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' REPLY BRIEF

May 30, 2019

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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	Respondent 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
Petition	Biofuels Coalition's Tenth Circuit Petition for Review of Agency Actions
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

Although EPA and Intervenor-Respondents have done their best to avoid the Court's review of the Challenged Exemptions, this Petition and the Biofuels Coalition are properly before the Court.

There are several reasons for EPA and Intervenor-Respondents to fear the Challenged Exemptions will not survive the Court's scrutiny. First, EPA exceeded its authority by granting *new* small refinery exemptions when Congress only permitted EPA to "extend" the initial statutory exemptions. Until recently, EPA took the straightforward view that the RFS "specifically provides for a temporary RFS exemption for small refineries, and for the possibility of extensions of those temporary exemptions," but no more. *See* 78 Fed. Reg 49,794, 49,825-26 (Aug. 15, 2013). EPA does not explain why its interpretation changed, but its position now contradicts the plain text of the statute.

Second, the Challenged Exemptions reveal a willful disregard of the Intervenor-Respondents' true financial positions in assessing their "hardship" petitions. For example, EPA's new interpretation of "economic hardship" can be satisfied without any significant impairment to operations. The Challenged Exemptions also contradict, without explanation, EPA's own public position that it is almost impossible for most small refineries to claim *any* economic hardship from

purchasing or generating RINs because those costs are passed through to purchasers of gasoline and diesel fuel.

Third, EPA also failed to ensure that any economic harm was both "disproportionate" and *caused by* the RFS, as the statute requires. The "economic hardships" EPA describes in the Challenged Exemptions, even if credited, were not *disproportionate* to the refining industry, or even related to the RFS (e.g., EPA's reference to an industry-wide market downturn).

This Court's ruling in *Sinclair Wyoming Refining Co. v. EPA*, 887 F.3d 986 (10th Cir. 2017), does not validate EPA's decision to disregard clear statutory limitations on its authority to extend small refinery exemptions (*see* EPA Br. at 4, 15). *Sinclair* had not even been decided when EPA first changed its approach with the HollyFrontier Cheyenne exemption. But more fundamentally, EPA has *Sinclair* entirely backward. The Court in *Sinclair* held that EPA could not impose a greater burden on small refinery exemption petitions than the statute imposed, but it did *not* invalidate the statutory requirements or hold that EPA could ignore them. The gravamen of *Sinclair* is that the agency *only* has the authority Congress has conferred on it by statute—here, EPA abandoned express statutory limitations altogether. Accordingly, the Challenged Exemptions must be vacated.

ARGUMENT

I. The Biofuels Coalition's Petition Is Justiciable by this Court

A. Petitioners Have Established Article III Standing

The Biofuels Coalition has offered evidence that each of EPA's decisions to grant the Challenged Exemptions caused redressable injury to the Petitioners sufficient to establish Article III standing. Indeed, the Biofuels Coalition's standing in this case is so "self-evident," *see Nat'l Biodiesel Bd. v. EPA*, 843 F.3d 1010, 1015 (D.C. Cir. 2016), that EPA does not contest it.

To the extent that Intervenor-Respondents argue that Petitioners' injury is too speculative and/or not traceable to the Challenged Exemptions, or is not redressable, they either misapprehend the law or draw unsupported conclusions from the facts.

1. The Challenged Exemptions Injured Petitioners

The Challenged Exemptions caused the Biofuels Coalition's members to suffer: (i) reduced demand for ethanol blending and RINs compared to RFS requirements, Pet'rs' Br. at 24-26; Richman Decl. ¶8-23, Ex. A; (ii) lower ethanol and RIN prices due to reduced demand, *see, e.g.*, Pet'rs' Br. at 26-27; Richman Decl. ¶19-21; McAfee Decl. ¶14; and (iii) diminished biofuels investment and financing because the disparity between EPA's public rulemakings and its secret disposition of the Challenged Exemptions undermined investment-backed expectations and chilled growth in the renewable fuels sector. Jennings Decl. ¶22; Cooper Decl. ¶22; *see also* McAfee Decl. ¶6.

The Challenged Exemptions represent an estimated [redacted] in avoided RFS compliance costs (*see* Pet'rs' Br. at 60 n.34) which—though perhaps "relatively small" (HollyFrontier Br. at 22) to a company with over $10 billion in revenues[1]—well exceeds the "identifiable trifle" needed to establish standing. *Am. Humanist Assoc., Inc. v. Douglas Cty Sch. Dist. RE-1*, 859 F.3d 1243, 1252 (10th Cir. 2017).

The Supreme Court "routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement." *Clinton v. City of New York*, 524 U.S. 417, 433 (1998) (internal citation omitted). Petitioners have such competitor standing; obligated parties (including Intervenor-Respondents) are not only consumers of renewable fuels (due to RVO obligations) but also competitors to Petitioners' members because each gallon of renewable fuel blended displaces petroleum products. *See* REC1_504; *see also Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) ("[E]conomic actors suffer an injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition against them.") (internal quotations omitted). Since the Challenged Exemptions reduced the required portion of renewable fuels contained in transportation fuel sold

[1] *See* REC1_049; SUPP_036.

domestically (*see* 42 U.S.C. § 7545(o)(2)(B)), the Refineries benefitted at Petitioners' expense. *See* Pet'rs' Br. at 25.

Petitioners' harm from the Challenged Exemptions is an "application of basic economic logic," *United Transp. Union v. Interstate Commerce Comm'n*, 891 F.2d 908, 912 n.7 (D.C. Cir. 1989), not "speculation." HollyFrontier Br. at 20; *see also* Wynnewood Br. at 24. The Challenged Exemptions dumped approximately [redacted] RINs back into the market that would otherwise have been retired for compliance. Pet'rs' Br. at 8, 15–17, 26. This significantly increased the supply of excess RINs, *id.* at 8 (citing EPA's own analysis), and drove down the price of RINs and renewable fuels. *See* 83 Fed. Reg. 63,704, 63,726 (Dec. 11, 2018) ("RIN prices vary with the supply and demand for RINs."). It also reduced the incentive for ethanol blending by displacing purchases of new ethanol volumes. Pet'rs' Br. at 26; Richman Decl. ¶17–18, Ex. A at 9–13.[2] Even if the ethanol blend rate in 2018

[2] Ethanol blending increased in 2017 (*see* HollyFrontier Br. at 22) but declined in 2018, shortly after Woods Cross and Wynnewood received their exemptions (REC2_665; REC2_733) and when the extent of the exemptions became known. HollyFrontier's own estimates of the 2018 blend rate (10.07%), using data unavailable to Petitioners, is still lower than the average 2017 blend rate (10.13%) and much lower than the percentage standards set by EPA for 2017 (10.7%) and 2018 (10.67%) and Energy Information Administration estimates for 2018 (10.26%). *See* Richman Decl. ¶16-24; 81 Fed. Reg. 89,746, 89,751 (Dec. 12, 2016); 82 Fed. Reg. 58,486, 58,491 (Dec. 12, 2017). These differences might

turned out to be close to the previous year's (HollyFrontier Br. at 21 n.11), it was only because the price of ethanol had cratered, meaning the Biofuels Coalition's members were receiving a significantly lower price on a per unit basis than they otherwise would have received. Richman Decl. ¶13-16; McAfee Decl. ¶14-17; Mundt Decl. ¶10. In short, in the absence of the Challenged Exemptions, ethanol blending rates would have been higher and ethanol and feedstock prices would have been higher. *See* Pet'rs' Br. at 26-27; Richman Decl. ¶16-21.

Because Petitioners are thus "likely to suffer economic injury" due to the Challenged Exemptions, they "satisf[y] this part of the standing test." *City of New York*, 524 U.S. at 433; *see also Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1175 n.1 (10th Cir. 2015) ("Many cases confirm" that government action reducing

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appear small, but they resulted in a year-over-year decline in ethanol consumption of over 100 million gallons in early 2018. *See* Richman Decl. ¶16.

In addition, the number of "separated" RINs in excess of the annual target volume is not necessarily "overage" (*see* HollyFrontier Br. at 17-18) because this total includes the RINs renewable fuel exporters must separate and retire for exported volumes, 40 C.F.R. § 1429(b)(3), making them unavailable for compliance. The 322 million gallons in renewable fuel exports in 2017 thus makes up most of HollyFrontier's supposed "overage of 400 million RINs" for 2017. EPA, *Table 5: Total RIN Retirements for Annual Compliance Reported by Renewable Fuel Exporters*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and#main-content.

demand for a petitioner's product is "more than enough to satisfy Article III's 'injury-in-fact' requirement.").[3]

HollyFrontier suggests that its 2016 exemptions did not harm Petitioners in 2018. *See* HollyFrontier Br. at 20. HollyFrontier misses the mark, however, because RINs can be used in either the year they are generated or the following year, 40 C.F.R. § 1427(a)(6)(i). Since HollyFrontier regained 2016 RINs that it could use for 2017 compliance, its 2017 RINs were available for 2018 compliance. *See id*. It is

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[3] The nationwide RIN market makes *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235 (D.C. Cir. 2015) (Wynnewood Br. at 25–26) inapposite. Petitioners need not exclude other potential market factors or demonstrate direct sales to Intervenor-Respondents. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing…."); *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014) (third-party effects on RIN prices irrelevant to standing "so long as RINs cost *something*") (emphasis in original); *Harry v. Total Gas & Power N. Am., Inc.*, 889 F.3d 104, 111 (2d Cir. 2018) ("[P]rices at U.S. natural gas hubs are so interconnected that manipulation at any of the hubs amounts to manipulation of all of them…. For standing purposes, that is enough.").

Wynnewood also cites a bankruptcy court's ruling "from the bench" that rejected Growth Energy's intervention to oppose a refinery's proposed bankruptcy settlement. Wynnewood Br. at 27-28, A-147. That decision is inapposite because standing "is more stringent in bankruptcy [proceedings] than the case or controversy standing requirement of Article III." *In re Alpex Computer Corp*., 71 F.3d 353, 357 n.6 (10th Cir. 1995) (quotations omitted). Moreover, to the extent it considered Article III standing, the bankruptcy court rejected Growth Energy's petition because it found, unlike here, that allowing petitioner's challenge to the settlement would result in the refinery's liquidation and total RFS non-compliance. *See* Wynnewood Br. at A-153. This would have increased harm to Growth Energy. *Id*.

"basic economic logic" that parties use the least expensive means of compliance. *United Transp. Union*, 891 F.2d at 912 n.7.

2. Petitioners' Injury Is Redressable by this Court

Petitioners have shown that the harm from the Challenged Exemptions is redressable by making up the exempted volumes in a subsequent year. *See, e.g.*, McAfee Decl. ¶19 (restoring volume obligations either on Intervenor-Respondents specifically or on all non-exempt obligated parties collectively, to be satisfied by retirement of current year (i.e., not 2016 or 2017) RINs); Richman Decl. ¶24 (similar); Mundt Decl. ¶12 (similar).[4] This would generate additional demand for ethanol and accompanying RINs, thereby contributing to RIN price stabilization. *See* Pet'rs' Br. at 27. Also, a ruling that ties exemption extensions back to their statutory moorings would restore market certainty and investment-backed expectations. *See* Jennings Decl. ¶22; *see also Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 905–06 (10th Cir. 2012).

Intervenor-Respondents argue that having to make up for improperly exempted volumes would impose obligations "outside those required by the RFS" (HollyFrontier Br. at 17), and/or force Intervenor-Respondents to "over comply" (*see id.*; Wynnewood Br. at 29). But the annual statutory target volumes are the

[4] As these citations indicate, Petitioners did not waive this argument.

minimum, not a cap. *See* 42 U.S.C. § 7545(o)(2)(A)(i) (EPA must ensure "*at least* the applicable volume" of the RFS is met) (emphasis added). Each obligated party must satisfy its RVO regardless of whether the target volume is exceeded.[5] Nor is *retroactive* compliance the same as "*over* compliance," any more than paying back taxes results in over-taxation. Prospective remedies for past RFS wrongs are not new; EPA can and does require obligated parties to surrender current RINs to account for invalid RINs retired in good faith, even if the RINs already expired in a prior year. Pet'rs' Br. at 27 (citing 40 C.F.R. § 80.1431(b)(1)).

Congress and the courts have soundly rejected arguments that EPA is without the authority to redress past shortcomings with future action. *See* 42 U.S.C. § 7545(o)(5)(D) (authorizing credit deficit carryover so long as party "generates or purchases additional renewable fuel credits to offset" the deficit); *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 722-23 (D.C. Cir. 2017) (remanding 2016 RFS volume requirements so EPA could account for 500 million improperly-waived gallons—even though this would require obligated parties to "over comply" in a future year); *see also United States v. NGL Crude Logistics, LLC*, Case No. 2:16-cv-1038-LRR (E.D. Iowa Nov. 15, 2018) (requiring retirement of valid 2017 or 2018

[5] Exempting refineries based on the compliance of others would undermine the integrity of the RFS.

RINs to resolve alleged generation invalid RINs in 2011); *United States v. Chemoil Corp.*, Civ. Case No. 16-538 (N.D. Cal. Dec. 5, 2016) (similar).

B. Petitioners' Claims Are Not Time-Barred and Venue Is Proper

EPA admits that the Petition was timely as to the Challenged Exemptions (EPA Br. at 3). HollyFrontier refuses to accept EPA's concession that neither the CAA nor EPA's regulations bar the Petition as untimely but offers no evidence or authority that Petitioners had actual or constructive knowledge of these secret final agency actions triggering either time limitation, or to satisfy fundamental due process requirements. The CAA's 60-day time bar, triggered by Federal Register publication, does not apply to unpublished decisions like the Challenged Exemptions. 50 Fed. Reg. 7,268, 7,269 (Feb. 21, 1985); Pet'rs' Reply Regarding Finality and Jurisdiction, ECF No. 010110026137, at 3 n.3. EPA's regulation establishes a limitations period for unpublished final actions, 40 C.F.R. § 23.3, but assumes any such challenge will come from persons with actual knowledge of the decision. *See* 50 Fed. Reg. at 7,269. EPA reasoned that the due process problem of parties *without* actual notice would be addressed by judicial review. *Id*. Because the Challenged Exemptions remain withheld from the public, EPA does not and cannot argue that the Petition is untimely, nor should HollyFrontier be allowed to make such arguments either.

EPA and Intervenor-Respondents also argue that Petitioners are making an untimely challenge to the regulatory definition of "small refinery" promulgated in 2014 (EPA Br. at 22-24; HollyFrontier Br. at 24-27; Wynnewood Br. at 20-21). But Petitioners challenge only EPA's *application* of the statute and its regulations in the Challenged Exemptions. Petitioners do not challenge the regulation itself, which in any case does not conflict with Petitioners' argument, as discussed in *infra* Section III.C. Similarly, the petitions in *Sinclair*[6] and *HollyFrontier*[7]—concerning EPA's application of "disproportionate economic hardship" to those hardship petitions—were not challenges to 40 C.F.R. § 80.1441(e)(2). Because EPA has *not* made either the Challenged Exemptions or its revised interpretation available to the public, Petitioners had no prior opportunity to challenge either. *See* Pet'rs' Br. at 4 n.3 (citing declarations).

Relatedly, EPA and Wynnewood contest venue only as to the purported challenge to the regulatory definition of "small refinery." *See* EPA Br. at 3; Wynnewood Br. at 31. But because Petitioners have not challenged that definition, nor any other nationally applicable regulations or published findings of "nationwide

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[6] *Sinclair*, 887 F.3d at 990.

[7] *HollyFrontier Ref. & Mktg. Co. v. EPA*, No. 16-9564 (10th Cir. Filed Dec. 22, 2016).

scope or effect," venue is proper in this Court. *See Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 877 (D.C. Cir. 2015); REC2_646; REC2_685; REC2_741.

C. Petitioners' Claims Are Ripe for Review

Each of the Challenged Exemptions is a final agency action. REC2_646, REC2_685, REC2_741. And *every* petition for review of a small refinery exemption extension is appealable directly to a federal circuit court. 42 U.S.C. § 7607(d)(8); *see also, e.g.*, *Sinclair*, 887 F.3d 986; *HollyFrontier Ref. & Mktg. Co. v. EPA*, No. 16-9564 (10th Cir. 2016). This case is no different. *Oljato Chapter of the Navajo Tribe v. Train* is inapposite for each of these administrative adjudications because EPA has already developed its record, which is before the Court. 515 F.2d 654, 665-66 (D.C. Cir. 1975). The Petition does not turn on "new information" requiring revision of the small refinery regulations, *id.*, but rather on EPA's exceedance of statutory authority and inadequate record in making certain small refinery adjudications. And because EPA continues to issue more exemptions than ever,[8] an administrative petition here "would be pointless." *See Kennecott Utah Cooper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1214 (D.C. Cir. 1996).

[8] EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions; *infra* at 20.

II. The Challenged Exemptions Are Not Entitled to *Chevron* Deference

Despite Respondents' attempts to invoke a heightened level of deference,[9] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), applies to informal adjudications like the Challenged Exemptions. *Sinclair*, 887 F.3d at 992. Even if EPA's conclusions in the Challenged Exemptions were reasonable or rational—contrary to the record in this case—that would not be enough. Under *Sinclair* and *Skidmore*, the Court "defer[s] to agency interpretations of a statute only to the extent those decisions have the 'power to persuade.'" *Id.* at 999 (citing *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001)).

Wynnewood's argument (Wynnewood Br. at 18) that *Chevron* deference applies notwithstanding *Sinclair* fails because the Challenged Exemptions were not "produced via formal agency action." They were secret agency decisions not subject to public notice or comment—or any public scrutiny at all. While EPA may "formulate interpretations of general applicability in the course of issuing adjudicatory opinions" without publishing such opinions, the APA still requires "that the agency make such opinions available for public inspection and copying." *City of Gillette v. FERC*, 737 F.2d 883, 886 (10th Cir. 1984) (citing 5 U.S.C. § 552(a)(2)(A)).

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[9] *See* EPA Br. at 20-21; HollyFrontier Br. at 31; Wynnewood Br. at 17-18.

The conflict between EPA's public pronouncements and its decisions in the Challenged Exemptions illustrates precisely why this Court held that *Skidmore* deference is appropriate. *See Sinclair*, 887 F.3d at 991-93. Although EPA has publicly maintained that since 2011 it "adopted the interpretation of 'disproportionate economic hardship' set forth in the DOE Small Refinery Study," REC1_587, EPA states in footnotes to these secret decisions that "we are changing our approach" to allow exemptions without any significant impairment to refinery operations. REC2_636. EPA's sealed Response Brief admits the Agency has *also* changed its interpretation of the statute to permit small refineries that did not receive the initial small refinery exemption to be eligible for an "extension" of the exemption. EPA Br. at 23 n.4.

These clandestine interpretative changes not only are undeserving of *Chevron* deference but also subvert public rulemaking. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not…depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *see also Mead*, 533 U.S. at 229-230 (Congress assumed formal administrative procedure fosters fairness and deliberation).

III. EPA Exceeded Its Authority by Granting New Exemptions to the Refineries whose Exemptions Had Expired Previously

EPA and Intervenor-Respondents assert that the phrase "at any time" permits any refinery meeting the "small refinery" definition to qualify for a small refinery

exemption, regardless of whether it has ever qualified previously. EPA Br. at 25; HollyFrontier Br. at 37; Wynnewood Br. at 31-32. That interpretation conflicts with the face of the statute, EPA's prior analysis, and common sense.

A. EPA's Interpretation of "Extension" Conflicts with the Text and Structure of the CAA and Regulations

Both the CAA and the RFS implementing regulations use "extension" to mean the temporal continuation of an *existing* small refinery exemption. For example, Section 7545 (o)(9)(A)(ii)(II) provides that upon certain conditions, "the Administrator shall *extend the exemption under clause (i)* for the small refinery *for a period of not less than 2 additional years*." *Id.* (emphasis added); *see also* 40 C.F.R. § 80.1441(e)(1). "Extend" as used in § 7545(o)(9)(A)(ii)(II) can *only* mean "to increase the length or duration of; lengthen; prolong" the original exemption (Pet. Br. at 30) under certain conditions, and not "make available" a new exemption EPA Br. at 29; *see* HollyFrontier Br. at 36-38; Wynnewood Br. at 32. *Accord Sinclair*, 887 F.3d at 989 (using term "extension of the *initial* exemption.") (emphasis added).[10]

Given the well-established presumption that "a given term is used to mean the same thing throughout a statute," *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 456

[10] It is undisputed that the Refineries' exemptions had lapsed previously. *See* Pet'rs' Br. at 32.

(2012), when a small refinery petitions for an "extension" of its exemption under § 7545(o)(9)(B)(i), it seeks "[a] period of additional time to take an action, make a decision, accept an offer, or complete a task [i.e., achieve RFS compliance]." BLACK'S LAW DICTIONARY (10th ed. 2014); *see also id.* (5th ed. 1979) ("The word 'extension' ordinarily implies the existence of something to be extended."). *Accord* 40 C.F.R. § 80.1441 (using phrase "extension of *its* small refinery exemption," to indicate that the refinery already had an exemption) (emphasis added). Consistent with this, the statutory reference to "the exemption under subparagraph (A)," 42 U.S.C. § 7545(o)(9)(B)(i), conveys that the requesting refinery must have received that initial exemption and still have an exemption. *See Castillo v. United States*, 530 U.S. 120, 124 (2000) (statutory structure resolves any inherent ambiguity in literal statutory language).

Contrary to EPA's insinuation, courts routinely interpret "extension" to mean an uninterrupted temporal period. Petitioners previously cited one example (Pet'rs' Br. at 31), but others include: *United States v. Ojeda Rios*, 875 F.2d 17, 21 (2d Cir. 1989) ("[T]he term extensions is to be understood in a common sense fashion as encompassing all consecutive continuations of a wiretap order…."), *vacated and remanded on other grounds by* 495 U.S. 257 (1990); *United States v. Hermanek*, 289 F.3d 1076, 1086 (9th Cir. 2002) ("[A]n order is an extension of an earlier order only if it authorizes continued interception of the same location….").

The only case EPA cites in support of its definition of "extend" (EPA Br. at 29) actually reinforces Petitioners' argument. In *Rohrig Investments, LP v. Knuckle Partnership, LLLP*, the court rejected the idea that "extending" a property line meant lengthening the boundary in a straight line only as compared to following natural contours. 584 B.R. 382, 411 (Bankr. N.D. Ga. 2018). But even if the boundary "'extension' [did] not require a straight line," it was still a *continuous* line. *See id*. Continuity also is implicit in the temporal use of "extension": for example, a party seeking an extension of time in this Court must request it prior to the filing deadline. 10th Cir. R. 27.6.

By making the definition of "small refinery" and "at any time" the operative terms (EPA Br. at 25; HollyFrontier Br. at 37; Wynnewood Br. at 31-32), EPA and Intervenor-Respondents ignore the limiting term "extension"—used *four* times in 42 U.S.C. § 7545(o)(9). Reading both "at any time" and "extension" together "to give each word some operative effect where possible," *Duncan v. Walker*, 533 U.S. 167, 175 (2001) (internal quotations omitted), a small refinery may "petition" at any point during the year for an extension of its exemption from the prior year.[11] *See* 42 U.S.C.

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[11] "At any time" contrasts with other provisions of the statute where Congress has provided a deadline to act. *See* 42 U.S.C. § 7545(o)(9)(B)(iii) (requiring Administrator to act on exemption extension petition within 90 days of receipt); *id*. § 7545(o)(9)(A)(ii)(I) (requiring DOE study by December 31, 2008). For example, a small refinery may petition for an exemption extension after

§ 7545(o)(9)(B)(i); *Sinclair*, 887 F.3d at 993. The regulations do not state that "at any time" means that EPA can grant an exemption for any compliance year or grant a new exemption to any small refinery that does not currently have one.

But this is EPA's new interpretation (*see* EPA Br. at 23 n.4), and it is inconsistent with this Court's understanding of the statute and EPA's own regulations. *See Sinclair*, 887 F.3d at 989; 40 C.F.R. § 80.1441 ("extension of *its* small refinery exemption," implies prior existence of exemption).

B. Continuity of Small Refinery Exemptions Is Consistent with the Purpose the RFS

EPA mischaracterizes the statue by suggesting "temporary" merely reflects that the exemptions typically last only for a year. EPA Br. at 31 n.10. But this ignores the fact that small refinery exemptions were intended to provide a "bridge to compliance" for facilities that already qualified as small refineries rather than a road to non-compliance for facilities that might years later satisfy the throughput limits of a small refinery. *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 572-73 (D.C. Cir. 2015) ("That blanket exemption gave small refineries time to develop compliance strategies and increase blending capacity."); *see* 42 U.S.C. § 7545(o)(9)(B)(i)

November 30, when EPA sets the annual standard for the next year. 80 Fed. Reg. 77,420, 77,511 (Dec. 14, 2015).

(referencing § 7545(o)(9)(A)—"Temporary exemption"); 78 Fed. Reg. at 49,825 ("The Act specifically provides for a *temporary* RFS exemption for small refineries, and for the possibility of extensions of those *temporary* exemptions.") (emphasis added); *id*. (discussing providing small refiners "appropriate lead time"). In short, allowing small refineries to obtain exemptions years after obtaining their initial exemptions had lapsed would read the word "temporary" right out of the statute.

In contrast, providing extensions of exemptions only to those small refineries with uninterrupted exemptions limits new entrants and slowly brings all small refineries into compliance. *See* 40 C.F.R. § 80.1441(e)(2)(i) (requiring the small refinery to identify the hardship it "would face" and "the date the refiner anticipates that compliance with the requirements can reasonably be achieved"); 78 Fed. Reg. at 49,825 (EPA "extend[ed] the *temporary* exemption (and possibility of extensions) to a *few* small refiners") (emphasis added); REC1_528 ("Refineries that receive a[n] extension of their exemption" could take steps to "reduc[e] the impact" of future compliance costs, and as a result, "refineries that currently score high" on the efficiency-gains metric would "likely see a reduction in the scoring of this category in the future."); REC1_587 (requiring each petitioner to describe a plan for coming into compliance); Pet. for Review, App. A, *Dakota Prairie Ref., LLC v. EPA*, No. 16-2692 (8th Cir. filed June 13, 2016) (statement by EPA that "newer small refineries have the ability to consider whether they believe the establishment of the

RFS program and its requirements will cause economic hardship before beginning operations.") (included in Addendum).

The Challenged Exemptions undermine the purpose of the exemption provision by impermissibly relaxing the eligibility requirements for these exemptions. Although EPA contends that its revised interpretation does not require virtually every small refinery exemption petition be granted (EPA Br. at 39), that is what has happened since 2016. EPA has increased its approval rate of petitions from 50% to almost 100% and the overall number of exemptions has increased over 300%. *See* Pet'rs' Br. at 13-14. EPA initially estimated that a total of 42 small refineries would be eligible for exemptions until 2011. 72 Fed. Reg. 23,900, 23,924 (May 1, 2007). But now, a dozen years later, EPA has granted 35 of 37[12] petitions for 2017 and 39 petitions are pending for 2018.[13] Rather than have small refineries achieve compliance after an initial lead-in period, EPA has effectively made permanent the "temporary" blanket exemption that Congress purposefully expired in 2011.

Finally, because Intervenor-Respondents did not submit "plan[s] for achieving compliance in the future," REC1_587, EPA erred in acting on the

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[12] One remains pending and one was declared ineligible. *Supra*, note 8.

[13] *Id*.

exemption petitions. *Id*. ("EPA generally will not act on incomplete applications.").[14] As argued in Section III.B., *supra* at 18, EPA reasonably expected that small refineries would prepare to comply with their obligations during the initial exemption period. Instead, EPA granted exemptions to refineries whose only "compliance plan" was to enjoy perennial exemptions while urging EPA to amend its point of obligation regulation. REC2_589; REC2_597; REC2_648; REC2_653; *see also infra*, at 31-32. Shifting the burden of compliance from refiners to blenders is not a plan to achieve compliance with the RFS. In tolerating this strategy, EPA "perpetuate[d a] manner of self-inflicted hardship" that conflicts with the statute. *Hermes*, 787 F.3d at 578.

C. EPA's 2014 Regulation Does Not Conflict with Petitioners' Construction of "Extension"

EPA's and HollyFrontier's argument that the Petition "directly challenges EPA's 2014 Eligibility Regulation" (EPA Br. at 22-24; *see also* HollyFrontier Br. at 35), misunderstands both Petitioners' argument and EPA's final rulemaking at 79 Fed. Reg. 42,128, 42,152 (July 18, 2014).

[14] This argument was not waived (*see* EPA Br. at 51 n.16); Petitioners raised it in their Opening Brief (at 48 n.25). EPA cites no authority suggesting that a short argument is equivalent to no argument.

The 2010 RFS regulations defined a "small refinery" as having an average daily crude oil throughput not exceeding 75,000 bpd in "calendar year" 2006. 79 Fed. Reg. at 42,152. All refineries meeting this definition received the initial statutory exemption through 2010. *Id.*; *see also* 40 C.F.R. § 1441(b) (requiring verification letter for 2006 to be submitted by July 1, 2010). Believing it unfair for refineries that had exceeded the throughput threshold after 2006 to receive continued exemption extensions, EPA proposed to revise the definition of "small refinery" such that the 75,000 bpd threshold "must apply for 2006 and in all subsequent years," 78 Fed. Reg. 36,042, 36,064 (June 14, 2013), in order to qualify for an extension. EPA stressed that the proposed change "would not affect any existing exemption extensions" for 2011 and later, but rather only "would apply at such time as *any approved exemption extension expires and the refinery at issue seeks a further exemption extension.*" 79 Fed. Reg. at 42,152 (emphasis added). In short, EPA merely proposed to make such refineries ineligible *to seek a further extension of the exemption*, not to make them retroactively ineligible for exemptions they had *already received* based on the prior regulations.

The 2014 final rule rejected the proposal based on concerns that it could unfairly exclude from future extensions a refinery that had exceeded the threshold in a prior year for which it received an extension (which, as noted above, was allowable under regulations at the time). EPA's "small refinery" definition requires

the refinery to have met the 75,000 bpd threshold in the immediately preceding year as well as for the year in which it seeks an exemption and to face having its extension invalidated if its throughput exceeds the 75,000 bpd threshold during an exemption period. 79 Fed. Reg. at 42,152.[15]

In this context, EPA's and HollyFrontier's claims that it would have been impossible for a small refinery to have received an exemption continuously since 2006 unless it was also eligible for an exemption continuously since 2006 (EPA Br. at 23; HollyFrontier at 35) is highly misleading. The current (2014) regulations do not mention receipt of exemption (EPA Br. at 22 n.3) because applicable regulations prior to 2014 allowed small refineries with throughput above 75,000 bpd to continue receiving extensions of their exemptions so long as they met the statutory threshold once, in 2006. Rather than expanding eligibility to any refinery whose throughput dropped below 75,000 bpd in the prior and current calendar year, EPA's 2014 rule—consistent with statutory purpose—reduced the subset of refineries eligible for "further extension" by making ineligible refineries that were "small" in 2006 but that were no longer "small." 79 Fed. Reg. at 42,152.

[15] The text of 40 C.F.R. § 80.1441(e)(2)(iii), which speaks only to refinery throughput, not continuity of exemption, confirms this understanding.

EPA and HollyFrontier's arguments about the 2014 regulations therefore are a red herring. Nothing in Petitioners' argument requires any refinery to have done more than (1) qualify for the original exemption through 2010 by certifying its 2006 throughput, and (2) qualify for extensions continuously from 2011 forward. Moreover, EPA's decision to expand the term "*a* calendar year," 42 U.S.C. § 7545(o)(1)(K) (emphasis added), to two calendar years—the year before the requested exemption, and the year of, does not undermine the Biofuels Coalition's argument that temporal continuity is inherent in an "extension" of a small refinery exemption.

D. EPA Does Not Explain the Change to Its Interpretation of "Extension"

The Biofuels Coalition's interpretation of "extension of exemption" largely mirrored EPA's interpretation until recently. According to a 2016 document rejecting an exemption petition, EPA stated that it interpreted and implemented the statute and RFS regulations "as only allowing those small refineries qualifying for the statutory temporary exemption as now eligible for an extension of that exemption." *Dakota*, *supra* at 19-20. EPA then justified this interpretation as (a) being based on "plain language" of the CAA and regulations; and (b) avoiding negative practical consequences, including "use of less renewable fuel than EPA anticipated." *Id*.

Now—in a sealed brief—EPA states, without explanation, that its longstanding view is no longer the "best interpretation." EPA Br. at 23 n.4. Such "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126 (2016) (internal quotations omitted).

IV. EPA Effectively Eliminated the Statutory "Disproportionate Economic Hardship" Requirement in the Challenged Exemptions

EPA's de facto abandonment of the statutory "disproportionate economic hardship" standard is illustrated by fact that EPA no longer requires any significant impairment to a refinery's operations *at all* (REC2_636-37 n.10)—let alone *disproportional* impairment related to RFS compliance.

Apart from the misapplication of the statute's requirements, the Challenged Exemptions suffer from faulty reasoning, contradict EPA's earlier and later interpretations (without explanation), do not demonstrate thorough consideration of record evidence, and are unpersuasive and should be vacated. *Sinclair*, 887 F.3d at 991, 999; *see also Alaska Dept. of Envt'l Conservation v. EPA*, 540 U.S. 461, 466 (2004) (upholding EPA's invalidation of permit issued by state regulator, as state regulator's claim of control technology's "disproportionate cost" was unsupported by the record and undermined by contradictory statements).

A. EPA Failed to Require a Showing of Hardship

EPA argues that its new approach is consistent with *Sinclair* because it no longer requires a threat to long-term viability (EPA Br. at 36-37), but EPA's new approach goes much farther than that, finding disproportionate economic hardship "even if the refinery's operations are not significantly impaired." *See* REC2_636-637 n.10 (emphasis added) While EPA argues that it still considers "economic factors" and "operational impacts" (EPA Br. at 37-38), these are not equivalent to a finding of economic *hardship*—"something that 'makes one's life hard or difficult,'" *Sinclair*, 887 F.3d at 996—particularly since EPA concedes that it no longer requires "*significant* impairment of a refinery's operations" (EPA Br. at 38). *All* business functions involve "economic factors" and "operational impacts," most of which are not *hardships*.

This is not a "matter of semantics," as EPA suggests (EPA Br. at 38). EPA cannot ignore "the overall *purpose* of the inquiry," which is to determine whether a refinery is likely to suffer disproportionate economic hardship due to RFS compliance. *Sinclair*, 887 F.3d at 997. EPA offers no evidence—beyond its say-so—that a refinery could suffer such hardship *without* any significant impact on its operations, much less that any of the Refineries were likely to do so.

The record evidence, in fact, does not support that any of the Refineries suffered disproportionate economic hardship due to RFS compliance. REC2_628;

REC2_679; REC2_736 (DOE recommending full or partial denial based on viability score of 0). The record instead reflects that EPA's interpretation of disproportionate economic hardship (*see* REC2_636-37 n.10) fails to require a careful analysis of the financial impact of the RFS on each of the Refineries' economic health.

To the extent that the Challenged Exemptions mention refinery margins and operating losses at all, EPA failed to distinguish between compressed margins caused by RFS compliance or other economic factors that have nothing to do with the RFS. *See* Pet'rs' Br. at 44-45. In the case of the HollyFrontier Cheyenne decision, EPA even acknowledged that the reported losses derived from "a difficult year for the industry as a whole." REC2_645.

The Challenged Exemptions' conclusory statements about disproportionate economic hardship, conscious rejection of DOE's recommendations, and contradiction of record evidence regarding RIN pass through costs—taken together or separately—do not support corporate welfare valued at [redacted]. *See* REC2_600; REC2_666; REC2_706; REC1_437-438. *See Encino Motorcars*, 136 S.Ct. at 2127 ("[C]onclusory statements do not suffice to explain [agency] decision."). Granting the Challenged Exemptions without this required showing "improperly transforms Congress's statutory text into something far beyond what Congress plausibly intended," *Sinclair*, 887 F.3d at 997; *see* 42 U.S.C. 7545(o)(9)(B)(ii), and these decisions should be vacated.

1. Refineries Both Large and Small Recover Their RIN Acquisition Costs

In citing to purported expenses and operational losses as a basis for finding "hardship" (EPA Br. at 46), EPA does not respond to one of the fatal flaws in its analysis—the Agency's prior determination that refineries recover the cost of complying with the RFS. *See* REC1_438.[16] EPA offers no explanation as to why this economic presumption should not apply to the Challenged Exemptions.

EPA in the Challenged Exemptions did not acknowledge, much less address, its earlier public determination that RIN costs are recovered by refineries. *See Alaska*, 540 U.S. at 499 ("No reasoned explanation for [agency's] retreat from this

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[16] EPA's public analysis has been upheld by the academic studies and the petroleum industry itself. *See* Christopher R. Knittel, Ben S. Meiselman & James H. Stock, *The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard*, J. of the Ass'n of Envtl. & Res. Economists 1081, 1118 (Dec. 2017) (confirming Burkholder analysis and finding "concerns that petroleum refiners bear the burden of the RFS appear to be unjustified, as our finding of full wholesale pass-through indicates that petroleum refiners recoup the cost of RINs"); Jesse Burkhardt, *The Impact of the Renewable Fuel Standard on U.S. Oil Refineries*, Energy Pol'y 130, 429-430 (2019) (finding "complete [RIN] pass-through for…the Rocky Mountain Region" and "the [RIN] pass-through rates of the smallest and largest firms are not statistically different from one another in the gasoline market."); Comments of Am. Petroleum Inst., *An Analysis of the Renewable Fuel Standard's RIN Market*, 19 (Feb. 15, 2019) ("[T]here is unlikely to be any significant economic impact on the vast majority of obligated parties from variations in the RIN market, because the costs of RINs are generally recovered…."). Unlike the general economic treatises cited by HollyFrontier, *see* HollyFrontier Br. at 54-55, the above-referenced academic studies specifically address whether RIN costs are recovered by refineries.

position appears in the final [decision]."). *Compare* REC1_437-438; SUPP_578-79; SUPP_707; 83 Fed. Reg. 32,024, 32,058 (July 10, 2018) *with* REC2_600; REC2_666; REC2_706. Yet the ability to recover compliance costs is inarguably crucial to any determination of economic hardship—as EPA itself has asserted in its public pronouncements.

In its brief, EPA quotes the 2011 DOE Study to claim that higher RIN prices lead to greater RIN acquisition costs for some parties (EPA Br. at 58 (quoting REC1_438)). But EPA leaves out the next sentence, which explains that "higher [RIN] costs have a similar impact on *all* obligated parties," and that exempted small refineries therefore enjoy a windfall from elevated wholesale petroleum prices reflecting RIN costs. *See* Pet'rs' Br. at 59-60 (quoting REC1_438); *see also* 80 Fed. Reg. at 77,511. EPA also argues that larger refineries have "inherent scale advantages" (EPA Br. at 58) but offers no record evidence that the Refineries—subsidiaries of large, publicly-traded companies that manage RINs at the corporate level[17]—do not enjoy these advantages. This is precisely why DOE and EPA have acknowledged that corporate structure and finances are relevant to an economic

[17] For example, HollyFrontier owns five refineries and [redacted] RINs for Cheyenne and Woods Cross are [redacted], *id.* ¶1-2, presumably to reduce costs and promote efficiency.

hardship assessment. *See* REC1_519; REC1_570; REC1_587. Yet EPA offers no explanation why those advantages were not equally applicable to the Challenged Exemptions. *See U.S. Magnesium, LLC v. EPA*, 690 F.3d 1157, 1164 (D.C. Cir. 2012).

Accordingly, even if RIN costs are a refinery's [redacted] (Wynnewood Br. at 46), Intervenor-Respondents offer no evidence rebutting the detailed economic analysis in the record that they *recover* those costs through higher prices. *See* Pet'rs' Br. at 60. Intervenor-Respondents claim they cannot increase the price of their fuels to cover RIN costs[18] (HollyFrontier Br. at 56; Wynnewood at 47), but the record shows the increased value merchant refiners receive for their petroleum fuel is factored into in the market pricing of the fuels. REC1_437 (comparing price spread of gasoline sold in the United States relative to the price of gasoline in foreign markets to demonstrate that domestic gasoline prices reflect the RIN cost incurred by refiners). In fact, when Wynnewood's parent company CVR made almost identical comments to EPA in 2017, EPA dismissed CVR's analysis as

[18] HollyFrontier's record citations (*see* HollyFrontier Br. at 46-47), do not address the issue of cost recovery at all; they discuss margins and ethanol blend rates generally.

"erroneous[]." *Compare* REC2_694-695 (affirming Appendix B-5 to the DOE Study) *with* SUPP_579 (rejecting CVR's analysis).

2. The Refineries Are Insulated from Hardship Due to RFS Compliance as Subsidiaries of Large, Well-Financed Corporations[19]

EPA and Intervenor-Respondents argue that EPA properly limited its analysis to the proffered information about the refinery, not its corporate parent (*see* Wynnewood Br. at 48; EPA Br. at 56-57; HollyFrontier Br. at 51-52). But EPA not only *can* consider corporate structure and finances in determining economic hardship, it *must* do so to make a meaningful hardship assessment.

The Refineries do not operate in isolation, for RFS compliance or otherwise. HollyFrontier Refining purchased RINs for all its corporate refineries (Carron Decl. ¶1-2), submitted the Cheyenne and Woods Cross exemption requests (REC2_589, REC2_648), and intervened in this case. Likewise, the owner of Wynnewood's parent, CVR (SUPP_425), Carl Icahn, had CVR sell down its RIN inventory while advising the President to change the RFS point of obligation.[20] That Wynnewood's

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[19] Petitioners incorporate by reference arguments made in their Motion to Take Judicial Notice, ECF No. 010110093636.

[20] Patrick Radden Keefe, *Carl Icahn's Failed Raid on Washington*, The New Yorker (Aug. 28, 2017), https://www.newyorker.com/magazine/2017/08/28/carl-icahns-failed-raid-on-washington ("[W]hen the price of RINs was high, CVR sold millions of the

RIN costs might have been higher due to risky corporate strategy is relevant to EPA's analysis.[21] *See Meyer v. Bush*, 981 F.2d 1288, 1309 n.18 (D.C. Cir. 1993) ("Where, as here, the 'man behind the curtain' is undertaking functions that are legally significant to our inquiry, we cannot and must not disregard them.").

Both HollyFrontier and Wynnewood are owned by large, publicly traded companies. It was not reasonable for EPA to ignore corporate finances in its hardship determinations, or to accept claimed losses contradicted by the record. [redacted]

Similarly, EPA credited HollyFrontier's claimed losses when the company was pursuing a $1 billion stock repurchase program (REC1_56). By ignoring public information related to corporate parents and affiliates of the Refineries, EPA "failed to consider an important aspect of the problem." *U.S. Magnesium*, 690 F.3d at 1164; *see also Wash. Met. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 776

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credits. The company would eventually need to turn over its quota of credits to the E.P.A., yet in the months before its annual deadline it was quietly selling them off. This was extremely unusual.").

[21] CVR's pre-exemption financial statements acknowledge that the U.S. Attorney's office requested information regarding "activities relating to the RFS and Mr. Icahn's role as an advisor to the President." SUPP_488.

F.3d 1, 9 (D.C. Cir. 2015) (when faced with evidence of substantial direction and control by related entities, the court must "like Toto… pull back the curtain to expose the reality.").[22]

B. EPA Failed to Require RFS Impacts to Be Disproportionate

Not only does EPA's interpretation excise "economic hardship" from the statutory criteria, but the Agency also "impermissibly reads the word 'disproportionate' out of the statute" again. *Sinclair*, 887 F.3d at 997. This time, instead of making the facility-specific threat of closure the "*sine qua non*" of hardship, *id*., EPA ignored record evidence that the Refineries were not comparatively disadvantaged to other refineries due to their compliance with the RFS. Because the statute provides exemption extensions only to address demonstrated "*disproportionate* economic hardship," 42 U.S.C. § 7545(o)(9)(B)(i) (emphasis added), EPA must consider the financial impact of RFS compliance *within the context of the refining industry*.

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[22] *Hermes* (*see* EPA Br. at 55) is inapposite because that refinery wanted EPA to consider taxes paid by unitholders of the pass-through corporation's holding company, which would have required EPA to estimate individual tax rates for numerous unitholders. *See* 787 F.3d at 579. Here, by contrast, EPA ignored readily-accessible, pertinent public financial filings concerning the Refineries' parent corporations.

Although HollyFrontier and Wynnewood dispute that their RIN costs were relatively minor (*see* HollyFrontier Br. at 47-48; Wynnewood Br. at 45-46), total RIN costs alone are not indicative of whether there is *disproportionate* economic impact. *See Lion Oil Co. v. EPA*, 792 F.3d 978, 984 (8th Cir. 2015) ("Of course, some refineries will face higher costs than others, but whether those costs impose disproportionate *hardship* on a given refinery presents a different question."). HollyFrontier admits that the unit cost of a RIN on the national market is "the same for any purchaser," (HollyFrontier Br. at 48); thus total RIN costs reflect nothing more than the relative size of the refinery—larger refineries require a greater number of RINs than smaller refineries. In any case, the Refineries' stated RIN purchase costs ranged from only [redacted] of crude and refinery operating expenses. Pet'rs' Br. at 52.[23] This is not an economic hardship, let alone a significant impairment.

Further, as noted above, because all refineries can pass through the costs of compliance similarly, there is no *disproportionate* economic hardship from those costs. *See Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015) (finding no "disproportionate adverse effect" when "all fossil fuel producers in the

[23] EPA has compared the RFS to "a sales tax levied on businesses" because obligated parties pass on compliance costs in the wholesale price of product sold. *See* Pet'rs' Br. at 61 (citing SUPP_707).

area…will be hurt equally and all renewable energy producers in the area will be helped equally.").[24]

By setting such a low standard for an exemption, EPA allows small refineries to unfairly "benefit from increased profit margins relative to other obligated parties." *See* REC1_438.

C. EPA Failed to Require Impacts to Result from RFS Compliance

In its brief, EPA cites to various structural impacts including refining margins *without tying those impacts to RFS compliance*. *See* EPA Br. at 40-41. Under EPA's approach, a refinery could have poor refining margins for any number of reasons unrelated to the RFS—none of which qualify the refinery for this exemption. Yet the statute requires that any extension of the small refinery exemption be attributable to compliance with the RFS. 42 U.S.C. § 7545(o)(9)(A)(ii) ("if required to comply with paragraph (2)"); *id.* § 7545(o)(9)(A) (referencing extension of exemption under subparagraph (A)); *see Sinclair*, 887 F.3d at 997 ("statute also commands the EPA to consider the…impact of the RFS Program.").

The purpose of the exemption was to give small refineries additional time to prepare to comply with their obligations. *See Hermes*, 787 F.3d at 578. The

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[24] Similarly, to the extent the economic treatises cited by HollyFrontier state that producers cannot fully pass through RIN costs, HollyFrontier Br. at 54-55, this is not evidence of *disproportionate* hardship. *See* SUPP_578-579.

exemption was not meant to inflate profits of small refineries or bail out marginal ones. *Id*. ("Allowing small refineries to…distribute profits to its owners rather than us[ing] profits to prepare for approaching compliance obligations…would conflict with the terms of the statute."). HollyFrontier pursued a $1 billion stock repurchase program, and Wynnewood made a [redacted] distribution to affiliate unitholders, *see* Pet'rs' Br. at 57-58, rather than prepare for RFS compliance. Neither HollyFrontier nor Wynnewood provide any response as to why they could afford such payments to investors but not compliance with RFS regulations. The record shows that capital investments in blending infrastructure pales in comparison to the distributions Intervenor-Respondents have made to their investors. *Compare* REC1_514 (costs of $800,000 to $3 million per terminal) *with* REC2_729 [redacted] distribution to affiliate); REC1_56 (describing corporate $1 billion share repurchase program). To the extent the Refineries felt financially constrained during 2016-2017, it was primarily the result of their own business decisions, not the RFS.

Indeed, EPA's disposition of the Challenged Exemptions remains at odds with EPA's most recent public affirmation of the recoverability of RFS compliance costs:

> [W]e do not believe that the price paid for RINs is a valid indicator of the economic impact of the RFS program on these entities, *since a narrow focus on RIN price ignores the fact that these parties are recovering the cost of RINs from the sale of their petroleum products*. When the ability for obligated parties to recover the costs associated with acquiring RINs is considered, *we do not believe that RIN prices have had a negative economic impact on obligated parties*.

EPA, *Renewable Fuel Standard Program – Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments*, at 13-15 (Nov. 2018) (emphasis added), *available at* https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100VU6V.pdf.

EPA cannot contradict its public rulemakings and guidance in secret adjudications without explanation. *See Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *see also Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 236 (2009) (Breyer, J., concurring in part and dissenting in part) (recommending remand where EPA "has not explained why the traditional 'wholly disproportionate' standard cannot do the job now, when the EPA has used that standard (for existing facilities and otherwise) with apparent success in the past.").

D. Post-Enactment Explanatory Statements Did Not Abrogate the Statutory Requirement of "Disproportionate Economic Hardship"

EPA and HollyFrontier cannot rely on post-enactment explanations from Congressional committees to support its misinterpretation of the statute. *See* EPA Br. at 12; HollyFrontier Br. at 6; *see* Wynnewood Br. at 11. The legislative reports cited by EPA "could have had no effect on the congressional vote" because they post-dated enactment of the RFS by almost a decade. *Dist. of Columbia v. Heller*, 554 U.S. 570, 605 (2008); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011); *see also* Grassley Statement on the Energy and Water Appropriations Act, RFS Waivers (June 25, 2018), https://www.grassley.senate.gov/news/news-releases/grassley-

statement-energy-and-water-appropriations-act-rfs-waivers ("[N]either I nor any other senator voted for this report language."). Even if some post-enactment statements can be helpful, "like a law-review article," *United States v. Woods*, 571 U.S. 31, 48 (2013), statements that contravene the clear language of the statute are not.

CONCLUSION

For the reasons above, this Court should vacate the Challenged Exemptions and remand to EPA with instruction to account for the RINs in the Challenged Exemptions.

Dated: May 30, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as modified by this Court's Order, because, according to the word-processor used to compose the brief, this brief contains 8,496 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.

s/ *Matthew Morrison*

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2019, I electronically filed **PETITIONERS' REPLY 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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ADDENDUM

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 14 2016

OFFICE OF
AIR AND RADIATION

Mr. Tim Michelsen
Treasurer
Dakota Prairie Refining, LLC
P.O. Box 5601
Bismarck, North Dakota 58506-5601

Dear Mr. Michelsen:

I am writing in response to the petition from Dakota Prairie Refining, LLC (Dakota Prairie) for a one-year small refinery exemption from the requirements of the Renewable Fuel Standard (RFS) program for Dakota Prairie's refinery in Dickinson, North Dakota for 2015. Under the Clean Air Act (CAA) and its implementing regulations,[1] a small refinery may petition EPA to extend the exemption it previously received from its RFS obligations.[2] Pursuant to these provisions, Dakota Prairie submitted a petition to EPA on November 30, 2015, for an exemption from Dakota Prairie's RFS obligations for the 2015 compliance year.

While we appreciate the amount of information and analyses provided by Dakota Prairie in its petition, we have determined that Dakota Prairie is not eligible to petition for the small refinery exemption. EPA implemented the Energy Policy Act of 2005 (EPAct) to provide an automatic exemption through 2010 for facilities that satisfied the statutory 75,000 barrel per day average aggregate crude oil throughput limitation in calendar year 2004.[3] After enactment of the Energy Independence and Security Act of 2007 (EISA), EPA amended the regulations to also include as eligible for the temporary exemption those small refineries meeting the throughput limitation in 2006.[4] After that initial temporary exemption ended, Congress provided two mechanisms for "extending" the exemption for small refineries that had previously received the exemption.[5] Consistent with the plain language of the CAA and in furtherance of Congressional intent, EPA promulgated regulations that allow only small refineries that previously had received the initial exemption to qualify for an extension of that exemption.[6] Thus, EPA interprets and implements these provisions as only allowing those small refineries qualifying for the statutory temporary exemption as now eligible for an extension of that exemption. EPA believes this approach is not only consistent with the plain language of the statute and regulations, but also reflects the fact that

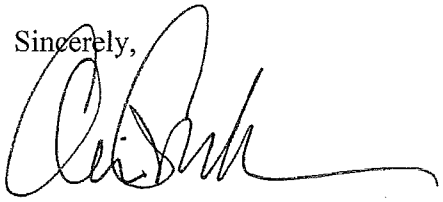
[1] CAA section 211(o)(9)(B); 40 CFR 80.1441(e)(2).
[2] *See* CAA section 211(o)(9)(A), 40 CFR 80.1441(a)(1) and (e)(1).
[3] 40 CFR 80.1141(a)(1); "Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program," 72 Fed. Reg. 23900, 23911, 23924 (May 1, 2007) ("RFS1").
[4] 40 CFR 80.1441(a)(1); "Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program; Final Rule," 75 Fed. Reg. 14670 (March 26, 2010) ("RFS2").
[5] *See* CAA section 211(o)(9)(A)(ii)(II) (specifying when the Administrator shall "extend the exemption under clause (i) for the small refinery"); 211(o)(9)(B)(i) ("a small refinery may…petition…for an extension of the exemption under subparagraph (A)").
[6] 40 CFR 80.1441(e)(1) and (2) ("a refiner may petition…for an extension of *its* small refinery exemption") (emphasis added).

newer small refineries have the ability to consider whether they believe the establishment of the RFS program and its requirements will cause economic hardship before beginning operations. EPA believes this approach also avoids two possible negative consequences associated with any refinery exemption – an increase in obligations for non-exempt facilities or the use of less renewable fuel than EPA anticipated when it established the applicable percentage standards. Because Dakota Prairie was not covered by the original small refinery temporary exemption, it is not eligible to apply for an extension of that exemption.

Based on the above, EPA is denying Dakota Prairie's request to evaluate its petition for a one-year small refinery exemption from its 2015 RFS obligations. This means that as of January 1, 2015, Dakota Prairie's gasoline and diesel production are subject to the percentage standards of 40 CFR 80.1405, and Dakota Prairie is subject to all other requirements applicable to obligated parties. In addition, should Dakota Prairie produce renewable fuel and/or generate or acquire Renewable Identification Numbers (RINs), it will be subject to RFS regulatory requirements that apply to such actions.

If you have any questions, please contact Byron Bunker of my staff at (734) 214-4155.

Sincerely,



Christopher Grundler, Director
Office of Transportation and Air Quality