No. _____

IN THE SUPREME COURT OF THE UNITED STATES

VALERO ENERGY CORP. AND
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

CORRECTED APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE DISTRICT OF COLUMBIA CIRCUIT:

Under this Court's Rules 12.4 and 13.5, petitioners Valero Energy Corp. and American Fuel & Petrochemical Manufacturers (AFPM)[1] respectfully request an extension of time to seek this Court's review by petition for a writ of certiorari over multiple judgments in related cases. Petitioners aim to prepare a single petition for a writ of certiorari that would allow this Court to address closely related questions about how EPA must determine which parties are obligated to satisfy annual volumetric requirements under the Clean Air Act's Renewable Fuel Standard program

[1] Pursuant to this Court's Rule 29.6, petitioner Valero Energy Corp. states that it has no parent corporation and that no publicly held company owns a 10% or greater interest in its stock. Petitioner American Fuel & Petrochemical Manufacturers is a national trade association that has no parent corporation and in which no publicly held company has a 10% or greater ownership interest.

(RFS program), as described below.

In two opinions covering three cases, each of which consolidated multiple petitions for review of EPA actions, the D.C. Circuit resolved important questions about EPA's duty to administer the RFS program according to specific procedures that Congress requires. The D.C. Circuit released these opinions and judgments closely in time (indeed, the mandates were all released on the same date), and petitioners could raise the salient points in a single petition. See this Court's Rule 12.4. To that end, petitioners respectfully request an extension of time that would take effect as follows:

- A 30-day extension of time, to and including December 30, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the following two cases that were argued jointly before the same three-judge panel below: *Alon Refining Krotz Springs, Inc.* v. *EPA* (No. 16-1052) and *Coffeyville Resources Refining & Marketing LLC* v. *EPA* (No. 17-1044).[2] The judgment of the D.C. Circuit was entered on August 30, 2019, and no party filed a petition for rehearing. Unless extended, the time for filing a

[2] Each of those two cases was itself a consolidation of multiple petitions for review. As relevant here, Valero's petitions for review were Nos. 16-1055 and 17-1259 (*Alon*) and 17-1047 (*Coffeyville*), and AFPM's petitions for review were No. 18-1029 (*Alon*) and No. 17-1051 (*Coffeyville*).

petition for a writ of certiorari would expire on November 29, 2019.[3]

- A 25-day extension of time, to and including December 30, 2019, to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *American Fuel & Petrochemical Manufacturers* v. *EPA* (No. 17-1258).[4] The judgment of the D.C. Circuit was entered on September 6, 2019, and no party filed a petition for rehearing. Unless extended, the time for filing a petition for a writ of certiorari would expire on December 5, 2019.

If the requested extension is granted, the time for filing the single petition for a writ of certiorari addressing all the judgments listed above (or, if that ultimately appears unhelpful to the Court, two separate petitions) would expire on December 30, 2019.

Pursuant to this Court's Rule 13.5, petitioners are filing this application at least 10 days before the date on which any petition would currently be due. As explained below, petitioners request an extension so their counsel may have adequate time to prepare the petition. This Court has jurisdiction under 28 U.S.C. §1254(1). The opinions (reported at 936 F.3d 628 (*Alon* and *Coffeyville*) and 937 F.3d 903 (*AFPM*)), are attached as Exhibits 1 and 2, respectively; the single judgment in *Alon* and *Coffeyville* is attached as Exhibit 3; the judgment in *AFPM* is attached as

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[3] The ninety-day period would expire on November 28, 2019, which is Thanksgiving Day, thus making the deadline November 29, 2019. See this Court's Rule 30.1.

[4] That case was consolidated with several other petitions for review, including *Valero Energy Corp.* v. *EPA* (No. 18-1027).

Exhibit 4; and the mandates in *Alon*, *Coffeyville*, and *AFPM* are attached as Exhibits 5, 6, and 7, respectively.

1. The RFS program, part of the Clean Air Act, is codified at 42 U.S.C. §7545(*o*). Congress adopted the RFS program in 2005 and amended it through the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007) (EISA). As the Court below explained, the RFS program was Congress's tool to "increase the production of clean renewable fuels." Ex. 1, *infra*, at 6 (quoting Pub. L. No. 110-140, 121 Stat. 1492 (EISA preamble)). Congress also intended the RFS program "to protect consumers." Pub. L. No. 110-140, 121 Stat. 1492 (EISA preamble).

The RFS program requires EPA to annually determine a "renewable fuel obligation" using notice-and-comment rulemaking. 42 U.S.C. §7545(*o*)(3)(B)(ii). The renewable fuel obligation is expressed in a volumetric rule that establishes how much renewable fuel must be included in the nation's transportation fuel for a given year. But who should be obligated to implement this mandate? Congress limited EPA to three choices: "refineries, blenders, and importers, as appropriate." *Id.* §7545(*o*)(3)(B)(ii)(I).[5] This determination is one of three "[r]equired elements" of "[t]he renewable fuel obligation determined for a calendar year." *Id.*

[5] Refineries (i.e., refiners) produce petroleum blendstock from crude oil; blenders mix blendstock with renewable fuel and additives, which actually produces transportation fuel (e.g., gasoline or diesel).

§7545(*o*)(3)(B)(ii). The forthcoming petition for a writ of certiorari will focus only on this required element—the "point of obligation."

The court below acknowledged that "the point of obligation is the foundational 'compliance provision' of the entire [RFS] program". Ex. 1, *infra*, at 6. EPA addresses the other "required elements" annually, but it has never adjusted the point of obligation. Indeed, in the context of an annual rulemaking, EPA has never even *considered* the appropriate point of obligation, despite the statutory text making it the first "required element" for every annual rule.

2. These cases involve two annual volumetric rules and one collateral proceeding, all presenting the point-of-obligation issue from different perspectives (omitting other arguments raised in each case):

***Coffeyville* (the 2017 Rule).** In comments on the proposed 2017 annual rule, petitioners presented evidence that the point of obligation was preventing the RFS program from functioning as intended. EPA deemed these comments "beyond the scope" of the rulemaking, reasoning that it need not consider the point of obligation at all. In their petitions for review before the D.C. Circuit, petitioners argued that an expressly articulated statutory "required element" of an annual rulemaking is *never* beyond the scope of the rulemaking.

***Alon* (the collateral proceeding).** Only a few days before finalizing the 2017 rule, EPA initiated a collateral proceeding in which it proposed to deny long-pending administrative petitions to change the point of obligation. 81 Fed. Reg. 89,746,

89,781 n.133 (Dec. 12, 2016). The proposal cited out-of-date information and stated that EPA did "not *believe* the challenges faced by some refiners in the current market are the result of their designation as obligated parties in the RFS program." EPA, *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation*, EPA-420-R-17-008 (November 2017), at 27 (emphasis added). EPA finalized that denial nearly a year later. See 82 Fed. Reg. 56,779 (Nov. 30, 2017). In petitions for review to the D.C. Circuit, petitioners challenged EPA's denial as well as EPA's failure to consider substantial support for the revision of the current point of obligation.

***AFPM* (the 2018 Rule).** Around the same time that EPA denied the petitions for rulemaking at issue in *Alon*, it also finalized the 2018 annual rule. In petitions for review filed in the D.C. Circuit, petitioners challenged the reasonableness of EPA's interpretation of waiver provisions, its refusal to respond to comments that revealed new data and analysis of central relevance to the issues identified in the proposed rule, such as escalating harms flowing directly from the point of obligation, and its refusal to consider comments on its failure to determine an "appropriate" point of obligation.

3. The D.C. Circuit denied all petitions for review relating to the point of obligation. In *Coffeyville*, the majority held that the Act does not make the point of obligation an *annual* "required element." Ex. 1, *infra*, at 45-46. *Because* the point of obligation is so important, the majority reasoned, Congress could not have required EPA even to *consider* the matter in annual rulemaking. *Id.* at 49-51. Yet,

envisioning future "extreme circumstances," the court also disclaimed "limitless and unreviewable discretion" for EPA. *Id.* at 53.

Judge Williams strenuously "disagree[d] with the [majority]'s conclusion, which grants EPA essentially unfettered discretion as to when—or even *if*—it will consider the appropriateness of the point of obligation." Ex. 1, *infra*, at 14 (concurring opinion). To him, the statutory mandate of an annual consideration—even if not an annual change—was a matter of clear text. *Id.* at 4-5. Judge Williams did not dissent, however, because he agreed with the majority in the *Alon* decision, Ex. 1, *infra*, at 32-41, that EPA's treatment of the petition for rulemaking satisfied for that year the duty to consider the point of obligation. Ex. 1, *infra*, at 16 (concurring opinion). Judge Williams noted that the denial of the petition for rulemaking in *Alon* was "subject to a more deferential form of arbitrary and capricious review" than would be true of an annual RFS program rulemaking, *ibid.*, but he agreed with the majority that EPA had satisfied it.

Finally, in *AFPM*, released a week later, the D.C. Circuit rejected the challenges to the 2018 Rule. Despite the annual duty and despite EPA's separate request for comments about the RIN market's functioning, the court held that "EPA correctly dismissed comments regarding its RIN policy for renewable fuel exports as outside the scope of the 2018 Rule." Ex. 2, *infra*, at 36. And it relied on *Alon* to reject the annual duty itself. *Id.* at 39.

4. Petitioners respectfully submit that the D.C. Circuit's error is both

manifest and of great significance to ensuring that all agencies comply with clearly articulated statutory requirements. As Judge Williams expressed, by rejecting petitioners' textual argument, "the panel . . . arrived at its conclusion only by extending to EPA the type of 'reflexive deference' that the Supreme Court has recently criticized." Ex. 1, *infra*, at 14 (concurring opinion).

Review of the judgments below will provide a prime opportunity to ensure that agencies comply with their governing statutes. EPA ignored a clear statutory mandate, and the D.C. Circuit paved the way for EPA to continue doing so every year. These errors affect and distort one of the largest and most important sectors of the economy, amplifying the need for review. Nor will these consequences be limited to the RFS program. When Congress establishes a procedure for achieving any goal, agencies may no more disclaim the procedure than the goal itself. Courts must ensure that agencies are not free to disregard these procedures.

5. Petitioners respectfully request an extension of time to file a petition for a writ of certiorari for the following reasons:

An extension of time is necessary to enable counsel to prepare the petition on this complex matter. Even EPA has recognized that statutory volume requirements have not been met for many years. A multitude of opinions now enshrine the RFS program's failings. Succinct presentation of these issues requires careful review and coordination among multiple parties and their counsel. Undersigned counsel intends to use the requested extension to winnow and distill the issues presented to only

those most urgently and appropriately warranting this Court's attention.

Given the upcoming Thanksgiving Holiday, access to co-counsel for the parties is limited. In addition, undersigned counsel is subject to a substantial number of conflicts, warranting additional time to prepare the petition.[6]

Finally, no meaningful prejudice would arise from the extension. Respondent prevailed below and will not be harmed by an extension of 30 days or less; indeed, by attempting to consolidate the issues into a single petition, the additional time will create efficiencies for all parties and the Court. Furthermore, should the Court grant the petition for a writ of certiorari, it is almost certain that the soonest this Court could hear oral argument would be in October Term 2020 regardless of whether an extension is granted.

Thus, the requested extension, so that the petition (or, if necessary, petitions) for a writ of certiorari would be due by December 30, 2019, is necessary to afford

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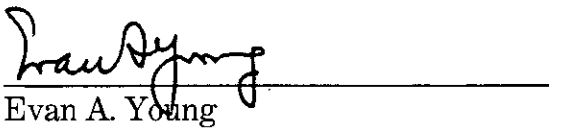
[6] These conflicts include multiple professional, personal, and civic obligations. For example, he has or had multiple briefing deadlines and oral arguments since the D.C. Circuit's opinions were released. Evan A. Young argued in the Texas Supreme Court on September 26 in No. 17-0736, *Teal Trading & Development, LP* v. *Champee Springs Ranches Property Owners Association*; he argued in the Texas Supreme Court on October 8 in No. 19-0452, *Janvey* v. *GMAG, LLC*; he is scheduled to argue in the U.S. Court of Appeals for the Ninth Circuit in No. 18-16721, *Becerra* v. *Dr Pepper/Seven Up*; and he will be preparing for argument in the Texas Supreme Court in No. 18-0403, *Credit Suisse AG* v. *Claymore Holdings, LLC*, on January 8, 2019. He has had or will have multiple briefing obligations in state and federal courts, including this Court, and has had multiple travel obligations for professional, bar, and personal purposes, including speaking at a conference and serving on the Texas Judicial Council and the (Texas) Supreme Court Advisory Committee. Further, arguing counsel below, Samara Kline, is on lengthy and long-scheduled international travel with minimal access to electronic communication.

counsel time to complete review of the record, consult meaningfully with co-counsel, and prepare a petition that will be of the greatest assistance to the Court.

Respectfully submitted.



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