No. 19-____

IN THE

Supreme Court of the United States

VALERO ENERGY CORPORATION AND
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

VOLUME I OF II

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QUESTIONS PRESENTED

The Clean Air Act's Renewable Fuel Standard program requires EPA to undertake annual notice-and-comment rulemaking to determine a "renewable fuel obligation" for the nation's transportation-fuel supply. The first of three annual "[r]equired elements" is to determine the point of obligation—*i.e.*, to ensure that the obligation "shall be applicable to refineries, blenders, and importers, as appropriate." 42 U.S.C. §7545(*o*)(3)(B)(ii)(I). EPA admits that it initially placed the point of obligation on refineries and importers, but not blenders, for reasons of administrative convenience. EPA has repeatedly refused to reexamine that placement in annual rulemaking, and it denied petitions for rulemaking seeking reconsideration outside the statutorily-mandated annual assessment.

The questions presented are:

1. Whether the requirement that EPA "shall" make a "calendar year" determination of the "appropriate" point of obligation requires EPA to consider in each annual rule whether the point of obligation remains appropriate.

2. Whether EPA can evade the annual duty by partitioning the point of obligation into a one-time collateral proceeding that ignores key evidence, relies primarily on the agency's own convenience, and claims more deference from a reviewing court than an annual rule would receive.

PARTIES TO THE PROCEEDINGS BELOW

This petition addresses three cases decided in the U.S. Court of Appeals for the District of Columbia Circuit:

- *Alon Refining Krotz Springs, Inc.* v. *EPA* (No. 16-1052) ("*Alon*");
- *Coffeyville Resources Refining & Marketing LLC* v. *EPA* (No. 17-1044) ("*Coffeyville*"); and
- *American Fuel & Petrochemical Manufacturers* v. *EPA* (No. 17-1258) ("*AFPM*").

The same three-judge panel heard argument in *Alon* and *Coffeyville* together, and its opinion and judgment cover both cases. In all three cases, the D.C. Circuit received and consolidated multiple petitions for review.

Petitioners Valero Energy Corporation ("Valero") and American Fuel & Petrochemical Manufacturers ("AFPM") were petitioners in all three cases. Valero was the petitioner in Nos. 16-1055 and 17-1259 (*Alon*), 17-1047 (*Coffeyville*), and 18-1027 (*AFPM*). AFPM was the petitioner in No. 18-1029 (*Alon*) and was the petitioner and intervenor in Nos. 17-1051 (*Coffeyville*) and 17-1258 (*AFPM*).

Respondent EPA was the respondent in all three cases below.

In addition, the following were parties to proceedings in the court of appeals but are not parties to this petition:

- Alon Refining Krotz Springs, Inc.
- American Petroleum Institute[d]
- American Refining Group, Inc.
- Biotechnology Innovation Organization[e]
- Calumet Specialty Products Partners, L.P.
- Coffeyville Resources Refining & Marketing, LLC
- Ergon Refining, Inc.
- Ergon-West Virginia, Inc.
- Growth Energy[d]

- Gulf Restoration Network[c]
- Hunt Refining Company
- Lion Oil Company
- Monroe Energy, LLC[b]
- National Biodiesel Board[g]
- Warren R. Neufeld[a]
- Philadelphia Energy Solutions Refining & Marketing LLC[a]
- Placid Refining Company, LLC
- Renewable Fuels Association[f]
- Sierra Club[c]
- Small Retailers Coalition[f]
- U.S. Oil & Refining Company
- Wynnewood Refining Company, LLC
- Wyoming Refining Company

(a) refers to petitioners in only *Alon*

(b) refers to a petitioner in only *Coffeyville* who was also an intervenor in *Alon*

(c) refers to petitioners in only *AFPM*

(d) refers to intervenors in all three cases

(e) refers to an intervenor in only *Coffeyville*

(f) refers to intervenors in only *AFPM*

(g) refers to a petitioner in both *Coffeyville* and *AFPM*, who was also an intervenor in *AFPM*

Parties not otherwise designated were petitioners in *Alon* and were petitioners and intervenors in *Coffeyville*.

STATEMENT OF RELATED PROCEEDINGS

This petition addresses three cases, each of which the D.C. Circuit decided as a consolidated case. The cases that the D.C. Circuit consolidated, but which are not at issue in this petition, are listed below, with their D.C. Circuit docket numbers.

In *Alon* and *Coffeyville*, the D.C. Circuit entered a single judgment on August 30, 2019 that decided:

- *Valero Energy Corporation* v. *EPA*, No. 16-1055;
- *Neufeld* v. *EPA*, No. 17-1255;
- *Valero Energy Corporation* v. *EPA*, No. 17-1259;
- *Alon Refining Krotz Springs, Inc.* v. *EPA*, No. 18-1021;
- *Coffeyville Resources Refining & Marketing, LLC* v. *EPA*, No. 18-1024;
- *Philadelphia Energy Solutions Refining & Marketing LLC* v. *EPA*, No. 18-1025;
- *American Fuel & Petrochemical Manufacturers* v. *EPA*, No. 18-1029;
- *Alon Refining Krotz Springs, Inc.* v. *EPA*, No. 17-1045;
- *Valero Energy Corporation* v. *EPA*, No. 17-1047;
- *Monroe Energy, LLC* v. *EPA*, No. 17-1049;
- *American Fuel & Petrochemical Manufacturers* v. *EPA*, No. 17-1051; and
- *National Biodiesel Board* v. *EPA*, No. 17-1052.

In *AFPM*, the D.C. Circuit entered a judgment on September 6, 2019 that decided:

- *Valero Energy Corporation* v. *EPA*, No. 18-1027;
- *Sierra Club and Gulf Restoration Network* v. *EPA*, No. 18-1040; and
- *National Biodiesel Board* v. *EPA*, No. 18-1041.

The cases listed above are those directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner Valero Energy Corporation states that it has no parent corporation and that no publicly held company owns a 10% or greater interest in its stock. Petitioner American Fuel & Petrochemical Manufacturers is a national trade association that has no parent corporation and in which no publicly held company has a 10% or greater ownership interest.

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EPA, *Renewable Fuel Standard Program - Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes: Response to Comments*, EPA-420-R-19-018 (Dec. 2019) 14

EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions 30

U.S. Energy Information Administration, *Refinery capacity data by individual refinery as of January 1, 2019*, https://www.eia.gov/petroleum/refinerycapacity/refcap19.xls 30

OTHER AUTHORITIES

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 17

Congressional Research Service, *The Renewable Fuel Standard (RFS): An Overview* (Sept. 4, 2019) 20

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Laura Blewitt, *Oil Refiners Cry Foul as 'RINsanity' Returns Amid Margin Squeeze*, Bloomberg News (Aug. 4, 2016, 11:01 PM), https://www.bloomberg.com/news/articles/2016-08-04/oil-refiners-cry-foul-as-rinsanity-returns-amid-margin-squeeze 32

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OPINIONS BELOW

The opinion of the court of appeals denying the petitions for review in *Alon* and *Coffeyville* (App., *infra*, 1a-90a) is reported at 936 F.3d 628. EPA's notice of denial in *Alon* (App., *infra*, 531a-537a) was published at 82 Fed. Reg. 56,779, and its explanation (App., *infra*, 356a-530a) appears in EPA publication number EPA-420-R-17-008. For *Coffeyville*, EPA's 2017 Rule (App., *infra*, 189a-355a) was published at 81 Fed. Reg. 89,746. The opinion of the court of appeals denying the petition for review in *AFPM* (App., *infra*, 91a-155a) is reported at 937 F.3d 903. EPA's 2018 Rule (App., *infra*, 552a-670a) was published at 82 Fed. Reg. 58,486.

JURISDICTION

The judgments of the court of appeals were entered on August 30, 2019 (*Alon* and *Coffeyville*) and September 6,

2019 (*AFPM*). No party sought rehearing. On November 19, 2019, The Chief Justice extended the time to file this petition to December 30, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Air Act's Renewable Fuel Standard program, 42 U.S.C. §7545(*o*), appears in its entirety in an appendix to this petition. App., *infra*, 156a-186a.

The most relevant part is §7545(*o*)(3):

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and

importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

PRELIMINARY STATEMENT

Just think about it once a year. That's what Congress asks of EPA: just to *consider*, during annual rulemaking, whether a multi-billion-dollar obligation falls on the "appropriate" parties.

This directive comes from the Clean Air Act's Renewable Fuel Standard program ("RFS program" or "program"), which embodies an ambitious and farsighted goal: ensuring that America's transportation-fuel supply contains increasing volumes of renewable fuels. Congress imposed yearly gallon-by-gallon mandates for multiple categories of renewable fuels, but Congress also recognized that the route to achieve those targets was uncharted and that adjustments would be necessary. It thus adopted specific procedures for EPA to follow *annually*.

Specifically, Congress enumerated three "[r]equired elements" for EPA to use in each "calendar year" rule-

making. The first is that the renewable-fuel obligation "shall be applicable to refineries, blenders, and importers, as appropriate."[1] §7545(*o*)(3)(B)(ii)(I).[2] This determination establishes what is commonly called "the point of obligation." In its initial implementing rule, EPA set the point of obligation on refineries and importers, but not blenders (who actually decide whether and how much renewable fuel to blend into transportation fuel and who control the physical means of doing so). EPA acknowledged that it set and retained that point of obligation for administrative ease. *No* annual rule since that acknowledgement has *ever* considered whether the point of obligation remains "appropriate," despite Congress making that assessment the first required element of *every* annual rule.

EPA's position is that "whether, how, and when" to consider the appropriateness of the point of obligation is up *to EPA*. Coffeyville Resp. Br. 66. Year after year, EPA deems comments about the point of obligation "beyond the scope" of the rulemaking. And it denied a series of long-pending petitions for rulemaking on the question. By contrast, it yearly addresses the other required elements, along with other annual duties—but not, as Congress directed, simultaneously with examining the point of obligation.

Annual consideration via rulemaking would allow regulated parties, the public, EPA, and reviewing courts to ensure that the program was working as intended. Whatever discretion EPA may have to decide *what* an "appropriate" point of obligation is, EPA wholly lacks authority to disregard Congress's directive to address that question.

Even if a statutory directive is burdensome and trivial,

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[1] Refineries produce petroleum blendstock from crude oil. Blenders mix blendstock with renewable fuel and additives to produce transportation fuel such as gasoline and diesel.

[2] All citations of §7545(*o*) reference 42 U.S.C. §7545(*o*).

but *certainly* when (as here) it is modest and important, agencies must obey clear congressional commands. Such commands are often procedural, like this one—Congress sets long-term goals with procedural requirements that ensure agencies administer complex programs in accordance with the underlying statutory objectives. Agency refusal to obey such commands—like judicial refusal to hold agencies accountable when they arrogate power to themselves—seriously erodes successful deployment of long-term statutory programs. Many statutes require agencies to obey procedures like the one EPA jettisoned here—and the D.C. Circuit's judgments below can only embolden comparable disregard of statutory duties.

This case, therefore, is a sober reminder of the need for this Court to define and enforce the line separating lawful exercise of delegated power from unaccountable agency action.

STATEMENT

I. Background

A. The RFS program

Congress enacted the RFS program in 2005 (and amended it in 2007) "to increase the [nation's] production of clean renewable fuels." Energy Independence and Security Act of 2007, Pub. L. No. 110-140, pmbl., 121 Stat. 1492, 1492; see also *id.* §§201-210 (amending the program); Energy Policy Act of 2005, Pub. L. No. 109-58, §1501, 119 Stat. 594, 1067-1076 (enacting the program) (as currently enacted, the "Act"). Although the program has been litigated constantly,[3] this Court has not yet considered it. The

[3] See, *e.g.*, *Valero Energy Corp.* v. *EPA*, 927 F.3d 532 (D.C. Cir. 2019); *Ergon-W. Va., Inc.* v. *EPA*, 896 F.3d 600 (4th Cir. 2018); *Sinclair Wyo. Ref. Co.* v. *EPA*, 887 F.3d 986 (10th Cir. 2017); *Nat'l Biodiesel Bd.* v. *EPA*, 843 F.3d 1010 (D.C. Cir. 2016); *Lion Oil Co.* v. *EPA*, 792 F.3d 978 (8th Cir. 2015); *Monroe Energy, LLC* v. *EPA*, 750 F.3d 909 (D.C. Cir. 2014); *Am. Petrol. Institute* v. *EPA*, 706 F.3d 474 (D.C. Cir. 2013);

D.C. Circuit's decisions, including those below, explain the RFS program's goals, background, and requirements. See App., *infra*, 6a-11a, 93a-101a.

The program requires that transportation fuel introduced into commerce in the United States contain annually increasing "applicable volume[s]" of four nested categories of renewable fuel: (1) cellulosic biofuel and (2) biodiesel, which are both components of (3) advanced biofuels, a component of (4) total renewable fuels. §7545(*o*)(2)(A)-(B). The Act prescribes exact annual volumes of renewable fuels through 2022, see §7545(*o*)(2)(B)(i), and requirements for setting volumes for following years, see §7545(*o*)(2)(B)(ii)-(v). The Act requires EPA to convert the annual volumes into applicable percentages of renewable fuel that the average gallon of transportation fuel must contain.

Despite the Act's detailed prescriptions, Congress recognized its inability to foresee how technology, the economy, natural-resource availability, and other variables would develop deep into the future. Accordingly, Congress did not set the RFS program on autopilot, but instead provided for annual adjustments, waivers, and exemptions, and mandated that EPA determine each year's "applicable percentages" in an annual rulemaking. See §7545(*o*)(3)(B)(i) (requiring annual rulemaking); §7545(*o*)(7) (permitting waivers); §7545(*o*)(9) (providing for small refinery exemptions). Volumetric determinations for 2017 and 2018 are not at issue in this petition.

B. The point of obligation

"Obligated parties"—those responsible for achieving these percentages—must demonstrate compliance with each annual Rule by acquiring and retiring "Renewable Identification Numbers" ("RINs"). See 40 C.F.R.

Grocery Mfs. Ass'n v. *EPA*, 693 F.3d 169 (D.C. Cir. 2012); *Nat'l Petrochem. Refiners Ass'n* v. *EPA*, 630 F.3d 145 (D.C. Cir. 2010).

§80.1427. A RIN attaches to a standardized measure of renewable fuel, *id.* §§80.1401, 80.1415, and generally becomes capable of being traded, sold, or used for compliance—that is, "separated"—when the renewable fuel to which it refers is acquired by an obligated party or blended with petroleum blendstock to produce finished transportation fuel.

Congress directed EPA to promulgate initial "compliance provisions" applicable to "refineries, blenders, distributors, and importers, as appropriate" to "ensure" that statutory requirements are met. §7545(*o*)(2)(A)(iii)(I) (the "Implementing Directive"). EPA's implementing regulations determined that refineries and importers, but not blenders, were the "appropriate" parties to obligate. 72 Fed. Reg. 23,900, 23,937 (May 1, 2007). EPA conceded at the time that this definition misaligned the obligation and the means of compliance: "[T]he actions needed for compliance largely center on * * * parties other than refineries and importers," the latter of whom "do not generally produce or blend renewable fuels at their facilities." *Ibid.*

EPA's concession acknowledged the reality that many refineries and importers, particularly independent companies that are not vertically integrated, cannot blend renewable fuels in any appreciable quantity. Instead, to comply with the program, these companies must buy RINs from unobligated blenders (who separate RINs when blending fuel, but have no compliance obligations), obligated parties holding excess RINs, or third parties (including speculators otherwise unconnected to the fuel industry) who trade RINs in an unregulated market. *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 700-701 (D.C. Cir. 2017) (Kavanaugh, J.) (*ACE*).

EPA confirmed in 2010 that it originally set the point of obligation to "minimize the number of regulated parties and keep the program simple." 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010). But simultaneously, EPA acknowledged

that its original rationale was "no longer valid" and that obligating "alternative" points in the fuel-supply chain would "more evenly align a party's access to RINs with that party's [RFS program] obligations." *Ibid.*

EPA nonetheless left the point of obligation unchanged. Despite the admitted "asymmetry in incentives," see *Am. Petroleum Institute* v. *EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013), EPA "d[id] not believe that the concerns expressed warrant[ed] a change in the designation of obligated parties for the RFS[] program at th[e] time" and instead professed "continue[d] belie[f] that the market w[ould] provide opportunities for parties who are in need of RINs to acquire them from parties who have excess." 75 Fed. Reg. at 14,722. EPA's asymmetrical definition of "obligated parties" has applied to all compliance periods since 2007, when the program began. 40 C.F.R. §§80.1106(a)(1), 80.1406(a)(1).

But Congress directed EPA to do more than establish an *initial* point of obligation. It also required EPA to make each annual Rule "applicable to refineries, blenders, and importers, as appropriate." §7545(*o*)(3)(B)(ii)(I).

Since 2010, however, EPA has refused to consider the point of obligation in any annual Rule, despite mounting comments demonstrating urgent need for an assessment. Not coincidentally, during the same time span, EPA's annual rulemakings have repeatedly concluded that "real-world constraints" made the statutory volume targets "impossible to achieve." App., *infra*, 199a-200a.

Parties, including independent refiners, small-business fuel retailers, and petitioners here, objected. They presented evidence that obligating refineries and importers, but not blenders, impeded the growth of renewable-fuel use while imposing onerous compliance costs on obligated parties—so onerous that some refineries' very viability was jeopardized solely because of the enormous

expense of acquiring RINs from sellers who were collecting windfall profits. For these reasons, which commenters explained using detailed data, the misalignment could no longer qualify as "appropriate." And EPA's earlier confidence that the market would harmlessly sort out EPA's misaligned point of obligation was gravely mistaken. Instead, the RIN market has been characterized by extreme volatility, causing program compliance costs to fluctuate by hundreds of millions of dollars overnight. See Alon Pet. Br. 39.

Beginning in 2014, obligated parties not only commented annually but also began petitioning EPA to change the definition it had adopted in the implementing regulations. EPA did not respond to those petitions until 2017.

II. Proceedings Below

The two opinions below address three cases, each illustrating a different aspect of EPA's refusal to adjust (and to even consider adjusting) the point of obligation. Each case arose as a petition for review to the D.C. Circuit after final agency action. In all three cases, that court exercised jurisdiction under 42 U.S.C. §7607(b)(1).[4]

A. The 2017 Rule (*Coffeyville*)

EPA's 2017 Rule did not address the multitude of comments regarding the agency's ongoing failure to obligate the appropriate parties. Instead, EPA's accompanying document stated that such comments were "beyond the scope of th[e] rulemaking" because EPA "did not propose any changes to the definition of an obligated party." App., *infra*, 187a. EPA's statement also mentioned a new "separate action" in which EPA proposed to deny the pending

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[4] The litigation concerning the 2017 and 2018 Rules (and the Rules themselves) addressed many issues distinct from the questions presented in this petition. The appendix thus contains voluminous material that, while part of the lower-court cases, is not relevant to this petition.

petitions for rulemaking. *Ibid.* Petitioners sought the D.C. Circuit's review of the 2017 Rule, challenging (as relevant here) EPA's failure to consider the point of obligation.

In a divided opinion, that court concluded that the Act is "ambiguous," under *Chevron* Step 1, as to whether EPA must consider the appropriateness of the point of obligation during annual rulemaking. App., *infra*, 50a. The majority acknowledged that the point of obligation is the "foundational element" of the program. *Id.* at 41a. It also agreed that "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." *Id.* at 54a. According to the majority, however, the Act "does not specify when or in what context EPA must make its appropriateness determination," and provides "at most grounds for assessing whether the agency adequately explained" its choice not to annually consider the point of obligation. *Id.* at 46a. The majority then concluded that EPA's interpretation was reasonable under *Chevron* Step 2, noting that "EPA believes it would not be feasible or worthwhile to undertake such reconsideration annually." *Id.* at 53a.

Judge Williams disagreed. The Act, he explained, expressly requires EPA to consider who is obligated "each time it sets the annual obligation." App., *infra*, 76a. EPA has discretion "to choose among the options that Congress has given it," but not to "'explain[]' why, in the agency's opinion, it's 'appropriate' *not* to choose among the options." *Id.* at 77a (citation omitted). Statutory-interpretation principles led Judge Williams to conclude that the Act "seems inevitably to require" annual consideration, not mere "recitation that some time ago the agency considered the factors that it then thought relevant." *Id.* at 76a.

Judge Williams emphasized that the majority "doesn't *actually use* any of the tools of statutory construction,"

App., *infra*, 88a, and instead "extend[s] to EPA the type of 'reflexive' deference" that this Court "has recently criticized," *id.* at 87a (quoting *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019)). This reflexive deference improperly "grants EPA essentially unfettered discretion as to when—or even *if*—it will consider the appropriateness of the point of obligation." *Ibid.*

Nonetheless, Judge Williams concurred in the judgment because he concluded that the collateral proceeding satisfied EPA's duty in connection with the 2017 Rule. App., *infra*, 89a.

B. The collateral proceeding (*Alon*)

Days before finalizing the 2017 Rule, EPA initiated the collateral proceeding at issue in *Alon*. EPA "proposed to deny the petitions [EPA] ha[d] received to change the point of obligation," App., *infra*, 187a, and it finalized that denial the next year, *id.* at 531a. EPA worried that merely *considering* the point of obligation would cause "upheaval and uncertainty in the fuels marketplace." *Id.* at 360a. EPA's denial rested heavily on its assumption that the misaligned point of obligation was harmless because companies lacking the ability to generate RINs could simply "pass[] on" the cost of obtaining RINs to customers. *Id.* at 372a. Petitioners had presented contrary evidence demonstrating that many refineries were unable to recover these costs, see Alon Pet. Reply 26-27, a fact that EPA itself later acknowledged by issuing dozens of "economic hardship" exemptions.

In *Alon*, the D.C. Circuit applied an "extremely limited" and "highly deferential" standard of review to conclude that EPA had acted with "enough" reasonableness in denying the rulemaking petitions that asked it to assess the point of obligation. App., *infra*, 32a (citations and internal quotation marks omitted). The opinion expressly declined to address petitioners' arguments that, for

example, EPA's issuance of waivers to small refineries based on "disproportionate economic hardship" under §7545(*o*)(9), and the bankruptcy of the largest refiner on the East Coast, directly contradicted EPA's rationale and disproved the pass-through theory. *Id*. at 35a-36a.

C. The 2018 Rule (*AFPM*)

In proposing the 2018 Rule, EPA raised continuing concerns about the RIN market. App., *infra*, 538a-540a. EPA acknowledged reports of market manipulation, *id*. at 539a, and highlighted considerable variation in renewable-fuel import and export levels and related concerns regarding renewable-fuel prices, *id*. at 547a. Petitioners' comments included data showing that EPA was rightly concerned about RIN prices and the RIN market; they presented new information confirming that the point of obligation was not "appropriate." AFPM Pet. Br. 55.

Although EPA devised RINs to allow obligated parties to verify compliance with the program, see §7545(*o*)(5) (authorizing a "credit" program), mounting evidence showed that the misaligned point of obligation had caused severe RIN-market inefficiencies and volatility and had imposed severe economic hardship on obligated parties. It also disincentivized infrastructure development that would facilitate adding renewable fuel to transportation fuels. AFPM Pet. Br. 63-64. But even after EPA itself raised concerns about the RIN market, EPA's final 2018 Rule again ignored responsive comments regarding the point of obligation because the agency had deemed them "beyond the scope" of the rule. App., *infra*, 551a. Weeks later, as comments had forecast, the East Coast's largest refiner declared bankruptcy, citing the program's "unpredictable, escalating, and unintended compliance burden" as the "primary driver" of its decision. AFPM Pet. Br. 7 (citation and internal quotation marks omitted). Petitioners challenged EPA's 2018 Rule, again arguing, as relevant here, that EPA failed to make the required determination of

"appropriate" obligated parties.

The D.C. Circuit briskly rejected the point-of-obligation argument: "There is no doubt that the EPA is correct that comments regarding the agency's 'obligated party' definition fell outside the scope of the 2018 rulemaking." App., *infra*, 132a. EPA had "declared" that it was uninterested in considering the point of obligation, *ibid.*, and the court concluded that *Coffeyville* justified EPA's declaration. *Id.* at 133a. Despite citing *Coffeyville*, the court did not actually analyze whether EPA had abused its direction—even though *Coffeyville* pointed to the court's obligation to assess that as support for holding that the statute imposed no annual duty. *Id.* at 54a.

REASONS FOR GRANTING THE PETITION

The need for this Court's review transcends correcting EPA's and the D.C. Circuit's serious statutory-interpretation errors. The more basic purpose of preventing agencies from inflating their power at the expense of congressional commands—and of ensuring that courts are not complicit when agencies overreach—is central here.

This Court's case law reflects an important balance: affording some deference to agencies while vigorously enforcing statutory commands. The judgments below disturb that balance, risking the RFS program and many others. The Court should grant the petition to ensure that traditional judicial review holds agencies accountable to congressional directives.

I. The D.C. Circuit wrongly deferred to EPA's evasion of the annual duty that the Act clearly imposes

Petitioners bring a single petition because the three cases here illustrate how EPA and the D.C. Circuit have eliminated an important and textually-explicit congressional command to an administrative agency.

- In *Coffeyville*, the D.C. Circuit granted EPA discretion where it had none. Congress ordered EPA

to *annually* consider whether the point of obligation remains appropriate, but the majority below approved EPA's self-serving belief that annual consideration is not "worthwhile." App., *infra*, 53a.

- In *Alon*, the same panel approved a collateral proceeding in which EPA arbitrarily and irrationally *refused* to initiate a rulemaking to consider the appropriate point of obligation. App., *infra*, 32a-42a. The majority allowed that proceeding to function as a one-time substitute for obeying Congress's command to consider the appropriate "point of obligation" every single year, alongside the other required elements for each annual Rule. *Id.* at 55a.
- Finally, in *AFPM*—issued only one week after *Coffeyville*—the D.C. Circuit showed that *Coffeyville*'s suggestion that EPA *could* abuse its discretion by ignoring the point of obligation in future annual rulemakings was toothless. App., *infra*, 132a-133a. The record in *AFPM* amplified grounds indicating that the point of obligation was no longer appropriate and impeded the RFS program's functioning, but the court, without conducting any "abuse of discretion" analysis, summarily deferred to EPA's decision to place the point of obligation entirely "outside the scope" of the 2018 Rule. *Ibid.*

These decisions allow EPA to evade a basic statutory command—to *consider* the point of obligation. EPA has relied on them—as recently as this month—to continue evading the command.[5] As important as that command is for the

[5] See EPA, *Renewable Fuel Standard Program - Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments*, EPA-420-R-18-019 (Nov. 2018) at 188 (concluding that "[c]hanges to the point of obligation" are "beyond the scope" of 2019 annual rulemaking); EPA, *Renewable Fuel Standard Program - Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes: Response to Comments*, EPA-420-R-19-018 (Dec. 2019) at 219

RFS program, its court-approved breach also reflects judicial reluctance to constrain agency lawlessness.

A. The Act requires annual consideration

Under the Clean Air Act, EPA must annually determine a renewable fuel obligation, a "[r]equired element[]" of which is that the obligation "shall be applicable to refineries, blenders, and importers, as appropriate." §7545(*o*)(3)(B)(ii). Discarding statutory-interpretation principles, the majority below concluded that the word "appropriate" gives EPA discretion to determine the obligated parties once, then apply that definition indefinitely. This interpretation defies the statute's text and unreasonably enlarges the agency's discretion to resolve a major question beyond the bounds that Congress dictated. See, *e.g.*, *Michigan* v. *EPA*, 135 S. Ct. 2699, 2711 (2015) ("The Agency must consider cost," but it is "up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost."). Even setting aside this clear congressional mandate, EPA acted arbitrarily and capriciously by refusing to consider the point of obligation in the underlying proceedings.

1. The Act's text requires annual consideration of whether the point of obligation is "appropriate"

The Act unavoidably obligates EPA to annually consider whether the point of obligation is appropriate:

> **(ii) Required elements**
>
> The renewable fuel obligation determined for a calendar year under clause (i) shall—
>
> (I) be applicable to refineries, blenders, and importers, as appropriate;
>
> * * * .

(declining to "reopen" consideration of the point of obligation in 2020 annual rulemaking, because "[t]he D.C. Circuit reviewed this issue in *Alon*").

§7545(*o*)(3)(B)(ii)(I). This delegation is not optional; it does not give EPA discretion to avoid making the annual point-of-obligation determination. "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett* v. *Spear*, 520 U.S. 154, 172 (1997); see also *Envt'l Def. Fund* v. *Thomas*, 870 F.2d 892, 898-899 (2d Cir. 1989) ("The words 'as may be appropriate' clearly suggest that the Administrator must *exercise* judgment." (emphasis added)).

a. Several textual observations reinforce this point. First, by its very definition, "appropriate" is a term which "naturally and traditionally includes *consideration* of all the relevant factors." *Michigan*, 135 S. Ct. at 2707 (quoting *White Stallion Energy Ctr., LLC* v. *EPA*, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part)) (emphasis added). While *Michigan* rebuked EPA for insufficiently considering such factors, *id.* at 2712, EPA's action here is worse—it cannot consider the *correct* factors if it refuses to undertake consideration *at all.* Under the Act's text, "each * * * calendar year" EPA must simultaneously consider *what* the next year's renewable fuel obligation will be and *who* will be responsible for achieving it. §7545(*o*)(3)(B)(i). This linkage makes sense, because who is obligated is fundamental to whether the obligation can be achieved.

Second, the statute also uses the word "appropriate" in the Implementing Directive, §7545(*o*)(2)(A)(iii)(I). In that context, no one contends that the word "appropriate" excused EPA from considering the relevant factors in implementing compliance provisions. When Congress uses "identical words" in "different parts of the same statute," courts normally interpret them to carry "the same meaning." *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (quoting *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005)). All agree that the first instance of "appro-

priate" required consideration at the implementing stage. The second instance requires the same consideration at the annual-rule stage. Indeed, the only reasonable reading of Congress's decision to twice use "appropriate" in the point-of-obligation context is that Congress wanted EPA to pay particular attention to whether the Act's burdens were allocated consistently with the Act's purpose.

Third, the RFS program is not the only environmental scheme *within the Clean Air Act* that requires EPA to consider, at a specific time, whether to adjust requirements. That Act, for example, also requires EPA to "at least every 8 years, review and, if appropriate, revise" certain performance standards. 42 U.S.C. §7411(b)(1)(B). Tellingly, however, that requirement includes an express escape hatch absent from the RFS program: EPA "need not review any such standard if the [agency] determines that such review is not appropriate in light of readily available information on the efficacy of such standard." *Ibid.* Both the *expressio unius* and surplusage canons are basic statutory-construction tools. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107-111, 174-179 (2012). When Congress wants EPA to determine *whether* review is appropriate, it says so expressly.

Fourth, the program's nature and structure indicate that Congress did not delegate to EPA the decision of how often—or whether—EPA must review the program's "foundational element." App., *infra*, 41a. The point of obligation is critical to the program's success, and it unquestionably drives economic behavior in the massive, unregulated, and opaque market for RINs. EPA has no expertise in commodity-market oversight. The scope and impact of the RFS program on the nation's economy and the comparative lack of relevant agency expertise emphasize that courts must exhaust traditional statutory-interpretation tools before deferring to EPA's construction—if deference

is appropriate at all. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) ("Deference under *Chevron* * * * is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.")

b. As Judge Williams recognized, in "apparent haste to bow to EPA's admittedly self-serving declaration of what the law means," the majority "doesn't *actually use* any of the tools of statutory construction in an attempt to discern Congress's meaning." App., *infra*, 88a. The whole point of Congress giving EPA discretion was for it "to choose among the options that Congress has given it"—not to "'explain[]' why, in the agency's opinion, it's 'appropriate' *not* to choose among the options." *Id.* at 77a (quoting *Kisor* v. *Wilkie*, 139 S. Ct. at 2449 (Kavanaugh, J., concurring in the judgment)).

The majority erred by concluding without considering context or the statute as a whole that the word "appropriate" meant that Congress had invited *State Farm*-style discretion. App., *infra*, 46a (citing *Kisor*, 139 S. Ct. at 2448-2449 (Kavanaugh, J., concurring in the judgment)). Of course, "appropriate" signals agency discretion, but *only within* the Act's bounds—which here require annual review. See *Michigan*, 135 S. Ct. at 2707; cf., *e.g.*, *Kennecott Copper Corp., Nev. Mines Div., McGill, Nev.* v. *Costle*, 572 F.2d 1349, 1354 (9th Cir. 1978) (a statute providing that "(t)he Administrator shall approve any revision * * * if he determines that it meets the [relevant] requirements" makes it "clear that the Administrator has a nondiscretionary duty to *make a decision*" (citation omitted; emphasis added)).

Analogies abound. The Federal Open Market Committee, for example, must meet "at least four times each year," 12 U.S.C. §263, to consider adjusting the target federal funds rate "so as to promote effectively the goals of maximum employment, stable prices, and moderate long-

term interest rates." 12 U.S.C. §225a. The Fed could not assert that meeting just *once* a year would suffice, nor could it retain a prior rate without deliberation. Congress judged that superintending *the entire economy* includes a minimum deliberative frequency. The Fed must assess whether the prior target rate still fits present conditions, and it must do so at the stated intervals. Likewise, EPA must assure itself that the point of obligation is "appropriate" in connection with setting the renewable fuel obligation "each * * * calendar year[]." §7545(*o*)(3)(B)(ii)(I).

The majority opinion in *Coffeyville* contends that the statute "does not specify when or in what context EPA must make its appropriateness determination." App., *infra*, 46a. But the statute in fact specifies both. That determination is one "[r]equired element[]" of setting the "renewable fuel obligation," which EPA "shall determine and publish" "each * * * calendar year[]." §7545(*o*)(3)(B). The timing directive precedes "as appropriate" by only eleven words. *Ibid.*

Finally, the majority cites §7545(*o*)(3)(B)(ii)(I), the Implementing Directive, which requires EPA to promulgate "compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate." App., *infra*, 44a. The majority says that inclusion of "distributors" in the Implementing Directive indicates that the first required element in the annual determination shows that distributors cannot be obligated parties. *Id.* at 49a. But as Judge Williams noted, the Act's text *already* excludes distributors from being obligated parties, because distributors do not introduce fuel "into commerce." App., *infra*, 82a. The majority's construction therefore renders §7545(*o*)(3)(B)(ii)(I) superfluous. That provision implicitly *confirms* that distributors do not have annual obligations, but §7545(*o*)(3)(B)(ii)(I)'s text and place within the statute reveal that it functions to require EPA to annually verify whether the point of obligation remains appropriate.

The majority's cursory textual analysis fails. Judge Williams correctly showed that recourse to traditional statutory-construction tools "seems inevitably to require" EPA to annually consider the point of obligation. App., *infra*, 76a. He likewise correctly saw that the majority extended deference where this Court would refuse it—because the statutory text leaves no ambiguity. *Id.* at 87a.

2. EPA's construction unreasonably allows it to avoid considering whether the point of obligation is impeding the program's goals

Even if there *were* any statutory ambiguity, *Chevron* bars deference to EPA's unreasonable interpretation. "*Chevron* allows agencies to choose among competing reasonable interpretations of a statute; it does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Michigan*, 135 S. Ct. at 2708. "Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation." *Util. Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 321 (2014) (*UARG*) (citation and internal quotation marks omitted)). The majority endorsed EPA's interpretation that "appropriate" allows EPA to perform the required consideration only when it deemed the *consideration itself* to be "feasible or worthwhile." App., *infra*, 53a. This interpretation is not reasonable.

First, EPA's reading requires conceding that Congress would allow EPA to disregard indefinitely a central aspect of a major, costly, and forward-reaching program. At the time of enactment, Congress could not predict how the renewable-fuel program would develop. See Congressional Research Service, *The Renewable Fuel Standard (RFS): An Overview* (Sept. 4, 2019) at 12. Because "implementation and impacts of the program are affected by many factors that are not easily predicted or controlled," *ibid.*, Congress mandated annual review. The majority's contrary

conclusion conflicts with its acknowledgement that "the case for changing an environmental regulation will almost never manifest itself at one discrete moment," but instead "will accumulate progressively over time, as scientific knowledge advances or economic conditions change." App., *infra*, 25a.

Second, EPA's reading results in different deference levels governing required elements that appear sequentially in the same subsection. Absent an annual duty, EPA might ignore the point of obligation until it received (and chose to respond to) a petition for rulemaking. Pushing off the congressionally mandated duty to "whenever, if ever," transfers power to EPA: an agency's denial of a petition for rulemaking is subject only to "'extremely limited' and 'highly deferential'" judicial review. *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007) (citation omitted). As Judge Williams noted, a different deference level (with a more demanding standard of review) tends, *at the least*, to "concentrate the mind of the administrator." App., *infra*, 90a. The Act links all the "[r]equired" elements; EPA's view disaggregates them in multiple ways, including how the courts review EPA's work.

Third, evidence of the effects of EPA's refusal to annually consider the point of obligation "should have alerted EPA that it had taken a wrong interpretive turn." *UARG*, 573 U.S. at 328. Even after EPA began receiving comments addressing the point of obligation, it concluded annual rulemakings by setting volumetric obligations below statutory targets, determining that Congress's goals were "impossible to achieve" due to "real-world constraints." App., *infra*, 199a-200a. Further, EPA has exempted increasing numbers of small refineries from annual renewable-fuel obligations after determining that compliance imposed "economic hardship" on them, see §7545(*o*)(9), thus exacerbating the harsh impact of the misplaced point of obligation on the remaining obligated parties. This

dysfunction is rooted in EPA's refusal to consider the point of obligation.

The majority rejected these arguments, citing EPA's "belie[f]" that "it would not be feasible or worthwhile to undertake such reconsideration annually." App., *infra*, 53a. Although "administrative convenience" and "improve[d] administrability" might *contribute* to a reasonable explanation under *Chevron*'s second step, see, *e.g.*, *Mayo Found. for Med. Educ. & Research* v. *United States*, 562 U.S. 44, 59 (2011), those factors must yield when they lead to an interpretation that hinders a statute's express purposes. See *ibid*. (approving agency's convenience-based interpretation when it also "further[ed] the purpose" of the underlying statute); see also *Judulang* v. *Holder*, 565 U.S. 42, 64 (2011) (concluding that agency action that is "unmoored from the purposes" of the underlying statute "cannot pass muster under ordinary principles of administrative law"). The majority's reliance on administrative ease for its interpretative conclusion was therefore misplaced. *Cf. Michigan*, 135 S. Ct. at 2708 ("[I]t is unreasonable to read an instruction to an administrative agency to determine whether 'regulation is appropriate and necessary' as an invitation to ignore cost.").

EPA wrongly claims that by "not propos[ing] any changes to the definition of an obligated party," it eliminates any duty to consider comments indicating that the definition is no longer appropriate. App., *infra*, 187a. But in Judge Williams's words, a reasonable interpretation forecloses the argument that EPA "need not even *address* the point—ever again." App., *infra*, 78a.

3. EPA's decision to treat relevant comments as "beyond the scope" of rulemaking was arbitrary and capricious

Even if EPA had no explicit statutory obligation to consider the point of obligation annually, its decision to place

the issue "beyond the scope" of annual rulemaking, App., *infra*, 187a, 551a, would still be arbitrary and capricious. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2125 (2016). An agency's decision is arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). EPA must give "adequate reasons" for refusing to consider the point of obligation. *Encino Motorcars*, 136 S. Ct. at 2125. It cannot make an important aspect of the program irrelevant by decree.

The point of obligation is "foundational" to the RFS program, as the majority below recognized. App., *infra*, 41a. EPA's insistence that it can maintain the RFS program without even *considering* this issue is akin to a motorist insisting that she can maintain her vehicle (or worse, *someone else's* vehicle) without ever checking the oil. That would be particularly irrational if the engine began to seize, and exponentially more so if the driver *recognized* that the engine was failing. But that is the situation here: "EPA and obligated parties have raised serious concerns that the Renewable Fuel Program is not actually functioning as intended." *ACE*, 864 F.3d at 712.

For example, in its 2018 Proposal, EPA identified specific concerns with the program, including "whether and how the current [RIN] trading structure provides an opportunity for market manipulation." App., *infra*, 539a. EPA specifically sought "comment and input on potential changes to the RIN trading system that might help address these concerns." *Ibid.* But in the same Proposal, EPA stated that it would not consider revisiting "the

current definition of 'obligated party.'" *Ibid.* Then, in a supplemental notice of proposed rulemaking for the 2018 Rule, EPA highlighted considerable variation in renewable-fuel import and export levels, raised related concerns regarding renewable-fuel prices and energy independence, and "invite[d] comment on how to balance" the Act's objectives of "increasing renewable fuels" and "limiting in certain circumstances the additional cost" of doing so. App., *infra*, 545a n.4. EPA is not blind to the RIN program's shortcomings; it merely wishes to avoid seeing an obvious cause.

In responsive comments, petitioners linked problems EPA identified to the misplaced point of obligation. AFPM Pet. Br. 56-57. Petitioners explained that unobligated RIN sellers are reaping windfall profits instead of incentivizing increased renewable-fuel sales. *Ibid.* This, in turn, causes undesirable volatility, price spikes, and RIN-market distortions. Petitioners also introduced extensive data and analysis demonstrating that applying the 2018 obligations only to refineries and importers, as EPA proposed, would constrain available supply—but that obligating appropriate parties, including blenders, would enhance supply. *Id.* at 55. Finally, petitioners introduced evidence demonstrating that obligated parties cannot "pass through" RIN costs as EPA purported to believe. *Id.* at 29-30.

Although petitioners demonstrated that EPA's concerns regarding imports, exports, and RIN-market manipulation flowed from the misplaced point of obligation, and although EPA expressly solicited comments on these exact issues, EPA ignored all comments identifying the point of obligation as the culprit. EPA's failure to consider an important aspect of these problems is a textbook arbitrary-and-capricious action. See *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 537 (2009) ("[a]n agency cannot * * * ignore inconvenient facts"). Its offered expla-

nation—that the point of obligation was "beyond the scope" of the annual rulemaking—directly contradicts evidence showing that the point of obligation is at the *heart* of program failures. Indeed, counterintuitive decisions—like setting the point of compliance someplace other than where compliance is achieved, as EPA did—require *more* explanation, not *no* explanation.

Therefore, even setting aside EPA's annual statutory duty, this Court cannot uphold EPA's arbitrary and capricious refusal to reconsider the point of obligation in promulgating the underlying annual rules.

B. The D.C. Circuit's deference to EPA's faulty collateral proceeding was improper and threatens other programs

The foregoing shows that the Act requires annual consideration of the point of obligation—and that, even if it didn't, EPA's refusal to consider related comments was arbitrary and capricious. The majority below reached a contrary conclusion by unduly deferring to EPA. First, EPA argued that its denial of rulemaking—a collateral proceeding—cures the defective annual rulemakings. AFPM Resp. Br. 56. Vacatur of that denial is necessary to ensure that EPA cannot invoke it to justify ignoring the point of obligation in the future. Second, in conducting the collateral proceeding, EPA wrongly continued its reliance on administrative ease and ignored crucial evidence and intra-agency inconsistency.

Review is needed to bring EPA back within lawful bounds, and to prevent lower courts from further expanding agency discretion to circumvent clear requirements. The collateral proceeding was an improper exercise that reached the wrong result. It should be vacated.

1. The D.C. Circuit wrongly deferred to EPA's decision to conduct a collateral proceeding

Rather than address comments regarding the point of

obligation in annual rulemaking, EPA considered the issue in a collateral proceeding that it convened more than three years after it began receiving requests for rulemaking. App., *infra*, 532a. The collateral proceeding did not justify EPA's interpretation of the Act or make its "beyond the scope" determination any less arbitrary and capricious.

The Act links the point of obligation (who is obligated?) and the percentage determinations (for how much?) side by side in the same list of annual duties. §7545(*o*)(3)(B)(ii). These duties include at least three required elements for an annual rulemaking that sets a single "renewable fuel obligation" for the coming year. *Ibid*. Jointly considering these interdependent duties allows the commenting public, EPA, and the courts to see every "aspect of the problem" together. *State Farm*, 463 U.S. at 43. Disaggregating them leads to inconsistency and incoherence.

Nor can the collateral proceeding justify EPA's decision to put the point of obligation "beyond the scope" of the annual Rules. First, if the Act requires annual consideration, see *supra* Part I.A, then the collateral proceeding—which began only thirteen days before the 2017 Rule was finalized—cannot discharge even the 2017 obligation. Second, petitioners' comments on the 2018 Rule raised new issues that EPA did not adequately address in the collateral proceeding. See *infra* Part II.B.2.

EPA's imposition of a collateral proceeding also unduly burdens stakeholders. Rather than participate in the comprehensive annual rulemaking that Congress intended, petitioners had to comment annually *and* initiate separate rulemaking petitions to have any hope of relief. The Wall Street Journal described this fight to get EPA to just *consider* the point of obligation as "a saga of bureaucratic hell" that "would make Kafka smile." Editorial, *Another Day in Bureaucratic Hell*, Wall St. J., Aug. 8, 2019, at A14.

These separate rulemaking petitions, moreover,

offered no guarantee that EPA would timely respond. See, *e.g.*, *In re Pesticide Action Network N. Am.*, 798 F.3d 809, 813 (9th Cir. 2015) (requiring a decision only after "EPA ha[d] spent nearly a decade reviewing" a petition and had ignored the court's "unambiguous order directing EPA to specify a date for issuing a 'final ruling'"). And when EPA *does* respond, a different standard of review applies. See *supra* Part I.A.2. These points demonstrate that an isolated collateral proceeding cannot discharge what Congress made an *annual* duty.

EPA's decision in the collateral proceeding should be vacated to protect the integrity of the program and to deter agencies from using shell games to evade congressional mandates. Moreover, under any standard of review, the collateral proceeding reached the wrong result.

2. EPA's decision in the collateral proceeding does not deserve deference

EPA's collateral proceeding not only contravened its statutory mandate, but also showcased arbitrary and capricious decisionmaking. The agency continued its long reliance on administrative ease to justify a decision that disregarded critical evidence and was plagued by inconsistency.

a. Since 2007, EPA has relied on administrative ease to justify divorcing program obligations from the means of compliance. EPA admitted the 2007 regulations were for administrative ease—"minimiz[ing] the number of regulated parties and keep[ing] the program simple." 75 Fed. Reg. 14,722. EPA also relied on administrative ease in 2010—instead of minimizing the number of regulated parties, it pivoted to preventing a "significant change in the number of obligated parties." *Ibid.* And in the collateral proceeding, EPA claimed that it would not consider the point of obligation annually due to associated "time pressure" and "lack of certainty." App., *infra*, 367a & n.10.

To take those concerns at face value in light of the countervailing textual and structural arguments mandating consideration reflects insufficient scrutiny. See *Massachusetts* v. *EPA*, 549 U.S. at 534 ("Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time."). Review is needed to clarify how far convenience can go to justify an agency's choices that impede rather than further statutory objectives.

First, EPA has not shown that any material convenience results from disregarding its statutory duty. The "burden" that the majority worried about "heap[ing] * * * onto EPA's plate," App., *infra*, 53a, is a pre-existing feature of the annual rulemaking, which, point of obligation aside, already prompts thousands of comments and extensive litigation. EPA's interpretation does not obviously incentivize fewer comments (assuming that is a benefit). Under EPA's interpretation, the scope of rulemaking encompasses symptoms of the misaligned point of obligation—such as the need for statutory waivers—but not the underlying cause. Nor has EPA's interpretation produced a smoother-functioning program, which itself would ease EPA's burdens. EPA's worries are both "vastly overblown," App., *infra*, 86a, and counterintuitive. See *Athens Cmty. Hosp., Inc.* v. *Shalala*, 21 F.3d 1176, 1180 (D.C. Cir. 1994) ("ease of administration can hardly justify a requirement that is of little or no benefit").

Second, whatever role convenience might play in the abstract, its significance must diminish as the regulatory effort that the agency avoids grows in importance. Here, the regulatory target is a massive portion of the economy, and the convenience EPA invokes places the program's foundational feature on autopilot. Indeed, EPA demands solicitude that even *judges* do not receive, given that this Court has rejected the "administrative convenience"

rationale for the judiciary. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (rejecting the idea of "[h]ypothetical jurisdiction"—even if it allows efficient resolution of otherwise-complex cases).

Third, administrative ease is not a valid rationale for an agency to do nothing—to give the point of obligation no consideration—because doing nothing is *always* easier than doing what Congress requires. See *Leather Indus. of Am., Inc.* v. *EPA*, 40 F.3d 392, 403 (D.C. Cir. 1994) ("Given that the EPA had at hand the information necessary accurately to prevent the known risks, it must provide some explanation for ignoring it * * * ."). Administrative convenience might justify an agency's decision to consider a problem at a certain level of generality, but EPA's decision to decline consideration altogether represents a difference in kind, not degree.

If administrative ease can justify EPA's (in)action here, it can justify almost anything.

b. EPA's decision in the collateral proceeding was irrational and capricious in light of evidence that the *Alon* opinion expressly declined to address. A pivotal assumption in EPA's denial of rulemaking petitions was that, no matter how volatile, inefficient, and extreme the RIN market becomes, the misaligned point of obligation is harmless. This assumption, in turn, rests on the premise that "[a]ll obligated parties, including merchant refiners, are generally able to recover the cost of the RINs they need for compliance" by passing RIN acquisition costs to their customers. App., *infra*, 403a. EPA also justified inaction by maintaining that "the current structure of the RFS program is working" and "providing obligated parties a number of options for acquiring the RINs they need to comply with the RFS standards." *Id.* at 359a. These assumptions defied the evidence before EPA and the agency's own contrary determinations.

For example, EPA received comments from the largest refiner on the East Coast, Philadelphia Energy Solutions & Marketing, LLC ("PES") detailing immediate real-world consequences of RIN-market dysfunction on a significant portion of the nation's domestic refining capacity. Alon Pet. Br. 46. PES explained that annual RIN costs, which represented more than twice its payroll and were its single largest expense after crude oil, had forced it to conduct layoffs, delay capital investments, suffer credit downgrades, and pursue imminent restructuring. *Ibid.*

In response, EPA invoked a stale pass-through theory, well aware that this theory defied reality. While EPA's denial theorized that "refiners recover the cost of the RIN through higher prices," App., *infra*, 488a, EPA contemporaneously was exempting increasing numbers of obligated refineries after finding that they suffered "disproportionate economic hardship" caused by the renewable-fuel obligation. See §7545(*o*)(9)(B)(i). For the 2017 compliance year, EPA issued economic-hardship exemptions to 35 small refineries—a 500% increase from just two years prior—and exemptions stayed at a similar level for 2018.[6] Government statistics show that fewer than 60 refineries qualified as "small refineries" potentially eligible for hardship exemptions—meaning that over *half* of *all* small refineries could *not* pass through RIN costs and instead were suffering economic hardship necessitating exemptions.[7] Given this record, EPA's conclusion that it need not reexamine the point of obligation because the RIN market was functioning and RIN costs were entirely passed

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[6] EPA, *RFS Small Refinery Exemptions*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated December 19, 2019).

[7] U.S. Energy Information Administration, *Refinery capacity data by individual refinery as of January 1, 2019*, https://www.eia.gov/petroleum/refinerycapacity/refcap19.xls.

through was contrary to the evidence, and arbitrary and capricious. See *Nat'l Ass'n of Home Builders*, 551 U.S. at 658; see also *Ergon-W. Va.*, 896 F.3d at 613 (holding that EPA's reliance on pass-through theory to deny exemption was arbitrary given specific evidence of hardship to the petitioning refiner).

EPA also dismissed PES's comments on the 2018 Rule based on looking retrospectively at what EPA saw as a small number of pre-2017 refinery closures. The fact that the RIN market had not driven other refineries out of business, however, was not a reasonable basis for EPA to conclude that the RIN market was functioning well. See, *e.g.*, *Sinclair Wyo. Ref. Co.* v. *EPA*, 887 F.3d 986, 988 (10th Cir. 2017) (holding that EPA exceeded its authority by interpreting hardship exemption to require a threat to a refinery's survival as an ongoing operation). In fact, within two months after EPA published the denial, PES filed for bankruptcy. AFPM Pet. Br. 7. Echoing its comments on the 2018 Rule, PES expressly identified the RFS program's "unpredictable, escalating, and unintended compliance burden" as "the primary" precipitant of its bankruptcy.[8] PES also asserted that "[a]ligning the point of obligation" would eliminate serious threats to the nation's refining industry. PES Disclosure Statement at 25.

The pass-through theory was also suspect due to EPA's shifting positions regarding extreme RIN prices. In 2007, EPA intended that RINs be widely available at low cost to facilitate compliance. 72 Fed. Reg. at 23,944; see also *ACE*, 864 F.3d at 699 (describing RIN markets as intended "to facilitate flexible and cost-effective compliance."). In 2010, EPA reaffirmed that its choice of obligated parties

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[8] Disclosure Statement for the Joint Prepackaged Chapter 11 Plan of Reorganization of PES Holdings, LLC and Its Debtor Affiliates at 1, *In re PES Holdings, LLC*, No. 18-10122-KG (Bankr. D. Del. Jan. 22, 2018), ECF No. 10 ("PES Disclosure Statement").

assumed "an excess of RINs at low cost." 74 Fed. Reg. 24,904, 24,963 (May 26, 2009). But EPA changed its tune following a series of wildly escalating and volatile prices that journalists dubbed "RINsanity."[9] In the denial, EPA recast high-cost RINs as *desirable*, a purported reflection of "the increasing cost of supplying additional renewable fuels to the marketplace." App., *infra*, 393a.

These and other unexplained inconsistencies in foundational assumptions underlying the denial exemplify reckless rulemaking and independently require vacating the denial.

3. The opinions below threaten other programs that rely on statutorily mandated procedural requirements

The D.C. Circuit allowed EPA to transform annual procedural safeguards here into authorization to indefinitely ignore the point of obligation—precisely the opposite of Congress's mandate. Because Congress often enacts procedural rules to achieve substantive goals, the holding below threatens more than just the RFS program.

For example, the Secretary of Health and Human Services must annually update the factor that determines how much the Medicare program will reimburse a hospital for its wage-labor. 42 U.S.C. §1395ww(d)(3)(E)(i). The factor "shall" be updated "on the basis of a survey conducted by the Secretary (and updated as appropriate)." *Ibid*. The Secretary has discretion to design the survey but cannot deem it "appropriate" to conduct no survey at all. See also,

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[9] See, *e.g.*, Gretchen Morgenson & Robert Gebeloff, *Wall St. Exploits Ethanol Credits, and Prices Spike*, N.Y. Times, Sept. 15, 2013, at A1; Laura Blewitt, Oil Refiners Cry Foul as 'RINsanity' Returns Amid Margin Squeeze, Bloomberg News (Aug. 4, 2016, 11:01 PM), https://www.bloomberg.com/news/articles/2016-08-04/oil-refiners-cry-foul-as-rinsanity-returns-amid-margin-squeeze (hailing "RINsanity the sequel").

e.g., 42 U.S.C. §1396s (list of pediatric vaccines must be "periodically reviewed and as appropriate revised"); 33 U.S.C. §1311 (effluent limitations must be "reviewed at least every five years and, if appropriate, revised"); 42 U.S.C. §§4321 to 44370m-12 (requiring agencies to consider the environmental consequences of particular federal actions).

As in these statutes, the RFS program dictates a procedure rather than an outcome. Annual review was Congress's best tool to keep the program functioning far into the future. Congress's ability to constrain EPA and other agencies via specific procedural limitations deserves protection. The judgments below shift power to agencies to act—or not—at *their* whim, not Congress's command. If Congress cannot trust the courts to insist that agencies follow statutory procedures, its ability to enact forward-looking programs diminishes. See, *e.g.*, *Massachusetts* v. *EPA*, 549 U.S. at 532 (recognizing Congress's understanding "that without regulatory flexibility, changing circumstances and scientific developments" can render a major environmental program "obsolete"). Review is warranted to preserve the boundaries that allow congressional delegation of authority. Absent agency adherence to procedural commands, neither agencies nor Congress can function properly.

II. This case presents an ideal vehicle

This petition presents a helpful alignment of three separate cases that reflect the D.C. Circuit's complete range of response. *Coffeyville* is the D.C. Circuit's resolution of the annual point-of-obligation issue, on which the panel divided. The majority said that EPA can use a "separate proceeding" because "appropriate" has no "particular temporal dimension." App., *infra*, 46a. Judge Williams disagreed, but concluded that the collateral proceeding (which he viewed as contemporaneous) saved the 2017 Rule. *AFPM*, upholding the 2018 Rule, doesn't mention

the collateral proceeding; it just cites *Coffeyville*. Although *Coffeyville* said that a refusal to reconsider the point of obligation could be an abuse of discretion if the record were definitive enough, *AFPM* gave EPA complete deference, concluding—without examining the record—that there is "no doubt" that the point of obligation is beyond the scope of annual rulemaking. *Id.* at 132a.

Review now is also timely and urgent because EPA must review "the implementation of the [RFS] program during calendar years" 2006 to 2022 to inform its administration of the program beyond 2022. §7545(*o*)(3)(B)(ii)(I). While a decision in this case would affect the 2017 and 2018 Rules (which are directly at issue), and the four following annual rules, it would be even more important beginning with the 2023 Rule. In that year, while the point of obligation will remain within the scope of annual rulemaking, see *supra* Part I.A.3, it will also become a baseline whose prior "implementation" the agency must "review" as it continues to administer the program. §7545(*o*)(2)(B)(ii). Because this baseline will affect how the program functions indefinitely, it is critical for the agency to determine it using the procedures that Congress specifically required.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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