No. 20-472

IN THE

Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, HOLLY-FRONTIER REFINING & MARKETING, LLC, HOLLY-FRONTIER WOODS CROSS REFINING, LLC, & WYNNEWOOD REFINING CO., LLC,
Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF

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April 15, 2021

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INTRODUCTION

Recognizing that the RFS could impose significant hardship on small refineries, and that forcing them to shutter would disserve the statute's overarching energy-independence objective, Congress both (i) granted small refineries an initial blanket exemption and (ii) authorized them to petition for an extension of the exemption at any time based on disproportionate economic hardship. As petitioners showed—and the government previously agreed—the statute "unambiguously does not require continuous receipt of a small refinery exemption since 2006 as a prerequisite for eligibility to receive an exemption in a future year due merely to the word 'extension.'" EPA 10th Cir. Br. 19.

Supporting the biofuel respondents, the government now takes the opposite position, asserting "EPA cannot grant 'an extension of the' small-refinery exemption to a refinery that has not previously maintained its exemption, because in such a circumstance there is no exemption to extend." EPA Br. 16. But the government's about-face—announced in an EPA press release on the day petitioners filed their opening brief—was ill-considered. The continuity requirement it now urges this Court to adopt appears nowhere in the statutory text and is incompatible with the statute's language, structure, and purposes.

As for the text, respondents contend that the word "extension" must be read in its temporal sense, which they say inherently requires continuity. Wrong on both counts. Nothing precludes reading "extension" in its "make available" sense, and, in any event, a temporal "extension" need not be continuous. No dictionary definition requires continuity. And Congress has both used the term "extension" temporally to refer to the re-

sumption of a government benefit after a lapse and enacted statutes expressly specifying when an "extension" must be "successive" or "consecutive." The absence of any such limitation here, together with surrounding terms that contrast an initial "temporary" exemption with "a hardship exemption" available "at any time" based on current economic hardship, precludes the Tenth Circuit's continuity requirement.

Respondents' attempts to reconcile their reading with the statute's overall design likewise fail. Contrary to their central claim, a continuity requirement is not necessary to achieve Congress's blending mandates. Congress authorized EPA to "account" for small refineries that are exempt in setting the annual blending percentage. 42 U.S.C. §7545(o)(3)(C)(ii). And EPA recently adopted an approach to ensure that overall renewable fuel mandates are achieved regardless of the extent to which the agency grants hardship exemptions to small refineries.

Moreover, respondents identify no reason to think that Congress crafted the hardship exemption based on the assumption that once a small refinery had achieved compliance for a single year, it could always achieve compliance in the future, and would thus never again experience "hardship" from the RFS. The statute's escalating compliance burdens, the variability of RIN prices, and small refineries' vulnerability to other economic factors beyond their control make such a conclusion especially implausible. It is equally implausible to believe Congress intended to force from business those refineries sometimes able to comply with statutory mandates, while allowing those who persistently fail to continue operating.

Finally, the Court should disregard the government's flip-flop. Not only did EPA grant the non-continuous exemptions at issue here to petitioners, but

EPA previously recognized that the statute contains no continuity requirement and embodied that conclusion in regulations specifying the eligibility criteria for a hardship exemption. It cannot now amend those rules through a press release.

ARGUMENT

I. THE STATUTORY TEXT DOES NOT LIMIT THE HARDSHIP EXEMPTION TO SMALL REFINERIES THAT HAVE BEEN CONTINUOUSLY EXEMPT.

Petitioners showed there are at least two available readings of "extension" that do not condition the hardship exemption on a small refinery's receipt of an exemption for every preceding year—an eligibility condition that counterintuitively rewards those who *never* meet statutory blending requirements with hardship exemptions, while denying exemptions to small refineries that can sometimes fulfill the statute's goals. Br. of Petitioners ("Br.") 22–32. Respondents primarily take aim at the "make available" reading of 'extension," but miss the mark. And even if "extension" is used temporally, respondents have no persuasive response to petitioners' showing that the term can naturally be used—and is *in fact* used *by Congress*—to refer to the resumption of a government benefit that has lapsed for a period of time. Ultimately, they offer no holistic interpretation of the hardship exemption that accounts for the surrounding terms, critical context that cannot be reconciled with a continuity requirement without distorting the congressional regime.

A. EPA May Grant "A Hardship Exemption" To Any Small Refinery Experiencing Disproportionate Economic Hardship.

The term "extension," standing alone, is necessarily ambiguous because it can mean either an increase in time or the grant of a benefit. Br. 23–25. Respondents do not dispute that the "make available" meaning is an "ordinary" meaning of the term "extension," frequently employed by both Congress and this Court. See *id.* They contend, however, that the word cannot bear that meaning in subparagraph (B)(i). They are wrong.

Respondents offer two main reasons for their assertion that "extension" in subparagraph (B)(i) must have a temporal meaning. First, they emphasize that subparagraph (B)(i) authorizes "an extension of the exemption under subparagraph (A)," and subparagraph (A) created a "temporary" exemption that expired in 2011 (or whenever extensions based on the DOE study ended). EPA Br. 19; RFA Br. 21. But subparagraph (B) does not use the term "temporary";[1] instead, and in stark contrast, it says "at any time." Br. 33–36. Given that clear temporal decoupling, the reference to "the exemption under subparagraph (A)," 42 U.S.C §7545(o)(9)(B)(i), is best understood as a reference to the substantive relief first described in that subparagraph—namely, an exemption from "[t]he requirements of paragraph (2)," *id.* §7545(o)(9)(A)(i).

Second, respondents argue that because subparagraph (A)(ii)(II) and other provisions of §7545 use "extension" temporally, it must be used the same way in subparagraph (B)(i). EPA Br. 20; RFA Br. 29. But the

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[1] Moreover, "EPA typically grants exemptions for only the identified compliance year, which means the exemptions are temporary in nature." EPA 10th Cir. Br. 31 n.10.

presumption of consistent usage "is particularly defeasible by context." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 171 (2012); see Br. 27. And the context that makes clear the term elsewhere involves temporality—like subparagraph (A)(ii)(II)'s reference to "a period of not less than 2 additional years"—is *absent* in subparagraph (B). The surrounding terms in subparagraph (B) fit better with the "make available" meaning.[2]

Indeed, respondents fail to explain why, if Congress had used "extension" temporally in subparagraph (B)(i), it would have called the relief it authorized "a hardship exemption" in subparagraph (B)(iii). Respondents assert that the phrase "a hardship exemption" is "shorthand" and cannot "change the meaning of [subparagraph B(i)]." EPA Br. 33; see RFA Br. 26–27. But subparagraph (B)(iii) does not *change* the meaning of subparagraph (B)(i); it *informs* it. And the notion that subparagraph (B)(iii) is mere "shorthand" is a tacit admission that its language cannot be read temporally. The "make available" reading, by contrast, fits with both subparagraphs. Where, as here, Congress used two phrases interchangeably, an interpretation that comports with *both* phrases' text should be preferred. See *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) ("[O]ur task is to fit, if possible, all parts into an harmonious whole.").

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[2] Similarly, that Congress elsewhere used the synonymous term "grant" to describe the approval of a request, *see* EPA Br. 31; RFA Br. 27, is not especially informative. "[T]here is no 'canon of interpretation that forbids interpreting different words used in different parts of the same statute to mean roughly the same thing.'" *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 845–46 (2018).

B. Even If The Statute Requires A Temporal Lengthening Of An Earlier Exemption, It Does Not Require Continuity.

Even if, however, subparagraph (B)(i) uses "extension" temporally, a small refinery need not have been *continuously* exempt to receive an "extension" of the exemption under subparagraph (A). Br. 29–31.

On this score, respondents have little to offer. Most significantly, they have no persuasive answer to the fact that Congress has used the term "extension" in *precisely* the sense petitioners propose—to refer to the extension of a government benefit for an additional period of time after a lapse. Br. 30 (discussing Section 203, Division N, of the Consolidated Appropriations Act and Section 2114 of the CARES Act). The government dismisses these statutes because the word "extension" appears in their captions, not their body. EPA Br. 36 & n.5. But that misses the relevant point—Congress used the term "extension" in a temporally non-continuous sense. While the government observes that these laws include specific dates, it does not suggest—and could not show—that Congress somehow misused the word "extension" in describing what the laws did. See *id.*; see also RFA Br. 32 (conceding "there may be some instances where Congress intends to authorize an extension after a lapse").

Moreover, when Congress intends to require that a temporal "extension" be continuous, it frequently does so expressly by including words like "successive" or "consecutive." See, *e.g.*, 8 U.S.C. §1184(g)(8)(D) (referring to "5 or more consecutive prior extensions"); 10 U.S.C. §2304a(f) (authorizing agency to "extend the contract period for one or more successive periods"); 15 U.S.C. §78d-5(a)(2) (authorizing agency to "extend such deadline as needed for one or more additional suc-

cessive 180-day periods"); 19 U.S.C. §2432(d)(1) (authorizing "further extensions of [waiver] authority for successive 12-month periods"); 28 U.S.C. §594(b)(3)(A) ("The 1-year period may be extended for successive 6-month periods …."); 49 U.S.C. §44506(c)(2)(B) (authorizing agency to "extend [appointment] authority for one or more successive one-year periods"); 50 U.S.C. §3172 (authorizing the President "to extend the period of a stay … for successive periods of not more than 120 days each"); *id.* §3024(n)(4)(E)(ii) (providing that authorization "may be extended … for successive periods of not more than 3 years"); see also *Geo-Energy Partners-1983 Ltd.* v. *Kempthorne*, 551 F. Supp. 2d 1210, 1219 (D. Nev. 2008) ("30 U.S.C. §1005(g) provides for a diligent effort extension and states that such extension must be 'successive.'"). If "extension" by itself entailed continuity, the limiting words "successive" and "consecutive" in such statutes would be surplusage.

Thus, in multiple other statutes, Congress has *both* used the term "extension" to refer to the non-continuous lengthening of a preexisting benefit that had lapsed *and* expressly specified when an "extension" must be "successive" or "consecutive." Each of these regular and natural uses of "extension" is a powerful strike against respondents' account of the temporal meaning of "extension." Together, they conclusively refutes the notion that the term requires continuity.

Nonetheless, respondents offer three reasons why, they say, a small refinery may receive an "extension" of its initial exemption only if it has received successive extensions in each prior year. First, they cite various dictionary definitions. EPA Br. 21; RFA Br. 30. None requires continuity. The lone dictionary the government cites—apparently a reprint of a law dictionary from 1889—refers to a "continuance," which does

not imply uninterrupted continuation.[3] See EPA Br. 21 (citing William C. Anderson, *A Dictionary of Law* 437 (1996)). Thus, as the government explained below, the interpretation it now urges would require the Court to "endorse a definition of the word 'extension' not found in any dictionary: a 'continuation of an existing period with no intervening lapse.'" EPA 10th Cir. Br. 29. Indeed, "[e]ven the definition of 'continuous' demonstrates that use of the word 'extension'—standing alone—is not assumed to mean 'uninterrupted.'" *Id.* at 31 (quoting *Webster's Third International Dictionary* 493–94 (1986), which defines "continuous" as "characterized by *uninterrupted extension* in time or sequence" (emphasis added)).[4]

Second, respondents contend that, in common usage, the term "extension" ordinarily involves continuity. EPA Br. 21–22, 34–35; RFA Br. 30–31. But however "ordinary speaker[s]" use the term in various contexts, EPA Br. 35, *Congress* has used the term "extension" in closely analogous contexts to mean the temporal "extension" of a previously lapsed government benefit. Br.

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[3] Merriam-Webster's online dictionary provides, as its first definition of "continuance," "CONTINUATION." MerriamWebster.Com Dictionary, https://www.merriam-webster.com/dictionary/continuance (last visited Apr. 12, 2021). And it defines "continuation" to include "resumption after an interruption." MerriamWebster.Com Dictionary, https://www.merriam-webster.com/dictionary/continuation (last visited Apr. 12, 2021).

[4] Not even respondents embrace the import of their argument that the temporal meaning of "extension of the exemption under subparagraph (A)" requires that the thing extended must currently be "in place." EPA Br. 18; RFA Br. 17. They concede that a small refinery can receive multiple extensions indefinitely as long as the extensions are successive. But after a small refinery receives its first hardship exemption, the relief currently "in place" would be relief granted not "under subparagraph (A)" but under subparagraph (B).

30. It is not at all unnatural or "idiosyncratic," EPA Br. 29–30, for example, to say that a person who had previously received pandemic-related unemployment benefits that expired in July applied for an "extension" of those benefits after Congress extended them in December. Nor does this usage rely on a "definition of a word that is absent from many dictionaries and is deemed obsolete in others." *Taniguchi* v. *Kan Pac Saipan, Ltd.*, 566 U.S. 560, 569 (2012). After all, respondents' definition does not appear in *any* dictionary, and Congress used the term in this sense in two separate statutes a few months ago. Whether Congress used the term the same way here thus depends not on hypotheticals about parking sessions or hotel rooms, EPA Br. 35, but on "statutory context." *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 455 (2012).[5]

Third, respondents again invoke the presumption of consistent usage, contending that because extensions under subparagraph (A)(ii)(II) were temporally continuous with the original exemption, any extension under subparagraph (B) must be temporally continuous. EPA Br. 22–23; RFA Br. 33–36. The presumption does not apply here. Petitioners ascribe the *same meaning* to "extension" in both subparagraphs—an increase in length of time, which may or may not be continuous. While extensions under subparagraph (A)(ii)(II) would likely have been continuous as a factual matter, that is a consequence not of the meaning of "extend," but of

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[5] Respondents' examples involving physical "extensions" (*e.g.*, extension cords, nail extensions), EPA Br. 21, are especially inapt. The nature of material objects is such that their "extension" necessarily is physically continuous. Not so with periods of time, as the government previously recognized. *See* EPA 10th Cir. Br. 30 n.8 (explaining that examples involving "*spatial* extension and not temporal extension" are "inapposite").

the fact that any extensions granted thereunder immediately followed a period in which all small refineries were exempt. Br. 26–27.[6] Subparagraph (B), by contrast, is available "at any time," and extensions thereunder may or may not be continuous with the initial exemption. Subparagraph (B)'s use of the term "extension" no more imports a continuity requirement from subparagraph (A)(ii)(II) than it imports that provision's requirement that extensions be at least two years. Put simply, when used in a temporal sense, the word "extension" does not inherently require continuity. Thus, it is used consistently to refer to both continuous and non-continuous extensions.[7]

C. The Statutory Context Precludes A Continuity Requirement.

Because there are permissible readings of "extension of the exemption under subparagraph (A)" that do not require temporal continuity, the question whether Congress imposed a continuity requirement must be answered through statutory context. Br. 32–39. Respondents insist the surrounding terms are all irrelevant because they address the *when*, *who*, and *why* of the hardship exemption, and "d[o] not speak to *what*

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[6] Extensions under subparagraph (A)(ii)(II), however, would not *necessarily* have been continuous. For example, EPA would have been required to extend the exemption for a small refinery that (a) DOE in 2008 found would suffer disproportionate economic hardship if required to comply, and (b) lost the exemption in 2010 because it temporarily grew beyond the definition of "small refinery," but regained "small refinery" status in 2011.

[7] Nor does §4575(o)(7)(E)(iii), which authorizes EPA to reduce blending requirements for biomass-based diesel in certain circumstances, "necessarily encompas[s] continuity." EPA Br. 22. That provision requires a "continuing" price disruption, but it does not require that the "additional 60-day period" of relief run consecutively with the initial 60-day period.

such an extension is." EPA Br. 37. But respondents' blinkered approach proceeds from the circular premise that the relevant language has only one possible meaning. The Court should reject respondents' invitation to "construe the meaning of statutory terms in a vacuum." *Tyler* v. *Cain*, 533 U.S. 656, 662 (2001); see Scalia & Garner, *supra*, at 167 ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, … in view of its structure and of the physical and logical relation of its many parts.").

Respondents' account of the surrounding terms is unpersuasive. They advance what the government previously—and rightly—characterized as "a remarkably narrow reading" of the expansive phrase "at any time," contending that "EPA has authority to grant the petition 'at any time,' *but only* if a small refinery has been eligible for and received an exemption in all RFS years prior to the petition." EPA 10th Cir. Br. 28. Respondents fail to respond to petitioners' showing that this is not how Congress ordinarily crafts a sunset provision. Br. 33–34. And they offer no non-circular explanation of why Congress would have defined "small refinery" based on throughput in "a calendar year" if eligibility for the hardship exemption actually turned on meeting the throughput requirement in *every* preceding year. EPA 10th Cir. Br. 27 (explaining that if Congress had intended to impose a continuity requirement, "it would have at least required that the throughput threshold in the definition not be exceeded for the current and all preceding years or otherwise indicated a date certain"). In each respect, the government was right before, and its current attempt to blind itself to the interpretive import of these surrounding terms is misguided.

II. A CONTINUITY REQUIREMENT IS INCONSISTENT WITH THE STATUTE'S DESIGN AND PURPOSE.

The Tenth Circuit's continuity requirement is also contrary to the statute's design and purposes. Br. 39–46. It would produce arbitrary distinctions between similarly situated small refineries, penalize those that intermittently achieve compliance while rewarding those that never do, and jeopardize the viability of important sources of domestic refining capacity—all while doing nothing to advance the goal of increasing renewable-fuel production. Respondents' counterarguments only underscore the unlikelihood that Congress would have mandated these irrational results, let alone by using a term like "extension" that can readily be understood—and that Congress has elsewhere used—to authorize non-continuous relief.

A. A Continuity Requirement Produces Arbitrary Distinctions.

A continuity requirement cannot be squared with any plausible account of congressional intent. It would mean that small refineries that can *never* comply with statutory blending requirements without hardship receive exemptions in perpetuity, while those that can sometimes comply without an exemption—furthering both the statute's energy-independence and blending goals—lose their exemption eligibility and are driven from the market. It would also mean that, as EPA explained in 2014, two small refineries facing identical circumstances would be treated differently merely because one did not receive an exemption "in a single year as much as 8 years ago." 79 Fed. Reg. 42,128, 42,152 (July 18, 2014); Br. 43, 47–48. Respondents offer no plausible "reason why Congress would have in-

tended, by choosing the wor[d] ["extension"] to differentiate between [small refineries] based on such an arbitrary criterion." *Roberts*, 566 U.S. at 106.

These outcomes are especially incongruous under a statute whose text imposes burdens that will intensify significantly over time, and in a market where some small refineries face "inheren[t]" structural limitations. 2011 DOE Study 34. These limitations can prevent small refineries from achieving compliance through blending, even if they could devote scarce capital to building capabilities for doing so. Br. 9–10, 42–44. And as DOE explained ten years ago, if small refineries must purchase RINs that substantially exceed the costs of blending, "this will lead to disproportionate economic hardship"—and some of the "numerous circumstances" in which that squeeze occurs will arise "[a]s the RFS mandate increases." 2011 DOE Study 2–3, 17–18.

Respondents offer no persuasive answer. The government says the small refineries in the example above "are not similarly situated" because one "developed a mechanism for compliance … in one year." EPA Br. 43 n.7; see also RFA Br. 42 (asserting that a small refinery must use the initial exemption period to "figur[e] out how to put itself in a position of annual compliance" thereafter (quoting App. 68a)). As explained, however, there is no settled state of compliance under this statute. Br. 42–43. Refineries must demonstrate compliance annually, and each year poses a different, and usually more demanding, compliance test in varying market conditions. Compliance in one year does not mean the refinery has acquired a "mechanism" to comply in every future year. Given the statute's escalating burdens, fluctuations in the price of RINs and gasoline prices, and other circumstances

potentially beyond the refinery's control, past compliance does not confer the ability to achieve future compliance. Br. 44.

EPA nevertheless contends (at 27) that the exemptions were designed for a "transitional" period. But if that were the statute's premise, Congress would not have made the exemptions turn on "hardship" and authorized small refineries to petition for relief "at any time." Had Congress intended the hardship exemption to "taper off" over time in the haphazard way respondents propose, surely it would have provided for this expressly. Br. 33–34. Respondents cite no statutory regime with a "transition period" anything like the novel one they attempt to manufacture here—where regulatory relief sunsets not on a fixed date or after a defined number of years, but at different customized dates for each regulated party based on its first compliant year. A statute that makes "hardship" the criterion for relief and imposes escalating burdens would be an especially unlikely context for the only such example.

B. A Continuity Requirement Is Not Needed To Achieve Blending Mandates.

Respondents contend that, without a continuity requirement, the RFS's "aggressive 'and market-forcing'" blending targets will not be met. EPA Br. 11, 41–42; RFA Br. 45. That is incorrect.

As RFA acknowledges, most refineries and importers have been able to comply. RFA Br. 16, 48. The three exemptions here equal only 0.2%, 0.25%, and 0.58% of the nationwide RFS obligation for the applicable years.[8] All small refineries taken together

[8] *Compare* EPA, *Fuels Registration, Reporting, and Compliance Help: Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters Under the Renewable Fuel Standard (RFS) Program*, https://www.epa.gov/fuels-registration-reporting-and-

(whether experiencing hardship or not) account for only 12% of domestic refining capacity. AFPM Br. 18.

More fundamentally, there is no prospect that small-refinery exemptions will "siphon a significant portion of renewable fuel blending requirements out of the RFS program" and create a "renewable fuel shortfall." RFA Br. 18, 45–46. Congress gave EPA authority to ensure that hardship exemptions for small refineries do not undermine the statute's "market forcing" renewable fuel production targets: it authorized EPA to "account" for small refineries that are exempt in establishing the annual percentage obligations. 42 U.S.C. §7545(o)(3)(C)(ii). And EPA recently adopted an approach in which the agency makes "increases to the percentage standards" that *offset* any decrease in the total fuel estimate from projected hardship exemptions for small refineries. 85 Fed. Reg. 7016, 7019 (Feb. 6, 2020). This approach, by design, produces the *same* total blending that would occur without exemptions.[9]

That ensures Congress's volume goals are achieved regardless of the extent to which hardship exemptions are granted. And it confirms there is no conflict between Congress's twin objectives to attain the mandated annual blending and protect small refineries from disproportionate economic hardship. Conversely,

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compliance-help/annual-compliance-data-obligated-parties-and (last updated Nov. 10, 2020) (listing Total RVO in Table 2), *with* RFA 10th Cir. Br. 25 (listing RINs exempted for each refinery).

[9] This completely answers the claims that appropriate application of the small-refinery exemption will harm agricultural communities and renewable-fuel producers. *See*, *e.g.*, Iowa et al. Br. 11–14; Nat'l Biodiesel Bd. Br. 12–13. Even putting aside that small refineries represent only a modest percentage of industry capacity, this approach ensures that exemptions will not impact overall renewable-fuel production.

an interpretation that forecloses hardship exemptions—at the very point when the escalating statutory burdens render them most needed—would undermine Congress's overall goal of domestic energy independence and security *and* its goal of protecting small refineries and the communities that depend on them. It would reduce domestic refining capacity and damage local businesses and communities while producing no increase in the overall blending of renewable fuel.

Respondents incorrectly contend that Congress did not intend the RFS to promote energy independence generally, but solely through encouraging renewable fuels. EPA Br. 41; RFA Br. 44, 48–49. Congress listed several purposes of the RFS: "To move the United States toward greater energy independence and security, to increase the production of clean renewable fuels, to protect consumers, to increase the efficiency of products," among others. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, 1492. It nowhere indicated that energy independence and security would be achieved solely through the production of renewables; it listed them as independent goals. Preserving domestic refining capacity by protecting small refineries thus furthers the RFS's goal of moving the United States toward energy independence and security. Br. 41.

Respondents also ignore the circumstances leading to the RFS. The United States had not "built a new refinery … since 1976." 151 Cong. Rec. H2366, H2373 (daily ed. Apr. 20, 2005) (Rep. Barton). And there was concern that U.S. refineries were already at "100 percent refining capacity" and thus any loss of small refineries would increase reliance on imported fuels. See *Hearing Before the Subcomm. on Clean Air, Climate Change, & Nuclear Safety*, 108th Cong. 4 (2003) (Sen. Inhofe); S. Rep. No. 108-57, at 42 (2003) (Sen. Cornyn);

see also Br. 10 & n.3. A continuity requirement is "incompatible with the [statute's] historical context," *Sandifer* v. *U.S. Steel Corp.*, 571 U.S. 220, 229 (2014), and its energy-independence purpose.

C. No Other Mechanism Exists To Protect Small Refineries From Disproportionate Economic Hardship.

Finally, respondents argue that hardship exemptions are unnecessary because small refineries can raise their prices to "pass through" compliance costs to customers. RFA Br. 49–50; EPA Br. 44. RFA (but not EPA) also contends EPA can address any concerns through other waiver authorities. RFA Br. 51–52.

Even if these premises were valid, they would not support a continuity requirement. A refinery that recovers its RFS costs through higher prices or achieves sufficient relief through other waiver authorities suffers no disproportionate economic hardship. Any petition it filed would thus be denied, whether or not it had previously received continuous exemptions. Indeed, if these assertions were valid, Congress need not have enacted the small-refinery exemption provisions. In any event, the premises are mistaken.

To begin, respondents' "pass-through" arguments are contrary to DOE's 2011 findings. DOE found that a small refinery "may face compliance costs that would significantly impact the operation of the firm, leading eventually to an inability to increase efficiency to remain competitive, eventually resulting in closure." 2011 DOE Study 36. In particular, a small refinery that lacks the capital necessary to invest in blending infrastructure or faces other structural barriers to blending can comply with the RFS only by purchasing RINs, which are a pure regulatory cost. Thus, when market-rate RINs "are far more expensive than those

that may be generated through blending, this will lead to disproportionate economic hardship." *Id.* at 2. DOE explained that when RIN prices rise, compliance will be costlier for small refineries that need to purchase them than for their larger competitors that can blend. *Id.* at 3. A firm is unlikely to be able to raise its prices to recover costs exceeding those borne by its competitors. See also CountryMark Br. 19 (documenting inability to pass through RFS regulatory costs); Small Refineries Coalition Br. 3, 17–18 (same).[10]

Respondents' "pass through" argument also overstates EPA's prior findings. EPA concluded only that "obligated parties were *generally* able to recover [the] increase in the cost of meeting their RIN obligations" in the price of their products. Dallas Burkholder, Office of Transp. & Air Quality, EPA, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* 29 (May 14, 2015) (emphasis added), *available at* https://www.grassley.senate.gov/download/epa-hq-oar-2015-0111-0062burkholderrin-analysis; App. 88a. While even this conclusion is disputed, that dispute is immaterial here.

The Fourth Circuit explained why in *Ergon-West Virginia, Inc.* v. *EPA*, 896 F.3d 600 (4th Cir. 2018).

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[10] Basic principles of economics establish that producers in a competitive market cannot pass through to consumers all taxes and other regulatory costs. *See* Pindyck & Rubinfeld, *Microeconomics* 338–40 (9th ed. 2018) (producers would bear a greater fraction than consumers of the costs of a gasoline tax and suffer reduce demand); Varian, *Intermediate Microeconomics* 288 (8th ed. 2010) ("In general, a tax will both raise the price paid by consumers and lower the price received by firms."); *Pub. Utils. Comm'n* v. *FERC*, 24 F.3d 275, 280–81 & n.4 (D.C. Cir. 1994) ("The more competitive the … market, the more likely the [seller] will bear the [tax].").

There, EPA defended its denial of a hardship exemption by relying on this same "pass-through" study. The court of appeals vacated EPA's action as arbitrary, because EPA's study "merely determined that the refining industry *as a whole* is not burdened by rising RIN prices." *Id.* at 613 (emphasis added). EPA could not, the court held, simply rely on "an industry-wide study and a nonspecific nationwide trend to find that RIN prices would not harm" an *individual* small refinery. *Id.* Instead, when acting on a hardship petition, EPA must examine "evidence of hardship *particular to [the] refinery* due to RIN costs." *Id.* And in *Ergon*, the small refinery had presented "specific evidence" that it "cannot pass the RIN costs on to purchasers." *Id.*[11]

RFA separately contends that the hardship exemption is unnecessary because "the RFS has other mechanisms that provide EPA with flexibility to address any 'negative economic effects.'" RFA Br. 51. Tellingly, EPA does not make this argument. To the contrary, it emphasizes that those mechanisms are "limited in scope." EPA Br. 25. Most fundamentally, they do not provide a means to address the concerns underlying the small-refinery provisions.

For example, EPA may reduce the statutory volume requirements for a given year if they would "severely harm the economy or environment of a State, a region, or the United States." RFA Br. 51 (citing 42 U.S.C. §7545(o)(7)(A)(i)). But that authority depends on a finding of circumstances that broadly affect a State or region, not circumstances unique to a particular small refinery. See 77 Fed. Reg. 70,752, 70,756 (Nov. 27,

[11] Similar evidence was presented by the exemption petitions here. *See* Administrative Record Vol. 2 (10th Cir. filed Mar. 21, 2019), ECF No. 10635063 ("REC2") at REC2_641, REC2_684 (applicants had zero or negative profit margins after incurring costs of obtaining RINs).

2012). And it authorizes a comparably broad reduction in the renewable fuel volume requirement. One reason for the separate small-refinery provisions, by contrast, is to enable EPA to make narrow, individualized allowances for the industry's smallest, most vulnerable participants *without* affecting attainment of the program's broader goals.

The statutory "safe harbor," RFA Br. 51, is likewise irrelevant. It merely allows a refinery to carry a RIN deficit forward into the next compliance year. In that carryover year, the refinery must not only satisfy its (likely increased) RFS obligation for that year, but also its deficit from the prior year. 42 U.S.C. §7545(o)(5)(D). And the refinery cannot carry over a deficit if it carried a deficit in the preceding year. 40 C.F.R. §80.1427(b). Permitting a refinery to spread its compliance over two years can provide useful flexibility, but it does not respond to the disproportionate economic hardship that Congress addressed in the separate small-refinery provisions.

The amicus briefs confirm the real-world consequences of the Tenth Circuit's decision. Some small refineries face years in which RFS compliance costs will be orders of magnitude greater than pre-tax income. See CountryMark Br. 17–19; Wyoming et al. Br. 15–16. Without hardship exemptions, these conditions threaten them with "financial ruin." CountryMark Br. 2. This will severely damage local communities and State economies. Wyoming et al. Br. 19–25.

While respondents seek to avoid these issues by contending that "pass-through" and other EPA waiver authorities eliminate the prospect of hardship, the court of appeals was more clear-eyed about the implications of its decision. It concluded instead that Congress expected small refineries facing hardship after the first few years of the program to "ponder" whether "it made

sense to … remain in the market in light of the statute's challenging renewable fuels mandate." App. 70a. In the Tenth Circuit's view, Congress preferred for small refineries facing disproportionate economic hardship from RFS compliance to be forced from the market rather than remain eligible for a hardship exemption—but only if they had achieved compliance in one or more prior years. That is not a plausible understanding of congressional intent, particularly under a statute whose principal object was "[t]o move the United States toward greater energy independence and security." 121 Stat. at 1492.

III. EPA'S 2014 ELIGIBILITY RULE REJECTED A CONTINUITY REQUIREMENT AND IS OWED DEFERENCE.

In 2014, EPA adopted a rule stating the eligibility requirements for a hardship exemption and rejecting any continuity limitation. The agency has applied that understanding across two Administrations. The government now argues (at 45–46) that EPA's 2014 eligibility rule did not address the continuity requirement because it focused on the definition of "small refinery." See also RFA Br. 55–57. That contention cannot withstand scrutiny. EPA's 2014 rulemaking expressly rejected the claim that the statute requires continuity and revised the proposed rule to ensure that the final rule permitted non-continuous exemptions. 79 Fed. Reg. at 42,152; 40 C.F.R. §80.1441(e)(2)(iii); Br. 46–50.

Although the government has not owned up here to that prior agency position, EPA Br. 45–46, it explained below that the statutory construction it now embraces "directly seeks to nullify" the 2014 eligibility rule. EPA 10th Cir. Br. 23. Noting that the eligibility conditions in the rule were comprehensive, the government criticized RFA for seeking to "impose eligibility requirements for small refinery exemption petitions that the

EPA rejected as not being required by the CAA during notice-and-comment rulemaking." *Id.* at 19. The government explained that EPA had "proposed to amend its regulatory definition to require the same requirement [RFA] now seek[s] to impose," but "ultimately rejected this proposal." *Id.* at 23. It repeatedly described EPA's regulations as rejecting a continuity requirement, and characterized its rule as imposing a "single limit on eligibility," namely, the throughput test. *E.g.*, *id.* at 26. Put differently, the fact that the rule itself did not "discus[s] what the word 'extension' actually means," EPA Br. 46 (quoting App. 78a), is irrelevant because EPA purposely excluded any continuity requirement.

EPA announced its reversal in position through a press release issued the day petitioners' brief was filed. EPA Br. App. 36a. The government contends (at 46–47) this renders *Chevron* inapplicable. But a legislative rule adopted through notice-and-comment rulemaking cannot be repealed by a press release. See *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015). While EPA can initiate a new rulemaking proposing to adopt its new position, any resulting rules cannot be applied retroactively. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988). Thus, hardship petitions that were filed under EPA's existing eligibility rule—like those here—must be decided under that rule's standards if the rule is lawful. And under *Chevron*, the existing rule has the force of law if it either implements an intepretation compelled by the statute or reasonably resolves a statutory ambiguity.

Properly construed, the statute does not require continuity. But assuming *arguendo* the statute is ambiguous, EPA reasonably decided in its 2014 rule that the statute authorizes non-continuous exemptions.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

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April 15, 2021

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