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ORAL ARGUMENT REQUESTED

No. 18-9533

In the United States Court of Appeals for the Tenth Circuit

Renewable Fuels Association, et al.,

Petitioners,

v.

U.S. Environmental Protection Agency,

Respondent, and

HollyFrontier Refining & Marketing LLC, et al.,

Intervenor-Respondents.

On Petition for Review of Final Agency Actions of the U.S. Environmental Protection Agency

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PETITIONERS' OPENING BRIEF

December 4, 2018

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DISCLOSURE STATEMENT

The **Renewable Fuels Association** ("RFA") is a non-profit trade association. Its members are ethanol producers and supporters of the ethanol industry. RFA promotes the general commercial, legislative, and other common interests of its members. RFA does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The **American Coalition for Ethanol** ("ACE") is a non-profit trade association. Its members include ethanol and biofuel facilities, agricultural producers, ethanol industry investors, and supporters of the ethanol industry. ACE promotes the general commercial, legislative, and other common interests of its members. ACE does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The **National Corn Growers Association** ("NCGA") is a non-profit trade association. Its members are corn farmers and supporters of the agriculture and ethanol industries. NCGA promotes the general commercial, legislative, and other common interests of its members. NGCA does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

The Farmers Educational & Cooperative Union of America, doing business as the **National Farmers Union** ("NFU"), is a non-profit trade association. Its members include farmers who are producers of biofuel feedstocks and consumers of

large quantities of fuel. The NFU promotes the general commercial, legislative, and other common interests of its members. It does not have a parent company, and no publicly held company has a 10% or greater ownership interest in it.

For the purposes of this brief, RFA, ACE, NCGA, and NFU are referred to collectively as the "Biofuels Coalition."

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2. Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standard Program for HollyFrontier Woods Cross Refining LLC's Woods Cross, Utah Refinery (Doc. No. R-34; REC2_680-85)

3. Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for Wynnewood Refining Company, LLC's Wynnewood, Oklahoma Refinery (Doc. No. R-45; REC2_737-41)

PETITIONERS' DECLARATIONS

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STATEMENT OF RELATED CASES

To Petitioners' knowledge, the only prior or related appeals regarding any of the three agency actions challenged in this case are the following:

HollyFrontier Refining and Marketing, LLC; HollyFrontier Cheyenne Refining, LLC v. EPA, No. 16-9564 (10th Cir.) (held in abeyance and then remanded on EPA's unopposed motion for voluntary remand and vacatur); and

Renewable Fuels Association, et al. v. EPA, No. 18-1154 (D.C. Cir.) (petition for reconsideration of EPA's regulations that fail to account for small refinery exemption extensions in calculating annual RFS percentage standards).

GLOSSARY OF ACRONYMS AND ABBREVIATIONS

APA	Administrative Procedure Act, 5 U.S.C. § 551 *et seq*.
Biofuels Coalition	Petitioners Renewable Fuels Association, American Coalition for Ethanol, National Corn Growers Association, National Farmers Union, collectively
CAA	Clean Air Act, 42 U.S.C. § 7401 *et seq*.
Challenged Exemptions	Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for HollyFrontier Cheyenne Refining LLC's Cheyenne, WY Refinery (Doc. No. R-20; REC2_629-46); Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standard Program for HollyFrontier Woods Cross Refining LLC's Woods Cross, Utah Refinery (Doc. No. R-34; REC2_680-85); and Grant of Request for Extension of Small Refinery Temporary Exemption Under the Renewable Fuel Standards Program for Wynnewood Refining Company, LLC's Wynnewood, Oklahoma Refinery (Doc. No. R-45; REC2_737-41), collectively
CVR	Intervenor-Respondent Wynnewood Refining Company, LLC, a subsidiary of CVR Refining, LP
DOE	United States Department of Energy
EPA	United States Environmental Protection Agency
HollyFrontier Cheyenne	Intervenor-Respondent HollyFrontier Cheyenne Refining LLC

HollyFrontier Refining	Intervenor-Respondent HollyFrontier Refining & Marketing LLC
HollyFrontier Woods Cross	Intervenor-Respondent Holly Frontier Woods Cross Refining LLC
HollyFrontier	HollyFrontier Cheyenne, HollyFrontier Refining, and HollyFrontier Woods Cross, collectively
REC	Agency Record
Refineries	Cheyenne Refinery, Woods Cross Refinery, and Wynnewood Refinery, collectively
RFA	Renewable Fuels Association
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number
RVO	Renewable Volume Obligations
SUPP	Petitioners' Supplemental Material for Judicial Notice

INTRODUCTION

Section 211(o) of the of the Clean Air Act ("CAA") establishes the Renewable Fuel Standard ("RFS"), designed by Congress to "increase the production of clean renewable fuels." Pub. L. No. 110-140, 121 Stat. 1492 (2007). The RFS requires Respondent United States Environmental Protection Agency ("EPA") to ensure that "obligated parties"—gasoline and diesel fuel refiners and importers—comply with annual RFS standards by blending increasing, specified quantities of renewable fuels into their gasoline and diesel or by purchasing credits. *See* 42 U.S.C. § 7545(o)(2)(A)(i), (o)(2)(B), (o)(3)(B); 40 C.F.R. § 80.1427.

To give small refineries additional time to transition to the RFS, Congress provided a "temporary exemption" from RFS obligations until 2011. 42 U.S.C. § 7545(o)(9)(A)(i). Following the initial exemption and a two-year "extension" for select small refineries until 2013, small refineries could petition EPA for a further "extension of the [temporary] exemption" only upon demonstrating that compliance with the RFS for that year would cause "disproportionate economic hardship." *Id.* § 7545(o)(9)(A)-(B); 40 C.F.R. § 80.1441(e)(2).

Intervenor-Respondent HollyFrontier Refining & Marketing LLC ("HollyFrontier Refining") submitted such exemption petitions for compliance year 2016 on behalf of two small refineries owned by its subsidiaries, Intervenor-Respondent HollyFrontier Cheyenne Refining LLC ("HollyFrontier Cheyenne") and

Intervenor-Respondent Holly Frontier Woods Cross Refining LLC ("HollyFrontier Woods Cross") (collectively, with HollyFrontier Refining, "HollyFrontier"). A subsidiary of CVR Refining, LP, Intervenor-Respondent Wynnewood Refining Company, LLC ("CVR"), submitted an exemption petition for its Wynnewood Refinery for compliance year 2017.

As explained more fully herein, each of these exemptions (collectively, the "Challenged Exemptions") must be vacated because EPA exceeded its statutory authority in granting them by applying much broader interpretations of "extension of the [temporary] exemption," "disproportionate economic hardship," and "compliance with the requirements" than Congress could have plausibly intended—essentially reading these express limitations on EPA's waiver authority out of the statute entirely. *See* 5 U.S.C. § 706(2)(C). EPA also acted arbitrarily and capriciously by considering factors Congress did not intend; ignoring or failing to consider evidence that none of these refineries faced significant economic hardship—much less hardship attributable to RFS compliance; and by failing to apply its own guidance and analysis. For these reasons as well, the Challenged Exemptions must be vacated. *See id.* § 706(2)(A).

JURISDICTIONAL STATEMENT

The CAA confers jurisdiction to "the United States Court of Appeals for the appropriate circuit" over any "locally or regionally applicable" final action by EPA. 42 U.S.C. § 7607(b)(1). This Court has jurisdiction because the Biofuels Coalition challenges three final EPA actions, each granting an extension of a temporary exemption from RFS obligations under 42 U.S.C. § 7545(o)(9)(B) to a specific small refinery located within the Tenth Circuit:

(1) HollyFrontier's Cheyenne, Wyoming refinery ("Cheyenne Refinery"), granted May 4, 2017 (Administrative Record Vol. 2[1] ("REC2") 614-646);

(2) HollyFrontier's Woods Cross, Utah refinery ("Woods Cross Refinery"), granted December 20, 2017 (REC2_665-685); and

(3) CVR's Wynnewood, Oklahoma refinery ("Wynnewood Refinery"), granted March 23, 2018 (REC2_733-741).[2] *See Sinclair Wyo. Ref. Co. v. EPA*, 887

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[1] The Administrative Record will be filed by EPA pursuant to 10th Cir. R. 17.1. EPA anticipates that the Administrative Record will consist of two consecutively-paginated volumes: Volume 1 (REC1_001-588), compiling non-confidential business information ("CBI") documents, and Volume 2, compiling CBI documents (REC2_589-741). Petitioners' consecutively-paginated Supplemental Materials begin with "SUPP_". *See* Petitioners' Motion for Judicial Notice.

[2] These three refineries are, collectively, the "Refineries."

F.3d 986 (10th Cir. 2017) (exercising jurisdiction over challenge to EPA's denial of a petition to extend a small refinery temporary exemption).

The Petition is not time-barred. *See* Biofuels Coalition's Response and Reply Regarding Jurisdiction, ECF No. 010110013502, 010110026137[3]; *see also* EPA Response Regarding Jurisdiction, ECF No. 010110021808 at 1 n.1 ("EPA concedes that no applicable time limitation *bars* the Petition before the Court.") (emphasis in original).

ISSUES PRESENTED FOR REVIEW

1. Whether EPA exceeded its authority under 42 U.S.C. § 7545(o)(9)(B) by granting to each of the Refineries an extension of a "temporary exemption," where the exemption had previously expired and where each of the Refineries had met its RFS obligations in the previous compliance year.

2. Whether, in evaluating the Refineries' requests for extensions of the small refinery exemptions, EPA exceeded its statutory authority under 42 U.S.C. §

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[3] Because the adjudications were secret, the Biofuels Coalition did not have access to the Administrative Record at the time and could not have commented or participated. *See* Declaration of Geoff Cooper ("Cooper Decl.") ¶12; Declaration of Brian Jennings ("Jennings Decl.") ¶5; Declaration of Roger Johnson ("Johnson Decl.") ¶8; Declaration of Jon Doggett ("Doggett Decl.") ¶8. *Cf. U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1165 (10th Cir. 2012) (extra-record evidence accepted for standing purposes).

7545(o)(9)(B) by applying interpretations of the terms "disproportionate," "economic hardship," and "compliance… [with RFS obligations] would impose a disproportionate economic hardship" that improperly transformed Congress's statutory text into something far beyond what Congress plausibly intended.

3. Whether EPA acted arbitrarily, capriciously, or in a manner otherwise contrary to law by granting an extension of the small refinery exemption under 42 U.S.C. § 7545(o)(9)(B) to:

a. HollyFrontier's Cheyenne Refinery, where EPA relied on factors deemed irrelevant by Congress, failed to consider important aspects of the problem, and failed to establish a rational relationship between the facts considered and the conclusion reached;

b. HollyFrontier's Woods Cross Refinery, where EPA relied on factors deemed irrelevant by Congress, failed to consider important aspects of the problem, and failed to establish a rational relationship between the facts considered and the conclusion; and

c. CVR's Wynnewood Refinery, where EPA relied on factors deemed irrelevant by Congress, failed to consider important aspects of the problem, and failed to establish a rational relationship between the facts considered and the conclusion.

STATEMENT OF THE CASE

I. Statutory Framework

A. The RFS Statute

Congress created the RFS "[t]o move the United States toward greater energy independence and security, [and] to increase the production of clean renewable fuels," by requiring that increasing volumes of fossil fuels be replaced by renewable fuels in the transportation fuels sold in the United States. *See* Pub. L. No. 110–140, 121 Stat. 1492 (2007); Pub. L. No. 109-58, 119 Stat. 594 (2005). Specifically, EPA must "ensure that transportation fuel[4] sold or introduced into commerce in the United States…on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel"[5] required by the statute. *Id*. § 7545(o)(2)(A)(i). EPA's regulations are codified at 40 C.F.R. Part 80, Subpart M.

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[4] The term "transportation fuel" means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels). 42 U.S.C. § 7545(o)(1)(L).

[5] Although the RFS sometimes lists these four categories separately, it also refers to them collectively as "renewable fuel." *See* 42 U.S.C. § 7545(o)(1)(B), (D), (E), (J); *see also* 40 C.F.R. § 80.1401. Renewable fuels are "produced from renewable biomass" such as crops, trees, and animal byproducts, and are "used to replace or reduce the quantity of fossil fuel present in a transportation fuel." *Id*. § 7545(o)(1)(I)-(J).

Each year, EPA calculates applicable percentage standards of renewable fuels that "obligated parties" must achieve to meet the applicable annual volume requirements.[6] Each "obligated party" must satisfy its own annual Renewable Volume Obligations ("RVOs"), which are calculated from EPA's applicable percentage standards. 40 C.F.R. § 80.1427(a)(1). EPA has designated refiners and importers of gasoline and diesel as "obligated parties." *Id*. § 80.1406. Obligated parties must hold (and then retire) enough renewable fuel credits, known as Renewable Identification Numbers ("RINs"), for each compliance year to cover their RVOs.[7] 42 U.S.C. § 7545(o)(3)(B)(ii), (o)(5); 40 C.F.R. § 80.1406. Each RIN

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[6] EPA may adjust the statutory volumes only when specific criteria are met. *See* 42 U.S.C. § 7545(o)(7). To determine the annual "applicable percentages" for each of the four types of renewable fuels, EPA first estimates "the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States" the following year, then divides the applicable volume of the particular type of renewable fuel (e.g., cellulosic, advanced, biomass-based diesel, and total renewable) by the estimate of the total volume of non-renewable transportation fuel to arrive at the percentage each obligated party must meet. *Id*. § 7545(o)(3); 40 C.F.R. § 80.1405. For example, the applicable percentage standards of total renewable fuel were 10.10% for 2016 and 10.70% for 2017. 40 C.F.R. § 80.1405(a)(7)(iv); (8)(iv).

[7] Each obligated party calculates its RVO (and thus the number of RINs needed to demonstrate compliance) for a given compliance year by multiplying the volume of nonrenewable transportation fuel that it produces or imports by EPA's applicable percentage for that year. 40 C.F.R. § 80.1407.

"is a unique number generated to represent a volume of renewable fuel." 40 C.F.R. § 80.1401.

An obligated party may satisfy its annual RVOs either by 1) blending renewable fuel into gasoline or diesel and selling the product domestically, *see id*. §§ 80.1427–80.1429, or 2) purchasing RINs on the RIN market from parties that have separated more RINs than they need for compliance. *See id*. §§ 80.1428, 80.1460(c)(1); *see also* 42 U.S.C. § 7545(o)(5)(B).

In theory, if every obligated party satisfies its RVO either by blending renewable fuels or by purchasing enough RINs, the annual applicable volumes will be met. But when EPA exempts obligated parties from their volume obligations after the Agency sets the annual percentage standard, as it has done in the Challenged Exemptions, the total amount of renewable fuel blending will not reach the required levels even if all remaining non-exempt obligated parties meet their RVOs, because EPA does not adjust the applicable percentage standard when it grants these exemptions, leaving fewer obligated parties.[8]

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[8] EPA accounts for any small refinery exemptions granted prior to promulgating the annual standard in its calculation of the annual percentage standard, but to date it has decided not to adjust the subsequent annual percentage standards to account for waivers granted after promulgation of the final rule. 40 CFR § 80.1405(c); 82 Fed. Reg. 58,486, 58,523 (Dec. 12, 2017).

B. Small Refinery Temporary Exemptions

1. Initial Temporary Exemption and "Extension" Period

Congress provided a "temporary exemption" to all small refineries[9] until 2011, with a further extension of "at least two years" for any small refinery that a Congressionally-directed DOE study concluded would experience "disproportionate economic hardship" from RFS compliance. *See* 42 U.S.C. § 7545(o)(9)(A). EPA reports that out of 59 eligible small refineries, only 24 received an extension for 2011-2012 based on DOE's 2011 Small Refinery Exemption Study ("2011 DOE Study"), REC1_483-582, as contemplated by the statute.[10]

2. Further Case-by-Case Extensions for "Disproportionate Economic Hardship"

After the initial extension of the temporary exemption expired, Congress provided EPA with narrowly-tailored waiver authority to address continuing hardship to individual small refineries on a case-by-case basis. A small refinery may petition EPA "at any time" for "extension of the exemption under subparagraph (A)

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[9] A "small refinery" is one "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).

[10] Although the record indicates the 2011 DOE Study determined that 13 small refineries qualified for an exemption, REC2_635, EPA's website states that 24 refineries received the exemption for 2011-12. EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

for the reason of disproportionate economic hardship." *Id*. § 7545(o)(9)(B)(i); 40 C.F.R. 80.1441(e)(2). To qualify, the small refinery must:

- Have received and qualified for the initial temporary exemption (42 U.S.C. § 7545(o)(1)(K)); *see also* 40 C.F.R. § 80.1441(b));
- Demonstrate that the refinery continues to meet the statutory definition of "small refinery" (40 C.F.R. § 80.1441(e)(2)(iii));
- Specify and support the factors demonstrating "disproportionate economic hardship" the small refinery would face in meeting RFS obligations (*Id*. § 80.1441(e)(2)(i)); and
- Identify the date by which the small refinery anticipates that RFS compliance can reasonably be achieved. *Id*.

II. Background Regarding EPA's Determination of Temporary Exemption Extension Petitions

Although Congress did not define the term "disproportionate economic hardship," it "provided the EPA with a comprehensive directive in analyzing and evaluating RFS Program exemptions." *Sinclair*, 887 F.3d at 993. The statute requires that EPA consult with DOE and consider the findings of DOE's study and "other economic factors." *Id*. (citing 42 U.S.C. § 7545(o)(9)(B)). DOE's evaluation in the consultation uses the same matrix composed of two indices described in the 2011 DOE Study. *See e.g.*, REC2_627-628. One index measures "disproportionate impact" to the refinery through structural metrics (e.g., access to capital, presence of

other business lines, and local market acceptance for renewable fuels) and economic impact metrics (e.g., the refinery's refining margin relative to the industry). *See* REC1_524-529. The other index measures impact on the refinery's "viability" (i.e., its ability to remain competitive considering its cost of compliance) using factors such as such whether costs impair efficiency gains or are likely to lead the refinery to need to shut down. *Id*. The raw scores in each index are averaged, then each is divided by two to reach final "disproportionate impact" and "viability" scores. *See, e.g.*, REC2_644. These two scores are the basis for DOE's recommendation to EPA on whether a small refinery should be exempt from some or all of its RVO for a given year. Before 2016, DOE would recommend an exemption extension if the refinery received a score greater than one on both indices. *Id*. Starting in May 2016, based on direction in a Congressional report, DOE began recommending a 50 percent exemption if a refinery scored greater than one on only one of the two indices. *See* REC2_644; REC2_679 n.4.

EPA has offered little public information regarding its adjudication of these exemptions petitions, but an EPA memorandum issued in December 2016 explained that EPA considers "the findings of the DOE Small Refinery Study and a variety of economic factors," including "profitability, net income, cash flow and cash balances, gross and net refining margins, ability to pay for small refinery improvement projects, corporate structure, debt and other financial obligations, RIN prices, and

the cost of compliance through RIN purchases." REC1_586-588. It is not clear from public sources or the Administrative Record whether EPA continues to consider the same "variety of economic factors" identified in this memorandum for its decisions for the 2016 compliance year forward, although EPA's decisions on the Challenged Exemptions indicate that it did not do so in those three cases.

A. EPA Extended a Limited Number of Exemptions for Compliance Years 2013-2015

Following the expiration of the 24 exemption extensions conferred pursuant to the DOE Study at the end of 2012, EPA granted only seven to eight exemptions for each compliance year from 2013-2015, while denying (or declaring ineligible) a comparable number of petitions.[11] This was consistent with the "temporary" character of the exemption, and the regulatory goal of bringing all small refineries into compliance with the RFS. *See* 40 C.F.R. § 80.1441(e)(2)(i); *see Hermes Consol., LLC v. EPA*, 787 F.3d 568, 578 (D.C. Cir. 2015) (statute "contemplate[s] a "[*t*]*emporary* exemption" for small refineries with an eye toward eventual compliance with the renewable fuels program for all refineries.").

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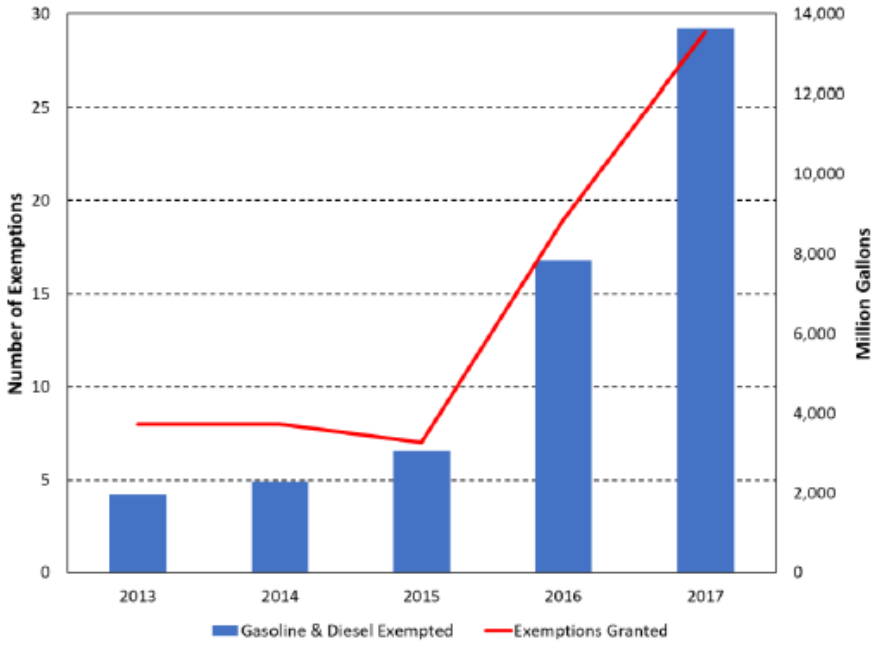
[11] *See RFS Small Refinery Exemptions*, *supra* note 10. Of the 43 exemption petitions EPA received for compliance years 2013-2015, 23 were granted. *Id.*

B. EPA Abruptly Changed Approach Starting in Compliance Year 2016

EPA changed its approach around the time it granted the Cheyenne Refinery exemption, REC2_682, noting that while "a showing of a significant impairment of refinery operations may help establish disproportionate economic hardship," EPA could now find that RFS compliance imposed a disproportionate economic hardship "*even if the refinery's operations are not significantly impaired.*" *See* REC2_636-637 n.10 (emphasis added).

Under this new interpretation of "disproportionate economic hardship," EPA has yet to deny a single petition. EPA has so far granted 19 of the 20 petitions submitted for compliance year 2016 (including Cheyenne and Woods Cross Refineries), with one still "pending." *RFS Small Refinery Exemptions*, *supra* note 10. EPA has granted 29 of the 36 petitions submitted for compliance year 2017 (including Wynnewood Refinery), with seven still "pending." *Id*. Consequently, the exempted volume of renewable fuels (i.e., the additional volume that would have been blended but for these exemptions) jumped from 190 million gallons for compliance year 2013 to 1.46 billion gallons (so far) for 2017. *Id*.

Figure 1. Number of Small Refinery Exemptions Granted and Associated Fuel Volumes



See RFS Small Refinery Exemptions, *supra* note 10.

III. The Challenged Exemptions

The Challenged Exemptions were among the first granted after EPA changed its approach. *See* REC2_636 n.10. Not one of the Refineries was exempted during the compliance year prior to the year for which they received an "extension." REC2_638 n.13; REC2_673; REC2_687. EPA also granted full one-year exemption extensions to each Refinery, rejecting DOE's recommendations for each one. EPA's justification for doing so in each case was based on its contention that the Refineries may have suffered disproportionate economic impact due to one or more of the following factors:

(i) "a difficult year for the industry as a whole" in 2016, REC2_645 (Cheyenne); REC2_682 (Woods Cross);

(ii) high RFS compliance costs reported at the refinery (and not the corporate) level, REC2_684 (Woods Cross);

(iii) operating losses and negative free cash flows reported at the refinery level, REC2_645 (Cheyenne); REC2_684 (Woods Cross); [redacted]; and

(iv) a lower than average negative refining margin either over the three-year period scored by DOE or over the compliance year for which exemption was sought, REC2_645 (Cheyenne); REC2_684 (Woods Cross); [redacted]

Each decision also reflected EPA's changed view (as of compliance year 2016) that "disproportionate economic hardship" can be based on either disproportionate impacts or adverse structural conditions alone. REC2_644 (Cheyenne); REC2_682 (Woods Cross); REC2_738 (Wynnewood).

A. HollyFrontier Cheyenne Refinery

HollyFrontier Refining petitioned EPA in March 2017 for an exemption extension for compliance year 2016 for its Cheyenne Refinery, equivalent to [redacted] of total renewable fuel. *See* REC2_589-610. Because the Cheyenne Refinery did not achieve a score of 1 or higher on either index of DOE's

scoring matrix, DOE recommended that EPA deny completely an exemption for 2016. REC2_627-628. EPA acknowledged that HollyFrontier Refining's corporate parent had a credit rating consistent with "sound petroleum refineries," and cash holdings that *grew by almost one billion dollars* during the same compliance period. REC2_640. Still, EPA rejected DOE's advice and on May 4, 2017, without explaining the disconnect between the record and its decision, granted HollyFrontier a full exemption from the Cheyenne Refinery's 2016 RVO. REC2_629-646.

EPA speculated that a small refinery "may" suffer disproportionate economic hardship from "a difficult year for the [refining] industry as a whole," without finding that *this* refinery suffered disproportionate harm. REC2_645. EPA also cited HollyFrontier Cheyenne's operational losses, negative cash flows, and lower refining margins to conclude that the Cheyenne Refinery would suffer disproportionate economic hardship from RFS compliance for 2016—without addressing HollyFrontier's considerable corporate financial resources, explaining how the hardships EPA cited are related to RFS compliance, or comparing Cheyenne Refinery's claimed hardship to other refineries. *See* REC2_645-646.

B. HollyFrontier Woods Cross Refinery

In September 2017, HollyFrontier Refining also submitted an exemption petition for its Woods Cross Refinery, which had an RVO of [redacted] of renewable fuel for compliance year 2016. REC2_666; REC2_648-653. DOE's

memo and scoring matrix recommended only a 50 percent exemption for 2016. REC2_678-679.

EPA, again rejecting DOE's advice, granted a full exemption for compliance year 2016 for the Woods Cross Refinery on December 20, 2017. REC2_680-685. In contrast to its decision on the Cheyenne Refinery, EPA did not cite any financial statistics related to HollyFrontier Corp. and, based on the Administrative Record, any material outside HollyFrontier Refining's petition and DOE's analysis—including EPA's prior analysis (cited in EPA's Cheyenne Refinery decision at REC2_634 n.5) that found small refineries did not suffer disproportionate economic hardship by purchasing RINs through the market as opposed to generating RINs through blending. REC2_680-685.

C. CVR Wynnewood Refinery

On January 23, 2018, CVR petitioned for a hardship extension from Wynnewood Refinery's RVO of [redacted] of renewable fuel for compliance year 2017. REC2_687-714; *see also* REC2_718-719. DOE's memo and scoring matrix for the Wynnewood petition recommended only a 50 percent exemption for 2017. REC2_732; REC2_735-736. Again EPA rejected DOE's recommendation, granting a full exemption from Wynnewood's 2017 RVO on March 23, 2018. REC2_735-741.

IV. Petition for Review

The Biofuels Coalition suspected an increase in small refinery exemptions in early 2018 but only learned of the Challenged Exemptions in April 2018. *See e.g.*, Cooper Decl. at 5; Pet. at 3. Shortly thereafter, the Biofuels Coalition filed its Petition for Review of the Challenged Exemptions on May 29, 2018. Pet. at 1.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") "requires courts to consider agency action in conformity with the agency's statutory grant of power, and agency action is unlawful if it is 'in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.'" *Sinclair*, 887 F.3d at 990 (quoting 5 U.S.C. § 706(2)(C)). Such questions of statutory interpretation are reviewed *de novo*. *Id.*

Even if authorized, any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" must also be set aside. 5 U.S.C. § 706(2)(A). An agency action is arbitrary or capricious "[1] if the agency has relied on factors which Congress has not intended it to consider, [2] entirely failed to consider an important aspect of the problem, [3] offered an explanation for its decision that runs counter to the evidence before the agency, or [4] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164 (10th Cir. 2012) (internal quotation marks and citations omitted). An agency action also must

be set aside as arbitrary and capricious if the agency does not "adhere to its own rules and regulations," because "[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned." *Texas v. EPA*, 829 F.3d 405, 430 (5th Cir. 2016) (internal quotations omitted). To satisfy the above standards, the agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotations omitted). A court may not shore up deficiencies in the agency's reasoning, or "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* Nor may a court defer to an agency's conclusory or unsupported suppositions. *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 841 F.3d 1141, 1150 (10th Cir. 2016).

Moreover, EPA's determinations of small refinery exemption petitions under the RFS are entitled only to limited *Skidmore* deference. *See Sinclair*, 887 F.3d at 991-93 (applying *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Under *Skidmore*, a court "examine[s] the persuasiveness of agency action with no thumb on the scale of judicial deference," and the weight given to the agency's judgment "depend[s] upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and

all those factors which give it power to persuade, if lacking power to control." *Id.* at 991 (quoting *Skidmore*, 323 U.S. at 140) (alteration in original).

Because "[t]he same flaws that lead [a court] to conclude [an agency action] lacks the power to persuade also demonstrate…that judgment to be arbitrary and capricious for want of reasoned decisionmaking," the *Skidmore* and arbitrary and capricious standards represent "[t]wo distinct but potentially overlapping standards of APA review." *Fox v. Clinton*, 684 F.3d 67, 74, 80 (D.C. Cir. 2012).

SUMMARY OF ARGUMENT

Each of the Challenged Exemptions was granted under CAA Section 211(o)(9)(B), which provides EPA with authority to issue case-by-case "extensions" of the "temporary exemption" to "small refineries" upon a showing of "disproportionate economic hardship" from compliance with RFS requirements. The Challenged Exemptions all exceeded EPA's authority because none was a literal "extension" of an existing exemption and none was supported by a plausible showing of "disproportionate economic hardship" consistent with the statutory requirements.

EPA's authority is circumscribed by the statute's plain language and informed by the RFS's purpose—accelerating the integration of renewable fuels by ensuring that transportation fuel sold in the U.S. "contains at least the applicable volume of renewable fuel" dictated by the statute. 42 U.S.C. § 7545(o)(2)(A)(i). *All*

refineries—including small refineries—are "obligated parties" required to shoulder their proportional share of annual RFS volume targets. *Id.* § 7545(o)(2(A)(iii)(I); 40 C.F.R. § 80.1406(a). Although all small refineries received a "temporary exemption" from RFS through 2010, and the statute permits limited "extensions," this exemption was provided with an eye toward eventual compliance for all refineries. *See Hermes*, 787 F.3d at 578; 40 C.F.R. § 80.1441(e)(2)(i) (regulations requiring petitioning refinery to estimate when compliance can reasonably be achieved).

As threshold matter, none of the Challenged Exemptions "extended" an *existing* exemption—and EPA has no authority to "extend" expired exemptions or grant *new* exemptions. EPA's approach to assessing "disproportionate economic hardship" drastically changed for compliance year 2016, as each of the Challenged Exemptions reflects. *See e.g.*, REC2_636 n.10. These decisions departed from EPA's prior analysis so dramatically that EPA effectively eliminated the need to demonstrate that the financial impact was causing a hardship, that the hardship was disproportionate compared to other refineries, and that the hardship was caused by RFS obligations.

Statistics on EPA's dispositions of small refinery exemption petitions between 2013-2017 show that the Challenged Exemptions are part of a flood of new "exemption extensions" granted for 2016 and 2017. *See supra* note 10. Although

in 2015 only seven small refineries continued under an exemption extension, EPA has granted 48 exemptions *so far* for 2016-2017, with eight petitions still "pending." *Id*. Because these exempted volumes are not made up by other obligated parties, EPA acknowledged that these 48 exemptions have effectively returned *2.25 billion* RINs to the market that otherwise would have been required for compliance, thus making future compliance less reliant on additional renewable fuel blending. EPA's unjustified and sudden expansion of its exemption authority thus undermines the core purpose of the RFS and EPA's obligation to implement it.

Because EPA's interpretation of "extension" and "disproportionate economic hardship" in the Challenged Exemptions are contrary to the statute's plain language and intent, the Challenged Exemptions were outside EPA's authority and must be vacated. 5 U.S.C. § 706(2)(c); *United States v. Turkette*, 452 U.S. 576, 588-90 (1981) (relying on statement of findings and purpose in Racketeer Influenced and Corrupt Organizations Act to interpret statutory term); *Sinclair*, 887 F.3d at 993, 999.

EPA's analysis of each of the Challenged Exemptions was also arbitrary and capricious because it relied on factors Congress never intended it to consider, entirely failed to consider basic economic information, ignored contrary record evidence (including EPA's *own* analysis), and was so flawed as to be implausible.

The Challenged Exemptions must be vacated on these grounds as well. *See* 5 U.S.C. § 706(2)(a); *U.S. Magnesium*, 690 F.3d at 1164; *Zen Magnets*, 841 F.3d at 1150.

STANDING

Each Petitioner has standing to challenge EPA's final agency actions based on the interests of its members, which include companies that manufacture and market ethanol fuel to blenders and marketers of gasoline (and generate RINs in doing so, *see* 40 C.F.R. § 80.1426), as well as agricultural producers of corn and other agricultural feedstocks used to produce renewable fuel.[12] *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342-43 (1977) (outlining prerequisites to "associational standing"); *Am. Forest & Paper Ass'n v. EPA*, 154 F.3d 1155, 1158-59 (10th Cir. 1998) (same). Because the purpose of the RFS is to ensure that "gasoline sold or introduced into commerce in the United States… contains the applicable volume of renewable fuel," 42 U.S.C. § 7545(o)(2)(A)(i), producers of renewable fuels, and of the feedstocks necessary to make them, are within the zone

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[12] Cooper Decl. (explaining RFA's standing); Jennings Decl. (explaining ACE's standing); Johnson Decl. (explaining NFU's standing); Doggett Decl. (explaining NCGA's standing); Declaration of Eric McAfee (RFA member); Declaration of Scott Mundt (ACE member). *See U.S. Magnesium*, 690 F.3d at 1165 (allowing extra-record evidence to establish standing).

of interest contemplated by the RFS. *See* 75 Fed. Reg. 14,670, 14,670 (Mar. 26, 2010) (describing industries potentially affected by RFS regulations).

When injury to a trade association's members results from actions taken by third parties, such as HollyFrontier and CVR, the association has standing if there is a "substantial probability that [the challenged] action created a demonstrable risk... of injury to the particularized interests" of the association's members.[13] *See S. Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 895 (D.C. Cir. 2006) (internal quotations omitted). "[C]ourts routinely credit assertions founded on basic economic logic in upholding standing," *Shays v. FEC*, 414 F.3d 76, 90 (D.C. Cir. 2005) (internal quotations omitted), and such "basic economic logic" establishes that the exemptions caused the Biofuels Coalition's members a concrete and particularized injury. *Cf. Associated Gas Distributors v. FERC*, 899 F.2d 1250, 1259 (D.C. Cir. 1990) (constitutional standing may be established by showing defendant's actions had the "immediate potential…to hurt them competitively."). By exempting the Refineries from their RFS obligations and "reinstating" or freeing up RINs that the refineries otherwise would have retired, EPA flooded RINs back into the market, lowering the mandatory use of (and hence, the demand for) renewable fuel, which

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[13] *See* Declaration of Scott Richman ("Richman Decl.") ¶8-24.

in turn lowered prices the Biofuels Coalition's members could receive for renewable fuels and feedstocks (such as corn).

The 48 small refinery exemptions EPA granted for compliance years 2016 and 2017 effectively returned 2.25 billion RINs to the market "that would otherwise have been required for compliance by the small refineries granted an exemption." 82 Fed. Reg. at 58,494; 83 Fed. Reg. 32,024, 32,029 (July 10, 2018). The avoided costs enjoyed by the Refineries due to the Challenged Exemptions proportionally contributed to harm to the renewable fuel and feedstock industries, as shown in the table below:

Refinery	**Total RINs Exempted (gallons)**	**Exempted gallons of non-advanced renewable fuel (generally corn-based ethanol)**	**Bushels of corn (approximate)**
Cheyenne	[redacted]	[redacted]	[redacted]
Woods Cross	[redacted]	[redacted]	[redacted]
Wynnewood	[redacted]	[redacted]	[redacted]

See REC2_600, REC2_666, REC2_706; Doggett Decl. ¶15 (corn-to-ethanol conversion ratio).

Exempted obligated parties can use the RINs they otherwise would have retired to a) satisfy RVOs for the same year at a different refinery (if they own multiple refineries), b) carryover the RINs to satisfy a portion of the next year's obligation, or c) sell the reinstated RINs for a windfall profit, *see* REC1_438.

Any of these outcomes has the effect of putting additional RINs back on the market, rather than retiring them, which in turn drives down the demand for, and price of, ethanol and ethanol feedstocks. EPA has conceded that "the 2016 and 2017 exemptions have directly increased the number of carryover RINs that will likely be available for compliance with the 2019 standards." 83 Fed. Reg. at 32,030. EPA's latest estimates indicate that obligated parties have used almost half a billion carryover RINs over the past year for compliance purposes rather than new blending. *See* Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, EPA-HQ-OAR-2018-0167 at 24 (Nov. 30, 2018), https://www.epa.gov/sites/production/files/2018-11/documents/rfs-2019-annual-rule-frm-2018-11-30.pdf (prepublication version). The portion of this increase and use of carryover RINs attributable to the Challenged Exemptions will continue to harm Biofuels Coalition members as Intervenor-Respondents use the carryover RINs, rather than RINs obtained through purchasing and blending ethanol, to satisfy their RVOs for future compliance years. RFA's analysis estimates that the Challenged Exemptions reduced ethanol consumption by 15 million gallons resulting in $6.3 million in reduced revenues to RFA members from February through August 2018. *See* Richman Decl. ¶18.

The effects of the dramatic 2016-2017 increase in exemptions (including the Challenged Exemptions) are still being felt. Ethanol blending levels have dropped

compared to pre-exemption estimates, *see* Richman Decl. ¶15-17, and market prices of RINs, of ethanol, and of agricultural feedstocks used to produce renewable fuel, are significantly lower than they would be if the EPA had not dramatically increased the number of small refinery exemptions by granting "extensions" to refineries that, like those in the Challenged Exemptions, had previously ceased to be covered by the temporary exemption. Ethanol prices have reached a 13-year low, Jennings Decl. ¶20, and RFA estimates that approximately $62.5 million in unrealized value to RFA members due to lower prices can be attributed to the Challenged Exemptions for the period of February to August 2018. *See* Richman Decl. ¶21.

A favorable decision from this Court would redress these injuries. Because improperly reinstated RINs have injured the Biofuels Coalition's members by artificially increasing the supply of RINs, resulting in lower demand and lower prices, a remand to EPA could result in the retirement of the improperly reinstated RINs. *Cf.* 40 C.F.R. § 80.1431(b)(1) (requiring adjustment of compliance calculations to reflect deletion of invalid RINs). This would redress the injury to the Biofuels Coalition by reducing the supply of available RINs on the market, leading to greater renewable fuel and feedstock demand and a corresponding rise in prices.

ARGUMENT

Congress provided EPA with narrowly circumscribed authority to grant an "extension" of the small refinery temporary exemption on a case-by-case basis to

refineries that demonstrate that "compliance with [RFS] requirements" would impose a "disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B). In each of the Challenged Exemptions, however, EPA did *not* require (1) that the exemption be an "extension" of an existing temporary exemption rather than a new exemption; (2) a showing of "economic hardship" that is plausibly consistent with the language and meaning of the statute; (3) that any such hardship be "disproportionate" relative to other refineries; or even (4) that the hardship be related to RFS compliance. EPA has no authority under the statute to grant an exemption extension if *any* of these statutory requirements is not met. Because EPA granted the Challenged Exemptions even though *none* of these requirements was met, EPA exceeded its statutory authority, and each of the Challenged Exemptions must be vacated. 5 U.S.C. § 706(2)(C)); *see also Sinclair*, 887 F.3d at 993, 999.

EPA also acted arbitrarily and capriciously in granting the Challenged Exemptions. EPA's analysis failed to consider important factors such as: (1) fundamental principles of economics relevant to the consideration of each refinery's claimed economic hardship; (2) industry-wide realities regarding the impacts of RFS compliance costs, which EPA has noted and relied upon in previous Agency actions; (3) the impact of carryover RINs; and (4) available public financial information regarding the refineries and their respective corporate parents. The Challenged Exemptions also offer inadequate factual support or justification for their

conclusions. Instead, EPA supported its decisions with only cursory explanations that ran counter to the evidence and reached determinations so implausible they cannot be ascribed to a difference in view or the product of agency expertise. *See U.S. Magnesium*, 690 F.3d at 1164.

Whether evaluated in terms of exceeding statutory authority or acting arbitrarily and capriciously, when the Agency's analysis in these adjudicatory determinations is so wholly unpersuasive, EPA is due no deference. *See Skidmore*, 323 U.S. at 140.

I. EPA Exceeded Its Statutory Authority Because None of the Challenged Exemptions Plausibly Meet Section 211(o)(9)(B)'s Requirements

The Challenged Exemptions exceed EPA's statutory authority in three ways. First, EPA has transformed a case-by-case process for helping ease the path to compliance for a select few small refineries into a blanket exemption that is seemingly available to any small refinery, even if the refinery has previously demonstrated an ability to comply with the RFS. Second, EPA failed to ensure that the economic impact of complying with the RFS has caused a "disproportionate economic hardship" to the refinery. EPA's determination that structural impacts[14]

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[14] "Structural impacts" include factors such as a refinery's percentage of diesel production, access to credit, and local market acceptance of renewable fuels. REC1_525-527. *See supra* at 10-11 and REC1_524-529 for discussion of DOE scoring.

alone justify the disproportionate economic hardship exemption is an impermissible interpretation of the statute. And by failing to undertake any meaningful comparison between petitioning refineries and their competitors, EPA read the term "disproportionate" out of the statute. Third, EPA conducted no analysis to determine whether the Refineries' alleged hardships are or would be attributable to the cost of coming into compliance with RFS obligations.

A. EPA Cannot "Extend" Temporary Exemptions That Have Expired

EPA exceeded its statutory authority by granting exemption "extensions" to three refineries whose temporary exemptions had already expired. Because none of the Challenged Exemptions was granted to a refinery that was eligible to receive an "extension" in the first place, the Challenged Exemptions must be vacated. *Sinclair*, 887 F.3d at 991-93 (applying *Skidmore*, 323 U.S. at 140).

The CAA permits a small refinery to petition for an "extension of exemption." 42 U.S.C. § 7545(o)(9)(B)(i). Because the unambiguously expressed intent of Congress was that these exemptions, and any extensions of them, be limited in number and "temporary," EPA's decisions to "extend" exemptions to refineries that were no longer exempt from the RFS were actually grants of *new* exemptions, not "extensions" of existing exemptions. This is not within EPA's authority. EPA provides no justification for its interpretation of "extension," nor could any justification so completely at odds with the plain text of the statute be persuasive.

"Extend" is generally defined as "to increase the length or duration of; lengthen; prolong." *See* Random House Webster's Unabridged Dictionary at 684, 1631 (Deluxe Ed. 2001). Similarly, within the context of the statute, the plain meaning of "extension" is the continuation of an existing period with no intervening lapse. Courts have long recognized this ordinary meaning. *See, e.g.*, *Sakharam D. Mahurkar v. Arrow Int'l*, 160 F. Supp. 2d 927, 938 (N.D. Ill. 2001) (term "extends" describes something that is "continuous"). Such ordinary meanings must govern here. *See Sinclair*, 887 F.3d at 993 ("[S]tatutory terms are generally interpreted in accordance with their ordinary meaning.").[15]

The language and structure of the exemption provision also shows that while Congress devised a process to give all small refineries significant additional time to achieve RFS compliance, it also expected such relief would be "temporary" and

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[15] Moreover, if Congress did not intend to require continuity of the exemption, it could have simply allowed for *new* exemptions, instead of "extensions" of the "temporary" exemption it created, or used a different term in place of "extension" such as "renew," defined as "to begin or take up again." *See* Random House Webster's Unabridged Dictionary at 684, 1631 (Deluxe Ed. 2001); *see also Benzel v. Chesapeake Exploration, L.L.C.*, 2:13-CV-00280, 2014 WL 4915566, at *8 (S.D. Ohio Sept. 30, 2014) ("[E]xtending" means "increasing the ... duration of" whereas "renewal" indicates a party is "begin[ning] or tak[ing] up"); *Aquilent, Inc. v. Distributed Solutions, Inc.*, No. 1:11-cv-393, 2012 WL 405009, at *7 (E.D. Va. Feb. 7, 2012) (A new contract cannot be considered an "extension" of a prior contract).

limited only to small refineries at the time of enactment, not to any small refinery at any time in the future.[16] *See supra* Statement of Case I.B; *Hermes*, 787 F.3d at 578 (terms of the statute contemplate a "'[*t*]*emporary* exemption' for small refineries with an eye toward eventual compliance…for all refineries."); REC1_584 ("refiners have now had many years since the initiation of the RFS program in 2007 to develop business practices to meet RFS obligations").

Out of the 59 small refineries covered by the initial exemption, only seven still had exemptions in place as of the end of compliance year 2015.[17] The Refineries were among those small refineries whose prior exemptions had lapsed. *See* REC2_638 n.13 (no exemption requested for Cheyenne Refinery for 2014); REC2_673 (listing Woods Cross Refinery RIN purchase costs for 2014-16, suggesting no exemption since 2013); REC2_687 (no exemption since 2012). The Refineries were thus legally ineligible for any further *extension* of their original exemptions.

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[16] Only refineries who were small refineries in 2006, at the time the legislation was enacted, are eligible for the temporary statutory exemption through 2010. Thereafter, the exemption applicant "must meet the definition of 'small refinery' in § 80.1401 for the most recent full calendar year prior to seeking an extension." 40 C.F.R. § 80.1441(e)(2)(iii).

[17] Without public data, it is not possible to say whether these seven had *continuous* exemptions, only that the number of exempt refineries was not growing. *See RFS Small Refinery Exemptions*, *supra* note 10.

Although the statute provides that a refinery may submit a petition "at any time," the refinery may still only petition to *extend* its exemption. Within the context of the statute and in order to give every word its ordinary meaning, this can only mean a refinery can petition at any time for an exemption so long as the refinery was exempt from compliance in the immediately preceding year. *See True Oil Co. v. Comm'r*, 170 F.3d 1294, 1299 (10th Cir. 1999) ("appellate courts must examine the…language in context, not in isolation"). *Cf.* 40 C.F.R. § 80.1441(e)(2)(iii) (must be small refinery in year prior to petition). Congress could have allowed a small refinery to petition for an "exemption" at any time—but that is not what the statute provides. The term "extension" should not be interpreted mere surplusage; the statute only allows for petitions to extend an existing exemption.[18] *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (internal quotations omitted).

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[18] Allowing an expansive reading of "at any time" also would lead to absurd results. If a small refinery in 2018 were permitted to request an exemption for 2013, after its compliance deadline had long passed and its 2013 vintage RINs expired, that refinery—after waiting years to request exemption—could not have been facing hardship at the time of compliance. *See Robbins v. Chronister*, 402 F.3d 1047, 1050 (10th Cir. 2005) (applying the Supreme Court's absurdity exception to the plain language rule of statutory construction).

Given that the statute plainly dictates that the "temporary exemption" can only be *extended* and does not provide for reinstatement or a new exemption, EPA had no authority to grant the Challenged Exemptions, even if each of them *had* demonstrated disproportionate economic hardship caused by the RFS.

B. EPA's Interpretation of "Disproportionate Economic Hardship" Is Inconsistent with the Statute's Plain Language and Intent

EPA's interpretation of the phrase "disproportionate economic hardship" in the Challenged Exemptions is entitled to deference only to the extent this Court finds it persuasive. *Sinclair*, 887 F.3d at 993, 999. This Court was not persuaded by EPA's argument in *Sinclair* that the "disproportionate economic hardship" standard required a threat to the refiner's viability, finding it was "contrary to the meaning and the purpose of the statute" to set the bar for an extension so high, thereby "improperly transform[ing] Congress's statutory text into something far beyond what Congress plausibly intended." *Id.* at 997, 999. Here, EPA has also acted "contrary to the meaning and purpose of the statute," but this time erring so far in opposite direction as to read the "disproportionate economic hardship" requirement out of the statute entirely—granting extensions to the Refineries that came nowhere close to satisfying any plausible interpretation of that phrase.

None of the Challenged Exemptions offered reasoned analysis supporting EPA's determinations that these refineries would experience disproportionate economic hardship from RFS compliance—and therefore these decisions have no

"power to persuade" that EPA's interpretation of the statute is more plausible than the record for each of the Refineries would suggest. For example, EPA speculates in two of the Challenged Exemptions that a "difficult year for the industry as a whole" *may* cause disproportionate hardship to small refineries but offers no analysis of whether *these* refineries actually suffered any such "hardship" that was "disproportionate" to that experienced by other refineries. REC2_645 (Cheyenne); REC2_682 (Woods Cross). EPA also ignored the record, its own prior analysis, and fundamental economic principles to find "disproportionate hardship" where—by any plausible interpretation of that term—there was none. *See infra* Section II.A for full discussion of issues with EPA's economic analysis.

Taken as a whole, the Challenged Exemptions thus lack the "thorough… consideration," "valid…reasoning" and "consistency with [other] agency pronouncements" that are the hallmarks of lawful agency action. *Sinclair*, 887 F.3d at 991. Because EPA failed to apply a plausible standard of "disproportionate economic hardship," the Challenged Exemptions must be vacated.

1. By Granting the Challenged Exemptions Based on "Structural Factors Alone," EPA Eliminated the Required Showing of "Economic Hardship"

Although "disproportionate economic hardship" does not require evidence of hardship so severe that it would cause a small refinery to go out of business, a petition for extension must still demonstrate economic "suffering" and "privation"

in order to substantiate the "hardship" required for an extension of the exemption. *Sinclair*, 887 F.3d at 996. But in the Challenged Exemptions EPA did not require such a showing—instead finding that "structural impacts" or "adverse structural conditions alone" justified a full exemption for these three refineries, even though these factors had no significant impact on the refineries' operations. *See* REC2_682 (Woods Cross); REC2_738 (Wynnewood); REC2_636-637 n. 10 (Cheyenne).

While DOE's scoring rubric assesses structural impacts of RFS compliance, these are only part of the picture—they are not dispositive of "economic hardship," which requires assessment of operational factors as well. For example, a small refinery might have carryover RINs to offset the cost of its obligation, have significant financial resources, or be located in a market where it can recover any costs of compliance. Indeed, EPA has previously determined that small refineries are *not* disproportionately harmed by RIN purchases because these costs are recouped in prices of refined product. *See infra* Argument II.A.2.

EPA also has jettisoned a core component of "hardship" analysis entirely. In its decision granting the Cheyenne Refinery petition, EPA explained that "compliance with RFS obligations may impose a disproportionate economic hardship when it is disproportionately difficult for a refinery to comply with its RFS obligations—*even if the refinery's operations are not significantly impaired*." REC2_636-637 n.10 (emphasis added). In other words, EPA assumes

"disproportionate impact" for small refineries, and no longer requires *any* operational impairment at all—let alone impairment rising to the level of "economic hardship"—suggesting that virtually *any* small refinery can qualify for a hardship exemption regardless of its financial health.[19] This interpretation "fall[s] outside the boundaries of permissible choice" by eliminating a key prerequisite for an exemption extension. *Sinclair*, 887 F.3d at 996; 42 U.S.C. § 7545(o)(9)(B)(i); *see also Clark v. Rameker*, 573 U.S. 122, 134 S.Ct. 2242, 2248 (2014) ("[A] statute should be construed…so that no part will be inoperative or superfluous.") (internal quotations omitted).

EPA's willingness to relinquish a demonstration of refinery-specific hardship also undermines the purpose and structure of the statute to ensure the use of steadily increasing volumes of renewable fuels. The various waiver authorities provided to EPA under the statue are expressly limited and must be exercised consistent with the statute's purpose. *See* 42 U.S.C. § 7545(o)(7). Here, Congress provided an initial "temporary" exemption through 2010 for *all* small refineries, with no "hardship"

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[19] Since its change in interpretation, EPA has yet to deny a single one of the 71 petitions received for years 2016-18. *RFS Small Refinery Exemptions, supra* note 9. EPA's outcome-oriented interpretation effectively provides the blanket exemption that Congress expressly ended in 2011. *See* 42 U.S.C. § 7545(o)(9)(A)(i).

requirement. 42 U.S.C. § 7545(o)(9)(A); *see supra* Statement of Case II.B. If Congress wanted *all* small refineries to continue to enjoy an exemption regardless of hardship, it would simply have made the "temporary" exemption "permanent." *See Sinclair*, 887 F.3d at 998 (Congress knows how to draft a statutory provision when it intends to do so). It did not do so.

EPA references a post-enactment explanatory statement accompanying the 2016 Consolidated Appropriations Act, Pub L. No. 114-113 (2015), to support its revised interpretation. *See* REC2_644-645 (Cheyenne); REC2_681 (Woods Cross); REC2_738 (Wynnewood).[20] But post-enactment legislative history "is not a legitimate tool of statutory interpretation"—EPA's authority is bounded by statutory language, not post-hoc opinions.[21] *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011) ("Permitting the legislative history of subsequent funding legislation to alter

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[20] For Wynnewood, EPA also references the 2017 Consolidated Appropriations Act, Pub. L. No. 115-31 (2017) and Sen. Rep. 114-281. REC2_738.

[21] Even if the explanatory statements had any legal relevance, EPA distorts Congress's advice beyond recognition. The statement advised DOE that if either disproportionate impacts or viability impairment were found, it should recommend a 50% waiver. *See* REC2_644; REC2_679 n.4. It did not require that EPA grant *a full 100% exemption* for disproportionate impacts alone, as it did in each of the Challenged Exemptions, against DOE's advice in each case. *See* REC2_628; REC2_679; REC2_736; *see also supra* at 14-17 (DOE recommended 50% exemptions for Woods Cross and Wynnewood, and no exemption for Cheyenne).

the meaning of a statute would set a dangerous precedent…they cannot be made the device for unenacted statutory revision."). Because EPA granted the Challenged Exemptions without statutory authority, its decisions must be vacated.

2. EPA Did Not Require Any "Hardship" to Be "Disproportionate"

Moreover, even if the Challenged Petitions had provided evidence of plausible economic hardship, EPA did not examine or explain how any of the three refineries suffered *disproportionate* hardship vis-à-vis larger refineries, as the statute requires. 42 U.S.C. § 7545(o)(9)(B)(i). As this Court has held, EPA's assessment of disproportionate impact "inherently requires a comparative evaluation." *Sinclair*, 887 F.3d at 997; *see also Lion Oil Co. v. EPA*, 792 F.3d 978, 984 (8th Cir. 2015) ("relative costs of compliance alone cannot demonstrate economic hardship because all refineries face a direct cost associated with participation" in the RFS).

Congress created the temporary small refinery exemption to account for any potential inherent scale advantages of large refineries, *see id*., at least during the initial years of RFS compliance. Consequently, a small refinery that *does not directly compete* with large refineries would be inherently less likely to demonstrate *disproportionate* economic hardship because the large refinery would not have an advantage in that market. *See infra* Argument I.B.2.b (discussing competition in PADD IV).

To determine whether there has been a "disproportionate" harm, "EPA must compare the effect of the RFS Program compliance costs on a given refinery with the economic state of other refineries." *Sinclair*, 887 F.3d at 997. EPA did not even attempt to make such a comparison in any of the Challenged Exemptions; it merely stated without support or analysis that the refineries suffered disproportionate economic hardship. *See* REC2_646 (Cheyenne); REC2_684 (Woods Cross); REC2_741 (Wynnewood). EPA exceeded its statutory authority by granting the Challenged Exemptions because it failed to conduct the kind of comparative analysis that would ensure that any small refinery hardships were disproportionate. *See Sinclair*, 887 F.3d at 997.

a. A "Difficult Year for the Industry as a Whole" Is Not Evidence of "Disproportionate" Hardship

For the two HollyFrontier exemption decisions, EPA further demonstrated its disregard for the required element of disproportionality in the statute. Among the "other economic factors" EPA references in its decisions on HollyFrontier's Cheyenne and Woods Cross Refineries was "a difficult year for the industry as a

whole" in 2016, noting that "[t]hroughout the industry, refineries reported lower net refining margins in 2016." REC2_645 (Cheyenne); REC2_682 (Woods Cross).[22]

Such "macro" perspectives are inadequate where they statute calls for a "micro"-level analysis, however, and a difficult year *for the entire industry* is not in itself evidence of *disproportionate* hardship for small refineries generally, nor for the two HollyFrontier refineries EPA examined. *Cf. Lion Oil*, 792 F.3d at 983 (pipeline disruption affecting four refineries not refinery specific impact). Lower margins—particularly if due to industry wide trends—are neither "a disproportionate" hardship nor one caused by RFS obligations, as the statute requires. *See* REC2_645 (acknowledging lower net refining margins "[t]hroughout the industry" for 2016).

If Congress intended to empower EPA to exempt *all* small refineries from the RFS program during industry-wide downturns, it could easily have drafted such a provision. *See Sinclair*, 887 F.3d at 998. But the small refineries exemption was "temporary," and "extensions" beyond those mandated under the 2011 DOE Study are expressly limited to case-by-case assessments of disproportionate economic

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[22] EPA's exemption to the Wynnewood Refinery notes that [redacted] REC2_738-739.

hardship due to the RFS. 42 U.S.C. § 7545(o)(9)(A)-(B). EPA has no authority to expand upon this relief.

EPA has previously acknowledged as much. *See* 75 Fed. Reg. at 14,736 (2010) ("Congress spoke directly to the relief that EPA may provide for small refineries…[and] EPA believes that an additional or different extension…provision in section 211(o)(3) would be inconsistent with Congressional intent."). To the extent EPA wishes to reduce volume obligations *for the entire industry or a particular region*, rather than small refineries only, based on "a difficult year for the [refining] industry as a whole," it could do so under its general waiver authority, if the RFS "would severely harm the economy" of "a State, region, or the United States." 42 U.S.C. § 7545(o)(7)(A)(i). Because Congress established a distinct statutory procedure for reducing severe harms to the regional or national economy (i.e., non-disproportionate economic hardship), EPA may not use industry-wide economic hardship as a basis to expand upon the separate criteria established under 42 U.S.C. § 7545(o)(9)(B)(i) to address "disproportionate economic hardship" to specific small refineries. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations omitted).

b. A Small Refinery Does Not Suffer "Disproportionate Hardship" from the RFS when Its Regional Competition Is Comprised Only of Other Small Refineries

EPA also ignored, with regard to the Cheyenne and Woods Cross Refineries, the important aspect of competition within PADD IV, which ought to have been central to any assessment of whether any economic hardship was "disproportionate" for these two refineries.[23] *See Sinclair*, 887 F.3d at 997.

All refineries in PADD IV could qualify as small refineries as defined in the statute. REC1_465, REC1_471, REC1_477, REC1_480.[24] Moreover, according to HollyFrontier, the primary competition of refineries in PADD IV is from other refineries within PADD IV. *See* REC2_649 (competes with refineries in Utah, Wyoming, and Montana); consequently, Cheyenne and Woods Cross compete primarily against other small refineries within the same PADD. Given the fact that the primary competition for Cheyenne and Woods Cross comes from other small refineries, EPA ought to have recognized that neither was likely to be

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[23] Petroleum Administration for Defense Districts (PADDs) are geographic aggregations of the fifty states used for tracking data related to crude oil and petroleum products. PADD IV includes Wyoming, Colorado, Montana, Utah, and Idaho. REC1_532.

[24] While rated at 85,000 barrels per day, the Sinclair Wyoming Refining Company's refinery has previously received small refinery exemptions, as eligibility is based on throughput. *See Sinclair*, 887 F.3d at 889-90.

"disproportionately" disadvantaged by RFS compliance due to any potential inherent scale advantages of large refineries. EPA did not recognize or address this issue, which further demonstrates that EPA made no attempt to make a comparative assessment of disproportionate harm for either the Cheyenne or Woods Cross refineries. *Cf.* REC2_632 (Congress sought estimate of small refinery impacts by region).

C. EPA Did Not Require that "Disproportionate Economic Hardship" Be Due to Compliance with RFS Obligations

The plain language of the statute also requires that the "disproportionate economic hardship" used to justify an exemption extension be caused by "compliance with the requirements of paragraph (2)," referring to 42 U.S.C. § 7545(o)(2), which establishes the RFS and related applicable volume obligations. 42 U.S.C. § 7545(o)(9)(B)(i) (referencing *id.* § 7545(o)(9)(A)(ii)(I)); *see also Sinclair*, 887 F.3d 988 (exemptions are available only to "small refineries that would suffer a 'disproportionate economic hardship' *in complying with the RFS*…") (emphasis added).

In each of the Challenged Exemptions, EPA acknowledged that DOE found [redacted] but offers no evidence that its decision to ignore DOE was based on evidence of hardship *resulting from compliance with the RFS*. *See* REC2_645 (Cheyenne); *see* REC2_682 (Woods Cross); REC2_739 (Wynnewood). EPA

implicitly attributes any negative financial performance, such as a loss from operations or negative refining margins, to RFS compliance. *See* REC2_645 (Cheyenne); REC2_684 (Woods Cross); REC2_741 (Wynnewood). Yet EPA does not explain how these data points relate to RFS compliance, or how, RFS compliance has made financial performance worse. Although EPA referenced HollyFrontier's and CVR's estimated RFS compliance costs, which consisted of RIN purchases, *see* REC2_639; REC2_684; REC2_740-741, it ignored its own public statements that RIN costs are passed through in the prices that merchant refiners receive for their refined product, and therefore present no "hardship" at all. *See infra* Argument II.B; REC1_411-412 ("Merchant refiners…should not therefore be disadvantaged by higher RIN prices, as they are recovering these costs in the sale price of their products."). EPA references other types of economic hardships small refineries might face, such as poor access to credit or lack of other business lines, *see e.g.*, REC2_645, but it fails to tie any of these to the cost of RFS compliance.

Tellingly, EPA stated that the Woods Cross and Wynnewood Refineries' disproportionate economic hardship [redacted] REC2_684 (Woods Cross); REC2_741 (Wynnewood). If a *full* exemption from the RFS would only relieve "in part" the alleged hardship, EPA did not limit its "hardship" analysis to that caused by RFS compliance—as the statute dictates it must.

Because EPA did not limit its "hardship" finding to hardship due to RFS compliance, the Challenged Exemptions exceeded EPA's authority and must be vacated.

II. The Challenged Exemptions Were Also Arbitrary and Capricious

As discussed at length below, EPA's outcome-oriented analysis of these three exemption petitions at turns relied on factors that Congress did not intend EPA to consider, or conversely failed to consider important aspects required by any reasoned assessment of "disproportionate economic hardship." *See U.S. Magnesium*, 690 F.3d at 1164. When EPA offered explanations for its findings at all, these were either contrary to the record evidence or "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id*. EPA further failed to "adhere to its own rules and regulations," *see Reuters Ltd. v. FCC*, 781 F.2d 946, 950-51 (D.C. Cir. 1986), and contradicted its own directly relevant public analysis and findings, without explanation.

Because EPA failed to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," its decisions must be vacated. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (internal quotations omitted).

A. EPA Made Fundamental Errors and Failed to Consider Relevant Economic Factors in Assessing the Degree of Hardship

CVR and HollyFrontier's petitions predictably characterized their Refineries as cash-constrained, but as EPA acknowledged, it was obligated to evaluate these claims based on the DOE Study and "other economic factors including… corporate structure." *See* REC1_587; REC2_645; REC2_740; 42 U.S.C. § 7545(o)(9)(B)(ii). A cursory review of the record and the financial status of the Refineries and their corporate parents reveals that EPA did not fulfill this obligation in the Challenged Exemptions.

None of the Refineries was facing "disproportionate economic hardship" in any meaningful sense of that term. Yet, in each of the Challenged Exemptions, EPA accepted the refinery's claims, selectively relying only on information supporting those claims, while ignoring any contrary information (even that provided by the refineries themselves) and relevant context and analysis (including EPA's own analysis) that disproved those claims. None of the decisions even describes specific nature or extent of the "hardship," often referencing potential harms faced by refineries generally rather than actual "economic hardship" faced by each specific refinery. EPA's woefully deficient review manifested itself in:

(1) fundamental analytical errors contrary to basic economic principles;

(2) failures to assess the refinery petitioners' claims against the data reported and readily-available public data; and

(3) failures to consider the refineries' access to corporate resources, including carryover RINs and lines of credit.

While any one of EPA's errors in isolation might have indicated oversight or mistake, taken together they indicate that EPA's approach was plainly outcome-oriented and in direct conflict with the statute and EPA's public analysis and determinations.[25] As such, EPA's grant of the Challenged Exemptions was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," requiring its decisions be vacated. 5 U.S.C.§ 706(2)(A); *U.S. Magnesium*, 690 F.3d at 1164 (enumerating types of arbitrary and capricious agency actions); *see also WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1236 (10th Cir. 2017) (even if the court concluded that the agency had sufficient data, "we would still conclude this…assumption itself is irrational (i.e., contrary to basic supply and demand principles").

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[25] EPA was so outcome-oriented that it acted upon the exemption petitions even though they did not include a plan to achieve compliance, as required by agency guidance. *See* REC1_587; REC2_597; REC2_652; REC2_687-713; REC2_718-729. *See Reuters*, 781 F.2d at 950-51 (agency action that does not "adhere to its own rules and regulations" must be set aside).

1. The Refineries' Margins Were Not Reliable Evidence of the Refineries' True Economic Status

EPA cited gross and net refining margins in each of the Challenged Exemptions as a factor justifying a full exemption, contrary to DOE's recommendation. REC2_645 (Cheyenne); REC2_683-684 (Woods Cross); REC2_740 n.5 (Wynnewood). But EPA ignored information that these numbers do not reflect the true economic health of these Refineries.

Cheyenne: Although EPA [redacted] 2016 to support the assertion that Cheyenne "would suffer disproportionate economic hardship from compliance with RFS obligations," REC2_645, the record shows that this "operational loss" was neither evidence of "hardship" nor related to the RFS. Instead, it was primarily the company's accounting write-down of [redacted]. REC2_602. This one-time write-down was irrelevant to Cheyenne's cash flow in 2016. Cheyenne's *actual* operating loss, "[redacted], which was only [redacted] of its annual revenue for that year ([redacted]). REC2_602; REC2_605.

Woods Cross: EPA cited a sharp decline in Woods Cross's refining margin for 2016 as a basis for granting a full exemption to Wood Cross. REC2_684. But this ignores that (1) as EPA acknowledged elsewhere, refineries industry-wide experienced lower refining margins in 2016, REC2_682; and (2) that Woods Cross's three-year gross and net margins for 2014-2016 [redacted],

respectively) *exceeded* the industry average, REC2_683 n.7.[26] Any "hardship" thus was not "disproportionate" or RFS-related.

Wynnewood: Wynnewood Refining characterized [redacted] in scheduled refinery turnaround costs as [redacted] rather than capital expenditures amortized over time, which skews financial reports for 2017 since the plant is mostly non-operational during the turnaround. *See* REC2_712; CVR Refining, Annual Report (Form 10-K), at 79 (Feb. 26, 2018) ("2017 CVR 10-K") (SUPP_472) ("Costs associated with these turnaround activities [every four to five years] were included in direct operating expenses"). EPA should have realized this would impact the "disproportionate" analysis, since it caused Wynnewood's net margins to appear artificially low to compared to other refiners who did amortize their capital turnaround costs over time. *Compare* REC2_604 (showing Cheyenne turnaround as capital expenditures) and REC1_057 (HollyFrontier "turnaround spending is amortized over the useful life of the turnaround") *with* REC2_712 (showing turnaround as direct operating expenses for Wynnewood Refinery) and 2017 CVR 10-K at 79 (SUPP_472) (turnaround costs are direct operating expenses). More importantly, regardless of whether Wynnewood Refinery's turnaround costs

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[26] DOE considers a three-year average to "eliminate market volatility." REC1_527.

were expensed or capitalized, such periodic costs cannot be seen as evidence of "economic hardship" and are not related to RFS compliance.

2. The Refineries' RIN Purchase Costs Were Relatively Modest Proportional to the Rest of the Industry, and in Any Event Were Recouped Through Higher Fuel Prices

The Refineries' exemption petitions allege that RIN purchase costs caused disproportionate economic hardship. REC2_593 (cost of RINs "adds a heavy financial burden" to Cheyenne); REC2_684 (RINs "purchased on the open market at extraordinary cost for a refinery the size of Woods Cross"); REC2_688 [redacted] for Wynnewood Refinery). EPA accepted these assertions without question, REC2_645 (Cheyenne); REC2_684 (Woods Cross),[27] but the record shows that the Refineries' RIN purchase costs were marginal in the context of each refinery's crude and operating expenses, representing less [redacted] of the applicable state and local sales tax rate[28] for each refinery:

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[27] EPA's cursory decision for Wynnewood Refinery did not mention RIN costs at all.

[28] *See* Tax Foundation, https://taxfoundation.org/state-and-local-sales-tax-rates-in-2017/.

Refinery	**RIN Purchase Expense**	**Applicable Sales and Local Tax Rate (2017)**
Cheyenne	[redacted]% of 2016 combined cost of crude and operating expenses (REC2_602; REC2_639)	5.40%;
Woods Cross	[redacted]% of 2016 combined cost of crude and operating expenses (REC2_666; REC2_668)	6.76%
Wynnewood	[redacted]% of combined cost of crude and operating expenses for first nine months of 2017 (*see* REC2_706; REC2_728)	8.86%

Such relatively minor expenses cannot support a finding of "economic hardship," nor could it be "disproportionate," since all obligated parties have the same percentage standard and pay similar prices on the RINs market. The Intervenor-Respondents' proportional obligations were the same as any other refinery's. *Cf.* REC1_413 (explaining functioning of RIN markets and compliance flexibility for obligated parties).

Similarly, while higher RIN prices may mean greater RIN acquisition costs, EPA has determined that merchant refiners like CVR and HollyFrontier do not face greater hardship than integrated refineries because "[RIN] costs have a similar impact on all obligated parties." REC1_438. Moreover, EPA has also recognized that since such costs are largely recoverable through the price of the refineries' products, they do not reflect a net loss. *See infra* Argument II.B. It was arbitrary and capricious for EPA to ignore evidence—particularly its own public findings and

analysis—to conclude that RIN purchase costs were evidence of "disproportionate economic hardship."

3. EPA Failed to Consider Carryover RINs in Assessing the Refineries' Overall RFS Compliance Costs

While extensions of the temporary exemption are granted at the refinery level, obligated parties may comply with their RVOs on a refinery-by-refinery basis or in the aggregate for all the refineries operated by the corporate parent (here, HollyFrontier Refining and HollyFrontier Corp. and CVR Refining, LP).[29] *See* 40 C.F.R. § 1406(c). RINs are fungible, corporate-level assets, which may be used to offset RVOs at any of the corporation's refineries. *See* REC1_536 (obligated parties subtract the amount of any carryover RINs from their RVO (up to 20 percent) to determine how many new RINs are needed). If any of the Refineries or their corporate parents held carryover RINs, those RINs could be used to offset RIN purchases during the year of alleged hardship. The Refineries did not provide corporate carryover RIN data, and EPA made no effort to obtain additional

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[29] HollyFrontier Refining submitted petitions for the Cheyenne and Woods Cross Refineries. *See* REC2_600; REC2_666 [redacted]; *see also* 2017 CVR Refining 10-K at 97 (SUPP_490) ("CVR Refining is subject to the Renewable Fuel Standard.").

information about how carryover RINs, if any, were allocated within the companies.[30]

EPA has recognized that the "carryover RIN bank" is relevant to determining relative hardship in meeting volume requirements—for example, in evaluating waivers of RFS volume requirements under 42 U.S.C. § 7545(o)(7), EPA considers the total number of carryover RINs available to all obligated parties when setting the nationwide applicable volumes and percentages. *See e.g.*, 81 Fed. Reg. 89,746, 89,754 (Dec. 12, 2016) ("[A] bank of carryover RINs is extremely important in providing obligated parties compliance flexibility.").

Here, however, EPA did not similarly consider the impact of corporately-held carryover RINs on the Refineries' ability to meet or partially offset their RFS obligations, nor that granting "hardship" extensions to small refineries owned by large, well-financed corporations incentivizes those companies to use carryover RINs to relieve obligations at non-exempt refineries or sell them for a windfall. *Cf.* REC2_635 n.8 (acknowledging competitive advantage from exemption) (quoting 2014 DOE Study Addendum, REC1_583-585). This type of opportunistic shell

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[30] REC2_600; REC2_666 (total volume of carryover RINs assignable to Cheyenne and Woods Cross [redacted]); REC2_706 (Wynnewood Refinery reported [redacted], but EPA did not ask whether any carryover RINs were held by CVR Refining).

game—structuring operations at its small refineries to suggest "hardship," in order to reap greater profits—undermines the RFS's purpose by effectively reducing the overall annual volume obligation without public knowledge or scrutiny. It was therefore arbitrary and capricious for EPA to ignore the known impact of carryover RINs in granting the Challenged Exemptions.

4. The Financial Health of the Refineries' Corporate Parents Should Have Been an Essential Element of any "Economic Hardship" Determination

More broadly, because the Refineries' corporate parents ultimately bear RFS obligations, *supra* note 29, HollyFrontier's and CVR's corporate financial positions are crucial to assessing the "disproportionate economic hardship" claims from the Refineries. Although EPA claimed to consider "publicly available information" among "other economic factors" supporting its decisions to grant the Challenged Exemptions, *see* REC2_684 (Woods Cross); REC2_637, REC2_645 (Cheyenne); REC2_741 (Wynnewood), EPA apparently did not use public information to validate the claims made in the exemption petitions, in light of the Refineries' access to corporate resources. Further, even though the Refineries are owned by public companies with annual disclosure obligations, the record does not include any publicly available financial information *for the years in which the refineries sought the Challenged Exemptions*. Consequently, so to the extent EPA considered such information at all, it ignored the *most relevant* public financial data for the exemption

petitions.[31] As discussed below, the most recent publicly available Form 10-Ks for HollyFrontier (2016) and CVR (2017)[32] included refinery-level data contradicting EPA's findings of disproportionate economic hardship for each of the Refineries.

EPA ignored plainly relevant information indicating that the Refineries' "hardship" claims were no more than a thinly-veiled attempt by their corporate owners to avoid RFS obligations by engineering "hardship" at the refinery level, while the parent entities flourished. The Challenged Exemptions thus undermined the clear intent of the statute. *See Hermes*, 787 F.3d at 578 ("Allowing small refineries to perpetuate that manner of self-inflicted hardship would conflict with the terms of the statute, which contemplate a "[*t*]*emporary exemption*" for small refineries with an eye toward eventual compliance with the renewable fuels program for all refineries.") (quoting 42 U.S.C. § 7545(o)(9)(A) (emphasis added). EPA erred by failing to recognize the effect of corporate resources in assessing economic

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[31] The record for the Cheyenne Refinery petition includes HollyFrontier Corp.'s 2015 Form 10-K, which addressed the year prior to the requested exemption year.

[32] HollyFrontier Corp.'s 2016 Form 10-K became available on February 22, 2017, almost a month before the Cheyenne Refinery petition was complete, and half a year before the Woods Cross petition. *See* HollyFrontier Corp., Annual Report (Form 10-K) (Feb. 22, 2017) ("2016 HollyFrontier Corp. 10-K") (SUPP_001). CVR Refining, LP's Form 10-K for 2017 was released one month before EPA granted Wynnewood's petition, *see* REC2_732; REC2_733. 2017 CVR 10-K at 1.

hardship, the Court must vacate the Challenged Exemptions as arbitrary and capricious. *See U.S. Magnesium*, 690 F.3d at 1164.

HollyFrontier. Even after accounting for RIN costs, HollyFrontier had an EBITDA (earnings before interest, taxes, depreciation, and amortization) of $200 million in 2016. 2016 HollyFrontier Corp. 10-K at 39 (SUPP_039); *see Hermes*, 787 F.3d at 578 (importance of EBITDA). RFS compliance apparently did not curtail HollyFrontier's 2016 spending on planned capital initiatives, which exceeded projections. *Compare* REC1_058 *with* REC2_604 and REC2_670. While DOE recognized that [redacted], REC2_679; REC2_673; REC1_059, EPA did not address this fact in its analysis. It beggars belief that HollyFrontier would invest almost [redacted] to increase refining capacity significantly—all while complying with the RFS—and yet assert that a mere [redacted] in RIN purchases threatens the ongoing viability of the refinery. *See* REC2_652; *see Hermes*, 787 F.3d at 578.

Although EPA cited serious cash flow limitations in 2016 for the Cheyenne and Woods Cross refineries, HollyFrontier was not cash constrained at all—in fact, it was conducting a $1 billion stock repurchase program, REC1_056; REC2_645, and purchased Petro-Canada Lubricants Inc. from Suncor for $862 million *in cash*,

2016 HollyFrontier Corp. 10-K at 6 (SUPP_006). These facts also are not indicative of a company suffering disproportionate economic hardship. *See Hermes*, 787 F.3d at 578.

CVR. EPA likewise did not consider the appropriate metric of Wynnewood's financial health, [redacted] totaling [redacted] in 2017 and [redacted] in 2016. REC2_729. Looking at cash flow is appropriate here because Wynnewood Refining made [redacted] for the first three quarters of 2017 and distributed another [redacted] over the prior three years. REC2_729; *see* 2017 CVR Refining 10-K at 65 (SUPP_458) (characterizing as "distributions to our common unitholders"). By granting Wynnewood's exemption despite apparently abundant corporate resources, EPA capriciously rewarded CVR's choice "to distribute profits to its owners rather than use profits to [meet its] compliance obligations." *See Hermes*, 787 F.3d at 578.

Although apparent on the face of the record, EPA also ignored errors and omissions concerning Wynnewood Refinery's access to credit. While CVR's petition claims that the Wynnewood Refinery [redacted] and [redacted] REC2_689, REC2_718, DOE's report

noted a Standard & Poor's credit rating of [redacted], REC2_723, which DOE which considers [redacted] to credit. *See* REC1_525-526.[33]

B. The Challenged Exemptions Contradict EPA's Determination that Merchant Refiners Like HollyFrontier and CVR Do Not Face Systemic Disadvantages from RFS Compliance Compared to Integrated Refiners

Each of the Refineries claimed disproportionate economic hardship due to the cost of purchasing RINs for RFS compliance. *See* REC2_593 (Cheyenne); REC2_649, REC2_652 (Woods Cross); REC2_688 (Wynnewood). EPA's own prior (and current) analysis and determinations contradict the Refineries' claims. Yet, EPA credited the Refineries' claims in granting the Challenged Exemptions, without acknowledging its contrary analysis or attempting to reconcile the apparent disagreement. *See Bd. of County Comm'rs v. Isaac*, 18 F.3d 1492, 1497 (10th Cir. 1994) ("an agency acted arbitrarily and capriciously if it…failed to consider important aspects of the problem, presented an implausible explanation or one contrary to the evidence.") (citations omitted).

EPA has published its analysis and conclusion that, although higher RIN prices may lead to greater RIN acquisition costs for obligated parties, such "higher

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[33] EPA also ignores the credit facility specified in CVR Refining, LP's 10-K for 2017, pursuant to which funds could be made available to Wynnewood Refinery. CVR Refining 2017 10-K at 2, 7 (SUPP_395; SUPP_400).

[RIN] costs have a similar impact on *all* obligated parties, and that "exempting merchant refiners (or any other obligated party) from their RIN obligation while maintaining RIN obligations for other obligated parties *would allow the exempted parties to benefit from higher petroleum prices that reflect RIN costs* while incurring no RIN costs themselves." REC1_438 (emphasis added). Therefore, contrary to CVR's assertion that its competitors have windfall RIN revenues, EPA has already determined that exempting merchant refiners *like CVR and HollyFrontier* would actually provide *them* with windfall profits.[34] *See id.*; REC2_694.

EPA has applied this analysis in contemporaneous determinations and rulemakings, including its November 2017 ruling denying petitions for rulemaking submitted by CVR, among other obligated parties. *See, e.g.*, *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation*, EPA-420-R-17-008 (Nov. 2017) at 24 (SUPP_579) (assumption that RIN costs are not recoverable by merchant refineries is "unfounded" and "ignore[s] the complexities of the fuels market"); *see also* 83 Fed. Reg. at 32,058 (acknowledging that all "obligated parties, including

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[34] If RIN purchase costs are recouped by refiners as EPA concluded elsewhere, the Challenged Exemptions were effectively subsidies of approximately [redacted] for Cheyenne Refinery (REC2_600); and [redacted] for Woods Cross Refinery (REC2_666); and [redacted] for Wynnewood Refinery (REC2_706).

small entities, are generally able to recover the cost of acquiring the RINs necessary for compliance with the RFS….”). EPA continues to take this position. Little more than one month ago, EPA argued to the D.C. Circuit in its response to an APA challenge to a 2017 rulemaking that “purported refinery operating costs related to RFS compliance…in a vacuum, *do not establish that obligated parties face ‘severe economic harm.’*” Brief of Respondent EPA at 44, *Am. Fuels and Petrochemicals Manufacturers v. EPA*, No. 17-1258 (D.C. Cir. Oct. 25, 2018), ECF No. 1757157 (SUPP_707) (emphasis added). EPA explained that “obligated parties pass on RFS compliance costs to their customers…, [and in] this sense, the RFS is analogous to a sales tax levied on businesses.” *Id*. (SUPP_707). EPA also explained that, even if this were not true, “a refinery may have high RFS compliance costs without being in financial distress—indeed it may even be wildly profitable.” *Id*. (SUPP_707). The Biofuels Coalition agrees.

But EPA reached the entirely opposite conclusion in the Challenged Exemptions, and in doing so did not “establish a rational relationship between its factual findings and its conclusion,” offering no reasoned analysis, nor even acknowledging the conflict with its prior analysis at all. *Bd. of County Comm’rs*, 18 F.3d at 1497.

Because EPA offered no credible record-supported explanation for disregarding its previous and current determination that merchant refiners recover

RIN purchase costs, and therefore are not at a systematic disadvantage, its actions were arbitrary and capricious. *See Zen Magnets*, 841 F.3d at 1151 ("An agency may not simply ignore without analysis important data trends reflected in the record.").

CONCLUSION

For the reasons above, this Court should vacate the Challenged Exemptions and remand to EPA with instruction to deny the exemption petitions.

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Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The issues involved in this petition for review of agency actions will benefit from full discussion with the Court in oral argument, during which counsel can address any questions the court might have.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because, according to the word-processor used to compose the brief, this brief contains 12,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font size and Times New Roman type style.

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CERTIFICATE OF DIGITAL SUBMISSIONS AND PRIVACY REDACTIONS

I hereby certify that in the above and foregoing all required privacy redactions have been made.

I hereby certify that the hard copies of the above and foregoing are exact copies of the ECF filing.

I hereby certify that the above and foregoing ECF submission was scanned for viruses with the most recent version of Microsoft System Center Endpoint Protection updated on December 2, 2018, and according to the program is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2018, I electronically filed **PETITIONERS' OPENING BRIEF** with the Clerk of the Court using the CM/ECF system, which will send email notification of such filing to all attorneys of record, as well as email service to all attorneys of record.

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