No. 22-1276 (and consolidated cases)

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE SAN ANTONIO REFINERY, LLC, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Action
by U.S. Environmental Protection Agency

UNOPPOSED BRIEF OF GROWTH ENERGY AS AMICUS CURIAE IN SUPPORT OF EPA AND DENIAL OF THE PETITIONS

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CORPORATE DISCLOSURE STATEMENT

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

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GLOSSARY

EPA	U.S. Environmental Protection Agency
PB	Petitioners' Brief
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number

STATEMENT OF IDENTITY AND INTEREST[1]

Growth Energy is a leading national trade association of renewable-fuel producers dedicated to promoting the production and use of renewable fuel, particularly conventional ethanol, which is the principal renewable fuel used to meet the annual requirements established by EPA under the Renewable Fuel Standard ("RFS") program. *See Americans for Clean Energy v. EPA*, 864 F.3d 691, 697-98 (D.C. Cir. 2017). Because the RFS defines the domestic "demand" for renewable fuel, *id.* at 705, Growth Energy has a strong interest in EPA's implementation of the RFS.

Accordingly, Growth Energy routinely comments on EPA's proposed RFS actions, including the action challenged here. *See Letter from Growth Energy* (July 28, 2022), EPA Dkt. # EPA-HQ-OAR-2022-0434-0015.[2] Growth Energy also routinely participates in lawsuits challenging EPA's RFS actions.

This amicus brief apprises the Court of the potential relationship between this case and several other cases involving other RFS actions, which cases are

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[1] EPA consents to the filing of this brief, and petitioners do not oppose its filing. No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparing or submitting this brief, and no person other than Growth Energy, its members, or its counsel contributed money intended to fund preparing or submitting this brief.

[2] https://www.regulations.gov/comment/EPA-HQ-OAR-2022-0434-0015.

pending in this Court and other circuits, and in all but one of which Growth Energy is participating (as petitioner, intervenor, or amicus curiae). *See Sinclair Wyoming Refining Co. v. EPA*, No. 22-1074 (D.C. Cir.) (petitioner); Order, *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1073, ECF #1987065 (D.C. Cir. Feb. 22, 2023) (intervenor); *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1210, ECF #1975422 (D.C. Cir. Nov. 29, 2022) (intervenor); *Calumet Shreveport Refining LLC v. EPA*, No. 22-60266, ECF #303-1 (5th Cir. Mar. 16, 2023) (intervenor); *Hunt Refining Co. v. EPA*, No. 22-11617, ECF #87 (11th Cir. Apr. 27, 2023) (amicus curiae).

Growth Energy believes this brief will further inform the Court of the potential implications of this case for these other pending cases beyond what the parties have indicated. Additionally, this brief argues that this case affords no occasion for the Court to address the issues also raised in those other cases, but alternatively, this brief explains, from the biofuels-industry perspective, why the Court should reject petitioners' arguments on those issues.

INTRODUCTION

The petitions should be denied because petitioners' arguments are both misdirected and incorrect.

In 2022, EPA took a series of related actions under the Renewable Fuel Standards ("RFS") program: it extended the deadlines for obligated parties to

demonstrate compliance with their 2019-2022 RFS obligations ("Extension Rule"); then denied petitioners' and other small refineries' applications for exemption from their 2016-2021 RFS obligations ("Exemption Denials"); concurrently excused some disappointed exemption applicants of their 2016-2018 RFS obligations anyway, but declined to excuse others for those years and for 2019-2021, including petitioners ("Alternative Compliance Actions"); set the 2020-2022 standards ("2020-2022 Rule"); and finally, allowed disappointed exemption applicants to select an extended compliance schedule with an expanded range of eligible RIN vintages to meet their 2020 RFS obligations. Here, petitioners challenge only the last of these, the Alternative RIN Retirement Schedule for Small Refineries ("Alternative Schedule").

This Court's recent decision in *Wynnewood Refining Co. v. EPA*, No. 22-1015, __ F.4th __, 2023 WL 4567577 (D.C. Cir. July 18, 2023), requires that the petitions be denied because it establishes that petitioners' claim is directed at the wrong EPA actions. The *Wynnewood* petitioners claimed they were harmed by EPA's delays in issuing the 2020-2022 Rule and the Exemption Denials, and by EPA's attendant refusal to "mitigate" that alleged harm by erasing their RFS obligations, like EPA did through the Alternative Compliance Actions. This Court held that their "reasonable-mitigation argument is misdirected" at the Extension Rule, which merely "alter[ed] [their] compliance deadlines." *Id.* at *10. Here,

petitioners aim the same arguments at the Alternative Schedule, which, like the Extension Rule, altered a compliance deadline (and expanded eligible RIN vintages). Therefore, as in *Wynnewood*, their claim is misdirected and should be rejected.

In any event, petitioners' claim fails on the merits. Growth Energy agrees with the reasons given in EPA's brief, and confines this brief to supplementing and amplifying certain points. As elaborated below, first, petitioners' preferred "mitigation" standard does not apply to the Exemption Denials—the source of some of their asserted harm—because that standard is only for rulemakings but the denials were adjudications. Next, EPA may "mitigate" the harm of late RFS obligations only if they have retroactive effect, but neither the 2020-2022 Rule nor the Exemption Denials had retroactive effect because neither imposed new substantive obligations or penalties for past conduct, and the Exemption Denials did not depart from a clear prior policy.

Even if there were retroactive effects to mitigate, however, EPA adequately mitigated them because there were ample carryover RINs to meet the relevant RFS obligations, and EPA gave petitioners sufficient time to acquire the necessary RINs (to the extent they had not already done so). Further, requiring compliance would not impose a cost on petitioners but rather merely eliminate a windfall (the RIN premium they previously collected, which would ordinarily offset the RIN price

they would pay to demonstrate compliance). Any marginal difference in RIN prices between the relevant compliance years and now is a consequence of petitioners' strategic decision to wait to acquire the necessary RINs. In contrast, excusing petitioners of their RFS obligations would undermine the RFS's purpose of increasing the amount of renewable-fuel use.

Finally, EPA lacks authority to use an alternative-compliance approach. Congress provided various ways to excuse overburdened obligated parties and carefully specified the conditions for granting such relief. That structure forecloses the notion that EPA has implicit discretion to excuse obligated parties in other circumstances—especially when EPA has specifically found that the obligated parties do not qualify for the statutory forms of such relief.

ARGUMENT

I. PETITIONERS CHALLENGE THE WRONG AGENCY ACTION

A. The Alternative Schedule Is One of a Series of Related Actions

Over the course of 2022, EPA issued a series of related actions under the RFS governing the measure of RFS obligations and the timing and mechanics of demonstrating compliance therewith. Each action is the subject of at least one pending lawsuit; this case is one. EPA's brief describes each of those actions and identifies the relevant cases. *See* EPA Br. ii-iii, 15-24. Briefly:

- Issued in February 2022, the Extension of Compliance and Attest Engagement Reporting Deadlines ("Extension Rule") postponed the deadlines by which obligated parties must demonstrate compliance for 2019, 2020, 2021, and 2022. 87 Fed. Reg. 5,696, 5,698 (Feb. 2, 2022).
- In April and June 2022, EPA denied 105 petitions for exemption from the 2016-2021 RFS obligations ("Exemption Denials"). EPA-420-R-22-005 (Apr. 2022) (noticed at 87 Fed. Reg. 24,300 (Apr. 25, 2022)) ("April Exemption Denials")[3]; EPA-420-R-22-011 (Jun. 2022) (noticed at 87 Fed. Reg. 34,873 (June 8, 2022)) ("June Exemption Denials").[4] Thirty-one of the 2018 petitions and 3 of the petitions for 2016-2017 had previously been granted; those decisions were reversed on remand from this Court and the Tenth Circuit in cases challenging the original grants.
- Concurrently with the Exemption Denials, EPA issued the Alternative RFS Compliance Demonstration Approach for Certain Small Refineries ("Alternative Compliance Actions"). EPA-420-R-22-006 (Apr. 2022) (noticed at 87 Fed. Reg. 24,294 (Apr. 25, 2022)) ("April Alternative

[3] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1014EG4.pdf.

[4] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P10156DA.pdf.

Compliance Action")[5]; EPA-420-R-22-012 (June 2022) (noticed at 87 Fed. Reg. 34,872 (June 8, 2022)) ("June Alternative Compliance Action").[6] The denial of the 34 remanded exemption petitions left those refineries with "unmet" RFS obligations for the covered years. The Alternative Compliance Actions deemed those refineries compliant with their unmet obligations "without retiring any additional RINs." 87 Fed. Reg. at 34,873. In effect, the Alternative Compliance Actions excused those refineries of the very obligations EPA had just determined they were not exempt from.

- In July 2022, EPA promulgated the RFS Annual Rules for 2020-2022 ("2020-2022 Rule"). 87 Fed. Reg. 39,600 (July 1, 2022). That action reduced the 2020 obligations to the level of renewable fuel actually used in 2020, *id*. at 39,602, and similarly set the 2021 obligations to the level of actual renewable-fuel use in 2021, *id*. at 39,602-39,603. Thus, the 2020-2021 obligations would require no additional renewable-fuel use and no drawdown of the carryover-RIN bank, *id.*, i.e., no need to use excess RINs carried over from prior years, *see Americans for Clean*

[5] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1014EK3.pdf.

[6] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P10156HC.pdf.

Energy, 864 F.3d at 699. The 2020-2022 Rule then set the 2022 obligations to the level of renewable fuel that EPA determined would be achieved in 2022 entirely through new renewable-fuel use, thus again avoiding a need to draw down the carryover-RIN bank. 87 Fed. Reg. at 39,603.

- Issued in September 2022, the Alternative Schedule allows small refineries to choose an alternative compliance framework that would give them more "time and … a broader range of RIN vintages to acquire … to demonstrate compliance for the 2020 compliance year." 87 Fed. Reg. 54,158, 54,160 (Sept. 2, 2022). Small refineries that select the alternative schedule may retire 20% of the total RINs needed to meet their 2020 obligations at each of the next five calendar quarters. *Id.* at 54,163. And they may use RINs generated in 2019-2024 to satisfy their 2020 obligations, *id.* at 54,162; otherwise, they would be limited to RINs generated in 2020 or 2019 (carryover RINs) to meet those obligations.

In lawsuits associated with some of these EPA actions, obligated parties (including many petitioners here) have advanced materially identical arguments for "mitigating" the alleged "harms" stemming from EPA's belated determination of their 2019-2021 obligations through the 2020-2022 Rule and the Exemption Denials. *See, e.g.*, Petitioners' Opening Brief 88-95, *Sinclair Wyoming*, No. 22-

1073, ECF #2003725 (D.C. Cir. Jun. 15, 2023) (challenging Exemption Denials); Petitioner's Opening Brief 33-35, *Hunt*, No. 22-11617, ECF #51 (11th Cir. Feb. 9, 2023) (same); Petitioners' Opening Brief 40-42, *Calumet*, No. 22-60266, ECF #310 (5th Cir. Mar. 23, 2023) (same); Petitioners' Opening Brief 25-29, *Wynnewood*, No. 22-1015, ECF #1961059 (D.C. Cir. Aug. 26, 2022) (challenging Extension Rule).

B. Petitioners' Arguments Are Misdirected at the Alternative Schedule

The thrust of petitioners' suit is that EPA "failed" to "minimize" or "mitigate the harm" EPA allegedly caused them by belatedly issuing the RFS standards for 2020-2021 and belatedly adjudicating their exemption petitions for 2018-2021. *E.g.*, Petitioners' Br. ("PB") 34-35, 37. They argue that EPA should have issued a "waive[r] or "provided an alternative compliance mechanism" that entirely excused them of their 2019-2021 obligations, like EPA did in its Alternative Compliance Actions for certain small refineries for their 2016-2018 obligations. PB44-47. These contentions have nothing to do with the Alternative Schedule, which merely gave petitioners *greater* compliance flexibility than they would otherwise have for 2020.

It was through the 2020-2022 Rule that EPA determined the 2020-2021 standards and declined to issue a general waiver. *See* 87 Fed. Reg. at 39,606. It was through the Exemption Denials that EPA denied petitioners' requests to be

exempt from their RFS obligations. And it was through the Alternative Compliance Actions that EPA excused certain small refineries but expressly declined to excuse petitioners of the obligations covered by certain denied exemption petitions. June Alternative Compliance Action at 18. Thus, any arguments about EPA's late obligation decisions or its alleged failure to mitigate the supposed harms stemming from those decisions should have been directed at the 2020-2022 Rule or the Alternative Compliance Actions.

In *Wynnewood*, this Court recently reached that that conclusion with respect to a nearly identical challenge to a substantively similar EPA action: the Extension Rule. Like here, the *Wynnewood* petitioners argued "that the Extension Rule … fails to 'reasonably mitigate' the harm caused by EPA's delays in taking other actions," namely, "the agency's delays in issuing the 2020-2022 standards and belated denial of … small refinery exemption petitions." 2023 WL 4567577, at *9. And like here, the *Wynnewood* petitioners argued that "'the only reasonable mitigation' … is to give obligated parties some form of reprieve from their renewable fuel obligations," such as by "offer[ing] parties an alternative compliance demonstration approach that would reduce their obligations[] [or] exercis[ing] its waiver authority to eliminate their obligations entirely." *Id.* The Court held it could not address those arguments:

> The Refineries' reasonable-mitigation argument is misdirected. … [O]ther agency actions that could bear on refineries' obligations are not before us

> here. EPA's delayed issuance of the 2020-2022 standards is subject to a separate pending challenge, *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1210 (D.C. Cir.), as is EPA's denial of several small refinery exemption petitions, *Sinclair Wyoming Refining Co. v. EPA*, No. 22-1073 (D.C. Cir.); *Hunt Refining Co. v. EPA*, No. 22-11617 (11th Cir.); *Calumet Shreveport Refining LLC v. EPA*, No. 22-60266 (5th Cir.). Any questions whether EPA has reasonably mitigated the asserted hardships caused by those delays are not before us in this case …. The agency action on review here is limited to EPA's decision to alter obligated parties' compliance deadlines in the Extension Rule.

Id. at *10.

The Court should follow *Wynnewood* and reach the same conclusion here.

II. PETITIONERS' ARGUMENTS ARE WRONG

If the Court were nonetheless to address petitioners' arguments that EPA was "require[d]" but failed "to 'minimize the hardship caused to obligated parties by virtue of EPA's delay," PB32 (quoting *Americans for Clean Energy*, 864 F.3d at 719, 721), it should proceed cautiously given the potential implications for other pending cases involving related EPA actions. And the Court should reject petitioners' arguments. EPA's brief already gives many reasons why, and Growth Energy agrees with those reasons. Here, Growth Energy supplements and amplifies certain points.[7]

[7] For the same reasons, the rare petitioners that did not receive alternative-compliance relief for their *2018* exemption-petition denials (*see* PB3, 45 n.21) would not be entitled to such relief, either.

A. Petitioners Invoke a Mitigation Standard That Applies Only to Retroactive Rulemaking and Thus Not to the Exemption Denials

Petitioners' case rests on a duty to minimize (or mitigate) the harms from certain late agency actions articulated in *Americans for Clean Energy* and earlier cases: EPA may "adopt[] late regulatory action, '*so long as* EPA reasonably considers' and 'minimize[s]' 'any hardship caused to obligated parties by … its lateness." PB3 (quoting *Americans for Clean Energy*, 864 F.3d 717-19, 721). As *Americans for Clean Energy* and its predecessors show, however, that mitigation standard applies only to rulemaking, not administrative adjudication. *See Americans for Clean Energy*, 864 F.3d at 718; *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 920 (D.C. Cir. 2014); *National Petrochemical & Refiners Ass'n v. EPA*, 630 F.3d 145, 165-66 (D.C. Cir. 2010). That standard, therefore, does not apply to the Exemption Denials because they are "adjudication[s]," "not a rulemaking." June Exemption Denials 5-6, 73; *see Sinclair Wyoming Refining Co. v. EPA*, 887 F.3d 986, 992 (10th Cir. 2017).

Under the standard for retroactive rulemaking, "EPA must … consider[] the benefits and the burdens attendant to" its retroactive application, "reasonably balance[] its statutory duties with the rights of" obligated parties, and "adequately consider[] various ways to minimize the hardship caused to obligated parties" by retroactivity. *Americans for Clean Energy*, 864 F.3d at 718-19, 721 (cleaned up).

In contrast, for administrative adjudication there is a strong presumption that rulings will be applied retroactively. "[I]t is black-letter administrative law that adjudications are inherently retroactive." *Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 921 (D.C. Cir. 2013); *see also Qwest Services Corp. v. FCC*, 509 F.3d 531, 539 (D.C. Cir. 2007) ("Retroactivity is the norm in agency adjudications." (cleaned up)). When "a rule [is] announced in an agency adjudication," the "application of the rule itself … *must*" be "retroactive." *Catholic Health*, 718 F.3d at 922 (cleaned up). As for the rule's "retroactive effect"—i.e., its "economic consequences"—an agency "may" "deny" it only under very limited circumstances: either "where the adjudication substitutes new law for old law that was reasonably clear and where doing so is necessary to protect the settled expectations of those who had relied on the preexisting rule," *id.* (cleaned up), or "when to do otherwise would lead to manifest injustice," *Qwest*, 509 F.3d at 539 (cleaned up).

B. Any Power or Duty to Mitigate Retroactive Effects of Rulemaking or Adjudication Is Inapplicable Because the 2020-2022 Rule and the Exemption Denials Lack Retroactive Effect

The mitigation standards just described do not apply to the 2020-2022 Rule or the Exemption Denials because those standards govern only new retroactive actions and neither the 2020-2022 Rule nor the Exemption Denials have retroactive effect.

1. EPA Had No Power or Duty to Mitigate the 2020-2022 Rule Because It Was Not Retroactive

Petitioners suggest that the mitigation standard recognized in *Americans for Clean Energy* applies to any "late" or "delayed" EPA action, i.e., any action taken after an applicable deadline. PB33, 46-47. But as *Americans for Clean Energy* and its predecessors show, that mitigation standard applies only to "mitigating … *retroactive* effects of [a] late rule." *Americans for Clean Energy*, 864 F.3d at 701 (emphasis added); *see also, e.g., id.* at 718-19 ("EPA's issuance of a late volume requirement with retroactive effects"); *Monroe*, 750 F.3d at 920; *National Petrochemical*, 630 F.3d at 158-62, 165-66. Indeed, the notion that *Americans for Clean Energy* recognized implicit authority for EPA to mitigate any effects of late RFS action, even if not retroactive, directly contradicts the Court's earlier holding in the same case that EPA lacked implicit authority to reduce RFS volume requirements even if "necessary to avoid causing harmful effects in the renewable fuel market." 864 F.3d at 711-12; *see infra* pp.27-28.

With respect to 2020-2021 (petitioners do not mount a challenge with respect to 2022), the 2020-2022 Rule had no retroactive effect. A new regulation is retroactive if it "attaches new legal consequences to [past] events," *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70 (1994), i.e., "imposes new sanctions on past conduct" or "new duties or disabilities regarding past transactions," *National Petrochemical*, 630 F.3d at 158-59. The 2020-2022 Rule, however, imposed no

substantive obligation or sanctions for past conduct. It set the 2020 and 2021 RFS obligations to the precise volumes that obligated parties had already used. And, in conjunction with the Extension Rule, it gave obligated parties until December 1, 2022 (for 2020) and March 31, 2023 (for 2021) to demonstrate their compliance with the obligations, 87 Fed. Reg. at 5,700—181 days and 293 days from when the rule was publicly released, on June 3, 2022. Thus, petitioners had at least 6 and nearly 10 months to acquire and retire the necessary RINs (to the extent they had not already done so)—more when considering the notice from the Notice of Proposed Rulemaking, *see Americans for Clean Energy*, 864 F.3d at 721-22; *Monroe*, 750 F.3d at 920-21; *National Petrochemical*, 630 F.3d at 163-64.[8]

2. EPA Had No Duty to Mitigate the Exemption Denials Because They Had No Retroactive Effect

The Exemption Denials were not retroactive with respect to 2019-2021 (the relevant years), either. Adjudication has "retroactive" effect only if "the rule itself effected a clear change in the legal landscape and attached new legal consequences

[8] Petitioners' notion of "lead time," PB39, is flawed. The 13 months between the November 30 deadline to set standards initially and the end of the compliance year gives obligated parties time to introduce the required renewable fuel into commerce, but the 2020-2022 Rule did not require any new fuel introduction, so that statutory period is an irrelevant metric for assessing whether EPA gave petitioners adequate time to comply.

to past actions." *Catholic Health*, 718 F.3d at 921. That is not true of the Exemption Denials.

First, petitioners erroneously assume that timely exemption decisions would have been different, PB32, 35; EPA might have accelerated its policy clarification and denied the petitions earlier.

Second, the Exemption Denials merely confirmed the status quo; they did not impose new obligations or sanctions. The small refineries were required to meet their RFS obligations unless and until they were granted an exemption, and the Exemption Denials denied their exemption requests, leaving them bound by their preexisting obligations—as EPA had long reminded them they would be if their petitions were denied. *See, e.g.*, EPA, *Memorandum re Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemption Requests* 3 (Dec. 6, 2016) ("2016 Memo").[9]

And third, the Exemption Denials did not effect a clear change in the governing standard. The prior approach was itself a brief, informal, immediately

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[9] www.epa.gov/sites/default/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf. Petitioners again rely on a faulty notion of lead time. PB35. Upon the Exemption Denials, petitioners only needed to retire RINs and, if necessary, acquire those RINs in the RIN market first. In conjunction with the Extension Rule, the Exemption Denials gave them ample time to do so. *See supra* pp.5-6, 14-15; 87 Fed. Reg. at 5,698.

challenged departure from the position later applied in the Exemption Denials. Before the Exemption Denials, the only articulated policy on the issue—in the 2016 Memo—was consonant with the policy applied in the Exemption Denials on the key differences between the current policy and the one applied in granting the 2016-2018 exemptions initially: disproportionate hardship must be caused by RFS compliance and hardship analysis must account for any RIN-cost recoupment. *See* June Exemption Denials at 5. The 2016 Memo stated that EPA "may only grant such petitions if … the small refinery will experience a 'disproportionate economic hardship' from compliance with its RFS obligations" and that it "evaluat[es] whether RFS compliance would cause the small refinery 'disproportionate economic hardship.'" 2016 Memo 1-2.[10] The 2016 Memo also stated that "since 2011, … EPA has adopted the interpretation of disproportionate economic hardship set forth in the [Department of Energy] Small Refinery Study," *id.* at 2 n.5, which in turn defined the task as "evaluat[ing] disproportionate economic hardship caused by the impact of compliance with the RFS on small refineries," accounting for "[t]he degree to which [RIN purchase costs] will be passed

[10] Thus, in some earlier cases courts noted that EPA had applied an approach that accords with both the 2016 memorandum and the later Exemption Denials. *See, e.g.*, *Hermes Consolidated, LLC v. EPA*, 787 F.3d 568, 573 (D.C. Cir. 2015); *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600, 607-08, 612-13 (4th Cir. 2018).

through," DOE, *Small Refinery Exemption Study* 2, 22-23 (March 2011).[11] In contrast, EPA articulated or applied petitioners' preferred approach only when initially granting the now-reversed exemptions for 2016-2018. *See Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1253-57 (10th Cir. 2020), *rev'd on other grounds sub nom. HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 141 S.Ct. 2172 (2021). There is "no legal authority … to support carving out an exception to the rule of [adjudicative] retroactivity based … on an agency interpretation so briefly embraced." *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1084 D.C. Cir. 1987).[12]

Moreover, the approach used in initially granting the 2016-2018 exemptions was subject to immediate legal cloud: it was judicially challenged as soon as interested parties learned of it, *see* Petition for Review, *Renewable Fuels Ass'n v. EPA*, No. 18-9533 (10th Cir. May 29, 2018)—before petitioners filed their petitions for 2019 and later exemptions, *see* PB17. "[O]nce the issue was expressly drawn into question[,] … [EPA] could [not] possibly find that [the

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[11] www.epa.gov/sites/default/files/2016-12/documents/small-refinery-exempt-study.pdf.

[12] Petitioners overstate EPA's supposed "abandon[ing] the scoring matrix and DOE recommendations." PB19. EPA considered DOE's views to the extent they were consistent with EPA's causation requirement and findings regarding RIN-cost recoupment. *See, e.g.*, June Exemption Denials at 18.

refineries] reasonably relied upon" the prior approach. *Qwest*, 509 F.3d at 540 (cleaned up).

C. Even if the 2020-2022 Rule or the Exemption Denials Had Retroactive Effects, EPA Adequately Mitigated Them

If the 2020-2022 Rule or the Exemption Denials had any retroactive effect with respect to petitioners' obligations, EPA adequately mitigated those effects through the Extension Rule, the Alternative Schedule, and the availability of carryover RINs. As noted above, in the retroactive-rulemaking context, EPA must "reasonably balance[] its statutory duties with the rights of" obligated parties and "adequately consider[] various ways to minimize the hardship caused to obligated parties" by retroactivity. *Americans for Clean Energy*, 864 F.3d at 718-19, 721. In the retroactive-adjudication context, EPA may avoid a new rule's retroactive effect if "necessary to protect the settled expectations of those who had relied on the preexisting rule," *Catholic Health*, 718 F.3d at 922 (cleaned up), or "when to do otherwise would lead to manifest injustice," *Qwest*, 509 F.3d at 539 (cleaned up).

Manifest injustice is assessed based on:

- "whether the new rule represents an abrupt departure from well established practice," *Clark-Cowlitz*, 826 F.2d at 1081 (cleaned up);
- "the extent to which the party against whom the new rule is applied relied on the former rule," *id.* (cleaned up);
- "the degree of the burden which a retroactive order imposes on a party," *id.* (cleaned up);
- "the statutory interest in applying [the] new rule," *id.* (cleaned up); and

- the harm "that non-retroactivity would inflict" on entities that are not party to the adjudication, *Qwest*, 509 F.3d at 540.

The manifest-injustice standard is so demanding that this Court appears never to have found it satisfied.

Under any of these standards, EPA sufficiently mitigated the supposed retroactive effects of the 2020-2022 Rule and the Exemption Denials.

1. The Exemption Denials did not abruptly depart from a well-established practice, and petitioners could not reasonably have relied on the prior approach. The abrupt departure required to trigger retroactivity concerns exists only if the old rule that "expressly address[ed] th[e] precise issue," *Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1071 & n. 4 (D.C. Cir. 1986), was "consistent" and "well-established," *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (cleaned up), was "authoritatively articulated outside of the same … proceeding in which it was eventually reversed," *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001), and had been "judicially confirmed," *id*. Only then could the prior standard have created "expectations on which a party might reasonably place reliance." *Qwest*, 509 F.3d at 540. None of that is true of the approach applied in initially granting the 2016-2018 exemptions.

As explained above, the policy applied in the Exemption Denials was consistent with EPA's only prior formally articulated policy, in the 2016 Memo;

the approach applied in granting the 2016-2018 exemptions reflected a brief interruption of that policy and was immediately subject to judicial challenge, before the 2019-2021 exemption petitions were even filed. *Supra* pp.16-17.

Moreover, any reliance on the 2016-2018 exemption grants was unreasonable because they "ha[d] no precedential value" for anyone—neither for "third parties" nor "even for the [recipient] refiner"—"since each petition must be resolved on a case-by-case basis" and the grant decisions were nonpublic. *Sinclair Wyoming*, 887 F.3d at 992. Given that "the *status quo ante* was … a case-by-case assessment with a highly uncertain outcome," any "reliance" on prior exemption grants "was badly misplaced." *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998).

Thus, small refineries that did not acquire or retain the RINs they would need for eventual compliance in the face of that litigation "assumed the risk" that their petitions would ultimately be denied and they would be subject to their RFS obligations. *AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006). That conclusion is reinforced by the fact that the approach EPA applied in granting the 2016-2018 exemptions was plainly unlawful, as the Tenth Circuit concluded in *Renewable Fuels*, 948 F.3d at 1253-57.

2. Petitioners falsely suggest that they did not "know the ground rules by which EPA will grant or deny their hardship petitions." PB35, 47. In fact, before

applying the current approach to deny petitioners' exemption petitions, EPA invited petitioners to comment on the approach EPA planned to apply, 86 Fed. Reg. 70,999, 71,000 (Dec. 14, 2021), and to supplement their petitions with information relevant to that approach, *see* EPA Br. 13, *Calumet*, No. 22-60266, ECF #313 (5th Cir. May 11, 2023).

3. Enforcing the 2019-2021 obligations, as determined by the 2020-2022 Rule and the Exemption Denials, will not meaningfully harm petitioners. As explained above, the 2020-2022 Rule and the Exemption Denials did not impose any new substantive obligations for 2019-2021—neither action required obligated parties to use more renewable fuel than they already had (per the 2020-2022 Rule) and were already obligated to (per the Exemption Denials). Those actions merely required petitioners to retire RINs and, if necessary, first to acquire the RINs for retirement.

Contrary to petitioners' contention, PB41, the 2020-2022 Rule did not require a RIN-bank drawdown for 2020 and 2021 because it set those years' standards to the levels of actual use. Nor did it require one for 2022 because EPA set the standard at a level that it expected to be met entirely through new renewable-fuel use. *Supra* p.7. Consequently, when EPA took these actions, there were ample carryover RINs for petitioners to acquire to meet their 2019-2022 obligations, and time for more excess RINs to be generated. *See* June Alternative

Compliance Action at 18; 87 Fed. Reg. at 39,614 (projecting 1.83 billion carryover RINs). And, as explained above, the Extension Rule and the Alternative Schedule gave petitioners ample time and flexibility to acquire and retire the RINs needed to comply with their 2019-2021 obligations.

Further, EPA has found, on a robust record, that obligated parties incur no net compliance costs because their "RIN costs are fully passed through"—that is, after all, a premise of the Exemption Denials. June Exemption Denials at 18, 24, 30-32, 50. In fact, EPA found that absolving refineries of their unmet RFS obligations would bestow upon them "a financial *benefit* through the sale of their petroleum fuel that includes the value of the RIN but no associated RFS compliance costs." June Exemption Denials at 29.

Petitioners' complaints about the RIN market are mistaken. They repeatedly assert that EPA's *delay* reduced RIN supply or raised RIN prices. PB18, 35. That violates basic economics; prices rose in response to the higher demand for RINs resulting from the Exemption Denials and the 2022 standards, irrespective of whether those actions were issued after the applicable deadlines. *See* PB36. And that is what Congress intended: higher RIN prices "help achieve the Congressional goals of greater renewable fuel production and use." *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 651 (D.C. Cir. 2019); *accord Monroe*, 750 F.3d at 919. If petitioners must pay more for a RIN now than they would have during the

relevant compliance year (i.e., than if they had acquired RINs ratably as they introduced fossil fuel), that is a happenstance of their "own (rather convenient) assumption that" their exemption petitions "would ultimately be resolved in [their] favor," not an "injustice" to remedy. *Qwest*, 509 F.3d at 540-41; *see Monroe*, 750 F.3d at 919. Petitioners' theory—that they pay higher RIN prices "no matter whether" they acquired RINs ratably or waited until after their exemption petitions were decided, PB22—is incoherent and confirms that *delay* did not raise RIN prices. Their complaint about supposed uneven RIN holdings, whereby RIN holders may "choose to sell their RINs only at very high costs," PB6, 21, 36, 46, is just a confusing way to say there are buyers who need RINs and sellers with excess RINs, i.e., a market. And their complaint that current RIN prices for different vintages are similar, PB41, is nonsense; the Alternative Schedule expanded the pool of available similarly priced RINs, which helped petitioners.

Finally, the theoretical possibility that EPA could have "waive[d]" the national volume requirements, PB47, is irrelevant because there was no evidence establishing that the statutory conditions for waiver were met, *see* 42 U.S.C. §7545(*o*)(7)(A), and EPA properly declined to issue such a waiver, 87 Fed. Reg. at 39,606.

4. On the other hand, excusing petitioners of their 2019-2021 RFS obligations, as they want, would undermine important statutory interests and the

associated interests of renewable-fuel producers, as well as EPA's attendant statutory duty to ensure compliance. Holding petitioners to their RFS obligations will reduce the supply of carryover RINs in future years and thus will "increase demand for renewable fuels in the future." June Alternative Compliance Action at 17. That serves Congress's purpose in enacting the RFS, namely, "increasing [the] amount of renewable fuel to be introduced into the Nation's transportation fuel supply each year." *Americans for Clean Energy*, 864 F.3d at 696; *see also id.* at 710. Relatedly, it is "obvious" that every RIN that petitioners would not have to retire if granted their desired relief "is matched by an equal and opposite los[t gallon of renewable fuel] that non-retroactivity would inflict on" renewable-fuel producers. *Qwest*, 509 F.3d at 540; *see also Aliceville Hydro Associates v. FERC*, 800 F.2d 1147, 1153 (D.C. Cir. 1986) (rejecting non-retroactivity where it "would impose an equal burden" on others). Further, excusing petitioners of their RFS obligations "would grant [them] a … benefit to which [EPA] now believes [they are] not entitled"—as shown by its denial of their exemption petitions for the same years—and therefore would "not … fulfill[]" the "overriding Congressional interest" in providing for exemptions only under the statutorily specified conditions. *Clark-Cowlitz*, 826 F.2d at 1085.

D. EPA Lacks Power to Issue Alternative Compliance-Style Relief

In any event, whether the determination of petitioners' RFS obligations through the 2020-2022 Rule and the Exemption Denials is viewed through the lens of retroactivity or not, EPA lacks authority to use the alternative-compliance approach petitioners demand. Agencies have only "the authority delegated to [them] by the statute," *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983), and Congress did not delegate such power to EPA. The alternative-compliance approach would fully excuse petitioners of their outstanding RFS obligations—the very obligations that EPA has determined they are *not exempt* from in the Exemption Denials. EPA cannot defy the statute, finding that an entity is not entitled to a particular form of relief and then invoked implicit authority to grant equivalent relief anyway.

That conclusion is confirmed by the broader statutory structure. The RFS's obligations are "mandatory." *Growth Energy v. EPA*, 5 F.4th 1, 7 (D.C. Cir. 2021). Obligated parties are statutorily "responsible for ensuring … [they] are met," on pain of civil penalty. *Americans for Clean Energy*, 864 F.3d at 704-05 (cleaned up); *see* §7545(d)(1). Correspondingly, EPA's overarching "statutory mandate [is] to 'ensure[]' that [the volume] requirements are met," *Americans for*

Clean Energy, 864 F.3d at 698-99 (quoting §7545(*o*)(3)(B)(i)), i.e., to "ensure [obligated] entities' successful compliance," *Growth Energy*, 5 F.4th at 10.

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

This carefully reticulated system of relief from RFS obligations precludes any conceit that EPA also has an atextual power to reduce RFS obligations under other circumstances. *Americans for Clean Energy*, 864 F.3d at 712. "When Congress provides exceptions in a statute, it does not follow that [agencies] have authority to create others. The proper inference … is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *see also*, *e.g.*, *NLRB v. SW*

General, Inc., 137 S.Ct. 929, 940 (2017) (Congress's "expressi[on]" of certain types of waivers "excludes another left unmentioned"). "EPA may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 485 (2001).

Indeed, this Court in *Americans for Clean Energy* already rejected an attempt by EPA to create "boundless … waiver authority" under the RFS based on "lesser degrees" of harm than those needed to meet statutory conditions for reducing RFS obligations where EPA believes such relief "necessary to avoid causing harmful effects in the renewable fuel market such as a significant increase in renewable fuel and RIN prices, RIN deficits, or non-compliance by obligated parties"—precisely the harms petitioners identify now. 864 F.3d at 710-12 (cleaned up). As the Court explained, Congress would not have provided numerous "safe harbor[s]" for obligated parties (including exemptions) "only to allow" EPA to reduce or eliminate RFS obligations on nonstatutory grounds. *Id.* at 712 (cleaned up). Moreover, the Court observed, recognizing the broader discretion EPA sought would impermissibly "turn[] the Renewable Fuel Program's 'market forcing' provisions on their head." *Id.*

Whatever power EPA might possess to mitigate the harms of late or retroactive actions, that power does not allow it to do what Congress precluded it

from doing directly. An agency "may not" "avoid retroactiv[ity]" if non-retroactivity is tantamount to taking an action directly that "violate[s]" the relevant statute. *National Treasury Employees Union v. Federal Labor Relations Authority*, 139 F.3d 214, 219-20 (D.C. Cir. 1998); *see also Verizon*, 269 F.3d at 1111 (rejecting contention that agency "may not retroactively correct its own legal mistakes"). Otherwise, EPA could defy the statute at will—which is presumably exactly what petitioners want. If EPA could use the alternative-compliance approach, EPA could grant any meritless waivers or exemptions it desired for its own policy reasons and then, after such action is challenged, purport to correct its error formally—and inevitably long after the short statutory deadline passed—while issuing another alternative-compliance action releasing obligated parties from their unmet RFS obligations. Congress's careful limits on RFS relief would be meaningless, but agencies cannot "cancel portions of a duly enacted statute." *Clinton v. City of New York*, 524 U.S. 417, 443-44 (1998).

CONCLUSION

The Court should deny the petitions for review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29 because it contains 6,350 words.

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July 24, 2023

CERTIFICATE OF SERVICE

I certify that on July 24, 2023, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

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