No. 19-835

In the Supreme Court of the United States

VALERO ENERGY CORPORATION, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Clean Air Act, 42 U.S.C. 7545(*o*)(3)(B)(ii)(I), requires the Environmental Protection Agency (EPA) to reevaluate which regulated entities must comply with the Renewable Fuel Standard program as part of every annual rulemaking in which the agency establishes the following year's volumetric targets for the sale and introduction of renewable fuels.

2. Whether EPA acted arbitrarily and capriciously in conducting a separate proceeding to consider petitioners' request to revise the agency's regulation designating which regulated entities must comply with the Renewable Fuel Standard program, rather than considering that request in the course of its annual volumetric rulemakings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

Statutes and regulation—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals in *Alon Refining Krotz Springs, Inc.* v. *EPA* and *Coffeyville Resources Refining & Marketing, LLC* v. *EPA* (Pet. App. 1a-90a) is reported at 936 F.3d 628. The opinion of the court of appeals in *American Fuel & Petrochemical Manufacturers* v. *EPA* (Pet. App. 91a-155a) is reported at 937 F.3d 559.

JURISDICTION

The judgment of the court of appeals in *Alon* v. *EPA* and *Coffeyville* v. *EPA* was entered on August 30, 2019. The judgment of the court of appeals in *American Fuel & Petrochemical Manufacturers* v. *EPA* was entered on September 6, 2019. On November 19, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 30,

2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves challenges to three decisions of the Environmental Protection Agency (EPA) concerning the Renewable Fuel Standard program established by the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.* Under that program, EPA is required each year to issue a rule setting the volume of renewable fuels that must be contained in transportation fuel that is sold or introduced into commerce in the United States in the following year. In conducting the 2017 and 2018 annual rulemakings, EPA declined to reconsider its longstanding "point of obligation" rule, which identifies the entities that must comply with the renewable-fuels requirements. In a separate proceeding, EPA denied several petitions for a rulemaking to reevaluate the same point-of-obligation rule, and explained why the existing rule was appropriate. The court of appeals denied petitions for review challenging the two annual volumetric rules and EPA's denial of the rulemaking petitions.

1. a. In 2007, Congress enacted the Renewable Fuel Standard program as an amendment to the CAA, see Energy Independence and Security Act of 2007, Pub. L. No. 110-140, Tit. II, Subtit. A, 121 Stat. 1519 (42 U.S.C. 7545(*o*)), in an effort "[t]o move the United States toward greater energy independence" and "increase the production of clean renewable fuels." 121 Stat. 1492. Renewable fuel is fuel made from renewable biomass (such as corn) that is "used to replace or reduce the quantity of fossil fuel present in a transportation fuel" for use in motor vehicles, motor vehicle engines, or other non-ocean-going vehicles or engines. 42 U.S.C. 7545(*o*)(1)(J).

As amended, the CAA requires EPA to promulgate regulations to "ensure that," for each calendar year, "transportation fuel sold or introduced into commerce in the United States" contains at least certain "applicable volume[s] of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel." 42 U.S.C. 7545(*o*)(2)(A)(i). The Act states that those regulations "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements" of the renewable-fuels program are met. 42 U.S.C. 7545(*o*)(2)(A)(iii)(I).

The CAA itself sets the annual volume targets for each year through 2012 for biomass-based diesel fuel, and through 2022 for other types of renewable fuel. 42 U.S.C. 7545(*o*)(2)(B)(i); see 42 U.S.C. 7545(*o*)(7)(A) and (D)(i) (authorizing EPA reductions in certain circumstances). For later years, EPA is required to determine the applicable volumes for each renewable-fuel category, in coordination with the Departments of Energy and Agriculture, "based on a review of the implementation of the program during calendar years" in which the volume targets are specified in the Act and on "analysis of" several other statutory criteria. 42 U.S.C. 7545(*o*)(2)(B)(ii).

To meet the annual volume targets, EPA must undertake annual rulemakings to determine the "renewable fuel obligation" for the following year. 42 U.S.C. 7545(*o*)(3)(B)(i). No later than October 31 of each year, the Administrator of the Energy Information Administration must supply the Administrator of EPA "an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States." 42 U.S.C.

7545(*o*)(3)(A). No later than November 30, EPA must "determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation." 42 U.S.C. 7545(*o*)(3)(B)(i).

Under the CAA, the renewable-fuel obligation "shall" (I) "be applicable to refineries, blenders, and importers, as appropriate"; (II) "be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States"; and (III) "consist of a single applicable percentage" for each type of renewable fuel "that applies to all categories of persons" that EPA has determined under subclause (I) should be subject to the renewable-fuel obligation. 42 U.S.C. 7545(*o*)(3)(B)(ii). The percentage standards set in each annual rule allow regulated entities to determine their renewable-fuel requirements for the upcoming year.

b. In a 2007 rulemaking, EPA first identified the entities that would be required to comply with the renewable-fuel obligation (referred to as "obligated parties"). See 72 Fed. Reg. 23,900, 23,924, 23,994 (May 1, 2007). In that rule, EPA identified refineries and importers of gasoline and diesel as the "appropriate" obligated parties. *Ibid.* In 2010, EPA reexamined and reaffirmed that approach when it promulgated regulations implementing amendments to the renewable-fuels program. 75 Fed. Reg. 14,670, 14,722, 14,867 (Mar. 26, 2010); see 40 C.F.R. 80.1406(a)(1). This regulation is commonly referred to as the "point of obligation" rule. No party challenged the point-of-obligation rule in 2007 or in 2010. See Pet. App. 11a-12a.

2. Petitioners challenge three subsequent actions taken by EPA in implementing the renewable-fuels program.

a. Petitioners challenge the 2017 and the 2018 annual volumetric rules. See Pet. App. 189a-355a (2017 Rule); *id.* at 552a-670a (2018 Rule). These rules established, for the respective years, the applicable volume requirements and percentage standards for each type of renewable fuel under the program. See *id.* at 198a, 209a-216a (2017 Rule); *id.* at 560a, 571a-579a (2018 Rule). EPA noted in each rulemaking that it had "received comments requesting that [it] change the point of obligation in the [renewable-fuels] program." *Id.* at 187a; see *id.* at 551a. Each time, EPA explained that identification of the appropriate obligated parties was "beyond the scope" of the annual volumetric rulemaking, and that the agency accordingly would not address the topic in those proceedings. *Id.* at 187a, 551a.

b. Petitioners also challenge EPA's 2017 denial of petitions seeking a rulemaking to revisit the point-of-obligation rule. In 2016, a number of obligated parties, including petitioners, filed petitions asking EPA to revise the rule. See Pet. App. 356a-357a. In November 2016, EPA proposed to deny these petitions and invited comments on its proposal. See *id.* at 358a. In November 2017, after receiving and reviewing more than 18,000 comments, the agency published an 85-page decision document denying the petitions. *Id.* at 356a-530a. EPA determined that a revision of the point-of-obligation rule would not result in net benefits to the renewable-fuels program and that, even if there were a marginal net benefit, the disruptive effects of such a change in the program, the fuels marketplace, and the long-settled expectations of the participants would still warrant denial. *Id.* at 356a-361a.

EPA explained that changing the point of obligation would not increase, and might decrease, the production

or use of renewable fuels. Pet. App. 458a-486a. The agency acknowledged a shortfall in one type of renewable fuel called cellulosic biofuel. *Id.* at 386a-387a. EPA concluded, however, that the shortfall in this fuel resulted from challenges in the "current research, development, and commercialization" of cellulosic biofuel. *Id.* at 483a. The agency found that changing the point of obligation to encompass new entities would not address any of these challenges. *Id.* at 487a-489a. By contrast, production of other renewable fuels had increased significantly and was "projected to meet or exceed the statutory volumes." *Id.* at 385a.

EPA also found that, contrary to petitioners' comments, the point-of-obligation rule did not disproportionately impact any particular group of refineries or provide windfall profits to unobligated blenders. Pet. App. 398a-419a. Based on the agency's own analysis and on independent third-party studies, EPA concluded that all petroleum refineries were generally able to charge higher fuel prices and thereby recover the costs of complying with the program. *Id.* at 410a-411a. The agency found that petitioners' contention regarding purported windfall profits "ignore[d] costs" that unobligated blenders incurred. *Id.* at 412a.

EPA determined that moving the point of obligation to encompass blenders would have the counterproductive effects of greatly increasing the number of obligated parties and the complexity of the renewable-fuels program. Pet. App. 496a-525a. EPA observed that many blenders are "very small entities, including retail station owners" that "may not have the resources or expertise to comply" with program requirements. *Id.* at 509a. It further determined that imposing the renewable-fuel obligations on those entities "could lead to increased

overall noncompliance with [program] requirements" and "place greater strain on [the agency's] limited resources to ensure compliance and conduct program oversight." *Id.* at 509a, 511a.

Finally, EPA found that changing the point of obligation would not increase energy security. Pet. App. 487a-496a. Some commenters had asserted that the current point of obligation threatened the "viability of some refineries," increased domestic fuel costs, and stimulated demand for foreign biofuels. *Id.* at 487a. But after examining the data submitted by the commenters and other publicly available data, the agency found no indication of general "hardship on the part of the US refining industry" and an "insufficient factual basis" for the commenters' claims. *Id.* at 487a, 495a.

3. In two published opinions, the court of appeals denied the petitions for review challenging the 2017 Rule, the denial of the rulemaking petitions to revise the point-of-obligation rule, and the 2018 Rule.

a. On August 30, 2019, the court of appeals denied the petitions for review challenging the 2017 Rule and EPA's denial of the rulemaking petitions. Pet. App. 1a-90a.

i. With respect to the 2017 Rule, petitioners argued that 42 U.S.C. 7545(*o*)(3)(B)(ii)(I), which directs EPA to establish annual renewable-fuel obligations that apply "to refineries, blenders, and importers, as appropriate," required EPA to reconsider the point-of-obligation rule as part of every annual volumetric rulemaking proceeding. See Pet. App. 44a-45a. The court of appeals rejected that contention. *Id.* at 44a-55a. The court observed that the statute "does not specify when or in what context EPA must make its appropriateness determination." *Id.* at 46a. The court further explained

that "[t]he term 'appropriate' 'naturally and traditionally includes consideration of all the relevant factors,'" but it "does not dictate *when* that consideration must be made." *Ibid.* (quoting *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015)). The court construed the term as instead affording EPA "broad policy discretion" to determine the best means for addressing the question. *Ibid.* (citing *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2448-2449 (2019) (Kavanaugh, J., concurring in the judgment)). It held that EPA had "reasonably exercised [that] discretion, and explained its decision, to address the point of obligation issue in a separate proceeding from its annual volumetric rulemaking." *Ibid.*

The court of appeals found support for EPA's approach in the CAA's structure and purposes. The court explained that the Renewable Fuels Standard program "contains not only 'annual' volumetric determinations, but also a slew of compliance provisions that are not annually redetermined." Pet. App. 50a (citation omitted). The point of obligation, it added, "is the foundational 'compliance provision' of the entire renewable fuels program." *Ibid.* The court explained that "[i]t would be strange indeed if Congress required EPA, as it went about its annual quantitative standard-setting duties, also to rethink a choice so basic to the RFS program's architecture." *Id.* at 51a. The court found it implausible "that Congress meant EPA to consider uprooting the baseline of the RFS program every year." *Id.* at 52a.

Finally, the court of appeals concluded that EPA's approach comported with "basic principles of administrative law," under which, as a general matter, the "choice between various procedural channels lies within the 'informed discretion of the administrative agency.'" Pet. App. 53a-54a (quoting *SEC* v. *Chenery Corp.*, 332 U.S.

194, 203 (1947)). That discretion, the court explained, "properly includes judgments about the scope of rulemakings and when to relegate ancillary issues to separate proceedings." *Id.* at 54a. The court held that EPA had acted reasonably in reading the term "as appropriate" in Section 7545(*o*)(3)(B)(ii)(I) to leave "undisturbed these background norms of broad but reviewable procedural discretion." *Ibid.*

The court of appeals noted that its interpretation of the CAA did not give the agency "limitless and unreviewable discretion." Pet. App. 54a. Rather, the court explained that "EPA's determination as to whether it is 'appropriate' to reconsider the point of obligation" in an annual rulemaking "is reviewable for abuse of discretion." *Ibid.* The court held that EPA had not abused its discretion here, particularly given the "separate, contemporaneous proceeding" in which it had considered "whether to change the point of obligation rule." *Ibid.*

ii. The court of appeals also denied the challenge to EPA's decision not to revise the point-of-obligation rule through a separate rulemaking. Pet. App. 32a-42a. The court observed that its review of an agency's denial of a rulemaking petition is "extremely limited" and "highly deferential." *Id.* at 32a (citation omitted). It concluded that EPA's 85-page decision denying the rulemaking petitions here had "considered the 'information currently before' it" and had "wrestl[ed] with the petitioners' claims" with sufficient "thoroughness and reasonableness." *Ibid.* (citation omitted).

The court of appeals specifically addressed petitioners' contention that "the current point of obligation misaligns incentives," thereby threatening the viability of refineries and "feed[ing] market volatility." Pet.

App. 33a. The court held that EPA had "reasonably explained why, in its view, there is no misalignment in the RFS program." *Ibid.* The court also upheld, as reasonable, EPA's conclusion that refineries can generally use downstream fuel sales to recover their costs of compliance with program requirements. *Id.* at 35a-36a. The court criticized petitioners for "plucking snippets from the [agency's] denial" to allege inconsistencies that the omitted details resolved. *Id.* at 36a; see *id.* at 36a-41a. It also found that EPA had acted reasonably in expressing concern about the uncertainty that would be injected into the renewable-fuels market by "overhauling a foundational element of the [renewable-fuels] program." *Id.* at 41a.

b. Judge Williams concurred in part and concurred in the judgment. Pet. App. 73a-90a. In his view, Section 7545(*o*)(3)(B)(ii)(I) unambiguously requires EPA to reconsider the point-of-obligation issue as part of each annual volumetric rulemaking. *Id.* at 76a. He acknowledged, however, the "substantial reliance interests" implicated by EPA's longstanding rule. *Id.* at 87a. He accordingly suggested that, "in the absence of significantly changed circumstances or a compelling new analysis," EPA could "make rather short work" of the analysis that he thought was required. *Ibid.* Despite his view that the CAA requires an annual point-of-obligation assessment, Judge Williams concurred in the denial of the petitions for review of both the 2017 Rule and the denial of the rulemaking petitions. He concluded that the agency had satisfied the relevant statutory requirement because, roughly contemporaneously with the 2017 Rule, EPA had adequately explained in its denial of the rulemaking petitions "why it was not 'appropriate' * * *

to change the point of obligation." *Id.* at 89a (citation omitted).

c. One week later, in a separate per curiam opinion, the court of appeals unanimously denied the petitions for review challenging the 2018 Rule. Pet. App. 91a-155a. Relying on its week-old decision, the court rejected petitioners' arguments that (1) the CAA required EPA to reconsider the point-of-obligation rule in that annual volumetric rulemaking, and (2) the agency had acted arbitrarily and capriciously by declining to reconsider that rule "in promulgating the annual applicable volumes and percentage standards in the 2018 Rule." *Id.* at 133a; see *id.* at 132a-133a.

ARGUMENT

Petitioners contend (Pet. 13-33) that the CAA, 42 U.S.C. 7545(*o*)(3)(B)(ii)(I), requires EPA to reconsider the agency's point-of-obligation rule during every annual volumetric rulemaking proceeding under the Renewable Fuels Standard program, and that the agency acted arbitrarily and capriciously by considering petitioners' request to revise the point-of-obligation rule through a separate proceeding instead. The court of appeals correctly recognized that the point-of-obligation rule is a foundational component of the program that has implications well beyond the annual renewable-fuels obligation. Although Section 7545(*o*)(3) requires EPA to identify the entities to whom the obligation applies, nothing in the text of that provision requires EPA to conduct an annual reconsideration of such a fundamental aspect of the renewable-fuels program. The CAA's structure and purposes strongly support EPA's determination not to do so. In any event, EPA thoroughly considered petitioners' concerns about the point-

of-obligation rule in a separate proceeding roughly contemporaneous with the annual rulemakings at issue here.

The court of appeals correctly declined to disturb the EPA actions reflected in the decisions below. Those decisions do not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that 42 U.S.C. 7545(*o*)(3)(B)(ii)(I) does not require EPA to conduct an annual reconsideration of its point-of-obligation rule.

a. The 2007 amendments to the CAA required EPA to implement the renewable-fuels program by promulgating regulations that "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met." 42 U.S.C. 7545(*o*)(2)(A)(iii)(I); see 42 U.S.C. 7545(*o*)(2)(A)(i). In compliance with that command, EPA defined the term "obligated party" to include refineries and importers. 75 Fed. Reg. 14,721-14,722. The Act further specifies that the annual renewable-fuel percentage standards "shall be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. 7545(*o*)(3)(B)(ii)(I). That provision is reasonably understood as permitting EPA to apply its prior "obligated party" determination in conducting its annual analysis, not as a command to reconsider each year what definition of "obligated party" would be "appropriate."

Other CAA provisions require EPA to review and, if appropriate, revise its regulations by a date certain. See, *e.g.*, 42 U.S.C. 7409(d)(1) (requiring the agency to undertake reviews "[n]ot later than December 31, 1980, and at five-year intervals thereafter"); 42 U.S.C.

7412(d)(6) (requiring the agency to "review, and revise as necessary * * * emission standards promulgated under this section no less often than every 8 years"). Section 7545(*o*)(2)(A), by contrast, does not require EPA to revisit its point-of-obligation rule after any specific interval. Cf. 42 U.S.C. 7545(*o*)(11) (requiring EPA to "conduct periodic reviews of * * * the feasibility of achieving compliance" with the volume requirements in Section 7545(*o*)(2)(B)). Although the annual renewable-fuel obligation must reflect EPA's determination as to the parties on whom the obligation falls, that requirement does not logically imply that EPA must reconsider its initial determination each year.

This understanding of the CAA is strongly supported by the structure of the Act and the renewable-fuels program. The "focus of the annual rulemakings" is to calculate percentage standards, not to reconsider the basic structure of the program as a whole. Pet. App. 51a. "It would be strange indeed if Congress required EPA, as it went about its annual quantitative standard-setting duties, also to rethink * * * choice[s] so basic to the * * * program's architecture." *Ibid.* That approach would create significant uncertainty for obligated parties, biofuel producers, and the market. *Id.* at 51a-52a.

The statutory deadlines also indicate that annual reconsideration of the program's basic structure is not required. To complete its annual standard-setting task, EPA must consider a vast amount of information in a short time frame. EPA conducts an in-depth analysis of renewable-fuels markets and evaluates many thousand comments. Pet. App. 51a; see *id.* at 53a. The Act requires EPA to determine the applicable percentage standards within a one-month period each fall. Compare 42 U.S.C. 7545(*o*)(3)(A) (requiring annual volume

estimates to be provided to EPA by October 31), with 42 U.S.C. 7545(*o*)(3)(B)(i) (requiring EPA to publish the percentage standards no later than November 30). Congress could not realistically have expected the agency also to undertake annually a wholesale reevaluation of the placement of the point of obligation, and to promulgate new compliance regulations for newly regulated entities if the point-of-obligation rule was changed. Pet. App. 51a; see *id.* at 520a-525a.

For all these reasons, the CAA is best read not to require EPA to reconsider the point-of-obligation rule in conducting each annual volumetric rulemaking. At a minimum, the statute does not unambiguously require EPA to undertake such review on an annual basis. The court below therefore correctly deferred to EPA's reasonable interpretation. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

b. Petitioners' contrary arguments are unpersuasive.

i. Petitioners contend (Pet. 15-16) that the term "as appropriate" in Section 7545(*o*)(3)(B)(ii)(I) unambiguously requires the agency to reconsider the point-of-obligation rule as part of each annual volumetric rulemaking. They assert that the term "appropriate" "traditionally includes consideration of all the relevant factors." Pet. 16 (quoting *Michigan* v. *EPA*, 135 S. Ct. 2699, 2707 (2015)) (emphasis omitted); see also Pet. 18 (suggesting that *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), requires the agency to "choose among the options that Congress has given it") (citations omitted). But the question is not *whether* EPA must identify the entities on whom the relevant obligation should be placed. Pet. App. 46a. The agency has done so repeatedly—in 2007, 2010, and 2017. The question is "*when* that consideration must be made," and specifically, whether it must be

made anew in every annual volumetric rulemaking. *Ibid.* The term "as appropriate" does not specify the point(s) in time at which that determination must be made.

Petitioners also rely (Pet. 16-17) on Section 7545(*o*)(2)(A)(iii)(I)'s requirement that EPA's implementation regulations must include compliance provisions that are "applicable to refineries, blenders, distributors, and importers, as appropriate." 42 U.S.C. 7545(*o*)(2)(A)(iii)(I). Petitioners contend (Pet. 17) that this provision mandates consideration of the appropriate point of obligation "at the implementing stage" of the renewable-fuels program, and that the term "as appropriate" in Section 7545(*o*)(3)(B)(ii)(I) therefore must "require[] the same consideration at the annual-rule stage." As noted, however, Section 7545(*o*)(3)(B)(ii)(I) can reasonably be understood as a cross-reference to EPA's prior determination under Section 7545(*o*)(2)(A)(iii). The Act's structure and purpose strongly support that reading.

Contrary to petitioners' assertion (Pet. 19-20), EPA's approach does not render Section 7545(*o*)(3)(B)(ii)(I) superfluous. That provision makes clear that, although for other aspects of the renewable-fuels program obligated parties may include "refineries, blenders, distributors, [or] importers," 42 U.S.C. 7545(*o*)(2)(A)(iii)(I), the renewable-fuel obligation may only "be applicable to refineries, blenders, and importers," 42 U.S.C. 7545(*o*)(3)(B)(ii)(I), *i.e.*, not to distributors. See Pet. App. 47a-49a. While petitioners repeat (Pet. 19) Judge Williams's view that the exclusion of distributors might be gleaned from other provisions in the Act, the court of appeals correctly explained that Congress may have

reasonably sought to clarify that "at best * * * non-obvious inference." Pet. App. 48a.

ii. Petitioners argue (Pet. 20) that, even if 42 U.S.C. 7545(*o*)(3)(B)(ii)(I) is ambiguous, EPA's interpretation is unreasonable because it would "allow EPA to disregard indefinitely a central aspect" of the renewable-fuels program. But even absent a statutory duty, EPA's decision not to examine the point-of-obligation issue in an annual rulemaking is reviewable for abuse of discretion. Pet. App. 54a. The court of appeals found it unlikely that "when and if the need for a program restructuring arises, EPA would fail to act." *Id.* at 53a. Petitioners' expressed concern rings particularly hollow in light of the agency's thorough consideration of the issue in response to their petition for rulemaking, reflected in an 85-page decision document addressing some 18,000 comments. *Id.* at 358a. If EPA unreasonably delays action upon similar petitions in the future, the CAA provides a mechanism to compel agency action. See 42 U.S.C. 7604(a).

Petitioners suggest (Pet. 21) that EPA's statutory interpretation is unreasonable because the agency's denial of a petition for rulemaking is reviewed by the court of appeals under a highly deferential standard. But EPA would likewise receive substantial deference for its technical determinations related to the point of obligation if they had been made as part of the volumetric rule. Pet. App. 16a (stating that "EPA's actions are 'presumptively valid provided they meet a minimum rationality standard'") (citing *Natural Res. Def. Council, Inc.* v. *EPA*, 194 F.3d 130, 136 (D.C. Cir. 1999)) (brackets omitted). There is no sound reason to suppose that any differences between those deferential standards would materially affect the outcome of judicial review.

Indeed, although Judge Williams otherwise agreed with petitioners' statutory analysis, he found that the standard of review made no difference here. *Id.* at 89a.

Petitioners also contend (Pet. 21) that EPA's interpretation is unreasonable because of the practical effects of the agency's "misplaced point of obligation." That argument is misguided. In its denial of the rulemaking petitions, EPA considered and rejected petitioners' criticisms of the agency's point-of-obligation rule. Compare, *e.g.*, Pet. App. 199a-200a (acknowledging "real-world constraints" like "the slower than expected development of the cellulosic biofuel industry"), with *id.* at 483a (concluding that "[c]hanging the point of obligation would not be expected to address the current research, development, and commercialization challenges" facing the cellulosic biofuels industry, and might "negatively impact the ability of [that] industry to overcome these challenges"); see *id.* at 384a-439a. Petitioners provide no reason to believe that EPA would have reached a different conclusion if it had undertaken that consideration as part of its annual volumetric rulemaking instead.

2. The court of appeals likewise correctly held that EPA had not acted arbitrarily and capriciously in considering petitioners' request to revise the point-of-obligation rule through a separate proceeding. "The focus of the annual rulemakings * * * is to translate the applicable volumes * * * into percentage requirements for each renewable fuel," Pet. App. 51a—not to resolve a question so "foundational" to the entire renewable-fuels program as the point of obligation, Pet. 23 (citation omitted). "'Given the time pressure associated with its annual standards rulemaking,'" EPA reasonably concluded that "it would not be feasible or worthwhile to

undertake such reconsideration" in those annual proceedings. Pet. App. 53a (citation omitted).

a. As petitioners' phrasing of the second question makes clear, their contrary arguments largely assume that EPA must annually reconsider the point-of-obligation issue. See Pet. i (asking "[w]hether EPA can evade the annual duty by partitioning the point of obligation into a one-time collateral proceeding"); see also, *e.g.*, Pet. 26 (contending that consideration of the appropriate point of obligation as part of each annual volumetric proceeding is required by the statute's inclusion of the issues "side by side in the same list of annual duties"); *ibid.* (arguing that the timing of EPA's separate proceeding here did not satisfy the agency's duty of "annual consideration"); Pet. 27 (contending that the burden on stakeholders of a separate proceeding and the lack of a definite timeline "demonstrate that an isolated collateral proceeding cannot discharge what Congress made an *annual* duty"); Pet. 28 (faulting EPA for failing to show that "any material convenience results from disregarding its statutory duty"). Because the court below correctly held that EPA has no such duty, these arguments also fail.

Petitioners argue (Pet. 26) that the point-of-obligation rule and the percentage standards raise "interdependent" issues. See Pet. 28 (arguing that the annual volumetric rulemakings "encompass[] symptoms of the misaligned point of obligation * * * but not the underlying cause"). But the renewable-fuel program contains "a slew of compliance provisions" that all rely on the point of obligation to ensure that the renewable-fuel standards are carried into operation. Pet. App. 50a. And "[a]gencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop."

Id. at 54a (quoting *Massachusetts* v. *EPA*, 549 U.S. 497, 524 (2007)).

Petitioners contend (Pet. 26) that participating in a separate proceeding unduly burdens stakeholders. But petitioners identify no judicial decision holding that such concerns override an agency's broad discretion to choose the procedural mechanisms that it deems appropriate to "perform[] its important functions." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947); see *ibid.* ("To insist upon one form of action to the exclusion of the other is to exalt form over necessity."). Petitioners likewise identify no reason to believe that conducting a new point-of-obligation inquiry every year would reduce the burden on stakeholders, many of whom might perceive a practical imperative to devote resources to challenging or defending the agency's current approach.

Petitioners insist (Pet. 26) that EPA's decision to address the point-of-obligation issue in a separate proceeding prevented the agency from considering additional information that arose after that proceeding concluded. The same problem could have arisen, however, if EPA had considered the point-of-obligation issue as part of its annual volumetric rulemaking. Under the court of appeals' interpretation, regulated entities are free to bring new material information to the agency's attention through a new petition for rulemaking or in comments to a future volumetric rule, and to challenge the agency's response as arbitrary and capricious if warranted. See p. 16, *supra*.

Petitioners argue (Pet. 28) that administrative convenience cannot justify placing the renewable-fuels program's "foundational feature on autopilot." See *id.* at 29 ("[A]dministrative ease is not a valid rationale for an

agency to do nothing."). But EPA's comprehensive consideration of the point-of-obligation issue in the separate proceeding belies petitioners' suggestion (Pet. 28) that the agency has placed the issue "on autopilot." Petitioners may disagree with the agency's resolution of that proceeding, but their contention that the agency ignored their concerns is baseless.

b. In addition to challenging EPA's decision to address the point-of-obligation issue in a separate proceeding, petitioners also briefly argue (Pet. 25) that the separate proceeding itself was arbitrary and capricious because it "reached the wrong result." It is not clear that this contention is encompassed within either question presented, and the argument lacks merit in any event. Petitioners do not dispute that judicial review of EPA's decision not to revise the point-of-obligation rule is "'extremely limited' and 'highly deferential.'" *Massachusetts*, 549 U.S. at 527-528 (citation omitted). EPA's thorough decision denying the petitions for rulemaking easily survives that review. See Pet. App. 89a (Williams, J., concurring in part and concurring in the judgment) (concluding that "EPA's reasoning was sufficient even under the deference level that" applies to determinations made in annual volumetric rulemakings.).

In denying the rulemaking petitions, EPA examined in detail whether revising the point-of-obligation rule would benefit the renewable-fuels program, and found that it would not. Based on its own analysis and its review of numerous studies, EPA found that treating "blenders" as obligated parties would not increase production or use of renewable fuels or improve the functioning of the program. Pet. App. 458a-486a. The agency further concluded that the renewable-fuel volumes

mandated by the CAA were unachievable at that time due solely to a shortfall in cellulosic biofuel, and that this shortfall resulted from factors other than the placement of the point of obligation, including challenges in the "current research, development, and commercialization" of cellulosic biofuel. *Id.* at 483a. EPA also considered and rejected arguments that some refineries were unfairly disadvantaged by the placement of the point of obligation. *Id.* at 398a-419a.

The court of appeals evaluated in detail the same challenges to EPA's reasoning that petitioners advance here, and it unanimously "found them to be * * * without merit." Pet. App. 42a; see *id.* at 32a-42a. Petitioners emphasize (Pet. 30-31) that some refineries have recently faced economic hardship. But the court of appeals correctly recognized that, because many of these events occurred *after* EPA issued its denial, they were not properly before the court. See Pet. App. 35a-36a. If developments that postdate EPA's final action provide any reason to question the agency's conclusions, the proper remedy is to present those developments to the agency in the first instance.

3. Although petitioners themselves have raised the statutory-interpretation question outside the D.C. Circuit, see *Valero Energy Corp.* v. *EPA*, No. 17-cv-4, 2017 WL 8780888, at *3 (N.D. Tex. Nov. 28, 2017) ("Plaintiffs claim that Defendants have neglected to conduct yearly reviews of what entities are 'appropriate' to regulate under the RFS program."), they do not identify any conflict in authority that would warrant this Court's review. Like the court below, the Northern District of Texas has held that "Section 211(*o*)(2)-(3) [of the CAA] * * * does not require the EPA to annually evaluate and ad-

just what entities are 'appropriate[ly]' subject to the implementing regulations and the annual percentage obligation." *Id.* at *4 (brackets in original).[1] Instead, petitioners contend (Pet. 32-34) that review is warranted to avoid undermining other statutorily mandated procedural requirements, and to facilitate EPA's upcoming review of the implementation of the renewable-fuels program for 2023. Neither assertion provides a sound basis for this Court's review.

The decision below does not impede the satisfaction of other statutory requirements. All of the mandates on which petitioners rely (Pet. 32-33) are imposed by differently worded provisions contained in different statutory programs and structures that serve different purposes. The D.C. Circuit's decision in this case, which addressed specific provisions of the CAA, does not dictate any particular interpretation of the unrelated statutory requirements that petitioners identify.

The prospect of EPA's review of the implementation of the 2023 renewable-fuels program likewise does not make review in this case "timely and urgent." Pet. 34. As noted, the CAA specifies volumes for three types of renewable fuels through the year 2022. 42 U.S.C. 7545(*o*)(2)(B)(i)(I)-(III). Beginning with the 2023 annual volumetric rule, the Act requires EPA to "review * * * the implementation" of the program in prior years, and to analyze six other statutory criteria, to set the annual volume standard. 42 U.S.C. 7545(*o*)(2)(B)(ii). That shift, however, will not break entirely new ground for

[1] Because the citizen-suit provision that petitioners invoked in that court authorizes suits only "to force compliance with nondiscretionary duties," the district court dismissed petitioners' claim for lack of jurisdiction. *Valero Energy*, 2017 WL 8780888, at *3. Petitioners' appeal of that decision is pending before the Fifth Circuit.

the program. Because the CAA specified volumes for biomass-based diesel only through 2012, see 42 U.S.C. 7545(*o*)(2)(B)(i)(IV), EPA has already undertaken several reviews to set biomass-based diesel volumes.

In any event, EPA has repeatedly and recently reaffirmed the current point-of-obligation rule, and the agency's decisions whether to reconsider that rule in future annual volumetric rulemakings will be reviewable for abuse of discretion. Pet. App. 54a.[2] Petitioners identify no reason to believe that imposing an additional statutory duty to reconsider the point of obligation is likely to make any substantive difference in the future implementation of the renewable-fuels program.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[2] The court of appeals' succinct rejection of petitioner's abuse-of-discretion challenge to the 2018 Rule—in a decision issued one week after the court of appeals' thorough analysis of the point-of-obligation issue—does not suggest that its consideration was not thorough or that its review of future annual volumetric rules will be "toothless." Pet. 14; see Pet. 34.