APPLICABILITY OF 1.0 PSI REID VAPOR PRESSURE ALLOWANCE FOR BLENDS OF GASOLINE AND 15 PERCENT ETHANOL

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INTRODUCTION

Section 211(h)(4) of the Clean Air Act allows the Reid Vapor Pressure (RVP)—a measure of gasoline volatility— to be 1.0 psi higher than EPA regulations otherwise require "[f]or fuel blends containing gasoline and 10 percent … ethanol." EPA currently interprets this provision to establish an RVP allowance for blends containing *between nine and ten percent* ethanol. EPA should change that interpretation and read § 211(h)(4) to establish an RVP allowance for blends containing *at least* ten percent ethanol. EPA should adopt this reading of § 211(h) for three reasons.

First, EPA can properly read the statutory text and structure to compel the conclusion that Congress intended the RVP allowance under § 211(h)(4) to extend to *all* blends containing ten percent ethanol, including blends containing *more* than that concentration. In ordinary parlance, a blend of gasoline and at least ten percent ethanol "contain[s] gasoline and 10 percent … ethanol," just as the statute requires. A blend of gasoline and 15 percent ethanol (E15), for example, contains ten percent ethanol, *plus* an additional five percent. In addition, the second clause of § 211(h)(4) establishes a compliance defense where, among other things, "the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4)." That language plainly provides that blenders of gasoline and 15 percent ethanol are in compliance with the RVP requirements, since there is a waiver for E15 under § 211(f)(4). Congress's reference to limits on ethanol content under § 211(f)(4) thus supports the conclusion that Congress understood the 10 percent to impose a floor on ethanol content rather than a ceiling.

The legislative history and purpose of § 211(h) confirm this reading. Congress enacted section 211(h) as part of the 1990 Clean Air Act amendments, which codified preexisting EPA regulatory limitations on RVP. The operative language of those regulations granted a 1.0 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)." 40 C.F.R. § 80.27(d)(2) (1990). At the time, that maximum ethanol content was ten percent, since the only extant waiver under § 211(f)(4) was for a blend of gasoline and ten percent ethanol (E10). But nothing in the regulations prevented a blend with a higher ethanol concentration from receiving the 1.0 psi RVP allowance if EPA granted it a waiver under § 211(f)(4). In addition, the Administration originally proposed a bill that would have explicitly *capped* eligibility for the RVP allowance at ten percent. But both chambers of Congress rejected that proposal.

Second, at a minimum, § 211(h) is ambiguous, and it is reasonable for EPA to read it to extend the 1.0 psi RVP allowance to all blends containing ten percent ethanol, including blends containing more than that concentration. EPA and Congress have long understood that, while ethanol can increase gasoline's RVP by up to 1.0 psi, it does not substantially contribute to tropospheric (ground-level) ozone formation. A 1.0 psi RVP allowance thus ensures that ethanol can be blended with standard base gasoline, rather than a special base gasoline with a lower RVP. And blends containing more than ten percent ethanol have *lower* evaporative emissions than E10, and thus contribute less to ozone formation than E10. Thus, extending the RVP allowance to blends containing more than ten percent ethanol furthers the allowance's basic purpose—enabling ethanol blends that do not substantially contribute to ozone formation, and indeed contribute less to ozone formation than E10, to enter the market through blending with standard base gasoline.

Finally, EPA can adequately explain a change of interpretation. EPA's current position rests on a basic misreading of the statute and an outdated set of facts. EPA's interpretation was largely inconsequential when the only waiver for an ethanol blend under § 211(h) was for E10. But now, at the very least because EPA has granted a waiver for E15, that misreading is

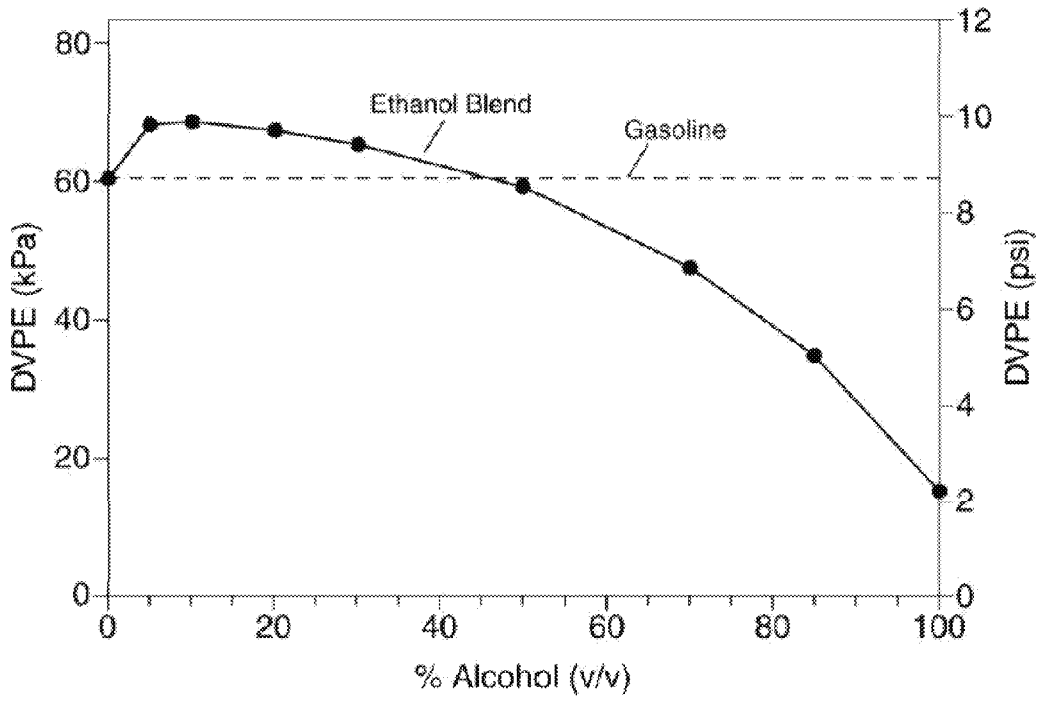
preventing E15 from entering the market on the same terms as E10, even though E15 produces less evaporative and tailpipe emissions. Updating its interpretation thus would align EPA with the best reading of the statute, protect the environment, increase U.S. energy independence, lower costs, and remove a regulatory barrier to economic growth.

BACKGROUND

A. Factual Background

Ethanol is a simple alcohol produced extensively in the United States from corn and other feedstocks. When added to gasoline, ethanol increases the fuel's octane rating. Ethanol has been used as a fuel additive in the United States since 1979, when a waiver was granted for E10 by operation of law under § 211(f)(4). *See* 44 Fed. Reg. 20,777 (Apr. 6, 1979). Section 211(f)(4) authorizes EPA to waive § 211(f)(1), which prohibits manufacturers from marketing or increasing the concentration of any new fuel additive that is not substantially similar to an additive included in the fuel used to certify motor vehicle compliance with emissions standards. EPA may grant a waiver under § 211(f)(4) if a new fuel additive or concentration will not cause vehicles to exceed their emissions standards.

Pure ethanol is not very volatile due to its polar molecular structure. When added to gasoline in small concentrations, however, increasing amounts of ethanol by volume increase the volatility of the blend. This effect continues until approximately ten percent by volume, at which point ethanol increases the blend's RVP by roughly 1.0 psi. Beyond that point, as the concentration of ethanol increases, volatility *decreases*, such that blends containing 12, 15, or 20 percent ethanol are less volatile than E10. The graph below from the Department of Energy's National Renewable Energy Laboratory shows this relationship, plotting volatility against ethanol content by volume, with E10 representing the top of the curve:



Fuel volatility is important for pollution regulation principally because evaporative emissions can contribute to the formation of ground-level ozone, a respiratory irritant, during the summertime high ozone season. The volatility of ethanol does not contribute significantly to the formation of ozone, however, because ethanol is comparatively less reactive in the atmosphere than gasoline hydrocarbons. E10 also reduces tailpipe emissions of other ozone-forming pollutants, and available data indicate that E15 reduces such emissions even more than E10. *See* Nat'l Renewable Energy Lab. (NREL), Review and Evaluation of Studies on the Use of E15 in Light-Duty Vehicles, 32-34, 39-41 (Oct. 2013); NREL, Effect of Ethanol Blending on Gasoline RVP Memo (Mar. 2012).

B. Statutory and Regulatory Background

1. EPA Volatility Regulation Before the 1990 Clean Air Act Amendments

In 1989, pursuant to the agency's general authority to regulate fuels, additives, and emissions under § 211(c) of the Act, EPA promulgated "Phase I" of a two-phase regulation

designed to reduce summertime gasoline volatility. 54 Fed. Reg. 11,868 (Mar. 22, 1989). The regulation imposed limits on the RVP of gasoline during summer months for certain areas of the country. 40 C.F.R. § 80.27(a) (1989).

The Phase I regulation also contained "[s]pecial provisions for alcohol blends," which provided that a qualifying blend would be in compliance with the RVP standards "if its [RVP] does not exceed the [otherwise] applicable standard ... by more than one [psi]." *Id.* § 80.27(d)(1). The blends qualifying for this special treatment had to contain "at least 9% ethanol (by volume)," with "[t]he maximum ethanol content ... not exceed[ing] any applicable waiver conditions under section 211(f)(4)." *Id.* § 80.27(d)(2). At the time, the maximum ethanol content was ten percent: Certification fuel did not include any additive substantially similar to ethanol, and the maximum ethanol concentration permitted by the 1979 waiver under § 211(f)(4) was ten percent. The preamble to the regulation thus described these special provisions as "an interim RVP allowance of 1.0 psi for ethanol blends of approximately 10 percent by volume," pending a "final decision on such an allowance for all blends ... in rules covering the second phase of RVP control." 54 Fed. Reg. at 11,869. Nothing in the operative language of the Phase I regulation, however, would have prohibited a blend containing a higher concentration of ethanol from receiving the same 1.0 psi allowance if EPA granted that blend a waiver under § 211(f)(4).

The following year, but before Congress's enactment of the 1990 Clean Air Act amendments, EPA promulgated "Phase II" of its volatility regulations. 55 Fed. Reg. 23,658 (1990). The Phase II regulation left the "special provisions for alcohol blends" in 40 C.F.R. § 80.27(d) unchanged, including the language specifying that "[t]he maximum ethanol content of gasoline shall not exceed any applicable waiver conditions under section 211(f)(4)." 40 C.F.R. § 80.27(d)(1) (1990). Because EPA had not, in the meantime, granted any new ethanol waivers

under § 211(f)(4), the preamble describes the Phase II regulation as "mak[ing] permanent the temporary 1.0 psi RVP allowance provided in the Phase I program for gasoline containing 9 to 10 percent ethanol." *Id.* As in Phase I, however, nothing would have prohibited a blend containing more than ten percent ethanol from qualifying for the 1.0 psi allowance if EPA granted a new waiver under § 211(f)(4).

EPA explained that it maintained the 1.0 psi RVP allowance for ethanol blends because "lower RVP [base] gasoline would be necessary to produce [ethanol blends] which could meet the gasoline RVP standards, and yet … the refining industry was not likely to make available sufficient lower-RVP product to maintain a significant [ethanol blend] market." 55 Fed. Reg. at 23,665. An RVP allowance was necessary to avoid "potential economic jeopardy to the fuel ethanol industry of requiring the same RVP standards for gasoline and [ethanol blends]." *Id.*

2. The 1990 Clean Air Act Amendments

Later that year, Congress enacted amendments to the Clean Air Act, including new § 211(h), which served largely to codify EPA's volatility regulations. Section 211(h)(1) requires EPA "to promulgate regulations making it unlawful … during the high ozone season to sell … or introduce into commerce gasoline with [an RVP] in excess of 9.0 [psi]." Those regulations must establish "more stringent [RVP] standards in … [ozone] nonattainment area[s]," and may allow lower standards in "[ozone] attainment area[s]." § 211(h)(2).

Like EPA's existing volatility regulations, § 211(h)(4) contains a special provision for certain alcohol blends. That provision, entitled "Ethanol waiver," provides in its first clause: "For fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the [RVP] limitation under this subsection shall be one [psi] greater than the applicable [RVP] limitations established under paragraph (1)." The second clause then contains a proviso setting forth a 3-

part compliance defense for any "distributor, blender, marketer, reseller, carrier, retailer, or wholesale purchaser-consumer." Such a party

> shall be deemed to be in full compliance with the provisions of this subsection if it can demonstrate … that (A) the gasoline portion of the blend complies with the [RVP] 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 [RVP] of the ethanol portion of the blend."

Id. (emphasis added). By providing this conditional defense not only for E10, but for any blend that does not "exceed its waiver condition under subsection (f)(4)," Congress plainly contemplated that, as under the Phase I and II volatility regulations, a blend containing more than ten percent ethanol could qualify for the 1.0 psi RVP allowance, provided that EPA granted an appropriate waiver under § 211(f)(4).

The text of § 211(h) changed as it proceeded through the legislative process. The original Administration bill (H.R. 3030) provided a 1.0 psi RVP allowance, but would have limited it to "gasoline containing at least 9 but not more than 10 per centum ethanol (by volume)." Clean Air Act Amendments, H.R. 3030, 101st Cong., § 214 (1990) 101st Cong., 1st Sess. (July 27, 1989). The Administration bill thus would have frozen in place the then-applicable numerical parameters of the 1.0 psi RVP allowance, preventing its extension to blends with more than ten percent ethanol if EPA changed the certification fuel or granted a new waiver under § 211(f)(4).

Both chambers of Congress, however, rejected the Administration's proposal for a 10 percent ceiling and instead adopted a 10 percent floor. The Senate bill provided for a 1.0 psi RVP allowance for "gasoline and 10 percent denatured anhydrous ethanol," but also provided a defense where the blend complies with "its waiver condition under subsection (f)(4)"—thereby making clear that the allowance could extend to blends with ethanol concentrations greater than ten percent. Clean Air Act Amendments, S. 1630, 101st Cong., § 214 (1990) 101st Cong., 1st

Sess. (Sept. 14, 1989). 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." *See* Clean Air Act Amendments, S. 1630 Engrossed Amendment House, 101st Cong., § 216 (1990) 101st Cong., 2nd Sess. (May 23, 1990); *see also* H.Rep. 101-490 at 71, 574 (similar). Congress ultimately adopted the Senate version.

The Senate Report explains the rationale for the 1.0 psi RVP allowance. As did EPA in promulgating the Phase I and II regulations, Congress "recognized that to require ethanol to meet a 9 pound RVP would require the creation of a production and distribution network for sub-nine pound gasoline. The cost of producing and distributing this kind of fuel would be prohibitive to the petroleum industry and would likely result in the termination of the availability of ethanol in the marketplace." S. Rep. 101-228 (Dec. 20, 1989) at 110. Congress further concluded that the allowance provision would "allow ethanol blending to continue to be a viable alternative fuel, with its beneficial environmental, economic, agricultural, energy security and foreign policy implications." *Id.* Nothing in the legislative history suggests any reason this rationale would apply to E10 but not blends with higher ethanol concentrations later shown to be compatible with motor vehicle emissions compliance and therefore granted waivers under § 211(f)(4).

C. EPA's Current Interpretation of § 211(h)(4)

1. The 1991 Volatility Rule

In 1991, EPA revised its volatility rules to implement new § 211(h). EPA stated that it "was not making any change to the current [RVP allowance] requirement that the blend contain between 9 and 10 percent ethanol (by volume)." 56 Fed. Reg. 64,704, 64,708 (Dec. 12, 1991). But in fact, EPA *did* change that requirement. Notwithstanding the fact that Congress had rejected the Administration proposal to limit the RVP allowance to blends containing nine-to-ten percent ethanol, EPA amended 40 C.F.R. § 80.27(d)(2) to provide that "the concentration of the

ethanol, excluding the required denaturing agent, must be at least 9% and no more than 10% (by volume) of the gasoline." Despite adding that new ten percent cap, EPA strangely left intact the preexisting language stating: "The maximum ethanol content of gasoline shall not exceed any applicable waiver conditions under section 211(f)(4)." 40 U.S.C. § 80.27(d)(2).

In the same rulemaking, EPA also implemented the newly enacted "deemed to comply" provision. EPA described this provision as a "compliance defense" that "is limited to ethanol blends which meet the minimum 9 percent requirements in the regulations and the maximum 10 percent requirement in the waivers under section 211(f)(4)." 56 Fed. Reg. at 64,708. In other words, while the statute provides that, for the defense to apply, "the ethanol portion of the blend [must] not exceed *its waiver condition under subsection (f)(4)*," § 211(h)(4) (emphasis added), EPA's regulation provides that "[t]he ethanol portion of the blend [must] not exceed *10 percent (by volume)*," 40 C.F.R. §80.28(g)(8) (emphasis added).

2. The 2011 E15 Waiver and Misfueling Regulations

Two decades later, in 2011, EPA granted a waiver for E15 under § 211(f)(4). 76 Fed. Reg. 4,662 (Jan. 26, 2011).[1] Out of concern that E15 could damage emissions control systems on pre-2001 vehicles, EPA also adopted restrictions on "misfueling" such older vehicles with E15 pursuant to its general authority under § 211(c). 76 Fed. Reg. 44,406 (July 25, 2011). In the preamble to those regulations, EPA responded to comments arguing that it should read § 211(h)(4) to extend the 1.0 psi RVP allowance to E15. *Id.* at 44,433-35. EPA declined, "confirming" its view that the RVP allowance is limited to blends containing nine-to-ten percent ethanol. *Id.* at 44,433.

[1] This waiver was conditional in that EPA imposed a limit on the RVP of the base gasoline. *See* 76 Fed. Reg. at 4,662-63. That condition in the waiver decision is separate from and independent of the RVP limitations under § 211(h).

3. 2014 Emissions Standards

In 2014, EPA adopted new emissions standards for "Tier 3" gasoline-fueled motor vehicles under § 202(a). 79 Fed. Reg. 23,414 (Apr. 28, 2014). As part of those new standards, in light of the wide availability of E10 in the market, EPA replaced E0 with E10 as the "new emissions test fuel." *Id.* at 23,419. In discussing the new certification fuel in the preamble to the regulation, EPA asserted without explanation that "E15 is not covered by the [RVP allowance under § 211(h)(4)] and thus is restricted to 9 psi nationwide." *Id.* at 23,526; *see also id.* ("[T]he 1.0 psi RVP [allowance] for E10 does not apply to gasoline with higher ethanol levels.").[2]

ARGUMENT

I. Legal Framework

In the event a party were to challenge an EPA rule interpreting the RVP allowance under § 211(h) to cover blends with more than ten percent ethanol, judicial review would be governed by the familiar two-step analysis set forth in *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). At step one, a court asks whether Congress has directly spoken to the precise question at issue, because "the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. Although step one begins with the plain text of the statute, "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." *Sierra Club* v. *EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) (quotation mark omitted).

[2] By including ethanol in certification fuel, EPA arguably placed ethanol outside § 211(f)(1)'s general prohibition on new fuel additives, since ethanol is now "substantially similar"—indeed, identical—to a "fuel additive utilized in [vehicle] certification," namely, ethanol. § 211(f)(1)(B). Whether that is so, and whether the 2014 emissions standards therefore rendered the prior waivers under § 211(f)(4) for E10 and E15 unnecessary, is beyond the scope of this submission.

At step two, a court must defer to an agency's interpretation so long as it is "reasonable." 467 U.S. at 843. The agency's interpretation need not be the only permissible reading of the statute, nor the interpretation the court would have adopted. *Id.* at 843 n.11. "If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, [a court will] give the administrator's judgment controlling weight." *NationsBank of N. Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quotation marks omitted).

An agency is free to change its interpretation of a statute it administers "if doing so is reasonable, within the scope of the statutory delegation, and the departure from past precedent is sensibly explained." *FedEx Home Delivery* v. *Nat'l Labor Relations Bd.*, 849 F.3d 1123, 1127 (D.C. Cir. 2017). An agency's change of position is not subject to any form of "heightened scrutiny." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 525 (2009). As *Chevron* itself explains, "to engage in informed rulemaking, [an agency] must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 863.

II. Traditional Interpretive Tools Compel Interpreting § 211(h)(4) To Provide an RVP Allowance for Blends Containing at Least 10 Percent Ethanol

Traditional tools of statutory interpretation show that Congress has spoken to the precise issue presented—the RVP allowance in § 211(h)(4) is available for any fuel blend that contains at least ten percent ethanol and complies with § 211(f). The statutory text and structure compel that reading, and the legislative history and purpose confirm it. EPA's current interpretation, while purporting to harmonize various provisions within § 211(h), in fact improperly distorts them.

A. The "10 Percent" Figure in § 211(h)(4) Is a Floor, Not a Ceiling or a Precise Requirement

Starting with the text, as explained, the first clause of § 211(h)(4) provides: "For fuel blends containing gasoline and 10 percent denatured anhydrous ethanol, the [RVP] limitation under this subsection shall be one [psi] greater than the applicable [RVP] limitations established under paragraph (1)." By its plain language, that provision establishes an RVP allowance for *all* blends containing ten percent ethanol, including blends like E15 containing *more* than that concentration. After all, a blend that contains more than ten percent ethanol still "contains ten percent … ethanol," as the statute requires. If Congress had wanted to limit the allowance to blends containing "exactly" ten percent ethanol, "approximately" ten percent ethanol, or "no more than" ten percent ethanol, it easily could have done so. But it did not.

To be sure, Congress also did not spell out that the allowance applies to blends containing "at least" ten percent ethanol. But in ordinary parlance, taking into account the context and purposes of the statute, such specificity is unnecessary. Because increasing the ethanol concentration beyond ten percent actually *lowers* volatility and *increases* the utilization of ethanol, allowing higher concentrations to benefit from the RVP allowance only better serves Congress's goals. Imagine a father tells his daughter, "If you eat 50 percent of your green beans, you may have dessert." If the daughter were to eat 75 or 100 percent of her green beans, better serving the goal of ensuring she got adequate nutrition, she would justifiably expect dessert. Or imagine a labeling regulation that provides that in order to call a beverage "juice," it "must contain 5% real fruit juice." A company that labeled as "juice" a beverage containing 10, 50, or 100% real fruit juice, having better served the goal of nondeceptive labeling, would not fear liability under that regulation. Even the Supreme Court has used the formulation "contain" an amount to mean "contain not less than" that amount. In *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59

(2003), the Court referenced federal regulations requiring that reduced fat milk "shall contain not less than 8 1/4 percent milk solids." 21 C.F.R. § 131.110(a); *see* 539 U.S. at 65. In comparing those regulations to stricter California regulations, the Court stated: "Federal standards require that reduced fat milk contain only 8.25 percent solids-not-fat," *id.* at 65, without stating expressly that the regulations permit more than the amount. The Supreme Court thus understands that, in the right context, "contains" means "contains at least."

If there were any doubt about this reading, the defense in the second clause of § 211(h)(4) removes it. That defense applies if, among other things, "the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4)." Congress easily could have borrowed the words "10 percent" from the first clause and limited this defense to instances where the ethanol concentration "does not exceed 10 percent." But Congress did not do so, and "[w]here 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." *Russello v. United States*, 464 U.S. 16, 23 (1983). Here, the logical explanation for the different language in the two clauses of § 211(h)(4) is that the first clause establishes a floor of ten percent, and the second clause establishes that any applicable waiver condition under § 211(f)(4) imposes a ceiling on the ethanol concentrations eligible for the compliance defense. Moreover, by referencing the separate potential ceiling in § 211(f)(4), Congress indicated that it did not intend the 10 percent itself to serve as a ceiling, but instead as a floor.

The legislative history reinforces this reading. Section 211(h) largely codified earlier EPA regulations on RVP. As explained, the operative language of those regulations granted a 1.0 psi RVP allowance for any blend of at least nine percent ethanol up to the maximum

authorized by a waiver under § 211(f)(4). At the time, that maximum was ten percent, but nothing in the regulations prevented the maximum from rising if EPA granted a new waiver, as it later did for E15 in 2011. In addition, while the original Administration bill would have expressly capped eligibility for the RVP allowance at ten percent ethanol, Congress rejected the Administration's language.

As explained, reading "ten percent" in § 211(h)(4) as a floor also furthers the statutory purpose. The purpose of RVP regulations is to limit evaporative emissions that tend to produce ozone. Ethanol blends can increase a fuel's RVP by up to 1.0 psi, but that increase does not substantially contribute to ozone, because ethanol is comparatively nonreactive in the atmosphere. The purpose of the 1.0 psi RVP allowance in § 211(h)(4), therefore, is to allow ethanol to enter the market and be blended with standard base gasoline, notwithstanding the fact that it technically increases RVP. A ten percent floor for the 1.0 psi allowance serves that purpose. It ensures that blenders cannot evade the otherwise applicable RVP limitation by splashing in a trivial amount of ethanol. But it also ensures that ethanol blends containing at least ten percent ethanol, with their accompanying environmental, economic, and foreign policy benefits, can enter the market on a fair playing field. Extending the allowance to include E15 furthers that purpose particularly strongly—E15 has *more* ethanol than E10, but with *less* evaporative *and* tailpipe emissions.[3]

[3] Although the statutory context, purpose and legislative history compel the conclusion that the ten percent figure in § 211(h)(4) should be construed as a floor, even if it were to be construed as a ceiling or a precise requirement, the only plausible interpretation of § 211(h)(4)(B) creates an *exception* to that ceiling or requirement for ethanol blends that have been granted waivers under § 211(f)(4) at concentrations greater than ten percent. That is the plain meaning of the "Provided, however, that…" language, which precedes the deemed to comply provision in § 211(h)(4)(A)-(C).

B. EPA's Current Interpretation Distorts § 211(h)(4) and Frustrates its Purpose

EPA currently interprets § 211(h)(4) to limit the 1.0 psi RVP allowance to fuel blends containing between nine and ten percent ethanol. The most complete justification for that interpretation appears in the preamble to the 2011 misfueling regulations. None of the four basic rationales set forth there is persuasive.

First, the misfueling regulation relied upon the fact that § 211(f)(4) originated in a 1987 legislative proposal that in turn was based on "technical data indicating that blending gasoline with ethanol so that it contains 9-10% ethanol results in an approximate 1 psi RVP increase." 76 Fed. Reg. at 44,434. That snippet of legislative history may help explain why Congress provided a 1.0 psi RVP allowance for E10, and it gives some justification for EPA's decision to extend the allowance down to E9. But it cannot explain why Congress would *bar* the allowance from extending to higher ethanol concentrations. As explained, E15 and other blends with more than ten percent ethanol are *less* volatile than E10. The misfueling regulation fixates on the technical data underlying a bill considered by a different Congress in 1987, and never mentions the Administration proposal capping the allowance at ten percent ethanol, nor Congress's rejection of that proposal.

Second, the misfueling regulation reasoned that in the "deemed to comply" provision, "the condition of 'not exceed[ing]' the section 211(f)(4) waiver limit cannot be read literally," because that supposedly "would mean that blends containing 1%, or 2%, or 5% would [be] deemed to comply," which in turn would make the allowance for 9-10% ethanol "meaningless." *Id.* To avoid this purported problem, EPA read the defense, like the RVP allowance itself, as applying only to nine-to-ten percent ethanol. But the purported problem EPA identified concerns the *minimum* ethanol concentration necessary to trigger the compliance defense, which neither the second clause of § 211(h) nor § 211(f)(4) speaks to. However one addresses that interpretive

gap, and EPA may have flexibility in reconciling these clauses with respect to the minimum, it does not justify imposing an atextual *maximum* on the concentration eligible for the RVP waiver, contrary to the text, history, and purpose of the first clause of § 211(h).

Third, the misfueling regulation asserted that limiting the allowance to nine-to-ten percent ethanol was necessary to give effect to the state opt-out provision in § 211(h)(5). In EPA's view, that was the only way "to provide States a meaningful and complete solution to emissions increases stemming from the relaxed RVP provisions in section 211(h)(4), not a partial solution" that addressed only the first clause, but not the second. 76 Fed. Reg. at 44,435. But EPA's current solution is not the only way out of this bind. More naturally, one could read § 211(h)(4) as establishing a floor for the blends that qualify for the 1.0 psi RVP allowance. One could then read § 211(h)(5), which employs the same language, to allow a state to opt out of the allowance, regardless of where a particular blend falls above the ten-percent floor.

Finally, EPA asserted that its interpretation furthers the allowance's purpose "to facilitate the participation of ethanol in the transportation fuel industry while also limiting gasoline volatility resulting from ethanol blending." Id. at 44,435. That argument appears to reflect a factual misunderstanding. As explained, E15 and other blends with more than ten percent ethanol have *more* ethanol and *lower* volatility than E10.

III. Even if the Statute Is Ambiguous, It Is Reasonable To Interpret § 211(h)(4) To Provide an RVP Allowance for Blends Containing At Least Ten Percent Ethanol

At a minimum, the arguments above demonstrate that the statute does not compel EPA's current interpretation, and affords EPA discretion to read § 211(h)(4) as extending the 1.0 psi RVP allowance to blends containing at least ten percent ethanol. Indeed, the reasonableness of that interpretation is difficult to dispute, since it would serve the RVP allowance's purpose better than EPA's current position. EPA's policy goal is "to facilitate the participation of ethanol in the

transportation fuel industry while also limiting gasoline volatility resulting from ethanol blending." 76 Fed. Reg. 44,434. As explained, E15 contains *more* ethanol, is *less* volatile, and produces *less* tailpipe emissions than E10.

IV. EPA Can Adequately Explain its Change of Interpretation

Finally, EPA can adequately explain a change in its interpretation of § 211(h)(4). As the foregoing arguments show, EPA's current interpretation rests on a basic misreading of the statute and an outdated set of facts. When it initially implemented § 211(h) in 1991, EPA purported to leave its prior regulations unchanged, but in fact EPA retained only the then-existing numerical parameters of the RVP allowance, while eliminating the regulatory flexibility the regulations contained. In so doing, EPA adopted a nine-to-ten percent limitation on the RVP allowance that the Administration bill had proposed, but which Congress rejected. When the previous Administration attempted retroactively to justify maintaining that limitation twenty years later in the 2011 misfueling regulations, it relied on a mix of rationales that do not withstand scrutiny—a cherry-picked piece of legislative history, a conflation of a minimum with a maximum, a misunderstanding of the relationship between § 211(h)(4) and (h)(5), and an appeal to statutory purpose that actually disserves EPA's and Congress's policy goals. By contrast, reading § 211(h) to establish an RVP allowance for blends containing at least ten percent ethanol easily harmonizes the statutory text, structure, history, and purpose.

Until recently, EPA's misreading of the statute was largely inconsequential, since the only waiver granted under § 211(f)(4) was for E10. But now, at a minimum because EPA has granted a waiver for E15, this issue has taken on new significance. E15 contains more ethanol, has a higher octane rating, and produces less evaporative and tailpipe emissions than E10. Enabling E15 to benefit from the same RVP allowance E10 has enjoyed would protect public health, boost fuel efficiency, lower costs, increase U.S. energy independence, and further the

Administration's deregulatory agenda by eliminating an unwarranted regulatory burden on U.S. agriculture and industry. *See* Executive Order 13,771, 82 Fed. Reg. 9,339 (Feb. 3, 2017).

CONCLUSION

EPA should correct its prior interpretation of § 211(h)(4) to apply the 1.0 psi RVP allowance to blends of gasoline and at least ten percent ethanol. Given the 2011 waiver for E15, this change would allow blending of 15 percent ethanol with standard base gasoline year-round, just like ten-percent ethanol. This result is consistent with the statutory text, structure, history, and purpose, as well as EPA and Congress's policy goals.