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.

U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITIONS FOR REVIEW OF FINAL AGENCY ACTION
OF THE ENVIRONMENTAL PROTECTION AGENCY

Initial Brief of Intervenors for Respondent Responding to Renewable-Fuels Producers

Thomas A. Lorenzen
Robert J. Meyers
Elizabeth B. Dawson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
(202) 624-2789

Richard S. Moskowitz
American Fuel & Petrochemical Manufacturers
1800 M Street, NW, Suite 900N
Washington, DC 20036

Counsel for American Fuel & Petrochemical Manufacturers

Amir C. Tayrani
Lochlan F. Shelfer
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036
(202) 955-8500

Counsel for Monroe Energy, LLC

Robert A. Long, Jr.,
Kevin F. King
Thomas R. Brugato
Carlton Forbes
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-5488

John Wagner
Maryam Hatcher
American Petroleum Institute
200 Massachusetts Ave. NW
Suite 1100
Washington, DC 20001

Counsel for American Petroleum Institute

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Intervenors hereby certify as follows:

A. Parties, Intervenors, and *Amici Curiae*:

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Petitioners Growth Energy, et al. (Doc. 1809534) at i.

B. Rulings Under Review:

The agency action under review is the Final Rule issued by the United States Environmental Protection Agency, titled "Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020," 83 Fed. Reg. 63,704 (Dec. 11, 2018).

C. Related Cases:

These consolidated cases have not previously been before this Court or any other court. However, the parties and issues in these cases overlap with other cases involving EPA's Renewable Fuel Standard program, as indicated in the Brief of Respondent (Doc. 1823451) at i-iii.

RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Intervenors submit the following statements:

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association whose members comprise approximately 85 percent of U.S. refining capacity and virtually all U.S. petrochemical manufacturing capacity. AFPM has no parent companies, and no publicly held company has a 10 percent 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 members.

American Petroleum Institute ("API") is a nationwide, not-for-profit association representing over 625 member companies engaged in all aspects of the oil and gas industry, including science and research, exploration and production of oil and natural gas, transportation, refining of crude oil, and marketing of oil and gas products. API has no parent companies, and no publicly held company has a 10 percent or greater ownership interest in API. API is a "trade association" within the meaning of Circuit Rule 26.1. API is a continuing association operating for the purpose of promoting the general commercial, professional, legislative, or other interests of its members.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Page(s)

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Briefing in Other Cases

Other Authorities

GLOSSARY

2019 Rule	Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020, 83 Fed. Reg. 63,704 (Dec. 11, 2018)
AFPM	American Fuel & Petrochemical Manufacturers
API	American Petroleum Institute
Br.	Brief of Petitioners Growth Energy et al., Doc. 1809534
EPA	Environmental Protection Agency
EPA Br.	Brief of Respondent EPA, Doc. 1823451
JA	Joint Appendix
Petitioners	Petitioners Joining Brief of Petitioners Growth Energy et al., Doc. 1809534 (Growth Energy, RFS Power Coalition, National Biodiesel Board, and Producers of Renewables United for Integrity, Truth and Transparency)
Producers United	Producers United for Integrity, Truth and Transparency
RFS	Renewable Fuel Standard
RIN	Renewable Identification Number

Intervenors American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and Monroe Energy, LLC submit this brief in response to the challenges raised by Petitioners Growth Energy et al. to EPA's 2019 Rule. For the reasons that follow, those petitions should be denied.

SUMMARY OF ARGUMENT

I. The Clean Air Act does not authorize EPA to reallocate renewable-fuel volume obligations from exempt small refineries to non-exempt obligated parties. The Act includes provisions addressing small-refinery exemptions, but none permits EPA to reallocate exempt volumes. Indeed, the only statutory provision addressing the effects of small-refinery exemptions on other obligated parties directs EPA to *reduce* the burden on non-exempt obligated parties based on prior *use of renewable fuel* by exempt small refineries. Other statutory provisions likewise call for adjustments to the annual volume requirements, but conspicuously omit any authority to reallocate volumes based on small-refinery exemptions. Petitioners' proposed "*ex post*" and "*ex ante*" reallocation methods are thus foreclosed by the Act. Those proposals are also unlawful for additional reasons and unworkable in practice.

Even if reallocation were *permitted*, it is not *required*. EPA has consistently taken the position that it may not reallocate small-refinery-exempt volumes to non-exempt obligated parties, and the Act supports that interpretation. This Court

rejected a challenge to EPA's longstanding approach in *AFPM v. EPA*, 937 F.3d 559 (D.C. Cir. 2019), and the same result is warranted here.

II. Producers United's challenge to EPA's practice of reinstating previously-retired RINs likewise fails. Administrative reinstatement of RINs is permissible under the Act: Congress devised a flexible credit system to effectuate the RFS program, and EPA has reasonably implemented that system by allowing reinstatement of RINs in appropriate circumstances. Similar to the "RIN bank" that is essential to the RFS program's operation, EPA's reinstatement authority is necessary to correct errors and to ensure that the program functions properly.

Producers United's argument also has troubling consequences for the Court and obligated parties. It would severely limit this Court's ability to craft a remedy were it to set aside a challenged RFS rule, and would force parties to litigate RFS claims through annual emergency stay petitions.

ARGUMENT

I. EPA Appropriately Declined To Reallocate Small-Refinery Exempt Volumes.

A. The Act Prohibits Reallocation.

Contrary to Petitioners' argument that EPA is required to reallocate small-refinery-exempt volume obligations (Br. 11, 14-17), the Act prohibits such reallocation.

The Act directs EPA to establish a single set of nested renewable-fuel volume obligations, and authorizes only a single adjustment to those obligations concerning small-refinery exemptions: a *reduction* "to account for the use of *renewable* fuel during the *previous* calendar year by small refineries that are exempt." 42 U.S.C. § 7545(*o*)(3)(B)(ii)(II), (3)(C)(ii) (emphases added); *see* 75 Fed. Reg. 14,670, 14,717 (Mar. 26, 2010). Congress easily could have drafted provisions allowing EPA to *increase* renewable-fuel-volume obligations based on small-refinery exemptions, or to account for the use of *nonrenewable* fuel by exempt small refineries. It did not do so.

A careful examination of the Act confirms that these omissions were not inadvertent. The statute contains several detailed provisions addressing small refineries. For example, the Act permits exempt small refineries to generate RINs in certain circumstances, *id.* § 7545(*o*)(5)(A)(iii), and provides that small refineries that waive their exemption must be assigned volume obligations, *id.* § 7545(*o*)(9)(D). These provisions demonstrate that Congress understood that small-refinery exemptions may affect the broader program and provided explicit direction governing that relationship.

Likewise, the Act twice refers to "projected" future fuel volumes, *id.* § 7545(*o*)(3)(A), (7)(D)(i), but conspicuously omits any authorization for EPA to adjust annual volume requirements based on projected future small-refinery

exemptions. One such provision requires EPA to reduce cellulosic volume requirements "to the projected volume available" each year, *id.* § 7545(*o*)(7)(D)(i); Congress could have included a parallel provision requiring EPA to increase volume requirements to account for the "projected volume" of small-refinery exemptions. Again, it did not do so.

"[A]dministrative agencies may act only pursuant to authority delegated to them by Congress." *Clean Air Council v. Pruitt*, 862 F.3d 1, 9 (D.C. Cir. 2017) (cleaned up). "The fact that Congress knew how to … reference other statutory provisions" and to refer to projected future volumes "when it wanted to" but did not do so with respect to small-refinery-exempt volumes confirms that the Act does not allow EPA to adjust the standards upward on the basis of past or projected future small-refinery exemptions. *Am. for Clean Energy v. EPA*, 864 F.3d 691, 733 (D.C. Cir. 2017) ("*ACE*").

Accordingly, EPA has long interpreted the statute as not contemplating reallocation. Since 2010, EPA has adhered to the view that "[p]eriodic revisions to the standards to reflect waivers issued to small refineries or refiners would be inconsistent with the statutory text." 75 Fed. Reg. 76,970, 76,804-05 (Dec. 10, 2010). EPA has repeatedly reaffirmed this understanding, and acknowledged that it

may be "required by the statute." EPA Br., *AFPM v. EPA*, No. 17-1258, Doc. 1767773, at 73 (D.C. Cir. Jan. 10, 2019).[1]

B. Petitioners' Proposed Reallocation Mechanisms Are Unlawful And Unworkable.

Petitioners' "*ex post*" and "*ex ante*" reallocation methods are foreclosed under the analysis above. Those methods also contravene the Act in additional ways and are unworkable in practice.

1. The "*Ex Post*" Approach.

Petitioners' "*ex post*" approach (Br. 19-21), which would require EPA to adjust the annual volume requirements to reflect exemptions granted in prior years, would exceed EPA's statutory authority. The Act requires renewable-fuel obligations to be set on an "annual average basis" and applies the obligations to a specific "calendar year." 42 U.S.C. § 7545(*o*)(2)-(3). The statute sets renewable

[1] *See, e.g.*, 76 Fed. Reg. 38,884, 38,859 (July 1, 2011); 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012); 78 Fed. Reg. 9,282, 9,303 (Feb. 7, 2013); 78 Fed. Reg. 49,794, 49,826 (Aug. 15, 2013); JA__[EPA-HQ-OAR-2017-0091-4990_at_216].

EPA's RFS 2020 final rule takes a different approach to the issue. EPA Br. 62. That new approach, which suffers from numerous legal flaws, post-dates the 2019 Rule and so is irrelevant here.

fuel volumes for each year, *id.* § 7545(*o*)(2), and to the extent those volumes are not met, the Act does not provide for redistributing them to future years.[2]

The Act contains three provisions addressing carryover of annual volume requirements: the previously mentioned mandate that EPA reduce renewable-fuel requirements based on previous use of renewable fuel by exempt small refineries, *id.* § 7545(*o*)(3)(C)(ii), the "reset" provision, and a provision governing RIN deficits. The "reset" provision requires EPA to *reduce* the statutory volumes if it waives at least 20 percent of a particular volume requirement for two consecutive years, or at least 50 percent of a requirement for a single year. *Id.* § 7545(*o*)(7)(F). The deficit provision allows individual obligated parties to "carry forward a renewable fuel deficit" for a single year. *Id.* § 7545(*o*)(5)(D). Congress could have provided that EPA must "reset" the annual volume requirements by increasing future obligations to offset past shortfalls, or created an aggregate deficit mechanism to be implemented by EPA, but, once again, did not do so.

Although Petitioners assert (Br. 20) that an *ex post* approach would "function[] like the carryover RIN bank that EPA has read into the statute," EPA has not "read in" the RIN bank. The RIN bank is based on statutory provisions providing

[2] Petitioners do not dispute (Br. 18-19) that Congress directed EPA to issue annual forward-looking standards issued by the statutory deadline, and do not suggest that EPA revise the standards after that deadline to address small-refinery exemptions.

for generation of "credits" and requiring that these "credits" be available for use for twelve months after generation, thus covering both the year in which the RIN is generated and the following year. *See* 42 U.S.C. § 7545(*o*)(5)(A), (C); *ACE*, 864 F.3d at 714 (obligated parties may "carry over credits from one year into the next"). By making RINs available for use in two compliance years, Congress struck a balance between ensuring required volumes are used and "ensur[ing] that obligated parties have sufficient flexibility to comply with" a complex regime that requires significant investments. *ACE*, 864 F.3d at 715. By contrast, Petitioners' *ex post* approach has no footing in the statutory text and would undermine the Act's careful balancing of those interests.

This Court's decision in *NPRA v. EPA*, 630 F.3d 145 (D.C. Cir. 2010), does not support Petitioners' *ex post* reallocation proposal. In the rulemaking upheld in *NPRA*, EPA combined the 2009 and 2010 biomass-based diesel volumes into a single volume requirement for 2010 due to delays in implementing Congress's overhaul of the RFS program. This Court held that, "[u]nder the circumstances," EPA's decision was permissible given the Act's silence regarding the consequences of missing the deadline for issuing the 2009 standards. *Id.* at 154-58; *see also ACE*, 864 F.3d at 720-21. *NPRA* thus stands for the limited proposition that EPA does not lose its power to *promulgate* volume requirements just because it misses the statutory deadline. Petitioners, however, invoke *NPRA* for a different proposition:

that EPA may reallocate volumes to a future year simply because the volume targets EPA promulgated in a prior year were not met. *See* Br. 18-20. That issue was not before the Court in *NPRA*, and the Court's decision accordingly does not address it.

Moreover, EPA has rejected reasoning that mirrors Petitioners' *NPRA* argument here. In the 2012 final rule, EPA concluded that "volumes waived in" one year "as a result of small refiner waivers [cannot] be 'made up' in setting" a subsequent year's standards because there are no statutory "provisions for ensuring the percentage standards actually result in the specified volumes actually being consumed." 77 Fed. Reg. at 1,340. For example, EPA uses projections of fuel consumption that may not turn out to be accurate, and thus may "not produce a demand for biofuels that exactly corresponds to the volumes in the statute." *Id.* Petitioners dismiss this analysis, noting that if less transportation fuel is used, that "does not result in obligated parties coming up short of" their volume obligations. Br. 20-21. But that argument fails because the "ensure" language undergirding Petitioners' argument relates to the volumes specified in the statute, not the annual volume requirements (expressed as percentages) issued by EPA. *See ACE*, 864 F.3d at 698-99; 42 U.S.C. § 7545(*o*)(3)(B)(i).

Imposing additional burdens on obligated parties based on actions taken in confidential, ad-hoc administrative proceedings regarding small-refinery

exemptions would also raise serious due-process concerns.[3] While an agency adjudication may have "some tangential impact on other entities," *Neustar, Inc. v. FCC*, 857 F.3d 886, 895 (D.C. Cir. 2017), permitting reallocation would cause decisions in nonpublic adjudications to have a direct and non-tangential effect on other regulated parties. Yet those parties would receive no notice or opportunity to be heard regarding their additional, reallocated compliance burdens. *See Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1816 (2019) (emphasizing the importance of giving "affected parties fair warning of potential changes in the law and an opportunity to be heard on those changes"); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Indeed, this Court recently observed that the confidential nature of small-refinery exemptions "paint[s] a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review." *Advanced Biofuels Ass'n*, 2019 WL 6217965, at *4.

[3] Small-refinery-exemption proceedings are informal adjudications in which only EPA and the petitioning small refinery participate. *See Sinclair Wyoming Refining Co. v. United States*, 874 F.3d 1159, 1165 (10th Cir. 2017). When EPA adjudicates a small-refinery petition, "the identities of the applicants, the decisions, and the decisions' rationales [are] kept completely confidential, unless the refinery itself chose to make the decision or conclusions public." *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, 2019 WL 6217965, at *2 (D.C. Cir. Nov. 12, 2019).

The *ex post* approach would also risk exceeding the "blendwall." Because most fuels infrastructure and vehicles cannot handle gasoline containing more than 10 percent ethanol, there are major constraints on the ability of the market to exceed a 10 percent ethanol mandate. *See ACE*, 864 F.3d at 700. Petitioners ignore this issue entirely, and their approach would increase the volume requirements without consideration of whether those levels are reasonably attainable.

2. The "*Ex Ante*" Approach.

Petitioners also suggest (Br. 17-19) that EPA may reallocate small-refinery-exempt volumes using an "*ex ante*" approach by attempting to estimate the number of small-refinery exemptions that will be granted in future years and adjusting the annual volume requirements accordingly. This argument presupposes that EPA's determination of small-refinery exemptions has been (and will continue to be) consistent across years, such that EPA could reliably predict how many small refineries (and how much non-renewable fuel) would be exempted in an upcoming compliance year.

But EPA's determination of small-refinery exemptions has varied dramatically from year to year. In 2015, EPA granted only 7 exemptions covering

290 million RINs.[4] That number increased to 35 in 2017, covering 1.8 billion RINs, but then declined to 31 exemptions covering 1.4 billion RINs in 2018.[5]

This constantly shifting approach undermines EPA's ability to make accurate forecasts, and this history cannot be ignored. *See BellSouth Telecomm's, Inc. v. FCC*, 469 F.3d 1052, 1060 (D.C. Cir. 2006) ("[T]he deference owed agencies' predictive judgments gives them no license to ignore the past when the past relates directly to the question at issue."). As EPA itself has stated, it would be impracticable to attempt to predict future exemptions, "making this task [*ex ante* reallocation] nigh impossible. And of course, if EPA gets this task wrong, it could end up setting compliance standards that are unachievable for obligated parties."[6]

EPA acknowledges that its shifts have been driven in part by changing legal interpretations. As EPA observes, "in prior years, EPA has taken different approaches in evaluating [small-refinery-exemption] petitions." 84 Fed. Reg. 57,677, 57,681 (Oct. 28, 2019). Moreover, EPA asserts discretion to apply differing methodologies to different petitions: "An EPA decision to grant or deny a small

---

[4] JA__[*RFS_Small_Refinery_Exemptions*_https://www.epa.gov/fuels-registrationreporting-and-compliance-help/rfs-small-refinery-exemptions].

[5] *Id.* As of January 23, 2020, EPA has not ruled on any small-refinery-exemption petitions for the 2019 compliance year.

[6] EPA Br., *AFPM v. EPA*, No. 17-1258, Doc. 1767773, at 75 (D.C. Cir. Jan. 10, 2019).

refinery petition applies only to that small refinery. EPA may apply the same methodology underlying its decision to evaluate other small refinery petitions. But it is not required to."[7] EPA similarly noted in a Tenth Circuit case that it adopted a "changed interpretation" of the small-refinery-exemption provision in a "decision document that is not before the Court, is being treated as confidential business information, and thus cannot be [publicly] disclosed."[8] These statements confirm that EPA does not have a settled small-refinery-exemption program that would allow it to predict with reasonable accuracy the volumes that would be exempted during upcoming compliance years.

The uncertainty is compounded by a barrage of legal challenges to EPA's small-refinery exemptions, including by Petitioners themselves. Growth Energy and others have challenged 2017 and 2018 small-refinery exemptions. *See Renewable Fuels Ass'n v. EPA*, No. 19-1220 (D.C. Cir.) (Growth Energy as Petitioner); *Renewable Fuels Ass'n v. EPA*, No. 18-9533 (10th Cir.). By Petitioners' own lights, it would be arbitrary for EPA to adjust volume obligations based on the expectation

[7] EPA Br., *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, Doc. 1785554, at 25 (D.C. Cir. July 8, 2019).

[8] EPA Br., *Renewable Fuels Ass'n v. EPA*, No. 18-9533, Doc. 010110245381, at 4 (10th Cir. Oct. 15, 2019).

of future exemptions, given that Petitioners challenge the validity of those exemptions.[9]

Further complicating matters, small refineries have also challenged EPA decisions denying exemption petitions. Two have prevailed. *See Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600 (4th Cir. 2018); *Sinclair*, 874 F.3d at 1172. Several additional challenges are pending. *See Suncor Energy, Inc. v. EPA*, No. 19-9612 (D.C. Cir.); *Ergon-West Virginia, Inc. v. EPA*, No. 19-2152 (4th Cir.); *Big West Oil LLC v. EPA*, No. 19-1197 (D.C. Cir.); *Sinclair Wyoming Refining Co. v. EPA*, No. 19-1196 (D.C. Cir.).

At bottom, the numerous challenges, brought by parties with opposing and often mutually exclusive legal positions, only underscore the uncertainty surrounding EPA's small-refinery exemptions.

Petitioners' proposed approach would foist that additional uncertainty onto non-exempt obligated parties. Reallocation would result in significant swings in volume obligations, preventing the advance planning and preparation that plays a critical role in the RFS program. *See, e.g.*, 77 Fed. Reg. at 1,340 (Act designed to "provid[e] advance notice and certainty to obligated parties regarding their regulatory requirements"). Moreover, reallocation would create an unequal playing

[9] Petitioners do not explain what EPA should do if it reallocates exempted volumes but the underlying exemptions are later invalidated.

field by shifting compliance burdens from exempted small refineries to non-exempt obligated parties. Non-exempt parties would need to shoulder not only their own RIN costs, but also those reallocated from exempt small refineries who sell the same fungible product. Petitioners do not address these market-distorting effects of their proposed reallocation scheme.

C. Even If Reallocation Were Permitted, The Act Does Not Require It.

Assuming for the sake of argument that the Act *allows* EPA to reallocate volume obligations based on small-refinery exemptions, it does not *require* reallocation.

Petitioners' contrary argument fails at the outset because it is time-barred. EPA's 2019 Rule did not reopen the reallocation issue, but merely applied EPA's longstanding approach. As noted above, EPA has since 2010 interpreted the Act as authorizing it to account for small-refinery exemptions in an upcoming compliance year only if exemptions for that year are issued *before* the final volume obligations are issued. EPA explained in the 2019 Rule that it "determined [its] legal, technical, and policy approach to these issues many years ago, and ha[s] simply applied [its] longstanding regulations and policies in this action." JA__[EPA-HQ-OAR-2018-0167-1387_at_183-84]. Accordingly, Petitioners' challenge is untimely. *See*

Medical Waste Inst. v. EPA, 645 F.3d 420, 427 (D.C. Cir. 2011) (declining to consider challenge filed long after agency "first use[d]" challenged approach).

Further, the National Biodiesel Board made a nearly identical argument in *AFPM*, and the Court denied the petition for review. *See* 937 F.3d at 587-89. Petitioners argue (Br. 23 n.13) that this panel may ignore *AFPM* because it relied primarily on procedural grounds. But *AFPM* also concluded that EPA had "reasonably rejected the proposals it received," and that "to the extent the EPA's method of accounting for" small-refinery exemptions "is a key assumption" of its annual rulemakings, EPA "carried its affirmative burden to justify that assumption." 937 F.3d at 589. These conclusions must be taken into account in assessing Petitioners' arguments.

In any event, Petitioners' arguments fail on the merits. The Act instructs EPA to publish annually "the renewable fuel obligation that ensures that" the required volumes of renewable fuel "are met." 42 U.S.C. § 7545(*o*)(3)(B)(i). Petitioners rely (Br. 15) on the word "ensure" to argue that EPA must increase other obligated parties' volume requirements to make up for exempted volumes. But this Court has already rejected a similarly absolutist interpretation of the word "ensure." *ACE*, 864 F.3d at 714. Promoting use of renewable fuel is not the Act's only goal, and the Act "d[oes] not pursue its purposes of increased renewable fuel generation at all costs," such that the general "ensure" provision cannot trump the Act's explicit direction

regarding small-refinery exemptions. *Id.* (cleaned up). Given this Court's narrower interpretation of "ensure," Petitioners err in arguing that the Act requires reallocation no matter the consequences.

Reinforcing this conclusion, the Act contains "waiver provisions" that "lessen the Renewable Fuel Program's requirements in specified circumstances," *id.*, as well as the "reset" provision, which requires EPA to reduce the statutory volumes in defined circumstances, *id.* § 7545(*o*)(7)(F). These provisions—like the small-refinery-exemption provisions—"are as much a part of the [statute's] purpose" as the provision requiring EPA to ensure that statutory volumes are met. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

II. EPA Has Authority To Reinstate RINs In Appropriate Circumstances.

A. Administrative Reinstatement Of Previously Retired RINs Is Lawful.

Producers United errs in arguing (Br. 28) that EPA lacks authority to reinstate previously-retired RINs. According to Producers United, such reinstatement violates the Act because "once RINs are retired, they cannot be used again." *Id.* But even if this challenge were properly before the Court—which, as EPA demonstrates, is not the case, EPA Br. 68-72—nothing in the Act prohibits EPA from administratively reinstating RINs. To the contrary, EPA's reinstatement authority derives from the Act.

The Act directs EPA to establish a "credit program" to facilitate compliance with the RFS program's annual volume requirements. *See* 42 U.S.C. § 7545(*o*)(5). The Act prescribes some of the credit program's features, but directs EPA to fill in many of the details, including rules governing transfer and retirement of RINs. *See id.* § 7545(*o*)(5)(A). Reinstating previously retired RINs is one detail in the broader framework established by the statute.

Reinstated RINs are not newly generated "credits." Rather, reinstatement is an administrative action taken regarding a previously generated RIN. This may occur for reasons unrelated to the granting of small-refinery exemptions. For example, EPA has reinstated RINs "as a result of errors [an obligated party] made in their compliance demonstration." Bunker Decl., EPA Opposition to Stay, *ACE v. EPA*, No. 16-1005, Doc. 1645849, ¶ 22 (D.C. Cir. Nov. 14, 2016).

Producers United therefore errs in suggesting that administrative reinstatement violates the statute by allowing parties to generate new RINs without otherwise complying with the statutory requirements. Permitting reinstatement of previously-retired RINs is the functional equivalent of granting administrative reconsideration with respect to retirement of those RINs. EPA has inherent authority to grant such reconsideration, particularly given the Act's express delegation of authority to implement the credit program. *See Ivy Sports Medicine, LLC v. Burwell*,

767 F.3d 81, 86 (D.C. Cir. 2014) (addressing agencies' "inherent authority to revisit their prior decisions").

B. Producers United's Argument Would Lead To Illogical Consequences.

Prohibiting EPA from reinstating RINs would lead to unintended and illogical results and would interfere with this Court's ability to remedy agency missteps. Suppose, for example, EPA adopts an annual volume requirement that is set aside as too high by this Court the following year. Under Producers United's logic, the obligated parties who complied with the unlawful rule would have no remedy; EPA would lack authority to reinstate the excess RINs used to comply with the invalidated volume obligations because doing so would generate "new" RINs. That result is untenable.

In related contexts, EPA has reopened prior-year compliance demonstrations to adjust for later-discovered errors that affected parties' RIN obligations. For example, after this Court set aside the 2012 RFS rule's cellulosic-biofuel requirement in *API v. EPA*, 706 F.3d 474 (D.C. Cir. 2013), EPA unwound the 2012 compliance demonstration and issued refunds to parties who purchased compliance credits from EPA, *see* Status Report, *API v. EPA*, No. 12-1249, Doc. 1648781 (D.C. Cir. Dec. 1, 2016). EPA has also reopened compliance demonstrations to invalidate fraudulently generated RINs, and to require parties that relied on such RINs to

replace them with valid substitutes. *See* 78 Fed. Reg. 12,158, 12,158 (Feb. 21, 2013) (discussing significant RIN fraud and steps to address use of fraudulent RINs). But EPA's ability to take these common-sense steps would be questionable under Producers United's approach.

Producers United seeks to have it both ways with respect to errors in EPA's volume requirements. Renewable fuels producers argue that when EPA imposes volume obligations that are *too low*, EPA must reconsider its position and increase the volumes even after the relevant compliance period ends. *See* JA_[EPA-HQ-OAR-2018-0167-1292_at_50] (arguing that EPA must "add the 500 million RINs covered by the vacated general waiver [in *ACE*] to the total 2019 volume requirement it would otherwise impose"). But when EPA imposes volume obligations that are *too high*, Producers United insists that EPA is powerless to provide a remedy. Interpreting the statute to mandate such a one-way ratchet would violate bedrock rules of statutory construction. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (courts must interpret statutes "as a symmetrical and coherent regulatory scheme" in which "all parts" fit "into an harmonious whole" (cleaned up)).

Producers United's argument would also pose severe difficulties for judicial review. Every RFS annual rule dating back to 2010 has been challenged in this Court. If there were no mechanism for reinstating retired RINs, obligated parties

would need to immediately rush to court to seek an emergency stay as soon as EPA issued new RFS standards for the following year. Otherwise, obligated parties would be forced to retire RINs to comply with that year's volume obligations, even though this Court may later set them aside. A stay would need to remain in place until this Court decided any petitions for review and disposed of any rehearing petitions, and until the Supreme Court disposed of any certiorari petitions, a process that would take years. Such a regime could significantly impair EPA's efforts to administer the program and would impose a substantial and recurring burden on this Court to hear emergency stay motions every year.

CONCLUSION

Petitioners' challenges to the 2019 Rule should be rejected.

Respectfully submitted,

/s/ Thomas A. Lorenzen
Thomas A. Lorenzen
Robert J. Meyers
Elizabeth B. Dawson
CROWELL & MORING LLP
1001 Pennsylvania Avenue, NW
Washington, DC 20004-2595
(202) 624-2789

Richard S. Moskowitz
American Fuel & Petrochemical Manufacturers
1800 M Street, NW, Suite 900N
Washington, DC 20036

Counsel for American Fuel & Petrochemical Manufacturers

/s/ Amir C. Tayrani
Amir C. Tayrani
Lochlan F. Shelfer
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave. NW
Washington, DC 20036
(202) 955-8500

Counsel for Monroe Energy, LLC

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.,
Kevin F. King
Thomas R. Brugato
Carlton Forbes
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001-4956
(202) 662-5488

John Wagner
Maryam Hatcher
American Petroleum Institute
200 Massachusetts Ave. NW
Suite 1100
Washington, DC 20001

Counsel for American Petroleum Institute

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32, Circuit Rule 32(e)(2), and this Court's August 20, 2019 order (Doc. 1802964) because it contains 4,156 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word and 14-point Times New Roman font.

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

January 23, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2020, I caused copies of the foregoing brief to be served by the Court's CM/ECF system, which will send a notice of the filing to all registered CM/ECF users.

/s/ Robert A. Long, Jr.
Robert A. Long, Jr.

January 23, 2020