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

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Under the Renewable Fuel Standard provisions of the Clean Air Act and the United States Environmental Protection Agency's ("EPA's") implementing regulations, refiners and importers of transportation fuel are required to blend increasing amounts of renewable fuel into their products. In recognition of the fact that small refineries might need more time to adjust to these blending mandates, Congress provided them with a temporary compliance exemption through 2010. EPA could extend this temporary exemption for additional time if, *inter alia*, a small refinery submitted a request to EPA showing that coming into compliance would cause it to suffer a disproportionate economic hardship. The Tenth Circuit concluded that, to be eligible to seek an extension of the temporary compliance exemption, the small refinery had to remain exempt in the years preceding its request.

Accordingly, the question presented is:

Whether EPA exceeded its authority by granting "extensions" of the "temporary exemption" under 42 U.S.C. §7545(o)(9)(B)(i) to small 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. 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 Respondents."

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OPINION BELOW

The Tenth Circuit's opinion is reported at 948 F.3d 1206 and reproduced at Petition Appendix ("App.") 1a–94a. The underlying EPA orders are not published in the Federal Register or otherwise publicly available, but they are produced in the Supplemental Appendix to the Petition ("Suppl. App.") 1a–46a.

JURISDICTION

The court of appeals entered its judgment on January 24, 2020. A petition for rehearing was denied on April 7, 2020. This Court entered an order on March 19, 2020 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, and granted on January 8, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 211(o)(9) of the Clean Air Act ("CAA"), 42 U.S.C. §7545(o)(9), provides:

(9) Small refineries.

(A) Temporary exemption

(i) In general

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption

(I) Study by Secretary of Energy

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.

(iii) Deadline for action on petitions

The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regulations promulgated under paragraph (2)(A) shall provide for the generation of credits

> by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.
>
> **(D) Opt-in for small refineries**
>
> A small refinery shall be subject to the requirements of paragraph (2) if the small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A).

42 U.S.C. §7545(o)(9). Other relevant provisions are set forth in Appendix C to the Petition. See App. 97a–103a.

INTRODUCTION

Congress enacted the Renewable Fuel Standard ("RFS") program to force the transportation market toward greater production and consumption of renewable fuels, which in turn would reduce greenhouse gas emissions, boost U.S. energy security, and support rural communities. For the RFS to function as intended, refiners and importers of gasoline and diesel fuels must blend increasing amounts of renewable fuel into their products each year.

When Congress enacted the RFS, it established a temporary exemption to provide all small refineries with additional time to prepare for compliance, 42 U.S.C. §7545(o)(9)(A)(i), with two pathways by which EPA could extend the initial exemption for refineries that needed more time before coming into compliance.

Id. §7545(o)(9)(A)(ii)(II), (B)(i). Under the pathway at issue here, small refineries could petition EPA for an extension of the initial exemption if they demonstrated that compliance with the RFS would result in disproportionate economic hardship.

The question presented in this case derives from the Tenth Circuit's determination that §7545(o)(9)(B)(i) authorizes EPA to extend a refinery's temporary exemption only if the refinery has been continuously exempt in each prior year. The Tenth Circuit analyzed the statutory term "extension of exemption" and emphasized that "[t]he small refinery exemption subject to an extension" is the initial exemption provided to all small refineries, which "is expressly identified as 'Temporary.'" App. 65a. The court then concluded that, "[p]aired with the rest of the amended Clean Air Act, . . . common definitions of 'extension' mean that a small refinery which did not seek or receive an exemption in prior years is ineligible for an extension, because at that point there is nothing to prolong, enlarge, or add to." App. 67a. The court explained that "[c]onstruing the word 'extension' to require prior exemptions—as a predicate to prolongment or enlargement—limits but preserves the small refinery exemption while giving meaning to the remainder of 42 U.S.C. § 7545(o)(9)." App. 70a–71a.

As explained herein, the Tenth Circuit's interpretation of the small refinery exemption provisions is the only interpretation that conforms with the statute's text, structure, and purpose. Continuity of the temporary exemption is inherent in both the ordinary

meaning of the word "extension" and the specific context in which it is employed in §7545(o)(9)(B)(i)—with a specific reference back to the finite "temporary" exemption granted to all small refineries at the start of the RFS program. This reading also carries out the small refinery exemption provisions' purpose of providing a temporary delay in RFS obligations for small refineries, with an eye toward bringing all refineries into compliance.

This Court should affirm the decision below.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Renewable Fuel Standard Program

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." *Americans for Clean Energy v. EPA* ("*ACE*"), 864 F.3d 691, 697 (D.C. Cir. 2017) (quoting the Energy Independence and Security Act, Pub. L. No. 110-140, 121 Stat. 1492 (2007)). To accomplish these goals, "[t]he statute mandates the gradual introduction of four nested categories of renewable fuels into the United States' supply of gasoline, diesel, and other transportation fuels." *Alon Refining Krotz Springs, Inc.*

v. EPA, 936 F.3d 628, 635 (D.C. Cir. 2019); 42 U.S.C. §7545(o)(2)(B).[1]

The statute prescribes annually increasing "applicable volumes" of renewable fuels that must be introduced each year, beginning at 4 billion gallons of renewable fuel in 2006 and ascending to 36 billion gallons in 2022. *Id.* §7545(o)(2)(B)(i)(I). "Under certain circumstances, the [statute] grants [EPA] authority to exercise so-called waivers to reduce applicable volumes below statutory levels." *American Fuel & Petrochemical Mfrs. v. EPA* ("*AFPM*"), 937 F.3d 559, 569–70 (D.C. Cir. 2019). "After exercising any waivers and finalizing an applicable volume for each type of fuel," the statute requires EPA to "calculate and promulgate renewable fuel obligations that will ensure that the Program's requirements are met in the upcoming year." *AFPM*, 937 F.3d at 570. In effect, EPA converts the applicable volume into a "percentage standard informing each obligated party"—any entity refining or importing transportation fuel, 40 C.F.R. §80.1406(a)(1)—"how much of its fuel production must consist of renewable fuels." *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 912 (D.C. Cir. 2014).

Obligated parties satisfy their renewable fuel obligation by "retiring" credits, called "Renewable Identification Numbers" or "RINs," "at an annual compliance demonstration." *AFPM*, 937 F.3d at 572; 40

[1] These categories are: (1) renewable fuel; (2) advanced biofuel; (3) cellulosic biofuel; and (4) biomass-based diesel. 42 U.S.C. §7545(o)(2)(A)(i).

C.F.R. §80.1427. RINs are "unique number[s] generated to represent a volume of renewable fuel[.]" 40 C.F.R. §80.1401. "RINs remain attached to the renewable fuel until that fuel is purchased by an obligated party or blended into fossil fuels to be used for transportation fuel." *Alon*, 936 F.3d at 637. "At that point the RINs become 'separated,' meaning they are, in effect, a form of compliance credit." *Id.* Separated RINs "may be retained by the party who possesses them or sold or traded on the open RIN market." *ACE*, 864 F.3d at 699. "[A]n obligated party [that] does not have enough RINs to meet its renewable fuel obligation . . . may: (i) attempt to purchase any RINs it needs on the open RIN market; (ii) use carryover RINs it has from the prior year to meet some portion of its obligation; or (iii) carry a renewable fuel deficit forward into the next compliance year, provided that some conditions are met." *ACE*, 864 F.3d at 699–700.

B. Temporary Exemptions for Small Refineries

Most obligated parties began fulfilling their RFS volume obligations in compliance year 2006. However, Congress "created a three-tiered system of exemptions to afford small refineries"—those whose "average aggregate daily crude oil throughput for a calendar year . . . does not exceed 75,000 barrels," §7545(o)(1)(K)—"a bridge to compliance." *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 572 (D.C. Cir. 2015); 42 U.S.C. §7545(o)(9)(A)–(B). First, the statute provided a "[t]emporary exemption" from RFS obligations to all small

refineries through 2010. *Id.* §7545(o)(9)(A)(i). Second, "the statute directed [the Department of Energy ("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 §7545(o)(9)(A)(ii)). Third, the statute allowed 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." *Id.* §7545(o)(9)(B)(i).

DOE conducted the mandated study in 2009 and found "no reason to believe small refineries will be disproportionately harmed by inclusion in the RFS[ ] program." Office of Policy & Int'l Affairs, Dep't of Energy, *EPACT 2005 Section 1501: Small Refineries Exemption Study*, at 13 (Jan. 2009). DOE explained that the RFS provided sufficient "flexibility," in that "[s]ome [small refineries] will be able to generate RINs through blending renewable fuels into their products; others may choose to purchase RINs[.]" *Id.* A few months later, the Senate Committee on Appropriations directed DOE to "reopen and reassess" its study. S. Rep. No. 111-45, at 109 (2009). DOE issued a revised study in 2011. Office of Policy & Int'l Affairs, Dep't of Energy, *Small Refinery Exemption Study* (Mar. 2011) ("2011

DOE Study"). In the 2011 DOE Study, DOE reversed itself and determined that small refineries can suffer disproportionate economic hardship from compliance with the RFS program, at least to the extent that compliance costs increase to the point that the refineries are not viable. *Id.*

The statute requires that EPA evaluate refineries' petitions for exemption extensions "in consultation" with DOE. 42 U.S.C. §7545(o)(9)(B)(ii). The statute does not define the term "disproportionate economic hardship," but directs EPA and DOE to "consider the findings" of DOE's study and "other economic factors." *Id.* §7545(o)(9)(B)(i)–(ii). EPA has offered little public information regarding its adjudication of small refinery exemption petitions after it receives DOE's recommendations. A 2016 EPA memorandum asserted that EPA considers "the findings of the DOE Small Refinery Study and a variety of economic factors," including "profitability, net income, cash flow and cash balances, gross and net refining margins, ability to pay for small refinery improvement projects, corporate structure, debt and other financial obligations, RIN prices, and the cost of compliance through RIN purchases." See Office of Air & Radiation, EPA, *Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests* (Dec. 6, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf. It is not clear from publicly available sources, however, whether EPA continues to undertake the analysis identified in EPA's 2016 memorandum.

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

Fifty-nine small refineries were exempt through 2010 under the initial blanket exemption. §7545(o)(9)(A)(i); 2011 DOE Study at 26. Between a two-year extension of exemption based on the 2011 DOE Study (*i.e.*, for 2011 and 2012) and a few individual petition-based exemptions, only 24 refineries remained exempt for 2011 and 23 remained exempt for 2012. 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012); EPA, *RFS Small Refinery Exemptions*, Table 2, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Mar. 18, 2021) ("*RFS Small Refinery Exemptions*"). Consistent with the "temporary" nature of the exemption, the number of exempt refineries "tapered down" between 2013-2015, with only eight extension petitions granted in 2013, eight granted in 2014, and seven granted in 2015. See *RFS Small Refinery Exemptions*; App. 68a.

But starting with the 2016 compliance year, EPA abruptly changed course. The number of exempt refineries jumped to 19 for 2016, 35 for 2017, and 32 for 2018.[2] *RFS Small Refinery Exemptions*. EPA adjudicates petitions for small refinery exemption extensions

[2] EPA has received 32 petitions for 2019 and 16 for 2020, *RFS Small Refinery Exemptions*, but has stated it will not act on these petitions until this Court issues a decision in this case, with the exception of two petitions that EPA granted the night before President Biden's inauguration. See Petition for Review, Ex. A–D, *Renewable Fuels Ass'n v. EPA*, No. 21-9518 (10th Cir. filed Feb. 8, 2021).

in secret, so the public only learned of the uptick in exempt refineries through news reports in the spring of 2018.[3] In August 2018, EPA created an online "dashboard" through which it periodically releases updates on the *aggregate* number of exemptions and the corresponding aggregate amount of renewable fuel covered by the exemptions. *RFS Small Refinery Exemptions*. But "[t]he dashboard does not identify the refineries that received extensions, the date of decisions, the regulatory standards being applied to evaluate applications, or the reasons for granting or denying the exemptions." *Advanced Biofuels Ass'n v. EPA*, 792 Fed. App'x 1, 4 (D.C. Cir. 2019).

II. BACKGROUND OF THE CASE

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 HollyFrontier Woods Cross Refining, LLC ("HollyFrontier Woods Cross") (collectively, with HollyFrontier Refining,

[3] 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-lawidUSKBN1HJ32R.

"HollyFrontier"). HollyFrontier Cheyenne received an extension of the temporary exemption through 2012 based on the 2011 DOE Study, but its exemption was not further extended in 2013 or 2014. App. 29a. HollyFrontier Cheyenne applied for an exemption extension in 2015, but EPA denied the petition. App. 29a. HollyFrontier Cheyenne appealed EPA's denial to the Tenth Circuit, which 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. App. 30a. The record does not indicate that HollyFrontier Woods Cross ever received an extension of the small refinery temporary exemption based on either the 2011 DOE Study or a petition to EPA. App. 32a.

A subsidiary of CVR Refining, LP, Petitioner Wynnewood Refining Company, LLC ("Wynnewood"), submitted an exemption extension petition for its Wynnewood Refinery for compliance year 2017. Wynnewood's petition stated that it had received an extension of the initial exemption in 2011 and 2012 but received no further extensions of the exemption. App. 34a.

EPA granted each of these three petitions in unpublished decisions that were initially issued only to the Petitioners. The Biofuels Respondents did not have access to these decisions until receiving the administrative record for this case from EPA.

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

The Biofuels Respondents learned of Petitioners' exemptions through media reports and confirmed them through the Petitioners' public filings with the U.S. Securities and Exchange Commission. The Biofuels Respondents filed a petition for review challenging EPA's statutory authority to grant these exemptions and challenging EPA's decisions as arbitrary and capricious in several respects.

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, while agency actions with national applicability are to be heard by the D.C. Circuit. 42 U.S.C. §7607(b)(1). Because EPA's decisions regarding individual small refinery exemption petitions are construed as having local or regional applicability, the Biofuels Respondents filed for review in the Tenth Circuit.[4]

In the ruling challenged by Petitioners, the Tenth Circuit vacated all three exemption decisions, holding

[4] In 2019, EPA changed its prior practice of issuing individual decision documents for each small refinery petition submitted. That year, EPA addressed all 2018 small refinery exemption extension petitions in a single memorandum, which also set forth EPA's national approach for adjudicating such petitions. The parties comprising the Biofuels Respondents have sought review of that decision before the D.C. Circuit. See *Renewable Fuels Ass'n v. EPA*, No. 19-1220 (D.C. Cir. filed Oct. 22, 2019).

that EPA exceeded its authority under 42 U.S.C. §7545(o)(9)(B)(i) by granting new small refinery exemptions to Petitioners' refineries when the plain text of the statute allows EPA to grant only "*extensions*" of the initial temporary exemption. 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 petitions each year." 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." App. 75a.

The Tenth Circuit found two additional flaws with EPA's decisions 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." App. 84a–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. App. 84a. These were among other factors that the court determined were inappropriately considered because they were "not restricted to disproportionate economic hardship caused by RFS compliance." 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." App. 87a. This is because "merchant refineries typically recoup their RIN purchase costs through higher petroleum fuel prices." App. 91a.

SUMMARY OF THE ARGUMENT

Most refineries and petroleum importers in the United States have complied with the requirements of the RFS, diversifying the United States' energy portfolio while reducing carbon-based pollution across the country. Recently, however, EPA has allowed certain smaller refineries to avoid compliance through unlawful application of the statute's small refinery exemption provisions. These provisions establish a temporary exemption for all small refineries through 2010, 42 U.S.C. §7545(o)(9)(A)(i), and two mechanisms for extending that temporary exemption. First, the statute provides that EPA "shall extend the exemption . . . for a period of not less than two additional years" for refineries that a statutorily-mandated DOE study concluded "would be subject to a disproportionate economic hardship if required to comply" with the RFS. *Id.* §7545(o)(9)(A)(ii)(II). Second, "[a] small refinery may at any time petition [EPA] for an extension of the exemption . . . for the reason of disproportionate economic hardship." *Id.* §7545(o)(9)(B)(i).

In the challenged actions, EPA granted three small refineries' petitions for exemption extensions, despite the fact that the refineries were no longer in exempt status. Applying the commonly understood and accepted meaning of "extension"—"to prolong" something that is currently in place—the Tenth Circuit held that EPA exceeded its authority under §7545(o)(9)(B)(i) by creating new exemptions from whole cloth, when the statute only authorized EPA to extend an existing exemption. Because none of the three refineries still had an exemption, there was nothing for EPA to extend.

Petitioners challenge the Tenth Circuit's interpretation of the statute, asserting that because "extension" can sometimes mean "grant" or "make available," the temporary exemption should be treated as a "free-standing exemption" that EPA can grant ad hoc.

The text, structure, and purpose of the statute preclude that interpretation. Starting with the text, §7545(o)(9)(B)(i) authorizes only "an *extension* of *the exemption under subparagraph (A)*." This alone forecloses the possibility that this provision allows EPA to grant a "free-standing exemption." Authority to extend is explicitly limited to the "temporary exemption" under subparagraph (A), which Congress granted when it enacted the RFS. There is thus nothing for EPA to "grant" or "make available," only a specific existing exemption to prolong. Further, because "extension" can only mean the continuance of the time-limited subparagraph (A) exemption, temporal continuity is required. See *infra* Part I.A.

The structure of the small refinery exemption provisions and surrounding terms further confirms this reading of §7545(o)(9)(B)(i). Petitioners concede that §7545(o)(9)(A)(ii)(II)—authorizing extension of the exemption "for a period of . . . additional years" based on the DOE study—requires temporal continuity. Established principles of statutory interpretation dictate that when Congress used the same term, "extension of exemption," in the following provision of the same section of the statute, it intended the same meaning. That refineries may submit their petitions "at any time" has no bearing on the refineries' *eligibility* for exemption extensions. Likewise, Congress's decision to define "small refinery" based on a year's throughput does not override the other conditions of eligibility for exemption extensions. See *infra* Part I.B.

The stated purposes of the RFS fully support the Tenth Circuit's interpretation of §7545(o)(9)(B)(i). The United States cannot realize Congress's vision for a cleaner and more diverse energy portfolio if small refinery exemptions continue indefinitely and unpredictably to siphon a significant portion of renewable fuel blending requirements out of the RFS program. The Tenth Circuit's holding also comports with the small refinery exemption provisions' "temporary" character and overarching goal of funneling all small refineries into compliance with the RFS. See *infra* Part I.C.

Petitioners' policy argument that §7545(o)(9)(B)(i) is meant to be a permanent "safety valve," which they conceive as an option for small refineries to *never* comply with the RFS, is foreclosed by the statute. This

argument also fails on its merits, particularly given that all but seven or eight small refineries complied for three consecutive years between 2013-2015. More importantly, the alleged harms cannot be reconciled with EPA's steadfast conclusion that refineries of all sizes can fully recover the costs of RFS compliance in the sales prices of their products. In any event, to the extent there is any validity to Petitioners' claims of economic harm caused by the RFS, the statute includes separate provisions to address such circumstances for all obligated parties. See *infra* Part I.D.

Lastly, this is not a *Chevron* deference case. Petitioners' claim that the Tenth Circuit's holding was a necessary assumption underlying a 2014 EPA rule is not only wrong, but also unpersuasive as a ground for giving deference to EPA's prior interpretation of §7545(o)(9)(B)(i). See *infra* Part II.

This Court should affirm the Tenth Circuit's decision.

ARGUMENT

I. THE STATUTE AUTHORIZES ONLY AN EXTENSION OF A SMALL REFINERY'S INITIAL TEMPORARY EXEMPTION.

The text, structure, and purpose of 42 U.S.C. §7545(o)(9), independently and as part of the statutory scheme, dictate that an "extension of exemption" under subparagraph (B)(i) can only mean the temporal

extension of the "temporary exemption" that Congress provided to all small refineries at the start of the RFS program.

A. The Plain Text of §7545(o)(9) Confirms the Tenth Circuit's Interpretation of Subparagraph (B)(i).

Section 7545(o)(9)(B)(i), captioned "Extension of exemption," provides that "[a] small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." Because the statute delineates EPA's "extension" authority by reference to the finite "temporary exemption" granted under subparagraph A, "extension" cannot, in the context of this statute, mean "to grant" a new exemption or "to make available" the exemption after a refinery's exemption term has expired. Accordingly, when the Tenth Circuit held that the only small refineries that are "eligible for extensions [are] ones that submitted meritorious hardship petitions each [prior] year," App. 68a, it applied a requirement inherent in the statute—*i.e.*, that a refinery needs to still *have* an exemption to be eligible to *extend* that exemption. This requirement was compelled by the ordinary meaning of "extension," which "dictate[s] that the subject of an extension must be in existence before it can be extended." *Id.* at 67a.

In any statutory construction case, this Court begins with the statute's text, considering "whether the language at issue has a plain and unambiguous

meaning with regard to the particular dispute in the case." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (citation omitted). Statutory terms not defined by the statute "are generally interpreted in accordance with their ordinary meaning." *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013) (citation omitted). Because statutory language "cannot be construed in a vacuum," however, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Roberts*, 566 U.S. at 101 (citation omitted).

Here, the ordinary meaning of the words of the statute and their context are in harmony. Critically, §7545(o)(9)(B)(i) identifies the "temporary exemption" granted under subparagraph (A) as the specific thing that may extended. That the statute describes "extension" by reference to a specific time-limited exemption granted by the statute is strong evidence that Congress used "extension" in the relevant ordinary sense of "an increase in length of time." See App. 66a. It is equally strong evidence that subparagraph (B)(i) does *not* confer on EPA any authority *to grant* a new "free-standing exemption" decoupled from the time-limited temporary exemption already granted by the statute. Pet'rs Br. 19, 28.

The surrounding text in §7545(o)(9) reinforces that interpretation. Subparagraph (B)(i) describes "extension" by reference to subparagraph (A), captioned "Temporary exemption," which provides that statutory RFS obligations "shall not apply to small refineries until calendar year 2011." *Id.* §7545(o)(9)(A)(i). The

statute offers two ways of *lengthening* that initial, finite term beyond 2010, both by an "extension of exemption." *Id.* §7545(o)(9)(A)(ii)(II), (B)(i). Neither of these "extension of exemption" clauses leaves any doubt as to what Congress permitted to be "extended": the "temporary exemption" under subparagraph A.

The first of these appears in subparagraph (A)'s second clause, "Extension of exemption." Therein, Congress directed DOE to conduct a study "to determine whether compliance with [RFS] requirements . . . would impose a disproportionate economic hardship on small refineries." *Id.* §7545(o)(9)(A)(ii)(I). The second subclause, also captioned "Extension of exemption," directed EPA to "extend the exemption under clause [A](i) . . . for a period of not less than 2 additional years" for small refineries that the DOE study determined "would be subject to a disproportionate economic hardship" if required to comply with the RFS. *Id.* §7545(o)(9)(A)(ii)(II).

The second way to extend the temporary exemption appears in subparagraph (B). There, Congress provided a refinery-driven petition process "based on disproportionate economic hardship." *Id.* §7545(o)(9)(B). Like §7545(o)(9)(A)(ii)(II), subparagraph (B)(i) is captioned "Extension of exemption," and it similarly specifies what can be extended by reference to the original exemption: "the extension of the exemption under subparagraph (A)." *Id.* §7545(o)(9)(B)(i).[5]

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[5] Because subparagraph (B)(i) references the entirety of paragraph A, an exemption extension by petition was available to

Petitioners' arguments that §7545(o)(9)(B)(i) gives EPA authority to grant a "free-standing exemption" either try to manufacture ambiguity where there is none, and/or take words and phrases out of context to avoid the otherwise obvious implications of the statutory scheme. None of Petitioners' arguments undercut the plain text of the statute or this Court's established principles of interpretation.

1. The term "extension" in §7545(o)(9)(B)(i) cannot mean "to grant" or "make available."

Petitioners' central premise is that the Tenth Circuit used the wrong definition of "extension" when interpreting §7545(o)(9)(B)(i). To argue that "extension" need not mean "an increase in length of time," App. 66a, Petitioners offer several examples showing that—at least as a general matter—the terms "extend" and "extension" can have "a wide range of possible meanings." Pet'rs Br. 23. But "construing statutory language is not merely an exercise in ascertaining the outer limits of a word's definitional possibilities." *FCC v. AT & T Inc.*, 562 U.S. 397, 407 (2011) (quotation marks omitted). Statutory language must be construed "in light of the terms surrounding it," and there is "no sound reason in the statutory text or context to disregard the

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eligible refineries either immediately after the initial exemption period in §7545(o)(9)(A)(i), or immediately after the expiration of the exemption extension under §7545(o)(9)(A)(ii)(II).

ordinary meaning of" extension in §7545(o)(9)(B)(i). *Id.* at 405, 407 (quotation marks omitted).

The Tenth Circuit appropriately identified "[a] common definition of 'extension' that meshes with th[e] statutory scheme": "an increase in length of time, especially an increase in time allowed under agreement or concession." App. 66a (quotation marks omitted). That approach incorporates two fundamental canons of statutory construction: (1) that otherwise undefined words "will be interpreted as taking their ordinary, contemporary, common meaning," *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2015) (quotation marks omitted); and (2) that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Parker Drilling Mgmt. Servs., Ltd. v. Newton*, 139 S. Ct. 1881, 1888 (2019) (quoting *Roberts*, 566 U.S. at 101). Construing "extension" in its temporal sense applies not only its ordinary meaning, but also the *only* meaning that makes sense in the context of §7545(o)(9)(B)(i).

Petitioners argue that the court should have considered that "extension" can also mean "to grant" or "make available." Pet'rs Br. 27–28. But identifying a possible alternative definition of a word "does not establish that the word is ordinarily understood in that sense." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012) (citation omitted). Nor does the existence of an alternative definition render a statute ambiguous—particularly when the proffered alternative cannot be squared with the plain terms of the statute. *AT & T*, 562 U.S. at 407; *Yates v. United States*, 574 U.S.

528, 537 (2015) ("[T]he plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.") (quotation marks omitted).

To begin with, the words "extend" and "extension" cannot be interpreted independently—in §7545(o)(9) these words are *always* used in conjunction with "exemption." They appear together in three captions—§7545(o)(9)(A)(ii), (A)(ii)(II), (B)(i) ("Extension of exemption")—and in each of the two operative extension clauses, both of which also identify the specific exemption to be extended—(o)(9)(A)(ii)(II) ("extend the exemption under clause [A](i)") and (o)(9)(B)(i) ("extension of the exemption under subparagraph (A)"). Thus, the operative term is not simply "extension" but "extension of the exemption in subparagraph (A)." Accordingly, §7545(o)(9)(B)(i) authorizes only an "extension of *the* exemption under subparagraph (A)," not *an* exemption in isolation. And because "the exemption under subparagraph (A)" is time-limited, an "extension" thereof is naturally interpreted as meaning "to make longer."

Interpreting §7545(o)(9)(B)(i) as instead authorizing EPA to grant a "free-standing exemption," Pet'rs Br. 28, rather than an extension of a specific existing exemption, renders meaningless the reference to "the exemption under subparagraph A"—the very term Congress used to identify the subject of the "extension." This violates the "cardinal principle of statutory

construction that [courts and agencies] must give effect, if possible, to every clause and word of a statute." *N.L.R.B. v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) (quotation marks omitted).

More fundamentally, replacing "extension" in §7545(o)(9)(B)(i) with Petitioners' suggested alternatives—"grant" or "make available"—renders the provision either redundant or impossible to execute by its literal terms. The provision would read: A "small refinery may at any time petition the Administrator for [a grant] of the exemption under subparagraph (A). . . ." But the statute already *grants* "the exemption under subparagraph (A)" in subparagraph (A)(i), which by its plain terms expired as of 2010. The conditional extension under subparagraph (A)(ii) was also finite (expiring as of 2012) and likewise granted by the statute. So, to interpret "extension" in (B)(i) as "grant" or "make available" "the exemption under subparagraph (A)," would ignore the express temporal limitations in subparagraph A.

Petitioners' interpretive problem is not solved by what they argue is "one of the most important textual clues in the statute": the reference in §7545(o)(9)(B)(iii) to a "petition for a hardship exemption." Pet'rs Br. 28. That Congress referred to "petition[s] for a hardship exemption" in a subclause instructing EPA to rule on such petitions within 90 days does not alter Congress's description in §7545(o)(9)(B)(i) of *what* specifically can be extended—"the exemption under subparagraph (A)." Nor does it make Petitioners' concept

of a free-standing exemption any more compatible with the rest of the statute.

Had Congress intended to create a "free-standing exemption," it would have done so in plain terms. Indeed, it would most likely have avoided using the term "extension" at all; it most likely would have used the word "grant," as it did throughout the Clean Air Act. For example, 42 U.S.C. §7545(o)(7)(C) speaks in terms of "[a] waiver *granted*," not a waiver *extended*.[6] Congress also used variations of "grant"—rather than "extension"—in other provisions of the Energy Policy Act of 2005 when referring to granting an exemption. See Pub. L. No. 109-58, 119 Stat. 594, 1101 ("No such exemption shall be granted. . . ."); 119 Stat. 594, 955 ("any exemption granted"). Where, as here, "legislators did not adopt obvious alternative language, the natural implication is that they did not intend the alternative." *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1659 (2017) (quotation marks omitted).

Petitioners' examples of how "extension" is used in other statutes "are largely irrelevant" except to make the uncontested point that "extension" can take on other meanings in other contexts. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, n.4 (1997).[7] Tellingly, Petitioners'

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[6] See also, *e.g.*, §7545(c)(4)(C)(ii)(III) ("grant the waiver"); §7545(f)(4) ("grant or deny an application"); §7545(k)(B)(iv) ("the granting and use of credits"); §7545(k)(7)(A) ("the granting of an appropriate amount of credits"); §7545(m)(3)(C)(ii) ("waiver may be granted").

[7] For example, Petitioners cite *Field v. Mans*, 157 F.3d 35, 43 (1st Cir. 1998), which states that the phrase "extension of credit"

examples of statutes where Congress used "extension" synonymously with "grant" or "make available" do not involve Congress authorizing an "extension" of something similarly time-limited, specific, and already in place.[8]

2. The term "extension" in §7545(o)(9)(B)(i) requires temporal continuity.

Petitioners argue in the alternative that the term "extension" does not require temporal continuity. Similar to their arguments regarding other possible definitions of extension, Petitioners again fail to demonstrate how a "free-standing exemption" is workable within the text of the statute. Instead, Petitioners offer only general examples in which temporal

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as used in section 523(a)(2)(A) of the Bankruptcy Code has two possible meanings—to grant or to lengthen or enlarge. The fact that the meaning of "extension" is ambiguous under an entirely different statutory scheme is irrelevant here, where the context and purpose of the provision at issue eliminate any ambiguity that the word "extension" may have in isolation.

[8] 22 U.S.C. §4061(a)(2) ("extension of the benefits of the [Foreign Service Retirement and Disability System]," including "future benefits," "to new groups of employees"); 22 U.S.C. §4061(a)(3) ("extension of benefits"); 43 U.S.C. §451b(c) ("extension of benefits"); 15 U.S.C. §78*l*(f)(1)(E) ("extension of unlisted trading privileges"); 38 U.S.C. §3748 ("extension of financial assistance"); 50 U.S.C. §2333(c) ("extension of foreign assistance"); 15 U.S.C. §§1141d, 1141e, 1141f, 1141g ("extension of protection"); 18 U.S.C. §892 ("extension of credit"); 42 U.S.C. §9601(20)(H) ("extension of credit"); 25 U.S.C. §3204(b)(3) ("extension of access"); 32 U.S.C. §308(a), §310(b) ("extension of temporary Federal recognition"); 19 U.S.C. §2434(c), §2437(c)(1) ("extension of nondiscriminatory treatment").

continuity is not an inherent requirement of "extension" in other, non-analogous contexts outside of the RFS. Context is integral to statutory interpretation, however, and the context of §7545(o)(9)(B)(i), authorizing extension of an established exemption, requires continuity.

The concept of temporal continuity is implicit in §7545(o)(9)(B)(i) because the term "extension" is delineated by reference to a specific extant, time-limited exemption. "Extension" in this context can mean only the continuance of the particular exemption that Congress granted "in subparagraph (A)." As the Tenth Circuit put it, an "extension" under §7545(o)(9)(B)(i) "requires a small refinery exemption in prior years to prolong, enlarge, or add to." App. 75a.

While Petitioners dispute that the term "extension" in subparagraph (B)(i) requires temporal continuity, they concede that nearly identical language in the immediately preceding subparagraph (A)(ii)(II) does require it. Pet'rs Br. 26–27; see 42 U.S.C. §7545(o)(9)(A)(ii)(II) (authorizing EPA to "extend the exemption . . . for a period of . . . additional years."). As explained *infra*, Petitioners offer no plausible reason why this Court should assign different meanings to essentially the same phrase in adjacent subparagraphs (A) ("extend the exemption") and (B) ("extension of the exemption"), particularly because both clauses use "extension" together with explicit reference back to the *same exemption*. Continuity is therefore required in both instances.

Even standing alone, the ordinary meaning and use of the term "extension" implicate continuity. Despite Petitioners' claim otherwise, Pet'rs Br. 29, the Tenth Circuit did reference a dictionary definition of "extension" implicating "continuity." App. 66a (citing *Extension*, Cambridge Online Dictionary, https://dictionary.cambridge.org/us/dictionary/english (last visited Mar. 20, 2021) ("[T]he fact of reaching, stretching, or *continuing*; the act of adding to something in order to make it bigger or longer.") (emphasis added)). Other dictionaries have likewise defined "extension" to invoke temporal continuity. See, *e.g.*, *Extension*, Black's Law Dictionary (11th ed. 2019) ("The continuation of the same contract for a specified period."). Consistent with these definitions, courts routinely interpret "extension" to mean a continuous temporal period. See *United States v. Hermanek*, 289 F.3d 1076, 1086 (9th Cir. 2002) ("an order is an extension of an earlier order only if it authorizes continued interception of the same location. . . ."); *United States v. Ojeda Rios*, 875 F.2d 17, 21 (2d Cir. 1989) ("the term extensions is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order. . . .") (quotation marks omitted), *vacated and remanded on other grounds by* 495 U.S. 257 (1990); see also *Sunac Petroleum Corp. v. Parkes*, 416 S.W.2d 798, 802 (Tex. 1967) ("It seems clear that the new lease was not an Extension of the old lease. An extension, as used in this context, generally means the prolongation or continuation of the term of the existing lease. . . . [But here] the lease had long since expired. . . .").

Moreover, if Congress did not intend to require continuity, it could have simply allowed for new exemptions, instead of "extensions" of the "temporary" exemption, or used a different term in place of "extension," such as "renewal," which is defined as "to begin or take up again." See Random House Webster's Unabridged Dictionary at 684, 1631 (Deluxe Ed. 2001); see also *Eastham v. Chesapeake Appalachia, L.L.C.*, 754 F.3d 356, 362 (6th Cir. 2014) (quoting *Xenia v. State*, 746 N.E.2d 666, 673 (Ohio Ct. App. 2000)) ("Paragraph 12 set forth an option to extend, rather than an option to renew, the water contract. Therefore . . . no new water contracts ever came into being, but the original water contract remained continuously in force through a series of successive one-year extensions."); *Aquilent, Inc. v. Distributed Solutions, Inc.*, 2012 WL 405009, at *7 (E.D. Va. Feb. 7, 2012) (A new contract cannot be considered an "extension" of a prior contract).

Petitioners provide the example of an extension of a filing deadline under Fed. R. Civ. P. 6(b)(1)(B), Pet'rs Br. 29, to suggest that extensions need not be continuous. However, this example actually *supports* the notion that the ordinary meaning of "extension" implies continuity. In conferring discretionary power to "extend the time" when "an act may or must be done within a specified time," Rule 6 distinguishes between the power to extend time "before the original time or its extension expires" for "good cause," Fed. R. Civ. P. 6(b)(1)(A), from the separately-conferred power to extend most deadlines after "time has expired," Fed. R.

Civ. P. 6(b)(1)(B), which requires a higher showing. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 895–96 (1990). This suggests that the power to extend after expiration is *not* inherent to—and should not be inferred from—a grant of the general power to "extend." Unlike Rule 6(b), §7545(o)(9) does *not* confer authority on EPA to "extend" a refinery's exemption after it expires, and such authority should not be implied from the term "extension" alone. See 42 U.S.C. §7545(o)(9). That is particularly so because the discretion to grant an "extension of exemption" under §7545(o)(9) is not analogous to a court's power to "extend the time" when "an act may or must be done within a specified time." See Fed. R. Civ. P. 6(b)(1). The temporary exemption is not "an act," but a continuation of a status—the status of being exempt from RFS obligations. Extension of the exemption is a continuation of that status for an additional period of time. That is quite different from extending a deadline for completing a specific "act."

Petitioners' other examples of instances where Congress expressly authorized the extension of a benefit after the benefit had lapsed similarly have no bearing on the statute at issue here. While there may be some instances where Congress intends to authorize an extension after a lapse, that intent is absent in §7545(o)(9). Instead, the text reflects that Congress intended the exemption provision to funnel all small refineries into compliance with the RFS. See *Hermes*, 787 F.3d at 578.

As discussed in Sections I.B and I.C, *infra*, the flaws with Petitioners' interpretation of §7545(o)(9)(B)(i) are

even more obvious when the plain text is construed within the structure of the small refinery exemption provisions and in light of their purpose.

B. The Structure of the Small Refinery Exemption Provisions Confirms That They Are Only a Temporary Bridge to Compliance.

The structure of §7545(o)(9) supplies contextual clues confirming that subparagraph (B)(i) can only be interpreted to authorize temporal extensions of the temporary exemption provided by subparagraph (A)(i). As noted, Petitioners concede that the extensions granted under subparagraph (A)(ii) are continuous extensions of the initial, temporary exemption in (A)(i). Pet'rs Br. 26–27. Yet Petitioners challenge the need for continuity in the nearly identical provision under subparagraph (B)(i). Petitioners cannot assign different meanings to the same phrase in the same section of the statute, particularly where, as here, the context makes clear that Congress intended the same meaning.

Nor can Petitioners use other statutory terms to negate the commonsense meaning of the term "extension of exemption." While language must be "construe[d] . . . in light of the terms surrounding it," *AT&T*, 562 U.S. at 398 (quotation marks omitted), it must also be read so that "no part will be inoperative or superfluous, void or insignificant." *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (quotation marks omitted). For this reason, the Tenth Circuit

correctly rejected Petitioners' proposed interpretation because it would not "allow[] the word 'extension' to maintain its ordinary meaning" or "meaningfully promote the aims of the statute." App. 74a.

1. "Extension of exemption" has the same meaning throughout §7545(o)(9).

Petitioners admit that "extension" in §7545(o)(9)(A)(ii)(II) invokes temporal continuity, Pet'rs Br. 26–27, but nonetheless argue that the same word should be interpreted entirely differently in §7545(o)(9)(B)(i) based on "context." Every piece of contextual evidence, however, points in the opposite direction.

First, both of the extension provisions have the same caption, "Extension of exemption," and while these "cannot limit the plain meaning of a statutory text, they supply clues as to what Congress intended." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) (internal citation and quotation marks omitted). Second, both the captions and the two operative clauses refer specifically to an "extension of exemption" in some form, within the same statutory provision, strongly suggesting that they have a single, fixed meaning. *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019) ("In all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning. We therefore avoid interpretations that would attribute different meanings to the same phrase.") (internal citation and quotation marks omitted).

There is a well-established presumption that "a given term is used to mean the same thing throughout a statute." *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456 (2012) (quotation marks omitted). This presumption is heightened where, as here, the same term is used multiple times in close proximity—*e.g.*, in different subparagraphs of the same paragraph, as extend/extension is used in §7545(o)(9). See *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) ("[T]o rule for [petitioners] we would have to suppose Congress set two words cheek by jowl in the same phrase but meant them to speak to entirely different periods of time. . . . [S]upposing such a surreptitious subphrasal shift in time seems to us a bit much."); *Nijhawan v. Holder*, 557 U.S. 29, 39 (2009) ("[S]ubparagraph M(i) appears just prior to subparagraph M(ii) . . . and their structures are identical. Where, as here, Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations.").

Moreover, both §7545(o)(9)(A)(ii)(II) and §7545(o)(9)(B)(i) describe "extend" and "extension" by reference to the same statutory exemption, further confirming that they are describing the same thing. See *IBP, Inc. v. Alvarez*, 546 U.S. 21, 22 (2005) ("[T]here is no plausible argument that these terms mean something different in §4(a)(2) than they do in §4(a)(1). This is not only because of the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning. It is also because §4(a)(2)

refers to '*said* principal activity or activities.' The 'said' is an explicit reference to the use of the identical term in §4(a)(1).") (internal citation omitted); see also *Envtl. Def. v. Duke Energy Corp*., 549 U.S. 561, 582–84 (2007) (Thomas, J., concurring in part) ("The statute here includes a statutory cross-reference, which conveys a clear congressional intent to provide a common definition[.]").

Petitioners' attempt to impose meaning on Congress's decision to split §7545(o)(9) into subparagraphs is likewise unavailing. Indeed, that the two exemption extension provisions appear in separate subparagraphs is unsurprising given their different schedules and procedures. Subparagraph (A) establishes the initial exemption and provides a one-time, two-year extension beginning in calendar year 2011 based on a DOE study. 42 U.S.C. §7545(o)(9)(A). Subparagraph (B), in contrast, provides an extension based on petitions to EPA, for any refinery that continues to be eligible. *Id.* §7545(o)(9)(B). A separate paragraph was also necessary because there are provisions in subparagraphs (C) and (D) that apply only to subparagraph (A), but not (B). *Id.* §7545(o)(9)(C), (D) (describing procedure for when a small refinery "waives the exemption under subparagraph (A)").[9] What remains

[9] Subparagraphs (C) and (D) also undermine Petitioners' position. These provisions require a small refinery opting out of the exemption in subparagraph (A) to comply with RFS obligations "*beginning in the calendar year following the date of notification*." See 42 U.S.C. §7545(o)(9)(C), (D). The phase "beginning in the calendar year" indicates that once a refinery undertakes its RFS compliance obligations, it would no longer be eligible for future

unaltered across subparagraphs (B), (C), and (D), however, is the cross-reference to "the exemption under subparagraph (A)"—the only exemption contemplated in §7545(o)(9).

2. Ability to petition EPA "at any time" does not alter the eligibility criteria for an extension of the exemption.

Petitioners argue that the phrase "extension of the exemption under subparagraph (A)" should not be given its most sensible meaning because subparagraph (B)(i) states that a small refinery "may at any time petition" for such an exemption extension. This erroneously conflates the *timing for submitting a petition* with *eligibility* for an exemption extension.

While the statute provides that a refinery may submit a petition "at any time," a refinery may petition only to *extend* its initial, temporary exemption. As the Tenth Circuit correctly explained, "even if a small refinery can submit a hardship petition at any time, it does not follow that every single petition can be granted." App. 72a. Within the context of the statute, and giving every word its ordinary meaning, this can mean only that a refinery may petition at any time for an exemption so long as the refinery remained exempt from compliance in the immediately preceding year.

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extensions of its initial, temporary exemption. If Congress had intended for refineries opting out of the exemption to be eligible for future exemptions, it would have just said "*in the year* following the date of notification."

Congress could have allowed a small refinery to *obtain an exemption* at any time—but that is not what the statute provides.

The word "any" in a statute can certainly have a broad sweep. Pet'rs Br. 33. But the meaning of "any" "depends on the statutory context," and "'any' in this context does not bear the heavy weight" Petitioners put upon it. *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 629 (2018); see also *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 337 (2014) (Breyer, J., concurring) ("I agree with the Court that the word 'any,' when used in a statute, does not normally mean 'any in the universe.' "). Here, the use of the word "any" to describe the *timing* of the petition process does not change the *eligibility* of refineries seeking to extend their respective exemptions. By trying to make the phrase "at any time" the operative term, Pet'rs Br. 33–36, Petitioners ignore the limiting term "extend" or "extension," which is used five times in §7545(o)(9). Indeed, if this Court were to adopt Petitioners' position, the term "extension" would be surplusage. See *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (quotation marks omitted).

There are at least two plausible interpretations that give "some operative effect" to both "at any time" and "extension." See *Duncan v. Walker*, 533 U.S. 167, 175 (2001) (quotation marks omitted). First, the phrase "at any time" could signal that refineries seeking an exemption extension are not constrained by the various deadlines applicable to the process of

setting annual renewable fuel standards. These include: EPA's November 30th deadline for issuing renewable fuel annual standards for the upcoming year, §7545(o)(3)(B)(i); the 90-day period in which EPA is obligated to act on small refinery petitions, §7545(o)(9)(B)(iii); and the December 31, 2008 deadline by which DOE had to complete its study, §7545(o)(9)(A)(ii)(I). In other words, a small refinery may "petition" at any point during a calendar year for another extension of the initial, temporary exemption.

Second, the phrase "at any time" could distinguish the third tier of the small refinery exemption from the first two tiers, which are explicitly time-limited. Subparagraph (A)(i) set the initial temporary exemption through 2010; and (A)(ii) required EPA to extend that exemption for two additional years for certain refineries. The third tier, (B)(i), is not inherently time-limited—refineries could petition for extensions in 2011 and any year thereafter, so long as they had received exemptions continuously and met all other requirements. For instance, refineries could petition immediately after the initial five-year exemption for all small refineries, if not exempted by the DOE study under §7545(o)(9)(A)(ii). Indeed, that is what happened in 2011 and 2012: 21 small refineries were exempt based upon the 2011 DOE Study, 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012), and two to three more small refineries obtained an exemption extension from EPA under §7545(o)(9)(B)(i). *RFS Small Refinery Exemptions*.

Petitioners' more expansive reading of "at any time" would also lead to absurd results. If a small

refinery in 2018 were permitted to request an exemption for 2013, long after its compliance deadline had passed, it is unlikely that the refinery—after waiting years to request an exemption—could have been facing hardship at the time of compliance.[10] See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

3. The statutory definition of "small refinery" does not alter the eligibility criteria for an extension of the exemption.

Petitioners also suggest that if Congress had intended to limit the hardship exemption to small refineries that had been continuously exempt every year of the program, one would not expect the definition of "small refinery" to turn on the refinery's throughput "for a calendar year." Pet'rs Br. 36–38; 42 U.S.C. §7545(o)(1)(K). Instead, they argue, Congress would have required the refinery's throughput to remain below 75,000 barrels in every preceding year of the

[10] EPA has agreed that the phrase "at any time" in §7545(o)(9)(B)(i) cannot be boundless. See EPA, *Denial of Small Refinery Gap-Filling Petitions* (Sept. 14, 2020), https://www.epa.gov/sites/production/files/2020-09/documents/rfs-denial-small-refinery-gap-filling-petitions-2020-09-14.pdf ("Indeed, it seems unlikely that Congress contemplated or intended to allow a small refinery to obtain hardship relief through submitting a petition in calendar year 2020 for RFS compliance year 2011, for example.").

program. Pet'rs Br. 38. This argument is misplaced. A small refinery's eligibility for the original exemption under (A)(i) was based on volumetric output alone, but exemption extensions under (B)(i) have additional requirements, including continuity. EPA's regulations recognize this distinction. A small refinery petitioning under subparagraph (B)(i) must show that it was "small" in the compliance year as well as the immediately preceding calendar year. 40 C.F.R. §80.1441(e)(2)(iii).[11]

The requirement for an annual volumetric demonstration was added in EPA's 2014 regulation, consistent with the statutory purpose of reducing the subset of refineries eligible for "further extension" by making ineligible refineries that were "small" in 2006 but that were no longer "small." 79 Fed. Reg. 42,128, 42,152 (July 18, 2014) ("[W]e no longer believe that it is appropriate that refineries satisfying the 75,000 [barrels per day] threshold in 2006 should be eligible for extensions to their small refinery RFS exemption if they no longer meet the 75,000 [barrels per day] threshold."). In other words, the 2014 regulation established that a small refinery cannot cease being small, yet still be exempt from compliance as a small refinery. This in no way conflicts with the Tenth Circuit's

[11] The requirement that a small refinery demonstrate it met the threshold in the prior year is necessary because a petition includes only a "project[ion]" of whether the refinery will meet the threshold "for the year or years for which an exemption is sought." 40 C.F.R. §80.1441(e)(2)(iii). So, when the refinery petitions for an extension in the following year, EPA has to confirm that the prior year's projection was accurate.

interpretation of §7545(o)(9)(B)(i). See App. 77a–78a. ("The 2014 Small Refinery Rule establishes who may seek an extension of an exemption, but it does not resolve what constitutes a valid extension.").

C. The Purposes of §7545(o)(9) and the Renewable Fuel Standard Program Confirm the Tenth Circuit's Interpretation.

The Tenth Circuit correctly recognized that the purpose of §7545(o)(9) is to "funnel[] small refineries toward compliance over time." App. 68a. The court noted a similar interpretation by the D.C. Circuit, which observed that "the terms of the statute[] contemplate a '[*t*]*emporary* exemption' for small refineries with an eye toward eventual compliance with the [RFS] program for all refineries." *Hermes*, 787 F.3d at 578; App. 68a. The purpose of this "temporary exemption" was to give small refineries "time to develop compliance strategies and increase blending capacity." *Id.* at 572–73, 588. In other words, "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" its temporary compliance exemption.[12] App. 68a.

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[12] Indeed, the American Petroleum Institute ("API") —the largest U.S. trade association for the oil and natural gas industry—has advocated for the interpretation of the small refinery exemption provisions adopted by the Tenth Circuit and has consistently argued that EPA should *not* grant large numbers of exemption extensions. See Br. of Am. Fuel & Petrochem. Mfrs., et al. at 34–36, *RFS Power Coalition v. EPA*, No. 20-1046 (D.C. Cir.

Petitioners' claim that "Congress gave no indication that it believed the hardship exemption would sunset," Pet'rs Br. 39, is patently false. Congress labeled the exemption "temporary," an explicit indication of intent that the exemption provision would phase out.[13] See *Temporary*, Black's Law Dictionary (11th ed. 2019) ("Lasting for a time only; existing or continuing for a limited (usu. Short) time; transitory."); *Temporary*, Lexico, https://www.lexico.com/definition/temporary (last visited Mar. 4, 2021) ("Lasting for only a limited period of time; not permanent."). Petitioners' attempt to confine the "temporary" label to subparagraph (A) fails, because as explained *supra*, subparagraph (B) does not establish a separate "hardship exemption," but rather

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filed Jan. 29, 2021) (argument presented by API only); see also API's Comments on EPA's Proposed Annual Standards for 2020 (November 29, 2019), https://www.api.org/~/media/Files/News/Letters-Comments/2019/November_2019/API%20Comment%202020%20RFS%20Supplemental%20Notice%20EPA-HQ-OAR-2019-0136.pdf ("In recent years, EPA has granted Small Refinery Exemptions (SREs) liberally, creating significant turmoil in the RFS program. The exemptions have created an unlevel playing field in the marketplace.").

[13] The statute's framework for setting annual standards for volumes of renewable fuels further confirms the temporary nature of the initial small refinery exemption and extensions of that temporary exemption. While Congress dictated the levels of renewable fuel that must be blended into transportation fuels between 2005 and 2022, §7545(o)(2)(B)(i), Congress deferred to EPA and DOE to set the annual standards thereafter based on a variety of factors. 42 U.S.C. §7545(o)(2)(B)(ii). While Petitioners assert that they need relief from EPA to reduce the cost of complying with the increasing levels set by Congress, it would make little sense for EPA to extend compliance exemptions past 2022, when EPA becomes responsible for setting those annual standards.

authorizes only "an extension of *the exemption under subparagraph (A)*"—the "[t]emporary exemption." 42 U.S.C. §7545(o)(9)(B)(i); Pet'rs Br. 40–41.

EPA's regulations reflect that the mechanisms available to extend the initial temporary exemption were meant to force refineries toward compliance. See 78 Fed. Reg. 49,794, 49,825 (Aug. 15, 2013) ("Congress provided two ways that small refineries can receive a *temporary extension* of the exemption beyond 2010.") (emphasis added). Specifically, EPA requires petitions for exemption extensions to identify "the date the refiner anticipates that compliance with the requirements can reasonably be achieved," 40 C.F.R. §80.1441(e)(2)(i), indicating that refineries cannot request relief without demonstrating to EPA that they are looking ahead toward compliance.

Further, the Tenth Circuit's interpretation of §7545(o)(9)(B)(i) is consistent with the well-established purposes of the RFS program. "By mandating the replacement—at least to a certain degree—of fossil fuel with renewable fuel, Congress intended the [RFS] Program to move the United States toward greater energy independence and to reduce greenhouse gas emissions." *ACE*, 864 F.3d at 696.[14] The statute provides

[14] Petitioners reference the fact that HollyFrontier's Cheyenne Refinery no longer produces petroleum fuels as evidence of the impact of the Tenth Circuit's decision. Pet'rs Br. 17. Petitioners fail to mention that HollyFrontier is converting the Cheyenne facility into a renewable diesel plant, a transition projected to yield a substantial profit. See Clifford Krauss, *Oil Refineries See Profit in Turning Kitchen Grease Into Diesel*, New York Times (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/business/

"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; §7545(o)(2). 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. *ACE*, 864 F.3d at 697. As the Tenth Circuit correctly observed, even "assuming *arguendo* that certain legislators thought the small refinery exemption was important, the ones who enacted the law also made clear that the renewable fuel targets reflected in the Energy Policy Act and the Energy Independence and Security Act were essential to promoting biofuel production, energy independence, and environmental protection." App. 69a–70a. The Tenth Circuit's interpretation of "extension" is the only interpretation that is consistent with these purposes.

Small-refinery exemptions "create[]" a "renewable-fuel shortfall" because EPA has not adjusted the volume obligations to account for retroactive exemptions, so the exempt "gallons of renewable fuels simply [go]

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energy-environment/oil-refineries-renewable-diesel.html; Margaret Austin, *HollyFrontier Seeking Permit, Public Comment for Pivot to Renewable Diesel*, Wyoming Tribune Eagle (Feb. 5, 2021), https://www.wyomingnews.com/news/local_news/hollyfrontier-seeking-permit-public-comment-for-pivot-to-renewable-diesel/article_15433e32-6eaa-5cd0-950d-75054c264968.html. Far from demonstrating need for a permanent compliance exemption, HollyFrontier's conversion of the Cheyenne Refinery wholly aligns with the RFS's goal of replacing some volumes of fossil fuel with renewable fuel.

unproduced." *AFPM*, 937 F.3d at 571. For example, the exemptions EPA granted for compliance years 2016-2018 effectively resulted in a shortfall of more than four billion gallons of renewable fuel relative to the statutorily required volumes. See *RFS Small Refinery Exemptions*. Because small refinery exemptions create a renewable fuel shortfall, contrary to the purposes of the RFS, the only plausible interpretation of §7545(o)(9) is for it to serve as a bridge to compliance such that the number of exempt small refineries would "taper[]" down each year. App. 68a. Providing limitless exemptions to petroleum refiners at the expense of the renewable fuels industry would both curb U.S. energy independence and increase greenhouse gas emissions.[15]

D. Petitioners' Policy Arguments Lack Merit and Cannot Overcome the Text, Structure, and Purpose of §7545(o)(9).

Petitioners claim that the "*escalating* burdens on regulated parties to blend renewable fuels" demonstrate an intent to create a permanent "safety valve" for small refineries. Pet'rs Br. 40. This self-serving characterization of §7545(o)(B)(i) is unsupported by

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[15] See Life Cycle Associates, *GHG Emissions Reductions Due to the RFS2–A 2020 Update* (Feb. 11, 2021), https://ethanolrfa.org/wp-content/uploads/2021/02/LCA_-_RFS2-GHG-Update_2020.pdf; Melissa Scully, Gregory Norris, Tania Alarcon Falconi, & David MacIntosh, *Carbon Intensity of Corn Ethanol in the United States: State of the Science*, Envtl. Res. Letters (Mar. 10, 2021), https://iopscience.iop.org/article/10.1088/1748-9326/abde08/pdf.

the text of the statute and the history of its implementation. Congress created a "temporary" exemption program at the same time it established the increasing volume requirements. In other words, Congress knew at the time it labeled the exemption "temporary" that refiners would be required to blend increasing volumes of renewable fuel each year. Likewise, the phrase "at any time" does not imply congressional intent for small refinery exemptions to serve as a permanent safety valve. Pet'rs Br. 40. As explained *supra*, the phrase "at any time" refers only to the timing of small refineries' petitions. It does not eliminate the exemption provision's "temporary" label. "[H]ad Congress intended" to create a permanent "regulatory relief program," Pet'rs Br. 4, "it would have said so." *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 443 (2016).

Although Petitioners assert that small refineries will face extinction if exemption extensions are no longer available, Pet'rs Br. 4, they fail to reconcile that assertion with the fact that (a) most small refineries complied with the RFS between 2013-2015, and (b) EPA has consistently determined that refineries of all sizes can completely recoup the cost of RFS compliance in the prices received for their products. Moreover, the statute contains specific waiver provisions to address situations where application of the RFS requirements would cause severe economic harm. See 42 U.S.C. §7545(o)(7).

Petitioners' interpretation of §7545(o)(9)(B)(i) is partly based on the flawed premise that a phase-out of small refinery exemptions would "threaten[] to shutter

important domestic refining capacity, undermining Congress's energy-independence purpose." Pet'rs Br. 4; see also Pet'rs Br. 41–42. To start, history contradicts Petitioners' suggestion that the end of small refinery exemptions would spell the end of a substantial number of small refineries. For compliance years 2013, 2014, and 2015, only eight, eight, and seven refineries were exempt each year, respectively. A similarly low number of refineries applied in each of these years: 16, 13, and 14, respectively.[16] Thus, for the three years prior to EPA's change in policy for adjudicating small refinery exemption petitions, most small refineries did not even apply for an extension of their exemptions—meaning most small refineries came into compliance for three consecutive years.[17] For Petitioners now to claim that elimination of small refinery exemptions would cause a reduction in the U.S. refining capacity so significant as to damage our nation's energy security is simply disingenuous.

Moreover, "[i]n establishing the RFS program, Congress sought to bolster energy security and independence *by boosting the amount of renewable fuels used in*

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[16] As of January 1, 2019, there were 53 small refineries operating in the U.S. See U.S. Energy Information Administration, *Refinery Capacity Report* (June 21, 2019), https://www.eia.gov/petroleum/refinerycapacity/.

[17] Notably, during this period where most small refineries complied with their RFS obligations, RIN prices (and thus, compliance costs) were historically high. See EPA, *RIN Trade and Price Information* (last updated Mar. 10, 2021), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information.

the domestic transportation fuel pool." See 82 Fed. Reg. 34,206, 34,211–12 (July 21, 2017) (emphasis added). In other words, Congress determined that the best way to increase U.S. energy independence and security was by diversifying the domestic fuel supply through the addition of increasing volumes of renewable fuel, not by "protecting domestic refining capacity." Pet'rs Br. 41.

Petitioners' assertion that refineries cannot "come into a settled state of 'compliance'" in part due to "structural constraints" unique to small refineries, Pet'rs Br. 42–44, is negated by EPA's longstanding position that refineries of all sizes are able to recover the costs of RFS compliance in the prices of their products. 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, Office of Transp. & Air Quality, 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 "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 consistently reiterated the conclusions of this report in the following years. For example, in a 2017 rulemaking, EPA reviewed studies submitted by commenters purporting to show "an inability to pass-through the cost of the RFS program to consumers," but EPA did "not find these assessments convincing" and concluded that "[a]ll obligated parties, including merchant refiners, are generally able to recover the cost of the RINs they need for compliance with the RFS obligations through the cost of the gasoline and diesel fuel they produce." EPA, EPA-420-R-17-008, Denial of Petitions for Rulemaking to Change the RFS Point of Obligation (Nov. 2017), at 23–24. EPA has reaffirmed its position on the ability of all refineries to pass-through and recover their compliance costs in rulemakings as recent as the 2020 RFS standards. In the final rule for the 2020 standards, EPA stated: "We have reviewed and assessed the available information, which shows that obligated parties, including small entities, are generally able to recover the cost of acquiring the RINs necessary for compliance with the RFS standards. . . . Even if we were to assume that the cost of acquiring RINs was not recovered by obligated parties . . . a cost-to-sales ratio test shows that *the costs to small entities of the RFS standards are far less than 1 percent of the value of their sales*." 85 Fed. Reg. 7,016, 7,067–68 (Feb. 6, 2020) (emphasis added). The fact that EPA has been unwavering in its position that small refineries are not disproportionately harmed by RFS compliance refutes Petitioners' claims that a permanently available exemption is necessary to keep small refineries in business.

Further, the RFS has other mechanisms that provide EPA with flexibility to address any "negative economic effects" caused by "application of the statutory volume requirements." See *ACE*, 864 F.3d at 712. Specifically, "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.'" *ACE*, 864 F.3d at 712 (quoting 42 U.S.C. §7545(o)(7)(A)(i)). Any state or obligated party can petition EPA for such relief. *Id.* §7545(o)(7)(A)(i). Unlike the "temporary" exemption provided to "funnel[] small refineries toward compliance," App. 68a, EPA's "severe economic harm waiver" authority already serves as an appropriate "safety valve" where the RFS obligations are shown to be excessively burdensome. Petitioners are fully aware of this safety valve, as evidenced by their recent petition for a severe-harm waiver. 86 Fed. Reg. 5,182, 5,183 (Jan. 19, 2021). The congressionally-intended phaseout of the small refinery exemption in §7545(o)(9) clearly does not leave EPA and obligated parties without recourse to address any economic harm caused by the RFS.

The statute also provides "a safe harbor for individual obligated parties struggling to comply with a year's requirements," namely, "[t]he statute mandates that EPA allows those parties to carry a renewable fuel deficit forward into the next compliance year." *ACE*, 864 F.3d at 712; 42 U.S.C. §7545(o)(5)(D); 40 C.F.R. §80.1427(b). Obligated parties frequently take

advantage of the deficit provision to shift some portion of their compliance burden to the following year. EPA's data shows that parties carried forward deficits of more than 390 million, 681 million, 130 million, and 442 million RINs in compliance years 2016, 2017, 2018, and 2019, respectively. EPA, *Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters under the Renewable Fuel Standard (RFS) Program*, Table 5 (last updated Nov. 10, 2020), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and. The deficit provision addresses the situation raised by Petitioners wherein a small refinery's ability to comply with their RFS obligations may vary year-to-year; if a refinery is struggling financially in a given year, it can defer its RFS obligations by carrying forward a deficit.

In a last-ditch attempt, Petitioners claim that the "unique conditions" caused by the COVID pandemic demonstrate a need for permanent small refinery exemptions. Pet'rs Br. 45. This argument fails because, in a holding that Petitioners declined to challenge, the Tenth Circuit held that "renewable fuels compliance must be the cause of any disproportionate hardship" used to justify an exemption. App. 83a. Because EPA had considered factors unrelated to the RFS in making the hardship determinations in each of the three challenged decisions, this constituted separate grounds (in addition to the "extension" issue before this Court) to vacate the exemptions. App. 83a. Petitioners' attempt to distract with other factors impacting refinery operations should be ignored, as these are clearly beyond

the scope of EPA's statutory authority in implementing the small refinery exemption provisions.[18]

II. *CHEVRON* DEFERENCE DOES NOT APPLY.

This is not a *Chevron* deference case. Under *Chevron*, this Court does not give any deference to an agency's interpretation of the law unless this Court is unable to discern Congress's meaning after applying "traditional tools of statutory construction." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2017) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, n.9 (1984)). Here, after applying traditional tools of interpretation, there is "no uncertainty that could warrant deference" under *Chevron*. *SAS Inst.*, 138 S. Ct. at 1358.

In an argument of last resort, Petitioners urge this Court to defer to what they view as a statutory interpretation made by EPA in its 2014 Small Refinery Rule. See 79 Fed. Reg. 42,128 (July 18, 2014). But Petitioners devoted little of their briefing in the Tenth

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[18] For instance, Petitioners point to Marathon Petroleum Corporation's decision to close its Gallup, New Mexico refinery as evidence of the impact of the Tenth Circuit's ruling, Pet'rs Br. 17, when in reality, Marathon attributed the decision to "the challenges COVID has created for our business." News Release, Marathon Petroleum Corp., Marathon Petroleum Corp. Reports Second-Quarter 2020 Results (Aug. 3, 2020), https://ir.marathonpetroleum.com/investor/news-releases/news-details/2020/Marathon-Petroleum-Corp.-Reports-Second-Quarter-2020-Results/default.aspx.

Circuit to such an argument. In fact, in the Tenth Circuit, the HollyFrontier parties did not cite *Chevron* at all. While Wynnewood recited the principles of *Chevron* deference, it made little attempt to explain how EPA made any statutory interpretation in its 2014 Small Refinery Rule. See Intervenor-Respondent Wynnewood Refining Company Br. 19, *Renewable Fuels Ass'n v. EPA*, No. 18-9533 (10th Cir. Apr. 8, 2020) (stating only that "[a]s part of that rulemaking, EPA promulgated a rule interpreting the CAA as allowing small refineries to apply for hardship relief if they were 'small' (i.e., had a crude oil throughput of fewer than 75,000 [barrels per day]) both in the year the exemption is sought and the immediately preceding year").

While EPA asked for *Chevron* deference in the Tenth Circuit, it did not mention the 2014 Small Refinery Rule at all in its discussion of deference. See EPA Br. 33–34, *Renewable Fuels Ass'n v. EPA*, No. 18-9533 (10th Cir. Mar. 25, 2020). "This Court has often declined to apply *Chevron* deference when the government fails to invoke it." *Guedes v. BATFE*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J., concurring in denial of certiorari). Moreover, EPA now agrees with the Tenth Circuit's reading of the small refinery exemption provision. See EPA, *After Careful Consideration, EPA Supports Tenth Circuit's Renewable Fuels Association Decision* (Feb. 22, 2021), https://www.epa.gov/newsreleases/after-careful-consideration-epa-supports-tenth-circuits-renewable-fuels-association. In these circumstances, *Chevron* deference to anything in the 2014 Small Refinery Rule would be especially inappropriate. See

Guedes, 140 S. Ct. at 790 ("Even when *Chevron* deference is sought, this Court has found it inappropriate where the Executive seems of two minds about the result it prefers.") (quotation marks omitted).

In any event, Petitioners' argument for *Chevron* deference is meritless. Petitioners recognize that EPA did not expressly make any statutory interpretation in the 2014 Small Refinery Rule. Instead, Petitioners suggest that EPA implicitly made a statutory interpretation that was a "necessary presupposition" of the 2014 Small Refinery Rule. See Pet'rs Br. 48 (citing *Nat'l R.R. Passenger Corp. v. Bos. & Maine Corp.*, 503 U.S. 407, 420 (1992)). In fact, there was no such "necessary presupposition." This Court should not defer to what Petitioners speculate that EPA had in mind when it adopted the 2014 Small Refinery Rule.

The Tenth Circuit correctly noted that the 2014 Small Refinery Rule did "not explain or resolve any ambiguity with respect to the statutory definition of 'extension.'" App. 80a. It explained that "[t]he 2014 Small Refinery Rule establishes *who* may seek an extension of an exemption, but it does not resolve *what* constitutes a valid extension." App. 78a. Moreover, "neither the preamble nor the administrative rule contains any discussion of what the word 'extension' actually means." App. 78a.

Petitioners' only response to the Tenth Circuit's analysis is their conclusory assertion that the 2014 Small Refinery Rule "indisputably rests on the premise that a small refinery that was ineligible for a hardship

exemption in a prior year may still receive a 'valid extension' of the exemption in a later year, and thus necessarily rejected the Tenth Circuit's interpretation." Pet'rs Br. 49. According to Petitioners, the "only reasonable reading" of the 2014 Small Refinery Rule is that EPA rejected the interpretation of the statute adopted by the Tenth Circuit in 2020, six years later.

Petitioners' recitation of the background of the 2014 Small Refinery Rule, however, ignores an explanation that is consistent with the Tenth Circuit's interpretation of the statute. The predecessor to the 2014 Small Refinery Rule provided that the "small refinery" determination should be based upon whether a refinery satisfied the 75,000 barrels per day threshold in 2006. 40 C.F.R. §80.1441 (2010). Thus, at the time EPA was considering its 2014 amendments, there could have been refineries that met the small refinery threshold in 2006 and therefore qualified to receive exemption extensions in the intervening years (if they met the other requirements), even if the refineries had exceeded the 75,000 barrels per day threshold in any year(s) after 2006. EPA's original proposal in 2014—a requirement that a refinery meet the threshold in 2006 and each year thereafter—could have rendered such refineries ineligible for future exemption extensions. 78 Fed. Reg. 36,042, 36,064 (June 14, 2013). EPA ultimately rejected that proposal in the final 2014 Small Refinery Rule. 79 Fed. Reg. at 42,152. In other words, EPA did not want to preclude a refinery from seeking an extension of a temporary exemption if it had been

eligible for and received continuous exemption extensions under the 2010 regulation but risked being deemed ineligible for future extensions based on retroactive application of the 2014 Small Refinery Rule. See *id.*

In fact, EPA's rationale for changing the definition of "small refinery" in the 2014 Small Refinery Rule is consistent with the Tenth Circuit's interpretation of the small refinery exemption. With the 2014 Small Refinery Rule, EPA sought to narrow the number of refineries that were eligible for exemptions. See 79 Fed. Reg. at 42,152.

For all of these reasons, *Chevron* deference does not apply.

CONCLUSION

This Court should affirm the Tenth Circuit's decision.

Respectfully submitted,

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