

ORAL ARGUMENT NOT YET SCHEDULED

No. 10-1380
(consolidated with Nos. 10-1414, 11-1002,
11-1046, 11-1072, and 11-1086)

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

GROCERY MANUFACTURERS OF AMERICA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petitions for Review
from the Environmental Protection Agency

BRIEF FOR PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rules 26.1 and 28(a)(1), and Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record certify as follows:

A. PARTIES AND AMICI

The following are parties in this Court:

In Petition Nos. 10-1380 and 11-1072: Petitioners are the Grocery Manufacturers Association, American Frozen Food Institute, American Meat Institute, American Petroleum Institute, National Chicken Council, National Council of Chain Restaurants of the National Retail Federation, National Meat Association, National Pork Producers Council, National Turkey Federation, and the Snack Food Association. The 10-1380 and 11-1072 Petitioners represent as follows:

The Grocery Manufacturers Association (“GMA”) is the largest association of food, beverage, and consumer product companies in the world. Its members are numerous and include Advanced Food Products, LLC, B&G Foods, Inc., Campbell Soup Company, ConAgra Foods, Dean Foods Company, General Mills, Inc., Hormel Foods Corporation, Kraft Foods Global, Inc., Safeway Inc., Target Corporation, and The Kroger Co. GMA’s member organizations employ more than 2.5 million workers in all 50 States, with U.S. sales totaling over \$460 billion annually. GMA leads efforts to increase productivity and growth in the food and

beverage industry, as well as industry efforts to promote the safety and security of the Nation's food supply. Because GMA's members produce and market a significant number of corn and other grain-based products, GMA has an interest in any rule or regulation that affects the availability or prices of these grains. To this end, GMA and other Petitioners submitted comments to EPA explaining the deleterious effects on the marketplace – in which its members actively participate – of an E12 or E15 waiver. *See* JA____, ____ [R2,717.1, 2717.2]. GMA is a “trade association” within the meaning of Circuit Rule 26.1. It has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in the association.

The American Frozen Food Institute (“AFFI”) is the national trade association that promotes and represents the interests of all segments of the frozen food industry. Among its many members are J.R. Simplot Co., NORPAC Foods, Inc., Frozen Specialties, Inc., Kellogg Co., and Pinnacle Foods. AFFI fosters industry development and growth, advocates on behalf of the industry before legislative and regulatory entities, and provides additional value-added services for its members and for the benefit of consumers. Like GMA, AFFI has an interest in rules or regulations that affect the availability or cost of grains – commodities that make up a large portion of its members' products. *See* JA____, ____ [R2,717.1, 2717.2]. AFFI is a “trade association” within the meaning of Circuit Rule 26.1. It

has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in the association.

The American Meat Institute (“AMI”) is the Nation’s oldest and largest trade association representing packers and other processors of beef, pork, lamb, veal, chicken, and turkey products and their suppliers throughout North America. A small sample of its members are Smithfield Foods, Inc., Kraft Foods, Inc./Oscar Mayer, Hormel Foods, Boar’s Head Provisions Co., Inc., Sara Lee Corporation, Omaha Steaks International, Inc., and Bob Evans Farms, Inc. Because its members are directly affected by the E15 waiver, AMI submitted comments to EPA opposing the waiver, explaining in detail the harm that would befall livestock, poultry, and dairy producers if the waiver were permitted. *See* JA___ [R2,768.1]. AMI is a “trade association” within the meaning of Circuit Rule 26.1. AMI has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in AMI.

The American Petroleum Institute (“API”) is a nationwide, not-for-profit association representing over 470 member companies – including Chevron Corporation, Marathon Petroleum Corporation, ConocoPhillips Company, BP America Inc., ExxonMobil, and Shell Oil Company – engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and

gas products. API is a continuing association for the purpose of promoting the general commercial, regulatory, legislative, or other interests of the membership. It is accordingly “one of the groups leading the research effort on mid-level ethanol blends[.]” JA___ [R13,923.1]. API and its members are directly concerned with ensuring that “adverse impacts [of permitting mid-level ethanol blends] are avoided.” JA___ [R2,680.1 at 1]. As API explained in its comments to EPA concerning the E15 waiver, “[t]he oil and gas industry needs a level of confidence in the data that would allow our brands to stand behind a new fuel.” *Id.* API is a “trade association” within the meaning of Circuit Rule 26.1. API has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in API.

The National Chicken Council (“NCC”) is a national, nonprofit trade association representing the poultry industry, including producers, processors, and distributors of chicken and chicken products – just two of whom are Tyson Foods and Perdue Farms. NCC’s members account for more than 95 percent of the chicken produced in the United States. As NCC explained in an attachment to its comments opposing the E15 waiver, about 85 percent of chicken feed is corn and soybean meal. JA___ [R2,347.1 at 2]. “The broiler chicken industry, by itself, purchases approximately 21.5 per cent of the nation’s corn used for feed and over 38 percent of the soybean meal produced.” *Id.* Accordingly, “[s]ince the supply of

corn is limited by the land available for planting, the new demand from the ethanol sector has sharply increased prices for corn, with serious consequences for the poultry and livestock industries.” JA___ [*Id.* at 3]; *see also* JA__-__ [*id.* at 5-7] (detailing the financial impacts of increasing ethanol in the market). NCC is a “trade association” within the meaning of Circuit Rule 26.1. It has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in the association.

The National Council of Chain Restaurants (“NCCR”) is a division of the National Retail Federation (“NRF”). NCCR, as a division of NRF, is the leading trade association exclusively representing the chain restaurant industry. NCCR’s member companies include some of the nation’s largest casual dining and quick-service restaurant brands, such as McDonald’s Corporation, Burger King Corporation, and Denny’s Inc. These restaurants purchase grain-based products as well as poultry and meat fed with grains, and are directly harmed by any regulation that diverts such grains from food and feed products. *See* JA___, ___ [R2,717.1, 2717.2]. NRF is a “trade association” within the meaning of Circuit Rule 26.1. NRF has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in the association.

The National Meat Association (“NMA”) is a national, nonprofit trade association representing meat packers and processors, equipment manufacturers

and suppliers across the United States. Its members are numerous and include Jensen Meat Company, Preferred Beef Group, and Keystone Foods – entities that will be directly harmed by the diversion of grains to ethanol instead of to livestock feed. NMA is incorporated in the State of California and is a “trade association” within the meaning of Circuit Rule 26.1. It does not have any outstanding shares or debt securities in the hands of the public. NMA has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in NMA.

The National Pork Producers Council (“NPPC”) is a nonprofit trade association. NPPC conducts public policy outreach on behalf of its 44 affiliated state association members, which represent most of the country’s 67,000 pork producers. NPPC is a “trade association” within the meaning of Circuit Rule 26.1. NPPC has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in NPPC.

The National Turkey Federation (“NTF”) represents all segments of the U.S. turkey industry, including growers, processors, breeders, hatchery owners, and allied companies. Some of NTF’s many members are Butterball Turkey LLC, Empire Kosher, Plainville Farms, Foster Farms, and Farbest Foods, Inc. NTF is the only national trade association representing the turkey industry exclusively, and its members are responsible for almost 100 percent of all turkey production in the United States. Because feed accounts for 70 percent of the cost of producing

turkeys, and corn is the single largest ingredient in turkey feed, NTF's members have a direct interest in all legislation, regulation, and litigation that affects the distribution and availability of corn. It therefore joined AMI's comments opposing the E15 waiver. *See* JA___ [R2,768.1]. NTF is a "trade association" within the meaning of Circuit Rule 26.1. NTF has no parent companies, and no publicly held company possesses an ownership interest of 10 percent or greater in NTF.

The Snack Food Association ("SFA") is the international trade association for the manufacturers of and suppliers to the snack food industry. SFA's membership represents 90 percent of this over-\$40 billion industry worldwide. Among its many members are Better Made Snack Foods, Inc., Frito-Lay, Inc., Kettle Foods, Inc., Snyder's-Lance, Inc., Utz Quality Foods, Inc., and others. The vast majority of SFA member-products are made from corn, wheat, and other such commodities. This Petitioner therefore joined GMA and others in opposing EPA's proposal due to the diversion of corn to ethanol production. *See* JA___ [R2,717.1]. SFA is a "trade association" within the meaning of Circuit Rule 26.1. SFA has no parent companies, and no publicly held company possesses an ownership interest of 10 percent or greater in SFA.

In Petition Nos. 10-1414 and 11-1046: Petitioners are the Alliance of Automobile Manufacturers, Association of Global Automakers, Inc., National

Marine Manufacturers Association, and Outdoor Power Equipment Institute.

These Petitioners represent as follows:

The Alliance is a trade association of 12 car and light truck manufacturers, including BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North America, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota Motors North America, Inc., Volkswagen Group of America, and Volvo Cars North America. Formed in 1999, the Alliance serves as a leading advocacy group for the automobile industry on a range of public policy issues. The Alliance has no parent company, and no publicly held company has a 10 percent or greater ownership interest in the Alliance.

Global Automakers is a not-for-profit trade association that represents 15 international motor vehicle manufacturers and distributors, certain original equipment suppliers, and other automotive-related trade associations. Global Automakers' mission is to protect and promote the unique interests of international automakers in the United States. It is dedicated to the promotion of free trade and to policies that enhance motor vehicle safety, fuel economy and the environment. Global Automakers' automobile manufacturer members include: American Honda Motor Co., American Suzuki Motor Corp., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Isuzu Motors

America, LLC, Kia Motors America, Inc., Mahindra & Mahindra Ltd., Maserati North America, Inc., McLaren Automotive, Ltd., Mitsubishi Motors North America, Inc., Nissan North America, Inc. Peugeot Motors of America, Subaru of America Inc., and Toyota Motor North America, Inc. Global Automakers has no parent company, and no publicly held company has a 10 percent or greater ownership interest in Global Automakers.

NMMA is the nation's largest recreational marine industry association, representing nearly 1,300 boat builders, engine manufacturers, and accessory manufacturers. Collectively, NMMA members manufacture an estimated 80 percent of marine products used in North America. The vast majority of NMMA members are small businesses. NMMA has no parent company, and no publicly held company has a 10 percent or greater ownership interest in NMMA.

OPEI is an international trade association representing the \$15 billion utility, forestry, landscape and lawn and garden equipment manufacturing industry. OPEI represents the industry before state, federal, and international regulatory and legislative bodies. OPEI is a recognized Standards Development Organization for the American National Standards Institute and active internationally through the International Standards Organization in the development of safety standards. OPEI has no parent company, and no publicly held company has a 10 percent or greater ownership interest in OPEI.

In Petition Nos. 11-1002 and 11-1086: Petitioners are the National Petrochemical and Refiners Association, International Liquid Terminals Association, and Western States Petroleum Association. These Petitioners represent as follows:

NPRA is a national trade association of more than 450 companies. Its members include virtually all U.S. refiners and petrochemical manufacturers. NPRA members supply consumers with a wide variety of products and services used daily in their homes and businesses. These products include gasoline, diesel fuel, home heating oil, jet fuel, lubricants, and the chemicals that serve as “building blocks” in making diverse products, such as plastics, clothing, medicine, and computers. NPRA members produce gasoline from crude oil and also produce ethanol. NPRA therefore submitted comments to EPA opposing the partial E15 waiver because accommodating an additional ethanol-gasoline blend will require NPRA members to undertake special transportation, handling, and fuel segregation efforts, imposing direct economic costs. *See* JA___ [R2,550]. NPRA has no parent companies, and no publicly-held company has a 10 percent or greater ownership interest in NPRA.

ILTA is an international trade association that represents 81 commercial operators of bulk liquid terminals, aboveground storage tank facilities, and pipeline companies located in the United States and 47 other countries. ILTA’s

membership also includes over 300 companies that are suppliers of products and services to the bulk liquid storage industry. ILTA member facilities include deepwater, barge, and pipeline terminals whose bulk liquid commodities are essential to the national and international economies. These terminals interconnect with and provide services to the various modes of bulk liquid transportation: oceangoing tankers, barges, tank trucks, rail cars, and pipelines. The commodities handled include a variety of petroleum products, crude oil, asphalt, chemicals, fertilizers, renewable fuels, animal fats and oils, vegetable oils, and molasses. ILTA has no parent companies, and no publicly-held company has a 10 percent or greater ownership interest in ILTA.

WSPA is a non-profit trade association that represents companies that account for the bulk of petroleum exploration, production, refining, transportation and marketing in the six western states of Arizona, California, Hawaii, Nevada, Oregon, and Washington. WSPA is dedicated to working towards ensuring reliable access to petroleum and petroleum products through policies that are socially, economically, and environmentally responsible. WSPA has no parent companies, and no publicly-held company has a 10 percent or greater ownership interest in WSPA.

Respondent in each of the consolidated petitions is the Environmental Protection Agency (“EPA”). Growth Energy has intervened in the consolidated cases in support of EPA.

B. RULINGS UNDER REVIEW

In these consolidated petitions, Petitioners seek review of two “partial waivers” of Clean Air Act fuel equivalency requirements issued by EPA ostensibly pursuant to 42 U.S.C. § 7545(f)(4): 75 FR 68,094 (Nov. 4, 2010), located in the Joint Appendix at JA____; and 76 FR 4,662 (Jan. 26, 2011), located in the Joint Appendix at JA____.

C. RELATED CASES

The consolidated matters on review have not previously been in this Court or any other court. Counsel are aware of no related cases involving substantially the same parties and the same or similar issues pending in this or any other court.

Respectfully submitted,

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GLOSSARY

Act or CAA: Clean Air Act

APA: Administrative Procedure Act

AIAM: Association of International Automobile Manufacturers, now known as Association of Global Automakers, Inc.

Alliance: Alliance of Automobile Manufacturers

API: American Petroleum Institute

ATA: Air Transportation Association of America

CRC: Coordinating Research Council, Inc., a joint venture of the American Petroleum Institute and the automobile industry for research and testing of fuels and vehicles

DOE: U.S. Department of Energy

E0: Gasoline containing no ethanol

E10: Gasoline containing ethanol up to 10% by volume

E15: Gasoline containing ethanol more than 10% and up to 15% by volume

EISA: Energy Independence and Security Act of 2007, P.L. No. 110-140, 121 Stat. 1492 (Dec. 19, 2007)

EMA: Engine Manufacturers Association

EPA or Agency: U.S. Environmental Protection Agency

FAA: Federal Aviation Administration

FERC: Federal Energy Regulatory Commission

GLOSSARY – Continued

FR:	Federal Register
Global Automakers:	Association of Global Automakers, Inc.
Growth:	Growth Energy
JA:	Joint Appendix
MVMA:	Motor Vehicle Manufacturers Association
MY:	Model Year
NACAA:	National Association of Clean Air Agencies
NHTSA:	National Highway Traffic Safety Administration
NMHC:	Non-Methane Hydrocarbons
NMMA:	National Marine Manufacturers Association
NMOG:	Non-Methane Organic Gases
NO _x :	Nitrogen Oxides
NPRA:	National Petrochemical and Refiners Association
NRDC:	Natural Resources Defense Council
OPEI:	The Outdoor Power Equipment Institute
PSI:	Pounds per square inch (a measure of gas pressure)
R:	Administrative Record
RFS:	Renewable Fuels Standard

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BRIEF FOR PETITIONERS

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the challenged agency decisions under 42 U.S.C. § 7607(b) and 28 U.S.C. § 1331. The six petitions consolidated for review in this proceeding were timely filed on November 9, 2010 (No. 10-1380), December 20, 2010 (No. 10-1414), and January 3, 2011 (No. 11-1002) (challenging EPA's November 4, 2010 waiver decision) and on February 16, 2011

(No. 11-1046), March 11, 2011 (No. 11-1072), and March 21, 2011 (No. 11-1086) (challenging EPA's January 26, 2011 waiver decision).

ISSUES PRESENTED FOR REVIEW

1. Whether, after finding that E15 may cause a failure of emission control devices in some engines, EPA acted contrary to law in granting a “partial waiver” for use of E15 in certain engines, where the governing statute permits EPA to issue a waiver only if the Administrator determines that the fuel will not cause or contribute to a failure of *any* emission control device or system.

2. Whether EPA violated the Clean Air Act's mandatory procedural requirements both by failing to hold Growth to its burden to substantiate its waiver application and by issuing waivers without providing public notice and an opportunity to comment on critical testing data.

3. Whether EPA acted arbitrarily and capriciously by granting a “partial waiver” for certain vehicles, where the data it gathered were deficient; the data showed evidence of vehicle engine failures; the Agency explained away emissions increases with reference to legally irrelevant emissions decreases; and the Agency failed to resolve important potential problems raised by its decision, such as misfueling.

STATEMENT OF THE CASE

This case involves two EPA decisions that fundamentally alter the nature of gasoline that may be introduced into commerce in the United States and the manner in which gasoline is sold and used. Previously all gasoline produced and offered for sale in the United States was allowed to include no more than 10% ethanol by volume, a fuel commonly known as “E10.” E10 is approved for use in all gasoline-powered vehicles and engines in the United States. EPA’s challenged decisions increase the maximum amount of ethanol that may be blended into gasoline to 15%, or “E15.” This means that 50% more ethanol may be blended into gasoline.

But EPA did not approve E15 for use in all gasoline-powered vehicles and engines. Instead, in two separate actions, EPA issued what it characterized as “partial waivers” allowing E15 to be used only in light-duty cars and trucks manufactured since 2001. EPA did not approve E15 for use in other types of gasoline-powered vehicles and engines, because it concluded that the data failed to demonstrate that E15 would not cause or contribute to violations of the emissions standards for those vehicles and engines.

EPA’s “partial waiver” decisions are beyond the Agency’s statutory authority. They also are not justified by the record. They should be vacated.

STATEMENT OF FACTS

The Renewable Fuel Standard. Ethanol (or ethyl alcohol) is a chemical compound with a multitude of common uses; among other things, ethanol gives alcoholic beverages their punch. As a fuel additive, ethanol currently makes up close to ten percent of the national gasoline supply. *See* JA___ [R2550.1, NPRA cmt., at 14]. Ethanol has been blended into the nation’s gasoline supply for a number of reasons, including most recently to satisfy the Renewable Fuel Standard (“RFS”).

First enacted as part of the Energy Policy Act of 2005, the RFS was incorporated into the Clean Air Act (“CAA”). Pub. L. 109-58, § 1501(a) (2005). It required increasing amounts of “renewable fuel” to be blended into the nation’s gasoline supply – from 4 billion gallons in 2006 up to 7.5 billion gallons in 2012 and beyond. Congress amended the RFS in 2007 to revise the types of fuels qualifying as renewable and to increase the ultimate goal to 36 billion gallons of renewables blended into the nation’s transportation fuel supply by 2022. 42 U.S.C. § 7545(o)(2)(B)(i)(I).

Ethanol is – for now – the only renewable fuel that can be produced in sufficient quantities to satisfy volumes contemplated by the RFS. If every drop of gasoline sold in the United States included 10% ethanol, approximately 14 billion gallons of ethanol could be blended into the domestic gasoline supply. 75 FR

14,670, 14,759 (Mar. 26, 2010). The RFS sets far higher renewable blending goals. But the RFS and the current limit of 10% ethanol in gasoline are not irreconcilable. The RFS includes mechanisms by which the EPA Administrator may waive the total volume of renewable fuel for any given year or waive requirements for certain renewable fuels. *See* 42 U.S.C. § 7545(o)(7)(A)(i)-(ii), (D), (E), (F).

Approval of Fuels and Fuel Additives. The CAA strictly regulates the fuels and fuel additives that may be introduced into commerce in the United States. Section 211(f)(1)(B) of the Act, 42 U.S.C. § 7545(f)(1)(B), requires that no fuel or fuel additive may be introduced into commerce in the United States *unless* the fuel or fuel additive is substantially similar to one already used in the certification of vehicles or engines subject to federal emissions standards. This ensures a consistent U.S. fuel supply.

Section 211(f)(4) of the Act allows EPA to waive the “substantially similar” requirements of Section 211(f)(1)(B) for a particular fuel or fuel additive if the Administrator determines that “the emission products of such fuel or fuel additive or specified concentration thereof, will not cause or contribute to a failure of *any emission control device or system* (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used) to achieve compliance by the vehicle or engine with the emission

standards with respect to which it has been certified pursuant to sections 7525 and 7547(a) of this title.” 42 U.S.C. § 7545(f)(4) (emphasis added).

In past waiver decisions, EPA rigorously assessed a waiver applicant’s supporting data for its Section 211(f)(4) request, frequently denying waiver requests where an applicant had failed to provide sufficient data. *See, e.g.*, 53 FR 2,088 (Jan. 26, 1988) (applicant failed to submit adequate information demonstrating that blend would not cause vehicles to exceed NO_x emissions standard or cause materials compatibility problems); 48 FR 52,634 (Nov. 21, 1983) (applicant’s test results failed to establish that blend would not result in emissions failures); 45 FR 53,861 (Aug. 13, 1980) (applicant’s data insufficient to establish that the blend would not lead to emissions failures); 43 FR 41,424 (Sept. 18, 1978) (applicant did not show that proposed fuel additive would not have a “statistically significant adverse emission effect”).

As recently as 2008, and hewing to its past technical rigor in waiver cases, EPA reiterated the depth of proof required of an applicant seeking a Section 211(f)(4) waiver. *See* JA___ [R2,559.2, ALLSAFE July cmt. (Ex. I)]. In a presentation to API, an EPA official recognized that a Section 211(f)(4) waiver would be required for mid-level ethanol blends like E15, and then covered in detail the supporting data expected from applicants seeking a waiver. *See* JA___, ___ - ___ [*Id.*, Slides 3, 7-20]. He also explained that submissions supporting a waiver

request must include testing relating to “exhaust emissions,” “evaporative emissions,” and “durability issues,” specifically including “materials compatibility” and “driveability or operability,” and cautioned that “[a]ll testing will need to be carried out over the useful life of [the] vehicle or equipment.”

JA___ [*Id.*, Slide 5.]

Growth’s Waiver Application. In March 2009, Growth submitted to EPA, on behalf of several ethanol manufacturing companies and affiliated interests, an “Application for a Waiver Pursuant to Section 211(f)(4) of the Clean Air Act for E-15” (“Waiver Application” or “Application”). JA___ [R2.6]. Growth’s Application requested that EPA approve “the introduction into commerce of an alcohol-gasoline blend containing up to fifteen percent ethanol by volume in unleaded gasoline (‘E-15’).” JA___ [*Id.* at 8].

EPA published a Federal Register notice announcing receipt of the Waiver Application and providing a 30-day public comment period (which was later extended by 30 additional days). JA___, ___ [74 FR 18,228 (Apr. 21, 2009); 74 FR 23,704 (May 20, 2009)]. In its notice, EPA reiterated the burden placed on applicants for a waiver: “[T]he Administrator may grant a waiver for a prohibited fuel or fuel additive *if the applicant can demonstrate* that the new fuel or fuel additive will not cause or contribute to engines, vehicles or equipment failing to meet their emissions standards over their useful life.” JA___ [74 FR at 18,288]

(emphasis added). EPA also observed that “[o]ne potential outcome at the end of our process * * * may be an indication that a fuel up to E15 could meet the criteria for a waiver for some vehicles and engines but not for others.” JA___ [*Id.* at 18,229]. EPA’s notice requested comments on, among other things, “whether an appropriate level of scientific and technical information exists” to support an E15 waiver. *Id.* EPA also sought comment on “the possibility that a waiver might be granted[] in a conditional or partial manner.” JA___ [*Id.* at 18,230].

Comments On The Waiver Application. EPA received approximately 78,000 comments on Growth’s Application. JA___ [75 FR 68,094, 68,095 (Nov. 4, 2010)]. Comments opposing the Application pointed out the lack of legal support for a “partial waiver,” the lack of adequate supporting data, and the potentially serious impacts of a waiver decision on manufacturers, multiple industries, consumers, and products, including smaller gasoline-powered equipment such as lawnmowers.

Multiple petitioners submitted comments objecting to a “partial waiver,” and counseling EPA to refrain from a waiver decision until rigorous emissions testing was fully complete. *See, e.g.*, JA___, ___, ___, [R1,180, 2,680, 13,923].

Petitioner API, for example, explained that the Growth Waiver Application was “wholly deficient in a number of areas,” including its “improper[]” characterization of test programs addressing intermediate ethanol blends, its

adoption of summary conclusions from incomplete testing programs, and its reliance on data of “questionable relevance” to current vehicle characteristics. JA___ [R2,680.1 at 1]. *See also* JA__-__ [R2,550.1, NPRA cmt., at 5-13]. API also explained in an earlier submission that it and a number of other stakeholders – including EPA itself, DOE, the automobile industry, and the Renewable Fuels Association, as well as the CRC, a not-for-profit organization that frequently coordinates with the government on major research undertakings – had been working to develop a “comprehensive research plan” to assess the effect of mid-level blends of ethanol on vehicle emissions. JA___ [R1,180 at 2].

Petitioner Alliance also filed substantial comments, emphasizing the need for additional testing on engine durability to fill information gaps and urging EPA to delay its waiver decision until after these results became available and after an additional opportunity to comment. JA___, ___-___ [R2,551.1 at 10, 22-24]. *See also* JA___ [R2,548, AIAM (now Global Automakers) cmt.]; JA___ [R2,679, NMMA cmt.].

Both Petitioner NPRA and the ALLSAFE coalition ^{1/} filed comments explaining that EPA lacked the statutory authority to issue a “partial waiver” of the Section 211 requirements. JA__-__, __ [R2,550.1 at 22-23; R2,490.2 at 6].

^{1/} ALLSAFE’s members include, among others, Petitioners Global Automakers, NMMA, and OPEI, and EMA.

ALLSAFE also contended that the Waiver Application was missing critical information proving that E15 would not cause failures of emission-control systems and engines, and that the presence of E15 in the marketplace could cause widespread misfueling of vehicles and engines not designed for it. JA__-__, __-__ [*Id.* at 2-5, 15-22].

In late November 2009, long after the comment period closed, EPA sent a letter to Growth stating that it was still “evaluating [the] E15 waiver petition,” and that it was awaiting the results of testing from DOE, which EPA described as providing “critical data” on the question of “component durability when E15 is used over many thousands of miles” and which EPA expected to be completed later in 2010. JA__-__ [R13,925.1 at 1-2]. As EPA later explained in its first waiver decision, DOE had “embarked on its Catalyst Study, in consultation with EPA, * * * after enactment of [EISA], which significantly expanded the [RFS] Program for increasing the use of renewable fuels in transportation fuel[.]” JA____ [75 FR at 68,095 n.2].

API filed a response to EPA’s letter, explaining that the data set from the test project to which EPA’s letter referred – called the DOE Catalyst Study – was “only part of the highway-vehicle story,” and was insufficient in itself to justify approval of E15. JA__, __ [R13,925 at 1, 2]. As API explained, the CRC “is conducting a much broader range of studies funded by the auto and oil industries as well as DOE

and other government agencies, called the ‘Auto/Oil E10+ Test Program for Highway ‘non-FFV’ Vehicles.’ ” JA__ [Id. at 1]. The CRC comprehensive test program, which included specific projects addressing engine durability issues, evaporative emissions control systems durability issues, automotive fuel storage and handling issues, and onboard diagnostic (OBD) “false illumination” issues, was underway, but not complete. JA__ [Id. at 2]. 2/

Because EPA had announced that it was expecting “critical data” to come in after the close of the comment period, several submitters sought a further opportunity for public comment after the Agency received the data. Forty-one associations, including most of the Petitioners, jointly submitted one such request in March 2010. JA__ [R13,960]. As those signatories explained, they were “concern[ed] that EPA may decide to allow the introduction into commerce of mid-level ethanol blends such as E15 based on new information that was not available for public comment when the docket was open last year.” JA__ [Id. at 1]. The signatories “strongly request[ed] that EPA provide for a second period of public comment” on such data. *Id.* See also JA__ [R13,961.1, Alliance cmt.].

EPA received new data, as it had predicted and sought – but it never reopened the public comment period. Instead, in early November 2010, EPA

2/ API continued to file notices with EPA about the progress of the CRC’s studies after the public comment period had closed and throughout (and beyond) the pendency of the Waiver Application. See, e.g., JA__, __ [R14,048, 14,053].

published a determination partially granting, partially denying, and partially deferring final action on the Waiver Application. JA__ [75 FR at 68,094].

EPA granted the Waiver Application with respect to light-duty gasoline-powered vehicles manufactured in MY2007 and newer model years. *Id.* This so-called “partial waiver” was based on two conditions: E15 must meet specified fuel quality and volatility parameters; and specified misfueling mitigation measures must be implemented. JA__ [*Id.* at 68,148].

EPA denied the Waiver Application with respect to “model year 2000 and older light duty motor vehicles, as well as all heavy-duty gasoline engines and vehicles, highway and off-highway motorcycles, and nonroad engines, vehicles, and equipment.” JA__ [*Id.* at 68,094]. And EPA deferred a decision on MY2001-2006 light-duty vehicles “until additional test data, currently under development, is available.” *Id.*

This “partial waiver” decision was remarkable in several respects. To begin with, and most fundamentally, the decision represented the first time that EPA had considered its waiver authority to be anything less than unitary. That is, EPA had never before rendered a decision approving a waiver request only *in part* – as to certain engines, and not as to others.

Second, and also contrary to its consistent prior practice, EPA approved (again, in part) Growth’s Waiver Application even though EPA readily conceded

that the Application was insufficiently supported by relevant data: “[Growth] did not provide the necessary information to support a full waiver in several key areas, especially long-term durability emissions data necessary to ensure that all motor vehicles, heavy-duty gasoline highway engines and vehicles, highway and off-highway motorcycles and nonroad products would continue to comply with their emission standards over their full useful life.” JA___ [*Id.* at 68,095]. *See also* JA___ [*Id.* at 68,097] (Growth’s information is “insufficient by itself to adequately assess the potential material compatibility of E15”); JA___ [*Id.* at 68,104] (“[Growth] has not presented a reasonable and valid engineering theory”).

But rather than deny the Application for lack of adequate justification, as it had done so many times in the past, *see supra* at 6, EPA instead turned to the DOE Catalyst Study assessing in part the effect on motor vehicles of long-term use of E15. JA___ [75 FR at 68,105]. API previously had pointed out the limited scope of the Catalyst Study, *see supra* at 10-11, and the Catalyst Study data had not been introduced into the E15 waiver application docket until long after the public comment period closed, *see supra* at 10. ^{3/} EPA nonetheless declared the

^{3/} The actual DOE report on its catalyst durability program remains unavailable to the public, so the details of its design, results, statistical analysis, and conclusions are unknown. What is certain is that program and analysis presented by EPA in its decision does not match the rigor described by EPA in its June 2008 and November 2008 materials. *See* JA___ [R2,559.2, ALLSAFE cmt. (Ex. I, Sample size example 11122008)].

Catalyst Study to be an important component of its decision. JA____ [75 FR at 68,105]. And after assessing the data supplied by that limited study and other data submitted by Growth – but without providing the public an opportunity to assess or comment on the late-arriving data or EPA’s interpretation of those data – EPA issued its “partial” approval of Growth’s waiver request. JA____-____ [*Id.* at 68,146-47].

The Second Waiver Decision. EPA issued its second E15 “partial waiver” decision in January 2011, approving the introduction into commerce of E15 for use in MY2001-2006 light-duty vehicles, subject to the same fuel quality and misfueling mitigation conditions specified in the first waiver decision. JA____ [76 FR 4,662 (Jan. 26, 2011)]. EPA reiterated in the second waiver decision the criteria that must be met for a Section 211(f)(4) waiver to be granted: An applicant bears the burden of “demonstrat[ing] that a new fuel or fuel additive will not cause or contribute to the failure of engines or vehicles to achieve compliance with the emission standards to which they have been certified over their useful life.” JA____ [*Id.* at 4,663]. EPA granted the E15 waiver for MY2001-2006 under this standard – notwithstanding the fact that the Agency concluded that there is “the possibility of a limited number of evaporative emission exceedances” if E15 were allowed to be used by this population of vehicles. JA____ [*Id.* at 4,664].

As with the first partial waiver, EPA conceded that “[t]he information submitted by [Growth] was not sufficient to support a waiver covering introduction of E15 into commerce for use in MY2001-2006 light-duty motor vehicles.” JA___ [*Id.* at 4,663]. As a result, EPA again had to rely heavily on data from the DOE Catalyst Study relevant to MY2001-2006 light-duty vehicles. JA___ [*Id.* at 4,665]. That compilation of data “was largely completed in November [2010],” with some additional test results arriving in December 2010. JA___ [*Id.* at 4,663]. But EPA did not reopen the administrative record and seek public comment on those data.

Three separate sets of petitioners timely sought review of EPA’s two separate waiver decisions. This Court subsequently consolidated the six petitions for briefing. D.C. Cir. No. 10-1380 *et seq.*, Order (April 5, 2011).

SUMMARY OF ARGUMENT

EPA’s E15 “partial waivers” are both legally and factually deficient. They are legally deficient because they exceed the Administrator’s authority under the CAA. Section 211(f)(4) permits a waiver only if the Administrator determines that a new fuel or fuel additive “will not cause or contribute to a failure of *any* emission control device or system” in a vehicle or engine “to achieve compliance” with emission standards for which that vehicle or engine was certified. Yet the Administrator issued unprecedented “partial waivers” covering only certain

engines and vehicles, and not others. “Any” means any. It does not mean some, or part. EPA’s decision fails at *Chevron* step one.

Even if the statute were not perfectly clear, moreover, the Administrator’s construction of it was not reasonable. EPA’s construction was instead gymnastical: the Agency borrowed liberally but selectively from other CAA provisions, ignored inconsistencies with other aspects of its emissions regulation regime, and patched over the prospect of misfueling with unproven administrative controls. This cannot withstand analysis under *Chevron* step two, assuming the analysis gets that far.

The E15 “partial waiver” decisions also are unsupported by the administrative record. EPA has – until now – hewed to a rigorous and exacting standard when assessing a waiver applicant’s compliance with the statutory standards. Not in this case, however. Here, when Growth failed to adequately support its Application, EPA stepped in to supply data lacking in the Application itself. Even these government-generated data were woefully insufficient to support EPA’s “partial waiver” decisions. EPA had previously announced that it would require a suite of rigorous tests before issuing a waiver, but it contented itself with far fewer, and narrower, tests, choosing to rely instead on “engineering judgment.” DOE’s limited testing data showed vehicle and engine failures in the very model years for which EPA was seeking to *approve* E15, but the Agency used statistical

sleight of hand in an attempt to argue those failures away. EPA acknowledged the prospect of increased emissions from E15 in the approved vehicle model years, but dismissed those negative effects based on unsupported assurances that vehicle compliance margins could accommodate some emissions increases. EPA understood that certain vehicles were more susceptible to failure from use of E15 than others, but it did not test some of the vehicles prone to failures. EPA also explained away predicted violations of evaporative standards due to E15 by speculating that these violations would be “offset” by other hypothetical emissions decreases. And EPA dismissed the prospect of serious misfueling problems stemming from the “partial waiver” by relying on stopgap conditions and a misfueling rule to be issued at a later date.

All of these shortcuts and infirm data led to two “partial waiver” decisions that were ill-considered, unwarranted, and unlawful. They should be vacated.

STANDING

Petitioners in these six consolidated cases fall into three categories – engine products, petroleum, and food. The engines products group – the Alliance, Global Automakers, NMMA, and OPEI – is made up of trade associations whose members manufacture light-duty motor vehicles, engines and related equipment, marine vessels, and outdoor power equipment, and whose emission-control devices, systems, and engines may be harmed by the use of E15. They are directly

affected by the partial E15 waiver. The Alliance and Global Automakers will be retroactively required to permit E15 to be used in all MY2001 and newer motor vehicles currently on the road, as well as all future vehicles. None of the current vehicles (other than a small number of flex-fuel vehicles) were manufactured, certified, or warranted to use ethanol blends greater than E10. They therefore face serious risks of liability imposed by numerous state and federal laws, as well as operational performance and consumer satisfaction exposure. *See, e.g.*, CAA, 42 U.S.C. §§ 7541 and 7547 (imposing liability for in-use emission warranty claims and providing for recall of vehicles and engines due to non-conformity with applicable standards); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1381, *et seq.* (requiring recalls under 49 C.F.R. Part 577 due to safety-related problems that potentially may be caused by the use of E15); Consumer Product Safety Act, 15 U.S.C. § 2051, *et seq.* (same). Vessel owners are potentially liable for safety-related problems that may be caused by the use of E15 under the Federal Boat Safety Act, 46 U.S.C. 4301, *et seq.* These Petitioners as well as individual members of the associations provided information detailing their harms to EPA in their comments opposing the E15 waiver. *See, e.g.*, JA____ [R2,559] (ALLSAFE and OPEI); JA____ [R2,679] (NMMA); JA____ [R1,026] (Mercury Marine); JA____ [R2,515] (Mercedes-Benz USA).

Three petroleum groups – API, NPRA, and WSPA – have members that produce gasoline from crude oil. ILTA has members that handle, store, and transfer bulk quantities of gasoline and renewable fuels. Accommodating an additional gasoline-ethanol blend in the fuel market – the direct result of EPA’s approval of E15 – will require petroleum group members to undertake special fuel production, transportation, and fuel segregation efforts. In addition, members that produce E15 blends will be required to comply with new compliance surveys and fuel pump dispenser labeling requirements. These actions will impose substantial economic costs.

Members of the petroleum group who are refiners and importers are also obligated parties under EISA, *see* 75 FR at 14,867-68 (to be codified at 40 C.F.R. § 80.1406). This means that refiners and importers will necessarily have to introduce E15 into commerce, which will affect other petroleum group members engaged in downstream operations. *See id.* at 14,772 (describing “essentially all downstream [fuel] blenders and terminals,” as well as the traditional “refiners and importers” as “regulated parties under RFS[] since essentially all gasoline will be blended with ethanol”). EPA’s partial E15 waiver therefore will require these organizations to expend enormous resources to blend and introduce E15 into the market.

In addition, petroleum group members could potentially face significant liability risks due to the harms that could result from using E15 in some waived vehicles or in misfueling pre-MY2001 vehicles and other engines, including power tools, generators, and vessels, for which E15 is manifestly unsuitable. These Petitioners, as well as individual members of their organizations, therefore submitted numerous comments explaining such harms. *See, e.g.*, JA___ [R2,550] (NPR); JA___ [R2,680] (API); JA___ [R2,824] (BP America); JA___ [R2,883] (Chevron). *See also* U.S. Gov't Accountability Office, GAO-11-513, *BIOFUELS: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends* 27-30 (June 2011), available at <http://www.gao.gov/new.items/d11513.pdf> (hereinafter GAO, *Biofuels*) (explaining the various costs and risks that retailers are likely to face in selling intermediate ethanol blends).

The food group petitioners – GMA, AFFI, AMI, NCC, NCCR, NMA, NPPC, NTF, and SFA – represent entities that either produce, market, and distribute food items made from the grains (mostly corn) that will be diverted to produce more ethanol, or raise livestock that eat feed predominantly made up of such grains. The increased demand for grains that produce ethanol will result in a corresponding increase in grain prices. *See* 75 FR at 14,683 (Table I.B-1) (predicting at least an 8.2% increase in corn prices and a soybean price increase of 10.3%). Petitioners raised this very point in their comments to EPA opposing the

E15 waiver request, as did their individual member organizations. *See, e.g.*, JA___ [R2,347] (NCC); JA___ [R2,717] (AFFI, GMA, NCCR, SFA, among others); JA___ [R2,768] (AMI and NTF); JA___ [R523] (Tyson); JA___, ___ [R1,321, 1,664] (Simmons); JA___ [R2,678] (Smithfield); JA___ [R13,898] (Farbest).

It is the settled law of this Circuit that where any one petitioner has standing, the Court need not address the standing of the other petitioners. *See Military Toxics Project v. EPA*, 146 F.3d 948, 954 (D.C. Cir. 1998). Here, however, *all* Petitioners are directly affected by EPA’s “partial waiver” decisions. The specific members of these organizations, identified in the Certificate of Parties, *supra*, will be harmed as here identified. Standing is therefore established.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing EPA’s “construction and implementation” of Section 211(f)(4), this Court will reverse EPA’s decision if EPA acted “outside the bounds of its statutory authority.” *MVMA v. EPA*, 768 F.2d 385, 389 (D.C. Cir. 1985). This Court will also reverse if EPA’s action “is arbitrary, capricious, or an abuse of discretion.” *Id.* To determine whether EPA acted in an arbitrary and capricious manner, the Court “must engage in a ‘searching and careful’ review of both the facts and the agency’s reasoning to ensure that the agency’s decision was a product

of reasoned decisionmaking based upon a consideration of the relevant factors.”

Id. at n.6 (citation omitted).

II. THE CLEAN AIR ACT DOES NOT GIVE EPA THE AUTHORITY TO ISSUE PARTIAL WAIVERS FOR NEW FUELS OR FUEL ADDITIVES.

EPA’s two “partial” E15 waiver decisions disregard the limits Congress imposed on the Agency’s discretion under the CAA. The plain and unambiguous language of Section 211(f)(4) prohibits EPA from granting “partial waivers.”

A. The Unambiguous Language Of CAA Section 211(f) Precludes A “Partial Waiver.”

When asked to decide whether an agency has exceeded its statutory authority, this Court follows the familiar rules laid down in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). If the Court concludes that “Congress has directly spoken to the precise question at issue,” then “the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. And, in making this determination, “a court should always turn first to one, cardinal canon before all others.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 253 (1992). Namely, “courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Id.* at 253-54. “When the words of a statute are unambiguous, * * * this first canon is also the last: ‘judicial inquiry is complete.’ ” *Id.* at 254 (citation omitted).

Congress has spoken directly to the precise question at issue in this case through the CAA. Section 211(f)(1) of the Act bars the introduction into commerce, or increase in concentration of, fuels or fuel additives not “substantially similar” to those used in vehicle and engine certification. 42 U.S.C. § 7545(f)(1). Section 211(f)(4) allows the EPA Administrator to waive this bar *only* if she determines the new fuel or fuel additive “will not cause or contribute to a failure of *any* emission control device or system [in a vehicle or engine] * * * to achieve compliance * * * with [EPA] emission standards with respect to which it has been certified[.]” *Id.* § 7545(f)(4) (emphasis added). ^{4/}

“ ‘Any,’ after all, means any.” *Ford v. Mabus*, 629 F.3d 198, 206 (D.C. Cir. 2010). *See also United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”) (citation omitted). The same holds true under the CAA. In three recent cases, this Court has confirmed that, “[i]n the context of the CAA, ‘the word “any” has an expansive meaning.’” *New Jersey v. EPA*, 517 F.3d 574, 582 (D.C. Cir. 2008) (quoting *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006)); *accord NRDC v. EPA*, 489 F.3d 1250, 1257-60 (D.C. Cir. 2007).

^{4/} This Court has concluded once already that “given the plain language of section 211(f)(4), we are obliged to give effect to ‘the unambiguously expressed intent of Congress.’” *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1058 (D.C. Cir. 1995) (citation omitted).

Applying this expansive meaning of the word “any” to Section 211(f)(4), a waiver is permitted only in situations where the fuel or fuel additive under review will not cause or contribute to failure in *any* control device or system—which is to say, where the fuel or fuel additive is suitable for *all* vehicles and engines the Administrator has certified for use with the given fuel. The plain language of the statute allows for nothing less.

But EPA concluded otherwise when it issued its “partial” waiver decisions. EPA determined that it had authority to authorize an E15 waiver for only *some* vehicles and engines. JA__-__ [75 FR at 68,145-46]. And it did so despite finding that Section 211(f)(4)’s waiver standard was *not* met for certain categories of vehicles and engines – namely, MY2000 and older motor vehicles, heavy-duty vehicles, non-road engines and equipment, and motorcycles. *See* JA__-__ [*id.* at 68,097-98]. Based on EPA’s own findings, E15 is not compatible with “*any* emission control device or system” used in gasoline-powered vehicles and engines; it is compatible only with *some* emission control devices and systems used in recent MY light-duty vehicles. Accordingly, E15 does not qualify for a Section 211(f)(4) waiver based on the plain language of the CAA, and EPA lacked the statutory authority to issue a “partial” E15 waiver.

B. EPA's Reasoning Disregards The Plain Statutory Text.

EPA's efforts to bend the CAA's language to its preferred result fail from the start.

In both waiver decisions, EPA rejects the "literal" interpretation of the statute as "impossible," reasoning instead that "Congress contemplated a workable waiver provision[.]" JA___ [75 FR at 68,100]; *accord* JA___ [76 FR at 4,664].

To state EPA's argument, however, is to refute it. EPA essentially "acknowledges" that the statute "is clear and unambiguous * * * when it objects to a 'literal' reading of the [statute's] language." *NRDC*, 489 F.3d at 1258. But EPA has neither recognized nor made any effort to satisfy its burden to "avoid a literal interpretation at *Chevron* step one." *See EMA v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996). To depart from Congress's plain language, EPA must "show either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." *Id.* EPA has done neither. And that alone is reason enough to reject EPA's reading of Section 211(f).

EPA offered three arguments supporting its preferred statutory interpretation. None has merit.

1. EPA first claims that Sections 211(f)(1) and 211(f)(4), both of which contain the word "any," are "parallel and complementary" provisions, and that its

“partial waiver” therefore is justified. JA___-___ [75 FR at 68,144-46]. Petitioners agree that Section 211(f)(4) must be read in light of Section 211(f)(1). But it does not follow that Section 211(f)(4), or Section 211(f)(1) for that matter, allows EPA to regulate fuels based on “subsets of motor vehicles” within a particular fuel type.

Section 211(f)(1) prohibits the introduction of new fuels or fuel additives not substantially similar to any used for certification in MY1975 or later vehicles and engines. In other words, a new fuel is permitted only if it is substantially similar to “any” – meaning any one – certification fuel. Section 211(f)(4), in turn, permits a waiver only if the fuel or fuel additive does not cause or contribute to an emissions failure of *any* – meaning any one – emission control device or engine. Indeed, and contrary to EPA’s assertion, that is why the word “any” in this provision is “paired with the consistent use of the singular when referring to vehicles and emissions control systems[.]” JA___ [75 FR at 68,145].

In addition, reading Section 211(f)(4) as “parallel and complementary” to Section 211(f)(1) means that like fuels are treated alike. A new fuel or fuel additive that causes or contributes to an emissions failure in a vehicle or engine that is certified to use that type of fuel or fuel additive may not be granted a waiver. This is because “such fuel or fuel additive” would cause or contribute to a failure of that vehicle or engine “to achieve compliance * * * with the emissions

standards *with respect to which it has been certified.*” 42 U.S.C. § 7545(f)(4) (emphasis added).

Despite the plain and unambiguous language of Section 211(f)(1) and 211(f)(4), EPA nonetheless argues that the 1990 and 2007 amendments to the CAA changed the essential meaning and function of these provisions. Not so.

“Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes.” *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

In 1990, Congress added Section 211(f)(1)(B) to the CAA, precluding the introduction of “any fuel or fuel additive for use by any person in motor vehicles” that was not substantially similar to certification fuel. Pub. L. 101-549, § 214(a) (1990). Previously, the statute had covered only those new fuels and fuel additives that were “for general use in light duty motor vehicles.” Pub. L. 95-95, § 222(a) (1977). The 1990 amendment therefore expanded the scope of the prohibition to apply “not only to unleaded gasoline but to all other fuels and fuel additives, including leaded gasoline, diesel fuel, and consumer additives.” H.R. Rep. No. 101-490, pt. 1, at 313 (1990). Nothing about this change suggests that Congress intended to alter the meaning of the word “any” in Section 211(f)(1). Nor does it suggest that comparisons should be made based on anything other than fuel type.

Like fuels are still compared with like fuels; there is just a greater variety of fuels subject to the general prohibition.

In 2007, Congress amended Section 211(f)(4). Prior to that year, the provision had permitted a waiver for any new fuel or fuel additive that did not cause or contribute to compliance failures in any emission control device or system “over the useful life of any vehicle in which such device or system is used.” Pub. L. 95-95, § 222(a). After 2007, the scope of the waiver was expanded to apply “over the useful life of the motor vehicle, motor vehicle engine, nonroad engine or nonroad vehicle in which such device or system is used.” Pub. L. 110-140, § 251 (2007). Like the 1990 amendment to Section 211(f)(1), this 2007 amendment to Section 211(f)(4) broadened the coverage of the CAA to include a *wider* range of vehicles and engines. This amendment in no way implies that Congress intended EPA to permit waivers based on *narrower* subsets of vehicles or engines. EPA’s argument that because of the 1990 and 2007 amendments to the CAA, “broad to narrow subsets of motor vehicles can be considered when deciding whether the introduction of a fuel or fuel additive for use by that subset of motor vehicles is in compliance with the prohibition,” JA___ [75 FR at 68,145], thus is unsupported by the statutory text.

EPA’s first statutory argument also fails on another ground: it conflicts with the CAA’s structure. Congress provided for the regulation of vehicles and fuels in

Title II of the CAA. 42 U.S.C. §§ 7521-90. When Congress intended to allow classifications based on broader or narrower subsets of vehicles or fuels, it expressly provided for that possibility in the statute. *See, e.g.*, 42 U.S.C. §§ 7521(a)(1) (permitting standards applicable to “any class or classes of new motor vehicles or new motor vehicle engines”), 7545(c)(2)(A) (referring to controls based on a “class of fuels”), 7547(a)(3) (allowing regulations applicable to “classes or categories of new nonroad engines and new nonroad vehicles”).

It is an established rule of statutory construction that “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *NRDC*, 489 F.3d at 1259 (citation omitted). Congress described in Section 211(f)(4) the exact contours of the exception to the general prohibition in Section 211(f)(1). “EPA may not, consistent with *Chevron*, create an additional exception on its own.” *NRDC*, 489 F.3d at 1260. There is “no reason the usual tools of statutory construction should not apply and hence no reason why ‘any’ should not mean ‘any.’ ” *Id.* (quoting *New York*, 443 F.3d at 886). 5/

5/ EPA also argues that its interpretation of “any” comports with the plain meaning of the word because it uses “any” in a way that is expansive – but limited: “EPA is * * * applying the term ‘any’ in an expansive manner, but in the context of a subset of motor vehicles.” JA___ [75 FR at 68,145 n.139]. Nonsense. A subset of “any” is called “some.”

2. Next, EPA argues that its partial E15 waiver is permissible because “the term ‘waive’ as used in section 211(f)(4) is not modified in any way.” JA___ [75 FR at 68,145]. Therefore, according to EPA, the statute should be read “as a general grant of waiver authority, encompassing both partial and total waivers, as long as the waiver criteria are met.” *Id.* This interpretation conveniently reads the word “any” out of the statute, depriving the word of the meaning it would otherwise convey. *See New York*, 443 F.3d at 887 (“a cardinal principle of statutory construction” prohibits the interpretation of a statute in a way that renders a word “insignificant” or “superfluous”) (citation omitted).

EPA’s proposed interpretation of “waive” also violates the rule that “[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) (citation omitted). When Congress intended to permit partial waivers of general prohibitions of the fuel or fuel additives provisions of Title II of the CAA, it expressly so provided. *See* 42 U.S.C. § 7545(k)(2)(A) (Administrator may “adjust (or waive entirely)” certain NOx requirements for reformulated gasoline), 7545(m)(3)(A) (Administrator may “waive, in whole or in part, the requirements” for oxygenated gasoline in “CO nonattainment areas”), 7545(o)(7)(A) (Administrator may “waive [certain]

requirements of [the Renewable Fuel Program] in whole or in part”). It did not do so in Section 211(f)(4). This Court should give effect to the varying degrees of discretion Congress granted EPA in different contexts under the statute.

In essence, EPA seeks to import the discretion afforded to it under Section 211(c) of the CAA into Section 211(f)(4). The former provision allows EPA to “control or prohibit” fuels, even those already in commerce, that are found to “impair to a significant degree the performance of any emission control device or system which is in general use.” 42 U.S.C. § 7545(c)(1). To balance this broad grant of discretionary authority, Section 211(c) also sets forth detailed and specific procedural requirements that EPA must follow to ensure good decisionmaking. *See, e.g., id.* § 7545(c)(2)(A), (C). Congress did not, however, grant EPA the same latitude of discretion in Section 211(f).

This Court should assume that, by setting forth differing mechanisms in Section 211(c) and 211(f), Congress intended those two provisions to be interpreted differently. *See Russello*, 464 U.S. at 23; *NRDC*, 489 F.3d at 1259. And, because “EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion,” *New Jersey*, 517 F.3d at 583 (citation omitted), this Court must reject EPA’s construction of Section 211(f) as allowing the issuance of partial E15 waivers.

3. Finally, EPA seeks to justify its partial waivers by repeatedly conflating the *standard* for allowing a waiver under Section 211(f)(4) with an applicant's *burden of proof* to demonstrate that the proposed new fuel or fuel additive meets that standard. See JA___ [75 FR at 68,145]. But these are two distinct concepts. EPA argues that, in the past, EPA has not required applicants to prove compliance with Section 211(f)(4)'s waiver standard to an absolute certainty, and that it "has in fact applied [its] *construct of this provision* in all of its past waiver decisions." JA___ [75 FR at 68,145] (emphasis added). EPA explains that it "has previously said that it is virtually impossible for an applicant to demonstrate that a new fuel or fuel additive does not cause or contribute to *any* vehicle or engine failing to meet its emissions standards." *Id.* (emphasis in original). It therefore allows an applicant to "extrapolate its findings and make its demonstration" based on a "sample size * * * comprised of a statistically significant sample of motor vehicles." *Id.*

From this, EPA leaps headlong to the unsupported assertion that "focusing on a relatively small but representative subset of motor vehicles does not violate the statutory use of the word 'any' in this provision." *Id.* According to EPA, Congress "[c]ertainly" did not state otherwise. *Id.*

But Congress *did* state otherwise. And EPA's rationale to the contrary is a non-sequitur. Congress may not have required *testing* on every single engine and

vehicle in current use, but that is where EPA’s logic ends. For Congress *did* require that any fuel or fuel additive not cause or contribute to the failure of “any” emission control device or system. The question whether Congress permitted EPA to extrapolate from available evidence to infer that Section 211(f)(4)’s waiver standard is met for an entire fleet of vehicles and engines is wholly different from the question whether the standard itself encompasses the whole fleet. *Cf. MVMA*, 768 F.2d at 390, 392-93 (recognizing as distinct the standard for “useful life” under Section 211(f)(4) and the requisite evidentiary showing to demonstrate that the standard has been met). The first question does not answer the second. EPA’s argument on this point accordingly lacks merit.

* * *

EPA’s interpretation of its statutory obligations requires it to redline the statute, such that it can grant a partial waiver so long as a new fuel or fuel additive “will not cause or contribute to a failure of *certain* motor vehicles to achieve compliance with their emission standards to which they have been certified over their useful lives.” JA___ [75 FR at 68,149] (emphasis added). But that is not what the statute says. EPA’s explanation “substitut[es] EPA’s desires for the plain text” of Section 211(f)(4). *New Jersey*, 517 F.3d at 582. Partial waivers are impermissible under the plain language of Section 211(f)(4).

C. EPA’s Interpretation of Section 211(f)(4) Also Is Unreasonable.

Even if the CAA’s language were not plain on its face, however, EPA’s reading of Section 211(f)(4) fails under *Chevron* “step two.” This Court will defer to EPA’s interpretation of a “silent or ambiguous” statute only if that interpretation is “based on a permissible construction of the statute.” *New York*, 443 F.3d at 884 (citation omitted). EPA’s reading of Section 211(f)(4) fails this test. Its interpretation significantly broadens the scope of EPA’s authority under the CAA, transforming the purpose of the statutory scheme as Congress designed it. And EPA’s interpretation creates other problems the Agency has identified with granting a partial E15 waiver, such as potential misfueling. For these reasons, EPA’s interpretation of Section 211(f)(4) is unworthy of any deference.

First, EPA has failed to offer a reasonable interpretation of the statute. According to EPA, “[i]n concept, * * * the combination of [the] partial waiver, with appropriate conditions, and partial retention of the substantially similar prohibition, has the same effect as when the criteria for a total waiver has been met”; that is, “the fuel or fuel additive will only be introduced into commerce for use in a manner that will not cause violations across the fleet of motor vehicles and nonroad products.” JA___ [75 FR at 68,146]. That is simply not so. EPA cannot mix and match various pieces of the statute in order to concoct a waiver scheme

found nowhere in the CAA itself. That is not statutory construction – it is statutory revision.

EPA’s interpretation also is completely inconsistent with prior agency practice. EPA has never before issued a *partial* waiver under Section 211(f)(4). The one example EPA offered in its first E15 waiver decision is inapposite. ^{6/} EPA identified a 1989 “Notice of Availability” of a “new iron-based diesel fuel additive.” 54 FR 48,311 (Nov. 22, 1989). This Notice did not, however, involve an application for a waiver under Section 211(f)(4). It also predated the 1990 Amendments; and as EPA itself recognized, the pre-1990 version of Section 211(f) *did not apply* to diesel fuel or additives. *See* JA___ [75 FR at 68,145]. Finally, even if it were true that EPA had previously interpreted Section 211(f)(4) as allowing “partial waivers,” “previous statutory violations cannot excuse the one now before the court.” *New Jersey*, 517 F.3d at 583.

Second, EPA’s waiver decision is internally inconsistent. As detailed above, EPA sought to limit the scope of the term “any” in Sections 211(f)(1) and (f)(4) by arguing that “any” applies only to given subsets of vehicles. But when describing the phrase “useful life” in its waiver decisions, EPA relies on the *expansiveness* of the language in those same Sections to argue that regulation based on anything less

^{6/} EPA’s citation of 54 FR 4,834 is incorrect. The Agency presumably meant 54 FR 48,311 – the EPA Notice issued on the cited date, November 22, 1989.

than the full “breadth of motor vehicles in the fleet” is inconsistent with the statute. JA__ [75 FR at 68,147]; *see also id.* (asserting that the prohibition in Section 211(f)(1) “equally protects all MY1975 and newer motor vehicles”). EPA reasons that construing Section 211(f)(1) to allow consideration of the effect of E15 on motor vehicles only during their “regulatory useful lives” “could require the Agency to approve waiver requests for new fuels and fuel additives even if they were clearly known to seriously degrade emission control devices or systems and cause large emissions increases in older motor vehicles, which comprise a significant percentage of the entire fleet.” *Id.* EPA describes this possibility as “*clearly contrary* to the purposes of section 211(f).” *Id.* (emphasis added).

Yet that is precisely what EPA is doing by granting a partial E15 waiver. Despite the fact that EPA has concluded that E15 is unsuitable for MY2000 and older vehicles, heavy-duty vehicles, nonroad engines and equipment, and motorcycles, EPA approved E15 for introduction into commerce. And it did so also despite the acknowledged prospect of misfueling of E15 into vehicles or engines for which it is not approved. *See* JA__-__ [*id.* at 68,097-98]. EPA nonetheless fails to offer a definitive solution to this problem in its waiver decisions. Instead, at the same time that the first partial waiver decision was published, EPA proposed a new rule establishing administrative controls to mitigate misfueling. *See* 75 FR 68,044 (Nov. 4, 2010). But the waiver decision

authorized manufacturers to introduce E15 into the marketplace immediately, provided that the manufacturers submitted, and EPA approved, a case-by-case plan for mitigating misfueling problems. *See* JA___-___ [75 FR at 68,148-49]. In both cases, EPA approved a waiver based on misfueling provisions that did not exist. In no way is this reasonable. ^{7/} EPA has arrogated to itself the authority to introduce new fuel blends without proven controls, undermining the Act’s objectives. Indeed, EPA has recognized that “[t]he discretion to grant a partial waiver includes the authority *and responsibility* for determining and imposing reasonable conditions that will allow for effective implementation of a partial waiver.” JA___ [Id. at 68,146] (emphasis added). EPA recognizes its responsibility in one breath and abrogates that responsibility in the next.

In sum, EPA’s partial waivers rely on a patchwork of different statutory provisions, portions of which were selectively plucked out of context and sewn together to support EPA’s rationale. EPA’s analysis in the waiver decisions lacks internal harmony, raises problems but fails to solve them, and uses inconsistent and

^{7/} EPA has now published a misfueling rule. Regulation to Mitigate Misfueling, <http://www.epa.gov/otaq/regs/fuels/additive/e15/mitigate-misfuel-e15.pdf> (June 23, 2011). But EPA of course could not have relied on that rule when it issued its waiver decision.

contradictory reasoning to reach a predetermined result. That is the antithesis of reasonable statutory interpretation. EPA's partial waivers should be vacated. 8/

III. THE PARTIAL WAIVERS ALSO ARE CONTRARY TO LAW BECAUSE EPA FAILED TO FOLLOW THE ACT'S MANDATORY PROCEDURAL REQUIREMENTS IN ISSUING ITS DECISIONS.

The partial waivers are invalid for yet another reason under the CAA: EPA did not follow the procedural requirements of Section 211(f)(4) when it issued its decisions. It failed to require Growth to meet its evidentiary burden under Section 211(f)(4). And it also failed to provide a meaningful opportunity for comment on the conclusions EPA drew from the DOE's Catalyst Study, which was critical to EPA's decision to grant a partial E15 waiver.

A. EPA Should Have Rejected Growth's Waiver Application Because Growth Did Not Meet Its Burden Under The Act.

Section 211(f)(4) provides, in pertinent part, that the Administrator may grant a waiver if she determines "that *the applicant has established* that such fuel or fuel additive or a specified concentration * * * will not cause or contribute to a failure of any emission control device or system * * * to achieve compliance by the vehicle or engine with the emission standards with respect to which it has been

8/ Moreover, as explained in Section IV, *infra*, even assuming that EPA has the authority to issue "partial" waivers, it failed to follow the statutory standard even within the subset of vehicles to which the "partial" E15 waiver applied, coming up with new and unprecedented standards to avoid having to recognize vehicles with emissions failures.

certified.” 42 U.S.C. § 7545(f)(4) (emphasis added). Even EPA recognized in its decision that “Section 211(f)(4) *clearly places upon the waiver applicant the burden of establishing* that its fuel or fuel additive will not cause or contribute to the failure of vehicles or engines to meet their assigned emission standards over their useful lives.” JA___ [75 FR at 68,100] (emphasis added). This has long been the Agency’s interpretation of the statute, and an interpretation that has been approved by this Court. *See supra* at 6-7; *American Methyl Corp. v. EPA*, 749 F.2d 826, 830 (D.C. Cir. 1984) (“[T]he burden of establishing that [a new fuel] meets the criteria for a valid waiver specified in section 211(f)(4), taking into account all available information, should be borne by [the applicant].”) (quoting a June 8, 1984 Letter from EPA’s General Counsel).

Despite this longstanding agency practice, EPA took a quite different approach with Growth’s Application. EPA concluded, without qualification, that “the studies and other information cited in [Growth’s] waiver request application * * * do not demonstrate that E15 is not likely to have adverse impacts on the long-term exhaust emissions (durability) of the emissions control system over the full useful life of motor vehicles.” JA___ [75 FR at 68,104]. The Agency continued, “EPA finds that the limited durability testing and other information relied upon by [Growth] is not adequate by itself to determine the long-term durability impact of

E15 on exhaust emissions control systems.” *Id.* That finding should have been the end of the matter.

But no. In an unprecedented move, EPA instead took on the burden itself to justify the E15 waiver. It coordinated its efforts with DOE to run extensive testing “on the effect E15 might have on motor vehicles after long-term use of E15.”

JA___ [*Id.* at 68,099]. The resulting Catalyst Study ultimately provided “valuable information” to EPA that formed the basis of both its waiver decisions. JA___ [*Id.* at 68,105].

The statutory scheme “clearly” places the burden on the applicant – not EPA – to prove the propriety of a waiver. JA___ [*Id.* at 68,100]. And for good reason. As explained in the next Section, the proceedings before the Agency were conducted in such a way as to preclude public comment on EPA’s interpretation of the most important evidence that EPA considered – the Catalyst Study. If Growth had been held to its burden, and if the waiver decision had primarily turned on the evidence submitted to EPA with the Application, this would not have occurred. But events unfolded otherwise, to Petitioners’ substantial prejudice.

B. EPA Failed To Provide A Meaningful Opportunity For Interested Persons To Comment On The DOE Catalyst Study.

Section 211(f)(4) of the Act requires the Administrator to receive “public notice and comment” before taking “final action to grant or deny an application submitted under this paragraph.” Yet EPA ended its public comment period in

July 2009, *see* JA___ [75 FR at 68,099], over a year before the data central to EPA’s decision – the DOE Catalyst Study – became available in September 2010, *see* JA___ [*id.* at 68,095]. In fact, some of DOE’s testing data were submitted for the record on October 12, 2010, literally the day before EPA announced its first partial waiver decision. JA___, __, __, __ [R14,014, 14,015, 14,016, 14,017]; *see also* JA___ [R14,019, EPA Technical Summary of DOE Study] (posted October 13, 2010). And additional data on MY2001-2006 vehicles were submitted after the first waiver decision was issued. JA___, __ [R14,045, 14,052]. The Agency did not, however, subsequently give public notice or reopen the comment period to accommodate discussion about that late-arriving data for either waiver decision. Despite receiving objections, EPA asserted in its waiver decisions that “[a]n additional comment period [was] neither necessary nor required by law.” JA___ [75 FR at 68,146].

EPA’s assertion conflicts with the clear mandate of the statute, rendering the notice and comment requirement of Section 211(f)(4) meaningless. This Court has held that where a statute requires notice and comment in agency proceedings, “the most critical factual material that is used to support the agency’s position on review must have been made public *in the proceeding* and exposed to refutation.”

ATA v. FAA, 169 F.3d 1, 7 (D.C. Cir. 1999) (emphasis in original). ^{9/} This is particularly true under the CAA. Section 211(f) was added as part of the 1977 Amendments to the Act. Among the “main purposes” of that set of amendments was “to insure more effective, informed public involvement in decisionmaking under the act.” H.R. Rep. No. 95-294, at 2 (1977) (Comm. on Interstate & Foreign Commerce). Congress made this purpose yet more explicit in 2007 when it added requirements for public notice and comment to Section 211(f)(4). EPA failed to allow for that “effective” and “informed public involvement” in its E15 waiver ruling.

In both of its waiver decisions, EPA repeatedly emphasized the significance and import of the DOE Catalyst Study. EPA explained in the first decision that DOE’s “testing is a *significant source of information* on the effects of E15 on the durability of motor vehicles’ emissions control systems, a key technical issue to be addressed in EPA’s waiver review.” JA___ [75 FR at 68,099] (emphasis added). Again in the second waiver decision, EPA stated that the Study provided “*critically*

^{9/} The statute at issue in *ATA v. FAA* required the FAA to “provide notice and an opportunity to air carriers * * * and other interested persons to comment on the application [by a local public airport authority to impose a passenger fee].” 169 F.3d at 6 (quoting 49 U.S.C. § 40117(c)(3)). This Court noted that “[t]his provision is similar to the notice and comment procedure for informal rulemaking under the APA,” *id.*, and so the Court relied on precedents interpreting the APA’s notice and comment procedural requirements in reaching its decision. *See id.* at 6-8.

important test data” concerning MY2001-2006 vehicles. JA___ [76 FR at 4,665] (emphasis added). In EPA’s own words, “[w]ithout the results from this test program, EPA would not have had the information necessary to properly assess the long-term exhaust emission (durability) performance of E15.” JA___ [75 FR at 68,105].

Because this vital aspect of EPA’s decision-making process was not submitted with the initial Application, interested parties were left to guess how EPA intended to use the Study or analyze its data. This is particularly problematic in the present case where EPA did not require Growth to substantiate its waiver request, as required under Section 211(f)(4). In the normal circumstance, the data justifying a waiver request would be submitted with an application and published for comment with the notice. *See Guidelines for Fuel Additive Waivers*, 43 FR 11,258, 11,259 (Mar. 17, 1978) (“All information and data which is used to support a request for a waiver should be submitted at the same time. Substantive amendments * * * may be considered to be new applications[.]”). But not so here.

In submitting the bulk of the substantiating data itself (via DOE), EPA essentially stood in the shoes of the applicant. And because it did not first issue any kind of analysis concerning the study on which it based its waiver decision, it withheld information that otherwise would have – and should have – been a critical part of a successful waiver application. The Application thus provided insufficient

notice of the data supporting the waiver, and there was effectively *no* comment period because EPA's cursory analysis was introduced only through the waiver decisions themselves.

Had EPA provided Petitioners a meaningful opportunity to provide comment, Petitioners would have raised the many substantial challenges to EPA's interpretation of the DOE Catalyst Study that are discussed in Section IV, *infra*. In this way, Petitioners "did not have a fair opportunity to comment" on the DOE Catalyst Study. *See ATA*, 169 F.3d at 8.

IV. EPA'S ACTIONS WERE ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE CONTRARY TO LAW.

Even aside from the significant legal and procedural errors the Agency committed in arriving at its "partial waiver" decisions, the data on which EPA relied and EPA's use of those data were deficient in multiple respects. These deficiencies independently render EPA's decision arbitrary and capricious.

A. The Data On Which EPA Relied Failed To Justify The "Partial Waiver" Decisions.

EPA's partial waiver decisions were the product of arbitrary and capricious decisionmaking because the data on which EPA relied wholly failed to justify the "partial waivers."

First, EPA drew firm conclusions regarding all vehicle and engine types covered by the partial waivers without data to back up those conclusions. The

DOE Catalyst Study critical to EPA's conclusions included just one test of many that commenters had identified as vital components of any mid-level ethanol blend testing program. *See supra* at 10-11. *See also* GAO, *Biofuels* at 31-35, App. II (detailing the various federally funded tests evaluating the effects of mid-level ethanol blends). For instance, CRC presented a comprehensive eight-part testing program at a June 2008 meeting of stakeholders. (For an updated version of this presentation, see JA___ [R13,998.1, CRC Mid-level Ethanol Program Summary].) EPA's representations at that time concerning the testing that it planned to conduct were consistent with CRC's recommendations. *See* JA___ [R2,559.2, ALLSAFE cmt. (Ex. I)]. But EPA did not follow through on the recommended broader suite of testing, nor did it explain its decision not to conduct those additional tests.

Moreover, the DOE Catalyst Study used just one vehicle of each model type per year for each mileage accumulation fuel, regardless of the type of emissions-control system. JA___ [76 FR at 4,670]. But EPA's own in-use testing regulations do not permit test results using only one vehicle for each mileage accumulation fuel per model year. 40 C.F.R. § 86.1845-04(b)(3)-(c)(3). In-use compliance testing requires at least four vehicles for large-volume manufacturers. *Id.* at Table S04-07. Thus, the robust testing procedures required to prove that vehicle models and engines *meet* EPA standards were relaxed for purposes of assessing whether

E15 will *cause* violation of those standards. The fact that EPA failed to follow its own guidelines is a hallmark of arbitrary and capricious decisionmaking.

EPA also concluded that NO_x tailpipe emissions are expected to increase by 5 to 10% with use of E15 in both “newer Tier 2 motor vehicles as well as older motor vehicles.” JA__ [75 FR at 68,111]. ^{10/} EPA concluded, however, that this increase should not be expected to result in violations of the applicable exhaust emissions standards because “Tier 2 motor vehicles generally have a significant compliance margin at the time of certification and later on in-use * * * that should allow them to meet their emission standards even if they experience the immediate NO_x [emission] increases from E15 when compared to E10.” JA___ [*Id.* at 68,096]. In other words, E15 will cause NO_x emissions to go up, but in EPA’s view, the relevant vehicle models “generally” have low enough emissions to still meet applicable standards.

Nowhere in the record does EPA provide data or an analysis that supports this sweeping conclusion. For example, EPA might have provided a list of relevant vehicle models, corresponding certification data, and a statistical analysis of whether the data for each affected vehicle model, in fact, provide a sufficient margin to accommodate an increase in NO_x emissions. No such analysis was

^{10/} Tier 2 vehicles are those that meet the heightened emissions standards promulgated by EPA in 2000. *See* 65 FR 6,698 (Feb. 10, 2000).

provided. EPA also might have shown how its more limited data on compliance margins could reliably be extrapolated to all vehicle models covered by the partial waivers. Even that sort of analysis was not provided. The best EPA can do is: (1) cite a study indicating that the *average* compliance margin for affected vehicle models is 50%; (2) offer non-specific information from EPA's in-use verification program; and (3) reiterate the limited emissions testing results provided by the DOE Catalyst Study. JA__-__ [*Id.* at 68,111-12]. ^{11/} At best, this information supports the conclusion that *certain* vehicle models, or perhaps certain vehicles within a vehicle type, will be able to accommodate the predicted NOx emissions increase. It in no way supports a conclusion that *all* vehicle models covered by the partial waivers will continue to comply with applicable exhaust standards. And despite EPA's occasional elision over the statute's actual requirements, *see, e.g.*, JA___ [*id.* at 68,112] ("the immediate exhaust emissions effects by themselves would not cause motor vehicles to exceed their exhaust standards"); JA___ [*id.* at 68,118] ("any increase in permeation due to E15 should not be sufficient to cause Tier 2 motor vehicles to exceed their evaporative emission standards"); JA___ [76 FR at 4,672] ("[t]he immediate exhaust emission impacts of interest are any that are caused by E15"), the statute requires only that a fuel or fuel additive cause "*or*

^{11/} Neither the study cited nor the information in the in-use verification program were part of Growth's Waiver Application. Nor were they part of EPA's Federal Register Notice concerning the Application.

contribute to” a failure of any emissions-control device or system. There is no statutory requirement that E15, by itself, consume the entirety of any compliance margin and cause a violation.

Second, the few vehicle models selected for testing were chosen in a manner that leaves key gaps in the actual emissions testing data. EPA asserts that “several relevant criteria were used to determine the motor vehicle models selected” for the DOE Catalyst Study, including: (1) whether the vehicle was Tier 2-compliant; (2) manufacturer and sales/registration volumes; and (3) whether or not the vehicle applies learned fuel trim at wide-open throttle. JA____-__ [75 FR at 68,105-06].^{12/} But EPA makes it clear that the overall purpose of the study was to “evaluate the actual impacts of E15 on * * * Tier 2 motor vehicle models from *high sales volume models* of the various light-duty motor vehicle manufacturers.” JA__ [*Id.* at 68,105] (emphasis added).

Yet, the record demonstrates that EPA was well aware that certain vehicle models have emissions-control systems that are particularly susceptible to damage from higher-level ethanol blends. *See* JA____ [*Id.* at 68,096]; JA____ [R14,036, DOE, Effect of Intermediate Ethanol Blends on Legacy Vehicles and Small Non-Road Engines, Report 1– Updated (Feb. 2009)]. For example, two studies

^{12/} *See infra* at 48 n.15 for an explanation of “learned fuel trim.”

identified early on by commenters 13/ – the CRC Project No. E-87-1 Mid-Level Ethanol Blends Catalyst Durability Study Screening (June 2009), JA___ [R2,553.1 at 14], and the Australian Orbital Study, *see* JA___ [R2,559.1 at 22-23] – revealed that certain vehicle models and engine types are much more likely to experience significant emissions increases when fueled with higher level ethanol blends than other vehicle and engine types with more advanced engine controls. 14/ These tests revealed that engines and vehicles that do not use “learned fuel trim” when using “open loop” air-to-fuel ratio controls 15/ would be much more likely to expose the catalyst to high temperatures that can harm the catalyst and, as a result,

13/ *See, e.g.*, JA___ [R2,551, Alliance cmt.]; JA___ [R2,559.1, ALLSAFE cmt.].

14/ *See, e.g.*, JA___ [R2,553.1, CRC E-87-1 Study, at 7] (“The Hyundai Accent was selected because it is a vehicle that displayed catalyst performance degradation on E20 in Australia that is also available in the US.”).

15/ As EPA explains, the durability of the catalyst used to control vehicle emissions “is highly dependent on temperature.” JA___ [75 FR at 68,103]. “Catalysts that exceed temperature thresholds will deteriorate at rates higher than expected, compromising the motor vehicles’ ability to meet the required emission standards over their [full useful life].” *Id.* Most vehicle engines are equipped with “closed loop” engine controls, which detect the amount of oxygen in the exhaust and use that information to adjust the air to fuel ratio in the engine to assure “peak catalyst efficiency.” JA___ [*Id.* at 68,105]. Open loop control occurs when the engine controller is not correcting the air-fuel ratio because the oxygen sensor is not supplying the data required to “close” the control loop. It typically happens when the vehicle is operating at higher throttle positions – precisely the time when uncompensated errors due to excessive ethanol can do the most damage. Engines with “learned fuel trim” can compensate for some of the potential problems associated with operation during periods of “open loop control.”

cause increased emissions. These events lead to significantly higher rates of performance deterioration and thus increased emissions. Although commenters urged EPA to have DOE target such vehicles in the Catalyst Study, only a few of the susceptible vehicle models were included in DOE's testing – those with high sales volumes. *See* JA___ [75 FR at 68,102] (summarizing comments); JA___-___ [*Id.* at 68,105-06] (describing vehicle selection for DOE testing).

Thus, even though a fuel's contribution to the “failure” of vehicles and engines is the essence of the Section 211(f)(4) determination, EPA lacks actual emissions testing data on some of the vehicle models proven to be most likely to suffer failures – lower sales volume vehicle models with open loop air-to-fuel ratio controls. EPA's failure to investigate this class of vehicle models was arbitrary and capricious.

Third, despite testing fewer than 20 vehicle models in support of the first waiver decision, testing only eight in support of its second waiver decision, and *not* testing all vehicle models known to have a propensity to fail when using ethanol-containing fuels, DOE's tests *still* produced failures using E15. *See* JA___ [76 FR at 4,671 (Table IV.A-2 & note)]. One vehicle tested, the MY2000 Honda Accord, failed to meet emission limits for NMOG. *Id.* (Table IV.A-2). ^{16/} EPA could not

^{16/} The same vehicle failed using E0. JA___ [76 FR at 4,672 (Table IV.A.3)]. EPA asserts that the failure of the E15 vehicle should be dismissed because “emissions of the E0 counterpart motor vehicle also exceeded the standard after

dismiss that test result as not statistically significant, because it did not test a statistically significant number of vehicles in support of its second “partial waiver” decision. *See* JA___ [*Id.* at 4,666] (“DOE’s [MY 2001-2006] test fleet does not include enough vehicles to allow the same statistical analysis conducted for MY2007 and newer light-duty motor vehicles”).

EPA also *averaged* the test results for the 2002 Nissan Frontier for carbon monoxide. EPA asserted that the “*average* of composites met standards, but one test result exceeded standard[s]” for that vehicle. JA___ [*Id.* at 4,671 (Table IV.A-2 & note)] (emphasis added). But the statute is absolute. If “any” emissions-control system failed, as it did with one test result, the Administrator cannot reason away a clear emissions failure though “averaging” of multiple tests for a given vehicle. *See also infra* at 53-54 (discussing “averaging” technique and its inconsistency with agency practice).

EPA also ignored data in the record demonstrating additional failures. The preliminary test data from CRC as of July 2009 showed that two vehicles out of a small sample set of 25 had failed their emissions-control system tests. JA___

only 25,000 miles of aging.” JA___ [*Id.* at 4,670]. But this summary assertion provides no basis for dismissing the E15 test results. EPA has not explained *why* the vehicles failed; it therefore has provided no grounds for concluding that the failure in the E15 vehicle is not due to the fuel’s ethanol content.

[R2,553.1, CRC E-87-1 Study, at 14]. The Alliance submitted this data in their comments. JA___ [R2,553]. ^{17/} EPA did not acknowledge those failures.

EPA also arbitrarily relied on flawed data from testing of the 2006 Nissan Quest. On the one hand, EPA explained that the “standard road cycle (SRC) was used for all aging” in the DOE Catalyst Study because “[t]his is a recommended EPA procedure that the manufacturers regularly use for verifying full useful life emissions capability.” JA__ [75 FR at 68,107]. On the other hand, EPA observes that “[t]he Nissan Quest aging was changed part way through aging to a series of steady speed laps on the test track at TRC at DOE’s direction to accelerate completion of this motor vehicle set.” *Id.* EPA provides no explanation as to why the modified test protocol used for the Quest – a protocol inconsistent with EPA’s own durability test procedures – produced data that are useful in assessing the potential impacts of fueling the Quest with E15. EPA’s decision to rely on these data was patently arbitrary.

In sum, even assuming it was appropriate for *EPA* to shoulder the burden Section 211(f)(4) places on a waiver applicant, the Agency should have conducted the robust testing that it indicated was necessary in the summer of 2008 to evaluate

^{17/} API also continued to seek to supplement the record even after the public-comment period closed with further updates and information about CRC’s expansive test results. *See* JA___, __, __, __, __, __ [R13,993, 14,003, 14,008, 14,010, 14,048, 14,053].

the effects of E15. It did not. EPA should have aged and tested multiple vehicles of each model in compliance with its in-use testing protocol. It did not. EPA should have tested vehicle models that it had reason to believe were particularly susceptible to damage from higher ethanol blends based on industry data. It did not. EPA should have confronted the failure of emissions-control systems in the data on which it relied. It did not. And EPA should have justified its decision to use the Quest test results. It did not.

Thus, even assuming EPA has the authority to issue “partial” waiver decisions, the evidence demonstrated that vehicles within the *approved* group failed or would fail emissions tests; indeed, EPA itself concluded that violations of evaporative emission standards would occur. Yet EPA nevertheless granted the partial waiver. This is the very definition of arbitrary and capricious.

B. The Standard EPA Used For Recognizing Vehicle Emissions Failures Is Inconsistent With The Standard EPA Uses In Vehicle Certification.

The DOE Catalyst Study plainly revealed that E15 *would* cause emissions failures in certain vehicles. But EPA manipulated that data by “averag[ing]” the test results as to models as a group so that these failures disappeared. *See supra* at 50-51; JA___ [76 FR at 4,671 (Table IV.A-2 note)]. EPA’s use of averaging to dismiss admitted test failures was arbitrary and capricious, because it did not take into account the essential element of the problem – failures of emissions-control

systems on the applicable vehicles. *See MVMA v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

And, once again, EPA failed to follow its own regulations. Test-averaging is inconsistent with EPA’s regulations for vehicle certification. EPA does not allow manufacturers to average results for certification testing; the Agency requires “every test vehicle” to meet its emissions standards, including the full useful life durability standards. 40 C.F.R. § 86.1841-01(b)-(d). Yet EPA took a markedly different, and deficient, tack here, testing only two vehicles per test group and claiming compliance with emission standards. ^{18/} It was arbitrary and capricious for the Agency to grant a waiver in the face of the test data. And it was completely contrary to Section 211(f)(4), which precludes waiver for a new fuel or fuel additive that causes or contributes to “any” failure.

^{18/} To be sure, EPA’s in-use and confirmatory testing regulations *do* allow averaging. 40 C.F.R. §§ 86.1845-04, 86.1846(b). But the DOE Catalyst Study fails to follow the requirements of these regulations also. For in-use testing, emissions from *four vehicles* are averaged; confirmatory testing is triggered if emissions exceed 1.3 times the standard. *Id.* § 86.1846(b)(1). EPA’s own certification regulations state that failure to comply with in-use and confirmatory testing requirements – including testing the proper number of vehicles – is deemed failure to comply with a condition of certification and would void a manufacturer’s certificate of conformity. *Id.* §§ 86.1848-10(c)(5), 86.1848-01(c)(5).

C. EPA Cannot “Offset” Actual Emissions Violations With Alleged Emissions Reductions.

EPA acknowledged that E15 would likely contribute to emissions violations. *See* JA___, ___ [76 FR at 4,663, 4,672]. As explained in Section A, *supra*, that should have been the beginning and the end of the analysis; E15 simply failed to meet the standard for a waiver. But instead, EPA once again adopted new criteria for recognizing emissions violations, claiming that other emissions-control gains would mitigate anticipated emissions violations.

First, EPA concluded that, as compared to E10, E15 had lower evaporative emissions. ^{19/} It stated that vehicles “should have somewhat lower evaporative emissions when operated on 9.0 psi [pounds per square inch] E15 than when operated on currently available in-use fuel.” JA___ [*Id.* at 4,665]. ^{20/} As a result,

^{19/} “Evaporative emissions” – hydrocarbon pollutants that escape into the air through fuel evaporation – can occur in several ways, including “diurnal” evaporation as the temperature rises during the day, and “running losses,” where a “hot engine and exhaust system can vaporize gasoline when the car is running.” EPA, Automobile Emissions: An Overview, *available at* <http://www.epa.gov/oms/consumer/05-autos.pdf>. Tailpipe, or “exhaust,” emissions are as they sound: emissions from the exhaust pipe of a vehicle, including carbon monoxide, carbon dioxide, nitrogen oxides, and hydrocarbons. *Id.*

^{20/} EPA conveniently determined that E10 was the proper comparison for evaporative emissions, apparently because EPA additionally determined that a 1.0 psi waiver applicable to gasoline-ethanol blends (such as E10) is not available to E15. *See* JA___, ___ [76 FR at 4,665, 4,675]. Section 211 of the CAA permits “fuel blends containing gasoline and 10 percent denatured anhydrous ethanol” to exceed the standard Reid vapor pressure limitation of 9.0 psi by 1.0 psi if such blends meet certain conditions. 42 U.S.C. § 7545(h)(4).

EPA concluded that *total* emissions would be reduced by the use of E15 in motor vehicles. Thus, EPA reasoned that the environmental benefit of moving from E10 to E15 justified granting the partial waivers, notwithstanding its conclusion that violations of evaporative emissions standards would occur. EPA’s quasi-Solomonic “offset” approach is foreign to the governing statute.

Section 211(f)(4) requires that all comparisons be made to E0 – gasoline with no ethanol in it, the fuel in use in 1974 when the statute first was passed. *See* JA___ [76 FR at 4,665 n.11]. ^{21/} If the evaporative emissions from E15 were compared to the evaporative emissions from E0, as required by the statute, EPA could not have claimed *any* reduction in evaporative emissions. There would have been no “offset.” EPA cannot excuse a violation of its own emissions limitations on the basis of claimed evaporative emissions reductions – especially when, in comparison to the correct baseline fuel, those reductions are fictional.

Second, recognizing the likelihood of some increased evaporative emissions, EPA created from whole cloth a new standard to govern emissions increases. EPA claimed that it could grant a waiver under Section 211(f)(4) so long as the new fuel or fuel additive did not “result in *a significant increase* in violations of the vehicle emissions standards.” JA___ [76 FR at 4,665 n.11] (emphasis added). Moreover,

^{21/} EPA did compare *tailpipe* emissions to E0. But it did not explain the different treatment for evaporative and tailpipe emissions.

EPA stated that “[e]ven if [it] were to adopt a more stringent test for waiver decisions, it would not apply such a test in these circumstances, where the actual environmental impact of the fuel is neutral or positive.” *Id.* In other words, according to EPA, where overall public policy is benefitted by allowing an increase in violations of emissions standards, EPA can grant a waiver despite that increase.

This is flatly prohibited by the statute. Section 211(f)(4) precludes a waiver for new fuels or fuel additives that “cause or contribute to a failure of any emission control device or system.” As explained in Section II, *supra*, “any” means any. And “contribute to” implies something less than “cause” – a point that EPA’s various offsetting and averaging manipulations wholly fail to take into consideration. EPA’s refusal to apply the appropriate statutory standard to the limited data that it did receive must be disallowed.

D. EPA’s “Misfueling Mitigation Conditions” Might Not Prevent Misfueling.

Misfueling is yet another significant problem that EPA acknowledged in its waiver decisions. Although EPA imposes certain conditions on the partial waiver to mitigate misfueling – fuel pump dispenser labeling, a survey of fuel pump labeling and fuel samples, proper documentation of ethanol content on product transfer documents, and customer outreach, JA__-__ [76 FR at 68,148-49] –

serious concerns still remain that such mitigation measures do not ameliorate this deficiency.

As far back as its Notice inviting comments on the Growth Application, EPA conceded that misfueling was a significant prospect, and that it had occurred in similar circumstances in the past. JA ___ [74 FR at 18,229]. EPA also “acknowledge[d] that the issue of misfueling would be challenging in a situation where a conditional waiver is granted.” JA ___ [*Id.* at 18,230]. And EPA “recognize[d] that there may be legal and practical limitations on what a fuel manufacturer may be required or able to do to ensure compliance with the conditions of the waiver, including preventing misfueling.” JA ___ [*Id.* at 18,229]. ^{22/} Then again in its waiver decisions, EPA acknowledged that “[t]he potential for misfueling incidents may exist for several reasons,” including “when E15 costs less than E10 or E0,” and in those situations where it is “more difficult to find fuels other than E15.” JA ___ [75 FR at 68,149].

EPA sought to mitigate the potential for misfueling (at least until the promulgation of a separate misfueling mitigation regulation) by imposing certain conditions on those seeking to introduce E15 into commerce. *See* JA ___ [*id.* at

^{22/} Courts have held that an agency action is arbitrary and capricious if it is unenforceable, as the misfueling conditions clearly will be, insofar as compelling gasoline consumers to use the proper fuel. *New York v. EPA*, 413 F.3d 3, 35 (2d Cir. 2005).

68,146]. But these conditions do not apply to anyone other than fuel and fuel additive manufacturers, as EPA recognized. *Id.* This means that the conditions that EPA claims will initially prevent misfueling do not “apply directly to various downstream parties, such as a retailer who is not also a fuel or fuel additive manufacturer.” *Id.*

And what is more, the conditions that EPA does impose, such as “fuel pump dispenser labeling” and “public outreach,” JA___ [*id.* at 68,148], have been shown to be ineffective in preventing misfueling in the past. JA___ [74 FR at 18,229] (acknowledging that customers have in the past engaged in intentional misfueling despite labeling); JA___ [R2,559.1 at 2-3] (documenting the same). ^{23/} Multiple commenters, including the U.S. Coast Guard, NMMA, ALLSAFE, OPEI, and the Alliance, all explained that there could be a likelihood of engine and vehicle emission-control system failures due to the use of E15, and that merely putting precautionary language on a label affixed to a gasoline pump might not prevent misfueling, which could lead to these serious problems. JA___, __, __, __, ___ [R2,503.1, 2,679.1, 2,559.1, 14,011.1, 2,551.1].

^{23/} EPA also imposed two other conditions, a “fuel pump labeling and fuel sample survey” and “proper documentation of ethanol content on product transfer documents.” JA___ [75 FR at 68,148]. Neither of those is likely to prevent customers from misfueling their vehicles, boats, or non-road engines.

Therefore, the conditions that EPA imposes on the partial E15 waiver are potentially ineffective in preventing misfueling. Because the prevention of misfueling is necessary to “allow for effective implementation of a partial waiver,” *see* JA___ [75 FR at 68,146], EPA’s decision to permit such mitigation measures – while at the same time allowing the introduction of E15 into commerce – renders the partial E15 waiver arbitrary, capricious, an abuse of discretion, and contrary to law.

CONCLUSION

The approaching ethanol “blend wall,” as some call it, is a public-policy problem. It is far from insurmountable, however; the EPA Administrator may, among other things, waive renewable fuel volume goals in certain circumstances. But what the Administrator may *not* do is approve an increased ethanol presence in gasoline after a shoddy process, based on incomplete science, because the renewable fuels mandate looms. EPA’s “partial waiver” is legally and factually unjustified.

For the foregoing reasons, Petitioners respectfully request that the Court grant their consolidated petitions for review and vacate the EPA’s two E15 waiver decisions.

Respectfully submitted,

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Dated: July 13, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,971 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July 2011, I filed the foregoing Brief for Petitioners through the CM/ECF system, which will send a notice of filing to all registered CM/ECF users. I also caused to be delivered to the Court by messenger five copies of the Brief, pursuant to Circuit Rule 31(b). I further certify that copies of the Brief were sent via first-class, postage-prepaid U.S. mail to the following:

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