No. 20-472

IN THE

Supreme Court of the United States

HOLLYFRONTIER REFINING & MARKETING LLC, *et al.*,
Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, *et al.*,
Respondents.

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

BRIEF FOR GROWTH ENERGY AND AMERICAN FARM BUREAU FEDERATION AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

Growth Energy is the leading association of domestic ethanol producers. "Today, nearly all gasoline used for transportation purposes contains 10 percent ethanol." *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7016, 7017 (Feb. 6, 2020). Because the Renewable Fuel Standard ("RFS") defines the minimum domestic demand for renewable fuel, *see* 42 U.S.C. §7545(*o*)(2)(B) & (3), Growth Energy has a strong interest in EPA's administration of the RFS program. Growth Energy regularly participates in RFS-related rulemakings and lawsuits.

The American Farm Bureau Federation ("AFBF") is the largest nonprofit general farm organization in the United States. Representing about six million member families in all fifty states and Puerto Rico, AFBF's members grow and raise every type of agricultural crop and commodity produced in the United States. AFBF seeks to build a sustainable future of safe and abundant food, fiber, and renewable fuel for our nation and the world. AFBF regularly participates in litigation, including as amicus curiae, to represent its members' interests.

In recent years, EPA's administration of RFS exemptions for "small refineries" has become especially important. Initially, the number of exempt small refineries dwindled from fifty-nine for 2010 to seven for

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae, their members, and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

2015. *RFS Small Refinery Exemptions*, Table 2.[2] The volume of renewable fuel covered by those exemptions was marginal: 190 million gallons for 2013; 210 million gallons for 2014; and 290 million gallons for 2015. *Id.*, Table 1. But then the trend reversed dramatically: 19 exempt refineries covering 790 million gallons for 2016; for 2017, 35, covering 1.82 billion gallons; and for 2018, 32, covering 1.54 billion gallons. *Id.*, Tables 1 & 2.

Because all the extension petitions for 2016-2018 were granted after EPA had finalized the renewable-volume obligations for those years, and because EPA has not increased subsequent volume obligations to offset the exempted volumes, those exemption extensions substantially reduced the demand for ethanol (and other renewable fuels).[3] But if EPA had applied the lower court's statutory interpretation—that a refinery is eligible for an exemption extension for a given year only if it was exempt for the prior year—then no more than two refineries could have received exemption extensions after 2015, *see* U.S. Br. 24, and the extensions' effect on renewable-fuel demand would have remained negligible.

It is critical to amici's members, therefore, that the judgment be affirmed.

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[2] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (updated Mar. 18, 2021).

[3] *See* Initial Brief for the Biofuels Petitioners 13-23, *RFS Power Coalition* v. *EPA*, No. 20-1046 (D.C. Cir. Jan. 29, 2021), ECF No. 1882940 ("Growth Energy D.C. Cir. Br.") (arguing that EPA was required to increase subsequent RFS volume requirements to make up for prior exemption extensions).

SUMMARY OF ARGUMENT

I. The interpretation EPA applied to decide petitioners' extension petitions is not owed *Chevron* deference, for several reasons. First, petitioners waived the issue. Second, EPA's interpretation was not adopted in the exercise of its lawmaking authority. Indeed, EPA's 2014 exemption-eligibility regulation, which petitioners cite, actually accords with the court of appeals' position that a refinery is eligible for an extension for a given year only if it was exempt for the prior year. Third, EPA's interpretation contradicts Congress's clear intent on the issue and anyway is unreasonable. Finally, the interpretation EPA applied no longer reflects EPA's considered position.

II. Petitioners' preferred interpretation—"grant"—is clearly incorrect. It is obscure. It would render the statute absurd: Congress would not have intended to say that a refinery could "petition … for a *grant* of the exemption under subparagraph (A)," given that Congress already granted that exemption. And it would not have been chosen for that purpose given the obvious and more direct alternatives: "grant" or "renewal" instead of "extension," or simply "petition … for an exemption." Moreover, Congress would not have intended "extension" to mean "grant" in one single provision when it consistently used "extend" and "extension" to mean "prolong" in the related provisions governing small-refinery exemptions, in the Act through which those provisions were enacted, and in §7545 more broadly. Finally, the lower court's interpretation does not treat the exemption provision as a statutory sunset.

Additionally, the lower court's interpretation, not petitioners', serves the principal statutory purpose of

forcing the market to use annually increasing amounts of renewable fuel. Providing an exemption in the RFS program's initial years afforded refineries ample opportunity to prepare to meet their escalating RFS obligations, given that those obligations were specified in the statute. Allowing refineries to obtain exemptions in later years after achieving compliance would render the statute self-defeating.

III. Should the Court affirm the lower court's interpretation, it should clarify that on remand, EPA must issue a remedial obligation requiring the exempted refineries to submit the number of RINs they would have been required to submit had they not received the unlawful extensions. Otherwise, judicial review of EPA actions granting relief from RFS obligations will be useless.

ARGUMENT

I. THE INTERPRETATION EPA APPLIED TO DECIDE PETITIONERS' EXEMPTION PETITIONS IS OWED NO *CHEVRON* DEFERENCE

For several reasons, the Court should not accord *Chevron* deference to the interpretation EPA applied to decide the extension petitions. Instead, the Court should adopt "the best statutory interpretation." *National Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).[4]

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[4] The Court has sometimes said that where *Chevron* deference is not owed, "the [agency's] interpretation is 'entitled to respect' only to the extent it has the 'power to persuade.'" *Gonzales* v. *Oregon*, 546 U.S. 243, 256 (2006) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944)). That is not deference in any meaningful sense, *see id.* at 269, and as explained herein, EPA's interpretation is not persuasive.

1. Petitioners waived the question of whether EPA's interpretation might be due *Chevron* deference. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." R. 14.1(a). Petitioners failed to mention deference in their certiorari petition, and the question petitioners did present—what the statute means—does not include the deference question. *See, e.g.*, *BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893, 908-909 (2019) (Gorsuch, J., dissenting) (noting Court adopted "independent judicial interpretation" where petitioner "devoted scarcely any of its briefing to *Chevron*"); *Neustar, Inc.* v. *FCC*, 857 F.3d 886, 894 (D.C. Cir. 2017) (agency "did not invoke [*Chevron* deference] with respect to rulemaking" and therefore "forfeited any claims to *Chevron* deference").

2. In any event, petitioners' *Chevron*-deference claim founders at so-called step zero. An agency's statutory interpretation "qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001) (emphasis added). EPA did not promulgate its interpretation in the exercise of its lawmaking authority.

First, the interpretation was implemented not through a rulemaking or formal adjudication, but through informal adjudications: the resolution of petitioners' and others' petitions for exemption extensions. *See Mead*, 533 U.S. at 230 ("the overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or *formal* adjudication" (emphasis added)).

Second, other indicia that the interpretation was adopted through the exercise of EPA's lawmaking power are absent. *See Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002) (considering "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time"). EPA's interpretation was not longstanding, but rather apparently was adopted contemporaneously with its disposition of the exemption petitions. *Cf.* Pet. App. 71a-72a. The task of interpreting the common, non-technical words "extend" and "extension" does not implicate EPA's expertise. EPA never articulated any analysis supporting its interpretation or otherwise showed that it gave the issue careful consideration. And EPA never announced its interpretation publicly. *See, e.g.*, *Kaufman* v. *Nielsen*, 896 F.3d 475, 484 (D.C. Cir. 2018) (interpretation applied in informal adjudication not entitled to *Chevron* deference in light of *Barnhart* factors).

Petitioners argue (Br. 46-49) that a 2014 EPA regulation "necessarily embodied" EPA's interpretation and thus qualifies for *Chevron* deference. Neither the regulation's text nor its preamble directly addressed the meaning of "extend" and "extension." Yet, drawing heavily on the preamble, petitioners claim (Br. 48-49) that its eligibly requirements "presuppos[e]" that a prior "lapse" in exemption is not disqualifying. Petitioners are incorrect; the regulation's text and preamble actually refute petitioners' reading.

The regulation provides that to be eligible for an exemption extension for a given year, a refinery must be "projected" to qualify as a "small refinery" for that year and must have qualified as a "small refinery" for

the prior year. 40 C.F.R. § 80.1441(e)(2); *see* 40 C.F.R. § 80.1401 (defining "small refinery"). That structure is identical to, and reinforces, the lower court's view that an extension may be granted for a given year only if the refinery was exempt for the prior year, because only then is there something to *extend*. The court's interpretation functions as a "continuity requirement" when applied year after year from the beginning: a refinery that was exempt for year 1 may be eligible for an extension for year 2; a refinery that was exempt for year 2 may be eligible for an extension for year 3, and so on; but a refinery that is not exempt for any given year will never be eligible again. Similarly, the regulation's eligibility rule in practice required continuity because, although the regulation was not adopted until three and a half years after the initial, "blanket" exemption expired, it appears that all exemption petitions granted up to the time the regulation took effect were granted to continuously exempt refineries.[5]

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[5] The blanket exemption, which ran through 2010, was granted to all fifty-nine extant small refineries. Office of Policy & Int'l Affairs, Dep't of Energy, *Small Refinery Exemption Study* at vii, 26 (Mar. 2011) ("2011 DOE Study"), https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf; *see* 42 U.S.C. §7545(*o*)(9)(A)(i). Next, EPA extended the exemption for thirteen of those refineries through 2012 based on the 2011 DOE Study, and separately granted individual petitions to extend the exemption through 2012 for eleven of those refineries and through 2011 for ten of them. U.S. Br. 7-8. Thus, the only refineries whose extension petitions were granted in the first round of such petitions were ones that were exempt in the prior year and therefore also qualified as a "small refinery" in that year. For the next year—2013—EPA granted only eight exemption petitions. *RFS Small Refinery Exemptions*, Table 2. The record does not disclose whether all eight had also been exempt in 2011 and 2012, but that is a reasonable assumption given that (i) the number of exempt refineries for 2011 and 2012 was three times the number

Moreover, at a minimum, the 2014 regulation's eligibility requirement accords with a continuity requirement *going forward*. That is, even if EPA, in promulgating the regulation, might have accepted that some refineries could be eligible for a future exemption extension even though they had not qualified as a "small refinery" in all prior years to that point, the regulation's eligibility requirement would still have limited eligibility for future extensions to those refineries that *thenceforth* qualified as a "small refinery" continuously. EPA might have thought that the statute should be interpreted to require continuous eligibility but that it would be unfair to impose that on refineries that had previously lost their exemption, out of concern that such refineries might not have realized the consequences of such a lapse.

This reading of the regulation squares with EPA's explanation in the regulation's preamble of why it

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for 2013 and (ii) in 2013 EPA proposed to define "small refinery" as a refinery whose average daily throughput "for calendar year 2006 and subsequent years" did not "exceed 75,000 barrels." *Regulation of Fuels and Fuel Additives: RFS Pathways II and Technical Amendments to the RFS 2 Standards*, 78 Fed. Reg. 36,042, 36,071 (proposed June 14, 2013). If EPA had already extended or was about to extend exemptions for 2013 to refineries that had exceeded the throughput limit in 2011 or 2012 and therefore not been exempt for one or both of those years, it would have been passing strange for EPA to propose an eligibility rule that would have disqualified those refineries for an extension for 2013 (or thereafter) without mentioning that fact in its 2013 proposed rule or in its 2014 rejection of that proposal. And by the next year (2014), EPA had finalized the eligibility regulation requiring that the refinery be a "small refinery" in both the exemption year and the prior year. In sum, it is likely that when the 2014 regulation's eligibility rule became effective, all refineries that had received exemption extensions to date had been continuously exempt and thus also continuously qualified as a "small refinery."

rejected its 2013 proposal. There, EPA said it would be "unfair[]" to "disqualify a refinery … based only on a single year's production since 2006," i.e., "in a single year as much as 8 years ago." *Regulation of Fuels and Fuel Additives: RFS Pathways II, and Technical Amendments to the RFS Standards and E15 Misfueling Mitigation Requirements*, 79 Fed. Reg. 42,128, 42,152 (July 18, 2014). But most of those years between 2006 and 2014 were covered by Congress's blanket exemption. Thus, EPA's concern was merely that a refinery that was a "small refinery" when the blanket exemption took effect (in 2006) and then exceeded the 75,000-gallon limit in a subsequent year before the regulation was promulgated (perhaps only during the pendency of the blanket exemption) should not be disqualified from obtaining an extension in the future. *See id.* Addressing that concern does not necessarily contradict a continuity requirement going forward.

That the 2014 regulation is consistent with a continuity requirement is confirmed by the same regulatory provision's repeated reference to "an extension of *its* small refinery exemption." 40 C.F.R. § 80.1441(e)(2) (emphasis added). The possessive "its" signals that a refinery would be eligible for an exemption extension only if it had been continuously exempt to that point, for without an exemption in the prior year, an applicant refinery would not *possess* an exemption to extend. *See* Appendix A to Pet. for Review, Letter from Christopher Grundler, EPA, to Tim Michelson, Dakota Prairie Refining, LLC at 1 & n.6 (Apr. 14, 2016) (stating 2014 regulation "allow[s] only small refineries that previously had received the initial exemption to qualify for an extension of that exemption," and emphasizing regulations' use of "its"), *Dakota Prairie Refining, LLC* v.

EPA, No. 16-2692 (8th Cir. June 13, 2016), ECF No. 4412414 (p.8/17).

At worst, the 2014 regulation is inconclusive on the issue and thus does not provide an authoritative agency interpretation to which the Court could defer.

3. EPA's interpretation does not deserve *Chevron* deference on the merits. First, *Chevron* "deference is not due unless a court, employing traditional tools of statutory construction," including "traditional canons" of interpretation, "is left with an unresolved ambiguity." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1630 (2018) (quotation cleaned). As explained below, the statutory text, structure, and purpose evince Congress's clear intent, leaving no ambiguity for EPA to resolve. Second, even if the statute were ambiguous, EPA's resolution of that ambiguity would merit deference only if it "f[e]ll within the bounds of reasonable interpretation." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2416 (2019). But EPA's interpretation does not, for much the same reasons that it contravenes Congress's intent.

4. Finally, even if the interpretation applied to the extension petitions at issue might have deserved *Chevron* deference when it was applied, it does not today because it "no longer reflect[s] the agency's position." *Wos* v. *E.M.A. ex rel. Johnson*, 568 U.S. 627, 643 (2013); *see* U.S. Br. 46-47 & App. 36a-39a.

II. THE STATUTE PERMITS EPA TO GRANT AN EXEMPTION PETITION FOR A GIVEN YEAR ONLY IF THE REFINERY HAS BEEN EXEMPT FOR ALL PRIOR YEARS

The interpretive choice confronting the Court is this: did Congress intend "extend" and "extension" as used in 42 U.S.C. §7545(*o*)(9) to mean "increase the duration of something that already exists," or "grant

something anew." The former is supported by all the relevant evidence; the latter, by none. Consequently, under §7545(*o*)(9)(B), EPA may grant an extension petition for a given year only if the refinery was exempt for the prior year, which (because that requirement would apply year after year) means, in practice, only if the refinery has been continuously exempt from the start of the RFS program.

A. The Statute Permits EPA to "Extend" the "Temporary Exemption" Granted by Congress

Congress began the RFS program with a blanket "[t]emporary exemption"—one applied to all extant small refineries—through 2010. §7545(*o*)(9)(A)(i). Congress then provided two mechanisms for an "extension of exemption." §7545(*o*)(9)(A)(ii), (B)(i). First, the statute provided that if the Secretary of Energy "determine[d]" that compliance with the RFS volume requirements "would impose a disproportionate economic hardship on small refineries," EPA could "extend the exemption under clause (i) for the small refinery"—i.e., could extend the congressionally granted blanket exemption—"for a period of not less than 2 additional years." §7545(*o*)(9)(A)(ii). Second, the statute provided that a "small refinery may at any time petition [EPA] for an extension of the exemption under subparagraph (A)"—i.e., could extend the "[t]emporary exemption"—"for the reason of disproportionate economic hardship." §7545(*o*)(9)(B)(i).

B. The Statute's Text and Structure Show Congress Used "Extend" and "Extension" to Mean "Prolong"

1. Ordinarily, the words "extend" and "extension" denote an increase in the length of something. The dictionary provides good evidence of that: the first seven definitions of "extend" on Dictionary.com (which draws definitions primarily from the *Random House Unabridged Dictionary*, supplemented by the *American Heritage Dictionary* and the *Harper Collins Dictionary*) all reflect a notion of "stretch[ing]" or "increas[ing]" something in space, effect, or time—i.e., "prolong." *Extend*, Dictionary.com[6]; *see* "About," Dictionary.com.[7] This understanding of "extend" and "extension" implies preexistence; the length, duration, or effect of something cannot be stretched or increased if it has no length, duration, or effect.

Petitioners note (Br. 23, 28) that "'extend' can also mean to 'offer or make available,'" as in "'grant.'" That suffices neither to establish their preferred interpretation nor even to render the statute ambiguous. *See Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context"); *accord King* v. *Burwell*, 576 U.S. 473, 492 (2015). Again, the primary and most common meaning of "extend" is "prolong"; the "grant" meaning is quite uncommon, not appearing until Dictionary.com's eighth definition of "extend." A meaning that is "not the ordinary meaning … does not control unless the context in which the word appears indicates that it does." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566

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[6] https://www.dictionary.com/browse/extend.

[7] https://www.dictionary.com/e/about/.

U.S. 560, 569 (2012). Here, as explained presently, all the contextual clues refute petitioners' contention that Congress intended to use their cherrypicked definition.

2. The statute describes the exemption to be extended in temporal terms. The Act defines a "[t]emporary exemption," which Congress initially granted only through 2010. §7545(*o*)(9)(A). Then, the Act permits EPA to "extend the exemption under clause (i)"—i.e., the exemption Congress granted through 2010—"for a period of … additional years." §7545(*o*)(9)(A)(ii)(II). Indeed, petitioners concede (Br. 27) that these provisions "made clear that [Congress] envisioned a temporal extension of that preexisting exemption."

Yet, petitioners assert (Br. 27) that there is "no reason" to conclude Congress assigned the same meaning to "extension" in subparagraph (B) of §7545(*o*)(9), the provision governing individual extension petitions. In fact, there are many such reasons. For starters, replacing "extension" with "grant" renders subparagraph (B) absurd. The statute would say that a refinery could "petition … for a *grant* of the exemption under subparagraph (A)." But "the exemption under subparagraph (A)" was already granted by Congress when it enacted the statute. Under petitioners' interpretation, then, petitioning for an "extension" under subparagraph (B) would be an act of futility: requesting something the refinery already received. The Court "will not construe a statute in a manner that leads to absurd or futile results." *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 138 (2004); *accord Pereira* v. *Sessions*, 138 S. Ct. 2105, 2115-2116 (2018). Petitioners can avoid this problem only by impermissibly rewriting the statutory phrase "the exemption under subparagraph (A)" as simply "an exemption." *See Yates* v. *United States*, 574 U.S. 528,

543 (2015) (Ginsburg, J., plurality op.) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." (quotations cleaned)).

Another obvious problem with petitioners' desire to give "extension" a different meaning in subparagraph (B) than in subparagraph (A) is that Congress does not write statutes that way. "Where … Congress uses similar statutory language and similar statutory structure in two adjoining provisions, it normally intends similar interpretations." *Nijhawan* v. *Holder*, 557 U.S. 29, 39 (2009). Here, though, where the language is not just similar but identical—*e.g.*, "Extension of exemption" appears in both, §7545(*o*)(9)(A)(ii)(II) & (B)(i)—and where the adjoining provisions are highly related substantively and cross-referenced, the Court should not entertain the possibility that Congress intended to give the same word different meanings in the two subparagraphs absent very clear and conclusive evidence of such intent—and there is none. *See Brown*, 513 U.S. at 118 ("[t]extual cross-reference confirms" Congress intended consistent meaning).

The broader statutory context confirms that Congress intended "extension" to have a consistent meaning across subparagraphs (A) and (B). "The consistent-usage canon breaks down where Congress uses the same word in a statute in multiple conflicting ways, *Return Mail, Inc.* v. *United States Postal Serv.*, 139 S. Ct. 1853, 1865 (2019), but here Congress used "extend" and "extension" consistently to indicate *prolonging* something that already exists. That is true of the Energy Policy Act of 2005, in which Congress enacted the exemption provisions. *See* Pub. L. No. 109-58, §1501(c)(2), 119 Stat. 594, 1075 ("extension of effective date … extend the effective date … for not more than 1 year"

(codified at §7545(h)(5)(C)(ii))); Pub. L. No. 109-58, §1507(4), 119 Stat. at 1082 ("extension of commencement date … extend the commencement date … for not more than 1 year" (codified at §7545(k)(6)(B)(iii))). And it is true of the rest of §7545. *See* §7545(k)(6)(A)(ii) ("extend the effective date … for one additional year, and may, by rule, renew such extension for 2 additional one-year periods"); §7545(m)(3)(C)(ii) ("extend such effective date for one additional year"); §7545(*o*)(7)(E)(iii) ("Extensions" "for up to an additional 60-day period"); §7545(t)(2)(B) ("shall extend for a period of no more than 10 consecutive calendar days").

If Congress had intended subparagraph (B) to empower EPA to grant a new exemption irrespective of whether the refinery was exempt for the prior year, Congress had two easy and obvious ways to do so: by using the word "grant" instead of "extension" or simply by allowing refineries to petition "for an exemption"—a locution that would have been perfectly clear and functional even though Congress provided a blanket exemption initially. Indeed, Congress used "grant" in many other provisions of the Energy Policy Act and of §7545 more broadly that authorize EPA to relieve a regulated entity of its duties. *See*, *e.g.*, § 7545(c)(4)(C)(ii)(III) ("grant the waiver"); §7545(f)(4) ("grant or deny an application"); §7545(k)(1)(B)(iv) ("the granting and use of credits"); §7545(k)(7)(A) ("the granting of an appropriate amount of credits"); §7545(m)(3)(C)(ii) ("waiver may be granted"); §7545(*o*)(7)(C) ("waiver granted"). Thus, Congress "knew how to draft the kind of statutory language that petitioner[s] seek[] to read into" subparagraph (B). *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 443-44 (2016). "[H]ad Congress intended to" give EPA the power to grant new exemp-

tions, it "would have said so." *Id.* Particularly because these are such "obvious alternative[s]," "the natural implication" of Congress's decision not to use them is that Congress did not intend to give "extend" and "extension" such meaning. *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 16 (2014).

3. Petitioners' textual counter-arguments have no merit, and certainly not enough to outweigh the evidence just discussed.

First, petitioners' "most significant[]" evidence—subparagraph (B)'s phrase "at any time," Pet. Br. 33—does not support their interpretation. Whether "the word 'any' has an expansive meaning," as petitioners assert (*id.*), is irrelevant. The statute expressly provides that a "small refinery may at any time petition … for an extension." §7545(*o*)(9)(B)(i). Hence, the phrase "at any time" plainly serves a different function from what petitioners claim: specifying when a refinery can request (and thus when EPA can grant) an extension petition, not the period to be covered by the exemption. *See* U.S. Br. 37-38.

Second, petitioners argue (Br. 28) that the reference in subparagraph (B)(iii) to "a hardship exemption" shows that what refineries petition for is "a free-standing exemption." That reading cannot be squared with subparagraph (B)'s statement that the petition is for "an extension of the exemption under subparagraph (A)." §7545(*o*)(9)(B)(i). Petitioners are right that these two clauses are "interchangeabl[e]," but that only shows that the phrase "hardship exemption" is shorthand for an extension of the exemption granted (and potentially extended) under subparagraph (A). Petitioners' reading renders the phrase "an extension of the

exemption under subparagraph (A)" superfluous or gibberish.

Third, petitioners contend (Br. 38) that, if Congress intended to require that the refinery have been exempt in the prior year, it could have written "for the reason of *continuing* disproportionate economic hardship." True, but for all the reasons already stated, the text is clear without the word "continuing."

Fourth, and similarly, petitioners argue (Br. 33-34, 39-40) that "when Congress intends to sunset a regulatory exemption, it does so expressly." That too may be true, but it is irrelevant because a continuity requirement is not a sunset provision. Under the court of appeals' interpretation, exemption extensions would be available for as long as small refineries continue to suffer disproportionate economic hardship from RFS compliance.

Finally, petitioners contend (Br. 29) that, even if Congress used "extend" in a "temporal sense," it still allows for a "non-continuous extension." This argument fails for several reasons. For starters, petitioners strain to identify examples supporting that understanding of "extend." The dictionary definition they quote (Br. 29)—"an increase in length of time: increased or continued duration"—actually refutes their argument, because both an increase and a continuation imply that the object of the extension already exists. Petitioners invoke (Br. 29) Federal Rule of Civil Procedure 6(b)(1)(B), but that rule speaks not to discontinuity but to whether a deadline can be extended after it has expired; the rule permits extensions after expiration of the deadline, but even then, the extension creates an enlarged, continuous period for action. The same is true of petitioners' "hypothetical tax benefit." Pet.

Br. 30. Petitioners do identify (Br. 30) two statutes in which Congress used "extend" or "extension" to indicate a discontinuous renewal of a benefit. Those statutes, however, establish at most that using "extend" and "extension" that way is exceedingly rare and should not be presumed to reflect Congress's intent.

Moreover, if Congress had intended to allow discontinuous "extensions," there would have been a much easier and more natural way to express that intent: by allowing a refinery to petition "for a renewal of the exemption." Again, Congress's decision not to adopt an "obvious alternative" implies that it did not intend to imbue its chosen language with that meaning. *Lozano*, 572 U.S. at 16.

C. The Statute's Purpose Is Served by the Court of Appeals' Interpretation, Not by Petitioners'

The RFS program's "increasing [volume] requirements are designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year." *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 710 (D.C. Cir. 2017) (Kavanaugh, J.) (quotation cleaned). As the court of appeals recognized, that purpose is served by interpreting the statute to permit EPA to grant an extension petition for a given year only if the refinery was exempt in the prior year. That interpretation "funnels small refineries toward compliance over time"; as small refineries attain the ability to meet their RFS obligations, the "number [of exemptions] should … taper[] down." Pet. App. 68a; *see Hermes Consol., LLC* v. *EPA*, 787 F.3d 568, 572, 578 (D.C. Cir. 2015). Without a continuity requirement, small refineries would have little incentive to make the sustained investment needed to meet their RFS obliga-

tions for the duration of the program; they could elect to do so when convenient and avoid their obligations when they considered the requisite investment too great.

Petitioners, however, contend (Br. 40) that phasing out exemptions is contrary to the statute's "*escalating* burdens" on obligated parties. As petitioners see it (Br. 40-43), the need for exemption increases as the RFS volume obligations increase, and a refinery's "ability to demonstrate compliance in one year will not be dispositive of its ability to do so in a future year, especially with escalating compliance obligations." This makes no sense for two reasons. First, by laying out the increasing volume requirements in the statute, Congress gave obligated parties ample lead time to prepare to meet them even as they escalate. *See* §7545(*o*)(2)(B). If compliance is too difficult as the requirements increase, that is only because the refinery has failed to make the necessary investments that Congress intended the program to force. Offering exemptions in the initial years of the program gives obligated parties ample opportunity to prepare for compliance over the long-haul; allowing obligated parties that have achieved compliance to nonetheless secure exemptions in later years only relieves them of the duty to take the actions necessary to increase renewable-fuel use. The Court "should not lightly conclude that Congress enacted a self-defeating statute." *Quarles* v. *United States*, 139 S. Ct. 1872, 1879 (2019).

Second, for a refinery able to achieve compliance, the marginal financial effect of increasing volume requirements in later years should be negligible. EPA has repeatedly found—based on extensive empirical analysis—that obligated parties fully recoup their RIN costs. *Denial of Petitions for Rulemaking to Change*

the RFS Point of Obligation 22-29 (Nov. 22, 2017)[8]; *see Alon Ref. Krotz Springs, Inc.* v. *EPA*, 936 F.3d 628, 649-652 (D.C. Cir. 2019) (per curiam) (affirming EPA's finding).[9] Accordingly, "fluctuat[ions]" in RIN prices, even if "radical[]," Pet. Br. 44, have no appreciable financial effect on small refineries. If a small refinery would face compliance difficulty from, as petitioners assert (Br. 41, 43-44), "basic structural impediments that do not diminish over time," Congress could reasonably have expected that the refinery would either remedy those impediments in the initial years of the program—principally during the blanket-exemption period—or never, in which case the refinery might qualify for continued exemptions.

III. EPA MUST IMPOSE REMEDIAL RFS OBLIGATIONS TO CORRECT THE UNLAWFUL EXEMPTION EXTENSIONS

Should the Court uphold the lower court's interpretation, almost all exemption extensions for 2016, 2017, 2018, and 2019 will immediately become invalid. *See* U.S. Br. 24.[10] Because EPA has not "adjust[ed] renewable fuel obligations to account for" those extensions, they created a "renewable-fuel shortfall," "imped[ing] attainment of overall applicable volumes."

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[8] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100TBGV.pdf.

[9] *See also Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019*, 82 Fed. Reg. 58,486, 58,517 (Dec. 12, 2017); *Renewable Fuel Standard Program—Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes: Response to Comments* 11 (Dec. 2019), https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100YAPQ.pdf.

[10] *See also* Petition for Waiver Under Clean Air Act Section 211(o)(7)(A)(i) of the Renewable Fuel Standard ("RFS") at 4 (Mar. 30, 2020), https://www.epa.gov/sites/production/files/2021-01/documents/rfs-waiver-petition-perkins-coie-2020-03-30.pdf.

American Fuel & Petrochemical Manufacturers v. *EPA*, 937 F.3d 559, 571, 588 (D.C. Cir. 2019) (per curiam). Thus, EPA will need to remedy its unlawful decisions to grant those extensions. To ensure that the Court's decision has force and that there is meaningful judicial review of relief EPA provides to obligated parties under the RFS program, *see* 42 U.S.C. §7607(b), the Court should make clear that on remand, EPA must require the exempted refineries to submit the number of RINs they would have been required to submit had they not received the unlawful extensions.

The lower court stated that on remand, EPA would "likely" take "action … at least partially redressing" the unlawful extensions, such as by requiring "after-the-fact retirements of RINs" by the formerly exempt refineries. Pet. App. 49a-50a. But in the past EPA has signaled that it could or would not remedy unlawfully granted RFS relief. In *Americans for Clean Energy*, the D.C. Circuit held unlawful EPA's 500-million-gallon waiver of the 2016 RFS volume requirement. 864 F.3d at 696. EPA still has not remedied that error. *See* Order, No. 16-1005 (D.C. Cir. Jan. 27, 2021), ECF No. 1882107. On remand, EPA stated that "any [remedial] approach that requires additional volumes of renewable fuel use" would constitute "a retroactive standard" imposing "a significant burden on obligated parties, without any corresponding benefit as any additional standard cannot result in additional renewable fuel use in 2016." *Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes*, 84 Fed. Reg. 36,762, 36,788 (July 29, 2019). If EPA were correct that remediation could constitute an unreasonable retroactive obligation, judicial review of EPA actions granting relief from RFS obliga-

tions, whether exemption extensions or waivers, would be pointless. Thus, the Court should clarify that requiring unlawfully relieved obligated parties to comply with future remedial obligations equal to the obligations they would have had but for the unlawful relief would not impose a retroactive standard at all, and certainly not one that EPA can avoid imposing.

A standard is retroactive only if it "attaches new legal consequences to events completed before its enactment." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269-270 (1994). But an obligation to remedy unlawful RFS relief would be neither new nor retroactive. First, a remedial obligation would simply restore the requirement that Congress intended and that EPA unlawfully relieved. Obligated parties cannot have "settled expectations" in a potentially unlawful agency decision to grant them relief from their congressionally imposed RFS obligations. *See id.* at 266, 269 n.24, 270. Second, a remedial obligation would apply in the future, and surely EPA could set a deadline for compliance that would afford obligated parties ample "notice" to structure their conduct to achieve compliance. *See id.* at 269 n.24, 270.

Moreover, obligated parties would not need to use additional renewable fuel—in the past or in the future—to meet their remedial obligations. Instead, they could use the available RINs in the so-called RIN bank (the aggregation of RINs carried over from prior years for compliance in future years). *See Americans for Clean Energy*, 864 F.3d at 699. In fact, using banked RINs is appropriate because it was the very unlawful exemption extensions that enabled those RINs to be banked in the first place. Thus, a remedial obligation

would restore the RIN bank's balance to what it would have been but for the unlawful exemption extensions.[11]

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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[11] Because all or nearly all the 2016-2019 extensions were granted after each covered compliance year ended, the exempted refineries had already acquired the RINs needed for compliance. Consequently, once those refineries received their extensions, most or all the corresponding RINs went into the RIN bank. *See, e.g.*, 85 Fed. Reg. at 7021 & n.15. For those years, EPA has granted extensions covering 4.3 billion RINs. *RFS Small Refinery Exemptions*, Table 1. The RIN bank currently contains about the same number of RINs. *See* EPA, *Available RINs*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/available-rins. *See generally* Growth Energy D.C. Cir. Br. 13-21, *supra* n.3.