No. 20-472

In the Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, ET AL., PETITIONERS

v.

RENEWABLE FUELS ASSOCIATION, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Under the renewable fuel standard program in the Clean Air Act, 42 U.S.C. 7545(*o*), all small refineries were initially exempt from the obligations that the program otherwise imposes on refiners and importers of gasoline and diesel fuel. Subparagraph (A) of the relevant provision established a blanket exemption for small refineries until 2011, and provided for the U.S. Environmental Protection Agency (EPA) to "extend" that exemption "for a period of not less than 2 additional years" based on the results of a study the Department of Energy was required to conduct. 42 U.S.C. 7545(*o*)(9)(A)(i) and (ii). Subparagraph (B) authorizes small refineries to petition EPA "at any time * * * for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i). The question presented is as follows:

Whether Section 7545(*o*)(9)(B)(i) authorizes EPA to grant an "extension of the exemption under subparagraph (A)" to a small refinery that has not received continuous prior extensions of the initial exemption provided in Section 7545(*o*)(9)(A).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-94a) is reported at 948 F.3d 1206. The orders of the U.S. Environmental Protection Agency under review (Pet. Supp. App. 1a-46a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2020. Petitions for rehearing were denied on April 7, 2020 (Pet. App. 95a-96a). The petition for a writ of certiorari was filed on September 4, 2020, and was granted on January 8, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 7545(*o*)(9) of Title 42 of the United States Code provides in relevant part:

(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.

42 U.S.C. 7545(*o*)(9)(A)-(B). Other pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-35a.

STATEMENT

Under 2005 and 2007 amendments to the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, transportation fuel sold in the United States must contain specified amounts of certain renewable fuels. Until 2011, small refineries were categorically exempt from those requirements. See 42 U.S.C. 7545(*o*)(9)(A)(i). That exemption was extended for some small refineries based on a finding by the Secretary of Energy that compliance would subject them to "disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(A)(ii). A small refinery "may at any time petition the" Environmental Protection Agency (EPA) "for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i). In 2017 and 2018, EPA granted exemption-extension requests submitted by three small refineries (petitioners in this Court) that had previously received the blanket

exemption and, in some cases, the initial two-year extension of that exemption, but had then not received further extensions in the intervening years. Pet. Supp. App. 1a-46a. The court of appeals vacated EPA's grant of the exemption-extension requests on multiple grounds and remanded to the agency. Pet. App. 1a-94a.

A. Statutory And Regulatory Background

1. a. In 2005 and 2007, responding to "profound concerns in the Congress" and the Executive Branch over the United States' dependence on foreign oil, S. Rep. No. 78, 109th Cong., 1st Sess. 6 (2005), Congress passed and President George W. Bush signed significant energy legislation, see Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Energy Independence and Security Act of 2007 (EISA), Pub. L. No. 110-140, 121 Stat. 1492. Those statutes established numerous measures to boost domestic energy production, reduce energy consumption through conservation and greater efficiency, and diversify the energy supply by supporting alternatives to fossil fuels—all with the stated goal of "mov[ing] the United States toward greater energy independence and security." EISA, 121 Stat. 1492.

b. Of central relevance here, Congress sought "to increase the production of clean renewable fuels," 121 Stat. 1492, by amending the CAA to include a renewable fuel standard (RFS) program. The RFS program requires that transportation fuel sold in the United States (*e.g.*, gasoline and diesel) contain specified quantities of certain renewable fuels that are typically derived from agricultural products prevalent in the United States. See 42 U.S.C. 7545(*o*)(1)(J); Pet. App. 11a-12a. The required quantities are set by statute and increase annually through 2022, see 42 U.S.C. 7545(*o*)(2)(B), subject

to various waiver and adjustment provisions, see, *e.g.*, 42 U.S.C. 7545(*o*)(3)(C) and (6)-(8).

To administer the RFS, EPA annually determines the percentage of renewable fuels that gasoline and diesel must contain. 42 U.S.C. 7545(*o*)(3)(B); see 40 C.F.R. 80.1405. Specified participants in the fuel industry—as relevant here, refineries—then calculate their individual renewable-fuel obligations by applying the percentage standards set by EPA to the volumes of gasoline and diesel that they produce. 40 C.F.R. 80.1406-80.1407. Refineries comply with their obligations by submitting to EPA a sufficient number of credits, known as Renewable Identification Numbers (RINs), that correspond to particular quantities of renewable fuel. 40 C.F.R. 80.1425-80.1427; see 42 U.S.C. 7545(*o*)(5).

A refinery can satisfy its RFS obligations either by blending the required quantity of renewable fuels into gasoline and diesel or by purchasing a sufficient number of RINs from other entities that blend renewable fuels. See 40 C.F.R. 80.1427-80.1429. The RFS program thus "facilitate[s] flexible and cost-effective compliance" while ensuring increased production of renewable fuels. *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 699 (D.C. Cir. 2017) (Kavanaugh, J.).

c. The RFS program includes several provisions specific to small refineries. A "small refinery" is a refinery "for which the average aggregate daily crude oil throughput for a calendar year * * * does not exceed 75,000 barrels." 42 U.S.C. 7545(*o*)(1)(K). The key provisions applicable to small refineries are contained in subparagraphs (A) to (D) of Section 7545(*o*)(9).

Subparagraph (A) of Section 7545(*o*)(9) is titled "Temporary exemption." Clause (i) of that subparagraph established a blanket exemption for the first five

years of the program by providing that the RFS annual volume requirements "shall not apply to small refineries until calendar year 2011." 42 U.S.C. 7545(*o*)(9)(A)(i). Clause (ii) of subparagraph (A), titled "Extension of exemption," directed the Department of Energy (DOE) to conduct a study by the end of 2008 "to determine whether compliance with" the RFS annual volume requirements "would impose a disproportionate economic hardship on small refineries." 42 U.S.C. 7545(*o*)(9)(A)(ii)(I). "In the case of a small refinery that" DOE determined "would be subject to a disproportionate economic hardship if required to comply with" those requirements, EPA was directed to "extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years," *i.e.*, until at least 2013. 42 U.S.C. 7545(*o*)(9)(A)(ii)(II).

Subparagraph (B) is titled "Petitions based on disproportionate economic hardship." Its first clause states that a small refinery "may at any time petition [EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i). In evaluating such a petition, EPA must consult with DOE and consider the DOE study "and other economic factors." 42 U.S.C. 7545(*o*)(9)(B)(ii). EPA "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." 42 U.S.C. 7545(*o*)(9)(B)(iii).

Subparagraphs (C) and (D) provide direction regarding small refineries that "waive[] the exemption under subparagraph (A)." 42 U.S.C. 7545(*o*)(9)(C)-(D). Any such refinery "shall be subject to the" RFS annual volume requirements after notifying EPA of its waiver, 42

U.S.C. 7545(*o*)(9)(D), and may earn credits for satisfying those requirements in the year after it provides notification, see 42 U.S.C. 7545(*o*)(9)(C).

2. a. From 2006 to 2011, all small refineries in existence at that time (about 60 total) were exempt from the RFS annual volume requirements under the blanket exemption in Section 7545(*o*)(9)(A)(i). See Administrative Record (A.R.) 490.

b. In 2009, DOE completed the statutorily mandated study "to determine whether compliance with the" RFS annual volume requirements "would impose a disproportionate economic hardship on small refineries." 42 U.S.C. 7545(*o*)(9)(A)(ii)(I); see Pet. App. 21a. DOE concluded that compliance with those requirements would not impose a disproportionate economic hardship on any small refinery because the market for RINs gave small refineries an affordable way to comply, even if they could not develop the infrastructure necessary to blend renewable fuel themselves. See Pet. App. 21a.

DOE reconsidered that position after a "report from the Senate Committee on Appropriations criticized" the 2009 study and directed DOE to reopen the matter. Pet. App. 21a. In 2011, DOE issued a revised study that identified 13 small refineries that would suffer disproportionate economic hardship if required to comply with the RFS annual volume requirements. See A.R. 529. As directed by Section 7545(*o*)(9)(A)(ii)(II), EPA extended for two years the exemptions for those 13 small refineries. See Pet. App. 22a.

Separately, pursuant to Section 7545(*o*)(9)(B)(i), EPA in 2011 granted petitions for "extension[s] of the exemption under subparagraph (A)" for 11 other small refineries that were not identified in the DOE study. Thus, a total of 24 small refineries received extensions

of the initial categorical exemption. See EPA, *RFS Small Refinery Exemptions*, https://go.usa.gov/xs6NS.

c. Over the next three years, EPA—in consultation with DOE—granted a decreasing number of petitions for extensions of the exemption pursuant to Section 7545(*o*)(9)(B)(i). EPA granted eight such petitions for each 2013 and 2014, and seven for 2015. Pet. App. 26a.

In late 2015, the Chairman of the House Committee on Appropriations submitted an explanatory statement criticizing the methodology DOE had used to determine whether small refineries faced disproportionate economic hardship. Pet. App. 23a-24a. That statement expressed the view that DOE had improperly interpreted the term "disproportionate economic hardship" to require a threat to a small refinery's viability. See *ibid.* The statement "reminded" DOE that "the RFS program may impose a disproportionate economic hardship on a small refinery even if the refinery makes enough profit to cover the cost of complying with the program." 161 Cong. Rec. H9693, H10105 (Dec. 17, 2015).

In 2016, the Senate Committee on Appropriations issued a report echoing those criticisms and stating that DOE's method of determining disproportionate economic hardship was "inconsistent with congressional intent." S. Rep. No. 281, 114th Cong., 2d Sess. 70. In 2017, an explanatory statement submitted by the Chairman of the House Committee on Appropriations expressed agreement with the Senate committee report. 163 Cong. Rec. H3327, H3884 (May 3, 2017).

d. In 2017, EPA began to grant more petitions for extensions of the exemption pursuant to Section 7545(*o*)(9)(B)(i). See Pet. App. 25a-26a. EPA granted 19 such petitions for 2016, 35 for 2017, and 32 for 2018. EPA, *RFS Small Refinery Exemptions*.

As "the number of granted petitions began to rise, so too did the amount of fuel exempted from" the RFS annual volume requirements. Pet. App. 26a. In 2017, for example, the amount of renewable fuel exempted from annual compliance was more than six times higher than it had been just two years earlier. *Id.* at 27a. That "significant decline in the required use of renewable fuel volumes * * * decreased the incentives for the production and use of renewable fuels." App., *infra*, 37a.

B. Proceedings Below

1. Petitioners are three small refineries located in Wyoming, Utah, and Oklahoma, respectively. See Pet. App. 29a, 32a, 34a. Each received the blanket exemption that was available to all small refineries under Section 7545(*o*)(9)(A)(i) from 2006 to 2011. See *ibid.* One of the petitioners—HollyFrontier Woods Cross Refining LLC (Woods Cross)—did not receive any extension of the initial blanket exemption. *Id.* at 32a. The other two petitioners—HollyFrontier Cheyenne Refining LLC (Cheyenne) and Wynnewood Refining Company, LLC (Wynnewood)—received two-year extensions of that exemption pursuant to Section 7545(*o*)(9)(A)(ii) because the 2011 DOE study had identified them as small refineries that would be subject to disproportionate economic hardship if they were required to comply with the RFS annual volume requirements. See *id.* at 29a, 34a.

2. Without receiving further extensions in the intervening years after the blanket exemption and the initial two-year extension had lapsed, petitioners in 2017 and 2018 each submitted petitions to EPA "for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i); see Pet. App. 28a. In evaluating each

petition, EPA consulted with DOE, as required by Section 7545(*o*)(9)(B)(ii). Based on its review of petitioners' financial submissions, DOE recommended that EPA deny Cheyenne's petition and grant 50% relief to Woods Cross and Wynnewood. See Pet. App. 30a-35a.

EPA granted all three petitions in full, concluding that each petitioner had demonstrated disproportionate economic hardship. See Pet. App. 28a-36a; Pet. Supp. App. 1a-46a. EPA explained that "a refinery does not experience disproportionate economic hardship simply because it may need to purchase a significant percentage of its RINs for compliance from other parties." Pet. Supp. App 9a n.5. The agency further explained that small refineries can recoup their compliance costs even if RIN prices rise, "because [higher] RIN prices lead to higher sales prices * * * for the refineries' blendstock, resulting in no net cost of compliance for the refinery." *Ibid.* EPA stated, however, that disproportionate economic hardship can "be the result of other economic factors, including a difficult year for the industry as a whole." *Id.* at 15a n.10, 29a; see Pet. App. 30a-36a.[1]

3. Several groups of renewable-fuel producers (private respondents in this Court) sought review of EPA's grant of the three petitions. Pet. App. 3a. Petitioners intervened to defend EPA's orders. See *ibid.* The Tenth Circuit vacated the orders and remanded to EPA for further proceedings. See *id.* at 1a-94a.

a. The court of appeals held that the private respondents had Article III standing to sue on behalf of their members, who compete with petitioners in the transportation-fuel market. Pet. App. 36a-54a. The

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[1] After granting the petitions at issue here, EPA separately granted Cheyenne's petition for the 2015 compliance year. Cf. Pet. App. 29a-30a.

court also held that the private respondents' challenge was timely and ripe. *Id.* at 54a-61a, 75a-80a.

b. On the question presented in this Court, the court of appeals held that EPA could not grant "an extension of the exemption under subparagraph (A)," 42 U.S.C. 7545(*o*)(9)(B)(i), to any small refinery that was not currently exempt from RFS annual volume requirements under subparagraph (A), see Pet. App. 65a-68a. The court explained that, under "ordinary definitions of 'extension'" and "common sense," the "subject of an extension must be in existence before it can be extended." *Id.* at 67a. Thus, when a small refinery has not continuously received extensions of its exemption under subparagraph (A) in prior years, the refinery "is ineligible for an extension" under Section 7545(*o*)(9)(B)(i), "because at that point there is nothing to" extend. *Ibid.* The court explained that its interpretation reflected Congress's design to "funnel[] small refineries toward compliance over time," an approach that strikes a "balance" between addressing economic hardship and achieving the "aggressive and 'market forcing'" targets established in the RFS program. *Id.* at 68a, 70a.

c. The court of appeals identified two additional grounds for vacating EPA's orders granting the small refineries' petitions. First, the court held that EPA may not grant relief under Section 7545(*o*)(9)(B)(i) based on disproportionate economic hardship that results from "something other than" required compliance with the RFS obligations. Pet. App. 82a. The court based that holding on the connection between Section 7545(*o*)(9)(B)(i) and Section 7545(*o*)(9)(A)(ii), which authorizes an exemption extension when a small refinery would "be subject to a disproportionate economic hardship *if required to comply*" with the RFS annual volume

requirements. *Ibid.* (emphasis added; citation omitted). Because the court concluded that EPA had granted the petitions at issue here based on economic hardship caused by other factors, the court vacated EPA's decisions. *Id.* at 83a-85a.

Second, the court of appeals held that EPA had acted arbitrarily and capriciously by failing to address the agency's prior stated position that refineries "pass through most or all of their RIN purchase costs" to customers through the price of the fuel the small refineries sell. Pet. App. 89a; cf. Pet. Supp. App. 9a n.5. The court observed that EPA "did not analyze the possibility of RIN cost recoupment when it granted" petitioners' requests for exemption extensions and "did not explain whether, to what extent, or why the pass-through principle was inapplicable." Pet. App. 89a-90a.

C. Subsequent Developments

1. Shortly after the court of appeals' decision, petitioners and other small refineries asked EPA to grant them exemptions for all prior years in which they had been required to comply with the RFS, even if they had not sought exemptions at the time and had successfully complied. See EPA, *Denial of Small-Refinery Gap-Filling Petitions* 3, https://go.usa.gov/xseBn. EPA denied a large group of those petitions in September 2020. *Id.* at 4. The agency questioned whether it had authority to grant petitions submitted many years after the compliance periods at issue. *Id.* at 3. EPA further determined that, even assuming that it had such authority, the petitions should be denied because the refineries could not establish disproportionate economic hardship for years in which they had "consistently complied with their annual RFS obligations while continuing to participate in the refining industry." *Id.* at 4.

2. In September 2020, petitioners filed a petition for a writ of certiorari seeking review of the court of appeals' interpretation of the term "extension of the exemption under subparagraph (A)" in Section 7545(*o*)(9)(B)(i). The government contended that this Court should not grant review because, *inter alia*, no circuit conflict existed and resolution of the question presented might not affect the case's outcome given the court of appeals' unchallenged alternative holdings. Br. in Opp. 8-13. The government did not address the merits of the court of appeals' decision but stated that it did "not violate any 'core principle of statutory interpretation.'" *Id.* at 10 (brackets omitted) (quoting Pet. 21).

3. On January 8, 2021, this Court granted certiorari. EPA then engaged in a "detailed review" of the court of appeals' decision and the agency's position. App., *infra*, 36a. EPA explained that, "following the change of Administration," it had completed its "careful review" and reached the "considered assessment that the Tenth Circuit's reasoning better reflects the statutory text and structure, as well as Congress's intent in establishing the RFS program." *Id.* at 36a, 39a. Because this Court had granted certiorari to review the Tenth Circuit's holding, however, EPA has not taken any action on pending exemption-extension petitions based on its reconsidered statutory interpretation.

SUMMARY OF ARGUMENT

The court of appeals correctly held that a small refinery cannot obtain an "extension of the exemption under subparagraph (A)," 42 U.S.C. 7545(*o*)(9)(B)(i), unless it has previously maintained such an exemption.

A. Section 7545(*o*)(9)(B)(i) allows a small refinery to petition "for an extension of the exemption under sub-

paragraph (A) for the reason of disproportionate economic hardship." Under the ordinary meaning of that language, a small refinery can receive an "extension of the exemption under subparagraph (A)" only if it has a current "exemption under subparagraph (A)." In 2011, all small refineries could seek an extension of the "exemption under subparagraph (A)," because all small refineries had that exemption for the first five years of the RFS program. But after that, only small refineries that had maintained an "exemption under subparagraph (A)" could lawfully receive extensions of that exemption, because the ordinary meaning of "extension" requires the existence of the thing to be extended.

The specific statutory context in which Section 7545(*o*)(9)(B)(i) appears, and the structure and purpose of the overall RFS program, support that commonsense interpretation. Section 7545(*o*)(9)(A)(ii), the clause that immediately precedes Section 7545(*o*)(9)(B)(i), uses "exten[sion]" in a way that petitioners concede (Br. 26) requires the existence of an exemption. The close connections between Sections 7545(*o*)(9)(A)(ii) and (B)(i)—which appear back-to-back, have the same title, address the same actor, and concern the same subject—strongly indicate that the term "extension" has the same meaning in both places. Making such an "extension" available only to the diminishing number of small refineries with an existing "exemption under subparagraph (A)" advances the RFS program's goal of "increas[ing] the production of clean renewable fuels," EISA, 121 Stat. 1492, to reduce dependence on foreign oil. And that reading makes sense of the statutory scheme. By providing an initial, "temporary" exemption that can be extended only under specified circumstances, Congress struck a sensible balance, giving small refineries time

to develop compliance strategies while maintaining the ultimate goal of universal compliance.

B. Petitioners advance (Br. 23-32) two alternative interpretations of Section 7545(*o*)(9)(B)(i), but neither has merit. The first is that the provision uses "extension" in a non-temporal sense—*i.e.*, to mean "grant." But that is not how Congress used the same word in the immediately preceding clause, and it is a poor fit with other RFS provisions. Petitioners' second interpretation—that a small refinery may obtain an "extension of the exemption under subparagraph (A)" by reacquiring an exempt status that it lost years before—is at best a strained understanding of the term "extension," and petitioners identify no sound reason to depart from the word's ordinary meaning.

Petitioners contend (Br. 32-39) that other terms in Section 7545(*o*)(9)(B)(i) shed light on the meaning of "extension." But the terms they highlight—"at any time," "small refinery," and "disproportionate economic hardship"—describe *when*, *to whom*, and *why* EPA can grant an "extension of the exemption under subparagraph (A)," not *what* such an "extension" is.

Petitioners' invocation (Br. 39-46) of statutory structure and purpose is also unpersuasive. They rely on the RFS program's rising annual volume requirements as a basis for renewed hardship relief, but that feature of the statute instead demonstrates that Congress intended a steady increase in renewable-fuel production, subject to a "temporary" small-refinery exemption that can be extended only in narrow circumstances. And petitioners' complaints about the burdens of RFS compliance are overstated, since the costs of such compliance are reflected in the marketwide price of refined products.

Petitioners argue (Br. 46-50) that a 2014 EPA regulation supports their view of the term "extension of the exemption under subparagraph (A)," and that the Court should defer to the interpretive judgment that the rule purportedly manifests. That argument is unsound. The 2014 rule defined the statutory term "small refinery," but neither the rule nor its preamble discussed the question that is presented here. In any event, because EPA now disagrees with petitioners' reading of the statutory term at the center of this case, deference to a purported prior agency judgment would be especially unwarranted.

ARGUMENT

Under 42 U.S.C. 7545(*o*)(9)(B)(i), a "small refinery may at any time petition" EPA "for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." In the court of appeals, petitioners and the government contended that Section 7545(*o*)(9)(B)(i) allows EPA to grant a petition submitted by any small refinery that establishes disproportionate economic hardship. Petitioners renew that argument here (Br. 20-46), and it has some support in post-enactment statements by congressional committees, see p. 8, *supra*. Based on the statutory text, context, structure, and purpose, however, the court of appeals unanimously rejected that reading. The government has concluded that the court's analysis is correct, and that EPA cannot grant "an extension of the" small-refinery exemption to a refinery that has not previously maintained its exemption, because in such a circumstance there is no exemption to extend. 42 U.S.C. 7545(*o*)(9)(B)(i); see App., *infra*, 36a-39a.

I. EPA MAY NOT GRANT AN EXTENSION OF THE SMALL-REFINERY EXEMPTION TO A PETITIONER THAT HAS NOT MAINTAINED THAT EXEMPTION

Congress authorized small refineries to be exempt from the RFS annual volume requirements in three distinct but interrelated circumstances. First, under the first clause of subparagraph (A), every small refinery was exempt from those requirements until 2011 unless it waived that exemption. 42 U.S.C. 7545(*o*)(9)(A)(i); see 42 U.S.C. 7545(*o*)(9)(C)-(D). Second, under the second clause of subparagraph (A)—titled "Extension of exemption"—EPA was required to "extend the exemption under clause (i) for [a] small refinery for a period of not less than 2 additional years" if DOE concluded that the refinery "would be subject to a disproportionate economic hardship if required to comply with" the requirements. 42 U.S.C. 7545(*o*)(9)(A)(ii). Finally, under the first clause of subparagraph (B)—also titled "Extension of exemption"—a "small refinery may at any time petition" EPA "for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i).

Under the most straightforward reading of the disputed statutory term, an "extension of the exemption under subparagraph (A)" is a temporal lengthening of an exemption that is in place. Thus, if a small refinery retains an "exemption under subparagraph (A)," EPA can grant a petition for an "extension of th[at] exemption." But if a small refinery has not maintained its "exemption under subparagraph (A)," no "extension of th[at] exemption" is possible.

That result follows not only from the ordinary understanding of an "extension," but also from the RFS program's structure and design. Because the "exemption

under subparagraph (A)" is a "*[t]emporary* exemption," 42 U.S.C. 7545(*o*)(9)(A) (emphasis added), a small refinery capable of satisfying the RFS annual volume requirements without disproportionate economic hardship cannot receive an extension of that exemption. The small-refinery provisions thus "afford small refineries a bridge to compliance" in the early years of the program, "with an eye toward eventual compliance with the renewable fuels program for all refineries." *Hermes Consol., LLC* v. *EPA*, 787 F.3d 568, 572, 578 (D.C. Cir. 2015); see Pet. App. 68a-71a.

A. The Statutory Text And Context Indicate That An "Extension Of The Exemption Under Subparagraph (A)" Can Be Granted Only To A Small Refinery That Has Maintained Its Exemption Under Subparagraph (A)

Section 7545(*o*)(9)(B)(i) states that "a small refinery may at any time petition [EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." Because the statute does not define the term "extension of the exemption under subparagraph (A)," this Court should "give the term its ordinary meaning." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). That meaning is straightforward: an "extension of the exemption under subparagraph (A)" is a temporal continuation of a subparagraph (A) exemption that remains in place at the time the extension is sought. 42 U.S.C. 7545(*o*)(9)(B)(i); see Pet. App. 66a-68a.

1. The statutory provision at issue here uses the term "extension" in its temporal sense

Section 7545(*o*)(9)(B)(i) uses "extension" in its temporal sense—*i.e.*, to mean "an increase in length of time." *Webster's Third New International Dictionary*

804 (2002); see, *e.g.*, *Black's Law Dictionary* 622 (8th ed. 2004) ("[a] period of additional time"); Pet. App. 66a-67a (citing similar definitions). The statutory context reinforces that understanding. Section 7545(*o*)(9)(B)(i) authorizes an "extension of the exemption under subparagraph (A)," and the subparagraph (A) exemption has a specified duration: all small refineries were exempt from the RFS annual volume requirements "until calendar year 2011," and some remained exempt for "a period of not less than 2 additional years." 42 U.S.C. 7545(*o*)(9)(A)(i) and (ii)(II). In authorizing an "extension of the" time-based "exemption under subparagraph (A)," Section 7545(*o*)(9)(B)(i) addresses the time period the exemption can remain in place.

The temporal meaning of "extension" in Section 7545(*o*)(9)(B)(i) is even clearer when that provision is read in conjunction with the immediately preceding clause, Section 7545(*o*)(9)(A)(ii). That clause—which, like Section 7545(*o*)(9)(B)(i), is titled "Extension of exemption"—directed EPA to "extend the exemption under" Section 7545(*o*)(9)(A)(i) "for a period of not less than 2 additional years" if DOE found that compliance with the RFS annual volume requirements would subject a particular small refinery to disproportionate economic hardship. 42 U.S.C. 7545(*o*)(9)(A)(ii)(II). The "exten[sion]" referenced in that clause unmistakably is a continuation in time—specifically, "a period of not less than 2 additional years." *Ibid.* And because all small refineries in existence at the time were exempt from RFS annual volume requirements until 2011, the "extension[s]" authorized by Section 7545(*o*)(9)(A)(ii) necessarily effected a temporal lengthening of exemptions that were already in place.

"[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Taniguchi*, 566 U.S. at 571 (citation and internal quotation marks omitted). That rule has particular force here, where the common term appears in "neighboring provisions," *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017), that have the same title ("Extension of exemption"), address the same actor (EPA), concern the same subject (when an exemption can be extended), and contain an explicit cross-reference. See *Milner* v. *Department of the Navy*, 562 U.S. 562, 570 (2011) (reading the same word to have the same meaning in two provisions that use the word "in the exact same way").

The time-based understanding of "extension" in Section 7545(*o*)(9)(B)(i) "is further clarified by" Congress's use of the term in "the rest of the statute." *FCC* v. *AT&T Inc.*, 562 U.S. 397, 407 (2011). For example, a provision titled "Extension of effective date based on determination of insufficient supply" authorizes EPA to "extend the effective date" of certain regulations "for not more than 1 year"—a usage that is necessarily time-based. 42 U.S.C. 7545(h)(5)(C)(ii). Similarly, another provision addressing the RFS program authorizes EPA to reduce the annual biodiesel requirement "for up to a 60-day period," 42 U.S.C. 7545(*o*)(7)(E)(ii), and then provides in a clause titled "Extensions" that EPA can make the reduction effective "for up to an additional 60-day period," 42 U.S.C. 7545(*o*)(7)(E)(iii); see 42 U.S.C. 7545(k)(6)(A)(ii) and (B)(iii) (other time-based uses of "extension"); 42 U.S.C. 7545(m)(3)(C)(ii) (same). Those additional time-based uses of "extension" elsewhere in Section 7545 reinforce the inference that "extension" in

Section 7545(*o*)(9)(B)(i) "carr[ies] 'the same meaning.'" *Henson*, 137 S. Ct. at 1723 (citation omitted).

2. The term "extension" includes a continuity element

Read in accordance with its usual meaning, the term "extension of the exemption under subparagraph (A)" in Section 7545(*o*)(9)(B)(i) also includes an element of continuity. Dictionary "definitions of 'extension,' along with common sense, dictate that the subject of an extension must be in existence before it can be extended." Pet. App. 67a (collecting definitions).

That concept of an "extension" squares with "how we use the word in everyday parlance." *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 454 (2012). Many common usages of "extension"—from "extension cord" or "nail extension" to legal terms like "contract extension" or "briefing extension"—imply a continuing connection with the thing to be extended. See, *e.g.*, William C. Anderson, *A Dictionary of Law* 437 (1996) (noting that "extension" "[i]mports the continuance of an existing thing"). It is common, moreover, to speak of multiple extensions back-to-back, so long as continuity is maintained. Thus, a homeowner can stretch together multiple extension cords, as in a string of Christmas lights. Or a litigant who requires months of additional briefing time can obtain it through a series of 30-day extensions.

The ordinary concept of an extension, however, does not include a resumption of some state or activity after a break in continuity. For example, if someone "subscribes to a news service in years one through five, allows the subscription to lapse in years six and seven, and goes back to the news service in year eight, we usually do not say that year eight was an 'extension' of the subscription from years one through five." Pet. App.

67a. An athlete that agrees to a continuation of an existing contract is said to sign an "extension," but an athlete that leaves as a free agent and eventually returns to finish his career with his original team is said to sign a new contract with that team, not an extension.[2]

The small-refinery provisions use the term "extension" in the ordinary manner. As noted above, Section 7545(*o*)(9)(A)(i) initially exempted all small refineries from the RFS "until calendar year 2011." Section 7545(*o*)(9)(A)(ii)—which immediately precedes Section 7545(*o*)(9)(B)(i) and is identically titled, "Extension of exemption"—required DOE to conduct a study "[n]ot later than December 31, 2008," the findings of which resulted in mandatory extensions of the initial exemption for some small refineries. The statutory directive that DOE complete its study in 2008, well before the initial blanket exemption was to expire in 2011, reflects Congress's expectation that the study-based "[e]xtension" required by Section 7545(*o*)(9)(A)(ii) would occur without a break in continuity.

Similarly, Section 7545(*o*)(7)(E)(iii)—titled "Extensions"—authorized EPA to order a reduction in the RFS biodiesel requirement "for up to an additional 60-day period" if the circumstances supporting the initial waiver were "continuing beyond the [initial waiver's] 60-day period." 42 U.S.C. 7545(*o*)(7)(E)(iii). There, too, the concept of an extension necessarily encompassed continuity with the thing to be extended. The most natural

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[2] See, *e.g.*, Scott Cacciola, *The One-Day Contract, a Last Hurrah for Athletes*, N.Y. Times, July 30, 2013 (describing, *inter alia*, how Hideki Matsui returned to the New York Yankees for a "one-day contract" in 2013 after having left the team in 2009 and then played for other teams), https://www.nytimes.com/2013/07/31/sports/the-one-day-contract-a-last-hurrah-for-athletes.html.

inference is that Section 7545(*o*)(9)(B)(i) uses the term "extension" to mean the same thing—to authorize EPA to grant a petition for an "extension of the exemption under subparagraph (A)" if the petitioner has maintained a continuing "exemption under subparagraph (A)." See Pet. App. 67a.

3. Petitioners were not eligible for an "extension of the exemption under subparagraph (A)" in 2017 and 2018

The foregoing textual and contextual indicators of Section 7545(*o*)(9)(B)(i)'s meaning support the court of appeals' conclusion: EPA can grant a temporal continuation of a small refinery's "exemption under subparagraph (A)" if, but only if, the small refinery has maintained its original exemption until it petitions for the extension.

Thus, in 2011, Section 7545(*o*)(9)(B)(i) authorized EPA to grant "an extension of the exemption under subparagraph (A)" to any small refinery that sought one and satisfied the hardship requirement, because at that time all small refineries (about 60) had an existing "exemption under subparagraph (A)" by virtue of the initial blanket exemption. In 2013, Section 7545(*o*)(9)(B)(i) authorized EPA to grant "an extension of the exemption under subparagraph (A)" to a small refinery that *either* had received a two-year extension of the initial exemption under Section 7545(*o*)(9)(A)(ii) based on the DOE study (a category that included 13 small refineries) *or* had received two years of extensions of the initial exemption pursuant to Section 7545(*o*)(9)(B)(i) based on EPA's own findings (a category that included 11 additional small refineries). See p. 7, *supra*. Through either route, the petitioning refinery had maintained an

"exemption under subparagraph (A)" and therefore could receive an "extension of th[at] exemption."

After that, Section 7545(*o*)(9)(B)(i) authorized EPA to grant an "exemption under subparagraph (A)" to any small refinery that continued to maintain its exemption. In 2014, five small refineries—the ones that had maintained an exemption since the start of the RFS program—were eligible for extensions. In 2015, the number was three, and in 2016 it was two.

Although EPA typically treats as confidential the identities of the small refineries that receive exemption extensions, see Pet. App. 53a, it is undisputed that petitioners were not among the small refineries that had maintained exemptions through the years for which they sought extensions, see *id.* at 75a. Woods Cross did not obtain an extension of its exemption after the initial blanket exemption expired in 2011. *Ibid.* Cheyenne and Wynnewood obtained two-year extensions of the initial blanket exemption by virtue of the 2011 DOE study, but they did not obtain further extensions in 2013. *Ibid.* Thus, when petitioners sought extensions in 2017 and 2018, EPA had no authority to grant their requests, because petitioners had no "exemption under subparagraph (A)" to "exten[d]." 42 U.S.C. 7545(*o*)(9)(B)(i).

B. The Statutory Structure And Purpose Confirm That An "Extension Of The Exemption Under Subparagraph (A)" Can Be Granted Only To A Small Refinery That Has Maintained Its Exemption Under Subparagraph (A)

The court of appeals' reading of Section 7545(*o*)(9)(B)(i), under which EPA may grant "an extension of the exemption under subparagraph (A)" only to small refineries that have maintained their original exemptions, has the effect of "funnel[ing] small refineries toward com-

pliance over time." Pet. App. 68a. That natural "taper[ing]" is consistent with the statutory text and context, and with the RFS program's structure and purpose. *Ibid.*

1. Congress structured the RFS program to force a significant increase in renewable-fuel production

The RFS program was enacted at a time of intense concern about American dependence on foreign oil, a condition that created both national-security and environmental risks. See p. 4, *supra*. The legislation establishing the RFS program declares Congress's purpose to "move the United States toward greater energy independence and security" by, *inter alia*, "increas[ing] the production of clean renewable fuels" that come from agricultural products prevalent in the United States. EISA, 121 Stat. 1492. The RFS program's central mechanism for advancing that objective is an "aggressive" mandate that compels annual increases in the volume of renewable fuels blended into gasoline and diesel. Pet. App. 70a; see 42 U.S.C. 7545(*o*)(2)(B). That mandate—a break from prior measures such as tax incentives for renewable-fuel production—was "designed to" change existing fuel-industry practices by "forc[ing] the market to create ways to produce and use greater and greater volumes of renewable fuel" that would serve as a "replacement" for oil in the American transportation sector. *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 696, 710 (D.C. Cir. 2017) (Kavanaugh, J.).

The RFS program's ambitious annual volume requirements are tempered by some waiver and adjustment authorities. See, *e.g.*, 42 U.S.C. 7545(*o*)(3)(C), (5)(D) and (6)-(8). Those authorities, however, are generally limited in scope. For example, a waiver of the RFS annual volume requirements "in whole or in part,"

42 U.S.C. 7545(*o*)(7)(A), "shall terminate after 1 year" unless it is "renewed by" EPA after specified consultation, 42 U.S.C. 7545(*o*)(7)(C). Other waivers are limited to 60 days. See, *e.g.*, 42 U.S.C. 7545(*o*)(7)(E)(ii). And while a party subject to the RFS annual volume requirements can comply by purchasing credits (RINs) rather than blending fuel themselves—and can even "carry forward a renewable fuel deficit" for one calendar year—the party must "achieve[] compliance with the" annual volume requirement the next year and must "generate[] or purchase[] additional renewable fuel credits to offset the renewable fuel deficit." 42 U.S.C. 7545(*o*)(5)(D). Thus, while the RFS program includes mechanisms "to facilitate flexible and cost-effective compliance," it ultimately demands adherence to its "'market forcing policy.'" *Americans for Clean Energy*, 864 F.3d at 699, 705 (citation omitted).

2. Properly construed, the small-refinery provisions fit with the RFS program's design

Given the RFS program's novel and aggressive requirements, Congress "was aware" that the program initially "might disproportionately impact small refineries," which lacked "the inherent scale advantages of large refineries." *Sinclair Wyo. Ref. Co.* v. *United States EPA*, 887 F.3d 986, 989 (10th Cir. 2017). For example, at the beginning of the RFS program, "[l]arge integrated refineries" could "more easily obtain financing for blending facilities" and could develop "joint ventures with" or acquire producers of renewable fuels.

A.R. 515 (2011 DOE study). Small refineries, by contrast, sometimes required more time to develop and implement compliance strategies. See *ibid.*[3]

The "three-tiered system" that Congress established for small-refinery exemptions addresses those transitional concerns while preserving the objective of "eventual compliance * * * for all refineries." *Hermes*, 787 F.3d at 572, 578. Section 7545(*o*)(9)(A) creates a "[t]emporary exemption" that includes the initial five-year blanket exemption, which gave all "small refineries time to develop compliance strategies." *Id.* at 572-573. It further provides for a limited "[e]xtension" of that exemption—an additional period of time in which small refineries can "make preparations to comply," *id.* at 578—if DOE finds that immediate compliance with the annual volume requirements would subject particular small refineries to "disproportionate economic hardship," 42 U.S.C. 7545(*o*)(9)(A)(ii). Finally, EPA can "extend" the "[t]emporary" "exemption under subparagraph (A)" based on EPA's own assessment of "disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(A) and (B)(i).

Taken on their own terms, and especially when read within the structure of a statutory program designed to

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[3] A "small refinery" for purposes of the RFS program is not necessarily a small company. The statute defines "small refinery" by facility-throughput volume, see 42 U.S.C. 7545(*o*)(1)(K), and a facility with a relatively low throughput volume can be owned by a large entity, see 75 Fed. Reg. 14,670, 14,859 n.389 (Mar. 26, 2010). Two of the small refineries here, for example, are owned by HollyFrontier Corporation (a Fortune 500 company), see Pet. Br. ii, and other large corporations that own small refineries have sought exemption extensions under the RFS, see, *e.g.*, Jarrett Renshaw & Chris Prentice, *Exclusive: Chevron, Exxon Seek 'Small Refinery' Waivers from U.S. Biofuels Law*, Reuters, Apr. 12, 2018, https://www.reuters.com/article/idUSKBN1HJ32R.

force major changes in the transportation-fuel supply, the small-refinery-exemption provisions are best understood as providing "a bridge to compliance" with the RFS annual volume requirements. *Hermes*, 787 F.3d at 572. Since 2010, EPA's regulations have reflected that understanding by requiring every petition for an extension pursuant to Section 7545(*o*)(9)(B)(i) to state "the date the refiner anticipates that compliance with the annual volume requirements can reasonably be achieved at the small refinery." 40 C.F.R. 80.1441(e)(2)(i). The RFS program thus has always forced small refineries to keep "an eye toward eventual compliance." *Hermes*, 787 F.3d at 578.

Interpreting the RFS scheme to "funnel[] small refineries toward compliance over time" makes sense as a practical matter. Pet. App. 68a. A small refinery filing a petition under Section 7545(*o*)(9)(B)(i) will have had at least five—and in many cases seven or more—years to "ponder operational issues and compliance costs." *Id.* at 70a. Each of the petitioners in this case, for example, was exempt from the RFS annual volume requirements for five to seven years at the outset of the program, and each then complied with those requirements for several years before seeking the relief at issue here. See *id.* at 75a. Petitioner Woods Cross had already complied with the 2016 annual volume requirement at the time it submitted a petition seeking an exemption for that year. C.A. Pet. for Review App. 5; see *ibid.* (indicating that petitioner Cheyenne had already complied with the 2016 annual volume requirement by the time its petition was granted). Petitioners thus have proven themselves capable of developing and implementing successful strategies for complying with the RFS annual volume

requirements. And the costs of ongoing RFS compliance need not fall on them, but instead will be reflected in the marketwide price of refined products. See Pet. App. 87a-92a; Pet. Supp. App. 9a n.5; A.R. 410-440.

To be sure, a particular small refinery may operate more successfully in some years than in others. But more than a decade into the RFS program, it is more consistent with the statutory objectives to require continued compliance by small refineries like petitioners than to allow a resumption of a "[t]emporary exemption" that lapsed years ago. 42 U.S.C. 7545(*o*)(9)(A) and (B)(i). The result of granting additional exemptions, moreover, is either to shift the compliance obligation to other (non-exempt) refineries or to leave the exempted volumes of renewable fuels out of the RFS program entirely. See Pet. App. 73a. The court of appeals' reading correctly avoids that "'goal-defying ([and] text-defying)'" result, and "reasonably balances the need to drive growth in the renewable fuel industry with the need to ensure that obligated parties have sufficient flexibility to comply with the statute." *Americans for Clean Energy*, 864 F.3d at 710, 715 (citation omitted). That interpretation furthers Congress's stated objective to promote "greater energy independence and security" by "increas[ing] the production of clean renewable fuels." EISA, 121 Stat. 1492.

II. PETITIONERS' CONTRARY READINGS LACK MERIT

Petitioners advance two alternative interpretations of the key statutory provision. First, they contend (Br. 23-29) that Section 7545(*o*)(9)(B)(i) uses the term "extension" in a non-temporal sense to mean "grant." Alternatively, they argue (Br. 29-32) that, even if Section 7545(*o*)(9)(B)(i) uses "extension" in a temporal sense, it does so in an idiosyncratic way that lacks an element of

continuity. Neither of those arguments is persuasive. The court of appeals correctly construed the disputed language, and its decision should be affirmed.

A. Petitioners' Proposed Interpretations Of The Term "Extension" In Section 7545(*o*)(9)(B)(i) Are Textually Unsound

Although the term "extension" can sometimes bear a non-temporal meaning, the statutory context precludes such a reading here. There is likewise no sound reason to construe the term "extension" in Section 7545(*o*)(9)(B)(i) to encompass the resumption of an exemption that had lapsed.

1. The term "extension" in Section 7545(o)(9)(B)(i) does not mean "grant"

Petitioners contend (Br. 23-29) that the term "extension" in Section 7545(*o*)(9)(B)(i) can be read to mean "grant." Petitioners correctly observe (Br. 23) that, "[i]n isolation," one possible meaning of "extension" is "grant." They cite (Br. 24-25) federal statutory provisions, and language in this Court's opinions, in which Congress or the Court has used the term in that way. But as petitioners acknowledge (Br. 25-26), the meaning of a statutory term depends on "the context in which it is" used. *United States* v. *Briggs*, 141 S. Ct. 467, 470 (2020). The statutory context here presents substantial obstacles to petitioners' proposed reading.

a. Petitioners assert (Br. 25 n.18) that "the exemption under subparagraph (A)" to which Section 7545(*o*)(9)(B)(i) refers is simply an exemption "from the requirements of paragraph (2)"—*i.e.*, the RFS annual volume requirements. See 42 U.S.C. 7545(*o*)(2). But subparagraph (A) does not simply identify the substantive statutory requirements to which the exemption

pertains; it also includes detailed language describing how long the exemption will last. Petitioners' reading of the term "extension of the exemption under subparagraph (A)" ignores that crucial aspect of the referenced subparagraph.

By contrast, a nearby RFS provision states that, under specified conditions, EPA "may waive the requirements of paragraph (2)." 42 U.S.C. 7545(*o*)(7)(A). Another authorizes "a petition for a waiver of the requirements of paragraph (2)." 42 U.S.C. 7545(*o*)(7)(B). Congress could have used similar language in the provision at issue here if it had intended to vest EPA with freestanding authority to grant a new exemption to a small refinery whose original subparagraph (A) exemption had lapsed. But Section 7545(*o*)(9)(B)(i) instead incorporates "the exemption under subparagraph (A)"—a "[t]emporary exemption" for specified time periods. 42 U.S.C. 7545(*o*)(9)(A).

Reading "extension" in Section 7545(*o*)(9)(B)(i) to mean "grant" is also inconsistent with Congress's use of those terms elsewhere in the statute. As noted above, several other provisions within Section 7545 use "extension" in its temporal sense, and that usage fits naturally here. By contrast, other provisions within Section 7545 use "grant" to confer authority to approve a request. See 42 U.S.C. 7545(c)(4)(C)(ii)(III) ("grant the waiver"); 42 U.S.C. 7545(f)(4) ("grant or deny an application"); 42 U.S.C. 7545(m)(3)(C)(iii) ("grant such waivers").

b. The language of Section 7545(*o*)(9)(B)(i) is especially telling in light of Congress's use of the parallel phrase "exten[sion of] the exemption under [Section 7545(*o*)(9)(A)(i)]" in the immediately preceding statutory clause. As outlined above, clause (i) of subparagraph (A) creates an initial blanket exemption for all

small refineries. Clause (ii) of the same subparagraph (A), titled "Extension of exemption," directs EPA to "extend the exemption under clause (i) * * * for a period of not less than 2 additional years," based on the results of the DOE study. Petitioners acknowledge (Br. 26-27) that the term "extend" in clause (ii) of subparagraph (A) refers to the "temporal" continuation of a previously existing exemption (the initial blanket exemption), not the granting of a new freestanding waiver.[4]

Petitioners nevertheless submit (Br. 27-29) that the critical language in Section 7545(*o*)(9)(B)(i)—also titled "Extension of exemption"—uses the word "extension" not in its temporal sense, but instead to authorize the granting of a new exemption. Petitioners assert (Br. 27) that "[t]here is no reason * * * to assume that every instance of the word 'extend' or 'extension' involves temporal continuity." As noted above, however, this Court's "usual presumption" is that "'identical words used in different parts of the same statute' carry 'the same meaning.'" *Henson*, 137 S. Ct. at 1723 (citation omitted). Indeed, the Court recently emphasized that "[i]n all but the most unusual situations, a single use of a statutory phrase must have a fixed meaning" across a statute. *Lomax* v. *Ortiz-Marquez*, 140 S. Ct. 1721, 1725 (2020) (quoting *Cochise Consultancy, Inc.* v. *United States ex rel. Hunt*, 139 S. Ct. 1507, 1512 (2019)).

To be sure, the presumption of consistent usage can be rebutted by context. See, *e.g.*, *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 320 (2014); Pet. Br. 27

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[4] Petitioners suggest (Br. 26 n.19) that Section 7545(*o*)(9)(A)(ii) uses "extend" in both its temporal-continuation and "'make available'" senses. But as petitioners acknowledge (*ibid.*), what Section 7545(*o*)(9)(A)(ii) makes available is "a longer time," which is another way of restating the temporal meaning of "extension."

(collecting cases). But the presumption has its greatest force when the provisions using the common term are closely interrelated—*e.g.*, when they appear "in the same section of the statute," *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980), and are used in the "exact same way," *Milner*, 562 U.S. at 570. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 171-172 (2012). The provisions at issue here appear back-to-back in the same statute, share the same title ("Extension of exemption"), address the same actor (EPA), and concern the same subject (extension of an RFS exemption). Section 7545(*o*)(9)(B)(i), moreover, expressly incorporates Section 7545(*o*)(9)(A). And the next clause, Section 7545(*o*)(9)(B)(ii), which prescribes what EPA must consider in evaluating a petition submitted under Section 7545(*o*)(9)(B)(i), expressly cross-references Section 7545(*o*)(9)(A)(ii).

c. Petitioners construe (Br. 28-29) Section 7545(*o*)(9)(B)(iii), which requires EPA to "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," to suggest that Section 7545(*o*)(9)(B)(i) uses the term "an extension of the exemption under subparagraph (A)" in a non-temporal sense. That argument reflects an overreading of the provision.

Titled "Deadline for action on petitions," Section 7545(*o*)(9)(B)(iii) establishes a timeline for EPA's consideration of a "petition * * * for a hardship exemption." Insofar as the term "petition * * * for a hardship exemption" in Section 7545(*o*)(9)(B)(iii) serves as shorthand for "petition * * * for an extension of the exemption under subparagraph (A)" in Section 7545(*o*)(9)(B)(i), the former cannot properly be read to change the meaning of the latter. To allow the timing

provision to change the meaning of the operative grant of authority would be to let "the tail wag the dog." *Commissioner* v. *Asphalt Prods. Co.*, 482 U.S. 117, 121 (1987) (per curiam) (citation omitted); cf. *Federal Republic of Germany* v. *Philipp*, 141 S. Ct. 703, 715 (2021) (explaining that a minor provision "did not purport to amend the critical phrase," and the Court would "not construe it to do so").

2. The term "extension" in Section 7545(o)(9)(B)(i) does not encompass a resumption of an exemption that had previously lapsed

Petitioners argue in the alternative (Br. 29) that, "even if Congress used the word 'extension' in its temporal sense," the court of appeals "erroneously imported a continuity requirement." In petitioners' view (Br. 29-31), EPA was authorized to grant an "extension of the exemption" that petitioners had possessed at the outset of the RFS program, even though none of the petitioners had been exempt from RFS annual volume requirements for many years.

As explained above, that argument departs from the ordinary understanding of a temporal extension. See pp. 21-23, *supra*. Petitioners note (Br. 29) that some dictionary definitions of "extension" do not "mention[] any continuity requirement." But dictionaries do reference continuity in their definitions. See p. 21, *supra*. In any event, "[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is *ordinarily* understood in that sense." *Taniguchi*, 566 U.S. at 568. More relevant is the word's usage "in everyday parlance." *Mohamad*, 566 U.S. at 454; see, *e.g.*, *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 634 (2012) ("[I]t is normal usage that, in the absence of contrary indication, governs our interpretation of texts.").

An ordinary speaker would not use the word "extension" to describe petitioners' request, especially given the statutory context.

A hotel guest seeking to book a favorite room, for example, would not ask to "extend" a stay that had occurred years earlier. Nor would a driver returning to a parking spot years after he had first parked there put money into the meter to "extend" his parking session. So too here, petitioners' request to be exempt from the 2016 and 2017 RFS annual volume requirements cannot naturally be characterized as seeking an "extension" of the exemptions they held earlier in the decade.

Petitioners identify (Br. 29-31) scattered instances in which the word "extension" can be used to describe the resumption of something that has previously expired. But those outliers serve mostly to reinforce the general rule that an extension requires the existence of the thing to be extended. To take petitioners' lead example (Br. 29), Federal Rule of Civil Procedure 6(b)(1)(B) allows a court to "extend" the time for a filing "after the time has expired." But in recognition that such a request is exceptional, the Rule requires a party seeking an extension "after the time has expired" to show that "the party failed to act because of excusable neglect." Cf. Fed. R. Civ. P. 6(b)(1)(A) (allowing extension without such a showing if the party asks "before the original time or its extension expires"). And any break in continuity attributable to excusable neglect presumably would be fairly brief. It would be a bold litigant who invoked Rule 6(b)(1)(A) to request an "extension" *years* after the relevant period had lapsed.

Petitioners also point (Br. 30) to a recent appropriations provision titled "Extension of Federal Pandemic

Unemployment Compensation." Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Div. N, Tit. II, Subtit. A, § 203, 134 Stat. 1953. That provision amended a statute that had provided pandemic-related unemployment benefits until July 31, 2020, to provide further benefits from December 26, 2020, to March 14, 2021. § 203(b)(1)(B), 134 Stat. 1953. To mandate that result, however, the statute's operative language does not use the word "extension," but instead identifies the dates on which the benefits expired and would resume. See *ibid.*[5]

In any event, atypical uses of the term "extension" in such contexts shed little light on either the term's ordinary meaning or its use in Section 7545(*o*)(9)(B)(i). Because "construing statutory language is not merely an exercise in ascertaining 'the outer limits of a word's definitional possibilities,'" this Court has refused to depart from a term's ordinary meaning even when the term is capable of being used in a different way. *AT&T*, 562 U.S. at 407 (brackets and citation omitted); see, *e.g.*, *Taniguchi*, 566 U.S. at 569-572 (declining "to embrace the broadest possible meaning that the definition of the word can bear"). Because petitioners identify "no sound reason in the statutory text or context to disregard the ordinary meaning" of the term "extension" in Section 7545(*o*)(9)(B)(i), *AT&T*, 562 U.S. at 407, its ordinary meaning should apply.

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[5] Petitioners also invoke (Br. 30) Section 2114 of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, Div. A, Tit. II, 134 Stat. 334. But that provision likewise identifies the dates on which particular benefits expired and would resume, rather than using the word "extension" in the operative statutory language.

B. The Terms Surrounding "Extension" Provide No Reason To Depart From That Term's Ordinary Meaning

Petitioners contend (Br. 32-39) that certain terms surrounding the phrase "extension of the exemption under subparagraph (A)" in Section 7545(*o*)(9)(B)(i) support petitioners' position. Specifically, they rely on the terms "at any time," "small refinery," and "disproportionate economic hardship." Those phrases prescribe, respectively, *when* a petition for an extension of the exemption can be filed, *who* can file such a petition, and *on what grounds* such a petition can be granted. But they do not address *what* an "extension of the exemption under subparagraph (A)" is, much less provide any basis to depart from that term's ordinary meaning.

1. ***"At any time."*** Petitioners rely heavily (Br. 33-36) on Section 7545(*o*)(9)(B)(i)'s statement that a small refinery may "*at any time* petition" for "an extension of the exemption under subparagraph (A)" (emphasis added). "[A]t any time" is an adverbial phrase that modifies the verb "petition"; it explains *when* a small refinery may petition for an extension of the exemption under subparagraph (A). But it does not modify "extension of the exemption," see *Nielsen* v. *Preap*, 139 S. Ct. 954, 964 (2019) ("[A]n adverb cannot modify a noun."), and it does not speak to *what* such an extension is.

The phrase "at any time" provides small refineries with significant potential benefits. For example, it allowed small refineries to seek an extension of the initial blanket exemption pursuant to Section 7545(*o*)(9)(B)(i) even if they were not identified in the DOE study and therefore did not receive mandatory extensions of that exemption pursuant to Section 7545(*o*)(9)(A)(ii). That authorization produced meaningful results; nearly half of the small refineries that received a 2011 extension of

their initial blanket exemption received that extension from EPA pursuant to Section 7545(*o*)(9)(B)(i) rather than Section 7545(*o*)(9)(A)(ii). See pp. 7-8, 23, *supra*.

The phrase "at any time" in Section 7545(*o*)(9)(B)(i) also allows small refineries to seek repeated extensions of their exemptions under subparagraph (A)—*e.g.*, at the end of the two-year extension provided to refineries identified in the DOE study. That authorization too has provided substantial benefits; eight small refineries received extensions under that authority in 2013, and some received further extensions in 2014, 2015, and beyond. See p. 24, *supra*.

Finally, the authorization for small refineries to petition "at any time" for an extension of the exemption under subparagraph (A) ensures that small refineries need not file such petitions before EPA's November 30 statutory deadline for determining the upcoming year's RFS obligations. See 42 U.S.C. 7545(*o*)(3)(B)(i). That "significant statutory concession" provides additional flexibility for small refineries. Pet. App. 73a.

Contrary to petitioners' contentions (Br. 32-34), interpreting the phrase "at any time" to have those effects does not cause that phrase to mean less than "exactly what it says" or create "a new eligibility criterion" for such petitions. It instead gives the phrase "at any time" its full literal effect, so that the phrase describes *when* a small refinery may "petition" EPA "for an extension of the exemption under subparagraph (A)."

To be sure, one might reasonably reframe the question presented here as whether a small refinery's current possession of an exemption from RFS annual volume requirements is an "eligibility criterion" for an "extension of the exemption under subparagraph (A)." But the fact that an extension petition can be granted "at

any time" is irrelevant to the resolution of that question, which turns instead on the meaning of "extension." A modified rule of this Court providing that a petition for a writ of certiorari could be filed "at any time," for example, would not change the meaning of "writ of certiorari" or affect the other prerequisites to filing such a petition, such as being a party to a case in a court of appeals. So too here, obtaining an "extension of the exemption under subparagraph (A)" requires the petitioner to have a subparagraph (A) exemption to extend, regardless of when a petition can be filed.

2. ***"Small refinery."*** Petitioners contend (Br. 36-38) that Section 7545(*o*)(1)(K)'s definition of "small refinery" sheds light on the meaning of "extension of the exemption under subparagraph (A)" in Section 7545(*o*)(9)(B)(i). That argument has the same basic flaw as petitioners' reliance on the term "at any time": it addresses a collateral issue—here, *who* can petition for an extension of the exemption under subparagraph (A)—rather than the central question of *what* an "extension of the exemption under subparagraph (A)" is.

Section 7545(*o*)(1)(K) states that the "term 'small refinery' means a refinery for which the average aggregate daily crude oil throughput for a calendar year * * * does not exceed 75,000 barrels." Petitioners suggest (Br. 36-38) that, if Congress had intended to require that a small refinery have maintained its exemption under subparagraph (A) in order to seek an "extension" of that exemption, Congress would have included that requirement in the definition of "small refinery." That reasoning is unsound. Because the ordinary meaning of "extension" conveys the requirement that the requester have the thing it asks to be extended, it was unneces-

sary to repeat that requirement in specifying the entities eligible for an extension. Cf. *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 416 (2012) ("[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute.").[6]

Petitioners further contend (Br. 37-38) that Congress's use of the calendar year as the unit of measure in the statutory definition of "small refinery" implies that a small refinery's actions before that year are irrelevant to its eligibility for an "extension of the exemption under subparagraph (A)." That conclusion does not follow either. The requirement that a petitioning refinery not exceed a particular throughput level in a given year ensures that extensions are available only to "small" refineries; it does not speak to what an "extension" of the small-refinery exemption is. Cf. *Americans for Clean Energy*, 864 F.3d at 711 (rejecting attempt to "bootstrap the definition" of an RFS term "into a boundless general waiver authority").

3. ***"Disproportionate economic hardship."*** Petitioners briefly contend (Br. 38-39) that the phrase "disproportionate economic hardship" indicates that an "extension of the exemption under subparagraph (A)" does not include a temporal continuity requirement. That claim reflects the same error as petitioners' related contextual arguments: the phrase "disproportionate economic

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[6] Petitioners' argument based on the statutory definition of "small refinery" is also logically inconsistent with the second of their alternative interpretations (Br. 29-32), under which an "extension of the exemption under subparagraph (A)" is available to any small refinery that previously had an exemption in at least one prior compliance year. That eligibility criterion likewise could have been incorporated into the "small refinery" definition.

hardship" addresses *why* an "extension of the exemption under subparagraph (A)" can be granted, not *what* such an extension is. Indeed, the word "extension" does not appear in petitioners' discussion (*ibid.*) of the inferences to be drawn from the term "disproportionate economic hardship."

C. The Statutory Structure And Purpose Do Not Support Petitioners' Reading

Petitioners contend (Br. 39-46) that the statutory structure and purpose strengthen their position. As explained above, however, the structure and design of the RFS program indicate that Congress provided small refineries a temporary bridge to compliance with the RFS volume requirements, not a perpetual carveout of the kind petitioners seek. See pp. 24-29, *supra*.

1. Petitioners suggest (Br. 41) that exempting small refineries from compliance with the RFS annual volume requirements advances the statutory purpose because it "promotes energy independence and security by protecting domestic refining capacity." But as petitioners acknowledge (*ibid.*), Congress in the RFS did not simply seek to promote energy independence as a general matter; Congress pursued that objective in a particular way, by imposing measures "to encourage the production of renewable fuels" that come from agricultural products prevalent in the United States.

Thus, while petitioners' argument for renewed hardship relief relies (Br. 40-44) on the RFS program's escalating annual volume requirements, those requirements instead demonstrate Congress's determination to "force the market to create ways to produce and use greater and greater volumes of renewable fuel." *Americans for Clean Energy*, 864 F.3d at 710. Allowing re-

started exemptions for a significant number of small refineries would disserve that statutory objective. That is presumably why Congress designated the exemption in Section 7545(*o*)(9)(A) as *"[t]emporary*," and permitted its "extension" only in limited circumstances. 42 U.S.C. 7545(*o*)(9)(A)(ii) and (B)(i) (emphasis added).

Petitioners emphasize (Br. 40-41) that the word "[t]emporary" appears only in Section 7545(*o*)(9)(A), which categorically exempted small refineries for an initial period and provided for extensions of that exemption based on the DOE study, and not in the adjacent Section 7545(*o*)(9)(B)(i), which vests EPA with additional exemption authority. But that distinction in subdivision has little force here because Section 7545(*o*)(9)(B)(i) authorizes an extension "of the exemption *under subparagraph (A)*" (emphasis added). If Congress had intended to distance the "extension" authority in Section 7545(*o*)(9)(B)(i) from the "[t]emporary exemption" in Section 7545(*o*)(9)(A), it would not have expressly incorporated the latter into the former. The "far simpler explanation, and the one that comports with the actual statutory language and context, is that" Congress provided a temporary period for small refineries to achieve compliance with the RFS volume requirements—and then expected them to continue complying. *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2118 (2018).

2. Petitioners contend (Br. 42) that the court of appeals failed to appreciate the difficulties of compliance and "the economics of small refineries." But petitioners have complied with the RFS annual volume requirements in several prior years—including, in some cases, the year for which they sought the exemption at issue here. See p. 24, *supra*. They can recoup the costs of

future compliance through the marketwide price for refined products. See Pet. App. 87a-92a; Pet. Supp. App. 9a n.5; A.R. 410-440. And the result of exempting small refineries like petitioners from those requirements is that either non-exempt refineries must blend a greater share of renewable fuel or the exempted volumes will fall outside the RFS program. See Pet. App. 73a. Petitioners identify no sound basis for concluding that Congress, in establishing a temporary exemption that can be extended only in limited circumstances, intended to allow small refineries to avoid contributing their fair share to accomplishing the RFS program's objectives throughout the entire duration of the program.[7]

Petitioners suggest (Br. 17, 44-45) that the court of appeals' interpretation will cause the shutdown of small

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[7] Petitioners see (Br. 43) "no reason" why one of "two small refineries that would experience *identical* 'disproportionate economic hardship' in 2021" should be eligible for an extension of the exemption under subparagraph (A) if it "had continuously obtained exemptions," while the second refinery would not be eligible if it "had not needed" an exemption "in, say, 2015." As explained above, the reason (in addition to the ordinary meaning of "extension" in this statutory context) is that the two refineries are not similarly situated; once a refinery has developed a mechanism for compliance with the RFS volume requirements in one year, it does "not need[]" an exemption in future years because it can recover the costs of compliance through the price of its product. *Ibid.* Moreover, under the second of petitioners' alternative interpretations of Section 7545(*o*)(9)(B)(i) (Br. 29-32), two refineries that have identical economic conditions would not always be treated the same. For example, a newly opened refinery would *not* be eligible for an extension under petitioners' second alternative interpretation (because the new refinery had not received an exemption in a prior compliance year), even if the new refinery had exactly the same current economic outlook as a refinery that had received a prior exemption.

refineries and associated job losses. Those claims are overstated. To the extent the Tenth Circuit's decision played any role in the recent increase in RIN prices (see *ibid.*), that will not harm small refineries because they can recover the higher cost of RINs through the marketwide price of refined products. See Pet. App. 87a-92a; Pet. Supp. App. 9a n.5; A.R. 410-440. Petitioners also fail (Br. 17) to substantiate their allegation that the court of appeals' decision caused the closure of a Marathon Petroleum refinery in Gallup, New Mexico. Marathon itself attributes the decision to idle that refinery not to the RFS program but to "the challenges COVID has created for [its] business." Marathon Petroleum Corp., *News Release: Marathon Petroleum Corp. Reports Second-Quarter 2020 Results* (Aug. 3, 2020), https://ir.marathonpetroleum.com/investor/news-releases/news-details/2020/Marathon-Petroleum-Corp.-Reports-Second-Quarter-2020-Results/default.aspx.[8]

Petitioners contend (Br. 45) that the challenges created by the COVID-19 pandemic illustrate the need for small-refinery exemptions to remain broadly available. But that contention shows how expansively petitioners read Section 7545(*o*)(9)(B)(i). Nothing in the statutory

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[8] Petitioners also suggest (Br. 17) that the court of appeals' holding is the reason that Cheyenne "no longer produces petroleum fuels." But HollyFrontier's announcement of its decision to convert the Cheyenne refinery to renewable-fuel production instead cites "consumer preferences and support from substantial federal and state government incentive programs." HollyFrontier Corp., *Press Release Details: HollyFrontier Announces Expansion of Renewables Business* (June 1, 2020), https://www.hollyfrontier.com/investor-relations/press-releases/Press-Release-Details/2020/HollyFrontier-Announces-Expansion-of-Renewables-Business. In any event, creating incentives for market participants to replace petroleum fuels with renewable fuels is a core purpose of the RFS program.

text, structure, history, or purpose suggests that Congress adopted that provision to create an all-purpose source of relief for small refineries, entitling them—and only them—to relief from industry-wide disruptions like a pandemic. See Pet. App. 83a. The government appreciates the difficulties that COVID-19 has caused for many industries and is actively working to address them, but the RFS provision at issue in this case is not an appropriate vehicle for granting such relief.

D. Petitioners' Reliance On A 2014 EPA Regulation Is Misplaced

Petitioners contend (Br. 46-50) that, if the Court does not conclude that one of their proposed interpretations is unambiguously required, it should rule in their favor by deferring, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to a 2014 EPA regulation that defines the statutory term "small refinery." See 79 Fed. Reg. 42,128 (July 18, 2014). That approach is unsound.

1. Even if the government were continuing to defend the EPA orders granting petitioners' exemption requests, the 2014 regulation on which petitioners rely would not trigger *Chevron* deference. *Chevron* deference can be appropriate where a regulation or other formal agency pronouncement "addresses" a relevant "ambiguity in the statute" under review. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001). Here, the purported ambiguity concerns the meaning of the term "extension of the exemption under subparagraph (A)" in Section 7545(*o*)(9)(B)(i). The 2014 regulation does not "address[]" that ambiguity. *Ibid.* It instead addresses a different potential ambiguity—the meaning of "small refinery" in the statute's definitional provision. "[T]he two issues are not the same." Pet. App. 77a.

Petitioners observe (Br. 47-48) that, during the rulemaking that produced the 2014 regulation, EPA initially proposed to limit the term "small refinery" to refineries that had produced an average daily throughput below 75,000 barrels for each calendar year since 2006. The agency ultimately decided, however, to impose that throughput limit only for the year for which an exemption is requested and the immediately preceding calendar year. See 79 Fed. Reg. at 42,152; 40 C.F.R. 80.1441(e)(2)(iii). Petitioners also note (Br. 47) that one commenter who supported the initial proposal invoked the statutory reference to an "extension," and that some statements in the 2014 rule's preamble seem to have implicitly assumed that a refinery can receive an exemption for one calendar year even if it was not exempt during a prior calendar year. But because "neither the preamble nor the administrative rule" that EPA ultimately adopted "contains any discussion of what the word 'extension' actually means," Pet. App. 78a, the 2014 regulation would not be entitled to *Chevron* deference in resolving the interpretive question presented here.

2. In any event, the government is not invoking *Chevron* in this Court, and EPA no longer adheres to the interpretation of Section 7545(*o*)(9)(B)(i) that petitioners believe to be implicit in the 2014 regulation. "This Court has often declined to apply *Chevron* deference when the government fails to invoke it." *Guedes* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (Gorsuch, J.). A traditional "justification" for *Chevron* deference "is that 'policy choices' should be left to Executive Branch officials 'directly accountable to the people.'" *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) (quoting *Chevron*, 467 U.S. at 865). But when the Executive Branch has

changed its position on the appropriate construction of particular statutory language, deference to any earlier agency position cannot be justified. See *ibid.* (declining to grant deference where "the Executive seems of two minds"); *Global Tel*Link* v. *FCC*, 866 F.3d 397, 408 (D.C. Cir. 2017) ("[I]t would make no sense for this court to determine whether the disputed agency positions * * * warrant *Chevron* deference when the agency has abandoned those positions.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 7545(*o*) provides:

Regulation of fuels

(*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.

(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 Admin-

istrator, 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.

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

(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.

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

(iii) Animal waste material and animal by-products.

(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 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 oceangoing 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 Decem-

ber 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
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 refines, 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 trans-

parency, 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 applica-

ble 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, 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.

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

2. 40 C.F.R. 80.1441 provides:

Small refinery exemption.

(a)(1) Transportation fuel produced at a refinery by a refiner, or foreign refiner (as defined at § 80.1465(a)), is exempt from January 1, 2010 through December 31, 2010 from the renewable fuel standards of § 80.1405, and the owner or operator of the refinery, or foreign refinery, is exempt from the requirements that apply to obligated parties under this subpart M for fuel produced at the refinery if the refinery meets the definition of a small refinery under § 80.1401 for calendar year 2006.

(2) The exemption of paragraph (a)(1) of this section shall apply unless a refiner chooses to waive this exemption (as described in paragraph (f) of this section), or the exemption is extended (as described in paragraph (e) of this section).

(3) For the purposes of this section, the term "refiner" shall include foreign refiners.

(4) This exemption shall only apply to refineries that process crude oil through refinery processing units.

(5) The small refinery exemption is effective immediately, except as specified in paragraph (b)(3) of this section.

(6) Refiners who own refineries that qualified as small under 40 CFR 80.1141 do not need to resubmit a small refinery verification letter under this subpart M. This paragraph (a) does not supersede § 80.1141.

(b)(1) A refiner owning a small refinery must submit a verification letter to EPA containing all of the following information:

(i) The annual average aggregate daily crude oil throughput for the period January 1, 2006 through December 31, 2006 (as determined by dividing the aggregate throughput for the calendar year by the number 365).

(ii) A letter signed by the president, chief operating or chief executive officer of the company, or his/her designee, stating that the information contained in the letter is true to the best of his/her knowledge, and that the refinery was small as of December 31, 2006.

(iii) Name, address, phone number, facsimile number, and e-mail address of a corporate contact person.

(2) Verification letters must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(3) For foreign refiners the small refinery exemption shall be effective upon approval, by EPA, of a small refinery application. The application must contain all of the elements required for small refinery verification letters (as specified in paragraph (b)(1) of this section), must satisfy the provisions of § 80.1465(f) through (i) and (o), and must be submitted by July 1, 2010 to one of the addresses listed in paragraph (h) of this section.

(4) Small refinery verification letters are not required for those refiners who have already submitted a complete verification letter under subpart K of this part 80. Verification letters submitted under subpart K prior to July 1, 2010 that satisfy the requirements of subpart K shall be deemed to satisfy the requirements for verification letters under this subpart M.

(c) If EPA finds that a refiner provided false or inaccurate information regarding a refinery's crude

through-put (pursuant to paragraph (b)(1)(i) of this section) in its small refinery verification letter, the exemption will be void as of the effective date of these regulations.

(d) If a refiner is complying on an aggregate basis for multiple refineries, any such refiner may exclude from the calculation of its Renewable Volume Obligations (under § 80.1407) transportation fuel from any refinery receiving the small refinery exemption under paragraph (a) of this section.

(e)(1) The exemption period in paragraph (a) of this section shall be extended by the Administrator for a period of not less than two additional years if a study by the Secretary of Energy determines that compliance with the requirements of this subpart would impose a disproportionate economic hardship on a small refinery.

(2) A refiner may petition the Administrator for an extension of its small refinery exemption, based on disproportionate economic hardship, at any time.

(i) A petition for an extension of the small refinery exemption must specify the factors that demonstrate a disproportionate economic hardship and must provide a detailed discussion regarding the hardship the refinery would face in producing transportation fuel meeting the requirements of § 80.1405 and the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.

(ii) The Administrator shall act on such a petition not later than 90 days after the date of receipt of the petition.

(iii) In order to qualify for an extension of its small refinery exemption, a refinery must meet the definition

of "small refinery" in § 80.1401 for the most recent full calendar year prior to seeking an extension and must be projected to meet the definition of "small refinery" in § 80.1401 for the year or years for which an exemption is sought. Failure to meet the definition of small refinery for any calendar year for which an exemption was granted would invalidate the exemption for that calendar year.

(f) At any time, a refiner with a small refinery exemption under paragraph (a) of this section may waive that exemption upon notification to EPA.

(1) A refiner's notice to EPA that it intends to waive its small refinery exemption must be received by November 1 to be effective in the next compliance year.

(2) The waiver will be effective beginning on January 1 of the following calendar year, at which point the transportation fuel produced at that refinery will be subject to the renewable fuels standard of § 80.1405 and the owner or operator of the refinery shall be subject to all other requirements that apply to obligated parties under this Subpart M.

(3) The waiver notice must be sent to EPA at one of the addresses listed in paragraph (h) of this section.

(g) A refiner that acquires a refinery from either an approved small refiner (as defined under § 80.1442(a)) or another refiner with an approved small refinery exemption under paragraph (a) of this section shall notify EPA in writing no later than 20 days following the acquisition.

(h) Verification letters under paragraph (b) of this section, petitions for small refinery hardship extensions under paragraph (e) of this section, and small refinery

exemption waiver notices under paragraph (f) of this section shall be sent to one of the following addresses:

(1) *For US mail:* U.S. EPA, *Attn:* RFS Program, 6406J, 1200 Pennsylvania Avenue, NW., Washington, DC 20460.

(2) *For overnight or courier services:* U.S. EPA, *Attn:* RFS Program, 6406J, 1310 L Street, NW., 6th floor, Washington, DC 20005. (202) 343-9038.

United States Environmental Protection Agency

Renewable Fuel Standard Program

EPA Signals New Position on Small Refinery Exemptions

After Careful Consideration, EPA Supports Tenth Circuit's *Renewable Fuels Association* Decision

On February 22, 2021 EPA announced that, after careful consideration of the 2020 decision of the U.S. Court of Appeals for the Tenth Circuit in Renewable Fuels Association et al. v. EPA, 948 F.3d 1206 ("Decision"), EPA supports that court's interpretation of the renewable fuel standard (RFS) small-refinery provisions. This conclusion, prompted by a detailed review following the Supreme Court's grant of certiorari in the case, represents a change from EPA's position before the Tenth Circuit. The change reflects the Agency's considered assessment that the Tenth Circuit's reasoning better reflects the statutory text and structure, as well as Congress's intent in establishing the RFS program.

RFS Program Background

Congress created the RFS program to reduce greenhouse gas emissions and expand the nation's renewable fuels sector while reducing reliance on imported oil. This program was authorized under the Energy Policy Act of 2005 and expanded under the Energy Independence and Security Act of 2007. In enacting the RFS program, Congress recognized the need to allow small refineries (those with aggregate crude oil throughput less than or equal to 75,000 barrels per day) to transition

into the program. Small refineries were exempted from the RFS program in its earliest years, 2006-2010, after which a small refinery could petition EPA for and receive an extension of its exemption if it could demonstrate the refinery would suffer "disproportionate economic hardship" as a result of complying with its RFS obligations. See CAA section 211(o)(9).

Surge in Small-Refinery Petitions Granted in Past Four Years

In calendar year 2017 (largely for the 2016 RFS compliance year), EPA began granting a large number of petitions for extensions of Small Refinery Exemptions (SREs). By 2018, the number of SREs issued for the 2017 compliance year was more than quadruple the number issued for the 2015 compliance year. For example, for the 2015 compliance year, only 290 million renewable identification numbers (RINs) were not retired due to SRE petitions granted, yet for the 2017 compliance year, that number grew to 1.82 billion non-retired RINs. The large increase in SRE petitions granted and associated unretired RINs represents a significant decline in the required use of renewable fuel volumes, which in turn decreased the incentives for the production and use of renewable fuels.

Tenth Circuit's Decision

In January 2020, the Tenth Circuit vacated and remanded three EPA decisions granting SRE petitions for the 2016 and 2017 RFS compliance years which were issued in calendar years 2017 and 2018, holding that a small refinery's petition can be granted only if the refinery satisfies two conditions:

- **Demonstrate an existing exemption**: Emphasizing the dictionary definitions of the word "extension" as "an increase," the court held that EPA could not extend or increase a small refinery's exemption unless the exemption was "in existence." In the court's view, "a small refinery which did not seek or receive an extension in prior years is ineligible for an extension, because at that point there is nothing to prolong, enlarge, or add to." The court also described CAA section 211(o)(9)(b)(i) as "funnel[ing] small refineries towards compliance over time."

- **Demonstrate disproportionate economic hardship caused by RFS compliance**: The court held that any alleged hardship justifying the grant of an SRE petition must be "caused by" RFS compliance. The court also held that EPA had acted arbitrarily and capriciously by deviating, without acknowledgment or a stated reason, from its prior position that refineries generally do not incur disproportionate economic hardship from purchasing RINs on the open market because the refineries "pass through most or all of their RIN purchase costs" to their customers.

Supreme Court Case and EPA's Position

On January 8, 2021, the U.S. Supreme Court granted the small refineries' petition for a writ of certiorari asking the Court to review the Tenth Circuit's holding regarding the SRE eligibility of small refineries that lack an existing exemption. HollyFrontier Cheyenne Refining, LLC, et al. v. Renewable Fuels Assn., et al., United States Supreme Court, Case No. 20-472.

After further, careful review of the RFA Decision following the change of Administration, EPA has reevaluated the statutory text and now agrees with the Tenth Circuit's reading of CAA section 211(o)(9)(B)(i) that an exemption must exist for EPA to be able to "extend" it. EPA agrees with the court that the exemption was intended to operate as a temporary measure and, consistent with that Congressional purpose, the plain meaning of the word "extension" refers to continuing the status of an exemption that is already in existence.

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