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The RFS Stands Before the Supreme Court

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The Renewable Fuels Standard (RFS) has experienced more than its fair share of litigation over the course of its 15-year existence but it had not reached the Supreme Court. January marked a new milestone, the Supreme Court granted certiorari—the technical term for the Supreme Court agreeing to hear a case on appeal—for three small refineries challenging a recent decision by the 10th Circuit (Argus Media, Jan. 9, 2021; *Renewable Fuels Ass'n v. U.S. Envtl. Prot. Agency*, 948 F.3d 1206 (10th Cir. 2020); *farmdoc daily*, March 12, 2020). The question presented to the Supreme Court is one of statutory interpretation. The petitioning small refineries sought review of the authority to grant extensions of exemptions for small refineries from the RFS mandates (Petition for Writ of Certiorari). The 10th Circuit Court of Appeals had overturned decisions by EPA to grant these refineries request for an extension of the exemption from the RFS mandates; the refineries are asking the Supreme Court to reverse the 10th Circuit decision. This article reviews the case presented to the Supreme Court and builds upon previous discussions about the small refineries exemption (SRE) issue (*farmdoc daily*, September 19, 2019; March 14, 2019; January 16, 2019).

Background

The RFS dates to the Energy Policy Act of 2005 and the Energy Independence and Security Act of 2007. Congress included a provision that initially exempted all small refineries—those processing less than 75,000 barrels of average aggregate daily crude oil throughput—from the RFS mandates through the end of 2011, known as the Small Refinery Exemptions (SRE) (*farmdoc daily*, March 12, 2020; 42 U.S.C. §7545(o)(9)(A)). The statute required that the Department of Energy (DOE) conduct a study to determine whether having small refineries comply with the RFS would "impose a disproportionate economic hardship on small refineries" (42 U.S.C. §7545(o)(9)(A)). As the 10th Circuit noted, Congressional appropriators criticized the study and recommended that DOE reopen the study and take additional input from small refineries; the revised study was undertaken and reissued in 2011, prompting EPA to extended the exemption to 21 small refineries through the end of 2012 (*Renewable Fuels Ass'n v. U.S. Envtl. Prot. Agency*, 948 F.3d 1206 (10th Cir. 2020)).

The statute also provided that a "small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) [the temporary exemption] for the reason of disproportionate economic hardship" (42 U.S.C. §7545(o)(9)(B)). And this is the matter at issue in the case accepted by the Supreme Court. The small refineries had sought exemptions from the RFS, which EPA granted; a decision vacated by the 10th Circuit Court of Appeals. Specifically, these refineries are asking the justices if a small refinery must have received "uninterrupted, continuous hardship exemptions for every year since 2011" in order to qualify for an extension of the hardship exemption under the statutory provision (Petition for Writ of Certiorari).

Discussion

The refineries pose a very narrow question of statutory interpretation to the Supreme Court. They argue that the 10th Circuit improperly interpreted the SRE provisions when it concluded that an extension of the exemption required previous exemptions (Petition for Writ of Certiorari). The refineries argue that the 10th Circuit "rested its conclusion on the purported meaning of the term 'extension'" in the statute and effectively read out of the statute the phrase "may at any time petition" for an extension of the exemption (Petition for Writ of Certiorari, at 9 and 13). They argue that this interpretation defeats Congressional intent to provide small refineries with "a safety valve" from the RFS mandates due to economic hardship (Petition for Writ of Certiorari, at 12). The small refineries' petition for certiorari provides an excellent example of the current state of statutory interpretation jurisprudence known as textualism (Coney Barrett 2017; Nourse 2012). It proffers a strange debate over the potential meanings of specific words in the statute; legal hairsplitting at its finest, complete with dueling dictionary definitions.

Among the critical facts of the case, HollyFrontier Cheyenne Refining LLC applied for an extension in 2015 after having not applied for (or not receiving) an extension in 2013 and 2014; the denial of that petition was the subject of a previous decision by the 10th Circuit (*Sinclair Wyo. Refining Co. v. EPA*, 874 F.3d 1159 (10th Cir. 2017)). When it applied for another extension in 2017, EPA granted the extension. Another refinery, HollyFrontier Woods Cross Refining LLC appears not to have received any previous exemptions or extensions, but EPA granted its petition in 2016. Finally, Wynnewood Refining Co., LLC was included in the blanket extension for 2011 and 2012 but had not received any further extensions since 2012. EPA granted its petition for 2017. As the 10th Circuit opinion lays out in detail, the decisions by EPA for these refineries were part of change in practice by EPA for SRE after 2016. It granted 19 out of 20 petitions in 2016, 35 out of 36 petitions in 21 and 31 out of 37 petitions in 2018 (*Renewable Fuels Ass'n*., 948 F.3d at 1225-30). The coalition of biofuels interests sued EPA for the extensions and the 10th Circuit vacated the EPA decisions, remanding them back to the agency for further consideration.

The 10th Circuit's decision was based on its interpretation of the word extension in the context of Congressional intent for the RFS to "funnel[] small refineries toward compliance over time" to accomplish the market forcing goals of the RFS, including increased renewable fuel production, energy independence and environmental protection (*Renewable Fuels Ass'n*, 948 F.3d at 1246-47 (citing *Hermes Consol., LLC v. EPA*, 787 F.3d 568 (DC Cir. 2015); *Ams. for Clean Energy v. EPA*, 864 F.3d 691 (DC Cir. 2017); and *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559 (DC Cir. 2019)). Noting that small refineries in 2016 and 2017 were in a "much different position" than they had been a decade earlier when the original exemption was in place, the court also pointed out that the interpretation of extension was the same one EPA used prior to 2016 in which the agency limited extensions "to only those small refineries that qualified for the original blanket exemption" (*Id*., at 1247). Accordingly, the court decided that an extension required prior exemptions, "a predicate exemption . . . in prior years to prolong, enlarge, or add to" (*Id.*, at 1249). The refineries argue that the 10th Circuit "rejected a plain reading" of the statutory text and limited "EPA to extending exemptions to only those small refineries that have previously and continuously received an extension of the exemption from the beginning of the RFS program" (Petition for Writ of Certiorari, at 17).

The 10th Circuit's narrow reading of the statutory text appears correct on its face. In subparagraph (A), Congress granted a "temporary exemption" to all small refineries. Congress also required a DOE study of the economic hardship for small refineries; for any small refinery that DOE concluded would be "subject to a disproportionate economic hardship if required to comply" with the RFS mandate, Congress required an extension of the temporary exemption for at least two years (42 U.S.C. §7545(o)(9)(A)). In subparagraph (B), Congress added an option for small refineries to petition "at any time" for an "extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship" (42 U.S.C.

§7545(o)(9)(B)). It is difficult to read this provision any other way than requiring any extension be for an existing exemption. Without an existing exemption under subparagraph (A) there is nothing for which to grant an extension under subparagraph (B). It is also a reading made more appropriate by the fact that the petitioning refineries had not received any extension of any exemption for multiple years. Their petition was effectively one for a new exemption, not an extension.

More problematic for the refineries, the meaning of the word extension was not the only reason that the 10th Circuit vacated the EPA decision. The government's brief in opposition to the petition for certiorari clearly summarized additional grounds. First, EPA was wrong to grant the extension based on the conditions in the industry rather than the statutory standard of disproportionate economic hardship due to compliance with the RFS. Second, EPA had "acted arbitrarily and capriciously in failing to explain or acknowledge an apparent change in position with respect to whether these kinds of small refineries pass on to others the refineries' costs of purchasing RINs" (Brief for the Federal Respondent in Opposition, at 13). Of these two, the first one would seem to be the most significant hurdle for the refineries. The statute and other appellate court decisions agree that the only disproportionate economic hardship that counts is that which would result from compliance with the mandate; standard economic hardship or hardship based on general conditions in the economy or the industry is insufficient (*Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575-76 (DC Cir. 2015); *Lion Oil Co. v. EPA*, 792 F.3d 978, 984 (8th Cir. 2015); *Sinclair Wyo. Ref. Co. v. EPA*, 874 F.3d 1159, 1169-72 (10th Cir. 2017); *Ergon-West Va., Inc. v. EPA*, 896 F.3d 600, 614 (4th Cir. 2018). EPA granted the extensions of exemptions based upon general hardship in the industry, not disproportionate to these specific refineries as a result of the mandate.

Pull back from the tangled thicket of the weeds of statutory interpretation; the meaning of the word extension appears a very narrow matter upon which to base a Supreme Court case. It is more astonishing given the success rates of petitions for certiorari: out of more than 7,000 petitions in a year, the Supreme Court tends to accept only 100 to 150 and hears only about 80 oral arguments (United States Courts, Supreme Court Procedures; *SCOTUSblog*, Supreme Court Procedure). Juxtaposing the narrow question posed with the rare success for petitions begs the question, how does this matter warrant the limited attention of the Supreme Court? Few clues exist at this stage, but one possible clue can be found in the 10th Circuit decision. That court spent considerable space on whether the biofuels groups had standing to sue EPA to overturn the decision to grant the extensions (*Renewable Fuels Ass'n*, 948 F.3d at 1230-39). Standing is a constitutional question of the power of the courts to hear a case and it generally requires three elements: (1) an injury in fact that is concrete and particularized, as well as actual or imminent and not hypothetical; (2) a causal connection between the injury and conduct, an injury that can be fairly traced to the challenged action; and (3) it must be likely that a court decision can provide redress for the injury (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It remains a subject of much debate among legal scholars and judges, especially for environmental cases (see e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Summers v. Earth Island Inst*., 555 U.S. 488 (2009); Pierce 1992; Stern 2018). While speculative at this point, the issue of standing for interest group litigation arguably presents more substance for the Supreme Court than does the narrow statutory interpretation question posed. The small refineries argued before the 10th Circuit that the biofuels groups who sued to overturn the EPA decision lacked standing—that they did not have an appropriate injury to allow a court to hear the case. Because such a question has vast implications for interest group lawsuits, particularly as it applies to environmental issues, the issue of standing might well be a matter that may have particular appeal to the new conservative majority; a question about which more analysis and review is needed.

Concluding Thoughts

With the granting of a petition for a writ of certiorari by small oil refineries, the Renewable Fuels Standard (RFS) will soon stand before the Supreme Court of the United States in its most high-profile case to date. The question presented to the Supreme Court is an exceedingly narrow matter of statutory interpretation regarding the proper meaning of the words of Congress for the granting of an extension of an exemption from the mandate. So narrow, in fact, the case begs further questions about whether the Supreme Court is looking at other matters such as the issue of standing for interest group litigants. Further analysis and review are needed to better understand the potential implications of the case.

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