No. 22-1126 (and consolidated cases)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GROWTH ENERGY,
Petitioner,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Final Agency Action
of the Environmental Protection Agency

INITIAL BRIEF FOR PETITIONER GROWTH ENERGY

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April 10, 2023

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28, Petitioner Growth Energy hereby certifies the following as to parties, rulings, and related cases.

PARTIES AND AMICI

A. Petitioners

Growth Energy; Sinclair Wyoming Refining Company LLC; Wynnewood Refining Company, LLC.

B. Respondents

U.S. Environmental Protection Agency; Michael S. Regan, EPA Administrator.

C. Intervenors

Wyoming Refining Company; American Refining Group, Inc.; Hunt Refining Company; Placid Refining Company LLC; Ergon Refining, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining, LLC; Par Hawaii Refining, LLC; U.S. Oil & Refining Company; Countrymark Refining and Logistics, LLC; San Joaquin Refining Co., Inc.; HollyFrontier Refining & Marketing LLC; HollyFrontier Cheyenne Refining LLC; HollyFrontier Woods Cross Refining, LLC; Delek US Holdings, Inc.; Island Energy Services, LLC; American Fuel & Petrochemical Manufacturers; American Petroleum Institute; Kern Oil & Refining Co.; The San Antonio Refinery.

D. Amici

There are no amici.

RULINGS UNDER REVIEW

The rulings under review are EPA's final actions titled *June 2022 Alternative RFS Compliance Demonstration Approach for Certain Small Refineries*, noticed at 87 Fed. Reg. 34,872 (June 8, 2022) ("June Action"), and *April 2022 Alternative RFS Compliance Demonstration Approach for Certain Small Refineries*, noticed at 87 Fed. Reg. 24,294 (Apr. 25, 2022) ("April Action"; together, "Compliance Actions").

RELATED CASES

Growth Energy is aware of the following cases in this and other circuits involving challenges to related EPA actions: *Sinclair Wyoming Refining Company LLC v. EPA*, No. 22-1073 (D.C. Cir. May 4, 2022); *Sinclair Wyoming Refining Company LLC v. EPA*, No. 22-9530 (10th Cir. May 24, 2022); *Wynnewood Refining Company LLC v. EPA*, No. 22-60357 (5th Cir. June 24, 2022); *Wynnewood Refining Company LLC v. EPA*, No. 22-60424 (5th Cir. Aug. 1, 2022).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners provide the following corporate disclosure statement:

Growth Energy is a non-profit trade association within the meaning of Circuit Rule 26.1(b). Its members are ethanol producers and supporters of the ethanol industry. It operates to promote the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

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GLOSSARY

EPA	U.S. Environmental Protection Agency
JA	Joint Appendix
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number

INTRODUCTION

Congress created the Renewable Fuel Standard ("RFS") to increase the country's use of renewable fuel. The RFS requires that refineries annually use at least the specified amount of renewable fuel in the transportation fuel they distribute, but it allows EPA to exempt individual refineries for a given year under limited circumstances. EPA initially granted 31 "small refineries" 34 exemptions from their 2016-2018 RFS obligations. Two lawsuits were promptly filed challenging the standard EPA applied in granting those exemptions. In the first suit, the Tenth Circuit invalidated EPA's standard and remanded the exemptions challenged there; in light of that decision, this Court remanded the exemptions challenged in the other suit. On remand, EPA denied the 34 exemptions consistent with the Tenth Circuit's ruling, restoring the refineries' 2016-2018 RFS obligations.

However, EPA concurrently issued the "alternative compliance" actions at issue. Despite their name, those actions do not facilitate the refineries' compliance with their now-unmet 2016-2018 RFS obligations, but rather absolve them from those obligations. Thus, EPA's "alternative compliance" actions reduced the net amount of renewable fuel that must be used by about 1.63 billion gallons. Although 2016-2018 have passed, the refineries could still meet their unmet obligations by using extra renewable fuel (or buying credits from others that used

extra renewable fuel) in the future. But EPA refused to require that, because of asserted concerns about imposing obligations "retroactively."

The "alternative compliance" actions are unlawful for multiple reasons. Most fundamentally, EPA cannot invoke "retroactivity" to exceed its statutory authority—by exempting non-exempt refineries—or to negate the judicial invalidation of the initial exemptions. Moreover, EPA could not withhold the exemption denials' retroactive effect anyway. *First*, the approach EPA applied in initially granting the exemptions was not a well-established policy supporting reasonable reliance: it was announced only in individual informal adjudications, short-lived, plainly defective, and immediately challenged. *Second*, non-retroactivity undermines the RFS's core purpose of increasing renewable-fuel use and hurts renewable-fuel producers. *Third*, compliance will not burden the refineries because they bear no net compliance costs anyway—that was, in fact, a central reason why EPA denied the exemptions. And *fourth*, there are readily available alternatives that could have addressed EPA's concerns while still encouraging increased renewable-fuel use. EPA disregarded most of these points, and its analysis was internally inconsistent and baseless.

More broadly, the "alternative compliance" actions are just the latest in a troubling pattern of EPA delaying the imposition or restoration of RFS obligations and then invoking the specter of "retroactivity" to neuter those obligations anyway.

Through "retroactivity," EPA has arrogated to itself the power to negate the RFS program itself, in defiance of Congress's express will.

JURISDICTION

Growth Energy timely petitioned for review of two final agency actions that were noticed in the Federal Register on April 25, 2022, and June 8, 2022. This Court has jurisdiction under 42 U.S.C. §7607(b)(1).

STATEMENT OF THE ISSUE

Whether EPA's decision to relieve certain refineries of their unmet RFS obligations for 2016-2018 was in excess of statutory jurisdiction, authority, or limitations, short of statutory right, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

STATUTES AND REGULATIONS

Relevant statutes and regulations appear in the Addendum.

STATEMENT OF THE CASE

A. The RFS Program

Congress created the RFS "to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year." *Americans for Clean Energy v. EPA*, 864 F.3d 691, 710 (D.C. Cir. 2017); *see Growth Energy v. EPA*, 5 F.4th 1, 8 (D.C. Cir. 2021) ("Congress intended the [RFS] to be a market forcing policy that would create demand pressure to increase consumption of renewable fuel." (cleaned up)). The RFS achieves this through the statutorily

specified "'applicable volume[s]'—mandatory and annually increasing quantities of renewable fuel that must be 'introduced into commerce in the United States' each year." *Growth Energy*, 5 F.4th at 7 (quoting 42 U.S.C. §7545(*o*)(2)(A)(i)). EPA's overarching "statutory mandate [is] to 'ensure[]' that those [volume] requirements are met." *Americans for Clean Energy*, 864 F.3d at 698-699 (quoting §7545(*o*)(3)(B)(i)). EPA "fulfills that mandate by translating the annual volume requirements into percentage standards," which "represent the percentage of transportation fuel … that must consist of renewable fuel." *Id.* at 699 (cleaned up); *see also* §7545(*o*)(3)(B). The statute specifies that "obligated parties"—generally refineries—are "responsible for ensuring that the renewable fuel volume requirements are met" by incorporating the required percentage of renewable fuel into the transportation fuel they make. *Americans for Clean Energy*, 864 F.3d at 705 (cleaned up). Obligated parties that fail to meet their annual RFS obligations "shall be liable … for a civil penalty." §7545(d)(1).

As "directed" by Congress, EPA "establish[ed] a 'credit program' through which obligated parties can acquire and trade credits and thereby comply with" their volume obligations. *Americans for Clean Energy*, 864 F.3d at 699 (quoting §7545(*o*)(5)). These credits—called Renewable Identification Numbers ("RINs")—are generated when renewable fuel is produced and "remain attached to the fuel until the fuel is purchased by … a refiner" and "blended" with petroleum

or diesel to make transportation fuel, at which point it is "separated" and available to be used to show RFS compliance or to be "sold or traded on the open RIN market." *Id.* When a RIN is used to show compliance, it is "retired." *Id.*

EPA sets deadlines to demonstrate compliance following the end of the compliance year. *See, e.g.*, JATK, TK-TK{87.Fed.Reg.5,696,5,697-5,698}. After demonstrating compliance, an obligated party possessing excess RINs for a given year may carry them over to use the next year. *Americans for Clean Energy*, 864 F.3d at 699-700. The national aggregate volume of "carryover" RINs is colloquially called the "RIN bank." *See id.*

EPA may grant a "small refinery" an "exemption" from its RFS obligations for a given year "for the reason of disproportionate economic hardship." §7545(*o*)(9)(B)(i); *see also* §7545(*o*)(1)(K) (defining "small refinery"). The effect of granting an exemption is that the RFS obligations "shall not apply to [that] refiner[y]" for that year. §7545(*o*)(9)(A)(i), (B)(i). Before a 2020 regulatory change, any exemptions granted after the RFS standards had been set for the exempted year would "create" a "renewable-fuel shortfall," meaning the exempted "gallons of renewable fuel [would] simply go unproduced." *American Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 568, 571 (D.C. Cir. 2019); *see* JATK, TK-TK{87.Fed.Reg.39,600,39,632-39,633}.

B. The Challenged Actions

This case concerns EPA's treatment of 31 small refineries in connection with its denial of their 34 exemption petitions: two for 2016, one for 2017, and 31 for 2018.

1. EPA's Exemption Denials

In 2017 and 2018, EPA did "not publicly release its [exemption] decisions," *Sinclair Wyoming Refining Co. v. EPA*, 887 F.3d 986, 992 (10th Cir. 2017)—a practice that "paint[ed] a troubling picture of intentionally shrouded and hidden agency law," *Advanced Biofuels Ass'n v. EPA*, 792 F. App'x 1, 5 (D.C. Cir. 2019). Nonetheless, in early 2018, representatives of the biofuels industry ascertained that EPA had recently granted three exemption petitions for 2016-2017. *See* JATK{June.Action.7}. So, in May 2018 they petitioned the Tenth Circuit for review of those exemptions. Petition for Review, *Renewable Fuels Ass'n v. EPA*, No. 18-9533 (10th Cir. May 29, 2018).

After that case was filed, 36 refineries—now on notice that EPA's approach to evaluating exemption petitions was under judicial review—filed exemption petitions for 2018. JATK-TK{June.Action.7-8}. While the Tenth Circuit case was pending, EPA granted 31 of the 2018 petitions under the same approach challenged there. JATK{June.Action.8}. Growth Energy and another biofuels representative

then petitioned this Court to review the 31 2018 exemptions. Petition for Review, *Renewable Fuels Ass'n*, No. 19-1220 (D.C. Cir. October 22, 2019).

The Tenth Circuit acted first. It held that the three 2016-2017 exemptions were invalid for three reasons. First, the refineries were ineligible because they had not been continuously exempt through the RFS program's prior years. *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1245-1249 (10th Cir. 2020), *rev'd sub nom. HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S.Ct. 2172 (2021). Second, EPA erroneously interpreted the statute to allow exemption based on hardship suffered "as a result of something other than RFS compliance"; rather, the statute means that "compliance must be the cause of any disproportionate hardship." *Renewable Fuels*, 948 F.3d at 1253-1254. And third, EPA "ignored or failed to provide reasons for deviating from [its own] prior studies showing" that refineries "recoup RFS compliance costs by passing them on"—"an important aspect of the problem" because it refutes the notion that RFS compliance causes economic hardship. *Id.* at 1254-1257 (cleaned up). Accordingly, the court vacated the three exemptions and remanded them to EPA. *Id.* at 1258.

Before EPA acted on remand, the Supreme Court rejected the Tenth Circuit's first ground—the "continuity requirement," *HollyFrontier*, 141 S.Ct. at 2177-2178—but did not opine on the other two grounds, *see id.* at 2175-2176.

Once the Supreme Court issued its decision, this Court, which had not yet ruled, remanded the 31 2018 exemptions (without vacatur) to "allow EPA the opportunity to reconsider its action in light of [the Tenth Circuit's and Supreme Court's] intervening decisions." Motion for Voluntary Remand Without Vacatur 2, *Renewable Fuels Ass'n*, No. 19-1220, ECF #1911606 (D.C. Cir. Aug. 25, 2021); Order 3, *Renewable Fuels Ass'n*, No. 19-1220, ECF #1925942 (D.C. Cir. Dec. 8, 2021) (per curiam).

At that point, EPA had before it the 31 refineries' 34 exemption petitions for 2016-2018, that it had previously granted under an approach the Tenth Circuit had doubly invalidated. EPA denied all 34 under an approach that corrected the two remaining errors identified by the Tenth Circuit. *See* JATK{April.Denials} ("April Denials") (denying 31 2018 petitions); JATK{June.Denials} ("June Denials"; together, "Exemption Denials") (denying three 2016-2017 petitions). Specifically, EPA concluded that "the best … and the most reasonable" interpretation of the statute is that "compliance with the RFS program [must be] the cause of" the refinery's disproportionate economic hardship." JATK-TK{June.Denials.17-19}. That requirement was not met because EPA found RFS compliance causes no hardship given its "longstanding conclusions regarding RIN cost passthrough." JATK{June.Denials.18}.

2. EPA's "Alternative Compliance" Approach

The Exemption Denials caused the 31 refineries to "have unmet 2016-2018 compliance obligations" equaling about 1.63 billion RINs. JATK, TK{June.Action.9,23}. Through the Compliance Actions at issue here, however, EPA fully released the refineries from those obligations by deeming them to have "m[]et their 2016-2018 obligations without retiring any additional RINs." JATK, TK, TK{June.Action.1,2,14}.[1]

EPA claimed authority to take the Compliance Actions based on this Court's "case law regarding retroactive RFS obligations." JATK{June.Action.10} (citing *Americans for Clean Energy*, 864 F.3d 691, *Monroe Energy, LLC v. EPA*, 750 F.3d 909 (D.C. Cir. 2014), and *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 154-158 (D.C. Cir. 2010)). "Under [that] case law," EPA said, "when [it] imposes a retroactive RFS standard, [it] is to reasonably consider and mitigate the burdens on obligated parties in its approach." *Id.* In EPA's view, the Exemption Denials "create[d] new obligations for past compliance years" and the Compliance Actions "mitigate" the "retroactive" "burdens" of those "new" obligations. *Id.* EPA "recognize[d] the exceptional nature of th[is] … approach,"

[1] The April Action is identical to the June Action *mutatis mutandis* and apparently was superseded by the June Action. *See* JATK & TK{June.Action.1&n.4}.

but judged it "appropriate" "only" because of the "confluence of [certain] factors … unique to the [31] small refineries." JATK{June.Action.12}.

SUMMARY OF ARGUMENT

I. EPA has no authority to release the refineries whose exemption petitions were denied from their RFS obligations.

A. EPA cannot use an atextual non-retroactivity power to do what Congress precluded it from doing directly. EPA denied the refineries' exemption petitions, and as EPA admits, the statute provides no other authority to release the refineries from their RFS obligations. Rather, the statute forecloses any notion that Congress left EPA room to assert an atextual power to release non-exempt refineries from their RFS obligations: the statute mandates that obligated parties meet their RFS obligations and that EPA ensure that they do, while providing a system of exceptions to relieve obligated parties of their RFS obligations under specific circumstances. *Growth Energy*, 5 F.4th at 8. Because none of those exceptions applies, EPA must enforce the refineries' RFS obligations. *Americans for Clean Energy*, 864 F.3d at 710-712; *United States v. Johnson*, 529 U.S. 53, 58 (2000).

Agencies may not withhold the retroactive effects of an adjudication when that would be tantamount to taking an action that violates the statute. *National Treasury Employees Union v. FLRA*, 139 F.3d 214, 219-220 (D.C. Cir. 1998);

Verizon Telephone Companies v. FCC, 269 F.3d 1098, 1111 (D.C. Cir. 2001). Otherwise, EPA could use a preference for avoiding retroactive effects to nullify carefully drawn statutory limits.

B. Additionally, EPA cannot avoid correcting judicially determined errors by withholding its correction's retroactive effect. The Tenth Circuit held that the approach applied in granting the 2016-2018 exemptions was unlawful, and the exemptions were accordingly remanded to EPA for correction. Although EPA formally corrected its error by denying the exemptions, it neutered that curative action by withholding the retroactive effect, thereby granting the very relief EPA determined the refineries were not entitled to. That impermissibly nullifies the process of judicial review. *City of Cleveland v. Federal Power Commission*, 561 F.2d 344, 346 (D.C. Cir. 1977); *Verizon*, 269 F.3d at 1111.

C. The special potential for abuse displayed by EPA's pattern of raising retroactivity concerns to nullify the RFS counsels against allowing EPA to continue to deem RFS obligations non-retroactive. In the context of rulemaking, this Court in *Americans for Clean Energy* in effect permitted EPA to negate the retroactive effect of its late-imposed RFS standards because the Court believed EPA was not doing so to avoid its statutory duties. EPA's record since then shows EPA has routinely done exactly that, repeatedly invoking retroactivity to erase RFS obligations and thereby defeat Congress's intent that the RFS would spur increased

renewable-fuel use. Although *Americans for Clean Energy*'s retroactivity framework does not apply here because that framework governs rulemakings rather than adjudications like exemption determinations, the Court nonetheless should make clear that EPA cannot withhold the retroactive effect of actions imposing or restoring RFS obligations.

II. Even if EPA had discretion to withhold the Exemption Denials' retroactive effect, EPA's decision to do so was erroneous.

A. EPA incorrectly invoked the framework governing retroactive rulemaking, rather than the demanding framework for adjudicative retroactivity, which presumes that the Exemption Denials are retroactive unless (1) the denials replaced an old policy that was sufficiently settled to support the refineries' reasonable reliance or (2) retroactivity would cause manifest injustice. *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921-922 (D.C. Cir. 2013); *Qwest Services Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007). Because retroactivity is a legal question and EPA has already made its case for non-retroactivity, the Court should apply the correct framework in the first instance and conclude that EPA could not deem the Exemption Denials non-retroactive.

B. Under the adjudicative framework, withholding the Exemption Denials' retroactive effect was impermissible.

First, EPA's prior approach was not a well-settled basis for reasonable reliance—it reflected a brief departure from an earlier practice that was consonant with the Exemption Denials, was not articulated authoritatively or outside the same proceedings that led to the Exemption Denials, and was never judicially confirmed. Rather, it was subjected to judicial review at the first opportunity, and it was plainly invalid, as the Tenth Circuit concluded. *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1084 (D.C. Cir. 1987) (en banc).

Second, retroactivity would not cause manifest injustice. Besides not abruptly departing from a well-settled practice, the Exemption Denials would not burden the refineries: there are ample carryover RINs to meet the refineries' restored RFS obligations, and they recoup their RIN costs anyway. Moreover, as EPA admits, only retroactivity would serve the core statutory purpose of increasing renewable-fuel use; every gallon of released RFS obligation is a gallon of lost renewable fuel. EPA's concerns about drawing down the RIN bank are meritless, for myriad reasons, including that doing so serves the RFS program by spurring increased renewable-fuel use. In any event, there are obvious alternative ways EPA could manage the Exemption Denials' retroactive effect, including setting future supplemental obligations, much as EPA has done to cure its delay and error on other occasions.

C. For the same reasons, non-retroactivity would be impermissible under the rulemaking framework.

STANDING

As an association, Growth Energy has Article III standing if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Military Toxics Project v. EPA*, 146 F.3d 948, 953-954 (D.C. Cir. 1998). A Growth Energy member has standing if it can show "injury-in-fact, causation, and redressability." *Deutsche Bank National Trust Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013). These requirements are met.

Growth Energy's members have standing because the Compliance Actions reduce the net demand for their products. This conclusion "is firmly rooted in the basic laws of economics and requires no complex chain of reasoning." *Growth Energy*, 5 F.4th at 33 (cleaned up). RFS obligations define the minimum "demand" for renewable fuel. *Americans for Clean Energy*, 864 F.3d at 705. By absolving the refineries of RFS obligations covering 1.63 billion gallons of renewable fuel—including 1.27 billion gallons of non-advanced renewable fuel—the Compliance Actions reduce the minimum demand for renewable fuel by a corresponding amount. JATK, TK, TK{June.Action.14,19,23}; *see Growth*

Energy, 5 F.4th at 33 ("reducing the 2019 applicable volumes … would cause the demand" for renewable fuel "to drop"); Declaration of Emily Skor ("Skor Decl.") ¶7-9 (attached as Standing Addendum). It is irrelevant that the restored 2016-2018 obligations covered by the Compliance Actions applied to past years because meeting those obligations will, as EPA notes, "increase demand for renewable fuels in the future." JATK[June.Action.17}; *see* JATK{June.Action.19}; Skor Decl. ¶7-8; *infra* pp.35-36, 40-42.

Growth Energy's members produce renewable fuel, particularly conventional ethanol, which would be the primary renewable fuel used to meet the non-advanced obligations covered by the Exemption Denials absent the Compliance Actions. Skor Decl. ¶6; JATK{87.Fed.Reg.39,612}; *see also* §7545(*o*)(1)(F); *Americans for Clean Energy*, 864 F.3d at 697-698. The destruction of demand for those products is an injury-in-fact. *See Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) ("economic actors suffer injury in fact when agencies lift regulatory restrictions on their competitors" (cleaned up)). That injury is traceable directly to the Compliance Actions, which suppress demand equal to the released unmet RFS obligations. And vacatur would redress that injury by compelling EPA to require that the now-non-exempt refineries meet their RFS obligations.

Additionally, protecting and promoting the demand for renewable fuel, especially ethanol, is Growth Energy's *raison d'être*. Skor Decl. ¶2; *see National Lime Ass'n v. EPA*, 233 F.3d 625, 636 (D.C. Cir. 2000). And this case can be adjudicated without the participation of Growth Energy's members.

For these reasons, Growth Energy and other renewable-fuel representatives have routinely had standing to challenge EPA actions—such as setting too-low standards or granting other small-refinery exemptions—that, like the Compliance Actions, reduced the effective RFS obligations. *See, e.g.*, *Growth Energy*, 5 F.4th at 12-14 (standing unquestioned); *Americans for Clean Energy*, 864 F.3d 691 (standing unquestioned); *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 664-665 (D.C. Cir. 2019) (finding standing). Indeed, the Tenth Circuit held that renewable-fuel representatives had standing to challenge the three 2016-2017 exemptions underlying the June Action. *Renewable Fuels*, 948 F.3d at 1230-1239. Similarly, this Court and the Fifth Circuit recently allowed Growth Energy to intervene to defend the Exemption Denials underlying the Compliance Actions. *See* Order, *Sinclair Wyoming Refining Company LLC v. EPA*, No. 22-1073, ECF #1987065 (D.C. Cir. Feb. 22, 2023); *Calumet Shreveport Refining LLC v. EPA*, No. 22-60266, ECF #303-1 (5th Cir. Mar. 16, 2023).

STANDARD OF REVIEW

The Court may reverse under the Clean Air Act if the action is "in excess of statutory jurisdiction, authority, or limitations, … short of statutory right," "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. §7607(d)(9).

Whereas the arbitrary-and-capricious standard is deferential, "[r]eview of retroactive agency action is in each case a question of law, resolvable by reviewing courts with no overriding obligation to the agency's decision." *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1554 (D.C. Cir. 1987) (cleaned up); *accord Qwest*, 509 F.3d at 537. But even under the arbitrary-and-capricious standard, EPA "must [have] examine[d] the relevant data," "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," not "failed to consider an important aspect of the problem," and not "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automotive Insurance Co.*, 463 U.S. 29, 43 (1983). Accordingly, EPA was "required … to give a reasoned explanation for its rejection of [responsible] alternatives" to its "chosen policy," and "[t]he failure … to consider obvious alternatives" warrants "reversal." *Spirit Airlines, Inc. v. DOT*, 997 F.3d 1247, 1255 (D.C. Cir. 2021) (cleaned up).

ARGUMENT

I. EPA COULD NOT RELEASE THE NON-EXEMPT REFINERIES FROM THEIR UNMET 2016-2018 RFS OBLIGATIONS

Although styled "alternative compliance actions," the challenged actions actually grant the very relief that EPA, on remand from two lawsuits, determined in the Exemption Denials that the 31 refineries did not qualify for: not having to comply with their outstanding 2016-2018 RFS obligations. Even if EPA can sometimes make its actions non-retroactive, it could not do that here. Congress required non-exempt refineries to meet their RFS obligations and directed EPA to ensure that they do. And the Judiciary concluded that the approach EPA used to exempt the refineries initially was invalid. EPA's approach asserts a power to nullify both Congress's limits on its authority and the courts' review of its actions. EPA has no such power.

A. EPA Cannot Invoke "Retroactivity" To Exceed Its Statutory Authority

Agencies have only "the authority delegated to [them] by the statute," *State Farm*, 463 U.S. at 42, and Congress did not delegate to EPA the power it asserts here. As EPA admits, there is no statutory provision authorizing the Compliance Actions. *See* JATK{June.Action.10}. The statutory structure forecloses any notion that Congress left EPA discretion to release a non-exempt refinery from its RFS obligations.

The RFS's obligations are "mandatory." *Growth Energy*, 5 F.4th at 7. Obligated parties are statutorily "responsible for ensuring … [they] are met," on pain of civil penalty. *Americans for Clean Energy*, 864 F.3d at 704-705 (cleaned up); *see* §7545(d)(1). Correspondingly, EPA's overarching "statutory mandate [is] to 'ensure[]' that [the volume] requirements are met," *Americans for Clean Energy*, 864 F.3d at 698-699 (quoting §7545(*o*)(3)(B)(i)), i.e., to "ensure [obligated] entities' successful compliance," *Growth Energy*, 5 F.4th at 10.

Mindful that under certain circumstances compliance could become too difficult, Congress provided several mechanisms for mitigating RFS obligations. Congress gave EPA "waiver" authority, which "allows EPA to reduce the statutory [nationwide] volume requirements," *Americans for Clean Energy*, 864 F.3d at 698, 705, if implementation of the RFS would "severely harm the economy or environment," if "there is an inadequate domestic supply" of renewable fuel, or if EPA projects a shortfall in cellulosic-biofuel production, §7545(*o*)(7). Congress authorized EPA to "exempt" individual small refineries from their RFS obligations "for the reason of disproportionate economic hardship." §7545(*o*)(9)(B)(i). And Congress allowed refiners to carry a compliance deficit forward into the next year or use excess RINs from the prior year or from another obligated party. *See* §7545(*o*)(5)(D); 40 C.F.R. §80.1427(b).

This carefully reticulated scheme for mitigating RFS obligations precludes any conceit that EPA also has an atextual power to reduce RFS obligations under other circumstances. "When Congress provides exceptions in a statute, it does not follow that [agencies] have authority to create others. The proper inference … is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *Johnson*, 529 U.S. at 58; *see also*, *e.g.*, *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 940 (2017) (Congress's "expressi[on]" of certain types of waivers "excludes another left unmentioned"). "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001). Here, that conclusion is even stronger given the expressly mandatory nature of RFS obligations. Congress's message is clear: unless one of the statutory exceptions applies, all obligated parties must fully meet their obligations and EPA must ensure that they do.

This Court has already rebuked EPA for inventing an atextual power to eliminate RFS obligations. Previously, EPA waived the 2016 RFS volume requirements based on its evaluation of "demand-side factors affecting the demand for renewable fuel." *Americans for Clean Energy*, 864 F.3d at 710. Reasoning that EPA could waive only in the statutorily specified circumstances, none of which involved consideration of demand-side factors, this Court rejected EPA's

effort to create a "boundless … waiver authority." *Id.* at 711. EPA argued there, just as it said in the Compliance Actions, that its waiver was "necessary to avoid causing harmful effects … such as a significant increase in renewable fuel and RIN prices, RIN deficits, or non-compliance." *Id.* at 711-712; *see* JATK{June.Action.12}. The Court disagreed, explaining that Congress would not have provided for mitigation in myriad specific circumstances only to allow EPA to take the same action based on "lesser" circumstances that did not satisfy the statutory requirements. *Americans for Clean Energy*, 864 F.3d at 712. "Taking a step back," the Court emphasized that even if EPA was right that meeting the statutory requirements would be "impractical," EPA's belief that the RFS "would work better if tweaked d[id] not give EPA the right to amend the statute." *Id.*

Americans for Clean Energy's analysis applies forcefully here. Even if EPA were right that the 31 refineries could not practically meet their restored 2016-2018 RFS obligations, EPA could not provide relief outside the statutorily specified modes—which it has already concluded do not apply. *See also HollyFrontier*, 141 S.Ct. at 2181-2183 (interpretation of RFS statute's exemption provision must "be guided only by the statute's text," not by "arguments from public policy"). In fact, EPA's position here is worse: whereas in *Americans for Clean Energy*, EPA at least claimed to be applying its statutory waiver authority, *see* 864 F.3d at 696, here EPA confesses there is no statutory basis for the Compliance Actions.

Whatever power EPA might possess to deem some actions non-retroactive, that power does not allow it to do what Congress precluded it from doing directly. Although an agency choosing between two statutorily authorized options might have discretion to apply its preference only prospectively to avoid the effects of retroactivity, an agency "may not deny … a remedy on the ground that it must avoid retroactive lawmaking" when non-retroactivity would be tantamount to taking an action that "violate[s]" the relevant statute. *National Treasury Employees Union*, 139 F.3d at 219-220; *see also Verizon*, 269 F.3d at 1111 (rejecting contention that agency "may not retroactively correct its own legal mistakes").

Indeed, EPA's view arrogates to itself the power to defy the statute at will. Henceforth, EPA could grant any meritless exemption petitions it desired for its own policy reasons and then, after the exemptions are challenged, purport to correct its error formally while issuing another "alternative compliance" action releasing the refineries from their unmet RFS obligations. Congress's careful limits on exemptions would be meaningless. Retroactivity concerns cannot free agencies from the constitutional principle that they have no power to "cancel portions of a duly enacted statute." *Clinton v. City of New York*, 524 U.S. 417, 443-444 (1998).

B. Nor Can EPA Invoke "Retroactivity" To Avoid Correcting Its Adjudicated Legal Errors

EPA also cannot invoke "retroactivity" to avoid correcting errors on remand from judicial review.

As EPA notes, the Tenth Circuit "determined" that the approach EPA applied in initially granting the 34 exemptions was "impermissible." JATK{June.Action.17}; *see also* JATK{June.Action.2,27}. On remand from that decision and the substantively identical case in this Court, EPA formally corrected its prior errors by denying the exemptions, JATK{June.Denials.2-3,5,17-18}; *see supra* pp.6-8, but through the Compliance Actions, EPA declined to substantively correct them.

An agency is "without power to do anything which is contrary to either the letter or spirit of" a judicial decision invalidating its action. *City of Cleveland*, 561 F.2d at 346; *see also WildEarth Guardians v. EPA*, 830 F.3d 529, 535 (D.C. Cir. 2016). An agency cannot refuse to "rectify legal mistakes identified by a federal court," *Verizon*, 269 F.3d at 1111, since that would "effectively nullif[y]" the judicial decision, *Core Communications, Inc.*, 531 F.3d 849, 856 (D.C. Cir. 2008). It "would make a mockery of the error-correcting function of [judicial] review … to say that the [refineries] must prevail [on reconsideration] because they (wrongfully) prevailed" initially." *Verizon*, 269 F.3d at 1111.

The imperative that EPA substantively correct its errors is heightened in the RFS context because of the annual nature of RFS obligations and exemption decisions. It is impossible for judicial review to conclude and for EPA to take corrective action on remand before the end of the relevant compliance year; corrections will always be "retroactive" in that sense. Thus, EPA's approach arrogates to itself the power to practically immunize its RFS actions from judicial review.

C. The Special Potential For Abuse Counsels Strongly Against Allowing EPA To Deem RFS Obligations Non-Retroactive

Notwithstanding EPA's insistence that this is a "unique situation," JATK{June.Action.12}, the circumstances could easily recur, *see supra* pp.22-23. Moreover, the Compliance Actions are just the latest in a troubling pattern of EPA using non-retroactivity broadly to undermine the RFS.

The first two times this Court applied retroactivity analysis to an RFS action, it approved of EPA's late imposition of RFS nationwide standards because those actions fulfilled EPA's statutory mandate to "ensure that the volumes for [the past year] are ultimately used." *National Petrochemical*, 630 F.3d at 152, 156-157, 164-166; *see Monroe Energy,* 750 F.3d at 919-920. The third time, however, the Court approved EPA's late imposition of RFS nationwide standards with a twist: it allowed EPA to set the standards to whatever level of renewable fuel the market

had used independently of the RFS. *Americans for Clean Energy*, 864 F.3d at 718-719.

Although *Americans for Clean Energy* endorsed EPA's invocation of retroactivity to nullify the RFS's market-forcing power, the Court stressed that it was "not a simple case of EPA using its delay as an excuse to shirk its statutory duties" to "ensure" that the volume requirements are ultimately met. 864 F.3d at 719. EPA's record since then shows that the Court's faith in EPA was misplaced; EPA now routinely erases RFS obligations under the guise of "reasonably … mitigat[ing] the burdens" of "retroactiv[ity]." JATK{87.Fed.Reg.39,609}. When there was a shortfall for 2020, EPA invoked *Americans for Clean Energy* to retroactively reduce the standards to the level of actual use. JATK-TK, TK{87.Fed.Reg. 39,602-39,603,39,609}. EPA did the same when belatedly setting the 2021 standards. *Id.* EPA's practice of invoking the retroactivity standard applied in *Americans for Clean Energy* (which does not apply here anyway because it governs rulemakings rather than adjudications, *infra* pp.27-28) to cancel RFS obligations is distressing.

EPA has turned its asserted power to mitigate retroactive effects into something vastly greater and more dangerous than the Court surely foresaw in *Americans for Clean Energy*: a power to negate the RFS program. Because of the annual nature of RFS compliance obligations, if EPA disagrees with Congress's

policy choices, EPA need only wait to set a standard or restore an obligation that should have been in place all along, and then it can, under its retroactivity approach, relieve obligated parties of those "new" duties, rendering its late action a toothless formality. In effect, EPA is using non-retroactivity to convert the RFS from the market-forcing program Congress intended into an accounting program in which EPA merely records how much renewable fuel the market elected to use independently.

Therefore, EPA should not have any power to withhold the retroactive effect of actions imposing or restoring RFS obligations. As explained below, there are other tools to manage the effect of retroactive RFS obligations while furthering the RFS's purpose. *See infra* pp.39-42.

II. EVEN IF EPA COULD MAKE THE EXEMPTION DENIALS NON-RETROACTIVE, IT HAD NO BASIS TO DO SO

In the Compliance Actions, EPA erroneously applied the retroactivity framework for rulemakings to the Exemption Denials, which are adjudications. The Court should apply the adjudicative-retroactivity framework in the first instance because retroactivity is a question of law, *supra* p.17, and the record is sufficient to conclude that non-retroactivity was impermissible—EPA has already made its case for non-retroactivity. In any event, EPA's analysis under the rulemaking framework was erroneous.

A. The Retroactivity Framework For Administrative Adjudications, Not For Rulemakings, Governs

The retroactivity precedents EPA relied on in its Compliance Actions involved administrative rulemakings—specifically, rules setting future RFS nationwide standards. *See Americans for Clean Energy*, 864 F.3d at 718; *Monroe Energy*, 750 F.3d at 920; *National Petrochemical*, 630 F.3d at 165-166; JATK{June.Action.10}. That precedent is inapplicable here because, as EPA notes, the Exemption Denials are "adjudication[s]," "not a rulemaking." JATK-TK, TK{June.Denials.5-6,73}; *see Sinclair Wyoming*, 887 F.3d at 992.

The retroactivity frameworks for the two contexts are different. When adopting a new RFS regulation, "EPA must … consider[] the benefits and the burdens attendant to" its retroactive application, "reasonably balance[] its statutory duties with the rights of" obligated parties, and "adequately consider[] various ways to minimize the hardship caused to obligated parties" by retroactivity. *Americans for Clean Energy*, 864 F.3d at 718-719, 721 (cleaned up).

In contrast, there is a strong presumption that rulings in administrative adjudication will be applied retroactively. "[I]t is black-letter administrative law that adjudications are inherently retroactive." *Catholic Health*, 718 F.3d at 921; *see also Qwest*, 509 F.3d at 539 ("[r]etroactivity is the norm in agency adjudications"). When "a rule [is] announced in an agency adjudication," "the rule itself" must have "retroactive application." *Catholic Health*, 718 F.3d at 922. As

for the rule's "retroactive effect"—i.e., its "economic consequences"—an agency "may" "deny" it only under very limited circumstances: either "where the adjudication substitutes new law for old law that was reasonably clear and where doing so is necessary to protect the settled expectations of those who had relied on the preexisting rule," *Id.* (cleaned up), or "when to do otherwise would lead to manifest injustice," *Qwest*, 509 F.3d at 539 (cleaned up).

In the Exemption Denials, EPA formally applied its exemption approach retroactively, but in the Compliance Actions, EPA withheld that approach's substantive retroactive effect.

B. Under The Adjudicative-Retroactivity Framework, EPA Could Not Withhold The Exemption Denials' Retroactive Effect

1. The Exemption Denials Did Not Replace Old Law That Was Reasonably Relied On

EPA did not trigger the first ground for withholding the retroactive effect of its current approach because, in applying that approach in the Exemption Denials, EPA did not replace a reasonably clear prior approach that had supported the settled expectations of those who had relied on it. To qualify under this standard, the old approach must have "expressly address[ed] th[e] precise issue," *Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1071 & n. 4 (D.C. Cir. 1986), been "consistent" and "well-established," *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (cleaned up), been "authoritatively articulated outside

of the same … proceeding in which it was eventually reversed," *Verizon*, 269 F.3d at 1110, and been "judicially confirmed," *id.* Only then could it have created "expectations on which a party might reasonably place reliance." *Qwest*, 509 F.3d at 540.

The approach EPA applied in initially granting the 34 2016-2018 exemptions reflected a brief departure from an earlier practice that was consonant with the one applied in the Exemption Denials. It was not articulated authoritatively or in an accessible way outside the same proceedings that led to the Exemption Denials. And it was never judicially confirmed—on the contrary, it was subjected to judicial review, and overturned, at the first opportunity. Under these circumstances, no refinery could have reasonably expected that EPA would adhere to the approach applied initially to the 34 petitions.

Before the Exemption Denials, the only authoritatively articulated policy on the precise issues—whether disproportionate hardship must be caused by RFS compliance and the significance of RIN-cost recoupment—expressed the same approach EPA later applied in the Exemption Denials. A December 2016 guidance memorandum stated that EPA "may only grant such petitions if … the small refinery will experience a 'disproportionate economic hardship' from compliance with its RFS obligations" and that it "evaluat[es] whether RFS compliance would cause the small refinery 'disproportionate economic hardship.'" JATK-

TK{2016.Memorandum.1-2} (emphasis added). The 2016 memorandum also stated that "since 2011, … EPA has adopted the interpretation of disproportionate economic hardship set forth in the [Department of Energy] Small Refinery Study," JATK TK{2016.Memorandum.2,n.5}, which in turn defined the task as "evaluat[ing] disproportionate economic hardship caused by the impact of compliance with the RFS on small refineries," accounting for "[t]he degree to which [RIN purchase costs] will be passed through," JATK, TK-TK{DOE.Study.2,22-23} (emphasis added). Thus, in some earlier cases courts noted that EPA had applied an approach that accords with the 2016 memorandum and the Exemption Denials. *See, e.g.*, *Hermes Consolidated, LLC v. EPA*, 787 F.3d 568, 573 (D.C. Cir. 2015); *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 607-608, 612-613 (4th Cir. 2018). In contrast, EPA articulated or applied the approach on which the refineries wish to rely only when granting exemptions for 2016-2018, including those reversed in the Exemption Denials. There is "no legal authority … to support carving out an exception to the rule of [adjudicative] retroactivity based … on an agency interpretation so briefly embraced." *Clark-Cowlitz*, 826 F.2d at 1084.

Moreover, none of the 2016-2018 exemptions were authoritative or otherwise the basis for reasonable reliance because they "ha[d] no precedential value" for anyone—neither for "third parties" (who would not have known about

them anyway, *see supra* p.6) nor "even for the [recipient] refiner"—"since each petition must be resolved on a case-by-case basis." *Sinclair Wyoming*, 887 F.3d at 992. Given that "the *status quo ante* was not a benchmark at all, but rather a case-by-case assessment with a highly uncertain outcome," any "reliance" on prior exemption grants "was badly misplaced." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998).

This conclusion is even clearer given that the approach used in granting the 2016-2018 exemptions was judicially challenged as soon as interested parties learned of it—first in the Tenth Circuit *Renewable Fuels* case filed before 2018 was halfway over and thus long before refineries had to satisfy their 2018 RFS obligations. *See supra* pp.6-7. "[O]nce the issue was expressly drawn into question[,] … [EPA] could [not] possibly find that [the refineries] reasonably relied upon" the prior approach. *Qwest*, 509 F.3d at 540 (cleaned up).

The final nail in the coffin—as if another were needed—is that, as the Tenth Circuit concluded in *Renewable Fuels*, the approach EPA applied in granting the 2016-2018 exemptions was plainly unlawful: it reflected an unreasonable interpretation of the statute and an arbitrary treatment of the record. *See supra* pp.7-8. The unreasonableness of any reliance is confirmed by the fact that 23 of the 31 refineries did not rely on the 2016-2017 exemptions, but instead retired

RINs to comply with their 2018 obligations fully or partially while awaiting EPA's decision on their 2018 petitions. *See* JATK{June.Action.7}.

Given all the circumstances, those who "chose not to" retire RINs or who used or sold the RINs that EPA subsequently returned after granting the exemption petitions while litigation was pending, *see* JATK{June.Action.7}, "assumed the risk" that their petitions would ultimately be denied and they would be subject to their RFS obligations. *AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006).

2. Retroactive Effect Would Not Cause Manifest Injustice

Although the Court has not definitively unpacked "manifest injustice," *see Clark-Cowlitz*, 826 F.2d at 1081-1082 & n.6; *Verizon*, 269 F.3d at 1109-1110, it has primarily considered:

- "whether the new rule represents an abrupt departure from well established practice," *Clark-Cowlitz*, 826 F.2d at 1081 (cleaned up);
- "the extent to which the party against whom the new rule is applied relied on the former rule," *id.* (cleaned up);
- "the degree of the burden which a retroactive order imposes on a party," *id.* (cleaned up);
- "the statutory interest in applying [the] new rule," *id.* (cleaned up); and
- the harm "that non-retroactivity would inflict" on entities that are not party to the adjudication, *Qwest*, 509 F.3d at 550.

The manifest-injustice standard is so demanding that the Court appears never to have found it satisfied. This case should not be the first; no factor supports non-retroactivity here.

a) The Refineries Did Not Reasonably Rely On A Well-Established Practice

As detailed above, the prior approach was not well-settled and was not reasonably relied on by the 31 refineries. EPA points to "the prior exemptions provided to these 31 small refineries and the judicial challenges to those exemptions," along with the "remands" of those decisions and the Tenth Circuit's "decision that led EPA to change its interpretation." JATK, TK{June.Action.10,12}. Those circumstances actually undermine EPA's non-retroactivity determination. The fact of prior exemptions is simply the predicate for even inquiring into retroactivity; they are not a basis to withhold retroactive effect—particularly when the reversal occurs in later proceedings on the same petitions. That the prior approach was challenged judicially and that EPA reversed course on remand defeat the notion that that approach was "settled" or a basis for reasonable reliance. *See supra* pp.31-32.

b) Retroactivity Would Not Burden The Refineries

The Exemption Denials, if given retroactive effect, would require the refineries collectively to retire 1.63 billion more RINs to satisfy their unmet 2016-2018 RFS obligations. *Supra* pp.9-10. But EPA says nothing about the actual

burden, if any, that would impose—a silence presumably reflecting EPA's awareness that retroactivity would not burden them, but rather would merely deny them the windfall they receive from being relieved of their obligations.

EPA has found, on a robust record, that obligated parties incur no net RFS compliance costs because their "RIN costs are fully passed through"—that is, after all, a premise of the Exemption Denials. JATK, TK, TK-TK, TK{June.Denial.18,24,30-32,50}. In fact, EPA has found that absolving the 31 refineries of their unmet 2016-2018 RFS obligations would bestow upon them "a financial **benefit** through the sale of their petroleum fuel that includes the value of the RIN but no associated RFS compliance costs." JATK{June.Denial.29}. Retroactivity could burden the refineries only if they were not afforded sufficient time to comply, but there are more than enough carryover RINs to meet the unmet 2016-2018 obligations, *see* JATK{June.Action.14} ("approximately 1.8 billion [carryover] RINs"), and anyway, as discussed below, EPA could easily craft a compliance program that would enable them to generate or acquire additional RINs in the future, *infra* pp.39-42.

In any event, whatever costs the refineries would bear in complying with their unmet 2016-2018 obligations would merely be costs they should have borne all along and were erroneously relieved of by the initial exemptions. Having to bear those costs after all cannot be considered an "injustice." *See Qwest*, 509 F.3d

at 541 ("Even if the particular circumstances of an individual case might conceivably support such forbearance …, that potential offers no reason for the Commission's attempt at a sweeping release from apparently applicable statutory obligations.").

c) Only Retroactivity Serves The Statutory Interests

i. Withholding the Exemption Denials' retroactive effect would impair important statutory interests and the associated interests of renewable-fuel producers.

Congress wanted refineries to be relieved of their individual RFS obligations only if they met the specific statutory requirements. *See supra* pp.19-23. Because "[w]ithholding retroactive application [of the Exemption Denials] would grant [the refineries] a … benefit to which [EPA] now believes [they are] not entitled"—the release from their unmet 2016-2018 RFS obligations—non-retroactivity would "not … fulfill[]" the "overriding Congressional interest" in providing for exemptions. *Clark-Cowlitz*, 826 F.2d at 1085.

Further, as EPA "acknowledges," giving the Exemption Denials retroactive effect would "increase demand for renewable fuels in the future," JATK{June.Action.17}, which serves Congress's purpose in enacting the RFS, *supra* pp.3-4. Relatedly, it is "obvious" that every RIN that retroactive application of the Exemption Denials would require the refineries to retire "is matched by an

equal and opposite los[t gallon of renewable fuel] that non-retroactivity would inflict on" renewable-fuel producers. *Qwest*, 509 F.3d at 540; *see Aliceville Hydro Associates v. FERC*, 800 F.2d 1147, 1153 (D.C. Cir. 1986) (rejecting non-retroactivity where it "would impose an equal burden" on others).

ii. EPA's concerns regarding the RIN bank are meritless. According to EPA, requiring the refineries to meet their unmet obligations could "jeopardize compliance for *all* obligated parties through a significant drawdown of the carryover RIN bank." JATK{June.Action.13}; *see also* JATK{June.Action.15}. EPA says that "reliance on carryover RINs to meet the 2016-2018 obligations would undermine the proposed standards for 2022, likely to the point of making them unachievable." JATK{June.Action.14}. More broadly, EPA says, "[t]he stability of the RFS program relies on the carryover RIN bank to provide an important and necessary programmatic and cost spike buffer that will both facilitate individual compliance and provide for smooth overall functioning of the program." *Id.*

Nothing about that reasoning is defensible. First, the current size of the RIN bank reflects the very invalid exemptions that were reversed by the Exemption Denials, *see* JATK{2023-25.DRIA.42} (exemptions "granted in 2018" led to a "large number of carryover RINs"). Thus, a bank drawdown to satisfy the restored obligations would merely put the bank back where it should have been.

Second, even a maximum drawdown—to about 200 million RINs—would not affect compliance with the 2022 RFS standards. EPA specifically set those standards (along with the 2020-2021 standards) low enough that they would be met without reliance on the RIN bank. JATK{86.Fed.Reg.72,436,72,455}; JATK{87.Fed.Reg.39,614}.

Third, that there are 305 million too few carryover RINs to satisfy the unmet 2016-2018 advanced obligation of 360 million, JATK, TK{June.Action.14,17}, is not problematic because there are obvious viable alternatives to address that specific shortfall, *see infra* pp.39-42.

Fourth, drawing down the RIN bank is salutary and furthers the RFS's market-forcing purpose. As EPA admits, a "reduced carryover RIN bank could force obligated parties to rely more on production of new renewable fuel," JATK{June.Action.17}—precisely what Congress created the RFS program to do, *supra* pp.3-4. Correspondingly, maintaining the RIN bank undermines that purpose by inflating the supply of RINs. *See* JATK{2023-25.DRIA.42}.

EPA's management of the bank belies its claim that the bank is an essential buffer. When the Covid-19 pandemic created an "unanticipated shortfall in 2020 renewable fuel use," EPA retroactively reduced the 2020 obligations to the level of actual use specifically to avoid a bank drawdown. JATK-TK{87.Fed.Reg.39,617-39,618}. And EPA's view that the "carryover RIN bank … allows obligated

parties to rely on other market participants," JATK{June.Action.16}, conflates the ability to trade RINs with the ability to carry them over to the next year; it is their tradability, even if only within a single compliance year, that enables one obligated party to rely on another. *See* JATK-TK{June.Action.4-5}; JATK, TK{87.Fed.Reg.39,613,39,657}.

EPA frets about supposedly uneven RIN holdings. *See* JATK{June.Action.16}. But there is nothing especially uneven about "obligated parties … represent[ing] approximately 55 percent of the 2019 total [RFS requirement] … hold[ing] over three-quarters of all available 2019 RINs." JATK & nn.90-91{June.Action.16&nn.90-91}; *see* JATK{Deadline.Extension.Rule}. More fundamentally, "uneven holdings" is just a confusing way to say there are buyers (those with fewer RINs than they need to meet their obligations) and sellers (those with more than they need). EPA's asserted concern about uneven holdings is contradicted by its recognition that the "RIN system … creat[es] an open, liquid market for RINs," which "allows all obligated parties, regardless of size or situation, equal ability to comply … immediately without having to invest capital or resources into blending facilities" and to do so "at the same cost." JATK-TK{June.Action.4-5}.

EPA worries that RIN holders "may choose to sell their RINs only at very high costs." JATK{June.Action.16}. Of course, that is how a market—and the

RFS—work: higher RIN prices "help achieve the Congressional goals of greater renewable fuel production and use." *Alon*, 936 F.3d at 651; *see Monroe Energy*, 750 F.3d at 919 ("high RIN prices … incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote"). In any event, EPA's speculation that RIN holders "may" sell as high prices does not support its conclusion that it is "nearly certain" that the 31 small refineries could not acquire sufficient RINs to comply, JATK{June.Action.16} (emphasis added), especially given the availability of alternatives outlined below.

d) There Are Viable And Obvious Alternatives

EPA is plainly incorrect that the alternatives to the Compliance Action "would not resolve the obstacles to compliance." JATK{June.Action.12}. There are serious alternatives to erasing the 2016-2018 obligations restored by the Exemption Denials. These generally fit two categories: affording the 31 refineries more time to acquire the needed RINs; and reducing the restored obligations only partially. Of course, strategies from the two categories could be combined. Most importantly, these alternatives would address its concern that "the potential drawdown of the carryover RIN bank … would threaten the integrity of the current and forthcoming standards," *id.*, although, as just explained, that concern is unfounded anyway, *see supra* pp.37-39.

i. EPA could afford the 31 refineries more time to acquire the necessary RINs. *See, e.g.*, *National Petrochemical*, 630 F.3d at 163 (setting curative obligation in future provides "ample notice … to accumulate RINs"); *Monroe Energy*, 750 F.3d at 920. As EPA recognized previously, setting a future obligation to remedy a prior erroneous reduction fulfills the statutory "require[ment] that EPA 'ensure' that 'at least' the applicable volumes 'are met'" and thus serves "the broader goal of the RFS program to increase renewable fuel use," while "lessen[ing] the likelihood that the carryover RIN bank is drawn down." JATK-TK{87.Fed.Reg.39,629-39,630}.

One obvious way to do that would be to reopen the 2016-2018 compliance deadline for the 31 refineries and allow them to use any valid RINs to meet the obligation. EPA has used this technique before. After the 2019 compliance deadline had passed, EPA extended the 2019 deadline for small refineries because their exemption petitions would not be adjudicated until after the original 2019 deadline. JATK & n.1{87.Fed.Reg.5,696,5,697&n.1}. And EPA extended the 2020 deadline for small refineries and allowed them to use post-2020-vintage RINs to meet their 2020 obligations. JATK, TK{87.Fed.Reg.54,158,54,160,54,162}. This history debunks EPA's objection that there is no viable alternative to the Compliance Actions because "the applicable compliance years are closed, and the compliance deadlines have passed." JATK{June.Action.12}.

Or EPA could create a future supplemental obligation for the refineries equal to the unmet 2016-2018 obligations (whether as a stand-alone obligation or as an increment to a future year's standard), and EPA could break the supplemental obligation into smaller ones spread over multiple years. EPA is currently doing exactly that to remedy its unlawful 500-million-gallon waiver of the 2016 RFS standard: imposing 250-million-gallon supplemental obligations in 2022 and 2023. JATK{87.Fed.Reg.80,582,80,618}; *see* JATK{87.Fed.Reg.39,627}. Thus, EPA's objection that a supplemental makeup obligation would be so "large" that it "would need to be spread over many subsequent compliance years," JATK{June.Action.12}, is not a credible reason for rejecting this alternative in favor of the Compliance Actions. Moreover, satisfying the restored 2016-2018 obligations gradually is better than not at all.

EPA is incorrect that setting a future makeup obligation would cause the 31 refineries to "be out of compliance" until the new obligations could be set. JATK{June.Action.12}. EPA could quickly extend or suspend the compliance deadline without notice and comment, just as it did for the 2019 extension noted above. JATK{87.Fed.Reg.5,697}. And EPA's assertion that "the applicable annual standards would likely need to be adjusted downward to accommodate the additional 2016-2018 obligations," JATK{June.Action.12}, makes no sense; again,

setting future makeup obligations would enable the market to meet them gradually by increasing its use of renewable fuel.[2]

ii. Instead or in addition, EPA could partially reduce the restored 2016-2018 obligations—a suboptimal solution but a better one than the Compliance Actions' complete reduction. For example, EPA could solve its concern that there will be "a shortfall in available advanced biofuel RINs to satisfy the 2016-2018 advanced biofuel obligations," JATK{June.Action.12}, by reducing the advanced and total unmet obligations by the size of that shortfall—305 million, *see supra* p.37—leaving an unmet obligation of 1.325 billion. Or EPA could reduce the total unmet obligation by some intermediate amount. Given EPA's duties to ensure that the obligations are met, and to account for the statutory interest in and benefits of increasing renewable-fuel use, EPA cannot cancel the unmet obligations more than necessary to sufficiently alleviate legitimate concerns with the Exemption Denials' retroactive effect.

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[2] The market already has the capacity to produce, deliver, and consume about 1.6 billion gallons of ethanol above EPA's latest expectations, without expanding infrastructure, in response to greater economic pressure from higher RFS standards. JATK-TK{2023-25.Growth.Energy.Comments.13-14}. That alone would cover the obligations restored by the Exemption Denials.

C. Even Under The Rulemaking-Retroactivity Framework, EPA Could Not Withhold The Exemption Denials' Retroactive Effect

Although the framework for retroactive rulemaking does not apply here, EPA would have no basis to withhold the Exemption Denials' retroactive effect under that standard, either. For all the reasons just discussed, the burdens of retroactivity do not outweigh the benefits, and there are other ways to mitigate any supposed burdens while serving the RFS's purpose of increasing renewable-fuel use.

CONCLUSION

The Court should grant the petitions, vacate the actions, and remand for further proceedings consistent with the arguments above.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of this Court's order of November 29, 2022, because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 8,962 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s/ Seth P. Waxman
SETH P. WAXMAN

April 10, 2023

CERTIFICATE OF SERVICE

I certify that on April 10, 2023, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

/s/ Seth P. Waxman
SETH P. WAXMAN

April 10, 2023

STATUTORY ADDENDUM

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shall take effect no later than November 1, 1992 (or at such other date during 1992 as the Administrator establishes under the preceding provisions of this paragraph). For other areas, the revision shall provide that such requirement shall take effect no later than November 1 of the third year after the last year of the applicable 2-year period referred to in paragraph (1) (or at such other date during such third year as the Administrator establishes under the preceding provisions of this paragraph) and shall include a program for implementation and enforcement of the requirement consistent with guidance to be issued by the Administrator.

(3) Waivers

(A) The Administrator shall waive, in whole or in part, the requirements of paragraph (2) upon a demonstration by the State to the satisfaction of the Administrator that the use of oxygenated gasoline would prevent or interfere with the attainment by the area of a national primary ambient air quality standard (or a State or local ambient air quality standard) for any air pollutant other than carbon monoxide.

(B) The Administrator shall, upon demonstration by the State satisfactory to the Administrator, waive the requirement of paragraph (2) where the Administrator determines that mobile sources of carbon monoxide do not contribute significantly to carbon monoxide levels in an area.

(C)(i) Any person may petition the Administrator to make a finding that there is, or is likely to be, for any area, an inadequate domestic supply of, or distribution capacity for, oxygenated gasoline meeting the requirements of paragraph (2) or fuel additives (oxygenates) necessary to meet such requirements. The Administrator shall act on such petition within 6 months after receipt of the petition.

(ii) If the Administrator determines, in response to a petition under clause (i), that there is an inadequate supply or capacity described in clause (i), the Administrator shall delay the effective date of paragraph (2) for 1 year. Upon petition, the Administrator may extend such effective date for one additional year. No partial delay or lesser waiver may be granted under this clause.

(iii) In granting waivers under this subparagraph the Administrator shall consider distribution capacity separately from the adequacy of domestic supply and shall grant such waivers in such manner as will assure that, if supplies of oxygenated gasoline are limited, areas having the highest design value for carbon monoxide will have a priority in obtaining oxygenated gasoline which meets the requirements of paragraph (2).

(iv) As used in this subparagraph, the term distribution capacity includes capacity for transportation, storage, and blending.

(4) Fuel dispensing systems

Any person selling oxygenated gasoline at retail pursuant to this subsection shall be required under regulations promulgated by the Administrator to label the fuel dispensing system with a notice that the gasoline is oxygenated and will reduce the carbon monoxide emissions from the motor vehicle.

(5) Guidelines for credit

The Administrator shall promulgate guidelines, within 9 months after November 15, 1990, allowing the use of marketable oxygen credits from gasolines during that portion of the year specified in paragraph (2) with higher oxygen content than required to offset the sale or use of gasoline with a lower oxygen content than required. No credits may be transferred between nonattainment areas.

(6) Attainment areas

Nothing in this subsection shall be interpreted as requiring an oxygenated gasoline program in an area which is in attainment for carbon monoxide, except that in a carbon monoxide nonattainment area which is redesignated as attainment for carbon monoxide, the requirements of this subsection shall remain in effect to the extent such program is necessary to maintain such standard thereafter in the area.

(7) Failure to attain CO standard

If the Administrator determines under section 7512(b)(2) of this title that the national primary ambient air quality standard for carbon monoxide has not been attained in a Serious Area by the applicable attainment date, the State shall submit a plan revision for the area within 9 months after the date of such determination. The plan revision shall provide that the minimum oxygen content of gasoline referred to in paragraph (2) shall be 3.1 percent by weight unless such requirement is waived in accordance with the provisions of this subsection.

(n) Prohibition on leaded gasoline for highway use

After December 31, 1995, it shall be unlawful for any person to sell, offer for sale, supply, offer for supply, dispense, transport, or introduce into commerce, for use as fuel in any motor vehicle (as defined in section 7554(2)[8] of this title) any gasoline which contains lead or lead additives.

***(o)* Renewable fuel program**

(1) Definitions

In this section:

(A) Additional renewable fuel

The term ''additional renewable fuel'' means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel

(i) In general

The term ''advanced biofuel'' means renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

[8] So in original. Probably should be section ''7550(2)''.

(ii) Inclusions

The types of fuels eligible for consideration as ''advanced biofuel'' may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term ''baseline lifecycle greenhouse gas emissions'' means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term ''biomass-based diesel'' means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term ''cellulosic biofuel'' means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

(F) Conventional biofuel

The term ''conventional biofuel'' means renewable fuel that is ethanol derived from corn starch.

(G) Greenhouse gas

The term ''greenhouse gas'' means carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons,[9] sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

The term ''lifecycle greenhouse gas emissions'' means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

The term ''renewable biomass'' means each of the following:

(i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested.

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal[10] land cleared at any time prior to December 19, 2007, including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

(iv) Slash and pre-commercial thinnings that are from non-federal[10] forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.

(v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.

(vi) Algae.

(vii) Separated yard waste or food waste, including recycled cooking and trap grease.

(J) Renewable fuel

The term ''renewable fuel'' means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

(K) Small refinery

The term ''small refinery'' means a refinery for which the average aggregate daily

[9] So in original. The word ''and'' probably should appear.

[10] So in original. Probably should be ''non-Federal''.

crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(L) Transportation fuel

The term ''transportation fuel'' means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

On the petition of a noncontiguous State or territory, the Administrator may allow the renewable fuel program established under this subsection to apply in the noncontiguous State or territory at the same time or any time after the Administrator promulgates regulations under this subparagraph.

(II) Other actions

In carrying out this clause, the Administrator may—

(aa) issue or revise regulations under this paragraph;

(bb) establish applicable percentages under paragraph (3);

(cc) provide for the generation of credits under paragraph (5); and

(dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

(iii) Provisions of regulations

Regardless of the date of promulgation, the regulations promulgated under clause (i)—

(I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but

(II) shall not—

(aa) restrict geographic areas in which renewable fuel may be used; or

(bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

If the Administrator does not promulgate regulations under clause (i), the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of renewable fuel (in billions of gallons):
2006	4.0
2007	4.7
2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	26.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

(II) Advanced biofuel

For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of advanced biofuel (in billions of gallons):
2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0

Calendar year:	Applicable volume of advanced biofuel (in billions of gallons):
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

(III) Cellulosic biofuel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2010	0.1
2011	0.25
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

(IV) Biomass-based diesel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of biomass-based diesel (in billions of gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

(ii) Other calendar years

For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i) for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

(II) the impact of renewable fuels on the energy security of the United States;

(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

(v) Minimum applicable volume of biomass-based diesel

For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Modification of greenhouse gas reduction percentages

(A) In general

The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D) (relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel), and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consideration, for natural gas fired corn-based ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

(D) 5-year review

Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level.

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, except as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

(F) Limit on upward adjustments

If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

(G) Applicability of adjustments

If the Administrator adjusts, or revises, a percent level referred to in this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.

(5) Credit program

(A) In general

The regulations promulgated under paragraph (2)(A) shall provide—

(i) for the generation of an appropriate amount of credits by any person that re-

fines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);

(ii) for the generation of an appropriate amount of credits for biodiesel; and

(iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

A person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(C) Duration of credits

A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.

(D) Inability to generate or purchase sufficient credits

The regulations promulgated under paragraph (2)(A) shall include provisions allowing any person that is unable to generate or purchase sufficient credits to meet the requirements of paragraph (2) to carry forward a renewable fuel deficit on condition that the person, in the calendar year following the year in which the renewable fuel deficit is created—

(i) achieves compliance with the renewable fuel requirement under paragraph (2); and

(ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(6) Seasonal variations in renewable fuel use

(A) Study

For each of calendar years 2006 through 2012, the Administrator of the Energy Information Administration shall conduct a study of renewable fuel blending to determine whether there are excessive seasonal variations in the use of renewable fuel.

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations specified in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

The determinations referred to in subparagraph (B) are that—

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

(ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and

(iii) promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

Notwithstanding any other provision of law, the seasonality requirement relating to renewable fuel use established by this paragraph shall not apply to any State that has received a waiver under section 7543(b) of this title or any State dependent on refineries in such State for gasoline supplies.

(7) Waivers

(A) In general

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)—

(i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a petition for a waiver of the requirements of paragraph (2) within 90 days

after the date on which the petition is received by the Administrator.

(C) Termination of waivers

A waiver granted under subparagraph (A) shall terminate after 1 year, but may be renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy.

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of $0.25 per gallon or the amount by which $3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel

(i) Market evaluation

The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.

(F) Modification of applicable volumes

For any of the tables in paragraph (2)(B), if the Administrator waives—

(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

(ii) at least 50 percent of such volume requirement for a single year,

the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program

(A) In general

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct for the Administrator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;
(ii) blendstock supplies; and
(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

Based on the results of the study, the Secretary of Energy shall make specific recommendations to the Administrator concerning waiver of the requirements of paragraph (2), in whole or in part, to prevent any adverse impacts described in subparagraph (A).

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

Clause (i) does not limit the authority of the Administrator to waive the requirements of paragraph (2) in whole, or in part, under paragraph (7).

(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).

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

Not later than 180 days after August 8, 2005, and annually thereafter, the Federal Trade Commission shall perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing arrangements among industry participants shall be considered.

(B) Report

Not later than December 1, 2005, and annually thereafter, the Federal Trade Commission shall submit to Congress and the Administrator a report on the results of the market concentration analysis performed under subparagraph (A)(i).

(11) Periodic reviews

To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—

(A) existing technologies;
(B) the feasibility of achieving compliance with the requirements; and
(C) the impacts of the requirements described in subsection (a)(2)[11] on each individual and entity described in paragraph (2).

(12) Effect on other provisions

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas,

[11] So in original. Subsection (a) does not contain a par. (2).

or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475) of this chapter. The previous sentence shall not affect implementation and enforcement of this subsection.

(q)[12] Analyses of motor vehicle fuel changes and emissions model

(1) Anti-backsliding analysis

(A) Draft analysis

Not later than 4 years after August 8, 2005, the Administrator shall publish for public comment a draft analysis of the changes in emissions of air pollutants and air quality due to the use of motor vehicle fuel and fuel additives resulting from implementation of the amendments made by the Energy Policy Act of 2005.

(B) Final analysis

After providing a reasonable opportunity for comment but not later than 5 years after August 8, 2005, the Administrator shall publish the analysis in final form.

(2) Emissions model

For the purposes of this section, not later than 4 years after August 8, 2005, the Administrator shall develop and finalize an emissions model that reflects, to the maximum extent practicable, the effects of gasoline characteristics or components on emissions from vehicles in the motor vehicle fleet during calendar year 2007.

(3) Permeation effects study

(A) In general

Not later than 1 year after August 8, 2005, the Administrator shall conduct a study, and report to Congress the results of the study, on the effects of ethanol content in gasoline on permeation, the process by which fuel molecules migrate through the elastomeric materials (rubber and plastic parts) that make up the fuel and fuel vapor systems of a motor vehicle.

(B) Evaporative emissions

The study shall include estimates of the increase in total evaporative emissions likely to result from the use of gasoline with ethanol content in a motor vehicle, and the fleet of motor vehicles, due to permeation.

(r) Fuel and fuel additive importers and importation

For the purposes of this section, the term ''manufacturer'' includes an importer and the term ''manufacture'' includes importation.

(s) Conversion assistance for cellulosic biomass, waste-derived ethanol, approved renewable fuels

(1) In general

The Secretary of Energy may provide grants to merchant producers of cellulosic biomass ethanol, waste-derived ethanol, and approved renewable fuels in the United States to assist the producers in building eligible production facilities described in paragraph (2) for the production of ethanol or approved renewable fuels.

(2) Eligible production facilities

A production facility shall be eligible to receive a grant under this subsection if the production facility—

(A) is located in the United States; and

(B) uses cellulosic or renewable biomass or waste-derived feedstocks derived from agricultural residues, wood residues, municipal solid waste, or agricultural byproducts.

(3) Authorization of appropriations

There are authorized to be appropriated the following amounts to carry out this subsection:

(A) $100,000,000 for fiscal year 2006.

(B) $250,000,000 for fiscal year 2007.

(C) $400,000,000 for fiscal year 2008.

(4) Definitions

For the purposes of this subsection:

(A) The term ''approved renewable fuels'' are fuels and components of fuels that have been approved by the Department of Energy, as defined in section 13211 of this title, which have been made from renewable biomass.

(B) The term ''renewable biomass'' is, as defined in Presidential Executive Order 13134, published in the Federal Register on August 16, 1999, any organic matter that is available on a renewable or recurring basis (excluding old-growth timber), including dedicated energy crops and trees, agricultural food and feed crop residues, aquatic plants, animal wastes, wood and wood residues, paper and paper residues, and other vegetative waste materials. Old-growth timber means timber of a forest from the late successional stage of forest development.

(t) Blending of compliant reformulated gasolines

(1) In general

Notwithstanding subsections (h) and (k) and subject to the limitations in paragraph (2) of this subsection, it shall not be a violation of this part[13] for a gasoline retailer, during any month of the year, to blend at a retail location batches of ethanol-blended and non-ethanol-blended reformulated gasoline, provided that—

(A) each batch of gasoline to be blended has been individually certified as in compliance with subsections (h) and (k) prior to being blended;

(B) the retailer notifies the Administrator prior to such blending, and identifies the exact location of the retail station and the specific tank in which such blending will take place;

(C) the retailer retains and, as requested by the Administrator or the Administrator's designee, makes available for inspection such certifications accounting for all gasoline at the retail outlet; and

(D) the retailer does not, between June 1 and September 15 of each year, blend a batch of VOC-controlled, or ''summer'', gasoline

[12] So in original. No subsec. (p) has been enacted.

[13] See References in Text note below.

STANDING ADDENDUM

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

GROWTH ENERGY, Petitioner, v. ENVIRONMENTAL PROTECTION AGENCY and MICHAEL S. REGAN, Administrator, Respondents.	Case No. 22-1126 (and consolidated cases)

DECLARATION OF EMILY SKOR

1. My name is Emily Skor. I am over 18 years of age and am competent to give this Declaration. This Declaration is based on personal knowledge. I am submitting this Declaration on behalf of the petitioner Growth Energy in the above-captioned matter.

2. I serve as the CEO of Growth Energy, a position I have held since May 2016. Growth Energy is a national trade association dedicated to promoting the commercial production and use of renewable fuels, particularly conventional and cellulosic ethanol. Growth Energy's 91 producer members make nearly 9 billion gallons of ethanol that is used to meet the requirements of the Renewable Fuel Standard ("RFS") under the Clean Air Act.

3. Growth Energy's membership includes the following producers of conventional ethanol: Absolute Energy, L.L.C.; Ace Ethanol LLC; Adkins Energy LLC; Archer Daniels Midland Co.; Big River Resources Boyceville, LLC; Big River Resources Galva, LLC; Big River Resources West Burlington, LLC; Big River United Energy, LLC; Bridgeport Ethanol, LLC; Bushmills Ethanol; Cardinal Ethanol, LLC; CHS - Annawan; Conestoga Energy Partners, LLC; Corn, LP; Denco II, LLC; Didion Ethanol LLC; ELEMENT, LLC; Fox River Valley Ethanol LLC; Front Range Energy, LLC; Glacial Lakes Energy, LLC; Golden Grain Energy, LLC; Greenfield Global Winnebago, LLC; Husker Ag, LLC; ICM, Inc.; Iroquois Bio-Energy Company, LLC; Kansas Ethanol, LLC; Marquis Energy - Wisconsin, LLC; Marquis Energy, LLC; Mid America Bio Energy & Commodities, L.L.C.; Midwest Ag Energy; Nebraska Corn Processing, LLC; Pennsylvania Grain Processing, LLC; Pine Lake Corn Processors, LLC; POET Bioprocessing; Redfield Energy, LLC; Siouxland Energy Cooperative; Sterling Ethanol, LLC; Tharaldson Ethanol Plant I, LLC; The Andersons; Three Rivers Energy; Western New York Energy, LLC; Western Plains Energy, LLC; White Energy Hereford, LLC; White Energy Plainview, LLC; Yuma Ethanol, LLC.

4. In the market for transportation fuel, renewable fuel competes with petroleum-based fuel. Any renewable fuel that is used for transportation purposes displaces the petroleum-based fuel that would otherwise be used.

5. The RFS annual volume requirements define the minimum amount of renewable fuel that must be used in the nation's transportation fuel supply, i.e., the minimum nationwide demand for renewable fuel.

6. Ethanol is, by far, the most commonly used renewable fuel in the transportation fuel market. Roughly three-quarters of the renewable fuel used to comply with the RFS annually is ethanol. And conventional ethanol accounts for roughly 95% of the renewable fuel used to meet the RFS's "implied non-advanced" requirement, i.e., the difference between the required advanced level and the required total level.

7. If EPA's "alternative compliance" actions challenged in this lawsuit are affirmed, thirty-one small refineries whose exemption petitions have been denied will nonetheless not be required to retire additional RINs to meet their restored 2016-2018 obligations. That would reduce the amount of renewable fuel that the refineries are required to blend into transportation fuel by about 1.63 billion ethanol-equivalent gallons. Correspondingly, that would reduce the demand for renewable fuel by an equivalent amount.

8. This is so even though the years 2016-2018 are in the past. EPA could set future supplemental obligations, as it has done on other occasions. To meet such a supplemental obligation, the refineries would have to retire more RINs; if there are not enough RINs already available, they would have to use more renewable fuel to

make more RINs available. Any RINs used to meet the restored obligations would not be available to meet other future RFS obligations, and thus additional renewable fuel would have to be used to meet those obligations. Thus, by freeing the thirty-one refineries from having to meet their restored obligations, EPA's "alternative compliance" actions eliminate the market's need to use a corresponding amount of renewable fuel to meet some future RFS obligations.

9. Consequently, EPA's "alternative compliance" actions substantially reduce the future demand for Growth Energy's members' renewable-fuel products for use in the nation's supply of transportation fuel.

10. Consequently, EPA's "alternative compliance" actions will cause serious economic injury to Growth Energy's members.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct based on my personal knowledge and information prepared by Growth Energy.

Executed this 10th day of April 2023.

Emily Skor