ORAL ARGUMENT NOT YET SCHEDULED

No. 19-1023 (and consolidated cases)

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Growth Energy, *et al.*,
Petitioners,

v.

Environmental Protection Agency,
Respondent.

On Petition for Review of Final Agency Action
of the Environmental Protection Agency

Joint Opening Brief of Petitioners American Fuel & Petrochemical Manufacturers, Monroe Energy, Small Retailers Coalition, and Valero Energy

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Certificate as to Parties, Rulings, and Related Cases

A. Parties, Intervenors, and *Amici*

Petitioners:

19-1023	Growth Energy
19-1027	RFS Power Coalition
19-1032	Monroe Energy
19-1033	Small Retailers Coalition
19-1035	National Biodiesel Board
19-1036	Producers of Renewables United for Integrity Truth and Transparency
19-1037	American Fuel & Petrochemical Manufacturers
19-1038	Valero Energy
19-1039	National Wildlife Federation, Healthy Gulf, Sierra Club

Respondents:

The Environmental Protection Agency ("EPA").

Intervenors:

American Fuel & Petrochemical Manufacturers, American Petroleum Institute, Growth Energy, Monroe Energy, and National Biodiesel Board are Respondent-Intervenors in the consolidated petitions.

Amici Before this Court:

None.

B. Rulings Under Review

The agency action under review is EPA's final action, entitled "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63,704 (Dec. 11, 2018), referred to in this brief as the "2019 Rule."

C. Related Cases

Each of the Petitions for Review consolidated under No. 19-1023 is related. The consolidated cases on review have not been reviewed by this or any other Court.

Dated: October 4, 2019

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Corporate Disclosure Statements

In accordance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, petitioners provide the following:

- American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members comprise virtually all U.S. refining and petrochemical manufacturing capacity. AFPM has no parent companies, and no publicly held company has a 10% or greater ownership interest in AFPM. AFPM is a "trade association" within the meaning of Circuit Rule 26.1. AFPM is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its memberships.

- Monroe Energy, LLC is a refiner of petroleum products and is wholly owned by Delta Air Lines, Inc., a publicly traded company.

- Small Retailers Coalition ("SRC") is a Texas non-profit national trade association with members across the United States. SRC has no parent company and no publicly held company has a 10% or greater ownership interest.

- Valero Energy Corporation is a Texas-based energy company incorporated under the laws of Delaware. Valero is the world's largest independent refiner, one of the two largest ethanol producers in the U.S. and the largest renewable-diesel producer. Valero has no parent corporation and no publicly held company owns a 10 percent or greater interest of its stock.

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Glossary

AFPM	American Fuel & Petrochemical Manufacturers
CRA	Charles River Associates
E0	Gasoline without ethanol content
E10	Gasoline blend with 9.0% to 10.0% ethanol content by volume
E15	Gasoline blend with >10.0% to 15.0% ethanol content by volume
E85	Gasoline blended with 51% to 83% ethanol by volume
EPA	Environmental Protection Agency
JA	Joint Appendix
PES	Philadelphia Energy Solutions
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number
RTC	Renewable Fuel Standard Program – Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments (EPA-OAR-HQ-2018-0167-1387)
SRC	Small Retailers Coalition

Statement Regarding Oral Argument

Petitioners request oral argument to present issues fundamental to the functioning of the Renewable Fuel Standard Program and to the nation's transportation fuel supply.

Jurisdiction

These timely-filed petitions challenge EPA's "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63,704 (Dec. 11, 2018) ("2019 Rule"). This Court has jurisdiction over this nationally-applicable rule under 42 U.S.C. § 7607(b)(1).

Statement of the Issues

1. Did EPA abuse its discretion in declining to exercise statutory waivers due to "severe economic harm" or "inadequate domestic supply," where it relied on inconsistent reasoning, ignored significant evidence, and invoked faulty analysis?

2. Did EPA arbitrarily and capriciously determine what volumes of advanced biofuel and total renewable fuel were "attainable" or "reasonably attainable" where EPA ignored constraints on these volumes?

3. Did EPA abuse its discretion or fail a statutory duty by refusing to consider whether it made 2019 RFS obligations applicable to "appropriate" parties, as 42 U.S.C. § 7545(o)(3)(B)(ii) requires?

4. Did EPA arbitrarily characterize comments on exported renewable fuels that were of central relevance as "beyond the scope of the rulemaking"?

5. Did EPA fail to comply with the Small Business Regulatory Enforcement Fairness Act?

Statutes and Regulations

Pertinent statutes and regulations are provided in the Addendum.

Statement of the Case

This Court repeatedly has considered the Clean Air Act's Renewable Fuel Standard ("RFS") Program, most recently in *American Fuel & Petrochemical Manufacturers v. EPA*, --- F.3d ----, 2019 WL 4229073 (D.C. Cir. Sept. 6, 2019) ("*AFPM*") (2018 RFS rule); *see also Alon Ref. Krotz Springs, Inc. v. EPA*, 936 F.3d 628 (D.C. Cir. 2019) ("*Alon*") (2017 RFS rule). Although those decisions largely upheld EPA's RFS rules for 2017 and 2018, the Court recognized the annual nature of the statutorily-required inquiry, *see AFPM*, 2019 WL 4229073, at *9 ("annual volumes are always dependent on a variety of considerations"), and the importance of the specific record in reviewing each year's decisionmaking, *see*, *e.g.*, *Alon*, 936 F.3d at 655, 659 (exclusion of point of obligation issue from an annual rulemaking could constitute an abuse of discretion).

The 2019 Rule stands out from prior years' rules for EPA's persistent failure to grapple with the comments and evidence before it, repeated recourse to inconsistent reasoning and faulty methodologies, and evasion of essential elements of rulemaking. These fundamental flaws mandate vacatur. Leaving the 2019 Rule in place would undercut important congressional objectives embodied in the RFS Program.

I. Background

Congress intended the RFS Program to increase energy independence, security, and renewable-fuel production, while protecting consumers. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007). The Act addresses four related renewable-fuels categories: (i) total renewable fuel (including all RFS-qualifying fuel); (ii) advanced biofuel; (iii) cellulosic biofuel (mostly biogas-derived compressed or liquefied natural gas and liquid cellulosic biofuel); and (iv) biomass-based diesel. RFS volume requirements are "nested;" cellulosic biofuel and biomass-based diesel also qualify as advanced and total renewable fuels. Congress specified annually-increasing "applicable volumes" through 2022 for each category except biomass-based diesel. 42 U.S.C. § 7545(o)(2)(B).

The statute requires that EPA annually determine renewable-fuel obligations to "ensure[]" the applicable volumes are met. *Id.* § 7545(o)(3)(B)(i). EPA may wholly or partially waive statutorily-specified volumes to redress inadequate domestic supply or severe economic or environmental harm. *Id.* § 7545(o)(7). A "required element" of EPA's annual determination is that obligations must be applied to "refineries, blenders, and importers, as appropriate." *Id.* § 7545(o)(3)(B)(i), (ii). To date, however, EPA has obligated only refiners and importers, never blenders. *See AFPM*, 2019 WL 4229073, at *3 (citing 40 C.F.R. § 80.1406(a)(1)). Refiners' and importers' RFS obligations are calculated as a percentage of the non-renewable gasoline or diesel fuel they produce or import annually for domestic consumption. 40 C.F.R. § 80.1407.

Obligated parties demonstrate RFS compliance through acquiring and retiring "RINs" (Renewable Identification Numbers), which represent a standardized measure of renewable fuel. *AFPM*, 2019 WL 4229073, at *4; 40 C.F.R. § 80.1427. RINs are assigned to each batch of renewable fuel produced or imported for use in the United States and are generally "separated" from that fuel when it is blended with petroleum blendstock to produce finished transportation fuel. *AFPM*, 2019 WL 4229073, at *4; *see* 40 C.F.R. §§ 80.1425-80.1426; 80.1428-80.1429.

Some obligated parties possess blending capacity and thereby obtain RINs from blending. *See* 72 Fed. Reg. 23,900, 23,904 (May 1, 2007). But many refiners, particularly independent refiners that are not vertically integrated, cannot blend renewable fuels in any appreciable quantity. *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 697, 704 (D.C. Cir. 2017). To comply, these refiners must buy RINs from others: unobligated blenders, speculators who trade RINs in an unregulated market, or obligated parties holding excess RINs. *Id.* at 699-700, 705.

In 2017, this Court recognized that "EPA and obligated parties have raised serious concerns that the Renewable Fuel Program is not actually functioning as intended and that, as a result, the statute's requirements will only become more and more impractical to meet." *Id.* at 712.

II. The 2019 Rule

A. Notice of proposed rulemaking

EPA issued its Proposed Rule on July 10, 2018. 83 Fed. Reg. 32,024 (Jul. 10, 2018). EPA projected that cellulosic biofuel production would fall well short of statutorily-mandated volumes—reaching only 381 million gallons, a fraction of the 8.5 *billion* gallons Congress predicted. *Id.* at 32,024-25, 32,037. EPA also anticipated a corresponding "shortfall" in volumes for total renewable fuel and advanced biofuel. *Id.* And EPA acknowledged "real constraints on the ability of the market to exceed a

pool-wide ethanol content of 10%." JA_[RTC.96.(EPA-HQ-OAR-2018-0167-1387)]; *see also* 83 Fed. Reg. at 32,041. Accordingly, EPA proposed using the cellulosic waiver in 42 U.S.C. § 7545(o)(7)(D) to reduce cellulosic biofuel, advanced biofuel, and total renewable fuel requirements to 381 million, 4.88 billion, and 19.88 billion gallons, respectively. 83 Fed. Reg. at 32,026.

EPA admitted that resulting volumes after application of the cellulosic waiver were not "reasonably attainable"; instead, they were merely "attainable," a new classification EPA created for 2019. *Id.* at 32,040. EPA did not propose invoking its general waiver authority to ensure "reasonably attainable" volumes but requested comment "on whether circumstances exist that would warrant further reductions in volumes through the exercise of the general waiver authority (*e.g.*, due to severe economic harm)." *Id.* at 32,048. EPA also acknowledged concerns expressed in prior years regarding RIN-market manipulation and solicited input on how to minimize or eliminate it. *Id.* at 32,027, 32,029.

B. Comments

Commenters provided compelling evidence demonstrating grounds for a severe-economic-harm waiver in addition to the cellulosic waiver. For example, Monroe Energy provided a study showing that the proposed 2019

Rule would severely harm the East Coast refining industry and dependent economies. JA_[Monroe.Comments.2.(EPA-HQ-OAR-2018-0167-0622)] (citing Craig Pirrong, *Analysis of the RFS Program and the 2019 Proposed Standards* (Aug. 17, 2018) ("Pirrong Study")). AFPM's and Valero's comments highlighted EPA's failure to estimate reasonably attainable volumes of advanced biofuel and ethanol blends and provided realistic estimates justifying an inadequate-domestic-supply waiver. JA_[AFPM.Comments.6-10]; JA_[Valero.Comments.2-5.(EPA-HQ-OAR-2018-0167-1041)]; JA_[Monroe.Comments.25-31].

Commenters also urged EPA to review placement of the point of obligation, *i.e.*, to make 2019 obligations applicable to "appropriate" parties, including blenders. *See* JA_[Valero.Comments.28-30].[1] Commenters demonstrated that aligning the point of obligation to include all three categories of market participants that Congress enumerated (refiners, importers and blenders) would not only alleviate harm to

[1] *See also* JA_[HollyFrontier.Comments.14.(EPA-HQ-OAR-2018-0167-1198)]; JA_[Small.Refiners.Coalition.Comments.2-4.(EPA-HQ-OAR-2018-0167-0166)]; JA_[Coffeyville.Comments.2-3.(EPA-HQ-OAR-2018-0167-1283)]; JA_[PES.Comments.3-4.(EPA-HQ-OAR-2018-0167-1274)]; JA_[PBF.Comments.5-6.(EPA-HQ-OAR-2018-0167-1197)].

obligated parties but also redress multiple constraints on the market's ability to satisfy annual requirements and program goals.[2]

Commenters also requested that EPA allow RINs associated with domestically-produced, exported renewable fuel to count for compliance purposes to encourage domestic production, allow EPA to make better projections, and further RFS Program goals. *See* JA_[Valero.Comments.18-25]; JA_[Monroe.Energy.Comments.38-39].

And commenters urged EPA to consider "harm to small retailers and the effect of the RIN market in creating or contributing to dramatically unfair competition in the retail market." JA_[Valero.Comments.13]; JA_[RTC.165].[3]

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[2] These constraints include market frictions hindering increased renewable-fuel penetration; RIN-market volatility; unfair competition on small retailers; and RIN-market speculation and fraud. JA_, _[Valero.Comments.28-30.and.referenced.attachments]; *see also, e.g.,* JA_[HollyFrontier.Comments.14.(EPA-HQ-OAR-2018-0167-1198)]; JA_, _[Small.Refiners.Coalition.Comments.2-4.and.referenced.attachments.(EPA-HQ-OAR-2018-0167-0166)]; JA_[Coffeyville.Comments.2-3.(EPA-HQ-OAR-2018-0167-1283)]; JA_[PBF.Comments.5-6.(EPA-HQ-OAR-2018-0167-1197)].

[3] *See also* JA_, _[SRC.Dabbs.GordonPetroleum.and.PetroTex.Comments.(EPA-HQ-OAR-2018-0167-1149-Vols.2, 4)]; JA_, _[Small.Refiners.Coalition.Comments.2-8,18-19.(EPA-HQ-OAR-2018-0167-1281)]; JA_[Coffeyville.Comments.5-6.(EPA-HQ-OAR-2018-0167-1283)]; JA_[PES.Comments.7.(EPA-HQ-OAR-2018-0167-1274)].

C. 2019 Rule

EPA set 2019 volumes even higher than proposed, requiring use of 418 million gallons of cellulosic biofuel, 4.92 billion gallons of advanced biofuel, and 19.92 billion gallons of total renewable fuel. 83 Fed. Reg. at 63,705. Despite these increased requirements, which raised total renewable-fuel requirements by 630 million gallons over 2018 and which EPA conceded were not "reasonably attainable," *id.* at 63,721, the Agency declined to exercise its general waiver authority. It also refused to consider the appropriate point of obligation or the treatment of exported fuel; EPA labeled these "beyond the scope" of the rulemaking. *Id.* at 63,708; JA_[RTC.19]; JA_[RTC.188].

EPA referenced prior denials of rulemaking petitions to conclude RFS requirements caused no harm to small retailers and, having analyzed only small refiners, categorically declared that the Rule "will not have a significant economic impact on a substantial number of small entities under the [Regulatory Flexibility Act]." 83 Fed. Reg. at 63,742; *see also* JA_[RTC.15].

Summary of Argument

The 2019 Rule requires vacatur and remand for multiple reasons:

First, EPA ignored extensive evidence demonstrating that the 2019 Rule will inflict serious economic damage on the Northeast region, relying

instead on inconsistent reasoning and flawed economic analysis to deny a severe-economic-harm waiver. EPA also, for the first time, set volume standards at levels it admitted were not "reasonably attainable," yet arbitrarily refused to invoke its inadequate-domestic-supply waiver authority, changing its policy without sufficient explanation.

Second, EPA also failed to engage in reasoned decisionmaking by identifying targets for advanced biofuel and total renewable fuel without rationally accounting for constraints on those fuels.

Third, EPA abused its discretion and violated statutory duties by treating as "beyond the scope" of the Rule whether the 2019 obligations were applied to "appropriate" parties. EPA ignored ample new evidence disproving the basis for EPA's prior inaction and compelling a course correction.

Fourth, comments regarding the relationship between EPA's treatment of exported fuel and consideration of annual volume requirements also were of central relevance to the rulemaking, not beyond its scope.

Fifth, EPA acted arbitrarily and capriciously and violated the Regulatory Flexibility Act by failing to analyze the Rule's impact on small-business retailers.

Standards of Review

Courts must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). Arbitrary action includes "entirely fail[ing] to consider an important aspect of the problem," offering an "explanation … counter to the evidence before the agency," and failing to articulate "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (*"State Farm"*).[4] An agency also acts arbitrarily or capriciously when it fails to "respond to serious objections" to its proposal. *Del. Dep't. of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015). Agencies must also "provide a reasoned explanation" for changing existing policy. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

Standing

Petitioners Valero and Monroe, and Petitioner AFPM's members,[5] are directly regulated under the 2019 Rule and therefore have Article III

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[4] Unless otherwise indicated, case quotations omit all internal quotation marks, alterations, footnotes, and citations.

[5] AFPM has associational standing to challenge the 2019 Rule, which directly regulates its members. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

standing. *See Monroe Energy, LLC v. EPA*, 750 F.3d 909, 915 (D.C. Cir. 2014). Petitioners also fall within the zone of interests the statute protects. *See Nat'l Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147-48 (D.C. Cir. 2002).

Small Retailers Coalition has standing to challenge the 2019 Rule because its members suffer a competitive injury and, thus, are "an object of the" 2019 Rule. *Energy Future Coal. v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015). Additionally, Small Retailers Coalition members are regulated by the 2019 Rule. *See Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161, 175-76 (D.C. Cir. 2007); *Alon*, 936 F.3d at 652 (reflecting EPA's recognition of non-obligated party businesses as regulated).

Argument

I. EPA Unreasonably Denied Statutory Waivers Intended to Mitigate Severe Economic Harm and Inadequate Domestic Supply.

In the 2019 Rule, EPA refused to exercise its general waiver authority despite receiving numerous comments demonstrating severe economic harm and questioning the adequacy of domestic renewable-fuel supply—and despite finding that the advanced-biofuel volume resulting from the cellulosic waiver alone was not "reasonably attainable." EPA's back-of-the-hand treatment of these waiver requests was arbitrary and capricious.

A. EPA's refusal to grant a severe-economic-harm waiver relied on inconsistent reasoning, ignored significant evidence, and invoked faulty analysis.

EPA has statutory authority to reduce renewable-fuel volume requirements upon determining that "implementation of the requirement would severely harm the economy" of "a State, a region, or the United States." 42 U.S.C. § 7545(o)(7)(A)(i). Commenters—including petitioner Monroe—urged EPA to exercise this waiver authority to avoid "inflicting severe economic harm on those regions in which refiners are concentrated," particularly "Petroleum Administration for Defense District ('PADD') Region 1" in the Northeastern United States, "where Monroe's refinery is located." JA_[Monroe.Comments.1]. In rejecting this request, EPA relied on inconsistent reasoning, wholly ignored the detailed economic study Monroe submitted, and invoked a faulty economic premise contradicted by recent analyses. For each of these reasons, EPA's denial of a severe-economic-harm waiver was arbitrary and capricious.

1. *In treating the effect of RIN costs differently in different circumstances, EPA violated a fundamental requirement of reasoned decisionmaking.*

EPA conceded that RFS "[c]ompliance costs can be used to make a determination of the economic impact of the applicable standards on a State, region or the U.S. and therefore could be grounds for waiving volumes." JA_[RTC.14]. It nevertheless denied a severe-economic-harm

waiver on the outdated theory that obligated parties' "RFS compliance costs" are "passed through to consumers in the marketplace" and therefore "do[] not represent a net cost to obligated parties." JA_, _[RTC.14.&.n.15] (citing Dallas Burkholder, Office of Transp. & Air Quality, EPA, *A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects* (2015) ("Burkholder Study")). According to EPA, "a narrow focus on RIN price ignores the fact that [obligated] parties are recovering the cost of RINs from the sale of their petroleum products." JA_[RTC.15].

EPA's reasoning is glaringly inconsistent. By the time of the 2019 Rule, EPA's outdated premise that obligated parties' RFS compliance costs are passed through to consumers had been disproven by *scores* of exemptions from the RFS Program that *EPA itself* granted to small refineries based on the "disproportionate economic hardship" program compliance would inflict. 42 U.S.C. § 7545(*o*)(9)(B)(i). Over the past three years, EPA granted 85 small-refinery exemptions.[6] Among the principal

[6] *See* EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

factors that EPA considers in evaluating these petitions are "RIN prices, and the cost of compliance through RIN purchases."[7]

As the Fourth Circuit recognized, that rational focus on RIN prices in evaluating small-refinery exemptions "appears inconsistent" with EPA's theory that RFS compliance costs do not burden obligated parties because they are passed through to consumers. *Ergon-W. Va., Inc. v. EPA*, 896 F.3d 600, 613 (4th Cir. 2018). After all, when RFS compliance costs have imposed "economic hardship" on scores of small refineries—thereby necessitating an RFS exemption—those costs obviously are not being entirely recouped by pass-through to customers. EPA offered no explanation for employing an illogical, inconsistent position in the 2019 Rule.[8]

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[7] EPA, *Financial and Other Information to Be Submitted with 2016 RFS Small Refinery Hardship Exemptions Requests* (Dec. 6, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf.

[8] EPA noted that the small-refinery exemption and severe-economic-harm waiver provisions "entail different considerations," and exercising one does not necessarily require exercising the other. JA_[RTC.19]. But the differences between the two provisions are irrelevant to this case. The fact that small refineries cannot pass through RIN costs necessarily indicates that EPA's pass-through theory is no longer correct, and cannot support a conclusion that RFS obligations cause no harm. Yet EPA did not address this inconsistency.

This sort of "self-contradictory" reasoning "does not constitute an adequate explanation of agency action." *Del. Dep't*, 785 F.3d at 16. When an agency's decision is "internally inconsistent" or otherwise illogical, it is "arbitrary" and must be set aside. *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1153 (D.C. Cir. 2011). Because EPA did not explain this logical inconsistency—and relied on incoherent reasoning to deny a severe-economic-harm waiver—the 2019 Rule was "arbitrary and capricious action" that must be vacated. *Ergon*, 896 F.3d at 613.

2. EPA also ignored compelling evidence of severe economic harm caused by RFS compliance costs.

Monroe submitted a recent, comprehensive study of the RFS Program's economic impact by Dr. Craig Pirrong, Professor of Finance and Energy Markets and Director of the Global Energy Management Institute at the University of Houston's Bauer College of Business. That study found that "any further increases in the RFS mandates could inflict devastating financial effects on the PADD 1 region and beyond." JA_[Monroe.Comments.2] (citing Pirrong Study). "Using standard economic analysis, and extensive data on the production and refining of motor fuels and biofuels," the Pirrong Study found that the "impact" of EPA's proposed 2019 Rule "is large, on both consumers and producers." JA_[Pirrong.Study.29.(EPA-HQ-OAR-0167-0622-A)]. Specifically, the

Pirrong Study found that "[t]he impact will fall particularly heavily on refiners on the East Coast of the United States," cutting their refining margins by "enough to make many [of them] unprofitable." *Id.* This, in turn, could "cause some refineries to shut down, with a consequent loss of jobs." *Id.*

The Pirrong Study emphasized that, for several reasons (including temporary economic benefits of the shale oil boom), only in the last few years has PADD 1—where refiners are generally less profitable than elsewhere—felt the RFS Program's full impact. JA_, _[Pirrong.Study.8-9, 11-12]. Current margins for PADD 1 refiners "appear to be close to 2009 and 2010 levels, when the United States was in a deep recession and many PADD 1 refiners went out of business." JA_[Pirrong.Study.13]. According to the Pirrong Study, "the 2019 RFS proposed requirements are likely to substantially exacerbate the financial difficulties of these refiners." JA_[Pirrong.Study.14].

By one estimate, for every refinery layoff in southeastern Pennsylvania, 18.3 jobs will be lost in that immediate area and 22 jobs will be lost across the State. JA_[Pirrong.Study.17-18] (citing Center for Workforce Information & Analysis, *Reemployment Assessment and Economic Impact of Conoco Phillips and Sunoco Closings* (Jan. 9, 2012)).

Accordingly, if a Pennsylvania refinery with 800 employees closes and only half can find re-employment, the result will be more than 7,300 direct, indirect, and induced job losses in southeastern Pennsylvania alone, with a total labor income loss in southeastern Pennsylvania of more than $539 million. *Id.* Obviously, job losses like this "would constitute a substantial negative economic impact on the local and regional economy." JA_[Pirrong.Study.18].

EPA simply ignored the Pirrong Study, declaring that "we have not received and are not aware of evidence suggesting that severe economic harm is occurring or may occur in a state or region." JA_[RTC.19]; *see also* JA_[RTC.14].

This blatant disregard of crucial record evidence was arbitrary and capricious. When an agency "entirely fails to consider an important aspect of the problem by failing to address evidence that runs counter to the agency's decision," the rulemaking must be set aside. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 307 (D.C. Cir. 2018). In addition, an agency "must respond to those comments which, if true, would require a change in the proposed rule." *La. Fed. Land Bank Ass'n v. Farm Credit Admin.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003). EPA entirely failed to grapple with the Pirrong

Study and Monroe's comments addressing, in detail, (JA_[Monroe.Comments.13-25]), the study's implications.

EPA has used this "head in the sand" approach before. In *Ergon*, the Fourth Circuit faulted EPA for "cit[ing] generally to an industry-wide study and a nonspecific nationwide trend" regarding pass-through of RIN costs, while ignoring "specific, contradictory evidence of hardship" to the refiner seeking an RFS exemption. 896 F.3d at 613. That transpired here too: EPA entirely ignored a new, comprehensive economic-impact analysis focused on the East Coast PADD 1 region, while invoking the same "industry-wide" Burkholder Study that the Fourth Circuit deemed too generalized. *See* JA_[RTC.14.n.15]. EPA's reasoning is no less arbitrary and capricious the second time around.

3. EPA improperly ignored evidence exposing serious economic flaws in its conclusion that all RFS compliance costs are passed through to customers.

To support its pass-through reasoning, EPA relied on its 2015 Burkholder Study. JA_[RTC.14.n.15]. But, as explained in the Pirrong Study, "a later study" by Charles River Associates ("CRA") in 2016 "shows that pass-through rates were lower for domestic products in 2015 and 2016." JA_[Pirrong.Study.27] (citing CRA, *Re-examining the Pass-through of RIN Prices to the Prices of Obligated Fuels* 8-9 (Oct. 2016)). The Pirrong

Study further emphasized that, "even with a high RIN price pass-through rate, refiners' profits can be adversely affected in a way that may affect their survival," particularly in PADD 1. JA_[Pirrong.Study.27].

EPA also cited its 2017 Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, which relied on several studies that post-dated the 2015 Burkholder Study to support a pass-through finding. *See* JA_[RTC.14.n.15] (citing Denial of Petitions 25-26 (Nov. 22, 2017) (EPA-HQ-OAR-2018-0167-0065)). But commenters provided analysis indicating that these studies cherry-picked data to arrive at their desired conclusion. In particular, a 2017 CRA study explained that one pass-through study omitted two variables (Brent-crude-based spreads) that were included in an earlier study, which results in a "distorted view of pass-through" and "calls into question the existence of other omitted variables." JA_[CRA, *Review of Updated Pass-Through Analysis of Knittel, Meiselman and Stock* 3 (Feb. 2017) ("2017 CRA Study") (EPA-HQ-OAR-2018-0167-1149-Vol.6)]. The 2017 CRA Study also found that this study improperly *included* a fuel-price spread (New York Harbor CBOB – Rotterdam EBOB), which misleadingly weighted the findings in favor of pass-through. JA_[2017.CRA.Study.4]. And the 2017 CRA Study raised questions about serious flaws in how

information was "pooled" to calculate pass-through. JA_[2017.CRA.Study.4-5].

EPA failed to acknowledge *any* of this in the 2019 Rule—let alone provide a reasoned response. This additional failure "to address evidence that runs counter to [EPA's] decision" mandates vacatur. *Genuine Parts Co.*, 890 F.3d at 307.[9]

4. Finally, EPA cannot rely on benefits the RFS Program may have for other industries to salvage denial of a severe-economic-harm waiver.

In denying the waiver, EPA also cited "the beneficial impacts of the 2019 volume requirements" for "renewable fuel producers, farmers, and other industries." JA_[RTC.13]. Because EPA "relied on multiple rationales (and has not done so in the alternative)," this Court can vacate the 2019 Rule based on EPA's deficient analysis of severe-economic-harm evidence

[9] EPA's point-of-obligation decision responded cursorily to the 2017 CRA Study, *see* JA_[Denial.of.Petitions.25-26], but did not address either the Pirrong Study or the 2016 CRA Study. Moreover, EPA's response to the 2017 CRA Study is nothing more than an ipse dixit assertion of "harmless error" that is too conclusory to satisfy the Administrative Procedure Act. *See* JA_[Denial.of.Petitions.25] ("while there may be concerns related to the appropriateness of the decisions by the [study] authors … , EPA does not believe these decisions had a significant impact on the[ir] conclusions").

without reaching its discussion of the RFS Program's alleged benefits. *Nat'l Fuel Gas Supply Corp. v. EPA*, 468 F.3d 831, 839 (D.C. Cir. 2006).

In any event, EPA's reliance on the RFS Program's benefits for some industries is not a permissible basis for denying a severe-economic-harm waiver to mitigate the far-reaching damage that the 2019 volume requirements will inflict on the PADD 1 region. EPA identified no benefits within PADD 1, and the statute directs EPA to consider only economic "harm" to the "region" at issue. 42 U.S.C. § 7545(*o*)(7)(A)(i). The term "harm" encompasses injury, but not offsetting benefit—and certainly not offsetting benefit elsewhere in the country. *See, e.g.*, *Black's Law Dictionary* (10th ed. online 2014) (defining "harm" as "[i]njury, loss, damage; material or tangible detriment").

Accordingly, whether or not this Court reaches EPA's consideration of the RFS Program's economic benefits, vacatur of the 2019 Rule is required.

B. EPA arbitrarily and unreasonably refused to consider exercising the inadequate-domestic-supply waiver.

EPA also has authority to reduce renewable-fuel volume requirements upon determining that "there is an inadequate domestic supply." 42 U.S.C. § 7545(o)(7)(A)(ii); *see* JA[AFPM.Comments.25-26]. EPA refused even to consider whether domestic supply was adequate. That was arbitrary and capricious.

In promulgating the 2019 advanced-biofuel standard, EPA employed four steps. First, EPA determined the "reasonably attainable" volume by considering "the availability of feedstocks, domestic production capacity, imports, and market capacity to produce, distribute, and consume renewable fuel." 83 Fed. Reg. at 63,721. Second, EPA projected what volumes of imported sugarcane ethanol, advanced compressed natural gas, advanced liquefied natural gas, heating oil, naphtha, advanced domestic ethanol and advanced biodiesel were reasonably attainable. Third, adding these together EPA determined that the "reasonably attainable" level was almost 200 million gallons less "than the 2.8 billion gallons" needed "to meet the advanced requirement were we to exercise our maximum discretion under the cellulosic authority." *Id.* at 63,723, 63,728. EPA then interjected a (new) fourth inquiry: whether 2.8 billion gallons was "attainable." *Id.* at 63,724.

For the first time in RFS rulemakings, EPA set volumes that it conceded were not "reasonably attainable." 83 Fed. Reg. at 63,721. In past rulemakings, EPA evaluated whether exercise of the cellulosic waiver would result in a "reasonably attainable" advanced-biofuel volume. *E.g.*, 82 Fed. Reg. 58,486, 58,506 (Dec. 12, 2017). In EPA's view, "reasonably attainable" volumes "are not likely to lead to feedstock/fuel diversions," which are

counterproductive to RFS greenhouse-gas-reduction goals. *Id.*; *see also* 42 U.S.C. § 7545(o)(2)(A)(i). By contrast, EPA previously concluded that a "maximum achievable" level would not be appropriate to set as a target, noting (without defining it) that it "may be relevant to our consideration of whether to exercise the general waiver authority on the basis of inadequate domestic supply." 83 Fed. Reg. at 63,721 n.83.

In 2019, however, the maximum cellulosic waiver could not achieve "reasonably attainable" volumes, so EPA created a new classification—somewhere between "reasonably attainable" and "maximum achievable"—to nevertheless employ only the cellulosic waiver. Calling such volume requirements "attainable," EPA admitted they *were* "likely [to] result in market disruption," "higher costs," and "feedstock and/or foreign advanced biofuel diversion." JA_[RTC.61]; 83 Fed. Reg. at 63,721. Moreover, use of the carryover RIN bank—unused RINs generated in the prior compliance year—may be required to meet any production shortfall. 83 Fed. Reg. at 63,730. This directly contradicts EPA's concern that "there remains considerable uncertainty surrounding the number of carryover RINs … available for use in 2019," and its resulting decision *not* to "intentionally draw down" the RIN bank. *Id.* at 63,709-10. EPA acknowledged that the only way to achieve "reasonably attainable" volumes was through the

"general waiver authority," but refused to consider that option, *see id.* at 63,730 n.128, creating instead a new category—"attainable" volumes—that did not reach the (still undefined) "maximum achievable" level it conceded may require waiver consideration. EPA thus avoided considering "an important aspect of the problem." *State Farm*, 463 U.S. at 43.

It was also improper for EPA to change its standard from "reasonably attainable" to merely "attainable" without adequate explanation. Commenters explained that EPA's advanced-biofuel projections should not include foreign-produced renewable fuels, JA_[AFPM.Comments.15-16], that they would "cause economic harm … without delivering environmental benefits,"

JA_[International.Council.on.Clean.Transportation.Comments.2.(EPA-HQ-OAR-2018-0167-0531)], and that EPA should not set advanced-biofuel volumes at a level triggering a RIN-bank drawdown, JA_[Valero.Comments.5]. These comments all suggested that EPA should reconsider what it deemed "reasonably attainable," much less "attainable." JA_[AFPM.Comments.18-20]; JA_[Valero.Comments.2-5.(EPA-HQ-OAR-2018-0167-1041)]; JA_[Monroe.Comments.25-31]. EPA provided no cogent response.

EPA never explained why it substituted a more onerous "attainable" standard, despite the corresponding negative consequences it recognized, or how incentivizing feedstock diversions, higher costs, and market disruption accords with EPA's statutory duties. This failure to explain results in arbitrary decisionmaking. *Encino*, 136 S. Ct. at 2125. EPA's decision to require obligated parties to meet a level of advanced biofuel it conceded was not "reasonably attainable" was arbitrary and capricious.[10]

II. EPA's Faulty Volume-Estimate Methodologies Undermine Its Ultimate Conclusions.

EPA's analysis of renewable-fuel volumes undergirds the entire 2019 Rule, including EPA's decision not to employ its general waiver authority. But that analysis is faulty, particularly with respect to sugarcane ethanol and gasoline-ethanol blends. The Rule must be vacated.

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[10] Petitioners also commented that (1) the statutory term "inadequate *domestic* supply" must exclude foreign imported fuel, and (2) for a severe-economic-harm waiver, the RFS program need not be the *sole* cause of the economic harm. *See, e.g.*, JA_, _[Monroe.Comments.8-11, 26-31]. EPA declined to take up these interpretive questions in the 2019 Rule. JA_, _[RTC.10-11, 17]. This Court subsequently addressed these issues as they pertained to the 2018 Rule. *See AFPM*, 2019 WL 4229073, at *10, *13. Because further review of the *AFPM* opinion remains possible, petitioners respectfully preserve these arguments for further review. Moreover, because these questions may arise again in a future rulemaking, petitioners or others may again challenge EPA's interpretations.

A. EPA overestimated available sugarcane ethanol.

EPA's advanced-biofuel calculation overestimates sugarcane ethanol. The following chart demonstrates EPA's chronic history of overestimation:

Imported Sugarcane Ethanol (million gallons)	2014	2015	2016	2017	2018
EPA "reasonably attainable" volumes	200	200	200	200	100
Actual volumes	65	89	34	77	37 (through October 2018)[11]

Despite this history, in the 2019 Rule, EPA maintains that 100 million gallons of sugarcane ethanol is "reasonably attainable." *Id.* at 63,722.

This Court upheld EPA's predictions for 2017 and 2018. But in *Alon*, this Court acknowledged "[t]here is some force to petitioners' objection to EPA's adherence to an estimate well over double the actual imports [of sugarcane ethanol] in the three preceding years." *Alon*, 936 F.3d at 663. Although for 2017 the Court could not "say that one more year of low imports made it arbitrary for EPA to adhere to that same projection for 2017," *id.*, the record for the 2019 Rule evidences not one, but *three* more

[11] 83 Fed. Reg. at 63,721 n.87, 63,722.

years of insufficient imports. JA_[AFPM.Comments.15]. After five years where actual volumes have never exceeded 45% of EPA's estimate, EPA is no longer predicting, it is wishing with its eyes closed.

B. EPA's total-renewable-fuel volume lacks record support.

Over 70 percent of the annual RFS requirements depend on gasoline-ethanol blends. *See* 83 Fed. Reg. at 63,705. The 2019 Rule recognized that detailed analysis of availability of fuels such as advanced biodiesel and renewable diesel is "an important benchmark" for EPA's consideration of waivers, 83 Fed. Reg. at 63,723, and devoted almost 12 pages to such analysis, 83 Fed. Reg. at 63,719-30.

But when it came to ethanol, in less than one page EPA resorted to an "assumption that the average ethanol concentration would be at least 10.[13] percent" as a "surrogate for attempting to separately estimate volumes of E0, E15, and E85." 83 Fed. Reg. at 63,731; JA_[Updated.Market.Impacts.of.Biofuels.in.2019.(EPA-HQ-OAR-2018-0167-1330)] (assuming 10.13 percent). In using this "assumption" as a "surrogate," EPA's conclusion regarding total renewable fuel is doubly divorced from reality. For example, EPA claims that because the average ethanol concentration in gasoline reached 10.13 percent in 2017, this same concentration can be reached in 2019.

JA_[Updated.Market.Impacts.of.Biofuels.in.2019.5]. EPA made this initial assumption in the Proposed Rule presuming gasoline consumption was rising, without any supporting analysis. JA_[Market.Impacts.of.Biofuels.in.2019.5]. Worse, for the Final Rule, faced with updated data predicting *falling* gasoline consumption, EPA made no attempt to explain why this assumption remained reasonable, particularly where its renewable-fuel mandates are *rising*. JA_[Updated.Market.Impacts.of.Biofuels.in.2019.5].

EPA declined to review factors affecting the production, distribution, use, and cost of gasoline-ethanol blends, because doing so "would contain a high degree of uncertainty." 83 Fed. Reg. at 63,731. EPA's position that a refined analysis is somehow less certain than a high-level "assumption" of an average ethanol consumption that omits any specific factors affecting supply and demand defies logic and EPA's approach to setting advanced-biofuel and cellulosic-biofuel standards. It also ignores that the market for gasoline-ethanol blends is not fungible. As AFPM has pointed out, only certain vehicles can use E85, JA_[AFPM.Comments.10], E15 is approved for only part of the light duty market, JA_[AFPM.Comments.10], and E0 is still used in a large segment of the market, including marine engines, JA_[AFPM.Comments.Att.2.15-17].

For the largest category of renewable fuel used to satisfy RFS requirements–gasoline-ethanol blends—no detailed analysis of "reasonably attainable" (much less "attainable") levels was performed. In contrast, for far smaller components of the RFS (*e.g.*, compressed natural gas and liquid natural gas derived from biogas, heating oil, naphtha, and domestic advanced ethanol), representing merely 0.03 percent of annual requirements, *see* 83 Fed. Reg. at 63,717, Tbl.III.D.1-4, EPA extensively examined feedstock and production issues. EPA also examined the ability of the market to use (or afford) advanced biofuels. *Id.* at 63,730, 63,731-34. And yet, after all that analysis, EPA determined its desired advanced-biofuel volume was not "reasonably attainable." True, EPA may not have a "free-floating obligation" to estimate reasonably attainable volumes of ethanol, *AFPM*, 2019 WL 4229073, at *13, but having acknowledged the inability of some fuels to reasonably attain EPA's volumes, it was arbitrary for EPA to summarily conclude that *no* gasoline-ethanol blend analysis was necessary. 83 Fed. Reg. at 63,731. EPA's sole reliance on past performance is inconsistent and lacking any explanation, and thus is arbitrary and capricious. *Bus. Roundtable*, 647 F.3d at 1153.

This Court determined that EPA's analysis in the 2018 Rule regarding attainable ethanol production sufficed to support its decision not to use

general waivers. *AFPM,* 2019 WL 4229073, at *14. But the 2019 Rule increases total-renewable-fuel requirements by 630 million gallons over the 2018 Rule without adequately explaining how such an increase could be accommodated given the factors it identified as primary constraints on ethanol consumption. *Compare* JA_[Market.Impacts.of.Biofuels.in.2018.(EPA-HQ-OAR-2018-0167-0024)], *with* JA_[Updated.Market.Impacts.of.Biofuels.in.2019.(EPA-HQ-OAR-2018-0167-1330)]. These constraints include the volume of ethanol that can be blended into gasoline as E10 (typically referred to as the E10 blendwall), the number of retail stations that offer higher ethanol blends such as E15 and E85 and the number of vehicles that can legally and practically use those fuels, the pricing of different fuel blends, and the supply of gasoline without ethanol (E0). JA_[Updated.Market.Impacts.of.Biofuels.in.2019.5]. AFPM's and others' comments on these issues merit evaluation and response. *Del. Dep't*, 785 F.3d at 16.

In November 2016 EPA projected 1,892 stations offering E15 and 4,535 E85 suppliers by 2017. JA_[Market.Impacts.of.Biofuels.in.2018.4.n.5]. When this proved wrong, EPA then predicted in June 2018 that there was "good reason to believe

that the projections made for 2017 will be met by the end of 2018." JA_[Market.Impacts.of.Biofuels.in.2019.4.(EPA-HQ-OAR-2018-0167-0025)]. But again, EPA was wrong. Five months later, only 1,274 E15 stations were operating, and there were only 3,599 E85 suppliers. JA_[Updated.Market.Impacts.of.Biofuels.in.2019.3]. This level is just slightly above the number of stations and suppliers existing two years prior. JA_[Market.Impacts.of.Biofuels.in.2018.3-4] (1,046 E15 stations and 3,322 E85 suppliers as of September 2017).

Having identified specific factors that act as "primary constraints" on ethanol use, EPA must analyze such constraints in a manner at least comparable to its examination of constraints facing production and use of other renewable fuels. To substantially increase the volume requirements for total renewable fuel without addressing this "important aspect of the problem" was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Finally, EPA pointed to "Possible Volume Scenarios" that *could* add up to its preferred total-renewable-fuel volume. Strikingly, nine of the twelve figures EPA chooses for advanced biodiesel and renewable diesel exceed what EPA determined would be reasonably attainable, with six of those exceeding even what EPA determined would be "attainable." And six of EPA's scenarios presume a sugarcane-ethanol level *three to five times*

what EPA determined would be reasonably attainable. JA_[Updated.Market.Impacts.of.Biofuels.in.2019.12]. Furthermore, although EPA's "assumption" for purposes of its total-renewable-fuel estimate was that ethanol could achieve a 10.13% pool-wide concentration, EPA assumed between 10.06% and *10.19%* ethanol content in its "possible" scenarios, without explanation. JA_[Updated.Market.Impacts.of.Biofuels.in.2019] (Table C-1). Those "possible" numbers are completely capricious, not rescued by EPA's subsequent disclaimer, and not entitled to deference. JA_[Updated.Market.Impacts.of.Biofuels.in.2019.13] (acknowledging that the scenarios "cannot be treated as EPA's views on the only, or even most likely, ways that the market may respond to the 2019 proposed volume requirements").

The limitations of EPA's own analysis demonstrate that EPA cannot reliably project whether actual pool-wide ethanol consumption would need to be 10.06, 10.13, 10.19 percent, or a substantially higher concentration to meet the volumes in the 2019 Rule. An analysis that presumes compliance first and then posits "illustrative" methods to achieve compliance—many of which do not even comport with EPA's own analysis of other fuels—fails to

demonstrate "a rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43.

III. EPA Abused Its Discretion and Violated the Statute in Treating the Point of Obligation as Beyond the Scope of the 2019 Rule.

A "required element" of the annual RFS rulemaking is that annual obligations "be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. § 7545(o)(3)(B)(ii). To date, EPA has obligated refiners and importers, but never blenders. In the 2019 Rule, EPA abused its discretion by treating comments requesting that EPA adjust the point of obligation as beyond the scope of the Rule.[12]

"EPA's determination as to whether it is 'appropriate' to reconsider the point of obligation in the context of an annual volumetric rulemaking is reviewable for abuse of discretion." *Alon*, 936 F.3d at 659. *Alon* held that in the 2017 Rule, EPA did not arbitrarily decline to consider the issue, because EPA substituted a collateral proceeding to assess stakeholder comments. *Alon* also upheld EPA's denial of petitions to reconsider the point of obligation. *Id.* In reviewing the 2018 Rule, which issued contemporaneously with that denial, *AFPM* held that *Alon* governed

[12] *See supra*, note 2.

consideration of the point-of-obligation issue. *AFPM*, 2019 WL 4229073, at *16.

The 2019 Rule's record, however, presented information that neither *Alon* nor *AFPM* considered regarding events that post-dated the 2018 Rule. Rather than consider important developments that undermined assumptions foundational to EPA's prior decisions, EPA capriciously disregarded this information. These developments were not only relevant to consideration of the severe-economic-harm waiver, *supra* § I.A.1-3, but also compelled EPA to respond to comments and correct course by revising the obligated parties for 2019. EPA instead summarily treated this issue as "beyond the scope" of the rulemaking and disregarded relevant comments. JA_[RTC.188].

The linchpin of EPA's past refusal to reconsider the point of obligation (and the basis for upholding that refusal) was the theory that obligating refiners but not blenders caused no harm because refiners "'recover the cost of the RINs they purchase' by passing that cost along" to their customers. *Alon*, 936 F.3d at 649 (quoting Denial of Petitions 25). As discussed above in § I.A.1-3, by the time of the 2019 Rule, continued trust in that theory was clearly irrational. Because the record precluded continued reliance on the pass-through theory, EPA abused its discretion

by disregarding comments demonstrating that the definition of obligated parties was not "appropriate" for the 2019 Rule, that significant harm could be alleviated by obligating blenders, and that aligning the RFS obligation with the means of compliance would help ensure that renewable-fuel volumes are met. *See supra*, note 2.

By the time of the final 2019 Rule, EPA had determined that RIN obligations *had caused economic hardship* to approximately 25% of refineries nationwide and therefore exempted those refineries from RFS obligations pursuant to 42 U.S.C. § 7545(o)(9)(B). 83 Fed. Reg. at 63,743 and n.179.[13] In doing so, EPA acknowledged that RFS compliance costs could *not* simply be "passed through," but rather had caused substantial economic harm to a significant number of refiners. *See supra* Argument § I.A.1.

Contemporaneously, refiner PES, responsible for nearly 30% of East Coast refining capacity, sought bankruptcy protection. JA_[Valero.Comments.(EPA-HQ-OAR-2018-0167-1041-Att.I)]. EPA then sought court approval of a settlement waiving hundreds of millions of RIN obligations. EPA represented to the bankruptcy court that absent this

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[13] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

waiver, RFS obligations would cause "serious negative financial … consequences'" for PES. *In re PES Holdings*, LLC, No. 18-10122(KG) (Bankr. D. Del. Mar. 30, 2018), Dkt. #347, at 14; JA_[PES.Comments.3.(EPA-HQ-OAR-2018-0167-1274)]; 83 Fed. Reg. at 63,709 n.30.

EPA's actions in the spring of 2018 not only disproved its earlier theories about RIN-cost pass-through but also exacerbated harm caused by misalignment of the point of obligation. The pass-through theory assumed that RIN obligations are like a tax, shared equally across the refining industry. *Alon*, 936 F.3d at 651 (citing Denial of Petitions 21). In waiving substantial RIN obligations for some refiners, however, EPA created competitive disadvantages for other merchant refiners, which thereafter shouldered RIN costs not imposed on their competitors. Misalignment also injured small retailers, who are undercut by large retailers and threatened with closure.

Because the PES bankruptcy and settlement and announcement of small-refinery exemptions post-dated the 2018 Rule and denial of petitions to reconsider the point of obligation, *Alon* declined to consider this information. *Alon*, 936 F.3d at 650. By the time of the 2019 Rule, however, EPA was well aware of these events and arbitrarily ignored them.

The underlying record also disproves another basis for EPA's prior resistance to reexamining the point of obligation. In the past, EPA baldly asserted that higher RIN prices correlated to "getting ever-greater volumes of renewable fuel into the transportation fuel pool—the explicit goal" of the RFS Program. *Id.* at 652 (citing Denial of Petitions 19). For the 2019 Rule, however, concrete data showed that RIN prices *do not* correlate to increased rates of renewable-fuel blending in the nation's transportation fuel. JA_[PBF.Comments.3.(EPA-HQ-OAR-2018-0167-1197)] (graph). To the contrary, throughout dramatic swings in RIN prices, the blend rate hovered consistently around 10%—at the E10 blendwall, suggesting that the blendwall continued to constrain renewable-fuel blending. Renewable-fuel consumption neither increased appreciably with rising RIN prices, nor decreased when RIN prices dropped. *Id.*

In addition to being an abuse of discretion, EPA's disregard of comments regarding the point of obligation violated mandatory statutory duties. The RFS statute requires EPA to conduct "periodic reviews" of the "feasibility of achieving compliance" with annual volume requirements and the impacts of the requirements on "each individual and entity [affected]" by the RFS. 42 U.S.C. § 7545(o)(11). EPA claims that its annual rulemakings satisfy this obligation. *See Valero Energy Corp. v. EPA*, 972 F.3d 532, 535

(D.C. Cir. 2019) (citing EPA, Periodic Reviews for the Renewable Fuel Standard Program (Nov. 2017)). Relatedly, *Alon* noted that the periodic-review provision "would appear to require EPA to reconsider the point of obligation if it concluded that its placement was obstructing compliance." 936 F.3d at 658-59. The record here required EPA to include in its periodic review consideration of how excluding blenders from annual obligations significantly harms both refiners and many retailers while impeding compliance with annual volume targets.[14]

EPA promulgated the 2019 Rule without considering negative impacts on small retailers and the fuel-distribution industry that have triggered great change and jeopardize the RFS Program. Small- and mid-sized retailers sell transportation fuel to consumers in competition with large blender-retailers, which profit from RIN sales and sell fuel at a loss. *Id.* at 650 (noting that blenders and integrated refiners "sell the finished transportation fuel at a loss, but maintain profitability through RIN sales"). By obligating refiners but exempting blenders, the current RFS Program structure has disrupted the fuel retail market, allowing large retailers to

[14] *See supra*, note 3.

undercut small and mid-size retailers.[15] This imbalance undermines small retailers' ability to offer higher ethanol-gasoline blends and pushes them to offer E0 (for which consumers are willing to pay a premium).[16] Because small and mid-sized fuel retailers comprise the lion's share of the fuel distribution market in the United States, this evidence compelled EPA to conduct the statutorily-required "periodic review" to expand the definition of obligated parties and alleviate destructive impacts on small fuel retailers, thus furthering compliance. JA_[SRC.Comments.(EPA-HQ-OAR-2018-0167-1149.Vol.4)]; JA_[Small.Business.Admin.Comments.(EPA-HQ-OAR-2018-0775-0762)].[17]

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[15] *Id.*

[16] 80 Fed. Reg. 77,420, 77,460 (Dec. 14, 2015); *see also* JA_[PES.Comments.4.n.10], JA_[Valero.Comments.3-4].

[17] EPA previously acknowledged that the market's failure to meet statutorily mandated volumes stems, at least in part, from (1) bottlenecks at the retailer link in the supply chain for higher-level blends, 80 Fed. Reg. at 77,460; 82 Fed. Reg. 34,206, 34,230 (July 21, 2017); and (2) failures of RIN value to pass through to consumers because the market for higher-blend fuels is inefficient. 82 Fed. Reg. at 34,230; *see also* JA_[Burkholder.Study.1.(EPA-HQ-OAR-0167-1283.Att.8)]; JA_[Denial.of.Petitions.51]. EPA also knows that the noncompetitive market for higher-blend fuels disproportionately favors large fuel retailers, who are much more likely to be in a position to offer higher-blend fuels and, thus, reap windfall profits from RIN sales. JA_[Denial.of.Petitions.56]. As discussed in § V below, EPA could take steps to study and ameliorate this situation, through the regulatory

Continued...

Finally, the RFS statute expressly requires EPA to reconsider the point of obligation annually. A "required element" of annual RFS rulemakings is to make obligations "applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. §7545(o)(3)(B)(ii)(I). Judge Williams's opinion concurring in the *Alon* judgment explained at length why plain language, statutory construction tools, and administrative-law principles establish that the statute unambiguously imposes this annual duty on EPA, thereby depriving EPA of legal authority to place the point of obligation beyond the scope of any annual rulemaking. *Alon*, 936 F.3d at 669-76 (Williams, J., concurring). Accordingly, even if the unique circumstances did not separately require point-of-obligation consideration for the 2019 Rule, the statute nonetheless would require it. Petitioners recognize, of course, that the *Alon* majority construed the RFS statute not to impose this annual duty, *id*. at 657, but Judge Williams correctly deemed that construction "utterly implausible," and "extend[ing] EPA the type of 'reflexive' deference that the Supreme Court has recently criticized." *Id*. at 670 (citing *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)). Petitioners

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flexibility analyses mandated under 5 U.S.C. §§ 603 and 604 but has instead decided to write off those small businesses as unimportant. *Id*.

acknowledge that the *Alon* majority binds the panel absent intervening case law, but nonetheless press and preserve their statutory argument.

IV. EPA Abused Its Discretion by Refusing to Consider That Treatment of Exports Is Closely Connected to Determining Achievable Volume Requirements.

Commenters on the 2019 Rule asked EPA to allow RINs generated from US-produced renewable fuel that is later exported to be used for RFS-compliance purposes. *See* JA_[Valero.Comments.19-25]; JA_[Monroe.Energy.Comments.38-39]; JA_[PBF.Comments.13)].[18] Rather than address this issue, EPA unilaterally declared these comments "beyond the scope of this rulemaking." JA_[RTC.188].

EPA improperly refused to "engage the arguments raised before it" regarding treatment of domestically-produced, exported renewable fuel. *Del. Dep't*, 785 F.3d at 11; s*ee also Petroleum Commc'ns, Inc. v. FCC*, 22

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[18] RINs attached to exported renewable fuel currently cannot be used to comply with annual RFS obligations but instead incur a matching Export Renewable Volume Obligation that requires the RIN to be retired and thereby negates its value. 40 C.F.R. § 80.1430; JA_, _[Valero.Comments.21, Att.M.2]. In contrast, importing foreign-produced renewable fuel generates RINs that can be separated and used for RFS compliance, as does blending domestically-produced renewable fuel that is consumed in the United States. *See* JA_, _[Valero.Comments.21, Att.M.2]. Commenters urged EPA to correct this imbalance by allowing domestically-produced renewable fuel that is exported for transportation use to generate RINs for RFS compliance. *See* JA_[Valero.Comments.18-25]; JA_[Monroe.Comments.38-39]; JA_[PBF.Comments.13].

F.3d 1164, 1173 (D.C. Cir. 1994) (ruling arbitrary and capricious agency "distort[ion]" of the record to find issue raised beyond the scope). This was arbitrary and capricious. *See State Farm*, 463 U.S. at 42-43. In *AFPM*, the Court relied on exclusionary language in the 2018 proposed rule to conclude that EPA was not arbitrary in disregarding the exports issue. *AFPM*, 2019 WL 4229073, at *15. Although petitioners reserve further challenge to that decision, the record here is materially different. The proposed rule for 2019 does not include the exclusionary language cited in *AFPM*; for 2019, EPA did not "unambiguously communicate[] its decision not to solicit comments" on this issue. *Id.* EPA invited comment on "all aspects" of the proposal and "any aspect of this rulemaking," as well as specific topics identified in the proposed rule. 83 Fed. Reg. at 32,057-58.

Further, comments on the export issue were explicitly linked to the subject matter of the 2019 Rule: determining reasonably-attainable annual volumes. Comments explained why "allowing RINs for exported renewable fuel" could "increase[] … production of clean renewable fuels." JA_[Valero.Comments.22]. Absent attention to exports, RFS goals would be compromised. Commenters provided expert analysis concluding that "continued growth in domestic ethanol production depends in large part on appropriately incentivizing exports of ethanol." JA_[Valero.Comments.22]

(citing David Korotney, EPA, *Market Impacts of Biofuels in 2019* (June 26, 2018) (EPA-HQ-OAR-2018-0167-0025)); JA_[Valero.Comments.22.n.101] (citing Energy Ventures Analysis Comments on PES Bankruptcy Settlement 4, 5 (EPA-HQ-OAR-2018-0167-1041-Att.J)). Commenters cited a Bipartisan Policy Center's Energy Project recommendation that EPA consider this issue to allow "the export of biofuels [to] meaningfully contribute to satisfying the RFS mandates." JA_[Valero.Comments.21.n.93] (citing Att. N 30).

Comments thus demonstrated that by penalizing domestically-produced renewable fuels that must be exported when domestic demand is insufficient, EPA was constraining the very growth it meant to incentivize through setting annual volumes. JA_[Valero.Comments.Att.M]. In contrast, allowing RINs for exports would support expanded markets for domestic ethanol, and the "increased exports would result in a net increase in ethanol demand." JA_[Monroe.Comments.38] (quoting EPA-HQ-OAR-2018-0167-0622-Ex.E 2); JA_[Valero.Comments.22] (citing Att. J. 4, 5). Expert analysis by CRA determined that, if RINs associated with exported volumes of renewable fuel could be retired for compliance purposes, "[b]y 2020, the RIN value for exporters could increase exports by 1.2 billion gallons." JA_[Monroe.Comments.38-39]. Consequently, creating

obligations for exported ethanol directly impacts the supply of RINs available for compliance and therefore is centrally relevant to volume-setting concerns of the Proposed Rule.

Additionally, comments regarding ethanol exports responded to other issues on which EPA solicited input, including RIN-market reforms, use of waivers, and maintenance of a sufficient RIN bank. *See* 83 Fed. Reg. at 32,027-39, 32,048. EPA emphasized the need for an "adequate RIN bank" to "make the RIN market liquid" and allow the RFS Program to "function[] best." 83 Fed. Reg. at 32,029.

Responsive comments indicated that with renewable exports excluded, EPA's proposed volumes were not reasonably attainable and would cause substantial economic harm to obligated parties. JA_[Valero.Comments.24]; JA_[PBF.Comments.13]. Comments specifically noted concerns with the proposed implied conventional fuel mandate of 15 billion gallons, which would require achieving an average ethanol content of 10.45%—thereby breaching the "E10 blendwall." JA_[Valero.Comments.3-4].

Comments indicated that EPA could advance energy security, increase renewable-fuel supply, and ensure a stable RIN market by

adjusting treatment of exports. *See* JA_, _[Valero.Comments.3, 21-24]; JA_[Monroe.Energy.Comments.38-39].

Additionally, commenters explained that renewable-fuel exports reform provided an alternative to invoking general waivers to relieve economic harm. JA_[Valero.Comments.3]. As Valero explained, absent "market correction and an adequate RIN bank," EPA's proposed volumes would lead to severe economic harm necessitating use of general waivers. JA_[Valero.Comments.7]. Crediting renewable-fuel export RINs would achieve a necessary market correction and shore up the RIN bank. JA_[Valero.Comments.3]; JA_[Valero.Comments.23-24]; JA_[Monroe.Energy.Comments.39]. As ethanol exports increased, associated RINs would enter the market, increasing liquidity and ameliorating potential RIN-price spikes caused by constriction of renewable blending capacity. JA_[Valero.Comments.24].

These comments showed that EPA's proposed volumes were unattainable if coupled with a restrictive policy regarding RINs for exported volumes. Equalizing treatment of exports presented a "significant alternative[] to the course [EPA] ultimately cho[se]," which EPA was required to consider for its decision "[t]o be regarded as rational." *Del.*

Dep't, 785 F.3d at 11. Accordingly, this issue independently requires remand.

V. EPA Failed to Comply with the Small Business Regulatory Enforcement Fairness Act.

The record disproved EPA's theory that obligated parties pass through compliance costs to customers. *Supra* § I.A.3. Likewise, EPA's conclusion that, by virtue of pass-through, small retailers are not harmed by the RFS in the 2019 Rule is arbitrary and capricious. Accordingly, EPA's failure to conduct a regulatory flexibility analysis regarding impacts of the 2019 Rule on small fuel retailers violates the Regulatory Flexibility Act. *See* 5 U.S.C. §§ 601, *et seq*.

Congress passed the Regulatory Flexibility Act to "mandate that [agencies] consider regulatory alternatives that still achieve statutory purposes, while minimizing the impacts on small entities." *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* 7, SBA.GOV (Aug. 2017). The Regulatory Flexibility Act requires either initial and final regulatory flexibility analyses describing the impacts of a rule on small business and steps taken to minimize such burdens, *see* 5 U.S.C. §§ 603-04, or certification that a rule will not have a significant economic impact on a substantial number of small entities, *see id*. § 605(b). EPA's failure to consider whether its regulations disproportionately burden

small retailers violates these requirements and independently warrants relief from the 2019 Rule.

The RFS Program generally, and the 2019 Rule specifically, regulates fuel retailers. As distributors, retailers are subject to RFS "compliance provisions." 42 U.S.C. § 7545(o)(2)(A)(iii). From 2007 to 2017, EPA acknowledged that "[o]ther fuel dealers" were "entities likely to be regulated by this action."[19] Following Small Retailers Coalition's Regulatory Flexibility Act challenges, however, EPA began insisting in the 2019 Rule that "[o]ther fuel dealers" are merely "*affected*" by EPA's final action. 83 Fed. Reg. at 63,704. EPA's changed terminology is unjustified, and therefore arbitrary and capricious.

The Regulatory Flexibility Act required EPA to analyze its impact on small fuel retailers as regulated entities or, at minimum, to properly certify no significant economic impact would inflict a substantial number of them. 5 U.S.C. § 604(a). EPA did neither. Although EPA asserted that the 2019 Rule will not significantly impact a substantial number of small *entities*, 83 Fed. Reg. at 32,057, EPA focused exclusively on small *refiners*, 83 Fed. Reg.

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[19] *E.g.*, 72 Fed. Reg. at 23,900; 82 Fed. Reg. at 58,486.

at 63,742-43. EPA's no-significant-impact conclusion therefore did not obviate the need for a final regulatory flexibility analysis.

The remedy for Regulatory Flexibility Act violations typically involves remanding the challenged rule and deferring its enforcement against small entities. 5 U.S.C. § 611(a)(4). EPA never considered the impact of the current RIN structure on small fuel retailers—a substantial deficiency since the RFS Program contains no "safety valve" for small retailers akin to the exemptions available to small refiners. Therefore, the Court should vacate the 2019 Rule until EPA meets its obligations.

Conclusion

For the above-stated reasons, the Court should vacate and remand the 2019 Rule.

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because this brief contains 9,029 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

/s/ Robert J. Meyers
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Dated: October 4, 2019

Certificate of Service

I hereby certify that on October 4, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Robert J. Meyers
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