ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1046 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RFS POWER COALITION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

ON PETITION FOR REVIEW OF AN ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

INITIAL BRIEF FOR RESPONDENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ET AL.

TODD KIM
Assistant Attorney General

TSUKI HOSHIJIMA
CAITLIN MCCUSKER
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Defense Section
P.O. Box 7611

Of Counsel:

RYLAND (SHENGZHI) LI
NORA GREENGLASS
U.S. Environmental Protection Agency

Office of General Counsel
Air and Radiation Law Office

Washington, D.C. 20044
(202) 514-3468 (Hoshijima)
(202) 514-1950 (McCusker)
tsuki.hoshijima@usdoj.gov
caitlin.mccusker@usdoj.gov

RESPONDENTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondents United States Environmental Protection Agency et al. ("EPA") submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

All petitioners, respondents, and intervenors in these consolidated cases are accurately identified in Refiners' opening brief.

The list of parties, intervenors, and amici in Biofuels Petitioners' opening brief is missing RFS Power Coalition from the list of petitioners but is otherwise accurate.

B. Rulings Under Review

The agency action under review is EPA's rule entitled "Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes," 85 Fed. Reg. 7016 (Feb. 6, 2020).

C. Related Cases

The 2020 Rule has not been challenged in any proceedings other than these consolidated cases. However, related issues were raised in a number of cases that involved certain Petitioners in this case. In *Growth Energy v. EPA*, 5 F.4th 1 (D.C. Cir. 2021) (per curiam), the

Court heard challenges to EPA's 2019 RFS rule, including challenges to EPA's approach for accounting for small refinery exemptions when calculating the percentage standards, EPA's regulation establishing the point of obligation, and EPA's regulation imposing the exporter renewable volume obligation. Similar issues were also raised in previous annual rule challenges, including *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559 (D.C. Cir. 2019) (per curiam), and *Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628 (D.C. Cir. 2019) (per curiam).

Petitioners Growth Energy and National Biodiesel Board filed a petition for review in this Court, Case No. 18-1154, challenging two EPA actions: Periodic Reviews of the Renewable Fuel Standard Program, 82 Fed. Reg. 58,364 (Dec. 12, 2017), and annual standard equations at 40 C.F.R. § 80.1405(c), which EPA established in its 2010 framework rule. That petition has been consolidated with two others, Nos. 19-1201, 20-1037, and is currently in abeyance.

Related issues concerning the small refinery exemption provision were raised in *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206 (10th Cir. 2020), *rev'd in part sub nom. HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021), as well as in *Sinclair*

Wyoming Refining Co. v. EPA, No. 19-1196 (D.C. Cir.) (consolidated with Nos. 19-1197, 19-1216, 19-1220, 20-1099).

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GLOSSARY

Biofuels Br.	Initial Brief for the Biofuels Petitioners (Jan. 29, 2021), Doc. No. 1882940
Biofuels Petitioners	Petitioners National Biodiesel Board, Growth Energy, Producers of Renewables United for Integrity Truth and Transparency, Waste Management, Inc., WM Renewable Energy, LLC, Iogen Corp., and Iogen D3 Biofuels Partners II LLC
EPA	U.S. Environmental Protection Agency
Proposal	Proposed Rule, "Renewable Fuel Standard (RFS) Program: RFS Annual Rules"
RFS	Renewable Fuel Standard
Refiners	Petitioners American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Valero Energy Corporation, and a group of refining companies calling themselves the Small Refineries Coalition
Refiners Br.	Initial Brief of American Fuel & Petrochemical Manufacturers et al. (Jan. 29, 2021), Doc. No. 1882897
RIN	Renewable Identification Number
RTC	EPA's Response to Comments in Support of the 2020 Rule, EPA-HQ-OAR-2019-0136-2157
2020 Rule	"Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes," 85 Fed. Reg. 7016 (Feb. 6, 2020)

INTRODUCTION

Under the Renewable Fuel Standard program in the Clean Air Act, transportation fuel sold in the United States must contain specified amounts of certain renewable fuels. 42 U.S.C. § 7545(*o*). In the action under review, EPA adjusted the target renewable fuel volumes for 2020, revised the formula for calculating percentage standards based on those volumes, and set the 2020 standards. 85 Fed. Reg. 7016 (Feb. 6, 2020) ("2020 Rule").

Two different petitioner groups challenge EPA's action. Petitioners representing petroleum refiners ("Refiners") argue that EPA set the standards *too high* by improperly accounting for a projection of transportation fuel volumes associated with exempted small refineries. They also reprise challenges to two longstanding RFS framework regulations that they unsuccessfully raised in past annual rule cases.

Petitioners representing the biofuels industry ("Biofuels Petitioners")[1] argue that EPA set the standards *too low* by failing to

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[1] Petitioner RFS Power Coalition was supposed to be part of Biofuels Petitioners' brief. Order (Oct. 26, 2020), Doc. No. 1868039; Joint Proposal (Sept. 30, 2020), Doc. No. 1864222. However, RFS Power Coalition is not listed on the brief, and Biofuels Petitioners omit RFS Power Coalition from its certificate of parties without explanation. *See*

account for small refinery exemptions from past years. They also challenge EPA's projection of the volume of available cellulosic biofuel, as well as EPA's clarification of an existing RFS recordkeeping regulation.

EPA permissibly declined to reconsider the two longstanding RFS framework regulations as part of this rulemaking. As to the challenges to the 2020 Rule that are properly raised, EPA requests voluntary remand without vacatur of the challenged parts of the 2020 Rule. Remand is justified because EPA recently signed a notice of proposed rulemaking to reconsider, in large part, the 2020 Rule. EPA also intends to address another challenged aspect of the 2020 Rule through additional notice-and-comment rulemaking. EPA's reconsideration is based in substantial part on significant and unanticipated intervening events, namely the COVID-19 pandemic and judicial decisions that bear on the scope of EPA's authority to grant small refinery exemptions. The Court should not proceed with judicial review of the current record while the agency reevaluates the 2020 Rule in light of those events.

Biofuels Br. i–ii. Because RFS Power Coalition failed to brief any issues in compliance with the briefing order, its petition should be denied.

JURISDICTION

The challenge to EPA's previously promulgated regulation establishing the exporter renewable volume obligation (*see infra* Argument Section I) is time-barred under the sixty-day jurisdictional deadline in 42 U.S.C. § 7607(b)(1). *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011).[2]

The Court lacks jurisdiction over Petitioner National Biodiesel Board's challenge to the separated food-waste recordkeeping provision because National Biodiesel Board failed to specifically identify a single member that is injured by the provision. *See Chamber of Commerce v. EPA*, 642 F.3d 192, 199–200 (D.C. Cir. 2011) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)); *see also* Biofuels Br. Add. at DEC5 (Decl. of Kurt Kovarik ¶ 15 (making only a generalized reference to "[a] number of [National Biodiesel Board] members" affected by the provision)).

[2] There is an exception in § 7607(b)(1) for petitions "based solely on grounds arising after such sixtieth day," which does not apply here. No petitioner argues that this exception is applicable in this case.

Otherwise, to the extent that Petitioners challenge the 2020 Rule, Petitioners timely filed petitions for review, and the Court has jurisdiction under the Clean Air Act. 42 U.S.C. § 7607(b)(1).

PERTINENT STATUTES AND REGULATIONS

All of the applicable statutes and regulations are contained in the briefs and statutory addenda for Petitioners.

STATEMENT OF ISSUES

1. Did EPA permissibly decline to reconsider long-standing RFS framework regulations as part of this rulemaking?

2. Should the Court remand the challenged parts of the 2020 Rule without vacatur where EPA has initiated, or intends to initiate, a rulemaking to reconsider those parts of the 2020 Rule, in large part due to significant and unanticipated intervening events?

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

In 2005 and again in 2007, Congress amended the Clean Air Act to establish the Renewable Fuel Standard program, codified at 42 U.S.C. § 7545(*o*). *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492.

The RFS program requires increasing volumes of renewable fuel to be introduced into the United States' transportation fuel supply each year. *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 568 (D.C. Cir. 2019) (per curiam); 42 U.S.C. § 7545(*o*)(2). Renewable fuel is fuel that is made from renewable biomass and is "used to replace or reduce the quantity of fossil fuel present in a transportation fuel." 42 U.S.C. § 7545(*o*)(1)(J).

The statute addresses four categories of renewable fuel: biomass-based diesel, cellulosic biofuel, advanced biofuel, and total renewable fuel. Biomass-based diesel and cellulosic biofuel are both subsets of advanced biofuel. *Id.* § 7545(*o*)(1)(D), (E). Advanced biofuels are any renewable fuel, except ethanol from corn starch, with sufficiently low lifecycle greenhouse gas emissions. *Id.* § 7545(*o*)(1)(B). Total renewable fuel is the broadest category. It includes all three other categories as well as conventional renewable fuels. All renewable fuel must be "produced from renewable biomass." *Id.* § 7545(*o*)(1)(J), (I).

For cellulosic biofuel, advanced biofuel, and total renewable fuel, the statute establishes increasing annual nationally applicable volume targets through 2022. *Id.* § 7545(*o*)(2)(B)(i). For biomass-based diesel,

the statute establishes target volumes through 2012 and directs EPA to set volumes for subsequent years based on certain statutory factors. *Id.* § 7545(*o*)(2)(B)(ii).

Congress authorized EPA to reduce the statutory volumes in limited circumstances. First, under the mandatory component of the cellulosic waiver provision, if EPA's projection of cellulosic biofuel production volume is lower than the statutory volume, then EPA must, by November 30 of the prior year, reduce the applicable volume to the "projected volume available." *Id.* § 7545(*o*)(7)(D)(i); *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013) (requiring this projection to take a "neutral aim at accuracy"). If EPA lowers the cellulosic biofuel volume, EPA has broad discretion to decide whether to also lower the applicable volumes for advanced biofuel and total renewable fuel "by the same or a lesser" amount. 42 U.S.C. § 7545(*o*)(7)(D)(i); *Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915–16 (D.C. Cir. 2014) (recognizing that the statute does not prescribe specific factors to consider in making this determination). Second, under the general waiver provision, if EPA determines that there is "inadequate domestic supply," or that the volumes "would severely harm the economy or environment of a State, a

region, or the United States," then EPA "may" exercise its discretion to lower the required volumes. 42 U.S.C. § 7545(*o*)(7)(A); *see also Americans for Clean Energy v. EPA*, 864 F.3d 691, 705–06 (D.C. Cir. 2017).

To "ensure[]" that the target volumes of renewable fuel are met, EPA determines and publishes the "renewable fuel obligation" for each compliance year. 42 U.S.C. § 7545(*o*)(3)(B)(i). The renewable fuel obligation is expressed as a set of percentage standards that EPA calculates by dividing the target volumes for each renewable fuel type by the projected total volume of gasoline and diesel that will be used in the United States that year, with certain adjustments. 42 U.S.C. § 7545(*o*)(3)(B)(ii); 40 C.F.R. § 80.1405(c). EPA must determine the standards for each compliance year by November 30 of the prior year. 42 U.S.C. § 7545(*o*)(3)(B)(i).

The statute provides that in determining the standards, EPA "shall" make adjustments to prevent the imposition of redundant obligations on any obligated party, as well as to account for the use of renewable fuel during the previous calendar year by exempt small refineries. *Id.* § 7545(*o*)(3)(C)(i)–(ii).

The standards for cellulosic biofuel and biomass-based diesel are "nested" within the standard for advanced biofuel. This means that volumes of cellulosic biofuel and biomass-based diesel may be used not only to satisfy standards for those fuels, but also to satisfy the advanced biofuel standard. *See id.* § 7545(*o*)(1)(B), (D), (E), (*o*)(2)(B)(i); 40 C.F.R. § 80.1427(a)(3)(i). The advanced biofuel standard, in turn, is nested within the total renewable fuel standard. Thus, for example, any renewable fuel that qualifies as cellulosic biofuel may simultaneously be used to satisfy the cellulosic, advanced biofuel, and total renewable fuel standards.

The statute provides that the standards shall "be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(*o*)(3)(B)(ii). EPA identified refiners and importers of gasoline and diesel as the "appropriate" obligated parties in its 2007 implementing regulations establishing the RFS program. 72 Fed. Reg. 23,900, 23,924 (May 1, 2007); *see* 42 U.S.C. § 7545(*o*)(2)(A)(iii)(I). EPA thoroughly reexamined and reaffirmed its approach in its 2010 revision to the implementing regulations. 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010); 40 C.F.R. § 80.1406(a)(1). In late 2017, EPA did so again in its denial of

rulemaking petitions to revise the point of obligation. EPA-HQ-OAR-2019-0136-0029 ("Point of Obligation Denial"), JA___–__.

Each obligated party uses the percentage standards to determine its individual renewable volume obligation. 42 U.S.C. § 7545(*o*)(3)(B)(ii). Specifically, an obligated party calculates its individual obligation for each fuel type by multiplying the relevant percentage standard by the volume of its production or importation of gasoline or diesel in that year. *Id.*; 40 C.F.R. § 80.1407(a).

Each obligated party demonstrates compliance with its individual obligation by obtaining and "retiring" a sufficient number of compliance credits in an annual compliance demonstration. 40 C.F.R. § 80.1427(a). Those credits, known as renewable identification numbers ("RINs"), represent volumes of renewable fuels. 42 U.S.C. § 7545(*o*)(5); 40 C.F.R. § 80.1401; 40 C.F.R. § 80.1426. An obligated party can obtain RINs by blending renewable fuels into transportation fuel or by purchasing RINs from others. 40 C.F.R. § 80.1426(a), (e); *id.* § 80.1428(b). Because the RFS program is meant to ensure the domestic use of renewable fuels, exporters of renewable fuels that generated RINs must also retire an equivalent number of RINs. *See* 40 C.F.R. § 80.1430.

Parties that acquire excess RINs in one year may sell such RINs. Or they can "carry over" the RINs and use them to meet up to 20% of their compliance obligations the following year.[3] 42 U.S.C. § 7545(*o*)(5); 40 C.F.R. §§ 80.1427(a)(1), (5), 80.1428(c). Additionally, obligated parties may carry a compliance deficit forward to the next year, which must then be satisfied together with the next year's compliance obligation. 42 U.S.C. § 7545(*o*)(5)(D); 40 C.F.R. § 80.1427(b).

Small refineries were categorically exempted from RFS obligations at the outset of the RFS program. 42 U.S.C. § 7545(*o*)(9)(A)(i). The statute directed EPA to extend that exemption for an additional period based on a Department of Energy study of small refineries. *Id.* § 7545(*o*)(9)(A)(ii). The statute further provides that "[a] small refinery may at any time petition the Administrator [of EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." *Id.* § 7545(*o*)(9)(B)(i). The statute

[3] The sum of all RINs carried over from a prior year is known as the carryover RIN bank. *See* 2020 Rule at 7020–22 (noting the role that carryover RINs play in facilitating compliance and supporting a well-functioning RIN market).

directs EPA to consult with the Department of Energy in evaluating such petitions. *Id.* § 7545(*o*)(9)(B)(ii).

II. The 2020 Rule

The EPA Administrator signed the 2020 Rule on December 19, 2019. 2020 Rule at 7069. The rule was published in the Federal Register on February 6, 2020.

The 2020 Rule established (1) adjusted 2020 target volumes for cellulosic biofuel, advanced biofuel, and total renewable fuel; (2) the 2021 target volume for biomass-based diesel;[4] (3) a revision of the percentage standard formula to account for volumes of gasoline and diesel projected to be exempted from renewable volume obligations; (4) 2020 standards for all four renewable fuel types;[5] and (5) other regulatory amendments including a clarification to requirements relating to renewable fuel produced from separated food waste.

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[4] EPA does not further address how it established the 2021 biomass-based diesel volume because no petitioner challenges the details of that analysis.

[5] The 2020 biomass-based diesel standard was calculated using a volume established in the previous year's rulemaking.

EPA projected that 590 million gallons of cellulosic biofuel would be produced in 2020. 2020 Rule at 7030. EPA exercised the mandatory component of the cellulosic waiver to reduce the statutory volume to the same amount. *Id.* at 7020; 42 U.S.C. § 7545(*o*)(7)(D)(i). EPA then exercised the full extent of its discretionary cellulosic waiver authority to lower the 2020 advanced biofuel volume and total renewable fuel volume by the same amount (9.91 billion gallons) that it lowered the cellulosic biofuel volume. 2020 Rule at 7020. EPA declined to further reduce volumes under the general waiver authority. *Id.* The following table shows the resulting volumes:

2020 Rule Volume Requirements as Compared to Statutory Volumes (billion gallons)

Fuel	**Statutory**	**2020 Rule**
Total renewable fuel	30.00	20.09
Advanced biofuel	15.00	5.09
Biomass-based diesel (for 2021)	>=1.0	2.43
Cellulosic biofuel	10.50	0.59

42 U.S.C. § 7545(*o*)(2)(B)(i)(I)–(III), (v); 2020 Rule at 7018.[6]

The 2020 Rule also revised the formula, codified at 40 C.F.R. § 80.1405(c), that EPA uses to calculate percentage standards from the

[6] Volumes are expressed as ethanol-equivalent volumes on an energy-content basis, except for biomass-based diesel, which is expressed as a biodiesel-equivalent volume. 2020 Rule at 7018 tbl. I-1 n.a.

adjusted volumes. 2020 Rule at 7048–51. To calculate the standards, EPA divides the nationally applicable volume of each renewable fuel type by the projected national volume of gasoline and diesel that will be used that year, with an adjustment to the denominator to account for volumes that are exempted from renewable volume obligations due to small refinery exemptions.

The 2020 Rule changed the method of adjusting the denominator for small refinery exemptions. In prior rules establishing annual standards, EPA reduced the denominator by the volume of gasoline and diesel attributable to small refineries that were exempted from RFS obligations as of the date of the rule. *Id.* at 7050. EPA did not account for any exemptions granted after the annual rule. *Id.* In the years leading up to the 2020 Rule, however, an increasing number of exemptions were granted after the annual rule, and a significant volume of such exemptions were thus not accounted for. *Id.* at 7050–51. In light of these circumstances, among others, EPA revised the formula to reduce the denominator by the volume of gasoline and diesel attributable to small refinery exemptions *projected* to be granted in that

compliance year, whether or not the exemptions had actually been granted by the time of the annual rule. *Id.* at 7050.

Applying that formula, the 2020 Rule finalized the 2020 standards as follows:

2020 Rule Standards

Fuel	**Percentage Standard**
Total renewable fuel	11.56%
Advanced biofuel	2.93%
Biomass-based diesel	2.10%
Cellulosic biofuel	0.34%

2020 Rule at 7019.

Finally, the 2020 Rule finalized several regulatory changes to the RFS program. As relevant here, EPA has long required renewable fuel producers that use food waste as a feedstock to meet certain registration and recordkeeping requirements documenting the location from which the wastes were obtained to demonstrate that the feedstock is in fact renewable biomass. 75 Fed. Reg. at 14,889. In the 2020 Rule, EPA revised the registration regulations to remove the requirement that producers provide the location of every facility from which separated feedstock is collected. 2020 Rule at 7062. EPA also added a provision to its recordkeeping regulations, 40 C.F.R. § 80.1454(j)(1)(ii), to clarify that the term "location" refers to the physical address from

which the wastes were obtained, not the physical or company address of an aggregator. *Id.*

In promulgating the 2020 Rule, EPA did not reconsider or take comment on other longstanding RFS framework regulations. In particular, EPA declined to reconsider the point of obligation regulation that it established in 2007 and most recently reexamined and reaffirmed in 2017. 40 C.F.R. § 80.1406(a); RTC 219, JA___. EPA also declined to reconsider regulations providing that RINs generated from renewable fuel exported from the United States cannot be used to satisfy RFS obligations. 40 C.F.R. § 80.1430; 2020 Rule at 7059 & n.217; 84 Fed. Reg. 36,762, 36,804 n.198 (July 29, 2019); RTC 223, JA___.

III. Notice of Proposed Rulemaking

On December 7, 2021, the EPA Administrator signed a notice of proposed rulemaking to revise the 2020 Rule.[7] As relevant to this case, EPA proposes to revise the previously established 2020 volume requirements for cellulosic biofuel, advanced biofuel, and total

[7] The notice, which is cited in this brief as "Proposal," is attached to this filing as pages A005 to A163 and is also available at: https://www.epa.gov/renewable-fuel-standard-program/proposed-volume-standards-2020-2021-and-2022. It has not yet been published in the Federal Register.

renewable fuel. EPA also proposes to revise the previously established 2020 standards for all four renewable fuel types. As part of the rulemaking, EPA is soliciting public comment on two additional issues raised by Petitioners in this litigation: the accounting of exempted small refinery volumes in the percentage standard formula and the inclusion of cellulosic carryover RINs in the "projected volume available" for purposes of the cellulosic waiver. Proposal at 43–45, 60.[8]

SUMMARY OF ARGUMENT

I. The challenges by certain Refiners to two long-settled RFS framework regulations should be denied. EPA did not abuse its discretion in deciding not to reconsider the point of obligation in the 2020 Rule. The Court has consistently rejected attempts to attack the point-of-obligation regulation in challenges to prior annual rules. Here, too, EPA permissibly decided that the current regulation remains justified, particularly in light of its comprehensive reconsideration of the issue in 2017, and that no new information merited renewed

[8] EPA also proposes to establish the 2021 and 2022 volumes and standards; to address this Court's remand in *Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017), of the rule setting the 2016 RFS standards; and to make various other changes to the RFS program. Those parts of the proposal are not relevant to this case.

reconsideration. EPA also did not reopen its longstanding policy of imposing RIN retirement obligations on exporters of renewable fuels, so the challenge to that policy is time-barred.

The Court should not accept Refiners' attempt to characterize these two issues as "alternatives" to the revised percentage standard formula in the 2020 Rule. Defining an alternative at that level of generality would allow annual challenges to various regulations that are part of the basic regulatory framework of the RFS program, as "alternative" ways of furthering broadly defined goals such as promoting renewable fuel use. The Court rejected a similarly framed argument in the challenge to the 2019 RFS rule, and the Court should do so again here.

II. The Court should grant EPA's request for voluntary remand without vacatur of the challenged parts of the 2020 Rule. EPA intends to reconsider each of the challenged parts of the 2020 Rule. EPA recently signed a notice of proposed rulemaking that proposes to revise the renewable fuel volumes and percentage standards established in the 2020 Rule, primarily due to significant and unanticipated intervening events. As part of that rulemaking, EPA is soliciting public

comment on the revised percentage standard formula in the 2020 Rule, as well as its interpretation of the relationship between the cellulosic waiver authority and cellulosic carryover RINs.

The Court should deny the challenge to EPA's separated food-waste recordkeeping regulation because the sole challenging petitioner lacks standing. In the alternative, however, the Court should also remand that provision because EPA intends to issue a separate notice seeking comments on that regulation.

Remand is particularly justified because EPA's reconsideration is based in substantial part on significant and unanticipated intervening events, namely the COVID-19 pandemic and judicial decisions that bear on the scope of EPA's authority to grant small refinery exemptions. The Court should not proceed with judicial review of the current record while EPA conducts its reconsideration, since allowing the reconsideration process to play out may narrow or moot the issues requiring judicial resolution.

STANDARD OF REVIEW

The Court may reverse EPA's action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(1)(E), (d)(9); *Am. Fuel*, 937 F.3d at 574.

This standard is narrow, and the Court cannot substitute its policy judgment for EPA's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its decisions must be upheld. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Lead Indus. Ass'n, Inc. v. EPA*, 647 F.2d 1130, 1160 (D.C. Cir. 1980). This Court gives an "extreme degree of deference" to EPA's "evaluation of scientific data within its technical expertise," especially "EPA's administration of the complicated provisions of the Clean Air Act." *Miss. Comm'n on Envtl. Quality v. EPA*, 790 F.3d 138, 150 (D.C. Cir. 2015). Judicial review is "particularly deferential in matters implicating predictive judgments," requiring only that "the agency acknowledge factual uncertainties and identify the considerations it found persuasive." *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105, 1108 (D.C. Cir. 2009);

see also Growth Energy v. EPA, 5 F.4th 1, 15 (D.C. Cir. 2021). The Court's review is limited to the administrative record. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985); 42 U.S.C. § 7607(d)(7)(A).

Questions of statutory interpretation are governed by the two-step test in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984). Under step one, the Court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If Congress' intent is clear, the inquiry ends. *Id.* at 842–43. If the statute is silent or ambiguous, step two requires the Court to decide whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. To uphold EPA's interpretation, the Court need not find that the interpretation is the only permissible construction, or even the reading the Court would have reached, but only that the interpretation is reasonable. *Id.* at 843 n.11.

ARGUMENT

I. EPA permissibly declined to revise long-standing RFS framework regulations as part of this rulemaking.

Certain Refiners improperly try to use the 2020 Rule as a vehicle to challenge two long-settled RFS framework regulations. Refiners Br.

Section IV. This Court has repeatedly rejected similar attempts to use annual RFS rules as vehicles to challenge long-settled RFS framework regulations. The Court should do the same here.

First, Refiners challenge EPA's regulation designating refiners and importers as obligated parties. Refiners Br. 41–43. EPA first made that designation in 2007 and then reaffirmed it in 2010. 75 Fed. Reg. at 14,722; 72 Fed. Reg. at 23,924. In 2017, EPA revisited the issue in its denial of rulemaking petitions to revise the point of obligation. Point of Obligation Denial, JA___–__. In the 2020 Rule, EPA declined to reconsider the issue on the basis that it was not aware of any new information or analyses that warrant revisiting the Point of Obligation Denial. RTC 219, JA___.

Year after year, parties have made unsuccessful attempts to attack the point of obligation in challenges to annual RFS rules. *See Growth Energy*, 5 F.4th at 22–24; *Am. Fuel*, 937 F.3d at 587; *Alon*, 936 F.3d at 641–59; *Americans for Clean Energy*, 864 F.3d at 737; *Monroe Energy*, 750 F.3d at 919. Here, too, the Court should deny the challenge. EPA's decision whether to reconsider the point of obligation in the context of an annual RFS rule is reviewed for abuse of discretion. *Alon*,

936 F.3d at 659. EPA did not abuse its discretion in deciding not to reconsider the point of obligation in this rulemaking. RTC 219, JA___.

Refiners argue that new information post-dating the Point of Obligation Denial required EPA to reconsider the point of obligation. They do so by making cursory references to increased numbers of small refinery exemptions, cumulative waiver determinations, and severe economic harm. Refiners Br. 43. However, they develop no argument as to why any new information was so different from the information that EPA previously considered that EPA abused its discretion by continuing to rely on the Point of Obligation Denial. In *Growth Energy*, the Court rejected similar arguments in the 2019 RFS rulemaking challenge because the petitioners had at most addressed one of EPA's many rationales in the Point of Obligation Denial for maintaining its approach and because the petitioners did not show "a change in circumstances" meriting reconsideration. *Growth Energy*, 5 F.4th at 23. So too here. The Point of Obligation Denial fully addressed the allegations that Refiners rehash here, such as the allegation that refiners with no means of blending are disadvantaged compared to integrated refiners and that unobligated refiners receive windfall

profits. *Compare* Refiners Br. 42, *with* Point of Obligation Denial at 2, 21–31, JA___, ___–___; *see also Growth Energy*, 5 F.4th at 23 (observing that Point of Obligation Denial addressed such concerns).

The Point of Obligation Denial involved consideration of over 18,000 comments, resulting in a comprehensive 85-page analysis of the impacts of the point of obligation on fuel refiners, blenders, and retailers. RTC 219, JA___. It was well within EPA's discretion to decide that enough factors justify the current regulation that, absent good reason, it will not undertake such a comprehensive reconsideration in each annual rulemaking. *Alon*, 936 F.3d at 657–58 (recognizing practical considerations supporting EPA's decision not to annually revisit the point of obligation).[9]

Second, Refiners challenge EPA's longstanding policy of requiring RIN retirements by exporters of renewable fuels. Refiners Br. 43–44. EPA has consistently interpreted the statute to require RFS obligations to be met through domestic consumption of renewable fuel. 72 Fed. Reg. at 23,936; *see also* 75 Fed. Reg. at 14,724–25. Accordingly, EPA's RFS

[9] In any event, to the extent that commenters claimed that the 2020 Rule would harm refiners, EPA thoroughly addressed those comments. RTC 10–18, JA___–___.

framework regulations provide that when renewable fuel is exported, the exporter must retire an equivalent number of RINs so that those RINs cannot be used to satisfy RFS obligations. 40 C.F.R. § 80.1430.

Any challenge to this policy had to be brought within sixty days of its promulgation, under the Clean Air Act's jurisdictional deadline for judicial review. 42 U.S.C. § 7607(b)(1). The reopening doctrine provides a limited exception to such a time limit. *Nat'l Ass'n of Reversionary Prop. Owners v. Surface Transp. Bd.*, 158 F.3d 135, 141 (D.C. Cir. 1998). However, EPA expressly declined to reopen this issue in the 2020 Rule. EPA's initial proposal for the 2020 Rule stated that EPA was not reconsidering or taking comment on this policy. 84 Fed. Reg. at 36,804 n.198. And EPA reiterated that statement in finalizing the 2020 Rule. 2020 Rule at 7059 & n.217; RTC 223, JA___. This Court has recognized that such an "express limitation of the subjects on which the EPA was soliciting comment unambiguously communicates" the agency's decision not to reopen." *Am. Fuel*, 937 F.3d at 586. For this exact reason, the Court recently rejected an attempt to challenge the exporter renewable volume obligation in petitions for review of the 2019 RFS rule. *Growth*

Energy, 5 F.4th at 21–22. The Court also rejected a similar attempt in the 2018 RFS rule challenge. *Am. Fuel*, 937 F.3d at 586.[10]

Refiners argue that EPA was nonetheless required to address these two issues as "alternatives" to revising the percentage standard formula. The Court should reject this effort to evade the jurisdictional time limit for review. In its annual RFS rulemaking, EPA considers waivers of the statutory volumes and calculates the resulting percentage standards. No part of that requires changes to any other RFS regulations. Defining an alternative at Refiners' level of generality

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[10] Refiners attempt to distinguish the 2018 RFS rule decision on the basis that here, unlike in that case, they explained in comments how changing the exporter policy would decrease proposed standards. Refiners Br. 44; *Am. Fuel*, 937 F.3d at 587. But the Court in that case did not hold that if a change in a prior policy would have required a change in the volumes and standards, then that prior policy would be reviewable even if the agency had not reopened it. That would have been a significant silent departure from the reopening doctrine, under which an expired jurisdictional deadline to challenge a regulation is reopened only when the agency undertakes "a serious, substantive reconsideration of the [existing] rule." *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1024 (D.C. Cir. 2008); *see also Nat'l Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1351 (D.C. Cir. 1995). EPA did not undertake such reconsideration of the exporter renewable volume obligation in the 2020 Rule. Moreover, in *Growth Energy*, the Court found challenges to the exporter policy untimely despite the petitioners' claims that a change to the policy would affect the volumes in the 2019 RFS rule. 5 F.4th at 22.

would allow annual challenges to various regulations that are part of the basic regulatory framework of the RFS program, as "alternative" ways of furthering broadly defined goals such as promoting renewable fuel use. That would open up large swaths of the RFS framework regulations to challenge each year, contrary to Congress's intent in 42 U.S.C. § 7607(b)(1) to limit such challenges to sixty days after the regulations are promulgated. It would also be burdensome to EPA and would create significant uncertainty for regulated entities and for biofuels and RIN markets. *Alon*, 936 F.3d at 658.

The Court rejected a similarly framed argument in *Growth Energy* and should do so again here. *See* 5 F.4th at 22 (finding petitioners' challenge to the exporter policy untimely because in the 2019 rule, EPA "was not seeking alternatives to the waiver through broader RIN market reforms such as altering the treatment of RINs connected to exported renewable fuel"). If Refiners want EPA to revise RFS framework regulations based on new facts, the appropriate avenue for relief is to submit administrative petitions for rulemaking to EPA to modify such rules. They may not try to broaden the scope of the annual rule. *See Alon*, 936 F.3d at 642–46.

In the alternative, if the Court concludes that these arguments are properly raised challenges to the revised percentage standards formula and standards in the 2020 Rule, then EPA seeks remand of the formula and standards as explained below. *Infra* Section II.

II. The Court should remand the challenged parts of the 2020 Rule without vacatur.

Petitioners challenge various parts of the 2020 Rule. First, Biofuels Petitioners challenge the volume requirements by arguing that EPA should have adjusted the volumes to account for small refinery exemptions in past years, Biofuels Br. Section I, and that EPA misinterpreted the cellulosic waiver, Biofuels Br. Section II. Second, all Petitioners challenge EPA's revision of the formula by which EPA calculates percentage standards based on the volumes. Refiners Br. Sections I–III; Biofuels Br. Section I. Third, all Petitioners challenge the 2020 percentage standards that EPA calculated using that revised formula. Refiners Br. Sections I–III; Biofuels Br. Section I. Fourth, National Biodiesel Board challenges EPA's revision of a regulatory requirement relating to renewable fuel produced from separated food waste. Biofuels Br. Section III.

The Court should remand the challenged parts of the 2020 Rule to EPA rather than deciding the merits of those challenges. EPA intends to reconsider each of those parts of the 2020 Rule, and remand would avoid expending the Court's and the parties' resources on further litigation over the current record.

A. EPA intends to reconsider the challenged parts of the 2020 Rule.

EPA recently signed a notice of proposed rulemaking in which it states its intention to reconsider various parts of the 2020 Rule. The proposal explains that EPA "generally do[es] not think it is appropriate to reconsider and revise previously finalized RFS standards." Proposal at 28. EPA nonetheless proposes to do so because of certain "critical and unanticipated events" that took place after EPA signed the 2020 Rule. *Id.*; *see also* Proposal at 7. Those events "are expected to adversely affect the ability of obligated parties to comply with the applicable standards and to achieve the intended volumes in the [2020 Rule]." *Id.* at 7. Therefore, EPA proposes "to retroactively adjust the 2020 volumes and standards to reflect the actual volumes of renewable fuels and transportation fuel consumed in the U.S." *Id.*; *see also id.* at 28.

One of those unanticipated events was the COVID-19 pandemic. EPA explains in the proposal that the pandemic resulted in a drastic fall in transportation fuel demand. *Id.* at 7, 28–29. This resulted in a significant and unprecedented shortfall in renewable fuel use in 2020. *Id.* Because of the disproportionate effect of the pandemic on gasoline demand as compared to diesel demand, the decrease in renewable fuel use was greater than the decrease in the renewable fuel obligation caused by the decrease in transportation fuel demand. *Id.* at 29.

EPA therefore proposes to revise the 2020 volume requirements as follows, to match the actual volumes of renewable fuel use in 2020:

Proposed Revised 2020 Volume Requirements (billion gallons)

Fuel	**2020 Rule**	**Proposed Revision**
Total renewable fuel	20.09	17.13
Advanced biofuel	5.09	4.63
Cellulosic biofuel	0.59	0.51

Proposal tbl. III.B-I.

Another significant unanticipated event was the possibility that the actual grant of small refinery exemptions might be far lower than projected in the 2020 Rule. *Id.* at 7, 29. EPA's calculation of the standards in the 2020 Rule assumed that EPA would be granting "a large number" of small refinery exemptions in 2020. *Id.* at 29; *see also*

2020 Rule at 7053. However, judicial decisions issued since EPA's signature of the 2020 Rule have created uncertainty about that assumption. Proposal at 29.

Specifically, on January 24, 2020, the Tenth Circuit vacated three small refinery exemptions that EPA had granted. *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206 (10th Cir. 2020). That decision was issued after the EPA Administrator's signature of the 2020 Rule, which was on December 19, 2019. *See* 2020 Rule at 7069.[11] The Tenth Circuit's decision had three holdings relating to EPA's authority to grant small refinery exemptions, and the Supreme Court granted certiorari to review the first of those holdings. In June 2021, the Supreme Court reversed the Tenth Circuit's decision "[t]o the extent the court of appeals vacated EPA's orders *on this ground*." *HollyFrontier Cheyenne Ref., LLC v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2183 (2021) (emphasis added).

In the proposal, EPA explains that there remains significant uncertainty about its 2020 small refinery policy in light of those

[11] The 2020 Rule was published in the Federal Register after the Tenth Circuit's decision.

decisions. Proposal at 29. In particular, there remains uncertainty about the impacts of the two holdings in the Tenth Circuit's decision that were not addressed by the Supreme Court, and EPA has not yet resolved the uncertainty. *Id.* Concurrently with the notice of proposed rulemaking, EPA issued a proposal to deny all pending small refinery exemption petitions, including 28 petitions for the 2020 compliance year.[12] EPA seeks comment on that proposed denial within thirty days of publication of notice in the Federal Register, which is forthcoming.

In light of the uncertainty about its small refinery policy, EPA proposes a range of revised 2020 standards. *Id.* at 59. The low end of the range is based on a projection of zero small refinery exemptions granted in 2020, and the high end is based on maintaining the same methodology as the 2020 Rule with updated data. *Id.* at 59–60.

EPA therefore proposes to revise the 2020 standards as follows:

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[12] The proposed denial and the notice of opportunity to comment on the proposed denial are attached to this filing as pages A164 to A234 and are also available at: https://www.epa.gov/renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions.

Proposed Revised 2020 Standards

Fuel	2020 Rule	Proposed Revised Low	Proposed Revised High
Total renewable fuel	11.56%	10.78%	11.36%
Advanced biofuel	2.93%	2.91%	3.07%
Biomass-based diesel	2.10%	2.37%	2.50%
Cellulosic biofuel	0.34%	0.32%	0.34%

Proposal tbl. VI.C-2.

EPA's proposal also seeks public comment on the revised percentage standard formula in the 2020 Rule, specifically the way that the formula accounts for a projection of exemptions granted after the standards are calculated. Proposal at 60. That is because the 2020 Rule's revision of that formula was based in part on EPA's small refinery policy at the time. *Id.*

In addition, EPA is soliciting comment on the issue, raised by Biofuels Petitioners in this litigation, of whether cellulosic carryover RINs should be included in the "projected volume available" for purposes of the cellulosic waiver. Proposal at 43–45; 42 U.S.C. § 7545(*o*)(7)(D)(i).

The signed proposal does not seek public comment on the separated food-waste recordkeeping regulation challenged by National Biodiesel Board. That provision is merely a clarification of a

recordkeeping requirement that has existed in the regulations since 2010.[13] Notwithstanding this fact, EPA intends to address National Biodiesel Board's objections by soliciting comment on this provision in a separate notice. Bunker Decl.¶ 5 (attached to this filing at A001–004).

B. EPA requests voluntary remand.

EPA requests voluntary remand of the volumes, revised percentage standard formula, and the standards in the 2020 Rule, each of which EPA intends to reconsider. EPA's decision to reconsider is based primarily on significant and unanticipated intervening events, namely the COVID-19 pandemic and judicial decisions that bear on the scope of EPA's authority to grant small refinery exemptions. The Court should grant EPA's voluntary remand request to give EPA an opportunity to complete that reconsideration.

The Court should deny National Biodiesel Board's challenge to the separated food-waste recordkeeping regulation for lack of standing. *See*

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[13] *See* 81 Fed. Reg. 80,828, 80,902–03 (Nov. 16, 2016) (explaining that the existing recordkeeping regulations "require[] renewable fuel producers to keep documents associated with feedstock purchases and transfers that identify where the feedstocks were produced and are sufficient to verify that the feedstocks meet the definition of renewable biomass").

supra p.3. If the Court nonetheless finds that the National Biodiesel Board has standing for its challenge, then in the alternative, EPA seeks remand of that provision as well. This remand request is justified by EPA's intent to issue a notice seeking comment on this issue. *See supra* p.33 (citing Bunker Decl. ¶ 5).

In making these requests, EPA does not confess error or impropriety as to any aspect of the 2020 Rule. *See Limnia, Inc. v. U.S. Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (stating that remand requests do not require such confessions); *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). EPA need only express, as it does here, an "intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Limnia*, 857 F.3d at 387.

This Court "commonly grant[s]" voluntary remand requests. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993). Doing so here, without reaching the merits, would avoid "wasting the courts' and the parties' resources." *Id.*; *see B.J. Alan Co. v. Interstate Commerce Comm'n*, 897 F.2d 561, 563 n.1 (D.C. Cir. 1990) ("[A]dministrative reconsideration is a more expeditious and efficient means of achieving

an adjustment of agency policy than is resort to the federal courts." (quoting *Commonwealth of Pennsylvania v. ICC*, 590 F.2d 1187, 1194 (D.C. Cir. 1978))). After all, remand would save the Court and the parties from having to spend any more time on litigation of the merits of this challenge based on the current record while EPA reconsiders and reviews the impacts of intervening events. And EPA's action on remand may moot or narrow the issues requiring judicial resolution.

Voluntary remand is particularly appropriate where, as here, intervening events warrant further consideration of the agency action. *See, e.g.*, *Ethyl Corp.*, 989 F.2d at 523 (concluding that voluntary remand was appropriate when an agency acknowledged that new evidence impacted agency decision and asked that the court "remand the matter to the Agency for further consideration"); *Nat'l Fuel Gas Supply Corp. v. FERC*, 899 F.2d 1244, 1249–50 (D.C. Cir. 1990) (granting Commission's request for remand following new legal decision, based on "general principle that an agency should be afforded the first word on how an intervening change in law affects an agency decision pending review"); *SKF*, 254 F.3d at 1028 (recognizing that an agency legitimately seeks remand when it "seek[s] a remand because of

intervening events outside of the agency's control, for example, a new legal decision").

This remand request is timely because it is being made promptly upon EPA's signature of the notice of proposed rulemaking. EPA previously sought an abeyance of this case when the draft notice of proposed rulemaking was submitted to the Office of Management and Budget for regulatory review. Motion (Sept. 9, 2021), Doc. No. 1913524. However, the draft notice was not available to the public at the time, and the Court was not able to determine whether the proposal justified deferring judicial resolution of this case. Order (Oct. 6, 2021), Doc. No. 1916973. Now that the notice of proposed rulemaking has been signed, the Court is able to fully evaluate the impact of the proposal on this litigation.

In ordering remand, this Court should not vacate the challenged parts of the 2020 Rule. Whether to vacate turns on (1) the "seriousness of the [action's] deficiencies" and (2) "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). Both factors weigh against vacatur.

First, EPA has not yet completed the reconsideration process. However, EPA undoubtedly has statutory authority to establish the 2020 standards and significant discretion in doing so. *See* 42 U.S.C. § 7545(*o*)(3)(B).

Second, there is no prejudice to any party from leaving the formula and standards in place pending EPA's reconsideration. Because 2020 has already passed, leaving the standards in place cannot possibly affect the transportation fuel market in that year. Further, while the 2020 compliance date for obligated parties is forthcoming on January 31, 2022, 40 C.F.R. § 80.1451(a)(1)(xiv)(F), EPA has initiated a rulemaking to extend that date and anticipates finalizing that rule in advance of January 31, 2022. 86 Fed. Reg. 67,419 (Nov. 26, 2021) (seeking comments on proposal by January 3, 2022). Specifically, EPA has proposed that the 2020 compliance date will occur subsequent to the finalization of the 2021 standards. *Id.* at 67,422. Because EPA is reconsidering the 2020 Rule in a consolidated rulemaking with the 2021 and 2022 standards, *see* Proposal, the new compliance deadline for the 2020 standards will be after EPA has completed its reconsideration process. Therefore, EPA does not expect that any obligated party will

need to demonstrate compliance with the existing 2020 standards during the pendency of the remand. Nor is there prejudice to any party from leaving the separated food-waste recordkeeping provision in place pending remand because the provision is merely a clarification of a recordkeeping requirement that has existed in the regulations since 2010. *See supra* p.33 & n.13.

CONCLUSION

For the reasons stated, the Court should deny Refiners' petitions to the extent that they challenge the regulations establishing the point of obligation and exporter renewable volume obligation; deny National Biodiesel Board's petition to the extent that it challenges the separated food-waste recordkeeping provision; deny RFS Power Coalition's petition; and otherwise remand the challenged parts of the 2020 Rule without vacatur.

Respectfully submitted,

TODD KIM
Assistant Attorney General

/s/ Tsuki Hoshijima
TSUKI HOSHIJIMA
CAITLIN MCCUSKER
U.S. Department of Justice

Environment and Natural Resources
Division
Environmental Defense Section
P.O. Box 7611
Washington, D.C. 2004
(202) 514-3468 (Hoshijima)
(202) 514-1950 (McCusker)
tsuki.hoshijima@usdoj.gov
caitlin.mccusker@usdoj.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation in the Court's briefing order, Order (Oct. 26, 2020), Doc. No. 1868039, because it contains 7,264 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ Tsuki Hoshijima
TSUKI HOSHIJIMA

CERTIFICATE OF SERVICE

I certify that the foregoing was filed through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Docket Activity.

/s/ Tsuki Hoshijma
TSUKI HOSHIJIMA