No. 19-835

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

REPLY FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement in the petition remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

IN THE

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The BIO repeats the lower court's error: It ignores crucial statutory text and twists other provisions to accommodate EPA's preferred outcome. Congress did not mean what it said, EPA claims, because considering the point-of-obligation determination annually would overwork EPA. EPA's arguments amass power in the agency far beyond the limits that Congress delineated.

The RFS program pervades the entire transportation-fuel sector, affecting the nation's energy security, environmental efforts, and food-supply chain—and every person or business that relies on motor vehicles for travel, deliveries, or anything else. If EPA can employ "administrative ease" to evade clear textual commands and skew judicial review in *this* program, then the opinions below license any agency to do the same. This Court should grant review and reverse.

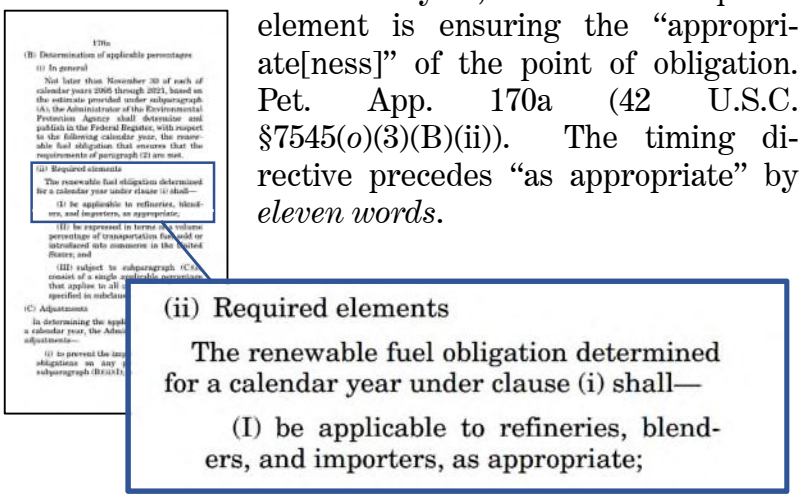
I. EPA's Disregard Of Statutory Text Necessitates Review

EPA defends an outcome that, by ignoring the Act's text, transfers substantial power to the agency and excuses it from a statutory command. EPA further ascribes unwritten motives to Congress that the text rebuts. The result transforms a "[r]equired" element of annual rulemaking into a discretionary act that EPA can avoid forevermore while insulating itself from meaningful judicial review. This Court should grant review to uphold congressionally-mandated limits on agency discretion and to enforce traditional judicial oversight.

A. EPA ignores clear statutory text

1. EPA's lead argument is that "*nothing* in the text of [paragraph 3] requires EPA to conduct an annual reconsideration" of the point of obligation. BIO11 (emphasis added). If the Government reads the Act as saying "nothing" about timing, then this Court's plain-text teachings have yet to be absorbed.

The Act states that the renewable-fuel determination must be made each "calendar year," and its first required element is ensuring the "appropriate[ness]" of the point of obligation. Pet. App. 170a (42 U.S.C. §7545(*o*)(3)(B)(ii)). The timing directive precedes "as appropriate" by *eleven words*.



EPA does not address this plain text. It quotes only ten words of paragraph (3)(B) and *entirely omits* from its Argument the words "calendar year"—which appear three times in paragraph (3)(B).[1] See BIO11-23. EPA's interpretations flout the Act's plain text:

Text	EPA
(i) * * * **[E]ach * * * calendar year[]** * * * [EPA] shall determine * * *, with respect to the following calendar year, the renewable fuel obligation * * *. (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** * * *. § 7545(*o*)(3)(B)(i), (ii) (emphases added).	"[N]othing in the text of [paragraph 3] requires EPA to conduct an annual reconsideration" of the point of obligation. BIO11.
Paragraph (3)(B)(ii)(I) does not mention ¶2—although ¶3 makes other internal cross-references.	Paragraph (3)(B)(ii)(I) "can reasonably be understood as a cross-reference to EPA's prior determina-

[1] EPA mischaracterizes petitioners' timing argument as entirely dependent on the term "appropriate." BIO14. *Petitioners* criticized *the majority* for making that assertion, which ignores the words "calendar year." Pet. 15.

	tion under" ¶2. BIO15.
Paragraph (3)(B)(ii)(I) does not mention "distributors."	Paragraph (3)(B)(ii)(I) "sought to clarify" that distributors are excluded. BIO16.
An "appropriate" point of obligation is the first of three "[r]equired elements" that Congress identified in ¶(3)(B)(ii) for annual renewable-fuel determinations.	"The 'focus of the annual rulemakings' is to calculate percentage standards, not to reconsider the basic structure of the program as a whole." BIO13 (quoting Pet. App. 51a).

2. EPA points to other statutory provisions that it *acknowledges* "require EPA to review and, if appropriate, revise its regulations by a date certain." BIO12-13. Paragraph (3)(B) is materially indistinguishable. It, too, identifies both the timing ("each ∗ ∗ ∗ calendar year[]") and the activity (determining the "appropriate" point of obligation). Interpreting paragraph (3)(B)(ii)(I) to afford EPA discretion to decide *not to evaluate the point of obligation annually* eviscerates the Act. It also jeopardizes the other provisions EPA identifies and creates a roadmap for any agency to evade Congress's typical means of ensuring regular consideration of, public participation in, and judicial oversight over future-reaching programs.

EPA's claim that paragraph (3)(B)(ii)(I) "is reasonably understood as permitting EPA to apply its prior 'obligated party' determination [from paragraph 2] in conducting its annual analysis" also proves too much. BIO12. EPA identifies no textual basis for this reading, and there is none.

Had Congress intended to incorporate paragraph 2's determinations into paragraph (3)(B)(ii)(I), the Act would say so. Elsewhere in paragraph 3, Congress used express language for internal cross-references, *including to paragraph 2*. *E.g.*, §7545(*o*)(3)(B)(i) (cross-referencing paragraph 2); §7545(*o*)(3)(B)(ii)(III) (cross-referencing §7545(*o*)(3)(B)(ii)(I)).[2]

3. Finally, EPA defends its position not with textual analysis, but with an unsound syllogism based on questionable premises:

- Congress would not require EPA to do something that EPA finds overly burdensome;
- annually considering whether the point of obligation remains appropriate would be very burdensome; and so
- the statute cannot possibly mean what it says.

This replaces rather than construes the Act.

a. Citing only the lower court's opinion, EPA declares that "[t]he 'focus of the annual rulemakings' is to calculate percentage standards, not to reconsider the basic structure of the program as a whole." BIO13 (quoting Pet. App. 51a). Congress, however, told the agency what to "focus" on when it set the "appropriate" point-of-obligation determination as the first "[r]equired element[]" of annual rulemaking. "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp.* v. *EPA* (*UARG*), 573 U.S. 302, 328 (2014). This case merits review because of such *methodological* errors, not just because of the serious context in which they arose.

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[2] In response to petitioners' showing that EPA's interpretation would render paragraph (3)(B)(ii)(I) superfluous, EPA reiterates the majority's argument (BIO15-16), but ignores petitioners' and Judge Williams's rebuttals (see Pet. 19; Pet. App. 81a-84a).

b. Deeming an annual required element to require *no action at all* is hardly a respectful reading of a major statute. Yet an essential premise of the judgments below and the BIO is that Congress must not have intended annual point-of-obligation consideration—it would be "strange indeed if Congress required EPA * * * to rethink a choice so basic" each year. BIO13 (quoting Pet. App. 51a). Inverting the teaching that Congress doesn't hide elephants in mouseholes, EPA would have Congress building a mansion to house a mouse. It would be "strange indeed" to expressly designate an *annual* required element—yet intend that EPA could decide it early on and *never consider it* again.

EPA's interpretation is especially ill-suited to a statute designed for change. EPA does not dispute that when Congress established the forward-looking RFS program in 2005, its evolution was unpredictable and dependent on the agency's responses to changing circumstances and developing information. Pet. 20-21. Statutory volume goals increase annually, domestic and imported supply-and-demand change annually, and new fuel pathways are periodically approved. These continually changing factors warrant annual attention to whether the designated point-of-obligation determination remains appropriate, an element that both EPA and the court below acknowledge as "foundational" to the program's success. Pet. App. 41a, 50a; BIO8, 10, 11, 17.[3] How could Congress better convey a command to annually review that foundation than by making it the first required element of every annual rule?

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[3] EPA acknowledges that its current actions will shape the program's next phase beginning in 2023. BIO22-23; §7545(*o*)(2)(B)(ii)(I). Given the RFS program's national and long-term import, enforcing the balance of powers that Congress mandated could hardly be more pressing.

c. Finally, inherent in EPA's and the lower court's framing is *another* mistaken premise—that annual consideration requires "wholesale reevaluation" of the point-of-obligation determination. BIO14. The Act requires EPA to take the program's pulse at annual intervals—not overhaul it.

EPA concedes that its other annual duties already require "in-depth analysis of renewable-fuels markets" and draw numerous comments. BIO13. Any additional point-of-obligation-related burden would be marginal. Indeed, annual consideration would likely *reduce* EPA's alleged burden—it would allow EPA to timely address changing facts, such as RIN-market dysfunction and misalignment between the means for compliance (*blending* renewable fuel) and the obligated parties (which presently exclude *blenders*). And by addressing *all* "[r]equired elements" together, program decisions would be more effective and responsive, such that duplicative litigation (which has followed *every* annual rule) could only decrease.

Not only does plain text dismantle EPA's argument—Congress *can* mandate tasks agencies find burdensome—but the facts do, too.

B. Administrative convenience does not make EPA's interpretation reasonable

"At a minimum," EPA argues, the Act "does not unambiguously require" annual consideration of the point of obligation. BIO14. Even if true (but see *supra* Part I.A), EPA would still have to show that its interpretation is *reasonable*. Nothing in the BIO comes close.

1. Like the court of appeals, EPA relies on administrative ease both to create and resolve a supposed ambiguity. See BIO13-17. "An agency confronting resource constraints may change its own conduct, but it cannot change the law." *UARG*, 573 U.S. at 327. *EPA's* view that assessing the point of obligation is not "feasible or

worthwhile," BIO17, therefore inverts the relationship between Congress and agencies. Bowing to claims of administrative ease would always transfer massive power from the legislative branch to the agency—"a severe blow to the Constitution's separation of powers." *UARG*, 573 U.S. at 327. This provides another compelling reason for review.

Even if administrative ease alone *could* satisfy *Chevron* step 2, EPA must show an annual check-up on the point-of-obligation determination is unreasonably burdensome. EPA fails this hurdle too. See *supra* Part I.A.3.c. While EPA complains that it "address[ed] some 18,000 comments" in the denial proceeding, BIO16, 98% were duplicates—only about 350 comments were unique. Pet. App. 369a.

2. Echoing the lower court, EPA asserts it is "unlikely" EPA would fail to act "if the need * * * arises." BIO16 (quoting Pet. App. 53a). Congress lacked the same confidence in the agency (otherwise, why mandate annual notice-and-comment rulemaking?). EPA's track record also belies its assurances:

- 2013: EPA fails to issue a final rule setting 2014 obligations.
- 2014: EPA fails to issue a final rule for 2015; it takes no action on point-of-obligation issues, despite challenges to the exclusion of blenders from EPA's obligated-parties definition in January. Pet. App. 365a, 532a.
- 2015: Despite many stakeholder comments showing that excluding blenders from the obligated-parties definition was inappropriate, EPA's final rule for 2016 (and, retroactively, 2014 and 2015) declares point-of-obligation comments "beyond the scope." *Ams. for Clean Energy* v. *EPA*, 864 F.3d 691, 703 (D.C. Cir. 2017). EPA takes no action on the point-

of-obligation petitions.

- 2016: Additional obligated parties petition for point-of-obligation reconsideration or rulemaking. EPA declares point-of-obligation comments "beyond the scope" of 2017 final rule. Pet. App. 187a.
- 2017: EPA denies all pending point-of-obligation-related petitions in November; it refuses to respond to point-of-obligation comments in its final rule for 2018.

EPA trumpets the 2017 collateral proceeding, in which EPA refused to reconsider its 2010 obligated-parties definition excluding blenders. EPA's denial protected so-called "reliance" interests, Pet. App. 361a, but any such interests stemmed largely from EPA's prior inaction. Further, the denial relied heavily on a 2015 paper, the only independent assessment of RIN-market data EPA has undertaken in the past decade. This paper, however, was based on information from 2013, *before* many of the ill effects of excluding blenders had manifested. See Pet. App. 392 n.45, 396, 402a n.61, 409a n.75, 410a n.78.

EPA's activities post-dating the D.C. Circuit's opinions equally belie its "trust-us" assurances. In the rulemakings for 2019 and 2020, EPA again refused to consider comments regarding the severe adverse consequences that demonstrate that excluding blenders was inappropriate. See Pet. 14 n.5. Ironically, EPA argues that the bankruptcy of the largest independent refiner on the East Coast due to RFS obligations post-dated the denial, and should be "present[ed] * * * to the agency in the first instance." BIO21. This information *was* presented to EPA in the 2019 rulemaking, but EPA summarily disregarded it as "beyond the scope." See Pet. 14 n.5.

The backlog of work that EPA now bemoans is not a flaw in Congress's design. It is the result of EPA's years-

long dereliction of duty.

C. EPA does not defend its arbitrary and capricious refusal to consider the point of obligation

EPA entirely ignores petitioners' argument that placing the point of obligation "beyond the scope" of the 2018 annual rulemaking was arbitrary and capricious. Pet. 22-25. Even absent §7545(*o*)(3)(B)(ii)(I), EPA cannot solicit comments on the RIN market's functionality while *simultaneously* refusing to entertain comments identifying the inappropriate point-of-obligation determination as a reason for the market's dysfunction. Pet. 23. Clarity from this Court regarding agencies' basic obligations to the regulated public remains needed.

II. EPA'S COLLATERAL PROCEEDING DOES NOT RECTIFY ITS FAILURE TO ABIDE BY THE ACT

A. EPA identifies no authority allowing it to substitute agency-friendly, discretionary proceedings for the mandatory annual rulemaking that Congress required

The second question presented warrants this Court's review because the judgments below undermine the principle that an agency's "discretion as to the substance of the ultimate decision"—here, whether excluding blenders remains appropriate—"does not confer discretion to ignore the required *procedures* of decisionmaking." *Bennett* v. *Spear*, 520 U.S. 154, 172 (1997) (emphasis added).

EPA contends that it was harmless to partition the point-of-obligation consideration into a one-shot, collateral proceeding. BIO20. But by definition, a *one-time* collateral proceeding cannot reasonably discharge EPA's duty to *annually* consider the point of obligation. And although EPA urges the Court not to trouble itself about the manifestly different deference levels, it simultaneously emphasizes that judicial review of the collateral proceeding must

be "extremely limited" and "highly deferential." BIO9. EPA's claim that the choice of procedure does not "materially affect the outcome of judicial review," BIO16, thus rings hollow, particularly because the majority in *Alon* did not determine how EPA would fare under ordinary review, Pet. App. 32a.

Beyond the standard of review, EPA ignores—and hopes this Court will ignore—numerous differences between EPA's chosen procedure and the statutorily-mandated one, each of which enhances agency power at the expense of the other branches:

Notice-and-comment rulemaking under §7545(*o*)(3)(B)(ii)	**Petition for rulemaking under 5 U.S.C. §553(e)**
EPA must act every year.	EPA must act within a reasonable but unbounded time.[4]
All stakeholders have notice that EPA is acting.	Notice is required only after EPA disposes of the petition.
EPA must receive and consider comments.	EPA has discretion to ask for comments, or not.
EPA must initiate consideration.	Petitioners must ask EPA for consideration.

[4] Courts have interpreted "reasonable" in this context to allow for delays of nearly a decade. See Pet. 27; see also *Telecomms. Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (defining "reasonable delay" using the "the hexagonal contours of a standard" that "is hardly ironclad" and "sometimes suffers from vagueness").

EPA must gather facts.	Petitioners must gather facts for EPA's review.
EPA must consider all aspects of the problem in a single determination.	EPA argues it can partition each aspect into separate rulemakings.
EPA has no discretion to ignore the Act's clear requirements.	EPA can refuse a petition for rulemaking using its "broad discretion to choose how best to marshal its limited resources."[5]

EPA naturally prefers the second column. The petition-for-rulemaking procedure flips the burden from the agency to the petitioners and relegates judicial review to the category of "cases * * * 'evaluated with a deference so broad as to make the process akin to nonreviewability.'" *Verizon* v. *FCC*, 770 F.3d 961, 966 (D.C. Cir. 2014) (quoting *Cellnet Commc'n, Inc.* v. *FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992)). That extraordinary deference has emboldened EPA to declare as "beyond the scope" any information indicating that continuing to exclude blenders from compliance obligations is not appropriate, hinders statutory objectives, jeopardizes energy security, and disincentivizes growth-enhancing investment in renewable fuels.

Congress, however, chose the first column. It falls to this Court to hold EPA—and all agencies eager to escape statutory limits—to account.

B. EPA's collateral-proceeding denial deserves no deference

EPA's collateral-proceeding denial was arbitrary and

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[5] *Flyers Rights Educ. Fund, Inc.* v. *FAA*, 864 F.3d 738, 743 (D.C. Cir. 2017) (quoting *Massachusetts* v. *EPA*, 549 U.S. 497, 527 (2007)).

capricious and therefore reached the wrong result. Among other things, the denial's central thesis is fundamentally inconsistent with EPA's contemporaneous findings in other RFS-program actions. While heaping praise on the denial, EPA makes no attempt to defend the serious inconsistencies that petitioners identified. See Pet. 29. Instead, EPA perfunctorily cites the opinion below (which, at best, papers over those inconsistencies). BIO21.[6]

EPA's denial rests heavily on EPA's purported "belief" that independent refiners "generally" recover the costs of compliance with annual obligations (*i.e.*, the cost of acquiring RINs on the open, unregulated market) by passing those costs through to customers. See, *e.g.*, Pet. App. 401a-403a. Other courts have recognized the obvious inconsistency between this position and EPA's escalating findings that obligated merchant refiners are experiencing economic hardships warranting exemptions from the program. The Tenth Circuit, for example, recently noted the "unexplained inconsistency" between an economic-hardship exemption and EPA's pass-through theory. *Renewable Fuels Ass'n* v. *EPA*, 948 F.3d 1206, 1257 (10th Cir. 2020) (quoting *Encino Motorcars, LLC* v. *Navarro*, 136 S. Ct. 2117, 2126 (2016)); see also *Ergon-W. Va., Inc.* v. *EPA*, 896 F.3d 600, 613 (4th Cir. 2018).

The denial's reasoning did not overcome these recognized deficiencies. EPA characterized contrary information as "not * * * convincing." Pet. App. 403a. It (like the court of appeals) did not address why obligated parties would spend years in protracted rulemakings and court proceedings urging a change in the point of obligation if the existing regime caused them no harm. Meanwhile,

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[6] EPA questions whether the petition encompasses EPA's collateral-proceeding decision. BIO20. Yes—the second question presented asks whether that decision improperly "ignores key evidence." Pet. i.

outside the collateral-proceeding silo, EPA specifically found again and again that independent refiners actually *were* suffering economic hardship as a direct result of RFS obligations. See Pet. 30.

These and other undefended and "[u]nexplained inconsistenc[ies]" in EPA's momentous decision to deny reconsideration of its point-of-obligation determination establish that the agency's action deserves no deference. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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