Comments of

THE ILLINOIS CORN GROWERS ASSOCIATION,

THE IOWA CORN GROWERS ASSOCIATION,

THE MISSOURI CORN GROWERS ASSOCIATION, AND

THE NEBRASKA CORN BOARD

On the U.S. Environmental Protection Agency's Proposed

Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations

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by C. Boyden Gray
Adam R.F. Gustafson
Andrew R. Varcoe
James R. Conde
BOYDEN GRAY & ASSOCIATES PLLC
801 17th Street NW, Suite 350
Washington, DC 20006
202-955-0620
gustafson@boydengrayassociates.com

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EXECUTIVE SUMMARY

EPA should finalize a rule allowing the year-round sale of E15 before June 1, 2019. Commenters commend EPA for proposing to correct its interpretation of the Clean Air Act's 1 psi Reid Vapor Pressure (RVP) waiver and to allow the year-round sale of E15. Commenters urge EPA to finalize the rule before June 1, 2019, to ensure E15 can be sold this summer. EPA should also adopt a non-enforcement policy for the first ozone season that the rule is in effect to provide assurance to retailers who may have potentially noncompliant blendstocks in underground storage tanks.

EPA should affirm that its proposed re-interpretation of the Clean Air Act's 1 psi RVP waiver is not only reasonable but the best interpretation of CAA § 211(h). The RVP statute is unambiguous. The only permissible interpretation of the Clean Air Act's 1 psi RVP waiver "[f]or fuel blends containing gasoline and 10 percent" ethanol is that all gasoline blends with at least 10 percent ethanol, including E15, are eligible. In the final rule, EPA should assert that its proposed interpretation is required by the statute's text, structure, and legislative history. Only in the alternative should EPA argue that—if the statute is ambiguous—its interpretation is permissible.

EPA's proposed amendments to its RVP regulations are inconsistent with its proposed interpretation of the 1 psi RVP waiver. EPA's proposed rulemaking would codify a "no more than 15%" ethanol limit on the blends eligible for the 1 psi RVP waiver and a related affirmative defense. This 15 percent ethanol limit is inconsistent with EPA's proposed re-interpretation of the 1 psi RVP waiver to cover *all* blends containing at least 10 percent ethanol. The proposed 15 percent limit is instead based on EPA's misinterpretation of a different statutory provision—the sub-sim law—and it will needlessly impede the introduction of higher ethanol blends in the future.

EPA may not withdraw the Clean Air Act's "deemed to comply" defense for E15 and other substantially similar fuels. Under the Clean Air Act, parties downstream of refiners and importers are "deemed to comply" with RVP requirements if they keep records that "demonstrate" that, among other things, the fuel blend's ethanol concentration "does not exceed its waiver condition under subsection (f)(4)" of the sub-sim law. EPA's proposed rule suggests that this defense may be inapplicable to fuels, like E15, that are "substantially

similar" and therefore no longer need a sub-sim waiver. EPA requests comment on "the continued use of the deemed to comply provision to ease the demonstration burdens" for such fuels. Denying sub-sim fuels like E15 the benefit of the "deemed to comply" provision would misinterpret the statute. A "substantially similar" fuel, like E15, does not "exceed its waiver condition," because it is not subject to a sub-sim waiver. EPA must therefore retain the "deemed to comply" defense for all "substantially similar" fuels that contain at least 10 percent ethanol and meet the other conditions of the "deemed to comply" provision.

EPA may not impose misfueling "conditions" under the sub-sim law. EPA solicits comment on whether it could impose several misfueling mitigation "conditions" on the sale of E15 as part of its interpretation of the term "substantially similar" under the sub-sim law. EPA may not. EPA's task in determining what fuels are "substantially similar" is limited: EPA must consider how a market fuel's "general physical and chemical characteristics" compare to a certification fuel's characteristics, and then make a judgment about whether those characteristics are "substantially similar." Leveraging that limited interpretative task to impose misfueling mitigation controls on E15 would go beyond what the text of the sub-sim law allows and impermissibly circumvent statutory restrictions on EPA's regulatory authority to control fuel under § 211(c) of the Clean Air Act.

EPA may not interpret its regulations to impose refinery-style compliance burdens on retailers that use blender pumps to produce gasoline-ethanol blends. EPA's proposed rule interprets the regulatory definitions of "fuel manufacturer" and "refiner" to include all parties, including retailers, that mix gasoline with E85 made using natural gasoline blendstock. This would impose a new unjustified restriction on the current practice of using blender pumps to produce E15.

EPA asserts that it is not re-opening these regulatory definitions for comment, but EPA's new interpretations impose new regulatory burdens on fuel retailers, and they are within the scope of the rulemaking. It would be arbitrary and capricious for EPA to ignore comments on its new interpretations.

EPA's proposed interpretation of its regulatory definition of "fuel manufacturer" is incorrect and unfair. EPA's interpretation ignores the term "bulk fuel" in the regulatory definition of "fuel manufacturer." Because retailers and their customers do not sell "bulk fuel," they are not "fuel manufacturers" under EPA's rules. EPA's misinterpretation of its

regulations would also produce absurd results, because it would suggest that millions of retail customers that purchase E15 are also "fuel manufacturers." EPA's interpretation raises due process concerns; fuel retailers that sold E15 blended with natural gasoline in the past would be retroactively liable without prior warning. EPA's interpretation would also threaten to strand government-sponsored investments in blender pumps. Instead of interpreting its rules in a way that could impose retroactive liability on thousands of retailers, the better, more fair approach would be to finalize prospective rules exempting retailers that use blender pumps from the definition of "fuel manufacturer."

EPA's proposed interpretation of its definition of "refiner" is incorrect and unfair. EPA's proposed interpretation fails to recognize that E85 made with natural gasoline is an "oxygenate" because it "increases the oxygen content of [] gasoline." Retailers that modify gasoline by adding E85 are therefore "oxygenate blenders," not refiners. EPA's proposed interpretation of the term "refiner" would raise serious fair-notice concerns. The better, more fair approach would be to finalize prospective rules regulating the quality of E85 and natural gasoline blendstock, as EPA suggested in the proposed REGS rule.

EPA should clarify that inconsistent state laws are preempted by the Clean Air Act. The Act preempts state controls on fuel "characteristic[s] or component[s]" that are not "identical" to EPA's rules. EPA should clarify that state laws banning E15 or denying the 1 psi RVP waiver to E15 are expressly preempted. In addition, state RVP restrictions are also impliedly preempted by § 211(h)(5) of the Clean Air Act. That section provides the sole and exclusive mechanism for states to opt out of the 1 psi waiver. In the final rule, EPA should provide legal certainty and uniformity by codifying a rule expressly preempting these inconsistent state restrictions.

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I. EPA'S NEW INTERPRETATION OF THE CLEAN AIR ACT'S 1 PSI REID VAPOR PRESSURE WAIVER IS CORRECT.

The Illinois, Iowa, and Missouri Corn Growers Associations and the Nebraska Corn Board ("Commenters") commend EPA for correcting its interpretation of the Clean Air Act to allow the year-round sale of E15, consistent with the text, structure, history, and purpose of the statute. EPA proposes to reinterpret Clean Air Act (CAA) § 211(h)(4) to apply the same Reid Vapor Pressure (RVP) standard to all "ethanol blends containing at least 10 percent ethanol."[1] Under this interpretation, E15 is entitled to the same 1 pound per square inch (psi) RVP standard as E10. Commenters urge EPA to finalize the rule before June 1, 2019, when the "high ozone season" begins, to ensure that E15 can be sold this summer.[2] If necessary to achieve this timeline, EPA could defer its proposed Renewable Identification Number credit reforms until a later date.

EPA should also adopt a non-enforcement policy for the first ozone season that the rule is in effect to provide assurance to retailers who may have potentially noncompliant blendstocks in underground storage tanks.

A. EPA's Proposed Interpretation Is the Only Permissible Interpretation.

CAA § 211(h)(4) provides:

> For fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the Reid vapor pressure limitation under this subsection shall be one pound per square inch (psi) greater than the applicable Reid vapor pressure limitations established under paragraph (1).[3]

The best interpretation of CAA § 211(h)(4) is, as EPA proposes, that the statute "establish[es] a lower limit, or floor, on the minimum ethanol content for a 1-psi [RVP] waiver . . . rather than an upper limit on the ethanol content."[4] Indeed, when the ordinary

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[1] *Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations*, 84 Fed. Reg. 10,584, 10,587, 10,591 (Mar. 21, 2019) (Proposed Rule).

[2] 40 C.F.R. § 80.27 (high ozone season "means the period from June 1 to September 15 of any calendar year").

[3] 42 U.S.C. § 7545(h)(4).

[4] Proposed Rule 84 Fed. Reg. at 10,591.

tools of statutory interpretation are applied to the statute—as they must be—it is clear that § 211(h)(4) unambiguously applies to all gasoline blends containing at least 10 percent ethanol.

Instead of defending its interpretation as the best reading of the statute, however, EPA begins its analysis by asserting that "[t]he term 'containing' as used in CAA sec. 211(h)(4) in the phrase 'fuel blends containing gasoline and 10 percent denatured anhydrous ethanol' is ambiguous."[5] This approach does not give sufficient weight to the statutory context in which that term appears. Under *Chevron*, a statute is not "ambiguous" unless EPA has exhausted all the "traditional tools of statutory construction."[6] The traditional tools of statutory construction include "text, legislative history, structure, and purpose."[7]

Using all the tools of statutory construction makes clear that EPA's proposed new interpretation of CAA § 211(h)(4) is the only permissible interpretation. It is true that Congress could have been clearer: Congress could have explicitly said that the 1 psi RVP waiver applies to any "fuel containing gasoline and [at least] 10 percent . . . ethanol." But it does not automatically follow from the absence of the phrase "at least" that the verb "containing" is ambiguous. "Reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'"[8] Once the whole text, its broader context, and the legislative history of the statute are taken into account, the verb "containing" as used in § 211(h)(4) only has one permissible meaning: all blends containing at least 10 percent ethanol are entitled to a 1 psi RVP waiver.

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[5] *Id.*

[6] *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000) (court must "exhaust[ ] traditional tools of statutory construction" at *Chevron* step one).

[7] *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1287 (D.C. Cir. 2000).

[8] *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427. 2442 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *see also Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) ("the court must examine the meaning of certain words or phrases in context and also exhaust the traditional tools of statutory construction, including examining the statute's legislative history to shed new light on congressional intent"); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 167–69 (2012) (explaining the "Whole-Text" canon).

Start with the text. As EPA points out, the plain meaning of the verb "containing" is "to have within: to hold."[9] E15 satisfies this definition because it "has within it 10 percent denatured anhydrous ethanol"; therefore, it "should receive the 1-psi waiver specified in CAA sec. 211(h)(4)."[10] The use of the plural noun phrase "fuel blends" also implies that more than one gasoline-ethanol blend qualifies for the waiver. If Congress had wanted to restrict the waiver to Gasohol—"*a fuel* consisting of 90% unleaded gasoline and 10% ethyl alcohol"[11]—Congress would have referenced Gasohol or used the singular noun "fuel" instead of "fuel blends."

The plain meaning of "fuel blends . . . containing" is confirmed by the whole text of § 211(h)(4) and its neighboring provisions.[12] When Congress adopted the 1 psi waiver statute, it included a "deemed to comply" provision that provides an affirmative defense for downstream fuel sellers and carriers who can show that, among other things, "the ethanol portion of the fuel blend does not exceed its waiver condition under" section 211(f)(4).[13] Ever since 2010, when EPA granted the first partial waiver for E15, E15 blends have complied with this requirement: the "ethanol portion" of an E15 blend "does not exceed" the 15 percent ethanol concentration allowed by the sub-sim waivers that EPA granted

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[9] Proposed Rule, 84 Fed. Reg. at 10,591.

[10] *Id.*

[11] *Fuels and Fuel Additives: Gasohol; Marketability*, 44 Fed. Reg. 20,777 (Apr. 6, 1979) (emphasis added).

[12] *See Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("In making the threshold determination under *Chevron,* a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. . . . It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (quotation marks, citations, and alterations omitted)); *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) ("Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

[13] 42 U.S.C. § 7545(h)(4)(B) (second sentence). EPA correctly reads this sentence "to apply to only the waiver condition specifying the ethanol content of the fuel." Proposed Rule, 84 Fed. Reg. at 10,592.

under section 211(f)(4) in 2010 and 2011. For this reason, it is impermissible to interpret the "deemed to comply" provision to apply only to E10.[14] More importantly, the deemed to comply provision also confirms Congress's intent to extend the 1 psi RVP waiver to *all* blends containing at least 10 percent ethanol. Congress could have limited the "deemed to comply" provision to fuel blends with *no more than* 10 percent ethanol; instead, Congress tied it to § 211(f), which empowers EPA to approve higher levels of ethanol.[15] EPA's former interpretation of § 211(h)(4) as limited to E10 was at odds with the statute's express reference to EPA's authority to allow higher ethanol blends into the market. EPA's proposed new interpretation would be a better reading of the text.

Any notion that Congress intended to limit the 1 psi RVP waiver to E10 was further refuted in 2005. In that year, Congress added § 211(h)(5), allowing States to request an exemption from the 1 psi waiver's application to "*all* fuel blends containing gasoline and 10 percent denatured anhydrous ethanol."[16] If the 1 psi RVP waiver applied only to E10 and excluded higher gasoline-ethanol blends, Congress's use of the word "all" would have been superfluous.[17]

Another tool of statutory construction that can overcome superficial ambiguity is the statute's history.[18] The historical context of § 211(h)(4)'s enactment further confirms that

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[14] As EPA recognizes, the "deemed to comply" provision "contemplates ethanol blends beyond 10 percent." Proposed Rule, 84 Fed. Reg. at 10,592.

[15] *See* Proposed Rule, 84 Fed. Reg. at 10,592 ("[I]f Congress had wanted to limit the application of the (h)(4) waiver to E10, it could have done so, but it did not. Instead, Congress contemplated that ethanol content may increase in the future, that parties would likely apply for [a] 211(f)(4) waiver for those higher blends, [and] that the 211(h)(4) waiver would also apply.").

[16] Energy Policy Act of 2005, Pub. L. 109-58, § 1501(c), 119 Stat. 594, 1074–75 (2005), *codified at* 42 U.S.C. § 7545(h)(5).

[17] As EPA now acknowledges, § 211(h)(5) must be read in harmony with § 211(h)(4). *See* Proposed Rule, 84 Fed. Reg. at 10,591 n.65.

[18] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 164 (2000) (considering a "statute's history" to determine whether a statute is ambiguous); *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Education*, 550 U.S. 81, 90 (2007) (considering the "history of the statute" in determining whether a statute is ambiguous"); *Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) ("[A] statute may foreclose an agency's preferred interpretation despite such textual ambiguities if its structure, legislative history, or purpose makes clear what its text leaves opaque.").

Congress did not restrict the 1 psi RVP waiver to E10. Congress enacted § 211(h) largely to codify EPA's preexisting regulations on gasoline RVP.[19] EPA's preexisting regulations granted a 1 psi RVP allowance for any blend of "at least 9% ethanol," with "the maximum ethanol content . . . not exceed[ing] any applicable waiver conditions under section 211(f)(4)."[20] This 9% floor was necessary to avoid giving refiners a perverse incentive to take advantage of the 1 psi RVP waiver by adding a few drops of ethanol to gasoline. Thus, under EPA's preexisting RVP regulations, a higher ethanol blend would have received the 1 psi RVP waiver if EPA approved the increased concentration of ethanol under § 211(f)(4). Congress enacted § 211(h) largely to codify EPA's "regulatory approach as it existed prior to 1990."[21] Given this context, the best interpretation is that Congress had the same objective as EPA: Congress meant to enact an ethanol floor, not a ceiling. That is why in 1991, when EPA conformed its regulations to § 211(h), EPA "interpret[ed] the statute as requiring *at least* 9 percent ethanol to be eligible for the" 1 psi RVP waiver.[22]

There is no evidence to suggest that Congress intended to depart from that approach when it enacted § 211(h)(4). To the contrary, the legislative history strongly suggests that Congress intended to grant the 1 psi RVP waiver to all blends with at least 10 percent ethanol. The original bill proposed by the Administration (H.R. 3030) would have limited the 1 psi RVP waiver to "gasoline containing at least 9 *but not more than* 10 per centum ethanol (by volume)."[23] But Congress *rejected* this proposal for a 10 percent ceiling and instead adopted a 10 percent floor. The Senate bill provided for a 1 psi RVP waiver for

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[19] *See* Proposed Rule, 84 Fed. Reg. at 10,600 ("Congress enacted CAA sec. 211(h) in 1990, which . . . we have interpreted as essentially codifying our regulatory approach to fuel volatility as it existed prior to 1990.").

[20] 40 C.F.R. § 80.27(d)(2) (1990).

[21] Proposed Rule, 84 Fed. Reg. at 10,600 ("Congress enacted CAA sec. 211(h) in 1990, which . . . we have interpreted as essentially codifying our regulatory approach to fuel volatility as it existed prior to 1990.").

[22] *Regulation of Fuels and Fuel Additives: Standards for Gasoline Volatility; and Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: Standards for Particulate Emissions From Urban Buses*, 56 Fed. Reg. 64,704, 64,706 (Dec. 12, 1991) (emphasis added).

[23] Clean Air Act Amendments, H.R. 3030, 101st Cong., § 214 (1990) 101st Cong., 1st Sess. (July 27, 1989) (emphasis added).

"gasoline and 10 percent denatured anhydrous ethanol," without limitation. And it also provided an affirmative defense where the blend complies with "its waiver condition under" 211(f)(4)—thereby making it clear that the waiver could extend to blends with ethanol concentrations greater than ten percent in the future.[24] The House bill would have achieved the same result, though without any compliance defense—it simply provided that the allowance would apply to "gasoline containing *at least* 10 percent ethanol."[25] Congress ultimately adopted the Senate version. Thus, Congress considered and rejected the Administration's proposal to limit the 1 psi RVP waiver to blends with no more than 10 percent ethanol. "[T]hese actions by Congress . . . preclude an interpretation" that restricts section 211(h)(4) to gasoline with not more than 10 percent ethanol.[26]

Historical context also explains why Congress did not adopt more precise language to modify the phrase "containing . . . 10 percent . . . ethanol" when it enacted § 211(h)(4). In 1990, the only gasoline-ethanol blends that could be sold under the sub-sim law, § 211(f)(4), were blends containing up to 10 percent ethanol.[27] If Congress had adopted the House bill's "at least" language, a court could have read § 211(h)(4) to require that gasoline contain *exactly* 10 percent or more ethanol to qualify for the 1 psi RVP waiver. More than 10 percent ethanol would violate the sub-sim waiver; less would violate the House bill's "at least" language. That would have made it practically impossible to blend lawful fuels that qualified for the 1 psi waiver, because it is unfeasible to consistently blend exactly 10 percent ethanol into gasoline.[28] By adopting the language of the Senate's bill instead of the House bill,

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[24] Clean Air Act Amendments, S. 1630, 101st Cong., § 214 (1990) 101st Cong., 1st Sess. (Sept. 14, 1989).

[25] *See* Clean Air Act Amendments, S. 1630 Engrossed Amendment House, 101st Cong., § 216 (1990) 101st Cong., 2nd Sess. (May 23, 1990) (emphasis added); *see also* H. Rep. 101-490 at 71, 574 (similar).

[26] *Brown & Williamson Tobacco*, 529 U.S. at 155.

[27] *Fuels; Blends of Ethanol in Unleaded Gasoline*, 47 Fed. Reg. 14,596 (Apr. 5, 1982) ([I]ntroduction into commerce of blends of less than 10 percent ethanol in unleaded gasoline was waived by the Gasohol waiver, as of December 16, 1978. Notice of this fact is hereby formally given.").

[28] *See Regulation of Fuels and Fuel Additives: Standards for Gasoline Volatility; and Control of Air Pollution From New Motor Vehicles and New Motor Vehicle Engines: Standards for Particulate Emissions From Urban Buses*, Proposed Rule, Fed. Reg. 24,242, 24,245 (May 29, 1991) ("The nature of the blending process

Congress lessened the risk that a court could interpret § 211(h)(4) to require exactly 10 percent or more ethanol.

In short, when read in context and in the light of history, § 211(h)(4) is unambiguous. It sets a minimum, not a maximum, ethanol concentration for the fuel eligible for the 1 psi RVP waiver. In the final rule, EPA should employ all the tools of statutory interpretation and state clearly that its proposed interpretation of CAA § 211(h)(4) is the best interpretation and the one that makes the most sense of the statute's text, context, and history. EPA should avoid reading ambiguities into the statutory text or relying heavily on controversial deference doctrines that could be overruled or that may no longer have much practical weight in litigation.[29] Only *after* determining that the statute clearly applies the same RVP standard to all gasoline containing at least 10 percent ethanol should EPA argue—in the alternative—that if the statute is ambiguous, its new interpretation is reasonable.

B. EPA May Reasonably Depart From Its Prior Interpretation.

EPA may reasonably depart from its past interpretation of the 1 psi RVP waiver because its former RVP rule misinterpreted the statute. But even if the statute were ambiguous, such that more than one interpretation is permissible, other "good reasons" support the agency's change in position.[30]

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itself (including filling procedures and the use of denaturing additives), further complicates a requirement that the ethanol portion of the blend be exactly 10 percent ethanol. EPA believes that Congress did not intend to require, as a condition to the one psi allowance, that blenders have absolutely no margin of safety for lawful compliance with section 211(f)(4) waiver conditions, given the practical difficulties involved in the blending process.").

[29] *See Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) ("[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."); *id.* at 2121 (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*."); *see also BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 909 (2019) (Gorsuch, J., dissenting) (pointing out that the litigant, "well aware of the mounting criticism of *Chevron* deference," had "devoted scarcely any of its briefing to *Chevron*").

[30] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates").

It is a settled principle of administrative law that agencies must interpret statutes "in some rational way."[31] An agency cannot choose among permissible interpretations of a statute "by flipping a coin."[32] Instead, an agency's interpretation "must be tied, even if loosely, to the purposes . . . or the appropriate operation of" the law it is implementing.[33] And in doing so, agencies must ordinarily "pay[] attention to the advantages *and* the disadvantages of agency decisions."[34]

EPA's past interpretation of § 211(h)(4) flunked this test because it was "unmoored from the purposes and concerns" of the Clean Air Act.[35] The purpose of § 211(h) is to control the volatility of commercial gasoline to reduce evaporative emissions.[36] But EPA's past interpretation ensured that only the most volatile gasoline-ethanol blends were sold. As EPA acknowledges, "E15 has a slightly lower RVP than E10 when made from the same [gasoline blendstock], a situation we believe will be the case unless E15 use becomes widespread."[37] In the likely scenario that E15 is made from the same blendstock as E10, "E15 is expected to lower the volatility of in-use gasoline by as much as 0.1 psi."[38] And even if E15 became widespread and refiners were to re-design their gasoline blendstocks for E15 instead of E10, the RVP of E15 would be no different than the RVP of the E10 gasoline it replaces.[39] In addition, as EPA has previously recognized, higher ethanol blends lower the reactivity (*i.e.*, the tendency to form ozone) of the resulting emissions, because "ethanol is

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[31] *Judulang v. Holder*, 565 U.S. 42, 55 (2011).

[32] *Id.*

[33] *Id.*

[34] *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

[35] *Id.* at 64.

[36] Congress enacted the volatility program to reduce "commercial gasoline volatility." S. Rep. No. 101-228, at 109 (1989).

[37] Proposed Rule, 84 Fed. Reg. at 10,603; *see also id.* at 10,592 ("E15 produced from the same [gasoline blendstock] as E10 would have similar (if not slightly lower) RVP than E10 and thus, would not" increase gasoline volatility).

[38] *Id.* at 10,603.

[39] *Id.* at 10,604.

less reactive than the average [volatile organic compound]."[40] By restricting the 1 psi RVP waiver to gasoline with no more than 10 percent ethanol, EPA's past interpretation discouraged the sale of a less volatile fuel with less reactive emissions, undermining the objectives of the RVP control program and increasing ozone pollution.

EPA's past interpretation also violated *all* of Congress's purposes in providing a 1 psi RVP waiver for ethanol blends. Congress granted that waiver to achieve the "beneficial environmental, economic, agricultural, energy security and foreign policy implications" of ethanol blending.[41] Congress recognized that these benefits of ethanol blending could not be achieved without a waiver because of the high "cost of producing and distributing" a "sub-nine pound RVP gasoline" blendstock.[42] Instead of fulfilling Congress's purposes, EPA's past interpretation of the waiver limited the beneficial implications of ethanol blending. It irrationally required E15 blenders to purchase costly sub-9 psi RVP blendstocks that refiners are unwilling to sell.[43] This imposed prohibitive costs on ethanol blending and unnecessarily limited the "environmental, economic, agricultural, energy security and foreign policy" benefits of increasing ethanol in gasoline.

EPA's past interpretation also had serious deleterious consequences for American farmers, fuel producers, fuel retailers, and drivers who would benefit from competition among a range of fuels options. Every summer (the period of greatest gasoline demand) thousands of retailers must stop selling E15 because EPA applies a more stringent RVP

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[40] *See* EPA, Report to Congress on Public Health, Air Quality, and Water Resource Impact of Fuel Additive Substitutes for MTBE 63 (Feb. 2009) ("With additional ethanol use, the ethanol content of VOC should increase. Ethanol is less reactive than the average VOC. Therefore, this change should . . . reduce ambient ozone levels.").

[41] S. Rep. No. 101-228, at 110 (1989).

[42] *Id.*

[43] Proposed Rule, 84 Fed. Reg. at 10,509 ("The same market limitation that prompted EPA to provide the 1-psi waiver for E10 in 1989 currently exists for E15. Namely, in much of the U.S., there is very little low-RVP [conventional blendstock for oxygenate blending, or CBOB] being produced and made available into which 15 percent ethanol could be blended while still meeting the 9.0 psi RVP standard for gasoline during the high ozone season. As a result, parties that might otherwise consider making and distributing E15 may choose not to, given the difficulty in obtaining CBOB that when blended to produce E15 would meet the 9.0 psi RVP during the summer.").

standard to E15 than it does to E10.[44] Small business owners have testified before EPA about the real-world burdens imposed by EPA's interpretation. As the owner of a convenience store in Nevada, Iowa, explained:

> The only problem I have with the E15 comes every June 1st. On that day, I need to restrict the sales of E15 to flex fuel vehicles only. And on that day, I begin trying to explain to my customers the complex regulations that make the fuel that they buy one day off limits the next day. They are frustrated and I am frustrated. And let me tell you, when [the] summer driving season starts, my E15 sales drop like a rock.[45]

EPA's past interpretation of the 1 psi RVP waiver provision thwarted Congress' purposes, deprived the public of an environmentally beneficial fuel choice, and harmed small business and American agriculture. But despite all of these disadvantages, EPA's past interpretation did not advance any countervailing statutory purpose or produce any advantage. Nor did EPA pay attention to the considerable disadvantages of its past restrictive interpretation of the 1 psi RVP waiver. In short, EPA's past interpretation was arbitrary and capricious, and EPA has good reasons to withdraw it.

II. EPA'S PROPOSED AMENDMENTS TO ITS RVP REGULATIONS ARE INCONSISTENT WITH ITS PROPOSED INTERPRETATION OF THE 1 PSI RVP WAIVER.

EPA correctly proposes to reinterpret CAA § 211(h)(4) to apply to all "ethanol blends containing at least 10 percent ethanol," including but not limited to E15 blends.[46] But the proposed rule would codify certain restrictions that are inconsistent with this interpretation.

A. EPA Cannot Justify a 15% Ethanol Limit on Fuels Eligible for the One Pound Waiver.

Although EPA interprets the CAA § 211(h)(4) to impose no upper limit on the ethanol blends eligible for the 1 psi RVP waiver, the proposed rulemaking would codify a

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[44] EPA, Transcript of Public Hearing, Renewables Enhancement and Growth Support Rule at 25:7–9 (Dec. 6, 2016).

[45] *Id.* at 28:15–22, 29:16.

[46] Proposed Rule, 84 Fed. Reg. at 10,587, 10,591.

"no more than 15%" limit.[47] The proposed 15% ceiling is inconsistent with EPA's new interpretation of § 211(h)(4). It is based on a misinterpretation of a different statutory provision—CAA § 211(f)—and it will needlessly impede the introduction of higher ethanol blends in the future.

EPA should not finalize the proposed 15% cap. The 15% cap would unnecessarily hamper the introduction of higher ethanol blends, because they would be ineligible for a 1 psi waiver unless and until EPA decided to amend its RVP regulations again. Instead, EPA should provide a 1 psi RVP waiver for all gasoline containing at least 9% ethanol, consistent with its proposed interpretation and with the rules that were in place when § 211(h)(4) was first enacted.[48]

B. EPA Cannot Justify a 15% Limit in Its Regulations Setting Forth Affirmative Defenses to RVP Violations.

The amendments to 40 C.F.R. § 80.28(g), which assigns presumptive liability for RVP violations and provides regulated persons with affirmative defenses they can use to avoid liability, should similarly omit all references to "no more than 15% ethanol"; "between 9 and 15 percent ethanol"; and "does not exceed 15 percent" ethanol.[49] These regulatory references are unnecessary to enforce the sub-sim law. They would also hamper the introduction of new higher ethanol blends into the market, because higher blends would be unable to take advantage of the streamlined RVP compliance mechanisms available to E10 and E15.

III. EPA MAY NOT WITHDRAW THE "DEEMED TO COMPLY" DEFENSE FOR E15 AND OTHER SUBSTANTIALLY SIMILAR FUELS.

In its proposal, EPA "seek[s] comment on the continued use of the deemed to comply provision to ease the demonstration burdens for fuels that do not have a CAA sec.

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[47] *Id.* at 10,625–26.

[48] 40 C.F.R. § 80.27(d)(2) (1990).

[49] Proposed Rule, 84 Fed. Reg. at 10,625–26.

211(f)(4) waiver, but nonetheless can be introduced into commerce because they are substantially similar to Tier 3 E10 certification fuel."[50]

Congress adopted the "deemed to comply" provision to ease the compliance testing burdens of parties downstream of refineries. Downstream parties deal with much smaller quantities of gasoline, so testing each "batch" of gasoline they sell would be prohibitively expensive.[51] To avoid this, Congress provided an affirmative defense: A downstream entity may avoid liability by keeping records that "demonstrate" that

> (A) the gasoline portion of the blend complies with the Reid vapor pressure limitations promulgated pursuant to this subsection;
>
> (B) the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4); and
>
> (C) no additional alcohol or other additive has been added to increase the Reid Vapor Pressure of the ethanol portion of the blend.[52]

In the proposed rule, EPA asserts that "a plain reading of this provision . . . would suggest that it could not apply where the agency concludes that a fuel is substantially similar to certification fuels."[53] Although EPA does not explain why "a plain reading" suggests that outcome, EPA appears to read the cross-reference to § 211(f)(4) in the "deemed to comply" provision to imply that only gasoline-ethanol blends that can be sold by virtue of a sub-sim waiver qualify for the affirmative defense.

This does not logically follow from "a plain reading" of the "deemed to comply" provision, or any reasonable interpretation of the statute. First, E15 complies with the literal text of the "deemed to comply" provision because its ethanol concentration does not exceed the concentration EPA approved in the 2011 E15 waiver.[54] That E15 is now *also* substantially similar does not mean that E15 now "exceed[s]" the concentration of ethanol

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[50] *Id.* at 10,601.

[51] *Id.* at 10,589, 10,592; *see also* 40 C.F.R. §§ 80.27(b); 80.28(g)(2) (setting forth volatility compliance requirements for refiners).

[52] 42 U.S.C. § 7545(h)(4).

[53] *Id.*

[54] EPA correctly reads § 211(h)(4)(B) "to apply to only the waiver condition specifying the ethanol content of the fuel." Proposed Rule, 84 Fed. Reg. at 10,592.

allowed under § 211(f)(4). Second, and more importantly, a gasoline-ethanol blend that is substantially similar to a certification fuel cannot by law "exceed its waiver condition under subsection (f)(4)." That is because only fuels that are not substantially similar are subject to EPA's waiver conditions under § 211(f)(4).[55] So sub-sim fuels comply with the text: the ethanol concentration of the fuel does not exceed any sub-sim waiver condition. Third, the "deemed to comply" provision must be read to work in harmony with the rest of § 211(h)(4), which gives a 1 psi RVP waiver to all gasoline-ethanol blends with at least 10% ethanol.[56] A plain reading of the "deemed to comply" provision, read in harmony with §§ 211(f) and (h)(4), therefore suggests that all substantially similar gasoline-ethanol blends containing at least 10% ethanol are eligible to assert the "deemed to comply" defense if they use a compliant gasoline blendstock and do not add any other alcohol compound to the fuel. There is also no good policy reason to deprive E15 of the affirmative defense enacted by Congress.

IV. EPA MAY NOT IMPOSE MISFUELING "CONDITIONS" UNDER THE SUB-SIM LAW.

EPA solicits comment on whether it could and should impose several "conditions" on the sale of E15 as part of its interpretation of the term "substantially similar" in CAA § 211(f)(1).[57] EPA's suggested "conditions" include the imposition of "misfueling mititation measures" including requiring manufacturers to "have an EPA-approved misfueling mitigation plan" before selling E15; requiring that E15 meet "industry established quality standards if used to make E15"; and limiting the sale of E15 to "vehicles certified on Tier 3 certification fuel."[58]

EPA is correct that "misfueling measures are unnecessary at this time and outside the scope of this" rulemaking.[59]

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[55] *See* 42 U.S.C. § 7545(f)(4).

[56] Scalia & Garner, *supra* note 8, at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.").

[57] Proposed Rule, 84 Fed. Reg. at 10,602.

[58] *Id.* at 10,602–03.

[59] *Id.* at 10,603.

More importantly, EPA lacks authority to impose misfueling mitigation conditions under § 211(f)(1). The prohibitions expressed in § 211(f)(1) control only fuels or fuel additives that are 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."[60] EPA's task in determining what fuels are "substantially similar" is limited: EPA must consider how a fuel's "general physical and chemical characteristics" compare to a certification fuel's characteristics, and then make a judgment on whether those characteristics make it "substantially similar" to the certification fuel.[61] Misfueling mitigation plans have nothing to do with the task of comparing "general physical and chemical characteristics" of fuels or fuel additives. Thus, they cannot be imposed as part of EPA's interpretation of "substantially similar."

Imposing misfueling mitigation conditions through a sub-sim interpretive rule would also impermissibly evade the Clean Air Act's requirements. In the Clean Air Act, Congress has authorized EPA to impose misfueling mitigation controls on fuel only "by regulation," and only after EPA meets evidentiary and procedural requirements.[62] An important canon of statutory interpretation is that the "mention of one thing implies the exclusion of another thing."[63] Here, EPA's authority to control fuel under § 211(c), must be read to imply the exclusion of EPA's authority to impose fuel controls through § 211(f). A contrary interpretation would allow EPA to impose binding controls on manufacturers by interpretative rule without jumping through any of the hoops that Congress required. That is why the D.C. Circuit has previously rejected EPA's attempt to evade the requirements of § 211(c).[64]

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[60] 42 U.S.C. § 7545(f)(1)(B).

[61] Proposed Rule, 84 Fed. Reg. at 10,597. In making a judgment, EPA may take into consideration the fact that E15 may be lawfully used only in model year 2001 and later light-duty vehicles. 40 C.F.R. § 80.1504(a)(1).

[62] *See* 42 U.S.C. § 7545(c).

[63] *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1061 (D.C. Cir. 1995) (citing *American Methyl Corp. v. EPA*, 749 F.2d 826, 845–36 (D.C. Cir. 1984)).

[64] *Ethyl Corp*, 51 F.3d at 1063 (holding that EPA lacks authority to protect the public health under § 211(f), in part because only § 211(c) grants EPA that authority).

For similar reasons, EPA also lacks authority to restrict its sub-sim interpretation to Tier 3 vehicles. The sub-sim law is clear. A fuel or fuel additive is not unlawful under the sub-sim law for use in light-duty vehicles or motor vehicles and engines more generally if it is "substantially similar to any fuel or fuel additive utilized in the certification of any model year 1975, or subsequent model year, vehicle or engine."[65] Nothing in the sub-sim law turns on what particular class of vehicles uses the certification fuel. Instead, the law categorically exempts manufacturers from the prohibition if a fuel is substantially similar to "*any* fuel or fuel additive" used in certification. Interpreting § 211(f)(1) to authorize EPA to prohibit the sale of E15 to pre-Tier 3 vehicles would also evade the requirements of § 211(c). This evasion would be particularly egregious because EPA has previously determined that E15 does not cause or contribute to emissions exceedances in 2001 and later motor vehicles; therefore, EPA has no technical basis to restrict the use of E15 to vehicles certified with Tier 3 fuel under § 211(c).[66]

EPA does have some authority to interpret the term "substantially similar" to require conformity with "industry established quality standards," but only if those standards are related to the fuel used in certification, and to the emissions performance of vehicles or engines, consistent with the objectives of § 211(f).[67] EPA has no authority, however, to regulate fuel in order to ensure optimal drivability, and to substitute its own judgment for the judgment of the states and consensus-driven private organizations that have traditionally regulated fuel performance characteristics.

To summarize, EPA should not impose any of these suggested restrictions on E15 in its interpretation of "substantially similar." The restrictions are unnecessary and unlawful.

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[65] 42 U.S.C. § 7545(f)(1)(A), (B).

[66] *See* Proposed Rule, 84 Fed. Reg. at 10,598.

[67] *Ethyl Corp*, 51 F.3d at 1062 (stating that Congress enacted the sub-sim law out of concerns with "effects on emissions").

V. EPA MAY NOT IMPOSE REFINERY COMPLIANCE BURDENS ON RETAILERS THAT USE BLENDER PUMPS TO PRODUCE GASOLINE-ETHANOL BLENDS.

Apart from EPA's re-interpretation of CAA § 211(h)(4) and § 211(f), the proposed rule also has specific legal consequences for retailers that sell E15 and higher ethanol blends using blender pumps. EPA proposes to treat retail-level blender pump operators who produce E15 from E85 made with natural gasoline as "fuel manufacturers" and "refiners," who are subject to burdensome fuel registration and fuel quality regulations. Contrary to EPA's suggestion, the agency's novel interpretation of these regulatory terms imposes new regulatory burdens and is directly within the scope of the rulemaking. If EPA were to enforce this understanding of its fuel registration requirements, hundreds of blender pump operators would be required to test fuel for compliance every time they complete a retail sale, which is infeasible. As a result, hundreds of retailers would be retroactively liable for violating heavy-handed compliance requirements they cannot possibly comply with. Instead of interpreting its regulations in a way that penalizes past conduct without fair warning, EPA should expressly exempt blender-pump operators from these compliance requirements, and EPA should control the quality of E85, as the agency would have done through the proposed REGS Rule.

A. EPA Proposes To Treat Retailers That Blend E15 With Natural Gasoline as "Fuel Manufacturers" and "Refiners."

1. EPA's Interpretation of Its Fuel and Fuel Additive Registration Rules

Under CAA § 211(a) and EPA's implementing regulations (40 C.F.R. Part 79), every "fuel manufacturer" must register any motor vehicle gasoline it sells with EPA.[68] To register motor vehicle gasoline, fuel manufacturers must file an "application" making certain assurances to EPA.[69] Among other things, manufacturers must provide the name of each additive "that will or may be used" in the fuel, and the fuel additive's range of concentration in the fuel. Manufacturers must also show, "or reference prior submissions" that show, that

[68] 42 U.S.C. §§ 7545(a), (b); 40 C.F.R. §§ 79.4(a), 79.10, 79.32

[69] 40 C.F.R. § 79.11.

the fuel has complied with EPA's emissions and health-effects registration testing regulations.[70] Fuel manufacturers must also submit quarterly and annual reports to EPA for each registered fuel they sell.[71]

Under EPA's fuel and fuel additive registration rules, "[a] party (other than a fuel refiner or importer) who adds an oxygenate compound to fuel in any otherwise allowable amount is not thereby considered a fuel manufacturer."[72] In other words, oxygenate blenders are exempt from the registration rules.

In the proposed rule, EPA interprets the exemption for oxygenate blenders in the registration rules to include retailers that blend E15 using blender pumps so long as they use gasoline and denatured fuel ethanol or E85 "produced solely from denatured fuel ethanol and certified gasoline (or CBOB)" as parent blends.[73] But according to EPA's proposed interpretation of its regulations, retailers that use E85 "that contains hydrocarbons not certified as gasoline blendstock for oxygenate blending (BOB) (*e.g.*, the natural gas liquids that are often used at ethanol plants to denature ethanol and make E85)" do not qualify as exempt oxygenate blenders. Moreover, EPA's proposed rule says that because these retailers are "altering the chemical composition of the fuel" by adding natural gasoline, they must comply with the fuel registration requirements applicable to "fuel manufacturers."[74]

2. EPA's Interpretation of Its Fuel and Fuel Additive Quality Control Rules

EPA has adopted many regulations to control the characteristics of fuels and fuel additives pursuant to CAA § 211(c) and other provisions of the Clean Air Act.[75] "Refiners"

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[70] *Id.* § 79.11(i).

[71] *Id.* § 79.5(a).

[72] *Id.* § 79.2(d)(2). An "oxygenate compound" is "an oxygen-containing, ashless organic compound, such as an alcohol or ether, which may be used as a fuel or fuel additive." *Id.* § 79.2(k).

[73] Proposed Rule, 84 Fed. Reg. at 10,595. Denatured fuel ethanol may use up to 3% natural gasoline as ethanol denaturant. *See* 40 C.F.R. § 80.1611. The use of 3% natural gasoline as a denaturant poses no problem under EPA's interpretation because denatured fuel ethanol is certified. 40 C.F.R. § 1610.

[74] Proposed Rule, 84 Fed. Reg. at 10,595.

[75] *See* 40 C.F.R. Part 80.

have extensive compliance obligations under the fuel quality control rules.[76] In conventional (*i.e.*, non-reformulated) gasoline areas, refiners generally must demonstrate compliance with rules controlling gasoline Reid Vapor Pressure (RVP),[77] sulfur,[78] and benzene,[79] among other fuel properties. In reformulated gasoline (RFG) areas, refiners must also comply with RFG regulations.[80] To demonstrate compliance with these rules, each refiner must sample and test each batch of gasoline for conformity with EPA's fuel standards, demonstrate compliance with annual average sulfur and benzene standards, register as a refiner with EPA, submit periodic and annual reports, and arrange for annual audits by an independent auditor.[81]

Not all parties who fit the general definition of "refiner" are treated as refiners under EPA's regulations. Under EPA's gasoline sulfur rules, for example, "oxygenate blenders . . . are not subject to the refiner or importer [sulfur] requirements, but are subject to the requirements and prohibitions applicable to downstream parties," and other specific requirements.[82] Similarly, under the RVP rules, an "ethanol blender" may demonstrate compliance "by showing receipt of certification from the facility from which the gasoline was received."[83]

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[76] EPA's fuel quality control rules define "refiner" as "any person who owns, leases, operates, controls, or supervises a refinery." 40 C.F.R. § 80.2(i). The rules define "refinery" to mean "any facility, including but not limited to, a plant, tanker truck, or vessel where gasoline or diesel fuel is produced, including any facility at which blendstocks are combined to produce gasoline or diesel fuel, or at which blendstock is added to gasoline or diesel fuel." 40 C.F.R. § 80.2(h). "[B]lendstock" is defined to mean "any liquid compound which is blended with other liquid compounds to produce gasoline." *Id.* § 80.2(s).

[77] 40 C.F.R. § 80.27.

[78] *Id.* § Part 80, Subparts H, O. The sulfur regulations in subpart O will gradually supersede the regulations in subpart H. *See id.* § 1602.

[79] *Id.* § Part 80, Subpart L.

[80] 40 C.F.R. § Part 80, Subpart D.

[81] *See* 84 Fed. Reg. at 10,595.

[82] *Id.* § 80.1609. The subpart H sulfur regulations also exempt oxygenate blenders. *See id.* § 80.212 ("oxygenate blenders" are "not subject to the [sulfur] requirements. . . applicable to refiners").

[83] 40 C.F.R. § 80.28(g)(8). An "ethanol blender means any person who owns, leases, operates, controls, or supervises an ethanol blending plant." *Id.* § 80.2(v). "Ethanol blending plant means any

In the proposed rule, EPA interprets the term "oxygenate blender" to include retailers that blend E15 using blender pumps so long as they use gasoline and denatured fuel ethanol or E85 "produced solely from denatured fuel ethanol and certified gasoline (or CBOB)" as parent blends.[84] But in EPA's view, retailers that use E85 "that contains hydrocarbons not certified as gasoline blendstock for oxygenate blending (BOB) (*e.g.*, the natural gas liquids that are often used at ethanol plants to denature ethanol and make E85)" do not qualify as oxygenate blenders. Instead, EPA claims, these retailers are "refiners," because they add "uncertified gasoline blendstocks into gasoline."[85]

B. EPA's Interpretations of "Fuel Manufacturer" and "Refiner" Are Within the Scope of the Rulemaking.

EPA asserts that despite its new interpretation of "fuel manufacturer," it is "neither reopening 40 CFR 79.2(d), nor soliciting comments on this provision," so the agency will "treat any comments we receive on this topic as beyond the scope of this rulemaking."[86]

EPA must consider comments on its new interpretation of the terms "fuel manufacturer" and "refiner." As EPA has acknowledged, the use of "blender pumps" to make E15 is "a recent development."[87] The practice did not exist in 1975, when EPA promulgated the definition of "fuel manufacturer." EPA's novel interpretation of "fuel manufacturer" and "refiner," if finalized, would change the legal landscape by imposing legal duties on retailers. Under these circumstances, EPA ought to consider comments by affected parties.

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refinery at which gasoline is produced solely through the addition of ethanol to gasoline, and at which the quality or quantity of gasoline is not altered in any other manner." *Id.* § 80.2(u).

[84] Proposed Rule, 84 Fed. Reg. at 10,595. The proposed rule does not interpret the term "ethanol blender," but presumably, it interprets this term to have the same meaning as "oxygenate blender."

[85] *Id.*

[86] *Id.* at 10,593. EPA does not include a similar disclaimer for its interpretation of "refinery."

[87] *Renewables Enhancement and Growth Support Rule*, Proposed Rule, 81 Fed. Reg. 80,828, 80,842 (Nov. 16, 2016) (Proposed REGS Rule).

EPA should acknowledge that its proposed interpretations of "fuel manufacturer" and "refiner" are within the scope of the rulemaking and respond to comments on this issue. A failure to respond to any significant comments would be arbitrary and capricious.[88]

C. Retailers Are Not "Fuel Manufacturers" Under the Registration Rules or the Sub-Sim Law, Because They Do Not Sell "Bulk Fuel."

EPA asserts that any retailer that uses E85 made from natural gasoline to blend gasoline "is a fuel manufacturer under our 40 C.F.R. part 79 regulations because they are altering the chemical composition of a fuel."[89] The relevant regulatory definition of "fuel manufacturer" provides:

> Fuel manufacturer means any person who, [i] for sale or introduction into commerce, produces, manufactures, or imports a fuel *or* [ii] causes or directs the alteration of the chemical composition of a bulk fuel, or the mixture of chemical compounds in a bulk fuel, by adding to it an additive.[90]

EPA relies on the second clause of the definition, which includes "any person who . . . causes or directs the alteration of the chemical composition of a *bulk fuel* . . . by adding to it an additive."[91] EPA's argument ignores the word "bulk." Retailers do not add E85 to "bulk fuel" when they use blender pumps. They are therefore not fuel manufacturers.

The term "bulk fuel" is not defined in EPA's fuel registration rules. But for purposes of subpart F—the fuel and fuel additive registration testing grouping rules—EPA does define the term "[b]ulk fuel additive" as "a product which is added to fuel at the refinery as part of the original blending stream or after the fuel is transported from the refinery *but before*

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[88] *City of Portland, Oregon v. EPA*, 507 F.3d 706, 714 (D.C. Cir. 2007) ("EPA is required to give reasoned responses to all *significant* comments in a rulemaking proceeding.").

[89] 84 Fed. Reg. at 10,595.

[90] 40 C.F.R. § 79.2(d) (emphasis added).

[91] Chemical composition is defined to mean "the name and percentage by weight of each compound in an additive and the name and percentage by weight of each element in an additive." *Id.* § 79.2(h). Although the definition of "chemical composition" refers exclusively to fuel additives, the definition of "fuel manufacturer" assumes that "chemical composition" can also modify "bulk fuel." *See id.* § 79.2(d).

the fuel is purchased for introduction into the fuel tank of a motor vehicle."[92] This definition suggests that retailers that add E85 to gasoline using blender pumps are not adding E85 to a "bulk fuel." The E85 in such cases is added when the fuel is being purchased for use in the motor vehicle, not "*before* the fuel is purchased for introduction into the fuel tank of a motor vehicle."

The plain meaning of "bulk fuel" confirms that retailers are not covered by the fuel registration rules. "Bulk" means "in large quantities."[93] Thus, while "bulk fuel" naturally covers wholesalers selling fuel by pipeline or truck, the term "bulk fuel" cannot reasonably be understood to encompass individual vehicle fill-ups at a retail refueling station.[94] No reasonable fuel retailer (or English speaker) would refer to an individual vehicle fill-up as a sale of "bulk fuel."

Ignoring the limiting term "bulk fuel" would lead to absurd results. Retail refueling stations sell E15 millions of times each year to countless customers.[95] Under EPA's interpretation, all of these retail customers become "fuel manufacturers" every time they use a blender pump to purchase E15 containing natural gasoline: even more directly than the refueling stations themselves, these customers "cause" natural gasoline to be added to certified gasoline. Under EPA's view, millions of retail customers would need to register as "fuel manufacturers" and comply with the registration rules. The "inclusion" of thousands of retailers and potentially millions of retail customers would "radically transform" the Clean Air Act's fuel registration program and would render it unworkable and unrecognizable to the Congress that enacted it.[96] Less than 700 entities appear to be

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[92] *Id.* § 79.50 (emphasis added).

[93] https://www.merriam-webster.com/dictionary/bulk.

[94] *Cf.* 40 C.F.R. § 63.421 (defining "bulk gasoline terminal" as a facility "which receives gasoline by pipeline, ship or barge, and has a gasoline throughput greater than 75,700 liters per day," for purposes of the Clean Air Act's national emissions standards for hazardous air pollutants); ASTM D4814 -16e, Table 4, n.1 (distinguishing a fuel's "bulk delivery" from "fuel dispensing facilities for the end user"); ASTM D7794 ¶ 6.1-12 (distinguishing a "bulk distribution terminal" from "retail").

[95] Approximately 280 million gallons of E15 were forecast to be sold across 1,575 retail stations. RFA, 2019 Ethanol Industry Outlook at 14. Assuming an average vehicle fill-up of about 15 gallons, that is almost 19 million retail sales.

[96] *UARG v. EPA*, 573 U.S. at 320.

registered gasoline or diesel fuel "fuel manufacturers."[97] Under EPA's proposed interpretation of its regulations, the number of fuel manufacturers would more than triple considering only retailers that sell E15, and even that dramatic increase would be overshadowed by the millions of retail consumers that would need to register as fuel manufacturers.

EPA's interpretation of "fuel manufacturer" to include retailers and their customers would also raise serious due process concerns. EPA's new interpretation would make almost every retailer that has previously sold E15 retroactively liable for failing to comply with the fuel registration requirements. The Due Process Clause limits the extent to which executive agencies may retroactively alter the legal consequences of a person's past conduct. That anti-retroactivity principle "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic."[98] In particular, a new agency interpretation that is retroactively applied to proscribe past conduct contravenes the bedrock due process principle that the people should have fair notice of what conduct is prohibited. As the Supreme Court has emphasized, "individuals should have an opportunity to know what the law is and to conform their conduct accordingly."[99] Due process therefore requires agencies to "provide regulated parties fair warning of the conduct a regulation prohibits or requires."[100]

EPA has long been aware of the practice of using blender pumps to make E15 and other ethanol blends, and EPA has never brought any enforcement actions to deter this practice. Nor has EPA ever promulgated final rules clearly warning that retailers that use

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[97] Inspection of EPA's data reveals 623 companies listed as gasoline or diesel fuel manufacturers. EPA, List of Registered Motor Vehicle Gasolines and Motor Vehicle Diesel Fuels, https://www3.epa.gov/otaq/fuels1/ffars/web-fuel.htm.

[98] *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("[F]or centuries our law has harbored a singular distrust of retroactive statutes.").

[99] *Landgraf*, 511 U.S. at 265.

[100] *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (internal quotation marks and alteration omitted); *see also FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").

E85 as a parent blend are "fuel manufacturers." Only in the preamble to the *proposed* REGS Rule did EPA first assert that all retailers that use blender pumps to make E15 are "fuel manufacturers."[101] But EPA did not finalize the proposed REGS rule, and the agency has now silently abandoned its prior proposed position that the use of *any* E85 fuel as a parent blend makes a retailer a "fuel manufacturer." These since abandoned agency assertions in the preamble to a proposed rule scarcely provide the "fair warning" that retailers needed to conform their conduct to the law.

EPA's interpretation is particularly unfair because the Government has encouraged investment in blender pumps to promote the sale of E15. Through its Biofuel Infrastructure Partnership (BIP), USDA has disbursed almost $100 million in federal grants to states that retailers must use to invest in infrastructure "dedicated to support higher ethanol blend utilization," including an expansion of blender pumps dedicated to make E15.[102] EPA's proposed interpretation unnecessarily risks stranding USDA's BIP investments in dedicated E15 refueling infrastructure, as well as any private investments retailers made in reliance on BIP.

EPA must interpret its registration regulations to avoid this absurd and unfair result. The statute does not compel EPA's proposed interpretation. CAA § 211(a) requires EPA to regulate the "manufacturer or processor of any fuel or fuel additive" designated by EPA.[103] When Congress wanted to authorize EPA to regulate fuel retailers and their customers in CAA § 211, it said so by making the law applicable to any "person."[104] Instead, Congress

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[101] Proposed REGS Rule, 81 Fed. Reg. at 80,842 ("Fuel retailers that make E15 at blender pumps using E85 as a parent blend are currently subject to all of the requirements that apply to refiners producing gasoline from crude oil, including registration, reporting, and per-batch testing. This is due to the fact that such blender pump operators are mixing non-gasoline (E85) with gasoline (E0 or E10) to produce a new finished gasoline.").

[102] *Notice of Funds Availability (NOFA): Biofuel Infrastructure Partnership (BIP) Grants to States*, 80 Fed. Reg. 34,363, 34,364 (June 16, 2015); *see also* USDA, List of States Receiving BIP Grants, https://www.fsa.usda.gov/programs-and-services/energy-programs/bip/index.

[103] 42 U.S.C. § 7545(a).

[104] *See, e.g.*, 42 U.S.C. § 7545(g), (h). "The term 'person' includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof." 42 U.S.C. § 7602(e).

targeted only "manufacturers or processors" of designated fuels or fuel additives.[105] One would not ordinarily say that a retail customer or even a retailer that mixes two finished fuels is a "manufacturer."[106] Thus, EPA may reasonably interpret "manufacturer or processor" to exclude E15 fuel retailers and customers that use blender pumps.

Better yet, instead of attempting to resolve this issue through preamble guidance, EPA should resolve these concerns through a prospective rule that exempts retailers that use blender pumps from the definition of "fuel manufacturer."

D. Retailers that Combine Gasoline With E85 Are Not "Refiners" Under the Fuel and Fuel Additive Control Rules.

EPA is correct that retailers that use certified blendstocks (including E85 made from denatured fuel ethanol and certified gasoline) are not regulated as refiners. But EPA is incorrect to assert that retailers that use E85 made using uncertified natural gasoline as a parent blend are refiners. They are instead "oxygenate" or "ethanol" blenders. EPA's regulatory scheme makes clear that these are separate categories and that "oxygenate" or "ethanol" blenders are not regulated as "refiners."[107]

E85 is an "oxygenate" under EPA's regulations because it "increases the oxygen content of [] gasoline."[108] Retailers that alter gasoline by adding E85 are therefore "oxygenate blending facilities."[109] Similarly, E85 is "ethanol."[110] Retailers that alter gasoline by adding E85 are therefore "ethanol blending plants."[111] Retailers that use E85 are adding

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[105] EPA believes the statutory terms "manufacturer" and "processor" have the same meaning. 40 Fed. Reg. 52,009, 52,010 (Nov. 7, 1975).

[106] To "manufacture" fuel means to make it "from raw materials by hand or by machinery." https://www.merriam-webster.com/dictionary/manufacture.

[107] *See, e.g.* 40 C.F.R. §§ 80.28(g)(8), 80.1609.

[108] *See, e.g.*, *id.* § 80.2(jj).

[109] *Id.* § 80.2(ll).

[110] *See id.* § 79.56 ("The Ethanol Family includes fuels composed of at least 50 percent ethanol by volume and their associated fuel additives. The base fuel for this family is E85 as specified in § 79.55(e).").

[111] *Id.* § 80.2(u).

"oxygenate" or "ethanol" to gasoline and not altering "the quality or quantity of gasoline . . . in any other manner."[112]

This does not mean that retailers are free to blend natural gasoline into E15 in a way that harms the environmental quality of gasoline. As mentioned, under EPA's gasoline sulfur rules, "oxygenate blenders . . . are subject to the requirements and prohibitions applicable to downstream parties," and other specific requirements.[113] In particular, oxygenate blenders may not add oxygenate—including E85—with a sulfur content "greater than 10 ppm" or that includes elements other than "carbon, hydrogen, nitrogen, oxygen and sulfur."[114] And ethanol blending plants remain subject to the same volatility standards.[115]

This does mean, however, that retailers are subject to the heavy-handed compliance mechanisms designed for full-fledged gasoline refiners.

Instead of regulating retailers that use E85 through preamble guidance, EPA should promulgate prospective regulations governing the quality of E85 and natural gasoline blendstock, as EPA proposed to do in the proposed REGS Rule.[116]

VI. EPA SHOULD CLARIFY THAT INCONSISTENT STATE LAWS ARE PREEMPTED BY THE CLEAN AIR ACT.

A. Inconsistent State RVP Restrictions Are Preempted.

If EPA finalizes its new proposed interpretation of the RVP rule, state controls that ban E15 or limit the availability of the 1-psi RVP waiver to E10 would be expressly preempted by CAA § 211(c)(4).[117] CAA § 211(c) requires that state controls applicable to

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[112] *Id.* §§ 80.2(u).

[113] *Id.* § 80.1609. The subpart H sulfur regulations also exempt oxygenate blenders from the rules applicable to refiners. *See id.* § 80.212 ("oxygenate blenders" are "not subject to the [sulfur] requirements. . . applicable to refiners").

[114] *Id.* § 80.1610(a); *see also id.* § 80.1609(b) ("Beginning January 1, 2017, the [denatured fuel ethanol] or other oxygenate used must comply with the requirements of § 80.1610 and all of the other requirements of this subpart O.").

[115] *Id.* § 80.27(2).

[116] Proposed Rule, 84 Fed. Reg. at 10,595.

[117] 42 U.S.C. § 7545(c)(4)(A)(ii).

RVP be "identical to the prohibition or control prescribed by" EPA, with some exceptions.[118] Approximately 23 states have "regulations that currently provide a 1.0 psi RVP tolerance . . . but limit that tolerance to gasoline containing 9–10 percent ethanol."[119] If EPA finalizes the proposed rule, these 23 state RVP controls would no longer be "identical" to EPA's regulations. Moreover, none of these states appears to be exempt from express preemption.[120] Therefore, these state RVP controls would be expressly preempted by the Clean Air Act to the extent they conflict with EPA's RVP regulations.

Even if § 211(c)(4) did not expressly preempt state RVP controls that refuse a 1 psi waiver for E15, these state RVP controls would be impliedly preempted by CAA § 211(h).[121] In § 211(h)(5), Congress provided an exclusive mechanism for states to opt out of the 1 psi RVP waiver.[122] Under the provision, a state governor must notify EPA that the 1 psi RVP waiver "will increase emissions that contribute to air pollution in any area in the State."[123] A state cannot simply assert that emissions will increase—the state must submit "supporting documentation."[124] EPA must "promulgate regulations . . . no later than 90 days after the date of receipt of a notification" removing the 1 psi RVP waiver for that state's gasoline-ethanol blends.[125] EPA must also consider whether these regulations "would result in an insufficient supply of gasoline in the State," and if so, EPA must extend the effective date of the regulations.[126] The statute thus balances the federal objectives of regulatory uniformity

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[118] California and states where EPA expressly approves a non-identical limitation as part of the SIP are exempt from express preemption. 42 U.S.C. § 7545(c)(4)(B), (C).

[119] Growth Energy, RVP Preemption Memorandum at 10 (Jan. 28, 2019), https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0775-0066.

[120] *See id.* at 10–14.

[121] 42 U.S.C. § 7545(h).

[122] *Id.* § 7545(h)(5).

[123] *Id.* § 7545(h)(5)(A).

[124] *Id.*

[125] *Id.* § 7545(h)(5)(B).

[126] *Id.* § 7545(h)(5)(C)(ii).

and maintaining a robust supply of gasoline with the federal objective of allowing states flexibility to prevent emissions that contribute to air pollution within their borders.

"The unavoidable implication of" § 211(h)(5) is that no state may opt out of the 1 psi RVP waiver "without" submitting a proper notification to EPA, and that no opt-out is effective without an EPA regulation.[127] If states could unilaterally opt out of the 1 psi RVP waiver, § 211(h)(5) "would easily be undercut."[128]

States that limit the 1 psi RVP waiver to blends containing no more than 10 percent ethanol upset the balance struck by Congress in § 211(h)(4), (5). CAA § 211(h)(4) allows a 1 psi RVP waiver to all fuel blends containing gasoline and at least 10 percent ethanol. No state has ever notified EPA that E15 with a 1 psi RVP waiver will increase emissions that contribute to air pollution, nor could they, because E15 is less volatile than E10.[129] State laws that evade § 211(h)(5) by unilaterally removing the 1 psi RVP waiver "stand as an obstacle" to the objectives of § 211(h)(5) by "interfering with the methods by which the federal statute was designed to" provide states an opt out from the 1 psi RVP waiver.[130] In short, § 211(h) impliedly preempts state laws that do not allow a 1 psi RVP waiver for all fuel blends containing gasoline and 10% ethanol.

In the final rule, EPA should make clear that inconsistent state restrictions that deprive E15 of the 1 psi RVP waiver are preempted by the Clean Air Act. EPA could do so by adopting a regulation that expressly preempts these restrictions. EPA may adopt such a preemption regulation pursuant to its authority to implement regulations that it "determines are necessary to implement and enforce the requirements of" § 211(h).[131]

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[127] *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (holding that "that the only way a State may regulate an OSHA-regulated occupation safety and health issue is pursuant to an approved state plan that displaces federal standards.").

[128] *Id.* at 101.

[129] Even if a state could show that E15 with a 1 psi RVP waiver will contribute to air pollution, states cannot partially opt out of the 1 psi RVP waiver only for E15.

[130] *Gade*, 505 U.S. at 99.

[131] 42 U.S.C. § 7545(h)(3).

B. State Bans on E15 Are Preempted.

EPA should also make clear that state laws or regulations that ban the sale of E15 are preempted by the Clean Air Act.[132] State E15 bans are expressly preempted because EPA has established a "control" applicable to the concentration of ethanol in gasoline under § 211(c): in the 2011 misfueling mitigation rule, EPA exercised its authority under § 211(c) "to establish a prohibition on the use of gasoline containing more than 10 vol% ethanol" in certain motor vehicles, engines, and equipment.[133] EPA's misfueling rule allows the use of E15 in all model year 2001 and later light-duty vehicles. State laws that ban the sale of E15 for use in these vehicles are not "identical" to the misfueling rule; therefore, to the extent state E15 bans are enacted to control motor vehicle emissions, they are expressly preempted by § 211(c)(4) of the Clean Air Act.

Even if state regulations limiting gasoline ethanol content to 10% were not preempted by § 211(c)(4), they would be impliedly preempted by the Clean Air Act. A state statute impliedly conflicts with a federal statute when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[134]

In the 2007 Energy Independence and Security Act, Congress amended the Clean Air Act to require the gradual replacement of fossil fuels with renewable fuels (including ethanol fuel) in the transportation system, in order to "move the United States toward greater energy independence and security" and to "increase the production of clean renewable fuels."[135] State E15 bans frustrate these purposes and objectives by limiting the market's ability to supply clean renewable fuels like ethanol. In the final rule, EPA should

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[132] Approximately five states, excluding California, currently appear to ban the sale of E15. *See, e.g.*, Ariz. Rev. Stat. § 3-3493; Nev. Admin. Code § 590.065(6)(c).

[133] *Regulation To Mitigate the Misfueling of Vehicles and Engines With Gasoline Containing Greater Than Ten Volume Percent Ethanol and Modifications to the Reformulated and Conventional Gasoline Programs*, 76 Fed. Reg. 44,406, 44,411 (July 25, 2011)*, codified at* 40 C.F.R. § 80.1504(a)(1).

[134] *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000).

[135] Energy Independence and Security Act of 2007, Pub. L. 110-140, tit. II § 201, 121 Stat. 1492 (2007) (codified at 42 U.S.C. § 7545(o)).

promulgate a rule that preempts state E15 bans to "ensure" that the renewable fuel content of transportation fuel continues to increase, as Congress required.[136]

[136] 42 U.S.C. § 7545(o)(2)(A)(i).