No. 20-472

In The Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, et al.,

Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether the United States Environmental Protection Agency ("EPA") exceeded its authority by granting "extensions" of the "temporary exemption" for small refineries under 42 U.S.C. § 7545(o)(9)(B) to three refineries for which the temporary exemption had previously expired.

RULE 29.6 STATEMENT

The Renewable Fuels Association ("RFA") is a non-profit trade association. Its members are ethanol producers and supporters of the ethanol industry. RFA promotes the general commercial, legislative, and other common interests of its members. RFA does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The American Coalition for Ethanol ("ACE") is a non-profit trade association. Its members include ethanol and biofuel facilities, agricultural producers, ethanol industry investors, and supporters of the ethanol industry. ACE promotes the general commercial, legislative, and other common interests of its members. ACE does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The National Corn Growers Association ("NCGA") is a non-profit trade association. Its members are corn farmers and supporters of the agriculture and ethanol industries. NCGA promotes the general commercial, legislative, and other common interests of its members. NCGA does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The Farmers Educational & Cooperative Union of America, doing business as the National Farmers Union ("NFU"), is a non-profit trade association. Its

RULE 29.6 STATEMENT—Continued

members include farmers who are producers of biofuel feedstocks and consumers of large quantities of fuel. The NFU promotes the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

For the purposes of this brief, RFA, ACE, NCGA, and NFU are referred to collectively as the "Biofuels Coalition."

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OPINION BELOW

The Tenth Circuit order (Pet. App. 1a–94a) is reported at 948 F.3d 1206. The underlying EPA orders (Suppl. App. 1a–46a) are not published in the Federal Register or otherwise publicly available.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2020. A petition for rehearing was denied on April 7, 2020. On March 19, 2020, due to the COVID-19 pandemic, this Court entered an order extending the time to file a petition for a writ of certiorari to 150 days. The petition for a writ of certiorari was filed on September 4, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

INTRODUCTION

Congress enacted the Renewable Fuel Standard ("RFS") program "to move the United States toward greater energy independence" and "to increase the production of clean renewable fuels." *Americans for Clean Energy v. EPA* ("*ACE*"), 864 F.3d 691, 696 (D.C. Cir. 2017) (Kavanaugh, J.) (quoting Pub. L. No. 110-140, pmbl., 121 Stat. 1492, 1492 (2007)). To accomplish these goals, the statute provides "increasing [volume] requirements [that] are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year." *Id.* at 710. For the RFS to function as Congress intended, obligated parties—refiners and importers of petroleum like the Petitioners—must each fulfill their share of the program's annual volume obligations. *Id.* at 697.

The Petition concerns EPA's authority to "extend" a "temporary exemption" from RFS obligations that allowed small refineries additional time to prepare for

RFS obligations. Petitioners argue that because the statute says a refinery may petition EPA for an "extension" of the temporary exemption "at any time," EPA can grant a *new exemption* after the temporary exemption described by the statute has expired.

The Tenth Circuit, however, held that in context "extension" can *only* mean "to increase the length or duration of; lengthen; prolong" the original exemption. Pet. App. 67a. In practice, this means that "the only small refineries" that "continue[] to be eligible for extensions" are "ones that submitted meritorious hardship petitions each year." *Id.* at 68a. This ruling is both a straightforward reading of the text, and also consistent with other judicial constructions of the small refinery temporary exemption.

The Tenth Circuit was the first, and thus far the only, court to address on the merits the specific issue raised by Petitioners here. The Tenth Circuit's decision therefore does not "conflict with the decision of another United States court of appeals"—or any other court—"on the same important matter." See Sup. Ct. R. 10(a).

Moreover, the Petition presents a discrete issue of statutory interpretation in a case of limited impact. The case involves only three EPA decisions involving three individual small refineries. A subsequent 2019 decision announcing EPA's national policy for adjudicating small refinery temporary exemptions is currently subject to judicial review in the D.C. Circuit. The same statutory construction questions before the Tenth Circuit will necessarily be addressed by the D.C.

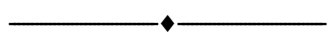
Circuit. The Tenth Circuit's more limited holding is therefore not the appropriate vehicle for this Court to review this issue.

To the extent the Petitioners hypothesize that the Tenth Circuit's decision could subject certain geographic areas or obligated parties to economic harms, the Clean Air Act has separate provisions to address those potential issues. See *ACE*, 864 F.3d at 712 (citing 42 U.S.C. § 7545(o)(5)(D), (7)(A)(i); 40 C.F.R. § 80.1427(b)).

Finally, the Tenth Circuit's vacatur of the three challenged EPA decisions rests on three separate and independent grounds, such that overturning the Tenth Circuit's holding on the single question presented in the Petition would not affect the outcome of the judgment below.

In sum, the Tenth Circuit's decision does not conflict with the decision of any other court, does not amount to an important question of federal law that should be settled by this Court, and the Court's review is not warranted before the D.C. Circuit rules on the issue presented as a matter of EPA's national policy.

The Petition should be denied.



STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Renewable Fuel Standard

Congress created the RFS program to "move the United States toward greater energy independence and security, [and] to increase the production of clean renewable fuels." *American Fuel & Petrochemical Mfrs. v. EPA* ("*AFPM*"), 937 F.3d 559, 568 (D.C. Cir. 2019) (quoting Pub. L. No. 110–140, 121 Stat. 1492 (2007)).

The RFS prescribes "applicable volumes—mandatory and annually increasing quantities of renewable fuels that must be introduced into commerce in the United States each year," beginning at 4 billion gallons of renewable fuel in 2006 and ascending to 36 billion gallons in 2022.[1] *AFPM*, 937 F.3d at 568 (quotation marks omitted); 42 U.S.C. § 7545(o)(2)(B)(i)(I). EPA is required to "ensure[]" that the statutory volume requirements are met, which it accomplishes by "translating the annual volume requirements into 'percentage standards.'" *ACE*, 864 F.3d at 699. The percentage standards "inform each obligated party"—gasoline and diesel fuel refineries and importers—"of how much fuel it must introduce into U.S. commerce based on the volumes of fossil-based gasoline or diesel it imports or produces." *Ibid.*

[1] The EPA has statutory authority to determine the volume amounts after 2022. 42 U.S.C. § 7545(o)(2)(B)(ii)–(v).

To demonstrate compliance, "obligated parties can acquire and trade credits," called "Renewable Identification Numbers" or "RINs." *ACE*, 864 F.3d at 699. RINs represent "the volume of ethanol-equivalent fuel gallons" in "each batch of renewable fuel that is produced or imported in the United States." *Ibid.*; 40 C.F.R. § 80.1401. When renewable fuel is blended into transportation fuel, "the RINs become 'separated' from the associated volumes of renewable fuel . . . [and] may be retained by the party who possesses them or sold and traded on the open RIN market." *ACE*, 864 F.3d at 699; 40 C.F.R. § 80.1429(b). Obligated parties meet their obligation by "accumulating or purchasing the requisite number of RINs and then 'retiring' the RINs in an annual compliance demonstration with EPA." *ACE*, 864 F.3d at 713; 40 C.F.R. § 80.1427.

B. Small Refinery Temporary Exemption

Most obligated parties were required to begin fulfilling their RFS volume obligations in compliance year 2006. However, "aware that small refineries"—those whose "average aggregate daily crude oil throughput for a calendar year . . . does not exceed 75,000 barrels," § 7545(o)(1)(k)—"would face greater difficulty complying with the renewable fuels requirements, [Congress] created a three-tiered system of exemptions to afford small refineries a bridge to compliance." *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 573 (D.C. Cir. 2015); see 42 U.S.C. § 7545(o)(9)(A)–(B).

First, the statute provided a "[t]emporary exemption" from RFS obligations to all small refineries until 2011. 42 U.S.C. § 7545(o)(9)(A)(i); see *Hermes*, 787 F.3d at 572–73. Second, "the statute directed DOE to conduct a study 'to determine whether compliance . . . would impose a disproportionate economic hardship on small refineries,'" and "[i]f DOE determined that any small refinery 'would be subject to a disproportionate economic hardship if required to comply with' the renewable fuels program, EPA was required to extend the exemption for that refinery 'for a period of not less than 2 additional years.'" *Hermes*, 787 F.3d at 573 (quoting 42 U.S.C. § 7545(o)(9)(A)(ii)). Third, the statute permits individual small refineries "at any time [to] petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B)(i); see also *Hermes*, 787 F.3d at 573.

C. EPA's Administration of Petitions for Extension of the Small Refinery Temporary Exemption

Congress "contemplated a '[*t*]*emporary* exemption' for small refineries with an eye toward eventual compliance with the renewable fuels program for all refineries." *Hermes*, 787 F.3d at 578. Consistent with this objective, EPA phased down the number of exempt refineries for the first several years of the RFS, from fifty-nine under the initial exemption to seven exempt refineries in 2015.

However, starting with the 2016 compliance year, EPA began to dramatically increase the number of exemptions. The number of exemptions jumped to nineteen for 2016, thirty-five for 2017, and thirty-one for 2018. EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registrationreporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Nov. 19, 2020). Because EPA did not adjust the volume obligations to account for these exemptions, the exempt "gallons of renewable fuels simply [went] unproduced." *AFPM*, 937 F.3d at 571. The 2016–2018 exemptions effectively resulted in a shortfall of more than four billion gallons of renewable fuel relative to the statutorily required volumes.[2]

EPA's reversal of its tapering of the temporary exemptions was not documented publicly, as EPA grants these exemptions in secret. The market impacts from EPA's policy shift drew the attention of the biofuels industry and the media, and ultimately opened up EPA's actions to judicial scrutiny. *See*, *e.g.*, Jarrett Renshaw & Chris Prentice, *Chevron, Exxon Seek 'Small Refinery' Waivers from U.S. Biofuels Law*, Reuters (Apr. 12, 2018), https://www.reuters.com/article/us-usa-biofuels-epa-refineries-exclusive/exclusive-chevron-exxon-seek-small-refinery-waivers-from-u-s-biofuels-law-idUSKBN1HJ32R. Notably, when the Biofuels Coalition filed its action in the Tenth Circuit, EPA was still refusing to make any information regarding its decisions on small refinery

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[2] EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registrationreporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Nov. 19, 2020).

exemption extension petitions publicly available, classifying all of it as confidential business information. That lack of public information nearly allowed EPA's actions to escape judicial review. It was only because the Biofuels Coalition was able to gather sufficient public information (made available by the Petitioners themselves) to challenge three specific EPA decisions that the Tenth Circuit was able to open up a window on the sea change in EPA's policy.

II. CASE BACKGROUND

A. Petitioners' Exemption Extension Petitions

Petitioner HollyFrontier Refining & Marketing LLC ("HollyFrontier Refining") submitted exemption extension petitions for compliance year 2016 on behalf of two small refineries owned by its subsidiaries, Petitioner HollyFrontier Cheyenne Refining LLC ("HollyFrontier Cheyenne") and Petitioner Holly Frontier Woods Cross Refining LLC ("HollyFrontier Woods Cross") (collectively, with HollyFrontier Refining, "HollyFrontier").

HollyFrontier Cheyenne received an extension of the temporary exemption through 2012 based on DOE's study, but its exemption was not further extended in 2013 or 2014. Pet. App. 32a. HollyFrontier Cheyenne applied for an exemption in 2015, but EPA denied the petition. *Ibid.* HollyFrontier Cheyenne appealed EPA's denial to the Tenth Circuit, and the court remanded the decision for further consideration in light of its opinion in *Sinclair Wyoming Refining Co. v.*

EPA, 887 F.3d 986 (10th Cir. 2017). For purposes of this case, the Tenth Circuit assumed that EPA granted the 2015 petition on remand, as the record did not reflect EPA's final disposition. *Ibid.*

The record does not indicate that HollyFrontier Woods Cross ever received an extension of the small refinery temporary exemption, either based on DOE's study, or thereafter. Pet. App. 35a.

A subsidiary of CVR Refining, LP, Petitioner Wynnewood Refining Company, LLC ("CVR"), submitted an exemption petition for its Wynnewood Refinery for compliance year 2017. CVR's petition stated that it had received an extension of the blanket exemption in 2011 and 2012 but received no further extensions of its exemption. Pet. App. 37a.

EPA granted each of these three petitions (two for 2016 and one for 2017) in unpublished decisions that were initially issued only to the Petitioners. The Biofuels Coalition did not have access to the decisions until receiving the administrative record for this case from EPA.

B. The Biofuels Coalition's Petition for Review and the Tenth Circuit's Judgment

The Biofuels Coalition learned of these exemptions through media reports and confirmed them through the Petitioners' public filings with the U.S. Securities and Exchange Commission. The Biofuels Coalition filed a petition for review challenging EPA's

authority to grant these exemptions as a matter of statutory construction and challenging the decisions themselves as arbitrary and capricious.

The Clean Air Act dictates that petitions for review of agency actions with local or regional applicability are to be heard by the U.S. Court of Appeals with jurisdiction over that locality or region. 42 U.S.C. § 7607(b)(1). The statute dictates that agency actions with national applicability are to be heard by the D.C. Circuit. *Ibid*. EPA's decisions regarding individual small refinery exemption petitions are construed as having local or regional applicability, and therefore the Biofuel's Coalition had to file in the Tenth Circuit.[3]

In the ruling challenged by Petitioners, the Tenth Circuit vacated all three challenged exemption decisions. It held that EPA exceeded its authority under 42 U.S.C. § 7545(o)(9)(B) by granting new small refinery exemptions to Petitioners Cheyenne, Woods Cross, and Wynnewood refineries (the "Refineries") when the plain text of the statute allows EPA to grant only "*extensions*" of exemptions. The court explained that "an 'extension' requires a small refinery exemption in prior years to prolong, enlarge, or add to," meaning that "the only small refineries . . . eligible for extensions were the ones that submitted meritorious hardship

[3] EPA changed its practice in 2019 by addressing all 2018 small refinery exemption extension petitions in a single memorandum, which set forth EPA's national approach for adjudicating petitions for small refinery exemptions. The parties comprising the Biofuels Coalition have sought review of that decision before the D.C. Circuit.

petitions each year." Pet. App. 68a, 75a. Because each of the three Refineries' exemptions had expired by 2013 at the latest, the court held that "[a]t most, these Refineries sought to renew or restart their exemptions," which "[t]he amended Clean Air Act did not authorize." *Ibid.*

The Tenth Circuit found two additional flaws that Petitioners have not challenged here. First, the Tenth Circuit held that EPA exceeded its statutory authority by "[g]ranting extensions of exemptions based at least in part on hardships not caused by RFS compliance." Pet. App. 85a. EPA's decisions cited to "[a] difficult year for the refining industry as a whole" and an "industry-wide downward trend" of lower net refining margins, among other factors that the court determined were "not restricted to disproportionate economic hardship caused by RFS compliance." Pet. App. 83a–84a.

Second, the Tenth Circuit held that it was arbitrary and capricious for EPA to have "ignored or failed to provide reasons for deviating from prior studies showing that" the costs of purchasing the credits needed to show RFS compliance (*i.e.*, "RINs") "do not disproportionately harm refineries which are not vertically integrated." Pet. App. 87a. This is because "merchant refineries typically recoup their RIN purchase costs through higher petroleum fuel prices." Pet. App. 91a.

REASONS TO DENY THE PETITION

I. THERE IS NO CIRCUIT SPLIT OF AUTHORITY

The Tenth Circuit's decision does not "conflict with the decision of another United States court of appeals"—or any other court—"on the same important matter." See Sup. Ct. R. 10(a). The Tenth Circuit was the first, and thus far the only, court to address the specific issue raised by Petitioners here on the merits.

Notably, this was the first time a court has scrutinized EPA's authority to *grant* exemptions under the small refinery exemption provision. Other cases have examined the provision in challenges by small refineries addressing EPA's *denial* of exemptions. See *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600 (4th Cir. 2018); *Sinclair Wyo. Refining Co. v. EPA*, 887 F.3d 986 (10th Cir. 2017); *Hermes Consol., LLC v. EPA*, 787 F.3d 568 (D.C. Cir. 2015); *Lion Oil Co. v. EPA*, 792 F.3d 978 (8th Cir. 2015). And while there may be overlap in some of the issues considered in these cases, the specific question presented here—whether EPA has authority to grant extensions of small refinery exemptions that have expired—had never been considered by another court.

Petitioners attempt (Pet. 19–20) to manufacture a circuit split by citing to instances where other courts have interpreted the word "extension" in entirely different contexts. But none of these cases addressed the language in the RFS provisions of the Clean Air Act governing small refinery exemptions. On the

contrary, Petitioners' arguments run counter to this Court's principle that "the Court must read the words [of a statute] in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 474 (2015) (quotation marks omitted). The fact that "extension" can have different meanings in different statutory schemes does not give rise to a conflict that warrants this Court's intervention here.

Petitioners further claim (Pet. 33) the Tenth Circuit's decision effectively creates regional conflict between circuits because small refineries in the Tenth Circuit will be barred from obtaining exemptions while refineries in other circuits remain eligible. But this premise is flawed and misleading. The Tenth Circuit's decision does not bar small refineries from continuing to seek extensions if their exemptions have not lapsed. The Tenth Circuit merely confirmed some of the prerequisites for issuing such exemptions (*e.g.*, a continuous temporary exemption with no lapses, a finding that any disproportionate economic hardship is the result of RFS compliance, and some explanation of how a small refinery could suffer a disproportionate economic hardship when EPA has repeatedly concluded that all refineries, large and small, recover their RFS compliance costs in the cost of the products they sell). To the extent EPA decides to limit the underlying decision to the Tenth Circuit, that is the result of the Clean Air

Act's venue provision and EPA's regional consistency regulations.[4]

Section 307(b) of the Clean Air Act requires that challenges to nationally-applicable standards and regulations be brought in the D.C. Circuit, while challenges to other final agency actions that are locally or regionally applicable be filed only in the United States Court of Appeals for the appropriate circuit. 42 U.S.C. § 7607(b). Because the Biofuels Coalition challenged EPA's decisions regarding three specific refineries located within the Tenth Circuit, the Clean Air Act's venue provision dictated that these had to be addressed in the appropriate regional circuit court of appeals. *Ibid.*; see also Pet. App. 4a.

EPA's regional consistency regulations provide that "[i]t is EPA's policy to . . . [r]ecognize that only the decisions of the U.S. Supreme Court and decisions of the U.S. Court of Appeals for the D.C. Circuit Court that arise from challenges to 'nationally applicable regulations . . . or final action' . . . shall apply uniformly." 40 C.F.R. § 56.3 (quoting 42 U.S.C. § 7607(b)). The regulations explicitly exempt "decisions of the federal courts that arise from challenges to 'locally or regionally' applicable actions." *Ibid.* Consequently, to the extent EPA has not yet applied the Tenth Circuit's

[4] In fact, the Biofuels Coalition supports uniform application of the principles announced by the Tenth Circuit and the parties comprising the Biofuels Coalition have raised similar issues in pending litigation in the D.C. Circuit. See *Renewable Fuels Ass'n v. EPA*, No. 19–1220 (D.C. Cir.) (petition filed Oct. 22, 2019).

decision nationally, that is the product of EPA's regulations, not of the decision itself.

II. THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT THE COURT NEEDS TO RESOLVE

The Petition presents a discrete issue of statutory interpretation that does not implicate an important question of federal law. See Sup. Ct. R. 10. Each of the three challenged EPA adjudications was issued solely to an individual small refinery. As just noted, EPA's regional consistency regulations relieve EPA from adopting "decisions that arise from challenges to 'locally or regionally applicable actions' "—such as the Tenth Circuit decision here—as national agency policy. Therefore, at most, the Tenth Circuit's ruling directly affects only those small refineries located in the Tenth Circuit. A decision with such limited effect is not an appropriate vehicle for this Court's review, particularly when the question presented in the Petition will be addressed in a challenge to EPA's national policy in a case currently pending before the D.C. Circuit.

Petitioners also exaggerate the economic impact of the Tenth Circuit's decision, and to the extent their arguments have any validity, the RFS has other built-in statutory mechanisms for EPA to address economic harm, thus obviating the need for this Court to intervene.

A. The D.C. Circuit Will Address the Same Question

Briefing has already begun in a case before the D.C. Circuit which will decide the question presented in the Petition in the context of EPA's national policy for adjudicating small refinery exemptions. See *Renewable Fuels Ass'n v. EPA*, No. 19–1220 (D.C. Cir. filed Oct. 22, 2019) (hereinafter "D.C. Circuit Action"). Until recently, EPA issued an unpublished individual decision for each petition for a small refinery exemption extension, like the three decisions addressed by the Tenth Circuit's ruling. For compliance year 2018, however, EPA abandoned its established practice of providing individual decisions to each refinery, and instead issued a single memorandum in August of 2019 to announce its decision for all of the 2018 petitions, granting thirty-one out of forty-two petitions received.[5] EPA has conceded that the memorandum is a challengeable final agency action.[6] The parties comprising the Biofuels Coalition filed a timely petition for review.

The Clean Air Act's venue provision requires a challenge to the 2018 small refinery exemption decision to be brought in the D.C. Circuit, as it contains

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[5] EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Nov. 19, 2020).

[6] See *Advanced Biofuels Ass'n v. EPA*, 792 F. App'x 1, 6 (D.C. Cir. 2019) ("During oral argument, the EPA acknowledged that the August 2019 Memorandum is 'final agency action' to which a challenge could be brought if filed within the required limitations period.").

EPA's statements of its national policy for adjudicating small refinery exemptions.[7] The D.C. Circuit Action will necessarily address the exact issue Petitioners raise here—whether EPA exceeded its authority under the Clean Air Act by granting small refinery exemptions under 42 U.S.C. § 7545(o)(9)(B) where the exemption had previously expired. See Pet'rs Br. 22-30, D.C. Circuit Action, *supra*, ECF No. 1874746 (filed Dec. 7, 2020). Petitioners HollyFrontier Cheyenne Refining LLC, HollyFrontier Refining & Marketing LLC, and HollyFrontier Woods Cross Refining, LLC have intervened in the D.C. Circuit Action.

Notably, the D.C. Circuit expressed interest in 2018 in reviewing EPA's recent policy change in its administration of small refinery exemptions. Although it lacked jurisdiction to rule on the merits of the petition then before it—challenging EPA's "change in methodology" used to award extensions of small refinery exemptions—the D.C. Circuit panel expressed discomfort at the record evidence of EPA's actions. The court's *per curiam* judgment dismissing the case stated that "EPA's briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review." *Id.* at 5. EPA had, however, recently opened the door for

[7] See 42 U.S.C. § 7607(b)(1); EPA Reply in Support of Mot. to Dismiss 7, *Sinclair Wyo. Ref. Co. v. EPA*, No. 19–9562 (10th Cir. Oct. 15, 2019), ECF No. 010110245406 ("An agency action that determines the rights of facilities all over the country, across multiple circuits, using a coordinated and consistent rationale is 'nationally applicable[.]' ").

judicial review, so that this "ongoing pattern of genuinely secret law" could be challenged through "the August 2019 formal and public memorandum announcing the EPA's new decisional framework and applying it to forty-two refineries." *Ibid.* The Biofuels Coalition has done just that in the D.C. Circuit Action.

B. The Tenth Circuit's Decision Will Not Cause the Economic Harm Imagined by Petitioners

There is no reason to expect the Tenth Circuit's decision to have the dire consequences hypothesized by the Petitioners. First and foremost, until 2017, EPA's longstanding policy was to funnel small refineries toward accepting their share of RFS obligations. Like most other small refineries, the Petitioners were among those that had already come into compliance. It is impossible to reconcile Petitioners' claim (Pet. 3) that the Tenth Circuit's decision will "pose an existential threat to . . . businesses" and "wreak havoc upon the communities they serve" with the fact that as of 2015, only seven small refineries remained exempt from RFS obligations.

Moreover, government studies suggest that most of the current economic turmoil in the oil markets is the result of COVID-19 impacts, not the Tenth Circuit's decision.[8] None of these studies even mention the

[8] See, *e.g.*, U.S. Energy Info. Admin., *Trends and Expectations Surrounding the Outlook for Energy Markets* (Aug. 2020), https://www.eia.gov/outlooks/aeo/pdf/trends_and_expectations_2020.

Tenth Circuit's decision. Even Petitioners' example of Marathon's decision to idle its Gallup, New Mexico refinery (see Pet. 30) has nothing to do with the Tenth Circuit's ruling—Marathon attributes the decision to "a full three months of the challenges COVID has created for our business."

Although Petitioners claim (Pet. 12) that the Tenth Circuit decision will "prevent[] some small refineries—who may, for structural reasons, never be able to blend fuel on their own—from 'remain[ing] in the market'" (citing Pet. App. 70a), EPA has consistently rejected the notion that merchant refiners that are unable to blend renewable fuel are disproportionately impacted by the RFS. In 2015, an EPA report assessing the 2013 RIN market concluded that "obligated parties were generally able to recover [the] increase in the costs of meeting their RIN obligations in the price they received for their petroleum-based products," and thus "these higher costs have a similar impact on all obligated parties." See Dallas Burkholder, U.S. EPA, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* 29 (May 14, 2015), https://www.epa.gov/renewable-fuel-standard-program/renewable-identification-number-rin-analysis-renewable-fuel-standard. The report specifically addressed merchant refiners

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pdf; see also G. Chakrabarty, T. Fitzgibbon, & M. Smith, *Downstream Oil and Gas Amid COVID-19: Succeeding in a Changed Market*, McKinsey & Company (Sept. 2020); J. Corrigan & M. Greenan, *COVID-19 and the Oil Price Collapse: Impacts on Refining and Downstream Businesses*, PwC U.S. (Apr. 2020), https://www.pwc.com/us/en/industries/energy-utilities-mining/library/covid-19-impact-oil-refining-downstream-businesses.html.

"who largely purchase separated RINs to meet their RFS obligations," and determined that these refiners "should not therefore be disadvantaged by the higher RIN prices, as they are recovering these costs in the sale price of their products." *Id*. at 3. EPA has reaffirmed the findings of this report in recent rulemakings. See 85 Fed. Reg. 7,016, 7,069–68 (Feb. 6, 2020).

Even if Petitioners' fears did materialize, any "negative economic effects" caused by "application of the statutory volume requirements . . . could be addressed through other provisions of the statute." *ACE*, 864 F.3d at 712. "In particular, Congress authorized EPA to reduce the statutory renewable fuel volume requirements upon a determination that implementation of those requirements 'would severely harm the economy or environment of a State, a region, or the United States.'" *Ibid*. (quoting 42 U.S.C. § 7545(o)(7)(A)(i)). Unlike the "temporary" exemption provided to small refineries, EPA's "severe economic harm waiver" authority appropriately serves as the "safety valve" sought by Petitioners to ensure that the RFS obligations are not excessively burdensome. Further, "[t]he statute provides other protections against economic harm," including "a safe harbor for individual obligated parties struggling to comply with a year's requirements. The statute mandates that EPA allows those parties to carry a renewable fuel deficit forward into the next compliance year." *Ibid*.; see also 42 U.S.C. § 7545(o)(5)(D); 40 C.F.R. § 80.1427(b).

In sum, the Tenth Circuit decision is unlikely to have the economic impact described by Petitioners, but

even if it did, EPA has multiple mechanisms to address such impact without resorting to the "temporary" small refinery exemptions that Congress intended to be phased out.

III. OVERTURNING ON THE QUESTION PRESENTED WOULD NOT ALTER THE JUDGMENT

Reversing the Tenth Circuit's decision on the question presented would not alter its judgment because the court also vacated each of these three EPA decisions on two separate and independent grounds.

First, the Tenth Circuit found that "[g]ranting extensions of exemptions based at least in part on hardships not caused by RFS compliance was outside the scope of the EPA's authority." Pet. App. 84a–85a. In all three challenged decisions, EPA cited "a difficult year for the industry as a whole" as a factor for finding hardship, which went beyond EPA's authority because "hardships caused by overall economic conditions are different from hardships caused by compliance with statutory renewable fuel obligations." Pet. App. 84a. Further, in two of the challenged decisions, EPA stated that an exemption would relieve those refineries' disproportionate economic hardship "in whole or in part," and the court concluded that "[t]he only way EPA's orders could have offered relief 'in part' was if the agency had inappropriately considered disproportionate economic hardship occasioned by something other than complying with" the RFS. *Ibid.*

Second, the Tenth Circuit held that it was an abuse of discretion for EPA to find that the three refineries suffered a disproportionate economic hardship while failing to address the agency's longstanding position that refineries small and large recover the cost of RFS compliance through the cost of the goods they sell. Pet. App. 87a–92a. The court found that "EPA did not analyze the possibility of RIN cost recoupment when it granted the Refineries' extension petitions," and in doing so EPA "'failed to consider an important aspect of the problem,' and its silence ran counter to the record." *Id.* at 92a (quoting *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Both holdings are standalone bases for the Tenth Circuit's vacatur of all three EPA decisions. This Court's review is therefore unwarranted on the single question presented in the Petition.

IV. THE TENTH CIRCUIT CORRECTLY CONSTRUED THE SMALL REFINERY TEMPORARY EXEMPTION

The Tenth Circuit correctly applied established canons of statutory interpretation. Even if it had not, this Court has long declined to grant petitions for certiorari solely for the purpose of error correction. See *Tolan v. Cotton*, 572 U.S. 650, 661 (2015) (Alito, J., concurring) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of

certiorari.") (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013)). This case presents no reason to depart from the Court's established practice.

"Extension" as used in § 7545(o)(9)(B) can *only* mean "to prolong, enlarge, or add to" the initial small refinery exemption (Pet. App. 67a), and cannot mean "make available" a new exemption as Petitioners argue it can (Pet. 14, 19). *Accord, Sinclair Wyo. Refining Co. v. EPA*, 887 F.3d 986, 989 (10th Cir. 2017) (using term "extension of the *initial* exemption") (emphasis added); Pet. 15 ("[T]he initial exemption could be extended for an additional two years. . . ."); see also Black's Law Dictionary (5th ed. 1979) ("The word 'extension' ordinarily implies the existence of something to be extended.").

The Tenth Circuit found that "ordinary definitions of 'extension,' along with common sense, dictate that the subject of an extension must be in existence before it can be extended." Pet. App. 67a. For example, "if someone interested in current events subscribes to a news service in years one through five, allows the subscription to lapse in years six and seven, and goes back to the news service in year eight, we usually do not say that year eight was an 'extension' of the subscription from years one through five. Rather, we say that the person renewed or restarted his or her subscription in year eight." *Ibid.*

The Petitioners' alternative definitions of "extension" do not make sense in context. For example,

Petitioners submit that "to make available" or "to grant" is a "well-accepted meaning of 'extension' " (Pet. 14). However, § 7545(o)(9)(B) does not authorize "extension of *an* exemption," it authorizes "extension of *the* [initial temporary] *exemption under Subparagraph (A)*." This indicates continuity of the initial, temporary exemption, not authority "to make available" a new exemption.

Petitioners also suggest that "extension" can mean "an enlargement in scope or operation" (Pet. 18). But the Refineries were not seeking to enlarge the "scope" or "operation" of their exemptions, they were seeking *new exemptions*. Regardless, the Refineries' alternative definition supports the Tenth Circuit's interpretation, as "an enlargement" implies something (*i.e.,* an exemption) in existence to enlarge. Refineries also suggest that "extension" can mean "the total range over which something extends" or "a development . . . that includes or affects more people, things, or activities" (Pet. 18–19). Neither of these make sense in the context of § 7545(o)(9)(B).

Petitioners argue (Pet. 12) that the Tenth Circuit interpreted "extension" to require continuous exemptions "[d]espite any indication in the statutory text that Congress intended to phase out the hardship exemption in subsection (B)." But that is not consistent with the statute's characterization of the exemption as "temporary." *See* 42 U.S.C. § 7545(o)(9)(B)(i) (referencing § 7545(o)(9)(A), "Temporary exemption"). Under the statute, "once a small refinery figures out how to put itself in a position of annual compliance, that

refinery is no longer a candidate for extending (really 'renewing' or 'restarting') its exemption." Pet. App. 68a. The Tenth Circuit is not alone in reaching that conclusion—the D.C. Circuit has likewise noted that the terms of § 7545(o)(9) contemplate a "'[*t*]*emporary* exemption' for small refineries with an eye toward eventual compliance . . . for all refineries." *Hermes*, 787 F.3d at 578.

Petitioners argue that the "temporary" exemption of § 7545(o)(9)(A) is distinct from "[t]he subsection (B) hardship exemption, . . . [which] is not found under the subsection entitled 'Temporary exemption.'" (Pet. 15). But these are not two separate exemptions—§ 7545(o)(9)(B) authorizes "an extension of *the exemption under subparagraph (A)*," referring to the "[t]emporary exemption." 42 U.S.C. § 7545(o)(9)(B)(i) (emphasis added). The Tenth Circuit correctly recognized this is its decision below. See Pet. App. 65a ("The small refinery exemption subject to an extension . . . is expressly identified as 'Temporary' in subpart (A).").

While Petitioners argue that "Congress had a distinct purpose in mind" when it "placed the subsection (B) hardship exemption in its own subsection" (Pet. 14), the text can only support the conclusion that the separate subsections denote the distinct *procedures* Congress established for extensions of the exemption. Subsection (A) provides an initial blanket exemption and an extension of that exemption through a study conducted by the U.S. Department of Energy, while Subsection (B) provides a procedure for refineries to petition for an extension of their exemption on a

case-by-case basis. See 42 U.S.C. § 7545(o)(9)(A)–(B). Petitioners are wrong to try to read a "distinct purpose" into the statute based on the organization of these provisions.

Petitioners also misconstrue the statute's use of the phrase "at any time" (Pet. 14) to mean that "'at any time,' EPA can grant or make available the exemption." That is not what the statute says. Section 7545(o)(9)(B) provides only that "[a] small refinery may at any time *petition* [EPA] for an extension of the exemption." (emphasis added). But "[e]ven if a small refinery can *submit* a hardship petition at any time, it does not follow that every single petition can be *granted*." Pet. App. 72a. The phrase "at any time" describes when a refinery may submit its extension petition; it has no bearing on other conditions of eligibility. By making "at any time" the operative term (Pet. 22–24), Petitioners ignore the limiting terms "extension" and "extend"—used *five* times in § 7545(o)(9), each referring back to the original temporary exemption period.

Finally, Petitioners' policy argument that § 7545(o)(9)(B) created a permanent "safety valve" for small refineries (Pet. 2, 13, 18, 22, 25, 27), is not supported by the text of the statute. Section 7545(o)(9)(B) does not establish a "safety valve," but rather, "Congress, aware that small refineries would face greater difficulty complying with the renewable fuel requirements, created a three-tiered system of exemptions to afford small

refineries a *bridge to compliance*." See *Hermes*, 787 F.3d at 572.

CONCLUSION

Because the Tenth Circuit's decision does not conflict with the decision of any other courts or amount to an important question of federal law that should be settled by this Court, and because the D.C. Circuit will have an imminent opportunity to address this issue at the national level, the Court should deny the Petition.

Respectfully submitted,

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