vehicles remain in use. JA_, _[RTC_44,_57].

Common sense aside, nothing in the statutory text authorizes EPA to make a substantial-similarity determination for only a subset of model years. To the contrary, as discussed above, subsection (f)(1) protects *all* vehicles that remain in use.

Likewise, EPA has explained that §7545(f)(1) prohibits introduction of a new fuel unless it "is 'substantially similar' to fuels used to certify model year 1975 *and* later vehicles and engines as compliant with federal emission standards." EPA Br. 2, *Grocery Mfrs.' Ass'n v. EPA*, 2013 WL 2316707 (S. Ct. filed May 24, 2013) (emphasis added); EPA Br. 8 n.3, *Chevron USA Inc. v. Browner*, 2000 WL 33982483 (9th Cir. filed Feb. 2, 2000) (interpreting §7545(f)(1) to "prohibit[] the sale of fuels that are not 'substantially similar' to fuels used in the certification of 1975 vehicles," regardless of whether those fuels are substantially similar to later model-year certification fuels).

This Court has similarly observed that §7545(f)(1) "prohibits the sale of fuels … that are not 'substantially similar' to those in use in vehicles or engines certified *since 1974*," not some subset of vehicles certified since 1974. *Ethyl Corp. v. Browner*, 989 F.2d 522, 523 (D.C. Cir. 1993) (emphasis added).

The statute as a whole also cuts against EPA's interpretation. Subsection (f)(4) provides the limited and sole exception to the subsection (f)(1) prohibition against sale of fuels that are not substantially similar to certification fuels. The availability of this exception weighs against interpreting subsection (f)(1) as including exceptions not expressly enacted. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied.").

Indeed, subsection (f)(4) is rendered superfluous by an interpretation of (f)(1) that allows partial or conditional substantial-similarity determinations. If EPA can subdivide the gasoline-powered vehicle fleet and impose conditions on the use of a fuel under subsection (f)(1), it can avoid the emission control device effects subsection (f)(4) is designed to protect. If subsection (f)(4) is to have meaning, subsection (f)(1) must be read according to its terms. *Nat'l Ass'n of Mfrs.*, 138 S. Ct. at 631.

EPA identifies no statutory language authorizing its new interpretation of §7545(f)(1) to consider only a subset of vehicles. Instead, EPA argues that, in the "unique situation" where E15 has been used in post-2000 vehicles for years pursuant to the partial §7545(f)(4) waivers issued in 2010 and 2011, EPA may make the substantial-similarity determination for that "subset of in-use vehicles." JA_[84_Fed._Reg._at_26,996]. Beyond lacking a foundation in the statutory text,

EPA's approach ignores its claimed basis for granting partial §7545(f)(4) waivers.[15]

EPA's interpretation of subsection (f)(4) as allowing a waiver to apply only to a subset of vehicles was based on several considerations specific to that provision and inapplicable to subsection (f)(1). To start, EPA purported to ground its interpretation in the statutory text, explaining that "waive" is typically interpreted as "encompassing both partial and total waivers." 75 Fed. Reg. at 68,145. EPA also cited subsection (f)(4)'s legislative history as contemplating waivers issued "under such conditions" as EPA found appropriate. *Id.* at 68,144.

Even assuming EPA's interpretation of subsection (f)(4) is valid, neither the text nor the history evidences any similar authority under subsection (f)(1). Nor does the statute even hint that EPA may use categories created under subsection (f)(4) for purposes of a subsection (f)(1) substantial-similarity analysis. Regardless, the one judge to reach the merits in *Grocery Manufacturers* concluded that EPA's partial E15 waivers "plainly run afoul of the statutory text" of subsection (f)(4), which does not allow for partial waivers limited to certain model years. 693 F.3d at 190 (Kavanaugh, J., dissenting). EPA's interpretation is thus even more flawed with respect to subsection (f)(1).

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[15] AFPM does not concede that EPA correctly interpreted subsection (f)(4). *See* Argument §III.

Finally, even if EPA had authority to make a substantial-similarity determination limited to specific model years, its exercise of that authority was unreasonable. EPA has used E10 as a certification fuel beginning with model-year 2017. JA_[84_Fed._Reg._at_26,993_n.100]. Yet EPA has used that certification fuel to declare E15 substantially similar when used in model-year 2001-2016 vehicles, even though those vehicles were *not* certified on E10.

EPA sought comment "on whether this proposed [substantial-similarity] interpretation for E15 should be limited … to vehicles and engines certified using … E10 certification fuel." JA_[84_Fed._Reg._at_27,006]. EPA declined to adopt that limitation, which would at least have aligned its substantial-similarity determination with the model years in which E10 is actually used as a certification fuel. Instead, EPA simply defined the relevant subset of vehicles as those "for which we have determined the use of E15 is appropriate." JA_[RTC_26]. But §7545(f)(1) does not authorize EPA to mix-and-match fuels and model years based on EPA's sense of what is "appropriate." *See UARG*, 573 U.S. at 328. In short, it is unreasonable to interpret the statute to allow EPA to find E15 substantially similar with respect to model-years 2001-2016—which were certified on E0—on the basis that E15 is substantially similar to E10 used in certification of post-2016 vehicles.

C. EPA Unlawfully Conducted a Substantial-Similarity Analysis for E15 at 9.0 psi, Not 10.0 psi.

EPA's substantial-similarity determination fails for a third reason: EPA did not conclude that the fuel it ultimately approved, E15 at 10.0 psi, is substantially similar to a certification fuel, i.e., E10 at 9.0 psi. Instead EPA compared E15 at *9.0 psi* to E10 at 9.0 psi. JA_[84_Fed._Reg._at_26,998]. EPA argued that it "need not address the 1-psi waiver that is expressly provided in another provision," because §7545(h)(4) "will itself allow for the 1-psi waiver for E15." JA_[*Id.*].

EPA's argument fails: nothing in subsection (f)(1) permits EPA to introduce a new fuel into commerce—E15 at 10.0 psi—that fails the substantial-similarity requirement. E15 at 10.0 psi is "any fuel," and so under the statute's plain text, *that* fuel must satisfy the substantial-similarity test. That is particularly so because volatility is an important fuel attribute that EPA evaluates in making substantial-similarity determinations. JA_[84_Fed._Reg._at_26,998].

Likewise, nothing in subsection (h) suggests that a fuel that benefits from the RVP waiver is subject to less-rigorous treatment under subsection (f)(1). Instead, subsection (h)(4) addresses only the RVP "limitation *under this subsection*" (emphasis added), not whether a fuel may lawfully be introduced into commerce under subsection (f)(1).

EPA's argument is flawed for two additional reasons. *First*, E15 at 9.0 psi can already be sold during the summer under the 2010-2011 partial waivers. EPA admits it made the substantial-similarity "determination for E15 *solely* in order to provide E15 produced by fuel and fuel additive manufacturers the [(h)(4)] 1-psi waiver," allowing the sale of E15 at *10.0 psi*. JA_[84_Fed._Reg._at_26,993] (emphasis added). In doing so, EPA sidestepped a key aspect of the substantial-similarity analysis: a comparison of evaporative emissions between E15 at 10.0 psi (the proposed new fuel) and certification fuels. Instead, EPA summarily concluded that "we need not look at the emissions impacts of E15 at 10.0 psi." JA_[84_Fed._Reg._at_26,998].

Second, EPA claims it is "not ignoring the impacts of volatility on emissions, but rather deferring to the direction of Congress to provide certain gasoline-ethanol blends a 1-psi waiver from volatility controls." JA_[RTC_37]. But EPA points to no statutory "direction" altering the §7545(f)(1) analysis in light of §7545(h)(4). And in the same discussion EPA acknowledges that it is "reinterpreting" the statute to extend the 1-psi RVP waiver to E15." *Id.* EPA's "bootstrap approach of relying on" its own novel interpretations of both subsections (f)(1) and (h)(4) to avoid conducting a substantial-similarity analysis of E15 at 10.0 psi must be rejected. *Motor Veh. Mfrs. Ass'n v. EPA*, 768 F.2d at 394.

D. EPA Unreasonably Concluded That E15 at 9.0 psi Is Substantially Similar to E10.

EPA's approval of E15 at 10.0 psi via a substantial-similarity determination for E15 at 9.0 psi was arbitrary and capricious. EPA stated that it evaluated "emissions, materials compatibility, and driveability" to conclude that E15 at 9.0 psi is substantially similar to E10 at 9.0 psi. JA_[84_Fed._Reg._at_26,997]. EPA has not justified its application of this analysis, derived from its §7545(f)(4) determinations, to a substantial-similarity determination under §7545(f)(1). EPA claims this is not new, JA_[*Id.*], but ignores EPA's own §7545(f)(1) interpretation requiring *chemical and physical* similarity, 56 Fed. Reg. 5,352, 5,353 (Feb. 11, 1991), a test E15—with 50% more ethanol than E10—fails. Regardless, EPA's decision does not satisfy the requirement to conduct reasoned decisionmaking.

1. Emissions

The goal of §7545(f) is to protect against emissions increases while ensuring fuel compatibility. As EPA has explained, "Congress based the 'substantially similar' exemption on the belief that fuels and fuel additives substantially similar to [certification fuels] would not adversely affect emissions." 45 Fed. Reg. 67,443, 67,445 (Oct. 10, 1980). However, EPA recognizes that E15, even at 9.0 psi, and even in post-2000 model-year vehicles, *will* increase certain emissions. EPA's own studies for model-year 2007-2019 vehicles show particulate matter increases

of 4% and nitrogen oxides increases of 2%—percentages EPA characterizes as "meaningful despite being small," JA_, _[84_Fed._Reg._at_26,999_&_n.139]. Projecting from one study of E0 and E10, EPA "expect[s] around 10 percent higher PM when moving from E10 to E15." JA_[*Id.*_at_26,999]. For other vehicles, EPA merely "expect[s]" E15 will not cause or contribute to emissions violations based on little more than conjecture. JA_[*Id.*_at_27,000]. EPA makes no attempt to square these emissions increases with its statutory mandate to ensure against these very effects, defying its obligation to connect the facts found and the choice made. *MVMA*, 463 U.S. at 43.

2. Materials Compatibility

EPA's conclusions regarding materials compatibility are inadequately explained. For example, EPA notes that "EPA's in-use surveillance program, and manufacturer emission defect information reports had not detected any failures attributable to ethanol *up to E10* in these vehicles." JA_[84_Fed._Reg._at_27,004] (emphasis added). To make the leap to E15, EPA exercised "engineering judgment discussed in the E15 waiver decisions," with no new analysis or even an explanation of why its previous analysis remained valid. Instead, EPA stated that it merely "expect[ed] that there will not be materials compatibility issues." JA_[*Id.*]. While courts typically defer to an agency's technical conclusions, courts do not defer to action based "only [on] conclusory statements" and "no discussion

of the studies upon which it relied." *Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990).

III. EPA'S REOPENER AND RETENTION OF ITS PRIOR PARTIAL E15 WAIVERS WAS UNLAWFUL.[16]

In 2010 and 2011 EPA concluded that E15 could be sold under §7545(f)(4), subject to two main conditions: (1) it could not be used in pre-2001 model-year light-duty vehicles or any nonroad engine or vehicle, and (2) it could not exceed 9.0 psi. In the E15 Rule, EPA reopened the 2010-11 waivers by reexamining those conditions and jettisoning the latter, *see* JA_[84_Fed._Reg._at_26,982], yet paradoxically leaving the waivers undisturbed. Just as EPA lacks authority to make a partial substantial-similarity determination, so too does EPA lack authority to issue (or retain) partial waivers under §7545(f)(4). Along with the E15 Rule, those waivers must fall.

A. EPA Reopened Its Partial §7545(f)(4) Waivers.

Where an agency "has opened [an] issue up anew, even though not explicitly, its renewed adherence is substantively reviewable." *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (citation omitted). EPA insisted it was "not soliciting comments on the [(f)(4)] waiver itself or any of its conditions," JA_[84 Fed._Reg._at_10,588]—perhaps wary of the scrutiny that

16 Only AFPM presents this argument.

waiver received, *Grocery Mfrs.*, 693 F.3d at 190-92 (Kavanaugh, J., dissenting) (finding "EPA's E15 waiver is flatly contrary to the plain text of the statute"). Nevertheless, EPA acknowledged that if it finalized its proposed substantial-similarity determination for E15, its previous §7545(f)(4) waivers "will no longer be necessary." The absence of the §7545(f)(4) waivers "would in effect remove the conditions of the E15 partial waivers imposed on fuel and fuel additive manufacturers." JA_[84_Fed._Reg._at_10,602]. EPA then sought comment on the necessity of re-imposing those conditions under a substantial-similarity determination, as well as additional mitigation measures *beyond* the current E15 §7545(f)(4) waiver conditions, JA_[*id._at_*10,602-03], revisiting the factual underpinnings of those waivers. EPA responded to comments regarding these mitigation measures, as well as the ability of E15 to take advantage of the 1-psi-RVP waiver. *See* JA_[RTC_39] (mitigation measures); JA_[RTC_6] (RVP waiver). The "entire context of the rulemaking" in which EPA "reconsidered and reinstated its original policy[,] … necessarily raises the lawfulness of the original policy." *Pub. Citizen v. NRC*, 901 F.2d 147, 150, 152 (D.C. Cir. 1990).[17]

[17] Alternatively, EPA has constructively reopened the waivers by altering E15's regulatory construct. *Sierra Club v. EPA*, 551 F.3d 1019, 1025 (D.C. Cir. 2008) (constructive reopener occurred even without regulatory-text change where EPA "created a different regulatory construct as to the means of measuring compliance with the general duty" at issue).

B. EPA's Partial §7545(f)(4) E15 Waivers Are Unlawful.

Just as EPA may not condition a substantial-similarity determination based on model year, neither may it impose model-year conditions on a waiver under §7545(f)(4). JA_[AFPM_Comments_30]; JA_[AFPM_Comments_Att._3]. As with subsection (f)(1), subsection (f)(4) contains the word "any," requiring a waiver applicant to demonstrate that a fuel "will not cause or contribute to a failure of *any* emission control device or system (over the useful life of the motor vehicle[)] … to achieve compliance … with [applicable] emission standards." §7545(f)(4) (emphasis added). "Put in plain English, [] to approve a waiver, EPA must find that the proposed new fuel will not cause *any* car model made after 1974 to fail emissions standards." *Grocery Mfrs.*, 693 F.3d at 190 (Kavanaugh, J. dissenting) (emphasis added). EPA therefore had no authority to grant E15 a waiver under §7545(f)(4), because EPA could not ensure that *every* car made after 1974 could use E15 without emissions violations.

This Court in *Ethyl Corp.* used a plain-language approach to rule that the "level of specificity in [§7545](f)(4) concerning the emission criterion effectively closes any gap the Agency seeks to find and fill with additional criteria." 51 F.3d at 1060. This Court similarly rejected EPA's attempt at an "added gloss" on the statute when EPA granted a §7545(f)(4) waiver to a fuel that failed EPA's own emissions test, because the failure was not "significant." *Motor Veh. Mfrs. Ass'n*,

768 F.2d at 400. EPA's attempt here at the added gloss of limiting the §7545(f)(4) waivers to certain model-year vehicles—making its decisions applicable only to "some" vehicles not "any"—is likewise impermissible.

EPA's decision was also arbitrary and capricious for the same reasons that EPA erred in concluding that E15 at 9.0 psi is substantially similar to E10 at 9.0 psi. Indeed, EPA relies almost entirely on the same record for both decisions. As explained above, EPA failed to adequately demonstrate that E15 will not cause or contribute to emission-control-device failure in even post-2000 model-year cars.

CONCLUSION

The Court should grant the petitions for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32, Circuit Rule 32(e)(1), and this Court's March 27, 2020 order (Doc. 1835704) because it contains 12,497 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point Times New Roman font.

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May 12, 2020

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2020, I caused copies of the foregoing brief to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

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May 12, 2020