**ORAL ARGUMENT SCHEDULED FOR MAY 1, 2020**

**No. 19-1023 (and consolidated cases)**

**IN THE**

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Growth Energy, *et al.*,
Petitioners,

v.

Environmental Protection Agency,
Respondent.

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

## Joint Reply Brief of Petitioners American Fuel & Petrochemical Manufacturers, Monroe Energy, LLC, Small Retailers Coalition, and Valero Energy Corp.

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## Glossary

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|---|---|
| AFPM | American Fuel & Petrochemical Manufacturers |
| E0 | Gasoline without ethanol content |
| EPA | Environmental Protection Agency |
| JA | Joint Appendix |
| PES | Philadelphia Energy Solutions |
| RFA | Regulatory Flexibility Act |
| RFS | Renewable Fuel Standard |
| RIN | Renewable Identification Number |
| RTC | Renewable Fuel Standard Program – Standards for 2019 and Biomass-Based Diesel Volume for 2020: Response to Comments (EPA-HQ-OAR-2018-0167-1387) |
| SBREFA | Small Business Regulatory Enforcement Fairness Act |
| SRE | Small-Refinery Exemptions |

## Summary of Argument

EPA failed to address significant comments and record evidence during its rulemaking. Now, the agency resorts to *post-hoc* rationalizations to buttress its decision not to consider a severe-economic-harm waiver. But agency action can be upheld only on grounds that the agency originally articulated; here, those grounds were non-responsive and logically inconsistent. EPA's grand theory that economic harm is impossible because RFS compliance costs are universally and immediately passed through is logically incompatible with EPA's practice of granting dozens of small-refinery exemptions on the basis that compliance costs impose economic harm on those refineries. And record evidence demonstrating that compliance costs are *not* perfectly passed through and *do* impose economic harm—particularly on the East Coast—further undermines the theory.

Compounding these errors, EPA provided no reasonable explanation for refusing to consider an inadequate-domestic-supply waiver while acknowledging that 2019's volume requirements are not "reasonably attainable." And EPA summarily dismissed requests to change the point of obligation, despite new evidence compelling the agency to reexamine this fundamental assumption.

At bottom, EPA contends that it may rely on prior years' decisions without addressing new record evidence and comments. Yet Congress required EPA to assess the RFS Program annually—and authorized annual judicial review. This review is crucial because the fuel market is complex and dynamic, domestic and international conditions change quickly, and regularly-available data exposes new consequences of the RFS Program. EPA cannot rest on past decisions when faced with new developments and new expert findings. But here, EPA did just that.

Moreover, EPA violated the RFA by not performing the required regulatory flexibility analysis and by not properly certifying that the rule will not have a significant economic impact on a substantial number of small entities. The proper remedy is vacatur.

## Argument

### I. EPA arbitrarily and capriciously declined to exercise the severe-economic-harm waiver and treated the point of obligation as beyond the scope of the Rule.

#### A. EPA's pass-through theory is logically inconsistent with its issuance of small-refinery exemptions.

EPA defends both its denial of a severe-economic-harm waiver and its disregard of comments on the misplaced point of obligation by invoking the theory that RIN costs are invariably and swiftly passed through. This assumption, however, is wrong and logically inconsistent with EPA's

practice of routinely granting small-refinery exemptions ("SREs"). Obligated Petitioners Br. 13-21. EPA now concedes refineries may experience "short-term" hardship before they "later pass those costs" to consumers, EPA Br. 31-32 & n.14, a retreat from its previous insistence that RIN prices are "100%" passed through within only "two business days." JA__[Point.of.Obligation.Denial.25.(EPA-HQ-OAR-2018-0167-0065)] ("Denial"). More fundamentally, EPA admits that the RFS Program *does* cause economic harm in some regions and to some refineries.

"[S]elf-contradictory" reasoning "does not constitute an adequate explanation of agency action." *See Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16 (D.C. Cir. 2015). Nor does it require this Court's deference. Given EPA's concessions and the evidence in the administrative record concerning the economic impact of RINs, EPA's pass-through argument supports neither its denial of a severe-economic-harm waiver nor its refusal to reconsider the point of obligation.

Other courts have recognized the inconsistency between EPA's pass-through theory and the economic-hardship findings underlying SREs. Most recently, in *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206 (10th Cir. 2020), the court found an "unexplained inconsistency" between EPA's invocation of the pass-through theory in other contexts and its grant of the challenged

economic-hardship exemptions, *id.* at 1255 (citation omitted). The court concluded that in granting the SREs, EPA must have "ignored" its pass-through theory or silently "deviat[ed]" from it without explanation, either of which was arbitrary. *Id.* at 1254-57.[1] Similarly (and contrary to EPA's reading at 33), the court in *Ergon-West Virginia, Inc. v. EPA*, 896 F.3d 600 (4th Cir. 2018), did far more than "simply require[] a more particularized response." It explicitly identified an "inconsisten[cy]" between "EPA's disregard" of Ergon's argument that it could not pass through RIN costs and the agency's consideration of "RIN prices and the cost of compliance through RIN purchases" in making SRE determinations. *Id.* at 613. The court concluded that it was arbitrary for EPA to rely on the pass-through theory to deny an SRE to a refinery that provided specific evidence of economic hardship due to RIN costs. *Id.*

The same inconsistency identified in those cases requires vacatur and remand here. The need to grant numerous SREs year after year for "disproportionate economic hardship" imposed by "compliance with" RFS obligations, 42 U.S.C. § 7545(o)(9)(A)(ii)(I), demonstrates that RIN costs are *not* generally passed through.[2] Indeed, SREs represent an

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[1] Obligated Parties disagree with the Tenth Circuit's ultimate decision to vacate the SREs.

[2] EPA granted 35 SREs for 2017 and 31 for 2018, exempting more than

acknowledgement that refineries cannot fully recover compliance costs through product pricing. Given EPA's SRE hardship determinations, the agency abused its discretion by invoking the generalized pass-through theory to ignore comments advocating a severe-economic-harm waiver. Likewise, EPA cannot rely on the pass-through theory to defend treating the point-of-obligation issue as beyond the scope of the Rule.

Further, the 2011 Department of Energy study on which EPA has long relied to evaluate SREs is fundamentally inconsistent with the pass-through theory. JA__[DOE,*Small.Refinery.Exemption.Study*.33.(2011).(EPA-HQ-OAR-2018-0167-1149.vol.2)] ("DOE Study"). Contrary to the notion that RFS compliance is costless, DOE—the expert agency—equated rising RIN prices with increased compliance costs and observed that independent refineries forced to purchase RINs are disadvantaged in comparison to vertically integrated oil companies that can comply through blending. JA__, __-__[DOE.Study. 3,16-17]. The study concluded that rising RIN prices would have a "significant impact" because RINs represent "the most significant cost of compliance" for small refiners. JA__[DOE.Study.21]. None of this would be true if RIN costs universally were passed through.

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3 billion RINs in RFS obligations and more than half the potentially-eligible refineries. *See* EPA, RFS Small Refinery Exemptions, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions.

Indeed, DOE understood that whether RIN costs can be passed through "depends on many factors, including the market power and the relative cost level of a small refiner relative to other market participants." JA__[DOE.Study.23].

EPA's claim that it is "unaware" of ever granting an SRE based on inability to pass through RIN costs is impossible for the Court to test. EPA's formal position, however, is that when evaluating SRE petitions, EPA considers economic factors including "RIN prices, and the cost of compliance through RIN purchases." Memorandum, EPA Office of Air & Radiation 2 (Dec. 2, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/rfs-small-refinery-2016-12-06.pdf; *see also Ergon*, 896 F.3d at 613 (citing EPA memorandum). Accordingly, EPA recently produced documents granting an SRE based on "financial information that documents a significant RFS compliance cost." Production Set, *Renewable Fuels Ass'n v. EPA*, No. 18-cv-2031 (D.D.C.), ED_002308-00051, https://foiaonline.gov/foiaonline/api/request/downloadFile/2019-07-31_RFA%20v.%20EPA%20(18-2031)_Production%20Set.pdf/c82d4070-f211-4875-be2e-2a6a6aeae32a. EPA's statements are consistent with the evidence of economic hardship presented in the 2019 Rule and inconsistent

with the pass-through theory.

### B. EPA failed to consider record evidence supporting a severe-economic-harm waiver.

Commenters submitted various evidence—including Dr. Craig Pirrong's detailed study, *Analysis of the RFS Program and the 2019 Proposed Standards* (2018) ("the Pirrong Study")—demonstrating economic harm the RFS Program was inflicting, particularly on the PADD 1 region in the Eastern United States. But EPA ignored them entirely. *See* Obligated Petitioners Br. 18. This manifest "fail[ure] to address evidence that runs counter to the agency's decision" is textbook arbitrary-and-capricious decisionmaking. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 307 (D.C. Cir. 2018).

EPA belatedly responds to this evidence (at 28-31), but "[t]hese arguments come too late." *Genuine Parts*, 890 F.3d at 314. Courts "may only uphold a rule on the basis articulated by the agency in the rule making record"; "*post hoc* rationalizations for agency action carry no weight." *Id.* EPA contends for the first time (at 26) that it was not required to address the Pirrong Study and other severe-economic-harm evidence because it had rejected similar evidence in prior rulemakings. But this is not an exception to the bar on agencies' *post-hoc* rationalizations; EPA had a duty to articulate this reason in the rulemaking record.

In any event, EPA's made-for-litigation reasoning does not excuse its inaction. EPA contends that simply citing its 2017 denial of administrative petitions regarding the point of obligation, Denial, JA__-__[EPA-HQ-OAR-2018-0167-0065], in the Response to Comments was sufficient to dismiss any comment contesting EPA's core premise—that the RFS Program could not inflict economic harm because all compliance costs are passed through to consumers. But the Denial did not "adequately refute[]" the evidence in *this* record. EPA's refusal to engage with record evidence is incompatible with its obligation to "always stand ready to hear new argument and to reexamine the basic propositions undergirding [its] policy." *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993).

EPA concedes (at 28) that the Denial "did not cite the 2016 [Charles River Associates] Study by name." And both the 2016 and 2017 Charles River Associates Studies refuted critical assumptions underlying EPA's pass-through conclusion—issues that this Court expressly did not "consider" when denying petitions for review of the Denial. *Alon Refining Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 650 (D.C. Cir. 2019); *see also* Obligated Petitioners Br. 19-21.[3]

[3] The Denial is also the subject of a pending petition for a writ of certiorari. *Valero Energy Corp. v. EPA*, No. 19-835 (U.S.) (filed Dec. 30, 2019).

Other studies in this rulemaking record—but unaddressed in the Denial—also undermined EPA's complete-pass-through theory. One "identified East Coast" refiners "as facing the 'most risk' from the RFS Program," JA__ & n.35[Valero.Comment.10.&.n.35.(EPA-HQ-OAR-2018-0167-1041)], because there is "substantially less pass through" in the PADD 1 region, with pass-through rates of only "38-50%," JA__[Holcomb.Study.6.(EPA-HQ-OAR-2018-0167-1041-Att.L)]. This conclusion was based on works such as Sebastien Pouliot, Aaron Smith & James Stock, *RIN Pass-Through at Gasoline Terminals* 3, 29 (Feb. 22, 2017) (finding "incomplete pass-through" on "the East Coast"), https://scholar.harvard.edu/files/stock/files/rack-pass-through-pouliot-smith-stock.pdf ("Pouliot Study"); *see* JA__-__[Holcomb.Study.9-10] (citing Pouliot Study).[4] Indeed, recent studies post-dating the Final Rule's publication confirm that there is "incomplete pass-through in PADD 1." Jesse Burkhardt, *The Impact of the Renewable Fuel Standard on US Oil Refineries*, 130 Energy Policy 429, 430, 434 (2019).

EPA, however, took the ostrich approach. EPA's unreasoned reliance on its prior position—which was premised on generalized national averages

[4] A co-author of the Pouliot Study, James Stock, also co-authored the studies on which EPA relied in the Denial. *See* JA__ & n.68[2017.Point.of.Obligation.Denial.25].

and aggregated industry-wide data—is especially inexcusable because the record indicated that the PADD 1 region experiences particularly severe harm and far less pass-through than elsewhere in the country. *See* JA__-__[Pirrong.Study.13-18.(EPA-HQ-OAR-0167-0622-A)]. EPA cannot simply "cite[] generally to an industry-wide study" regarding pass-through without considering "contradictory evidence" "specific" to one region. *Ergon*, 896 F.3d at 613.

EPA wrongly contends (at 28) that a study by Argus Consulting Services was "significant evidence" that refiners invariably pass through RIN costs. That study expressly stated that the available information "cannot be used to prove that the exact amount of the RVO costs are consistently passed along by refiners or importers." JA__[Point.of.Obligation.Denial.at.23.n.68.(EPA-HQ-OAR-2018-0167-0065)]. Rather, like the earlier study on which EPA relied, Argus looked at averaged aggregated data. The results did not disprove evidence presented to EPA that in particular regions of the country, refiners in fact could not pass through RIN costs and would suffer severe economic harm from the obligations imposed upon them.

Resorting to further *post-hoc* reasoning, EPA counters (at 29-30) that the Pirrong Study assumes that RIN prices affect the retail price of

transportation fuel, which EPA disclaimed in the Denial. But the Pirrong Study affirmatively demonstrated that retail prices *are* affected by RIN prices once the RFS requirements hit the "blend wall" (*i.e.*, when they require blending a higher proportion of ethanol than most vehicles can consume (around 10%)). JA__-__, _____[Pirrong.Study.19-22,Exs.29-32]. EPA never discussed the effect on prices due to the blend-wall in the Denial or the 2019 Rule.[5]

As for "the possibility of refinery closures due to the RFS program" (EPA Br. 30), EPA likewise failed to address that Philadelphia Energy Solutions ("PES") specifically cited its inability to pay RFS compliance costs—its largest expense—as a primary reason for its 2018 bankruptcy. JA__[Pirrong.Study.16]. PES "emerged from bankruptcy" (EPA Br. 45), only after a settlement in which EPA forgave the vast majority of PES's outstanding RFS obligations. JA__[Monroe.Comments.17-18,(EPA-HQ-OAR-2018-0167-0622)]. Neither the Denial nor the 2019 Rule reconciles this evidence of an RFS-induced bankruptcy—and EPA's decision to waive PES's RFS obligations—with EPA's insistence that RIN costs uniformly are

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[5] Contrary to EPA's contention (at 29 n.12), its criticism of focusing on RFS compliance costs as a percentage of the "crack spread" (gross margin) differed materially from Pirrong's observation that much lower crack spreads in the PADD 1 region demonstrate the unique economic challenges that PADD 1 refiners face. JA__-__, __[Pirrong.Study.11-12,Ex.20].

"complete[ly]" and "quickly" passed through. JA__[Point.of.Obligation.Denial.25].[6]

Finally, EPA ignored the Pirrong Study's conclusion that, "*even with a high RIN price pass-through rate*, refiners' profits can be adversely affected in a way that may affect their survival." JA__[Pirrong.Study.27] (emphasis added). In fact, several PADD 1 refiners would have been "unprofitable in all years between 2012 and 2017" had the 2019 standards been in effect in those years. JA__[Pirrong.Study.15]. Thus, this evidence was pertinent to the severe-economic-harm analysis, regardless of the merits of the pass-through theory.

### C. Post-hoc rationales underscore that failure to obligate "appropriate" parties was not "beyond the scope of the rulemaking."

EPA must apply annual RFS obligations to "refineries, importers, and blenders as appropriate." 42 U.S.C. § 7545(o)(3)(B)(ii)(I). Commenters explained why excluding blenders from any obligation was not appropriate and undermined RFS Program goals, but EPA dismissed these comments as "beyond the scope" of the Rule. JA_[RTC.188.(EPA-HQ-OAR-2018-0167-1387)]. EPA concedes that *Alon* requires abuse-of-discretion review.

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[6] Intervenors argue that petitioners' severe-economic-harm argument "is foreclosed by *AFPM*," but that contention fails for the same reason as EPA's reliance on its Denial—EPA ignored new evidence in this record.

EPA Br. 43-44. EPA offers various defenses of the existing point of obligation, including the discredited pass-through theory, but EPA did not rely on those grounds to disregard these comments. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) (explaining that the Court denies deference to agency litigating positions unsupported by administrative proceedings); *Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 612-15 (D.C. Cir. 2017) (declining to defer to the USDA's litigating position).

EPA incorrectly asserts (at 44) that the 2019 Rule "reaffirmed the point of obligation" and found "no credible evidence warranting reconsideration." In fact, rather than consider the substance of comments regarding the point of obligation, EPA summarily dismissed them as "beyond the scope." JA_[RTC.188]. EPA's interjection of *post-hoc* substantive arguments underscores that in doing so, EPA abused its discretion. *See Genuine Parts*, 890 F.3d at 314

EPA also defends its disregard of comments by invoking EPA's earlier Denial and intoning the pass-through theory. JA__-__[Point.of.Obligation.Denial]. But EPA failed to reexamine its prior assumptions in light of new evidence post-dating the Denial. *Bechtel*, 10 F.3d at 878. The record compelled EPA to revisit its pass-through

assumption before setting and applying 2019 obligations. Because EPA lacks specialized economics expertise, its pass-through theory merits no special deference, especially since EPA ignored the import of SREs, mischaracterized the PES bankruptcy, and disregarded DOE's conclusions and economists' reports.[7] *See Scheduled Airlines Traffic Offices, Inc. v. Dep't of Defense,* 87 F.3d 1356, 1361 (D.C. Cir. 1996) (no deference in matters outside agency's expertise). By obligating those who control the decision and means to blend renewable fuel into transportation fuel, EPA could eliminate concerns regarding pass-through of compliance costs; ease disproportionate economic hardship that threatens energy security;[8] eliminate market friction; and incentivize investment into renewable-fuel infrastructure, research, and development by those best-suited to advance RFS goals. JA_, _, _, _,[Valero.Comments.28-30.and.Atts.C,P,R]; JA_-_

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[7] In upholding the Denial, this Court expressly declined to consider evidence related to EPA's increasing reliance on SREs and other events that post-dated the Denial. *Alon*, 936 F.3d at 650.

[8] Imposing excessive compliance costs on independent refiners threatens energy security. JA_, _[Valero.Comments.on.Proposed.Denial.13,16.(EPA-HQ-OAR-2018-0167-1041.Att.R)]. Between 1990 and 2010, increasing numbers of refineries closed and industry-wide refining margins decreased significantly. JA__[DOE.Study.29-30.(EPA-HQ-OAR-2018-0167-1149.vol.2)]. By 2016, before the PES bankruptcy, commenters warned that losing even one more refinery would jeopardize East Coast supply. JA__[Valero.Comments.on.Proposed.Denial.16.(EPA-HQ-OAR-2018-0167-1041.Att.R)].

[Small.Refiners.Comments.3-4];

JA_[Comments.of.Rock.House.Advisors.on.Proposed.Denial.(EPA-HQ-OAR-2018-0167-1149.vol.4)].

### D. Purported benefits to other regions are irrelevant to the severe-economic-harm-waiver analysis.

EPA is incorrect that the statute permits it to consider offsetting benefits when evaluating a severe-economic-harm waiver. EPA Br. 33. The text identifies only one consideration: "severe[] harm" to "the economy … of a State, a region, or the United States." 42 U.S.C. § 7545(o)(7)(A)(i). It would effectively *nullify* the waiver for harm to a "region" if EPA could offset those harms with RFS Program benefits to *other* regions. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) (a provision should be interpreted such that it is "capable of being carried into effect").[9]

## II. The record required EPA to consider the general waiver.

In defending renewable-fuel volume estimates underlying its decision not to consider its general-waiver authority, EPA asserts that it need not provide a "high degree of quantitative specificity" (EPA Br. 20); but EPA must provide a "reasoned explanation for its actions." *Am. Petroleum Inst.*

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[9] Because the Pirrong Study focused on harm to the PADD 1 region as a whole, *see* JA__-__[Pirrong.Study.13-18], not merely one industry, EPA's characterization of Obligated Petitioners' argument as focusing on "one industry within a region" (EPA Br. 34), is a red herring.

*v. EPA ("API")*, 706 F.3d 474, 481 (D.C. Cir. 2013). And when EPA refuses to assemble or consider relevant data—but instead cherry-picks studies and historical conclusions that support its political position—it cannot claim "an 'extreme degree of deference' to evaluation of 'scientific data within its technical expertise.'" *Am. Fuel & Petrochemical Mfrs. v. EPA ("AFPM")*, 937 F.3d 559, 574 (D.C. Cir. 2019). Nor should the courts automatically defer to decisions driven by politics instead of science or sound policy. *See* JA_[AFPM.Comments.3.(EPA-HQ-OAR-2018-0167-0672)].

EPA deflects Obligated Petitioners' arguments by insisting that the cellulosic- and general-waiver authorities are wholly distinct—but they are tightly linked.[10] Because EPA chose to evaluate the general waiver after applying the cellulosic waiver, *see AFPM*, 937 F.3d at 579, EPA's accuracy and reasonableness in setting volumes under the cellulosic waiver affect the reasonableness of EPA's conclusion that no general-waiver inquiry is necessary. Obligated Petitioners explained (at 22-26) why EPA's conclusions regarding the cellulosic waiver required consideration of whether to invoke the general-waiver authority. EPA's responses are

[10] EPA's other refrain—that Petitioners have not shown that a different result would have obtained had EPA done its job—is a *non sequitur*. Petitioners bear no such burden of proof; rather, *EPA* must conduct, and bears a burden to demonstrate, reasoned decisionmaking. *API*, 706 F.3d at 481. Petitioners need only show that EPA failed to adequately justify and explain its decision—and Petitioners have done so.

meritless.

### A. Advanced Biofuel

EPA does not contest that, in contrast to every other past RFS rulemaking, for 2019 EPA set requirements based on volumes of advanced biofuel it concluded were not "reasonably attainable." EPA also does not deny that these levels, while conceivably merely "attainable," likely would result in feedstock diversions, market disruption, and higher costs, and potentially shrink the carryover RIN bank. *See* Obligated Petitioners Br. 24.

Despite abandoning its prior adherence to "reasonably attainable" requirements, EPA has not explained (1) why it remains reasonable to exercise only the cellulosic waiver; nor (2) why moving from "reasonably attainable" to "attainable" would not warrant at least considering the inadequate-domestic-supply waiver. EPA acknowledged that choosing the "maximum achievable" volume could necessitate considering the general waiver. 83 Fed. Reg. 63,704 (Dec. 11, 2018), 63,721 n.83. Characterizing "reasonably attainable" and "attainable" as "terms of art" (EPA Br. 35) does not explain why it was reasonable to create a new term of art and avoid the general waiver. Regardless, EPA may not assign a volume it describes as "attainable," somewhere on the spectrum between "reasonably attainable" and "maximum achievable"—especially where that volume will disrupt the

market—without explaining why this terminological change did not warrant consideration of the general waiver.

### B. Conventional Ethanol

EPA relies (at 19-23) on this Court's prior decisions regarding the reasonableness of requirements set in past years where the agency declined to exercise the inadequate-domestic-supply waiver. But for 2019, EPA expressed considerably less certainty, so its cursory speculation regarding how ethanol could be blended to meet the requirements is not so readily excused. For 2019, EPA projected, without any underlying analysis, only that domestic supply "*may* be sufficient," and even accounting for imports, total volumes "*likely* could be met." EPA Br. 35 (emphases added). It is arbitrary and capricious for EPA to leave such doubt about whether obligated parties may be placed in an untenable situation—unable to meet volume requirements due to no fault of their own—without taking a harder look at what volumes of what fuels would actually be produced, and therefore whether exercise of additional waiver authority was warranted.

Second, Obligated Petitioners do not contest EPA's math in applying its poolwide concentration to the reduced projection of gasoline consumption. EPA Br. 22. But absent from the Rule and EPA's brief is any explanation for continuing to increase ethanol volume requirements

despite decreasing overall gasoline consumption, particularly in light of EPA's acknowledgment of the constraints of the blend-wall on increased renewable-fuel blending. Obligated Petitioners Br. 38. Moreover, as AFPM and others noted, demand for E0 "remains strong," and above EPA's estimates. JA_, _[AFPM.Comments.2,.10]; JA_[Magellan.Midstream.Comments(EPA-HQ-OAR-2018-0167-0667)] (explaining why EPA's "historical figures are orders of magnitude low as compared to Magellan's experience with E0 demand").

### C. "Supply"

EPA brazenly employs the term "supply" as both a sword and a shield, yet refuses to define the term. EPA also refuses to consider comments it characterizes as addressing something other than "supply-side" factors (nevermind that the term "supply" constrains only the inadequate-domestic-supply waiver, not the severe-economic-harm waiver). EPA cannot forever avoid grappling with what "supply" means, and its circular reasoning is inherently arbitrary and capricious. EPA refuses to examine supply levels of different ethanol blends because "supply and use of [] gasoline-ethanol blends is strongly influenced by consumer demand," and because this Court precluded EPA from looking to demand-side factors in assessing domestic supply. 83 Fed. Reg. 63,704, 63,731. EPA effectively

says it cannot evaluate supply *at all* because supply is influenced by demand. That defies logic—and arbitrarily reads out an entire statutory-waiver provision.

### D. Sugarcane Ethanol

EPA must now be held accountable for maintaining its sugarcane-ethanol-estimation methodology "in the face of experience." *API*, 706 F.3d at 477; *see also* Obligated Petitioners Br. 27. While charging that Obligated Petitioners' arguments about sugarcane ethanol are overly selective, EPA's explanation omits the sugarcane-ethanol total for a particularly unfavorable year—2016, where only 34 million gallons were imported (versus 200 million gallons projected, 83 Fed. Reg. 63,704, 63,722)—obscuring the truth regarding past ethanol imports. EPA Br. 24. EPA did not explain why 2012 and 2013 volumes are more persuasive than those in 2016, or why its continued overestimation does not require consideration of the inadequate-domestic-supply waiver. This failure to explain and justify requires remand.

## III. Issues regarding the periodic-review provision and the Regulatory Flexibility Act were not waived.

EPA contends (at 47-48, 81) that Obligated Petitioners' comments did not preserve arguments regarding EPA's failure to conduct "periodic reviews" under 42 U.S.C. § 7545(o)(11) and comply with the Small Business Regulatory Enforcement Fairness Act ("SBREFA"). But exhaustion rules

generally do not apply to statutory-interpretation questions, which "do[] not require any particular expertise on the part of" the agency, *McKart v. United States*, 395 U.S. 185, 197-98 (1969), and which are "matter[s] within the expertise of the judiciary," *Stephens v. Pension Ben. Guar. Corp.*, 755 F.3d 959, 965 (D.C. Cir. 2014). EPA's duties under the "periodic review" provision and Regulatory Flexibility Act ("RFA") present statutory-interpretation questions directly within the "specialization of the courts, not the agencies." *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 996 n.6 (10th Cir. 2017); *see also Railroad Yardmasters of Am. v. Harris*, 721 F.2d 1332 (D.C. Cir. 1983) (holding waiver rule inapplicable where failure to raise issue at agency level did not hinder judicial review). Indeed, this Court previously observed that the periodic-review provision "would appear to require EPA to reconsider the point of obligation if … its placement was obstructing compliance." *Alon*, 936 F.3d at 658-59.

Moreover, the Small Refiners Coalition *did* comment on the SBREFA issue. JA_[Small.Refiners.Coalition.Comments.(EPA-HQ-OAR-2019-0168-0018.Ex.11)] (the SBREFA analysis "does not even consider the impacts of the RFS program on small retailers").

Accordingly, these issues are properly presented here.

## IV. EPA Violated the Regulatory Flexibility Act.

The RFA requires either a final regulatory flexibility analysis in conjunction with a final rule, 5 U.S.C. § 604(a), or a certification containing the factual basis for asserting that the rule will not have a significant economic impact on a substantial number of small entities, *id.* § 605(b). With respect to small fuel retailers, EPA did neither.

### A. Retailers are regulated parties.

EPA wrongly insists (at 81) that the 2019 RFS Rule does not regulate fuel retailers. As EPA acknowledges, "there is a significant distinction between" an "obligated" and a "regulated" party, JA__[Denial.69], and the RFA provides judicial review to regulated entities, regardless whether they are also obligated parties. *See Aeronautical Repair Station Ass'n, Inc. v. FAA*, 494 F.3d 161, 175-76 (D.C. Cir. 2007) (holding that contractors and subcontractors could challenge an FAA rule obligating drug testing of employees by other entities). Retailers, as distributors, are subject to "compliance provisions" of "the regulations promulgated" under the RFS Program. 42 U.S.C. § 7545(o)(2)(A)(iii). Moreover, EPA has long acknowledged that fuel retailers are "entities likely to be regulated by" its action. *See, e.g.*, 82 Fed. Reg. 58,486, 58,486 (Dec. 12, 2017).

### B. EPA's certification lacks a required factual basis.

EPA relies on its certification that the 2019 Rule will not significantly

impact a substantial amount of small entities. That certification, however, lacks "a statement providing the factual basis" for this assertion vis-à-vis small fuel retailers. *See* 5 U.S.C. § 605(b). Moreover, the conclusion of the point-of-obligation Denial that the RFS Program does not negatively affect small retailers cannot substitute for the required RFA analysis or constitute the requisite "factual basis," especially given that the Denial employed a different standard to judge a different issue.

EPA has never analyzed the economic impacts of the RFS on small retailers. The RFA protects small entities by requiring a specific analysis of impacts on them before promulgating new rules. EPA ignored comments regarding the absence of such an analysis pertaining to small retailers, except for watering down its definition of "[o]ther fuel dealers" from "likely regulated" (which it had been from 2010 through 2018) to merely "*affected*" without any explanation. 83 Fed. Reg. 63,704, 63,704 (Dec. 11, 2018). Without the required analysis, EPA's insistence that the 2019 Rule neither regulates small retailers nor impacts small entities is statutorily insufficient, and defies the Congressional mandate to consider the impact of its rules on small business.[11]

[11] SBREFA's Small Business Administration Office of Advocacy ("SBAOA") has stated: "EPA must remedy its compliance with the RFA [and] should conduct a comprehensive screening analysis that includes

## Conclusion

For these reasons, petitioners request vacatur and remand.

Respectfully submitted,

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non-obligated companies" for another RFS rulemaking. *See* SBAOA Comment on Proposed Rule: Modifications to Fuel Regulations, EPA-HQ-OAR-2018-0775-0762, https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0775-0762.

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## Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because this brief contains 4,546 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

*/s/ Robert J. Meyers*
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Dated: February 20, 2020

## Certificate of Service

I hereby certify that on February 20, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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