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

BRIEF OF PETITIONERS

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QUESTION PRESENTED

The Renewable Fuel Standard requires refiners, blenders, and importers of transportation fuel to blend increasing amounts of renewable fuels into their products each year. Recognizing that this mandate could harm small refineries, Congress provided that small refineries could "at any time petition [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 Tenth Circuit interpreted this provision to mean that a small refinery may obtain an exemption only if it has received uninterrupted, continuous extensions of the exemption for every year since 2011—an interpretation that excludes nearly all small refineries.

Accordingly, the question presented is:

In order to qualify for a hardship exemption under §7545(o)(9)(B)(i) of the Clean Air Act, does a small refinery need to receive uninterrupted, continuous hardship exemptions for every year since 2011.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are HollyFrontier Cheyenne Refining, LLC, HollyFrontier Refining & Marketing, LLC, HollyFrontier Woods Cross Refining, LLC, and Wynnewood Refining Co., LLC. Respondents are Renewable Fuels Association, American Coalition for Ethanol, National Growers Association, and National Farmers Union. The United States Environmental Protection Agency, who was respondent below, is also a Respondent.

HollyFrontier Cheyenne Refining, LLC, HollyFrontier Refining & Marketing LLC, and HollyFrontier Woods Cross Refining, LLC are each a wholly owned subsidiary of HollyFrontier Corporation, a Delaware corporation publicly traded on the New York Stock Exchange under the symbol HFC. Other than HollyFrontier Corporation, no publicly held company holds a 10% or greater interest in HollyFrontier Refining & Marketing LLC, HollyFrontier Cheyenne Refining, LLC, or HollyFrontier Woods Cross Refining, LLC.

Wynnewood Refining Company, LLC ("Wynnewood") is a wholly owned subsidiary of CVR Refining, LLC, a Delaware limited liability company. CVR Refining, LLC is a wholly owned subsidiary of CVR Refining, LP, which is an indirect wholly owned subsidiary of CVR Energy, Inc., a Delaware corporation publicly traded on the New York Stock Exchange under the Symbol "CVI."

RELATED PROCEEDINGS

This case arises from a petition for review of final agency action of the United States Environmental Protection Agency: *Renewable Fuels Association, et al.* v.

United States Environmental Protection Agency, No. 18-9533 (10th Cir. Jan. 24, 2020).

No other case is directly related to this one, whether in state or federal trial or appellate courts, or in this Court.

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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 confidential, unreported, and reproduced in a supplemental, sealed appendix to the Petition ("Suppl. App.") 1a–31a, 32a–39a, and 40a–46a.

JURISDICTION

The court of appeals entered judgment on January 24, 2020, App. 1a, and denied timely petitions for rehearing en banc on April 7, 2020, App. 95a–96a. The Petition was timely 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") (otherwise known as the Renewable Fuels Standard ("RFS") program) 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 statutory appendix C to the Petition. See App. 97a–103a.

INTRODUCTION

To help ensure American energy independence, Congress enacted the RFS program, which requires refiners and other regulated parties to demonstrate that specified amounts of ethanol and other renewable fuels are blended into the Nation's gasoline and diesel fuels each year. This program imposes significant compliance burdens on regulated parties, burdens that escalate because the amount of renewable fuel that must be blended increases each year.

Recognizing that these requirements could be particularly burdensome for small refineries, Congress granted them a blanket exemption from the RFS man-

date until 2011 and directed the Environmental Protection Agency ("EPA") to extend that exemption for two additional years for small refineries that the Department of Energy ("DOE") determined would otherwise suffer disproportionate economic hardship.

Congress also recognized, however, that these initial measures might be insufficient. Accordingly, in a separate subparagraph of the statute, Congress authorized small refineries to petition EPA "at any time" for "an extension of the exemption" from the RFS mandates based on "disproportionate economic hardship"—relief that Congress elsewhere in the same provision called "a hardship exemption."

The issue presented is whether the Tenth Circuit correctly held that small refineries are disqualified from seeking hardship exemptions unless they have a continuous, unbroken history of exemptions during all years of the RFS program. If affirmed, that holding would foreclose most small refineries from obtaining hardship exemptions and create a one-way ratchet that would effectively phase-out the exemption. The lower court's reading thus would eliminate a regulatory relief program for small refineries, which often provide high paying jobs in rural communities, are an important source of tax revenue, and supply reasonably priced transportation fuels in many regions not fully served by larger refineries. Equally important, the lower court's reading threatens to shutter important domestic refining capacity, undermining Congress's energy-independence purpose.

The lower court arrived at its interpretation in two main steps. First, focusing on the provision authorizing "an extension" of the hardship exemption, the court reasoned that one definition of "extension" is an "increase in length of time," a definition that supposedly presumes the thing being extended has been in

effect continuously up until the moment of extension. App. 66a–67a. Second, the court believed that this definition furthered the statute's purpose, which it characterized as funneling small refineries into compliance over time. It concluded that if a small refinery "figures out how to put itself in a position of annual compliance" for even one year, *id.* at 68a, it is forever disqualified from seeking future hardship relief because it has had "time to adapt" and to "ponder … whether it made sense to … remain in the market in light of the statute's challenging renewable fuels mandate," *id.* at 70a. The court did not explain how driving from the market small refineries that had attained but cannot maintain compliance, while allowing those that *never* achieve compliance to continue operating, would serve Congress's energy-independence goal or the exemption's purpose to alleviate hardship for small refineries.

As shown below, both parts of the court's analysis are wrong. The statute's text, structure, and purpose make clear that Congress designed the hardship exemption as a safety valve available whenever a small refinery experiences disproportionate economic hardship from the burdens of RFS compliance—burdens that Congress knew would escalate annually when it authorized small refineries to petition for "a hardship exemption" "at any time." This reading is fully consistent with the word "extension," and—unlike the Tenth Circuit's reading—it harmonizes with the surrounding statutory terms, the statute's structure, and the statutory purpose to secure energy independence. It also avoids the arbitrary results the Tenth Circuit's reading creates, while preserving a critical lifeline that Congress designed to protect small refineries and the communities they serve.

Properly construed, the statute does not prohibit EPA from extending a hardship exemption to a small

refinery simply because it has not received an exemption for every prior year. At a minimum, EPA's interpretation is reasonable and entitled to deference.

The Court should reverse the decision below.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Overview of the RFS program

In 2005, and again in 2007, Congress amended the CAA to include the present-day RFS program. See 42 U.S.C. §7545(o); Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492. Enacted against the backdrop of conflict in the Middle East and concerns over excessive reliance on foreign oil, the RFS program sought to "move the United States toward greater energy independence and security" by increasing domestic production of renewable fuels from U.S. agricultural feedstocks. 121 Stat. at 1492. The primary renewable fuel under the RFS program is ethanol, which is typically derived from corn and can be blended into gasoline.

The RFS program achieves its energy-independence goals by regulating the nation's transportation-fuel industry. 42 U.S.C. §7545(o)(2)(B)(i)–(ii). Specifically, the program requires certain regulated parties—entities that produce or import gasoline and diesel fuel in the 48 contiguous states or Hawaii—to blend renewable fuels into their transportation fuels. See *id.* §7545(o)(3)(B)(ii)(I); 40 C.F.R. §80.1406.

The RFS program establishes nationwide, annual targets for the volume of renewable fuels that regulated parties must blend into transportation fuels.

See 42 U.S.C. §7545(o)(2)(B)(i)–(ii). Congress prescribed numerical volumes for renewable fuel, advanced biofuel, and cellulosic biofuel for each year through 2022, and for biomass-based diesel through 2012. *Id.* §7545(o)(2)(B)(i)(I)–(IV). Each year, the volume requirement increases. *Id.* For example, the requirement for renewable fuel began at 4 billion gallons in 2006 and rises to 36 billion gallons by 2022. *Id.* §7545(o)(2)(B)(i)(I).

Each year, based on the Energy Information Administration's estimate of the volume of transportation fuel that will be introduced into commerce, EPA sets an annual percentage standard obligation designed to achieve the blending of the amount of renewable fuels required for that year. See *id.* §7545(o)(3)(B)(ii)(II); 40 C.F.R. §80.1405; see also 42 U.S.C. §7545(o)(2)(A), (3)(A), (3)(B)(i). Each regulated party uses that percentage standard to determine its individual RFS obligation based on the volume of gasoline and diesel it produces that year. 42 U.S.C. §7545(o)(3)(B)(ii)(III); 40 C.F.R. §§80.1405–.1407. Because EPA derives its percentage standard from Congress's escalating annual targets, the RFS's compliance burden increases each year.

Regulated parties demonstrate compliance with their RFS obligations by retiring a certain number of "Renewable Identification Numbers" ("RINs") annually. See 40 C.F.R. §§80.1401, 80.1425–.1426. Each RIN represents a gallon of renewable fuel. *Id.* When a party purchases a batch of renewable fuel, it also obtains the RINs associated with that batch. Once a party blends the renewable fuel into transportation fuel, the RINs are "separated" and can be "retired" to satisfy RFS obligations. *Id.* §§80.1426(e), 80.1429(b). But regulated parties can satisfy their RFS obligations another way. They can purchase RINs from others

through a credit-based market established by Congress and EPA. See 42 U.S.C. §7545(o)(5); 40 C.F.R. §§80.1427(a)(6), 80.1451(c). The price of RINs in this market, however, fluctuates substantially in response to supply and demand. See, *e.g.*, *Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486, 58,520 (Dec. 12, 2017) ("*2018 RFS Volume*") (fig.VI.B.2-1) (showing up to four-fold change).

While the RFS program forces increased consumption of renewable fuels based on agricultural feedstocks, it is not viewed as an environmental protection program. As the National Wildlife Federation observed, "the Renewable Fuel Standard created a strong economic incentive to increase domestic corn production to meet the federal mandate for new biofuels. The ensuing expansion and intensification of crop agriculture has transformed the landscape, leading to a cascade of negative impacts on wildlife habitat, water resources, and the climate."[1]

B. Small-Refinery Exemptions

Congress understood that RFS compliance could be especially burdensome for small refineries, defined as those with an "average aggregate daily crude oil throughput" of 75,000 barrels or less "for a calendar year." 42 U.S.C. §7545(o)(1)(K), (o)(9); see also 40

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[1] J. Lubetkin, Nat'l Wildlife Fed'n, *New Research Proves Biofuels Policy Driving Environmental Harm* (Mar. 7, 2019) (quoting Professor Aaron Smith, Univ. of Cal., Davis), https://www.nwf.org/Home/Latest-News/Press-Releases/2019/03-07-19-Biofuels-Environmental-Harm; *see also* D. Degennaro, *10 years later, Renewable Fuel Standard fails to live up to environmental promises*, The Hill (Dec. 19, 2017) (the production and use of corn ethanol under the RFS "has done incredible damage to the natural landscape, and actually increased rather than reduced climate-disrupting pollution").

C.F.R. §80.1401. Small refineries, Congress recognized, lack the "inherent scale advantages of large refineries." *Sinclair Wyo. Ref. Co.* v. *EPA*, 887 F.3d 986, 989 (10th Cir. 2017); see also *Hermes Consol., LLC* v. *EPA*, 787 F.3d 568, 572 (D.C. Cir. 2015).

For example, small refineries tend to be less integrated than their larger counterparts. See *Hermes Consol.*, 787 F.3d at 572. Larger refineries participate in more segments of the supply chain, including transportation, marketing, distribution, and sales. See Office of Policy & Int'l Affairs, Dep't of Energy, *Small Refinery Exemption Study*, at 23 (Mar. 2011) ("2011 DOE Study"). Smaller refineries do not have the same reach and often lack the significant capital necessary for expensive infrastructure to blend renewable fuels. See *id.* at 24, 34. This inhibits their ability to store and blend renewable fuels into their own gasoline and diesel fuels, so they often must satisfy their RFS obligations by buying costly RINs. See *id.* at vii, 2.

In addition, many retail stations will not accept blended fuels from small refineries (which may not own retail stations they can compel to accept such fuel). See Office of Policy & Int'l Affairs, Dep't of Energy, *EPACT 2005 Section 1501: Small Refineries Exemption Study*, at 12 (Jan. 2009) ("2009 DOE Study"); Cong. Research Serv., *Small Refineries and Oil Field Processors*, at Summary (Aug. 11, 2014) ("2014 CRS Report"). Again, in this situation, a small refinery must purchase costly RINs to comply.[2]

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[2] Many gas retailers have the capital and expertise to blend renewable fuels, so they can generate significant sums by selling the RINs they create to regulated refineries. *See* Bernard L. Weinstein, Maguire Energy Inst., S. Methodist Univ., *Renewable Identification Numbers (RINs) Trading Under the Renewable Fuels Program: Unintended Consequences for Small Retailers*, at

A small refinery might also be located in a remote area with little local demand, requiring it to ship most of its product by pipelines at additional expense to reach a market. See 2014 CRS Report at 5; 2009 DOE Study at 12. Pipelines, however, prohibit transportation of blended fuels, so these refineries have limited ability to comply with the RFS through blending, short of acquiring additional infrastructure downstream of the refinery. See Suppl. App. 19a, 38a. And some small refineries produce a higher percentage of diesel fuel than gasoline, and thus their ability to blend is inherently limited. See App. 24a, 30a, 81a; 2011 DOE Study at 34. These constraints again force heavy reliance on purchasing RINs to satisfy the annual obligation. See 2011 DOE Study at 34. The cost of RINs can strain a small refinery's already limited resources.

For these reasons, RFS compliance could make it too expensive for small refineries to stay in business. And shuttering a small refinery affects not only that business, but also the individuals and communities that rely on it. Small refineries often operate in rural locations, supplying quality jobs and resources to support local communities. See generally Amicus Br. Wyoming *et al*. in Support of Cert. 2-3, 10-16.

Applying RFS obligations to small refineries could also reduce the Nation's refining capabilities, undermining Congress's energy-independence and national-security goals.[3] For example, small refineries fre-

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4 (Aug. 2016), https://www.heartland.org/publications-resources/publications/renewable-identification-numbers-rins-trading-under-the-renewable-fuels-program-unintended-consequences-for-small-retailers.

[3] *See* S. Rep. No. 108-57, at 42 (2003) (statement of Sen. Cornyn) (discussing a predecessor to the RFS program and explaining that "a decline in refining capacity …. is a direct result

quently provide an outlet for crude reserves that cannot economically be transported to more distant refineries. They also often serve small markets that are not otherwise well connected to fuel-distribution networks, ensuring those markets obtain a steady supply of reasonably priced transportation fuels.

Accordingly, "to protect these small refineries," *Sinclair*, 887 F.3d at 989, Congress included a small-refinery exemption program in the RFS that has three distinct phases. See 42 U.S.C. §7545(o)(9)(A)–(B). The first two phases addressed the inception of the RFS program, and are included within the subparagraph entitled "Temporary exemption." Initially, under subparagraph (A), Congress created a "[t]emporary exemption," relieving all small refineries of any obligations under the RFS until 2011. *Id.* §7545(o)(9)(A)(i). Second, Congress directed EPA to extend this initial exemption for at least two additional years for any small refinery where DOE found that compliance would cause "disproportionate economic hardship." *Id.* §7545(o)(9)(A)(ii)(I)–(II).

The third phase addresses the operation of the RFS after that initial period, and appears in a different subparagraph lacking the title or term "temporary." In subparagraph (B), Congress provided that a "small refinery may *at any time* petition" EPA "for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." *Id.* §7545(o)(9)(B)(i) (emphasis added). EPA must consult with DOE and consider its recommendation and "other

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of overburdening government regulations that make it too expensive for small refiners to stay in business … or that force refiners to consolidate even further thereby eliminating refining capacity."); H.R. Rep. No. 107-157, at 73–74 (2001) (Committee on Ways and Means) ("it is appropriate to modify cost recovery provisions for small refiners" to reduce their compliance costs).

economic factors" to determine whether that refinery has shown disproportionate economic hardship warranting an exemption. *Id.* §7545(o)(9)(B)(ii). EPA must "act on any petition submitted by a small refinery for a hardship exemption" within 90 days. *Id.* §7545(o)(9)(B)(iii).

C. Regulatory Implementation

1. As Congress directed, DOE conducted a study to determine whether small refineries would suffer disproportionate economic hardship (and thus receive at least a two-year extension of the initial exemption). In 2009, DOE issued a report, concluding that small refineries did not need additional time because the ability to purchase RINs from third parties would effectively eliminate economic hardship.[4]

Members of Congress disagreed. An Appropriations Committee report expressed dissatisfaction with the 2009 DOE Study, deemed it incomplete, and stated that DOE should "reopen and reassess" it. S. Rep. No. 111-45, at 109 (2009). A conference report concurred. H.R. Rep. No. 111-278, at 126 (2009) (Conf. Rep.).

DOE issued a new report in 2011.[5] It reversed several key conclusions of the earlier report, and concluded that high compliance costs can lead to disproportionate economic hardship for small refineries.[6] As a result, the blanket exemption was extended to certain small refineries for two additional years under §7545(o)(9)(A)(ii)(II).

2. EPA adopted regulations implementing the RFS in 2010. See 75 Fed. Reg. 14,670 (Mar. 26, 2010). To

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[4] 2009 DOE Study at 13.

[5] 2011 DOE Study at 1.

[6] *Id.* at 2–3.

implement subparagraph (B), EPA adopted "a hardship provision" under which "any small refinery may apply" for a "case-by-case" determination "at any time on the basis of disproportionate economic hardship." *Id.* at 14,737. In its initial regulation, EPA defined the eligible small refineries as those that did not exceed the statute's 75,000-barrel throughput threshold in 2006. See 42 U.S.C. §7545(o)(1)(K); 40 C.F.R. §80.1441(a)(1) (2010).

In 2014, EPA amended its regulations and, among other things, redefined the criteria for the hardship exemption. Initially, EPA proposed that, to qualify, a small refinery must show that it remained below the statutory 75,000-barrel throughput threshold "in 2006 and in all subsequent years." 79 Fed. Reg. 42,128, 42,152 (July 18, 2014). In the final rule, however, the agency reversed itself, concluding that its initial proposal "could unfairly disqualify a refinery from eligibility for small refinery relief based only on a single year's production since 2006." *Id.* EPA "[did] not believe it would be appropriate to treat two refineries whose recent operating conditions were equivalent differently if one refinery exceeded 75,000 [barrels per day] in a single year as much as 8 years ago." *Id.* Accordingly, the final rule required satisfaction of the 75,000-barrel throughput requirement for only the year of the exemption and the immediately preceding year. *Id.*; 40 C.F.R. §§80.1401, 80.1441(e)(2)(iii) (2014).

Years later, members of Congress again expressed concerns with administration of the small-refinery hardship exemption. In 2017, they criticized EPA's adoption of an economic-hardship standard requiring small refineries to demonstrate that RFS compliance would threaten their viability. See S. Rep. No. 114-281, at 70 (2016); 163 Cong. Rec. H3327, H3884 (daily ed. May 3, 2017) (statement of Rep. Frelinghuysen).

They explained that the RFS "does not contemplate that a small refinery would only be able to obtain an exemption by showing that the RFS program threatens its viability." S. Rep. No. 114-281, at 70. Rather, "Congress explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable." *Id.*

II. BACKGROUND OF THE CASE

A. Factual Background

Petitioners owned and operated three small refineries that received the initial blanket exemption under §7545(o)(9)(A)(i). Administrative Record Vol. 2 (10th Cir. filed Mar. 21, 2019), ECF No. 10635063 ("REC2") at 638; REC2 at 665; REC2 at 687; REC2 at 733; see App. 29a, 34a. Some also received the DOE extension under §7545(o)(9)(A)(ii). REC2 at 638; REC2 at 665; REC2 at 687; REC2 at 733; App. 29a, 34a. However, they have not continuously received exemptions since the initial exemptions expired.

The Woods Cross Refinery experienced severe economic hardship and thus petitioned for a hardship exemption for 2016. App. 32a. Wynnewood Refining Company, LLC's Wynnewood Refinery sought, but was denied, an exemption in 2013; Wynnewood experienced severe hardship in 2017 and sought an exemption for its 2017 RFS obligation. *Id.* at 32a, 34a.

HollyFrontier's Cheyenne Refinery sought an exemption for 2015. App. 29a. But, as with Wynnewood's 2013 request, EPA denied the petition. *Id.* On appeal, the Tenth Circuit granted EPA's unopposed motion to vacate that decision in light of *Sinclair Wyoming Refining Co.* v. *EPA*, 887 F.3d 986, which held that EPA had adopted too stringent a standard for assessing disproportionate economic hardship. *Id.* at 999.

HollyFrontier's Cheyenne Refinery experienced severe economic hardship during the 2016 compliance year and petitioned for an exemption for that year. App. 29a–30a.

The exemption applications for HollyFrontier's refineries for 2016, and Wynnewood's for 2017, explained the financial and structural factors causing disproportionate economic hardship to each refinery. Like other small refineries, they had structural constraints, such as limited blending ability, historically low margins, lack of access to capital or credit, and lack of other business lines. See App. 30a, 32a, 34a. Economic factors including losses and asset impairment, and the high cost of purchasing RINs, exacerbated these constraints, creating severe economic hardship. *Id*. Indeed, some refineries were not profitable during this period. *Id.* at 81a–82a. After consulting with DOE and considering other economic factors, EPA granted each of the requested exemptions. *Id.* at 30a–36a.

B. Proceedings Below

Several associations representing the renewable-fuel industry sought review of the EPA orders extending exemptions to Cheyenne, Woods Cross, and Wynnewood in the Tenth Circuit. Relevant here, the associations argued that EPA could extend the hardship exemption only to small refineries that had received hardship exemptions each year since the RFS program commenced. The Tenth Circuit agreed. App. 65a–75a. This holding, if applied nationwide, would eliminate the exemption for most small refineries in the United States, and ultimately cause virtually all small refineries to lose the exemption.[7]

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[7] According to EPA data, only seven small refineries received a hardship exemption in 2015. *See* EPA, *RFS Small Refinery Exemptions* tbl. 2, https://www.epa.gov/fuels-registration-reporting-

The Tenth Circuit rested its conclusion on one "common definition" of the term "extension." App. 66a. Selecting among several alternative dictionary definitions, the court reasoned that the word "extension" in § 7545(o)(9)(B)(i) means "an increase in length of time." *Id.* at 65a–67a. According to the court, this definition of extension "along with common sense," "dictate that the subject of an extension must be in existence before it can be extended." *Id.* at 67a. Thus, "a small refinery which did not seek or receive an exemption in prior years is ineligible for an extension." *Id.*

The court further asserted that its chosen definition of "extension" "meshe[d] with this statutory scheme," App. 66a, because Congress intended small refineries to be "funnel[ed] … toward compliance over time," *id.* at 68a (citing *Hermes*, 787 F.3d at 578). Thus, "once a small refinery figures out how to put itself in a position of annual compliance, that refinery is no longer a candidate for extending (really 'renewing' or 'restarting') its exemption." *Id.*

The court acknowledged the inescapable result of its conclusion: some small refineries facing disproportionate economic hardship will be forced to shutter because they cannot satisfy their RFS compliance obligations. According to the court, the RFS was meant "to be aggressive and 'market forcing.'" App. 70a. Despite Congress's energy-independence goals, the court thought that Congress did not intend the hardship exemption to protect small refineries throughout the RFS program, but merely to extend "small refineries a substantial amount of time to adapt." *Id.* In the Tenth Circuit's view, "a small refinery in 2016 or 2017 had an ample opportunity" to "ponder … whether it made

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and-compliance-help/rfs-small-refinery-exemptions (last updated Feb. 18, 2021).

sense to … remain in the market." *Id.* So, the court believed, if a small refinery had fulfilled its blending requirements for any single year without disproportionate economic hardship, but was unable to survive the increased requirements imposed in any later year, Congress intended it to close—while allowing otherwise identically situated refineries to receive exemptions and remain in business if they had needed the hardship exemption in *all* prior years.

With respect to subparagraph (B)'s statement that a small refinery may petition for extension of the exemption "at any time," the Tenth Circuit acknowledged the "expansive" nature of the word "any." App. 72a. But in its view, "even if a small refinery can *submit* a hardship petition at any time, it does not follow that every single petition can be *granted*." *Id.* Because petitioners had not received uninterrupted exemptions up to the year for which they petitioned, the court concluded that EPA exceeded its statutory authority.[8]

The effects of the lower court's decision are already being felt. The price of RINs has increased sharply. Cert. Pet. 29 & n.6 (citing EPA data). Marathon Petroleum Corporation announced it would shutter its small refinery in Gallup, New Mexico, which is expected to result in layoffs of the refinery's 220 employees. And HollyFrontier's Cheyenne Refinery no longer produces petroleum fuels. See *id.* at 30.

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[8] Although the Tenth Circuit concluded that the continuity requirement precluded petitioners from receiving an exemption, it addressed other challenges to EPA's determination of disproportionate economic hardship. It held that EPA's economic-hardship findings were not arbitrary and capricious, but remanded for EPA to determine the extent to which petitioners could pass through the cost of RINs. App. 85a–87a. This and other determinations by the Tenth Circuit are not before this Court.

SUMMARY OF THE ARGUMENT

The RFS seeks to promote energy independence by requiring refiners and importers of transportation fuel to blend increasing amounts of renewable fuels into their products each year. Congress recognized, however, that these mandates could drive small refineries out of business, undermining its energy-independence goal and harming small communities. Thus, Congress established a bifurcated regime of small-refinery exemptions. Congress provided "temporary" exemptions in the program's early years, and further authorized small refineries thereafter "at any time [to] petition [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 Tenth Circuit, however, held that EPA had authority to grant small refineries a hardship exemption only if they had received uninterrupted, continuous extensions of their exemptions every year since 2011—an interpretation of "extension" that excludes nearly all small refineries (including petitioners here). In the court's view, once a small refinery meets the RFS's requirements in a single year, EPA can *never* again grant it a hardship exemption, even if the refinery faces disproportionate hardship based on the increased blending requirements of the next year. And the only small refineries eligible for exemptions are those that *never* fulfill the RFS's requirements without an exemption, a truly counterintuitive outcome.

Consideration of the full statutory context of §7545(o)(9)(B)(i) makes clear that the Tenth Circuit's interpretation is wrong. See *infra* Part I. Starting with the text, the dictionary definitions of "extension" include both an increase in the length of time *and* the offering or making something available to someone, such as the granting of a benefit. Both the U.S. Code

and this Court have used the term both ways. Significantly, moreover, in subparagraph (B)(iii), Congress described the relief it authorized in subparagraph (B)(i) simply as "a hardship exemption," without reference to "extension." This proximate characterization of the exemption as a free-standing "hardship exemption" is compelling evidence that Congress used the term "extension" in the latter sense, authorizing EPA to grant an exemption whenever a small refinery experiences disproportionate economic hardship.

But even if "extension" means an increase in time, the Tenth Circuit incorrectly imposed a continuity requirement. Once it exists, an exemption can be extended even if it lapses. Here, the statute granted all small refineries initial exemptions at the time of enactment. It is entirely natural—and consistent with the temporal definition of "extension"—to say that small refineries whose exemptions have lapsed are seeking an "extension" of their prior exemptions because they are experiencing hardship after an interlude during which they met the RFS's requirements.

Additional statutory context militates powerfully against construing the word "extension" to engraft a continuity requirement onto the hardship exemption. The statute's authorization of a petition "at any time," its bifurcated structure, and its focus on a refinery's throughput "for a calendar year" are inconsistent with a reading that disqualifies all small refineries that cannot meet the RFS's requirements for a single year. These features of the statute also foreclose a reading that would effectively sunset the hardship exemption.

The Tenth Circuit's interpretation is also inconsistent with the "context of the statute as a whole." *Sturgeon* v. *Frost*, 136 S. Ct. 1061, 1070 (2016). The RFS requirements increase annually, and the difficulty in meeting them necessarily varies substantially

from year-to-year based on market factors that small refineries cannot control and may lack resources to address. Congress intended to pursue energy independence through support for renewable fuels, but recognized that imposing demands that could put small refineries out of business would both undermine energy independence and harm numerous small communities. In this context, a bifurcated regime of initial temporary exemptions and ongoing hardship exemptions, when needed, serves Congress's purposes—while reading the statute to make hardship relief available only to refineries never successful enough to meet the RFS's requirement does not.

Properly construed, the statute does not impose the Tenth Circuit's continuity requirement, and EPA did not exceed its authority by extending hardship exemptions to petitioners despite prior lapses in their receipt of an exemption. At the very least, EPA's reading of the statute, underlying both its decisions here and its 2014 eligibility rule, is reasonable and entitled to deference. See *infra* Part II.

ARGUMENT

I. THE STATUTE'S TEXT, STRUCTURE, AND PURPOSE DEMONSTRATE THAT THE HARDSHIP EXEMPTION IS AVAILABLE "AT ANY TIME" A SMALL REFINERY EXPERIENCES DISPROPORTIONATE ECONOMIC HARDSHIP.

The statutory provision at the center of this case 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." 42 U.S.C. §7545(o)(9)(B)(i). The Tenth Circuit held that small re-

fineries can petition for an "extension of the exemption" only if they qualified for the original blanket exemption and their exemptions have *never* lapsed. That is not the best, let alone the only, reading of this text. Indeed, when the provision is considered in the full statutory context and in light of Congress's purposes, the statute unambiguously forecloses the Tenth Circuit's reading, which strips EPA of discretion to afford relief to small refineries that Congress sought to protect from disproportionate economic hardship.

The Tenth Circuit rested its interpretation primarily on one meaning of the term "extension," which the court read to require an unbroken temporal stream of exemptions from the program's inception until the year for which the small refinery seeks the exemption. But the term "extension" is not so rigid. It can be and frequently is used—by Congress, by courts, and in everyday speech—to mean the grant of a benefit without any temporal connotation. It can also be used in a temporal sense to mean an increase in length of time, but without continuity. Either of these accepted uses of "extension" is textually permissible. Either makes much more sense of the statute as a whole. And either requires reversal of the decision below.

The Tenth Circuit's narrow focus on its chosen definition of "extension" also misses the forest for the trees. In subparagraph (B), in stark contrast to subparagraph (A), Congress used deliberately expansive language, providing that a small refinery (defined based on its throughput "for a calendar year") could petition "at any time" for relief that Congress itself characterized as "a hardship exemption." These surrounding statutory terms, along with the statute's structure, are much more naturally read as creating a safety valve available whenever a small refinery experiences disproportionate economic hardship, rather

than a de facto sunset clause under which hardship relief is available only to the diminishing set of small refineries that have been continuously exempt since the RFS program's inception.

A continuity requirement also produces perverse results that defy any plausible reading of congressional intent. Contrary to the Tenth Circuit's assertion, there is no reason to believe that Congress preferred to force a small refinery suffering current economic hardship to close—but only if the small refinery had managed to comply with the RFS without an exemption in an earlier year. Congress knew that the program would impose escalating burdens each year, and there is no basis to believe it provided hardship exemptions only to those small refineries that were continuously *unable* to comply with RFS requirements, to drive out of business those that intermittently succeeded, or to create incentives for small refineries to avoid achieving the program's goals for fear of forfeiting eligibility for future exemptions. Indeed, these arbitrary and perverse results directly undermine Congress's overarching purpose to secure American energy independence.

Accordingly, the Court should reject the continuity requirement the Tenth Circuit engrafted onto the statute. Disqualifying small refineries who face disproportionate economic hardship from seeking a hardship exemption based on an unnecessarily crabbed reading of "extension" misreads the statute and contravenes Congress's intent.

A. The Term "Extension" Does Not Limit The Hardship Exemption To Small Refineries That Have Been Exempt Continuously.

The court of appeals hinged its statutory interpretation on its reading of the word "extension," which it

construed to require temporal continuity. App. 66a–67a. But in so holding, the court disregarded two additional ordinary meanings of the word—the making of something available and a non-continuous increase in time. Both make much more sense in the context of a provision permitting small refineries to petition for "a hardship exemption" "at any time."

1. The term "extension," standing alone, has multiple possible meanings.

a. The core meaning of the noun "extension" is "the action of extending or state of being extended." *Webster's Third New International Dictionary* (1986); see also *American Heritage College Dictionary* (4th ed. 2007) (same). And the verb "extend" "lends itself to great variety of meanings, which must in each case be gathered from context." *Black's Law Dictionary* (6th ed. 1990). In isolation, the words have a wide range of possible meanings, two of which are relevant here: to prolong and to make available. See *Field* v. *Mans*, 157 F.3d 35, 43 (1st Cir. 1998).

First, the verb "extend" can mean to "cause to last longer." *New Oxford American Dictionary* (3d. ed. 2010). Thus, as the Tenth Circuit observed, the noun "extension" can mean "an increase in length of time." App. 66a; see also, *e.g.*, *Webster's Third New International Dictionary* ("an increase in length of time : increased or continued duration"). The words are used in this sense, for example, when one says that a party received an extension of time to file a brief, or that a contractual term was extended an additional year.

Second, the verb "extend" can also mean to "offer or make available." *New Oxford American Dictionary*; see also, *e.g.*, *Webster's Third New International Dictionary* ("to make available (as a fund or privilege) often in response to an explicit or implied request: GRANT");

American Heritage College Dictionary ("To make available; provide."). Thus, the noun "extension" can mean "the fact of giving or offering something to someone." *Cambridge Online English Dictionary*. The words are used in this sense, for example, when one says that someone was extended a job offer, or that a business applied for an extension of credit.

Absent clarification from context, there is no *a priori* reason to prefer the former meaning to the latter. Congress has frequently used the noun "extension" in the latter sense. For example, in the Judicial Redress Act of 2015, Congress enacted an "extension of privacy act remedies" to citizens of certain foreign countries—citizens who had *not* previously enjoyed those remedies. See Pub. L. No. 114-126, §2, 130 Stat. 282, 282 (2016). Likewise, numerous statutes refer to the "extension" of things like "benefits,"[9] "privileges,"[10] "assistance,"[11] "protection,"[12] "credit,"[13] "access,"[14] "recognition,"[15] and "nondiscriminatory treatment."[16]

This Court, too, often uses the word "extension" to describe the making of something available to someone. For example, the plurality opinion in *Barr* v. *American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020), described this Court's prefer-

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[9] *E.g.*, 22 U.S.C. §4061(a)(2), (a)(3); 43 U.S.C. §451b(c).

[10] *E.g.*, 15 U.S.C. §78*l*(f)(1)(E).

[11] *E.g.*, 38 U.S.C. §3748; 50 U.S.C. §2333(c).

[12] *E.g.*, 15 U.S.C. §§1141d, 1141e, 1141f, 1141g.

[13] *E.g.*, 18 U.S.C. §892; 42 U.S.C. §9601(20)(H).

[14] *E.g.*, 25 U.S.C. §3204(b)(3).

[15] *E.g.*, 32 U.S.C. §308(a); *id.* §310(b).

[16] *E.g.*, 19 U.S.C. §2434(c); *id.* §2437(c)(1).

ence for "the extension of benefits or burdens" to remedy equal-treatment violations. *Id.* at 2354. Similarly, a dissenting opinion in *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), objected to the "extension of religion-based exemptions to for-profit corporations." *Id.* at 755 (Ginsburg, J., dissenting). There are many additional examples of this usage by the Court.[17]

b. When Congress authorized a small refinery to petition for "an extension of the exemption,"[18] it could therefore have used the word "extension" in its temporal sense, to mean a prolongation of the period of exemption (either continuously or not, see *infra*, pp.29–31), or it could have used the word in its sense of making available, to mean a grant of exemption from the RFS program's requirements. The dictionary definition of "extension" alone cannot resolve that dispute; only context can. Where, as here, the relevant statutory term has multiple possible meanings, "the term standing alone is necessarily ambiguous and each section

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[17] *See also, e.g.*, *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1700 (2017) (noting that "extension of benefits is customary in federal benefit cases"); *Golan* v. *Holder*, 565 U.S. 302, 318 (2012) (discussing the "extension of copyright protection to authors whose writings …are in the public domain"); *United States* v. *Virginia*, 518 U.S. 515, 557 (1996) (discussing "the extension of constitutional rights and protections to people once ignored or excluded"); *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993) (discussing the "extension of aid" to students at religious schools); *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 719 n.3 (1979) (discussing the "extension of financial assistance to small businesses"); *Idaho Sheet Metal Works, Inc.*, v. *Wirtz*, 383 U.S. 190, 202 (1966) (discussing the "the extension of the retail exemption to [certain] businesses").

[18] The "exemption" referred to is "the exemption under subparagraph (A)." 42 U.S.C. §7545(o)(9)(B)(i). Subparagraph (A), in turn, grants small refineries an exemption from "[t]he requirements of paragraph (2)." *Id.* §7545(o)(9)(A)(i).

must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 343–44 (1997); see also, *e.g.*, *Star Athletica, L.L.C.* v. *Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("[I]nterpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning."); *Roberts* v. *Sea-Land Servs., Inc.*, 566 U.S. 93, 100–01 (2012) (using statutory context to construe a term whose meaning "in isolation" was "indeterminate").

Thus, contrary to respondents' contention below, the temporal use of "extend" in subparagraph (A)(ii)(II) does not support the Tenth Circuit's interpretation of subparagraph (B)(i). The context—and not the dictionary definition—makes clear that "extend," as used in subparagraph (A)(ii)(II), involves temporal continuity.[19] In that provision, Congress directed EPA to "extend the exemption under clause (i)" for any small refinery that DOE determined would be subject to disproportionate economic hardship "for a period of not less than 2 additional years." 42 U.S.C. §7545(o)(9)(A)(ii)(II). Every potential recipient of the extension contemplated under subparagraph (A)(ii)(II) was a small refinery to whom the exemption had previously been extended—all small refineries were

[19] Notably, Congress's use of "extend" in subparagraph (A)(ii)(II) draws upon both the "prolong" and "make available" meanings of the term. Words with multiple meanings are often used in ways that draw upon more than one of them. For example, when one says that a person "extends" a hand to help someone up, the usage draws upon both the spatial meaning of "extend" and its sense of "to offer." Likewise, when one grants a benefit to someone for a certain period of time and subsequently "extends" the benefit's availability for an additional period, both the temporal and the "make available" meanings of "extend" are in play—the benefit is made available for a longer time.

granted a blanket exemption until 2011, see *id.* §7545(o)(9)(A)(i), so all small refineries in existence would still have been exempt when DOE's study was due in 2008, see *id.* §7545(o)(9)(A)(ii)(I). Moreover, Congress made clear that it envisioned a temporal extension of that preexisting exemption by its express reference to "a period of not less than 2 additional years." *Id.* §7545(o)(9)(A)(ii)(II).

There is no reason, however, to assume that every instance of the word "extend" or "extension" involves temporal continuity. It is perfectly natural to say, for example, that Congress authorized the extension of unemployment benefits to workers impacted by COVID-19, or that an employer extended to B the same offer previously extended to A. Just as the meaning of "extend" in subparagraph (A)(ii)(II) is clarified by its context, so too the meaning of "extension" in subparagraph (B)(i) is informed by its distinct context. See, *e.g.*, *Barber* v. *Thomas*, 560 U.S. 474, 484 (2010) ("[T]he same phrase used in different parts of the same statute [can] mea[n] different things, particularly where the phrase is one that speakers can easily use in different ways without risk of confusion."); accord *Roberts*, 566 U.S. at 108; *Envtl. Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 574–76 (2007); *Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595–96 (2004); *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001).

2. The "make available" meaning comports with the statutory text.

In concluding that "extension" in subparagraph (B)(i) is used in its temporal sense, the Tenth Circuit did not even acknowledge the "make available" definition. See App. 66a. That by itself was interpretive error, as the "existence of alternative dictionary definitions of" a statutory term, "each making some sense

under the statute, itself indicates that the statute is open to interpretation." *Nat'l R.R. Passenger Corp.* v. *Bos. & Main Corp.*, 503 U.S. 407, 418 (1992). As discussed below, the "make available" reading of "extension" best comports with the surrounding statutory terms, including Congress's express decision to permit small refineries experiencing disproportionate economic hardship to petition for relief "at any time."

Although the Tenth Circuit did not expressly acknowledge the "make available" meaning, it made two textual points that it may have—mistakenly—believed foreclosed it. First, it emphasized that Congress authorized small refineries to seek "an 'extension' of an exemption, as opposed to a free-standing exemption." App. 78a; see also *id.* at 67a–68a. This, however, ignores one of the most important textual clues in the statute. In subparagraph (B), Congress described the subject of a small refinery's petition in *two* ways. In subparagraph (B)(i), it called the petition a request "for an extension of the exemption under subparagraph (A)." 42 U.S.C. §7545(o)(9)(B)(i). Just a few lines later, in subparagraph (B)(iii), Congress referred to the same petition simply as a request "for a hardship exemption." *Id.* §7545(o)(9)(B)(iii). That Congress used these phrases interchangeably provides compelling evidence that the "hardship exemption" is exactly that—a "free-standing" exemption available at any time based on a showing of hardship.

Second, the court of appeals wrongly believed that its interpretation was necessary to avoid "strip[ping]" the word "extension" of "significant meaning." App. 68a. Construing "extension" to mean a "grant" would not do so. In both the U.S. Code and ordinary parlance, when describing a formal request for something, it is not uncommon to use the term "grant" when it could be omitted without discernible change in meaning.

See, *e.g.*, 47 U.S.C. §1455(b)(1) (authorizing applications "for the grant of an easement, right-of-way, or lease to, in, over, or on" federal property); 20 U.S.C. §4516(e) (authorizing universities to apply "for the grant for an endowment"). The same is true of the word "extension." A person who applies for the "extension" of a benefit is applying for the benefit. See, *e.g.*, 12 U.S.C. §1795e(a)(1) ("A member may *apply for an extension of credit* from the Facility to meet its liquidity needs.… The Board shall not approve *an application for credit* without first" taking specified steps) (emphases added). That is how this subparagraph should be understood—especially since Congress also described the relief it authorized as "a hardship exemption."

3. In the alternative, the temporal meaning of "extension" does not require continuity.

Finally, even if Congress used the word "extension" in its temporal sense of "an increase in the length of time," the court of appeals erroneously imported a continuity requirement. No dictionary definition the court cited mentions any continuity requirement. That is because, while a time period *can* be "extended" without interruption, that is not always the case. See *Webster's Third New International Dictionary* ("an increase in length of time: increased *or* continued duration") (emphasis added).

For example, a party whose time to file a brief has already expired may petition for an extension of time. See Fed. R. Civ. P. 6(b)(1)(B). A court might grant a continuous extension (*e.g.*, an additional 30 days from the original deadline) or a non-continuous extension (*e.g.*, an additional 30 days from the date of the court's order). Either way, it is perfectly acceptable usage to call the additional time an "extension."

Similarly, it would not be incorrect or unnatural to say, of a hypothetical tax benefit that was enacted in 2014 and expired in 2018, that "Congress in the most recent tax bill extended its operation for an additional two years, beginning in 2022." Although the period of the tax benefit's operation is non-continuous, the new tax bill nonetheless creates a temporal "extension"—the tax benefit, which would have been operative for four years, will now be operative for six. The original tax benefit was thus "prolong[ed], enlarge[d], or add[ed] to." App. 75a.

Congress has used the term "extension" in this sense. For example, in Section 203 of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, §203, (2020), Congress provided for an extension of pandemic-related unemployment benefits that had expired on July 31, 2020, with the extension becoming effective on December 26, 2020. Although the benefit program had lapsed, and although Congress left a temporal gap in the program's coverage when it extended it, Congress captioned the provision "Extension of Federal Pandemic Unemployment Compensation." *Id.* Similarly, in Section 2114 of the CARES Act, Congress provided for an "extension" of an unemployment benefits program for railroad workers that had expired in 2013, newly providing those benefits to a class of workers who received benefits from July 1, 2019 to June 30, 2020. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, §2114 (2020).

The court of appeals rested its contrary conclusion on its observation that "the subject of an extension must be in existence before it can be extended." App. 67a. But as the foregoing examples show, something can be in "existence," in the sense that allows us to talk about its "extension," even if its operation has temporarily lapsed. If—as with the refineries here—a small

refinery was once exempt from the RFS program's requirements but is not currently exempt, the prior period of exemption did not cease to exist when the exemption lapsed. Accordingly, there is nothing unnatural about saying that the prior exemption was "extended"—*i.e.*, caused to last longer—when EPA later granted the refinery's petition for an additional period of exemption. The Tenth Circuit drew a bright-line distinction between "extended," on the one hand, and "renewed," on the other. See *id.* But the boundary between these words is not so ironclad; they can be and are used synonymously. See *Pa. Co. for Ins. on Lives & Granting Annuities* v. *Rothensies*, 146 F.2d 148, 152 (3d Cir. 1944) ("The word 'renewal' ... has been construed as synonymous with extension."); *Campbell River Timber Co.* v. *Vierhus*, 86 F.2d 673, 674–75 (9th Cir. 1936) (collecting authorities "including federal decisions" showing "that the terms 'extension' and 'renewal' may be used interchangeably").

Thus, even if a temporal reading of "extension" were compelled, it would not follow that a small refinery must have *continuously* received an exemption in every prior year to qualify for an "extension of the exemption." If Congress had meant to impose such a requirement, surely it would have done so in a more express and intentional way, and not left the matter to a doubtful inference from the word "extension"—especially an inference that is contrary to the statute's structure and purpose. See *infra*, Parts B & C.

* * *

In sum, the centerpiece of the Tenth Circuit's limiting construction—the phrase "extension of the exemption"—does not support the court's conclusion that, to be eligible for a hardship exemption, a small refinery must have applied for and received an exemption for every preceding year of the program. That phrase,

standing alone, can with equal if not greater plausibility be read to authorize EPA to extend the exemption to any small refinery—or, at a minimum, to any small refinery that received the initial exemption—that demonstrates disproportionate economic hardship, regardless of whether it has been continuously exempt since the beginning of the program.

B. The Surrounding Terms And Statutory Structure Confirm That Congress Did Not Impose A Continuity Requirement.

Because the term "extension," in isolation, is susceptible to multiple interpretations, the question is which reading makes the most sense in the context of the provision and the statute as a whole. See *Roberts*, 566 U.S. at 101; *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) ("Courts have a 'duty to construe statutes, not isolated provisions.'" (quoting *Gustafson* v. *Alloyd Co.*, 513 U. S. 561, 568 (1995)); *Tyler* v. *Cain*, 533 U.S. 656, 662 (2001) ("We do not … construe the meaning of statutory terms in a vacuum. … [but] 'in their context and with a view to their place in the overall statutory scheme.'") (quotation omitted).

Once the interpretive lens is appropriately widened, the answer comes clearly into focus. Both the surrounding terms and the statute's structure confirm that Congress did not prohibit EPA from extending the hardship exemption to small refineries that are currently suffering disproportionate economic hardship simply because they have not been continuously exempt since the program began. The Tenth Circuit's imposition of a continuity requirement adds a new eligibility criterion that Congress did not include in the text and that reflects a highly implausible reading of congressional intent.

1. "At any time"

a. Perhaps most significantly, Congress provided that a small refinery could petition EPA for a hardship exemption "at any time." 42 U.S.C. §7545(o)(9)(B)(i). The phrase "at any time" "suggests a broad meaning," because "read naturally, the word 'any' has an expansive meaning." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 218–19 (2008) (alterations omitted) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). This expansive language cuts strongly against the Tenth Circuit's cramped construction, which adds to the existing statutory requirements to obtain an exemption the requirement that a small refinery never have met the RFS's requirements without an exemption—even though Congress expressly permitted small refineries to petition for hardship relief "at any time." The capacious and unqualified phrase "at any time" "must be construed to mean exactly what it says." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980).

That is especially so because Congress knows how to incorporate time limits when it creates exemptions, and did so in other amendments to the Clean Air Act. See 42 U.S.C. §7411(j)(1)(E) (setting a maximum number of years beyond which EPA may not grant a waiver). Indeed, sunset clauses are a statutory commonplace. When Congress creates them, it does so with express temporal limitations that are the opposite of the "at any time" language used here. See, *e.g.*, *Republic of Iraq* v. *Beaty*, 556 U.S. 848, 866 (2009) (explaining that "Congress has in other statutes provided explicitly" that statutes "sunset on a particular date").

Consistent with this general approach, when Congress intends to sunset a regulatory exemption, it does so expressly. See, *e.g.*, 42 U.S.C. §247d-7f(b); *id.* § 7625-1(b)(2); Pub. L. No. 116-127, §2202(e), 134 Stat. 178, 186 (2020); Pub. L. No. 109-364, §317(b), 120 Stat.

2083, 2142 (2006). Yet, without any comparable language here, and despite Congress's express specification that small refineries may seek relief "at any time," the court below effectively read a de facto sunset clause into the hardship exemption, rendering it of no further force or effect once the exemption of the last small refinery that has been continuously exempt lapses. If Congress had intended the hardship exemption to sunset, it would have said so expressly—and provided for an orderly winding down of the exemption that does not arbitrarily distinguish between small refineries currently facing economic hardship based solely on whether they had managed to comply with the RFS in the past. See *Roberts*, 566 U.S. at 106 (rejecting interpretation that produced distinctions based on "an arbitrary criterion").

b. The structure of §7545(o)(9) reinforces that "at any time" means exactly what it says. Congress bifurcated the section into distinct subparagraphs, the first of which is expressly denominated a "[t]emporary exemption," and contains multiple express temporal limitations. Subparagraph (A)(i) provided that the initial blanket exemption would remain in effect "until calendar year 2011." 42 U.S.C. §7545(o)(9)(A)(i). Subparagraph (A)(ii)(I) set a December 31, 2008 deadline for DOE's study of the economic effects of RFS compliance on small refineries. *Id.* §7545(o)(9)(A)(ii)(I). And subparagraph (A)(ii)(II) provided for extension of the exemption for a defined "period of not less than 2 additional years." *Id.* §7545(o)(9)(A)(ii)(II).

Rather than folding the hardship exemption into subparagraph (A), Congress began a new subparagraph, entitled "Petitions based on disproportionate economic hardship." And subparagraph (B) not only conspicuously lacks the sort of temporal limitations that appear in subparagraph (A), but uses the most

open-ended temporal authorization possible—"at any time." This striking textual and structural contrast clearly signals Congress's intent to decouple the hardship exemption under subparagraph (B) from the time-bound relief afforded in subparagraph (A). At a minimum, if Congress had intended to tie the availability of the hardship exemption under subparagraph (B) to an unbroken stream of exemptions under subparagraph (A), this would have been a "surpassing[ly] strange" way to do it. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

The much more plausible inference is that Congress had distinct purposes for these provisions and designed them to address distinct periods in which small refineries might experience difficulty complying with the RFS. Subparagraph (A) addressed the nascent years of the program, in which Congress concluded that small refineries needed a temporary period of initial relief to prepare their infrastructure and modify their business plans. Subparagraph (B), by contrast, recognizes that small refineries might face ongoing difficulties—difficulties that would not necessarily fade with time, or be consistent across time, especially given the ratcheting upwards of the volume obligation. Congress thus authorized EPA to extend "a hardship exemption" to small refineries "at any time" when they experience disproportionate economic hardship.

c. Against all of this, the court of appeals offered two responses, neither of which persuades. First, while acknowledging that "[c]ommon definitions of 'any' are indeed expansive," the court 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*." App. 72a. This misses the point. Of course, a petition that fails to show disproportionate economic hardship cannot be granted. And the Tenth Circuit

surely was correct that nothing in the statute precludes EPA from denying a "re-submitted extension petition for an earlier year even though the agency had previously denied that very petition." *Id.* But this hardly undermines the key point—that Congress is unlikely to have written the statute as it did, with bifurcated subparagraphs and the expansive, unqualified phrase "at any time," if EPA could not extend the exemption to small refineries currently suffering from disproportionate economic hardship simply because they did not need or obtain an exemption in an earlier year. The lower court has effectively read Congress as giving small refineries the right "at any time" to file petitions that can never be granted.

Second, the court of appeals asserted that the "at any time" language "confers a substantial benefit upon small refineries" by "exempt[ing] hardship petitioners from the EPA's annual percentages deadline." App. 74a. But there is no basis for believing that Congress's sole purpose in saying "at any time" was to exempt small refineries from the annual percentages deadline, to the extent Congress had that issue in mind at all. The point is not that the Tenth Circuit's interpretation would leave the phrase "at any time" without meaning or effect. Rather, it is that Congress used deliberately expansive temporal language that is inconsistent with an intent to eliminate hardship relief for small refineries based on temporal considerations—whether it be the filing of a petition after the annual percentages deadline or the absence of an unbroken temporal stream of prior exemptions.

2. "A small refinery"

Like Congress's specification of *when* relief may be sought, Congress's specification of *who* may seek relief evinces an expansive intent. Congress provided that

"[a] small refinery" may petition for a hardship exemption. 42 U.S.C. §7545(o)(9)(B)(i). Apart from requiring disproportionate economic hardship, Congress did not limit the class of small refineries eligible for a hardship exemption. The Tenth Circuit's interpretation in effect adds an eligibility requirement that Congress did not include in the statute's text: "A small refinery *that has continuously been exempt since the program's inception* may at any time petition…." If Congress had intended to limit the hardship exemption in this way, it could easily have said so. See *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (the "fundamental principle of statutory interpretation that absent provisions cannot be supplied by the courts … applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text") (cleaned up). Indeed, when Congress wanted to limit the class of eligible small refineries, it did so expressly—as when it limited relief under subparagraph (A)(ii) to those small refineries that DOE "determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2)." 42 U.S.C. §7545(o)(9)(A)(ii)(II).

Congress's definition of "small refinery" also is informative. "The term 'small refinery' means a refinery for which the average aggregate daily crude oil throughput for a calendar year … does not exceed 75,000 barrels." *Id.* §7545(o)(1)(K). If Congress had intended to limit the hardship exemption to small refineries that have 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." Under the Tenth Circuit's interpretation, if a small refinery's annual throughput *ever*

exceeded 75,000 barrels, rendering that refinery ineligible for a hardship exemption in a particular year, that small refinery would *forever* be ineligible, even if its throughput never again exceeded 75,000 barrels.

Had Congress intended this unlikely result, one would expect the definition of "small refinery" to reflect it. Congress could, for example, have defined a small refinery as a "refinery whose aggregate annual throughput has never exceeded 75,000 barrels." Instead, Congress focused on throughput "for a calendar year," without regard to whether the refinery's throughput remained below 75,000 barrels in every preceding year of the program. That definitional choice underscores the unlikelihood that Congress intended to forever disqualify small refineries from obtaining future hardship exemptions if they were ineligible for an exemption in a previous year.

3. "For the reason of disproportionate economic hardship"

Finally, nothing in the nature of the factual predicate that Congress required for relief—"disproportionate economic hardship"—suggests that Congress confined the hardship exemption to small refineries that have been continuously exempt throughout the RFS program. To the contrary, as discussed below, and as Congress undoubtedly understood, disproportionate economic hardship can occur at any time, and it may or may not be related to past disproportionate economic hardship—particularly given the program's escalating compliance burdens over time and the variable nature of RIN prices. Again, if Congress had intended the Tenth Circuit's interpretation, it could have conveyed that intent clearly by writing, *e.g.*, "for the reason of *continuing* disproportionate economic hardship." Instead, it authorized small refineries to

petition for a "hardship exemption" "at any time" based on a showing of current economic hardship.

C. The Tenth Circuit's Continuity Requirement Is Inconsistent With Congress's Purpose for Both the Hardship Exemption and the RFS.

The Tenth Circuit concluded that interpreting the term "extension" to impose a continuity requirement furthered the RFS's purposes. App. 68a–72a. It reasoned that its interpretation did so by "funnel[ing] small refineries toward compliance over time." *Id.* at 68a. The court believed that the RFS contemplated "a 'temporary' exemption for these entities 'with an eye toward eventual compliance.'" *Id.* (quoting *Hermes Consol.*, 787 F.3d at 578). "[O]nce a small refinery figures out how to put itself in a position of annual compliance, that refinery is no longer a candidate" for an exemption. *Id.* And "a small refinery in 2016 or 2017 had an ample opportunity to study and understand" what is required to comply with the RFS and "ponder … whether it made sense to … remain in the market in light of the statute's challenging renewable fuels mandate." *Id.* at 70a.

The Tenth Circuit's interpretation is fundamentally at odds with the statute's overall purpose and that of the exemption itself. The statute is "much more sensibly interpreted" not to impose the Tenth Circuit's continuity requirement. See *Roberts*, 566 U.S. at 102.

1. The Tenth Circuit's view that the hardship exemption would eventually be rendered obsolete—because small refineries would all be funneled toward compliance—is inconsistent with the text and the purpose apparent on the provision's face. Congress gave no indication that it believed the hardship exemption would sunset after small refineries acclimated to the

RFS. To the contrary, Congress provided that a small refinery could seek such an exemption "at any time." 42 U.S.C. §7545(o)(9)(B)(i). And it did so while adopting a scheme that imposes *escalating* burdens on regulated parties to blend renewable fuels into their fuel products. Congress prescribed particular volumes of renewable fuels for each year through 2022, and in each successive year that volume increases. *Id.* §7545(o)(2)(B)(i)(I)–(IV). For instance, Congress required 4 billion gallons of renewable fuel to be blended into U.S. fuels in 2006, but it mandated that 36 billion gallons be blended in 2022—a nine-fold increase. *Id.* §7545(o)(2)(B)(i)(I).

Congress thus set deadlines and time periods within the RFS provisions of the CAA, but none for the hardship exemption, which Congress instead made available "at any time" so that it would provide relief to small refineries when the intensifying statutory burdens created a need for it. The hardship exemption is accordingly designed as a safety valve, allowing EPA to grant relief to disproportionately affected small refineries as obligations become more severe, and potentially more threatening to those refineries' survival. This conclusion is further supported by the bifurcated structure of the small refinery's exemption provisions (into temporary and hardship exemptions). See *supra*, pp.34–35.

The Tenth Circuit stated that the "statute contemplates a 'temporary' exemption" for small refineries. App. 68a. But the only exemption labeled "temporary" is the one identified in subparagraph (A)—the blanket exemption, potentially coupled with the additional time based on DOE's study. 42 U.S.C. §7545(o)(9)(A). Separately, in subparagraph (B), applying after those initial years, Congress adopted the hardship exemp-

tion and made it available "at any time" upon a showing of disproportionate economic hardship. The statute nowhere suggests Congress expected this hardship exemption to become unnecessary over time; indeed, the steadily intensifying burdens on regulated parties suggest the opposite. "Had Congress intended [that the exemption would cease functioning], it most certainly would have said so." *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221, 228 (2012).

2. The Tenth Circuit believed that its continuity requirement and the eventual elimination of hardship exemptions would support the goals of "promoting biofuel production, energy independence, and environmental protection." App. 70a. But while Congress sought to encourage the production of renewable fuels, it did so to support the United States' "greater energy independence and security." See 121 Stat. at 1492. In authorizing the hardship exemption, Congress balanced and supported renewable fuel production *and* the continued survival of small refineries. See *Rodriguez* v. *United States*, 480 U.S. 522, 525–26 (1987) (per curiam) (recognizing that legislation often reflects competing values and generally does not pursue a single goal "at all costs"). Further, the hardship exemption promotes energy independence and security by protecting domestic refining capacity. See *supra*, n.3.

Congress understood that "the RFS Program might disproportionately impact small refineries because of the inherent scale advantages of large refineries"—basic structural impediments that do not diminish over time—and enacted an entire subsection "to protect these small refineries." *Sinclair*, 887 F.3d at 989; 42 U.S.C. §7545(o)(9). The Tenth Circuit's blithe suggestion that Congress would have intended the RFS to force some small refineries to shutter because under the RFS it would no longer "ma[k]e sense" for them to

"remain in the market," App. 70a, rather than enabling those small refineries to remain eligible for a hardship exemption and thus maintain production, is not a plausible understanding of congressional purpose. See *Owasso Indep. Sch. Dist. No. 1* v. *Falvo*, 534 U.S. 426, 436 (2002) (when "Congress is not likely to have mandated this result," it is error to "interpret the statute to require it").[20]

3. The Tenth Circuit's view that its interpretation would help push small refineries toward a state of "compliance," App. 68a, further misunderstood the RFS program and the economics of small refineries. The RFS program demands that each regulated party demonstrate its compliance annually; there is no single point at which a regulated party comes into a settled state of "compliance." The burden on each regulated party changes each year, based on the escalating requirements Congress imposed. See *supra*, p.7. And compliance depends on a party annually generating and/or purchasing sufficient RINs. See *id.*

Given that RFS compliance depends on numerous factors unique to each year (and circumstances over which the small refinery has no control), a continuity requirement makes no sense. A small refinery's ability to demonstrate compliance in one year will not be dis-

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[20] As EPA explained to the Tenth Circuit, "Congress likely envisioned a more programmatic concept of relief" through the hardship exemption "that allows EPA flexibility to grant petitions at its discretion 'at any time' that small refineries experience disproportionate economic hardship based on changes in the market, the financial health of individual facilities, and 'other economic factors' … as needed in future compliance years." Respondent's Br. 32, *Renewable Fuels Ass'n* v. *EPA*, No. 18-9533 (10th Cir. Sept. 20, 2019) ("EPA 10th Cir. Br.") (quoting 42 U.S.C. §7545(o)(9)(B)(i)–(ii)).

positive of its ability to do so in a future year, especially with escalating compliance obligations.[21] Under the Tenth Circuit's reading, if there were two small refineries that would experience *identical* "disproportionate economic hardship" in 2021, but the first had continuously obtained exemptions while the second had not needed one in, say, 2015, the first refinery could seek a hardship exemption but the second refinery would be ineligible. There is no reason—and certainly none provided by the Tenth Circuit—why Congress would have mandated that inexplicable result. Cf. 79 Fed. Reg. 42,152 (EPA concluding that it would not "be appropriate to treat two refineries whose recent operation conditions were equivalent differently" merely based on past eligibility).

The court of appeals also failed to appreciate the structural constraints facing small refineries. As DOE's study explained, "[l]arge refiners have options available on a scale well beyond those available to smaller refiners." 2011 DOE Study at 23. Larger refineries are often able to integrate operations, allowing them to "more easily obtain financing for blending facilities," or "accommodate their needs efficiently and shift emphasis from one sector to another as opportunities indicate." *Id.* Thus, "RFS[] compliance costs for

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[21] EPA explained below that a continuity requirement "'could unfairly disqualify a refinery from eligibility for small refinery relief based only on a single year's production since 2006.'" EPA 10th Cir. Br. 33 (quoting 79 Fed. Reg. at 42,152). EPA further emphasized that a continuity requirement "would disqualify many small refineries from eligibility for a hardship petition no matter how disproportionate their economic burden in a given year after 2006. Congress did not intend so narrow a safeguard." *Id.* And since 2010, EPA has taken the view that the RFS "authorizes EPA to grant an extension for a small refinery based upon disproportionate economic hardship, on a case-by-case basis." 75 Fed. Reg. at 14,737.

the larger refiner may be a small part of overall operating costs." *Id.* Small refineries, by contrast "are more limited in their options." *Id.* "They face a number of challenges and access to capital is generally limited or not available." *Id.* This can hamper their ability to build the infrastructure needed to blend biofuels into their fuels. And "[e]ven when capital is available, they may have to choose between making substantial investments in blending and investing in other needed facilities to improve operating efficiencies to remain competitive." *Id.* Small refineries also face other constraints that may arise from serving a niche market, needing to ship via pipeline, or heavy diesel production. See *supra*, p.10. In a "lower refining margin environment"—which many small refineries face—the regulatory costs of the RFS can "have a material effect on small refinery profitability." 2011 DOE Study at 23.

Because small refineries face these structural constraints, they are especially susceptible to changes in economic conditions for a given year. This vulnerability is magnified because the compliance program erected by EPA is based on a market-trading system, and the price of RINs—on which small refineries often must rely heavily for compliance—can fluctuate radically from year to year. See *2018 RFS Volume*, 82 Fed. Reg. at 58,520 (fig.VI.B.2-1) (showing a *3 or 4 fold increase or decrease* from one year to another). Thus, critically, the lower court's holding could have a small refinery lose its exemption forever if RIN prices happen to drop in a year—and thus be ineligible for hardship relief when RIN prices skyrocket the next year—even though the refinery has *no* control over RIN prices. Indeed, as noted, the price of RINs increased sharply following the Tenth Circuit's decision. See *supra*, p.17. It is implausible that Congress intended to confer or withdraw a hardship exemption for all future years based on such uncontrollable market movements.

The ongoing COVID pandemic offers a timely example of how unique conditions might severely affect a small refinery, and shows that the lower court's "continuity" requirement is irrational. The pandemic has caused a steep drop in demand for transportation fuel.[22] During this period, RIN prices have shot up (some as much as 100% since January 2020).[23] The unique vulnerabilities of small refineries render these market pressures acute because small refineries lack the ability their larger competitors have to offset such economic difficulties in a particular year. Given the difficulties small refineries face and the unpredictable and uncontrollable circumstances that might arise from year to year, Congress sensibly gave EPA the ability to grant small refineries a hardship exemption at any time when circumstances warrant it.

Reading the hardship exemption provision to preserve EPA's authority to address the changing conditions and constraints on small refineries is thus consistent with the statute's overall goal of ensuring energy independence and the hardship exemption's specific goal of preserving small refineries. *Sturgeon*, 136 S. Ct. at 1070 (individual provisions should be interpreted in the "context of the statute as a whole"). A continuity requirement undermines these goals, severely curtailing—and ultimately eliminating—the mechanism Congress adopted to ensure that the RFS's

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[22] Erwin Seba & Laura Sanicola, *Oil Refiners Face Reckoning as Demand Plummets*, REUTERS (Apr. 2, 2020), https://www.reuters.com/article/us-health-coronavirus-refineryruncuts/oil-refiners-face-reckoning-as-demand-plummetsidUSKBN21K0C8.

[23] *See* EPA, *RIN Trades and Price Information*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information (last visited Feb. 18, 2021) (displaying RIN prices for 2020).

ever-increasing burdens do not crush small refineries. The Tenth Circuit's interpretation is irreconcilable with a proper understanding of the statute's purposes.

II. EPA'S REASONABLE INTERPRETATION OF THE HARDSHIP EXEMPTION IS ENTITLED TO DEFERENCE.

"[A]fter applying traditional tools of interpretation," *SAS Inst. Inc.* v. *Iancu*, 138 S. Ct. 1348, 1358 (2018), Congress's intent is clear: the statute does not impose the Tenth Circuit's continuity requirement. That should end the matter, "for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); see *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("In making the threshold determination under *Chevron*, a reviewing court should not confine itself to examining a particular statutory provision in isolation. Rather, the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.") (citation omitted; cleaned up); *Roberts*, 566 U.S. at 113 n.12 (deference unnecessary because term was unambiguous in context). To the extent ambiguity remains, however, this Court should defer to EPA's reasonable interpretation.

There is no question that Congress granted EPA authority to resolve ambiguities in the RFS provisions of the CAA. See 42 U.S.C. §7601(a)(1); *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001). The only question is whether the interpretation underlying EPA's actions here—that a small refinery may receive a hardship exemption even if it lacks an unbroken stream of prior exemptions—was promulgated in an exercise of that authority. See *Mead*, 533 U.S. at 227. It was—in EPA's 2014 eligiblity rule.

In the 2014 eligiblity rule, EPA revisited the issue of which years matter in assessing whether a refinery is a qualifying "small refinery" by virtue of not exceeding the daily 75,000-barrel throughput threshold "for a calendar year." 42 U.S.C. §7545(o)(1)(K). In the proposed rule, EPA proposed to require a petitioner to show that it did not exceed the 75,000-barrel threshold "for all full calendar years between 2006 and the date of submission of the petition for an extension of the exemption." 78 Fed. Reg. 36,042, 36,064 (June 14, 2013). A commenter from the biofuels industry supported this approach, arguing it was mandated by the term "extension," which, the commenter contended, demonstrated that "Congress did not intend for small refineries to enter in and out of the program, even in the face of subsequent economic distress." Comments of National Biodiesel Board at 8–9 (July 15, 2013), EPA-HQ-OAR-2012-0401; see also *id.* at 8 (asserting "the statute provides for a one time extension, not an ongoing ability to seek relief").

In the final rule, however, EPA rejected its original proposal. "After further consideration," EPA concluded that requiring small refineries to satisfy the 75,000-barrel requirement for every year of the RFS program's life "could unfairly disqualify a refinery from eligibility for small refinery relief based only on a single year's production since 2006." 79 Fed. Reg. at 42,152. The agency "[did] not believe it would be appropriate to treat two refineries whose recent operating conditions were equivalent differently if one refinery exceeded 75,000 [barrels per day] in a single year as much as 8 years ago." *Id.* Instead, EPA decided a petitioner need show only that it satisfied the 75,000-barrel requirement for the year in which the hardship exemption was sought and the immediately preceding year. *Id.* This approach, the agency concluded, would "better address [its] primary concern from proposal of

treating refineries with similar performance the same," and would be "most appropriate given the objectives of the provision." *Id.*

The 2014 eligibility rule thus necessarily embodied EPA's conclusion that a small refinery that did not qualify for a hardship exemption in a previous year (because it exceeded the 75,000-barrel threshold) could nevertheless obtain a hardship exemption in later years. That conclusion is incompatible with the Tenth Circuit's interpretation—advocated in the above-described comments supporting EPA's rejected proposal—that the word "extension" means that a single year of ineligibility forever disqualifies a small refinery from receiving a hardship exemption. Because EPA's conclusion that a prior year of ineligibility does not forever disqualify a small refinery from obtaining a hardship exemption was a "necessary presupposition" of the 2014 rule, EPA's interpretation is entitled to *Chevron* deference. See *Nat'l R.R.*, 503 U.S. at 420.

In *National Railroad*, for example, this Court deferred to the Interstate Commerce Commission's interpretation of the term "required," even though "the ICC did not in so many words articulate its interpretation of the word 'required.'" *Id.* *Chevron* deference was appropriate because "the only reasonable reading of the Commission's opinion, and the only plausible explanation of the issues that the Commission addressed after considering the factual submissions by all of the parties, is that the ICC's decision was based on the proffered interpretation." *Id.*

So too here. EPA's decision to drop its proposed requirement of continuous eligibility from 2006 forward, its rejection of the commenter's position, and its reasoning in the rule's preamble all make clear that the availability of the hardship exemption to small refineries despite a lapse in a prior year was a "necessary

presupposition" of the 2014 rule. See *id.*; see also, *e.g.*, *In re FCC 11-161*, 753 F.3d 1015, 1115 (10th Cir. 2014); *Sherley* v. *Sebelius*, 644 F.3d 388, 395 (D.C. Cir. 2011) (applying *National Railroad*).

The Tenth Circuit declined to defer because, in its view, "[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, or "explain or resolve any ambiguity with respect to the statutory definition of 'extension,'" *id.* at 80a. But the 2014 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. If EPA had accepted that reading of "extension," as expressly urged during the comment period, then EPA's limitation of the 75,000-barrel requirement would have been a futile gesture. As EPA explained, that limitation was designed to prevent "unfairly disqualify[ing] a refinery from eligibility for small refinery relief based only on a single year's production since 2006," and to avoid inequitable treatment of "refineries whose recent operating conditions were equivalent" based on a refinery's ineligibility "in a single year as much as 8 years ago." 79 Fed. Reg. at 42,152.

Under the Tenth Circuit's interpretation, however, the unfair and inequitable treatment EPA sought to avoid is unavoidable—once ineligible for even a single year, a small refinery is forever disqualified from future relief. Thus, the only reasonable reading of the 2014 rule is that EPA rejected that interpretation of the statute. See *Nat'l R.R.*, 503 U.S. at 420.

Because EPA, in an exercise of its rulemaking authority, construed the statute to permit a small refinery to receive a hardship exemption despite one or

more prior years of ineligibility, and because, for all the reasons described above, that reading is consistent with the statute's text and eminently reasonable, this Court should defer to EPA's interpretation.

CONCLUSION

For these reasons, the Court should reverse.

Respectfully submitted,

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