No. 20-472

In the Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, ET AL.,
PETITIONERS

v.

RENEWABLE FUELS ASSOCIATION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When Congress created the renewable fuel standard program in the Clean Air Act, 42 U.S.C. 7545(*o*), it initially exempted small refineries from the obligations that the program otherwise imposes on refiners and importers of gasoline and diesel fuel. Subparagraph (A) of the relevant provision established a blanket exemption for small refineries until 2011, subject to a possible extension "of not less than 2 additional years" based on the results of a study to be conducted by the Department of Energy. 42 U.S.C. 7545(*o*)(9)(A)(i) and (ii). Subparagraph (B) authorized small refineries to petition the U.S. Environmental Protection Agency (EPA) "at any time * * * for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i). The question presented is as follows:

Whether the EPA may grant a small refinery's petition for an "extension of the exemption" under Section 7545(*o*)(9)(B)(i) if the small refinery has not previously applied for and received continuous prior extensions of the initial exemption provided in Section 7545(*o*)(9)(A).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-94a) is reported at 948 F.3d 1206.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2020. A petition for rehearing was denied on April 7, 2020 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on September 4, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 2005, Congress amended the Clean Air Act, 42 U.S.C. 7401 *et seq.*, to create a market-based renewable fuel standard program designed "to ensure that gasoline sold or introduced into commerce in the United States included rising amounts of renewable fuel" in the

ensuing years. Pet. App. 6a; see Energy Policy Act of 2005 (Energy Policy Act), Pub. L. No. 109-58, Tit. XV, Subtit. A., § 1501(a)(2), 119 Stat. 1067-1074 (42 U.S.C. 7545(*o*)). Renewable fuel is fuel made from renewable biomass, such as corn, which is "used to replace or reduce the quantity of fossil fuel present in a transportation fuel." 42 U.S.C. 7545(*o*)(1)(J). The program is administered by the U.S. Environmental Protection Agency (EPA). 42 U.S.C. 7545(*o*)(2)(A)(i).

The renewable fuel standard program establishes annual targets for the volume of various types of renewable fuels to be sold as transportation fuel in the United States. 42 U.S.C. 7545(*o*)(2)(A)(i) and (B)(i). As amended, the Clean Air Act specifies the "applicable volume" targets for each year from 2006 to 2022, with future targets to be set by the EPA. 42 U.S.C. 7545(*o*)(2)(B)(i) and (ii). The Act also authorizes the EPA to lower the annual targets in certain circumstances by granting waivers. 42 U.S.C. 7545(*o*)(7)(A) and (D)(i). Subject to any adjustments under those waiver authorities, the EPA uses the annual volume targets and an estimate from the Department of Energy (DOE) of the total volume of transportation fuel expected to be sold in the following calendar year, 42 U.S.C. 7545(*o*)(3)(A), to generate a "renewable fuel obligation" for the calendar year, expressed as a volume percentage for each type of renewable fuel, 42 U.S.C. 7545(*o*)(3)(B)(i); see 40 C.F.R. 80.1405(c). The EPA is required to publish the applicable volume percentages in the Federal Register each year by November 30. 42 U.S.C. 7545(*o*)(3)(B)(i).

The annual volume percentages established by the EPA are used to impose obligations on individual refiners and importers of gasoline and diesel fuel, based on the amount of non-renewable fuel each party produces

or imports. 42 U.S.C. 7545(*o*)(3)(B); see 40 C.F.R. 80.1406(a)(1), 80.1407. Refiners and importers may comply with their obligations by blending renewable fuels into transportation fuels, or by purchasing credits from other parties in a market-based system. Pet. App. 15a-16a; 42 U.S.C. 7545(*o*)(5). The credit system works by assigning a "Renewable Identification Number" or "RIN" to each batch of renewable fuel that is produced or imported. 42 U.S.C. 7545(*o*)(5)(A)(i); see 40 C.F.R. 80.1401, 80.1426(a) and (e). Refiners and importers meet their annual obligations by amassing or purchasing RINs. 42 U.S.C. 7545(*o*)(5)(B); 40 C.F.R. 80.1427(a).

b. This case concerns the exemptions available under the renewable fuel standard program for any "small refinery," defined as a refinery "for which the average aggregate daily crude oil throughput for a calendar year * * * does not exceed 75,000 barrels." 42 U.S.C. 7545(*o*)(1)(K). When Congress created the program in 2006, it granted small refineries a blanket exemption until 2011 from the program's renewable fuel obligations. 42 U.S.C. 7545(*o*)(9)(A)(i); see Energy Policy Act § 1501(a)(2), 119 Stat. 1073. Congress also directed DOE to study whether requiring small refineries to comply with the annual standards "would impose a disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(A)(ii)(I). Congress further directed the EPA to "extend the exemption under clause (i)," *i.e.*, the initial blanket exemption, for "not less than 2 additional years" for any small refinery, if the DOE study determined that the refinery "would be subject to a disproportionate economic hardship if required to comply." 42 U.S.C. 7545(*o*)(9)(A)(ii)(II).

"The DOE issued a small refinery study in 2009." Pet. App. 21a. After legislators criticized aspects of the

study, DOE "issued a revised small refinery study in 2011." *Id.* at 22a. The 2011 study identified 13 small refineries that DOE concluded would suffer a disproportionate economic hardship if they were required to comply with the annual renewable fuel obligations, and the study recommended that those refineries "receive an extension of their * * * exemption." Administrative Record 529. The EPA extended the exemption for those small refineries for 2011 and 2012. 77 Fed. Reg. 1320, 1340 (Jan. 9, 2012).[1]

The Clean Air Act also authorizes the EPA to grant case-by-case additional relief for small refineries, based on disproportionate economic hardship. Specifically, "[a] small refinery may at any time petition [the EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i). Subparagraph (A) is the provision that created the initial blanket exemption until 2011 and that authorized the additional two-year extension conditioned on the DOE study. The EPA must, in consultation with DOE, consider the DOE study "and other economic factors" in evaluating a small refinery's petition, and it must act on the petition within 90 days. 42 U.S.C. 7545(*o*)(9)(B)(ii) and (iii); see 40 C.F.R. 80.1441(e)(2).

2. Petitioners are the owners and operators of three small refineries, each of which submitted a Section 7545(*o*)(9)(B) petition for hardship relief to the EPA. Pet. App. 28a; see Pet. 8. Two of the refineries—HollyFrontier Cheyenne Refining (Cheyenne) and

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[1] The EPA also granted additional case-by-case exemptions for those years, exempting a total of 24 small refineries in 2011 and 23 in 2012. See Pet. App. 22a; EPA, *RFS Small Refinery Exemptions* (updated Nov. 19, 2020), https://go.usa.gov/x7MVZ.

Wynnewood Refining (Wynnewood)—had been identified in the 2011 DOE study as small refineries that would have been subject to disproportionate economic hardship had they been required to comply with the renewable fuel obligations imposed under the program. Pet. App. 29a, 34a. Accordingly, those small refineries had been covered by both the initial blanket exemption and the subsequent two-year extension that the EPA had granted after the DOE study. Wynnewood had not received any further "hardship relief" since 2012, *id.* at 34a (citation omitted), and Cheyenne had not received relief in some years since 2012, see *id.* at 29a-30a. The third refinery—HollyFrontier Woods Cross Refining (Woods Cross)—was not identified in the DOE study and had not previously received any hardship relief under Section 7545(*o*)(9)(B). *Id.* at 32a.

The EPA granted each of the extension petitions in full, exempting Cheyenne and Woods Cross from the program's renewable fuel obligations for 2016 and exempting Wynnewood from the obligations for 2017 (as the petitions had requested). Pet. App. 31a, 33a, 35a. In granting the petitions, the EPA stated that small refineries generally had not been found to experience disproportionate economic hardship merely because they "may need to purchase a significant percentage of [their] RINs for compliance from other parties," because rising "RIN prices lead to higher sales prices obtained for the refineries' blendstock, resulting in no net cost of compliance." *Id.* at 31a (citation omitted). The EPA also stated that "disproportionate economic hardship may be the result of other factors, including a difficult year for the industry as a whole." *Ibid.* (citation omitted).

3. The Clean Air Act authorizes courts of appeals to review final actions taken by the EPA under Section 7545. See 42 U.S.C. 7607(b)(1). In May 2018, a group of renewable fuels producers—referred to as the Biofuels Coalition in the proceedings below, see Pet. App. 3a—petitioned the Tenth Circuit for review of the EPA's decisions granting hardship relief to petitioners. See C.A. Pet. for Review 1-2 (May 29, 2018). Petitioners intervened to defend the decisions. Pet. App. 3a.

The court of appeals granted in part and denied in part the petition for review. Pet. App. 1a-94a. After determining that the Biofuels Coalition had Article III standing to sue on behalf of its members (some of whom are petitioners' competitors), *id.* at 36a-54a, the court held that the EPA lacked statutory authority to grant hardship relief to petitioners under the circumstances presented here, *id.* at 65a-75a. The provision at issue states that a small refinery may petition for "an extension of the exemption under subparagraph (A)." 42 U.S.C. 7545(*o*)(9)(B)(i). Emphasizing dictionary definitions of the word "extension" as "'an increase,'" Pet. App. 66a (citation omitted), the court held that the EPA could not extend or increase a small refinery's exemption unless the exemption was "in existence," *id.* at 67a.

Although Subparagraph (A) had created a blanket exemption for all small refineries until 2011, the court of appeals further held that a particular small refinery must continue to have an exemption in place at the time of its extension petition in order to be eligible for "an extension of the exemption under subparagraph (A)." 42 U.S.C. 7545(*o*)(9)(B)(i). In the court's view, "a small refinery which did not seek or receive an extension in prior years is ineligible for an extension, because at that point there is nothing to prolong, enlarge, or add

to." Pet. App. 67a. The court also described Section 7545(*o*)(9)(B)(i) as "funnel[ing] small refineries toward compliance over time," *id.* at 68a, and it stated that its interpretation of the statute was consistent with the EPA's practice in 2016, see *id.* at 71a-72a.

Petitioners and the EPA had emphasized that, under the statute, a small refinery may petition "at any time" for a hardship-based extension of the exemption. 42 U.S.C. 7545(*o*)(9)(B)(i). While acknowledging that the term "any" is "expansive," the court of appeals reasoned that, "even if a small refinery can *submit* a hardship petition at any time, it does not follow that every single petition can be *granted*." Pet. App. 72a. The court also stated that the phrase "at any time" ensures that a small refinery may petition for an extension even after the EPA's November 30 deadline for publishing renewable fuel obligations for the following calendar year, *id.* at 73a—a feature of the exemption process that the court described as "confer[ring] a substantial benefit upon small refineries," *id.* at 74a.

The court of appeals rejected the Biofuels Coalition's other challenges to the EPA's actions, with two exceptions. Pet. App. 4a-5a. First, the court held that the EPA had erred to the extent that it had permitted the small refineries to demonstrate a "disproportionate economic hardship * * * as a result of something other than * * * compliance" with the program, such as industry-wide conditions. *Id.* at 82a. The court interpreted Section 7545(*o*)(9)(B)(i) to require that any hardship must be "caused by" compliance with the renewable fuel standard program in order to provide a basis for an exemption. *Id.* at 83a.

Second, the court of appeals held that the EPA had acted arbitrarily and capriciously by deviating, without

acknowledgment or a stated reason, from its prior position that refiners generally do not incur disproportionate economic hardship from purchasing RINs on the open market because the refiners "pass through most or all of their RIN purchase costs" to their customers. Pet. App. 89a; see *id.* at 87a-92a. The court observed that the EPA "did not analyze the possibility of RIN cost recoupment when it granted" petitioners' requests for hardship relief, and that the agency "did not explain whether, or to what extent, or why the pass-through principle was inapplicable." *Id.* at 89a-90a. After vacating the EPA's actions, the court remanded to the agency for further proceedings. *Id.* at 94a.

The court of appeals later denied petitioners' request for rehearing en banc, without any noted dissent. Pet. App. 95a-96a.

ARGUMENT

Petitioners seek review (Pet. 11-12) of the court of appeals' holding that the EPA exceeded its authority under 42 U.S.C. 7545(*o*)(9)(B)(i) by granting hardship relief to small refineries that had not continuously been granted prior extensions of the exemption that all small refineries received when Congress first created the renewable fuel standard program. See 42 U.S.C. 7545(*o*)(9)(A). The question whether the EPA's exemption authority extends to these circumstances (as the government argued below) does not warrant further review at this time.

The decision below does not meet this Court's ordinary criteria for granting certiorari. See Sup. Ct. R. 10. The decision does not conflict with any decision of this Court or another court of appeals. Indeed, the question presented was one of first impression in the court of appeals and has never previously been addressed by any

other court. Accordingly, the risk that small refineries in the Tenth Circuit will be at a competitive disadvantage (see Pet. 32) versus small refineries elsewhere in the country is indeterminate at this time. The question presented in the petition is currently before the D.C. Circuit in other pending litigation, and this Court will be better positioned to assess whether the issue warrants its review after that case is decided. This case would also be an unsuitable vehicle in which to address the question presented because the court of appeals vacated the EPA's actions and remanded to the agency on several other grounds that petitioners do not challenge. Accordingly, the petition for a writ of certiorari should be denied.

1. As explained above, when Congress created the renewable fuel standard program, it took steps to protect small refineries from experiencing any disproportionate economic hardship as a result of compliance with the program. Subsection (A) of Section 7545(*o*)(9) provided all small refineries with a blanket exemption from the program's renewable fuel obligations "until calendar year 2011." 42 U.S.C. 7545(*o*)(9)(A)(i). Congress also directed the EPA to extend that initial exemption for "not less than 2 additional years" for any small refinery that DOE determined "would be subject to a disproportionate economic hardship if required to comply" with the renewable fuel obligations the program would otherwise impose. 42 U.S.C. 7545(*o*)(9)(A)(ii)(II). And in Subparagraph (B), Congress provided that "[a] small refinery may at any time petition the [EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i).

The court of appeals held that Section 7545(*o*)(9)(B)(i) does not authorize the EPA to grant a small refinery's petition for hardship relief unless the refinery has "consistently received an exemption in the years preceding its petition." Pet. App. 5a. Under the court's construction, unless a small refinery has received a continuous, unbroken chain of extensions of the original Subparagraph (A) exemption, the refinery is "ineligible" for hardship relief under Section 7545(*o*)(9)(B)(i) because the refinery's prior exemption is no longer "in existence" and therefore cannot be "exten[ded]" any further. *Id.* at 67a.

Petitioners contend (Pet. 17-26) that the decision below is inconsistent with sound principles of statutory interpretation, as articulated by this Court and by other courts of appeals, and with congressional intent. But petitioners do not identify any square conflict between the decision below and any decision of this Court or another court of appeals. Indeed, petitioners do not identify, and the government is not aware of, any other decision in which a court of appeals has addressed whether the EPA may grant hardship relief under Section 7545(*o*)(9)(B)(i) to a small refinery after the refinery has ceased to operate under an exemption in prior calendar years.

While the government's arguments did not prevail below, the Tenth Circuit's decision does not violate any "core principle[] of statutory interpretation" (Pet. 21) so as to warrant the Court's intervention at this time. The court of appeals addressed the question presented by focusing first on the statutory text and, in particular, on the ordinary meaning of the word "extension," as evidenced by dictionary definitions. Pet. App. 65a-67a. The court also considered what it perceived to be the

purpose of the exemption-extension provision—to "funnel[] small refineries toward compliance over time," *id.* at 68a—and the provision's role in the overall statutory scheme, see *id.* at 69a-70a. And the court considered and rejected counterarguments predicated on the fact that the statute authorizes small refineries to petition for an extension of the exemption "at any time." 42 U.S.C. 7545(*o*)(9)(B)(i); see Pet. App. 72a-74a. The court thus did not "ignore[] subsection (B)" (Pet. 23) or any of its relevant terms.

Petitioners are correct that the word "extend" can mean "to make available," Pet. 19 (citation omitted), as in extending a job offer or extending credit. Petitioners are also correct (Pet. 14) that other courts of appeals have recognized that alternative connotation of "extend" or "extension" in construing other statutes. See, *e.g.*, *Field* v. *Mans*, 157 F.3d 35, 43 (1st Cir. 1998) (stating, in the context of the Bankruptcy Code, that the term "extension" can "refer to an offer 'to make available'") (citation omitted). But no other court of appeals has yet addressed the meaning of the term "extension" as used specifically in Section 7545(*o*)(9)(B)(i).

2. The question presented is currently pending before the D.C. Circuit in *Renewable Fuels Association* v. *EPA*, No. 19-1220 (filed Oct. 22, 2019) (*Renewable Fuels*). In that case, another biofuels coalition, consisting of the same organizations involved here plus others, filed a petition for review challenging an August 2019 EPA exemption decision. Pet. for Review at 1-2, *Renewable Fuels*, *supra*, No. 19-1220. In that nationally applicable decision, see *id.* at 2, the EPA addressed requests by 36 small refineries, including petitioners, for hardship relief under Section 7545(*o*)(9)(B)(i) for the refineries' 2018 renewable fuel standard obligations. See

Gov't Mot. To File Consolidated Br. at 2-3, *Renewable Fuels*, *supra*, No. 19-1220 (Nov. 5, 2020).

Among other issues, the challengers in that case argue that the "EPA has no authority to 'extend' small refinery exemptions to refineries that were not exempt for all prior years," relying heavily on the Tenth Circuit's decision in this case. Pet. Opening Br. at 22, *Renewable Fuels*, *supra*, No. 19-1220 (Dec. 7, 2020) (capitalization altered; emphasis omitted); see *id.* at 22-29. That is in substance the same issue that petitioners raise here. See Pet. i. Under the current briefing schedule, briefing in the D.C. Circuit will be complete in March 2021, although a motion for an enlargement of the schedule is currently pending.

Those pending D.C. Circuit proceedings provide an additional reason to deny the petition in this case. If the D.C. Circuit parts ways with the Tenth Circuit on the question presented, this Court can consider whether that conflict warrants further review. If the D.C. Circuit agrees with the Tenth Circuit, petitioners' concerns (Pet. 32) about competitive disadvantages for small refineries located in the Tenth Circuit will have considerably less force, as the EPA decision under review in the D.C. Circuit is national in scope.[2] And petitioners—or at least some of them—could seek further review at that time, since Cheyenne and Woods Cross have now intervened in the D.C. Circuit proceedings. In either event,

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[2] The EPA is also still considering its options for managing small-refinery exemption requests going forward; a future policy decision could similarly reduce the possibility of disparate treatment. Cf. *National Envtl. Dev. Ass'n's Clean Air Project* v. *EPA*, 891 F.3d 1041, 1050 (D.C. Cir. 2018) ("The [Clean Air] Act does not instruct EPA how to address * * * intercircuit conflicts or how to implement the [Act's] 'fairness' and 'uniformity' provisions.").

any further review by this Court would likely benefit from the additional views of another court of appeals. See *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (noting the "benefit" the Court receives "from permitting several courts of appeals to explore a difficult question before this Court grants certiorari").

3. The government agrees with petitioners that the question presented has important implications for the renewable fuel standard program. This case, however, would be an unsuitable vehicle for addressing the question because a decision favorable to petitioners would not change the judgment below. In addition to holding that the EPA lacked statutory authority to grant the hardship petitions at issue here, the court of appeals also vacated and remanded the challenged agency actions on other grounds. Pet. App. 82a-85a, 94a.

In particular, the court held that the EPA had erred in finding Section 7545(*o*)(9)(B)(i)'s "disproportionate economic hardship" standard satisfied based on industrywide conditions, and that the agency had acted arbitrarily and capriciously in failing to explain or acknowledge an apparent change in position with respect to whether these kinds of small refineries pass on to others the refineries' costs of purchasing RINs. See pp. 7-8, *supra*. Petitioners do not seek review of those holdings, and it is not clear that petitioners could otherwise demonstrate disproportionate economic hardship for the calendar years in question. Where a favorable resolution of the question presented would confer no practical benefit on the parties that seek this Court's review, "strong prudential considerations disfavor[] the exercise of the Court's certiorari power." *Padilla* v. *Hanft*, 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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