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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 20-472,
5 HollyFrontier Cheyenne Refining versus Renewable
6 Fuels Association.

7 Mr. Keisler.

8 ORAL ARGUMENT OF PETER D. KEISLER

9 ON BEHALF OF THE PETITIONERS

10 MR. KEISLER: Mr. Chief Justice, and
11 may it please the Court:

12 The statute establishing the Renewable
13 Fuel Standard exempted all small refineries from
14 its requirements for the first years of the
15 program and authorizes them individually to seek
16 extensions of that exemption at any time based
17 on hardship.

18 The question here is whether it
19 prohibits EPA from granting a hardship exemption
20 to a small refinery that hasn't been
21 continuously exempt for all prior years.

22 Respondents claim it does. Under
23 their view, a small refinery can receive
24 exemptions indefinitely but only if it's never
25 able to comply without hardship. If there's

1 even one year in which it can comply without
2 hardship, it's then disqualified for all future
3 years.

4 Nothing in the statute's text imposes
5 this unique prohibition. Respondents' argument
6 rests on the word "extension," which they
7 contend should be read temporally here to mean
8 an increase in a length of time.

9 But even if "extension" is read in its
10 temporal sense, that does not require
11 continuity. No dictionary defines "extension"
12 to require continuity. And Congress has used
13 the term elsewhere when it's specifically
14 authorizing the temporal resumption of a benefit
15 after a lapse. And where Congress has wanted to
16 limit the term in the way Respondents urge, it's
17 added limiting words, like "successive" or
18 "consecutive," which it didn't do here.

19 A continuity requirement would also be
20 contrary to this statute's purposes. The
21 statutory design is to impose burdens that
22 escalate dramatically over time. As the
23 Department of Energy explained in 2011, some
24 small refineries will face inherent and
25 disproportionate hardships that will only arise

1 or that will increase as those mandates grow.

2 Driving those small refineries out of
3 the market would undermine the statute's energy
4 independence goals, and that's one of the
5 reasons Congress authorized them to petition at
6 any time based on hardship.

7 I welcome the Court's questions.

8 CHIEF JUSTICE ROBERTS: Mr. Keisler,
9 under your reading, which -- "extend" means to
10 grant, you know, you extend an offer or extend
11 condolences, could an entirely new refinery
12 apply for an extension to it of a hardship --
13 hardship exemption? In other words, coming onto
14 the scene for the first time, they would, under
15 your view, I think, have to ask for an
16 extension?

17 MR. KEISLER: Yes, Mr. Chief Justice.
18 If the Court adopted the make-available meaning
19 of "extension," then, yes, a completely new
20 refinery that came into existence after the
21 initial period would still be able to seek an
22 extension of the exemption.

23 But the Court could also construe
24 "extension" in the temporal sense without
25 requiring continuity, and in that case, it's

1 certainly arguable that a new entrant would not
2 be able to get an extension of the initial
3 exemption, because it didn't have one, without
4 there being any requirement that the extensions
5 have been continuously enjoyed by others.

6 CHIEF JUSTICE ROBERTS: Well, which of
7 those two readings of "extension," I guess, each
8 one of which you embrace, do you think is the
9 right one?

10 MR. KEISLER: If we were forced to
11 choose, Your Honor, we would acknowledge that
12 reading "extension" in that temporal sense
13 without continuity would enable the Court to
14 avoid having to decide whether this is one of
15 those instances in which the same word has
16 different meanings within the same statute, and
17 so, for that reason perhaps, that might be a
18 preferred reading.

19 But even in that circumstance, our key
20 point would be that even the temporal meaning of
21 "extension" does not require continuity.
22 Congress has used it in exactly the other way
23 multiple times, and no dictionary says that the
24 temporal meaning of "extension" requires
25 continuity.

1 CHIEF JUSTICE ROBERTS: Well, it seems
2 like your sort of "any port in a storm" reading
3 of this statute -- I'm not sure that -- I'm not
4 sure that's the strongest position.

5 MR. KEISLER: Well, then, Your Honor,
6 we would be happy to rely on the other
7 construction of "extension" as well because
8 "extension" is often used when there is some
9 preexisting stat -- separately authorized
10 benefit and it is being extended or made
11 available to a different setting or time period
12 or set of recipients, just like in 2015 when
13 Congress enacted what it called an extension of
14 Privacy Act remedies to citizens of certain
15 foreign countries. It is a word that Congress
16 often use when it is enlarging or extending the
17 scope of a preexisting benefit.

18 And we'd, of course, be happy with
19 that reading here as well. Our principal point
20 is that there is no basis under either reading
21 to impute a continuity requirement to the word.

22 CHIEF JUSTICE ROBERTS: So this really
23 is a -- a freestanding exemption, and -- in your
24 view, and I wonder -- I'm not saying it's an
25 inconceivable construction, but is this the --

1 what you might expect if Congress were going to
2 provide a freestanding exemption, that they
3 would do it in this sort of roundabout way?

4 MR. KEISLER: I don't think it's all
5 that roundabout, Mr. Chief Justice.

6 First of all, in subparagraph
7 (B)(iii), that is exactly how Congress referred
8 to this. It referred to the same petition and
9 the same relief as simply a hardship exemption.
10 It omitted the word "extension" entirely, which
11 we think weighs strongly against Respondents'
12 effort to ascribe such a transformative meaning
13 to that single word.

14 In addition, this is a statute in
15 which the obligations, as I said, intensify
16 dramatically over time, and it seems implausible
17 to think that Congress meant that merely being
18 able to comply for one year in the early years
19 of the program would mean that a small refinery
20 would never warrant hardship relief ever again.

21 CHIEF JUSTICE ROBERTS: Counsel, I --
22 I -- I think you would agree that there's no
23 Chevron deference issue here because the agency
24 has changed its position, is that right?

25 MR. KEISLER: Well, we don't agree

1 with that, Your Honor. Although, of course, we
2 think the statute should be construed the way we
3 urge without regard to Chevron, we do think that
4 there is deference here because EPA adopted this
5 interpretation in a notice-and-comment
6 rulemaking in 2014, and it hasn't changed that
7 rule.

8 CHIEF JUSTICE ROBERTS: Well, the
9 agency doesn't abide by the same position. Are
10 you saying just it didn't do that through notice
11 and comment?

12 MR. KEISLER: Well, that's part of it,
13 Your Honor, but it's also the fact that these
14 are agency adjudications. We filed our
15 petitions under the existing rule, and that rule
16 has the force of law if it's lawful.

17 And, under Chevron, it's lawful if it
18 either implements the clearly expressed intent
19 of Congress or reasonably resolves statutory
20 ambiguities, even --

21 CHIEF JUSTICE ROBERTS: Thank --

22 MR. KEISLER: -- in a court's --

23 CHIEF JUSTICE ROBERTS: -- thank you,
24 counsel.

25 Justice Thomas.

1 JUSTICE THOMAS: Thank you, Mr. Chief
2 Justice.

3 Mr. Keisler, the Chief Justice has
4 covered most of the ground I was interested in,
5 but I am interested in this. For you to
6 prevail, would your reading have to be the more
7 normal reading of "extension" or simply one of
8 -- one possible reading of -- of the word
9 "extension"?

10 MR. KEISLER: I think I would perhaps
11 put it in a third way, Justice Thomas, which is
12 we think it is the best reading of the word in
13 the context of this particular statute, both the
14 other text, like the words "at any time," and
15 the statutory purposes I alluded to anyway --
16 earlier.

17 Even if there was some tie-breaker
18 needed, we would then say that, as I just
19 indicated, we think Chevron deference should be
20 accorded to the earlier 2014 rulemaking. But we
21 don't rely on that because we think we are
22 urging the best reading of the statute.

23 JUSTICE THOMAS: This seems a little
24 bit odd to think of an extension for something
25 that has already terminated. You know, it's

1 odd, I were to lose -- if my electricity is
2 turned off because I failed to pay a bill and
3 then I paid it or is that -- or I get a
4 reprieve, is that an extension, or is that a
5 grace period? It just seems rather odd to read
6 it that way.

7 MR. KEISLER: I -- I think this is a
8 word, Justice Thomas, that's highly sensitive to
9 context, and I think there are certainly some
10 contexts like the one you just mentioned in
11 which one wouldn't think of what we're talking
12 about as an extension.

13 But, here, in the context of
14 government benefits that lapse and then resume,
15 Congress has specifically used the word
16 "extension" to describe a resumption after a
17 lapse. It did so twice because this has been
18 happening recently in light of the pandemic,
19 where Congress has resurrected benefit programs
20 that had previously lapsed, in one case, more
21 than six years ago.

22 And in each of those cases that we
23 described in our brief, Congress labeled the
24 resumption of a program that had been lapsed and
25 unavailable, in one case, for a period of years,

1 as an extension of that program.

2 So we think the context to focus on
3 here is the one in which Congress is acting on
4 benefit programs that have lapsed, and, there,
5 Congress has said benefits resumed after a lapse
6 can be an extension.

7 In addition, as I indicated, where it
8 has wanted to limit the word "extension" to be
9 only continuous, it has felt the need to add
10 words like "consecutive" or "successive,"
11 consecutive extensions or extensions for
12 successive periods.

13 And under Respondents' view, all of
14 the many statutes that talk about extensions for
15 successive or consecutive periods, the words are
16 all surplusage.

17 JUSTICE THOMAS: And along that line,
18 how much weight do you put on the -- the phrase
19 "may at any time"?

20 MR. KEISLER: I think it's a very
21 important phrase, Your Honor. That is the
22 broadest possible temporal language. And it is
23 inconsistent, we think, with any understanding
24 of subparagraph (B) that treats it as
25 transitional or temporary or designed to sunset.

1 Subparagraph (A) is captioned
2 temporary. Subparagraph (A) is filled with time
3 limits and deadlines, but Congress then broke
4 this petition process out into a separate
5 subparagraph (B), lacking the word "temporary,"
6 lacking all those temporal words, and including
7 the broadest possible temporal language, "at any
8 time."

9 And we think what that signifies, Your
10 Honor, is that these two subparagraphs are
11 dealing with two different periods, subparagraph
12 (A), with the initial periods of the program in
13 which initial broad relief was applied to
14 everybody, and subparagraph (B), reserving the
15 right to give relief to individuals with
16 hardship as the demands of the statute ratchet
17 up.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer.

21 JUSTICE BREYER: Good morning. The --
22 the other argument that was -- I believe it's in
23 the lower court and that the Respondents make is
24 Congress had a good reason for making this a
25 single connected exemption. They wanted to

1 phase out the exemptions over time and
2 gradually, if this exemption would end, as it
3 would, or become narrow under their
4 interpretation, it would, there would be fewer
5 and fewer companies that were exempt, and that
6 would mean more and more would have to figure
7 out some way of making do with the program.

8 And that's what they wanted. What's
9 your response?

10 MR. KEISLER: Well, those are the two
11 competing narratives of what is going on here,
12 Justice Breyer. We have said the provision is
13 meant as a safety valve for when hardship occurs
14 as the demands of the program ratchet up.

15 Our friends on the other side say it
16 was supposed to be a funnel, one which actually
17 would funnel some small refineries out of the
18 market to the extent that they couldn't comply.

19 And we think there are several reasons
20 why the safety valve and not the funnel metaphor
21 is right here.

22 First of all, as I mentioned a moment
23 ago, this is a statute in which the burdens
24 escalate over time and the petition is supposed
25 to be based on hardship. It seems implausible

1 to think that Congress would assume that an
2 early ability for a year to comply would mean
3 there would be no need in the future.

4 Second, the purposes of the statute
5 are all served by our interpretation because
6 Congress wanted both to ensure that the volume
7 requirements of blended fuel are met and that
8 small refineries are protected. And EPA now has
9 an approach in which it will slightly increase
10 the applicable percentage to take account for
11 the projected small refinery exemptions in the
12 next year.

13 That means that every goal gets
14 served. The small refineries get protected and
15 the statutory volumes all get blended. But,
16 conversely, if Respondents' interpretation is
17 adopted, you will force some small refineries
18 out of the market, which is a kind of
19 contraction of refining capacity that doesn't
20 serve Congress's energy independence goals, but
21 you wouldn't get a single drop of additional
22 fuel blended.

23 And finally, the anomalies I referred
24 to in my opening statement, similarly situated
25 refineries, both facing identical hardship, get

1 treated oppositely because one of them, several
2 years ago, when the statutory demands were
3 lighter, is able -- was able to comply, or the
4 refinery that is never able to comply without
5 hardship gets exemptions indefinitely because
6 they're continuous, but the refinery that
7 occasionally can comply is driven out.

8 None of that, we think, commends
9 Respondents' view of this statute. We think it
10 is a safety valve and not a funnel.

11 JUSTICE BREYER: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito.

13 JUSTICE ALITO: Mr. Keisler, you and
14 the -- and Respondents have different accounts
15 of the purpose of the Act. But it's always
16 difficult to interpret an act in light of its
17 purposes, so -- because acts serve multiple
18 purposes. So let's put that aside and look at
19 the text.

20 You're right, "extension" can mean two
21 different things. It can mean what you think it
22 means. It can mean what Respondents think it
23 means. I don't know whether that's a wash, but
24 both of those are possible.

25 The best textual hook I think you have

1 is the "at any time" argument, but there are
2 some other accounts of the role that that's
3 supposed to play and the role that it plays, and
4 I'd appreciate it if you would address those.

5 One is that it meant to -- it meant to
6 indicate that a party can -- a small refinery
7 can seek an extension after the -- the finding
8 that's made on November 30. Why isn't that a
9 plausible explanation of its meaning?

10 MR. KEISLER: Well, I think that is
11 certainly one scenario, Justice Alito, in which
12 it would be applied, but it is a very narrow and
13 specific focus and limitation for the broadest
14 possible temporal language possible.

15 You know, the Tenth Circuit said that,
16 well, it says you can file it at any time, but
17 that doesn't mean it can be granted at any time.
18 You know, we --

19 JUSTICE ALITO: I know. That's not --
20 let's put that one aside. But what about the --
21 the November 30 deadline? So it's -- it's
22 narrow, but it's a possible explanation?

23 MR. KEISLER: Well, I don't think it's
24 a full and sufficient explanation, though,
25 because, under the court of appeals' view, the

1 ability to file a petition that can be granted
2 ceases once a small refinery has had one good
3 year. That's not at any time.

4 So it's not simply that Respondents
5 have a view that attributes only a very narrow
6 purpose to the broadest possible language. It
7 also cuts out some obvious applications of that
8 language when Congress has said these petitions
9 can be filed at any time based on hardship.

10 JUSTICE ALITO: Let me come back to
11 the -- the question you were talking about with
12 the -- with the Chief Justice, and that is
13 whether a -- a small refinery that did not get
14 an exemption under (A) could ask for a hardship
15 exemption under (B).

16 How is that possible? Because the
17 first part of (B) says a small refinery may at
18 any time petition the administrator for an
19 extension of the exemption under subparagraph
20 (A). So why doesn't that mean that the refinery
21 must have had one under (A) in order to ask for
22 one under (B)?

23 MR. KEISLER: I think that is one
24 reading, Justice Alito, but not the only
25 necessary reading. If it were that reading, all

1 the refineries here would still get the
2 extension because they all had the initial
3 exemption.

4 But, with respect to the specific
5 question, if one reads "extension" as make
6 available, the way we talk about extensions of
7 credit or extensions of other government
8 benefits, then you wouldn't need to have had an
9 exemption under subparagraph (A) to get an
10 extension of that exemption because, as I
11 mentioned earlier, "extension" is often used
12 when there's a preexisting benefit that is then
13 being enlarged with the scope being provided to
14 some new set or new setting.

15 And, here, what that phrase would mean
16 is that the terms of the exemption in
17 subparagraph (A), which is where it's defined as
18 the requirements of paragraph (ii) shall not
19 apply, the terms of the exemption in
20 subparagraph (A) are being extended to the
21 petitioning small refinery.

22 JUSTICE ALITO: What do you think is
23 the -- suppose you're right that the -- the
24 exemptions don't have to be continuous. What do
25 you think is the standard that the EPA is to

1 apply under (B)?

2 I don't really see any standard. To
3 what -- is this -- to what degree is this purely
4 a matter of EPA discretion?

5 MR. KEISLER: I think it is limited,
6 Your Honor, by phrases like "disproportionate
7 economic hardship." "Disproportionate," in
8 particular, requires the EPA find -- to find
9 that the small refiner in question is
10 experiencing some type of disadvantage or
11 hardship that is distinct from simply what
12 anybody else in the market might be
13 experiencing.

14 And the reason Congress established
15 these separate provisions is that it understood
16 that small refineries have several inherent and
17 structural disadvantages that set them apart and
18 that can, in certain circumstances, give rise to
19 a level of hardship from compliance here that
20 far exceeds those of their larger competitors.

21 JUSTICE ALITO: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel, just for
25 me to be sure or clear, I thought the circuit

1 below disagreed with your interpretation of what
2 "economic hardship" means. I thought the
3 circuit below thought that it meant you had to
4 have a particular hardship relating to blending
5 the fuels or buying the credits.

6 Am I wrong about that?

7 MR. KEISLER: No, you're right,
8 Justice Sotomayor. The -- the lower courts felt
9 that the EPA had not applied a strict enough
10 causation standard because it took into account
11 both the fact that the market was experiencing a
12 difficult year, combined with the individual
13 circumstances of the small refinery and the
14 costs it had to bear in complying --

15 JUSTICE SOTOMAYOR: So your --

16 MR. KEISLER: -- with the statute.

17 JUSTICE SOTOMAYOR: -- so your answer
18 to Justice Alito basically means that there's
19 still a fight -- there's still a fight --
20 there's still a dispute going on below?

21 MR. KEISLER: Yes, Your Honor.

22 There's going to have to be a remand even if we
23 prevail here so that the other issues raised by
24 the Tenth Circuit can be addressed by EPA. But,
25 if the Tenth Circuit is affirmed, there will be

1 no remand because we'll just be statutorily
2 foreclosed from relief.

3 JUSTICE SOTOMAYOR: Now, secondly, you
4 keep speaking about how Congress has acted in
5 other statutes, other relief statutes that it's
6 given at different times. But let's look at
7 this particular one.

8 Is there any use of the word
9 "extension" anywhere in this statute --
10 elsewhere in this statute that doesn't have a
11 temporal continuity meaning?

12 MR. KEISLER: Yes, Justice Sotomayor.

13 JUSTICE SOTOMAYOR: What --

14 MR. KEISLER: I think --

15 JUSTICE SOTOMAYOR: -- what other
16 section besides the one at issue?

17 MR. KEISLER: Section (o)(7)(E)(iii),
18 which we address in Footnote 7 of our reply
19 brief. That's the situation in which, if
20 there's a feedstock disruption, EPA can waive
21 certain requirements for up to 60 days.

22 And then (e)(7)(O)(iii) says that in
23 the event that disruption is continuing beyond
24 the expiration of that period, it can be
25 extended for up to another additional 60 days.

1 EPA certainly doesn't have to make the
2 determination that it is continuing beyond the
3 initial 60-day period after it's expired, but it
4 certainly can, and if it did, the extension
5 would be non-continuous.

6 The other uses of "extension" in this
7 statute, I would acknowledge, Justice Sotomayor,
8 are continuous, but they're continuous because
9 of features about those provisions because they
10 all involve extensions of an effective date when
11 some requirement will first take effect. And,
12 of course, if an effective date is extended, it
13 has to be continuous because, otherwise, it
14 wouldn't work.

15 JUSTICE SOTOMAYOR: Well, counsel, I
16 guess my biggest problem is that you say, in
17 context, we should read this differently, and
18 you're talking about the two interpretations,
19 the competing interpretations of what the
20 purpose might be of this statute.

21 But doesn't the use of the word
22 "temporary" in the provision at issue suggest
23 the other side's reading more than yours?

24 MR. KEISLER: I don't think so, Your
25 Honor, because, as -- as you just said,

1 "temporary" is in the other provision, in
2 subparagraph (A). And subparagraph (B) not only
3 lacks that word; it says the opposite. It says
4 "at any time."

5 JUSTICE SOTOMAYOR: But --

6 MR. KEISLER: And I would just add --

7 JUSTICE SOTOMAYOR: -- but the problem
8 is that (B) defines what (A) is -- defines (A),
9 and (A) is where you get the extension at all.

10 MR. KEISLER: Yes, but I don't think
11 that means that subparagraph (B) carries over
12 with it every aspect of subparagraph (A). For
13 example, the extensions are going to be of
14 different duration. There are all sorts of
15 different terms about when they will be provided
16 and -- and what conditions will be appended to
17 them.

18 So I -- I think we understand
19 subparagraph (B) as linked to subparagraph (A)
20 in some respects and de-linked in others. It's
21 linked because it is talking about the same
22 relief, the same defined exemption from the
23 requirements of subparagraph (ii), but it is
24 de-linked because it's not temporary. It's at
25 any time.

1 JUSTICE SOTOMAYOR: One last question.
2 On your alternative reading, the one that you
3 suggested to the Chief Justice, if we were to
4 accept that "extension" is not -- doesn't
5 require continuity, wouldn't that result in the
6 -- and I think you acknowledge that small
7 refineries that came into the scene after 2006
8 could never receive an exemption, correct?

9 MR. KEISLER: Under that reading, yes,
10 Your Honor.

11 JUSTICE SOTOMAYOR: So, under that
12 reading, basically, it is a sunset reading of
13 this provision?

14 MR. KEISLER: Well, I don't think it's
15 a sunset because the provision would continue to
16 be available to everyone who's there when the
17 program started. But, yes, if you newly came
18 into existence as a small refinery, you would be
19 ineligible.

20 And for what it's worth, EPA in 2016
21 suggested one reason why that might be so. It
22 injected a continuity requirement, but it did
23 say that new entrants shouldn't be able to get
24 an extension, and they said that was because a
25 new entrant comes into the world knowing this

1 program exists and -- and can have planned for
2 it, rather than one who had it foisted upon it.

3 JUSTICE SOTOMAYOR: Thank you,
4 counsel.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: Good morning, Mr.
7 Keisler. In -- in thinking about the ordinary
8 meaning of this word, "extension," I guess
9 I'm -- I'm wondering if you would comment on --
10 on this hypothetical.

11 Suppose that I rented an apartment
12 five years ago and I rented it for a year, and
13 then I decided to give it up, and five years
14 later I'm now really tired of where I'm living
15 now and I want to move back, and I call the
16 landlord and say: I'd like an extension of my
17 lease. What -- what would the landlord say?

18 MR. KEISLER: I think the landlord
19 would scratch her head and think that's a very
20 strange context in which to be using the word
21 "extension." I agree with that.

22 And that, I think, is like the
23 government's examples of the hotel guests or the
24 people parking their cars. I think those may
25 have a different connotation in part because

1 they involve rights, the physical occupation,
2 and because you go away and you then come back,
3 and we think of that as discontinuous.

4 And that's why we think the much more
5 apt context here is how Congress has used the
6 word in the context of government benefits and
7 programs that existed, lapsed, and resumed.

8 JUSTICE KAGAN: Well, Mr. Keisler, I
9 mean, let's think about it in this particular
10 context. So there's a small refinery and -- and
11 let's say that its initial exemption ended in
12 2011, and since then, it's been able to meet its
13 renewable fuel obligations and, indeed,
14 continues to do so for -- for decades. And
15 then, in the year, you know, 2040, 30 years
16 later, it runs into problems and it -- it files
17 a hardship petition.

18 And you are saying that in this
19 context it's anymore an ordinary use of the word
20 "extension" to say that after that 30-year
21 lapse, the small refinery gets its extent -- its
22 extension?

23 MR. KEISLER: We would, Your Honor.
24 And while that's an extreme example, we think it
25 is still more in keeping with the statutory

1 purposes and text to permit the small refinery
2 in Your Honor's example to petition at any time.

3 JUSTICE KAGAN: I mean, I -- I -- I
4 guess --

5 MR. KEISLER: That would be the --

6 JUSTICE KAGAN: -- I understand your
7 argument about purpose, but I'm just trying to
8 focus on the text here, and -- and I -- I
9 guess -- I don't know, explain that -- that
10 textual analysis to me.

11 MR. KEISLER: Well, I think it's a
12 couple of things, Your Honor. First of all, the
13 text says "at any time." And second of all,
14 while the hypothetical is extreme and I think
15 probably highly unlikely, it is, we think, no
16 less extreme and much more contrary to the text
17 and purpose to say that a refinery which had one
18 good year in 2013, when the requirements of the
19 program were so much more modest, somehow is
20 foreclosed in 2016 when it faces real hardship
21 from --

22 JUSTICE KAGAN: Well, I understand --

23 MR. KEISLER: -- the lapsing --

24 JUSTICE KAGAN: -- your purpose
25 argument, but I wouldn't think that that's a

1 problem with the text. I mean, 2013, now it's
2 2016, that's not an extension. It's a
3 resumption or a renewal or a something else, but
4 it doesn't seem really like an extension.

5 MR. KEISLER: Well, I think it is an
6 extension, Your Honor, in the same way that
7 Congress has used "extension" in the other
8 contexts I've mentioned. And I think that is
9 fortified here by the fact that this extension
10 can be sought at any time and that the relief is
11 described in paragraph (B)(iii) as simply a
12 hardship exemption without even using the word
13 "extension" at all, which whatever else --

14 JUSTICE KAGAN: Well, thinking about
15 that "at any time" language, Mr. Keisler --
16 and -- and Justice Alito talked about this too
17 -- and, you know, of course, that seems very
18 general language, but, if you look at this
19 provision, it's -- it, you know, essentially
20 says, look, you can get your extension by way of
21 this study or then, even if you're not
22 identified in this study, you can petition for
23 an extension at any time and -- and you can do
24 that even after the EPA determines the upcoming
25 year's obligations, and you can do it even after

1 a compliance year, so even after the year goes
2 through and -- and you haven't met it and you're
3 kind of asking for a backwards extension.

4 So that's a lot of "at any time" to
5 give meaning to that -- to that phrase without
6 distorting the word "extension," without
7 distorting the meaning of the word "extension,"
8 isn't it?

9 MR. KEISLER: Well, I think it is some
10 applications of "at any time," but it would also
11 be the case that there would be some instances
12 in which the refinery couldn't petition at any
13 time, in particular, any time after it had one
14 year in which it could comply without hardship.

15 So I think Your Honor's interpretation
16 permits them to do it at some times but not at
17 any times. And I suppose I would just quarrel
18 with the premise of the question that
19 interpreting "at any time" in its natural way
20 requires a distortion of the meaning of the word
21 "extension." "Extension" is a word of many
22 meanings, and it is frequently used in statutes
23 the way we are recommending here.

24 JUSTICE KAGAN: And you said
25 frequently, but I -- I think your brief only

1 really has these two COVID examples in it. I
2 mean, if you had written this brief last year,
3 you would have had no examples.

4 MR. KEISLER: Well, I think the
5 pandemic is what's given rise to the need for
6 Congress to resume programs that had it
7 previously let lapse, but it's not just those
8 two examples because we also think it's telling
9 the negative examples we've described in which,
10 when Congress has wanted to define "extension"
11 so as to impose a continuity requirement, it's
12 used additional words like "successive" or
13 "consecutive," which under Respondents' reading
14 are all surplusage.

15 JUSTICE KAGAN: Thank you, Mr.
16 Keisler.

17 CHIEF JUSTICE ROBERTS: Justice
18 Gorsuch.

19 JUSTICE GORSUCH: Good morning, Mr.
20 Keisler. You acknowledge in your briefs that
21 extensions under (A)(ii)(II) are likely to be
22 continuous during that first period of time,
23 during the first five-year period, but you --
24 you suggest that there -- it is at least
25 possible that they might not be, that there

1 could be discontinuity there too, which would
2 strengthen your argument that there could be
3 discontinuity under (B).

4 I -- I just want to explore that
5 argument a little bit further. It's Footnote 6
6 of your reply brief. How do we know that the
7 definition of small refineries would be applied
8 and measured for each calendar year during that
9 first five-year period rather than only once
10 when the initial exemption was required?

11 MR. KEISLER: Well, the question
12 didn't come up, Justice Gorsuch, so I suppose we
13 can't know for certain, but the way the statute
14 defines small refinery, it says that you have to
15 meet the 75,000-barrel-daily-throughput for a
16 calendar year. That at least suggests that it
17 was talking about an individual year.

18 So a refinery which started out as a
19 small refinery and then in 2010 grew beyond that
20 definition, we think, wouldn't be a small
21 refinery in 2010 and wouldn't have been entitled
22 to the blanket exemption for that year.

23 JUSTICE GORSUCH: Do we know for a
24 fact whether there -- that ever happened,
25 whether that -- small refineries, some qualified

1 initially and then didn't qualify later or vice
2 versa during that first five-year period?

3 MR. KEISLER: I don't know whether
4 that happened during the first five-year period.
5 I do know that refineries have grown and shrunk
6 in general beyond and within that definition
7 during the broader life of the program.

8 JUSTICE GORSUCH: And has EPA treated
9 them as small refineries during some periods and
10 not others?

11 MR. KEISLER: Well, yes, because their
12 current regulation, the one that was adopted in
13 their 2014 eligibility rule, specifically says
14 that the relevant year when a small refinery is
15 applying is the year for which it's seeking the
16 exemption and the immediately prior year. So it
17 wouldn't matter under that regulation whether
18 you were a larger refiner in earlier years.

19 JUSTICE GORSUCH: Has EPA disavowed
20 that aspect of its regulation?

21 MR. KEISLER: Not that I know of, Your
22 Honor.

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Kavanaugh.

1 JUSTICE KAVANAUGH: Thank you, Chief
2 Justice.

3 Good morning, Mr. Keisler. I want to
4 explore with you the relevance, as others have
5 mentioned, of the "at any time" language and
6 just get your sense of how that works here.

7 I guess what you're saying is the word
8 "extension" under your temporal extension
9 argument could be read in one of two ways. It
10 could be read to require continuous, it could be
11 read to require -- to not require continuous to
12 get the temporal extension, and that we have to
13 look at other clues in the text of the statute
14 before we get to the purposes, and I'll get to
15 that, but before we get to the purposes, we look
16 at other clues in the text, and "at any time" is
17 your hook.

18 Justice Kagan and others have pointed
19 out that you don't necessarily have to read it
20 that way, and I just want to get your kind of
21 full understanding of how "at any" -- "any time"
22 works here. And are there any other textual
23 clues that would tell us whether to read
24 "extension" as continuous or not requiring
25 continuous?

1 MR. KEISLER: Yes. Thank you, Your
2 Honor. I think "at any time" is best read as
3 the most expansive possible temporal language
4 which is meant to ensure that as the demands of
5 the program escalate, the safety valve will be
6 there such that a small refinery that newly
7 experiences hardship can obtain relief at any
8 time.

9 And as I said, the -- the contrary
10 view really doesn't give "at any time" the broad
11 meaning the text demands because it says that
12 once you've had one good year, you're out. And
13 that's not "at any time."

14 And that's why we say that the statute
15 is designed for two different periods,
16 subparagraph (A) for the temporary initial
17 period and subparagraph (B) for when
18 individualized relief is necessary thereafter.

19 As to other textual clues, we think
20 there are several. First of all, there is the
21 contrast in the language between subparagraph
22 (A) and subparagraph (B), one that has --
23 subparagraph (A) that has "temporary" and all
24 these time limits and deadlines, and
25 subparagraph (B), which has no temporal language

1 other than the most expansive possible "at any
2 time."

3 And, second, there is the subparagraph
4 (iii) reference to "a hardship exemption." This
5 talismanic word "extension" is suddenly
6 eliminated when Congress restates the same
7 petition and the same relief, which at a minimum
8 says Respondents are giving much more weight to
9 it than Congress did.

10 And, finally, other textual aspects of
11 this statute -- this is a statute which
12 textually commands that the burdens will
13 intensify year after year after year and
14 textually says that relief is to be given based
15 on hardship.

16 And it does not seem a sensible
17 reconciliation of all these provisions to say
18 that that text and the underlying purpose it
19 indicates would be served by kicking out a small
20 refinery from eligibility for exemption because
21 in one early year of the program it was able to
22 comply without hardship.

23 JUSTICE KAVANAUGH: And I understand
24 your argument today to be focusing much more on
25 the second argument in your brief, the temporal

1 extension, than the first argument in your
2 brief, which I think is probably wise. I
3 understand why you did it in your brief, but is
4 that correct? Do you think that's -- that
5 second argument's actually a stronger argument
6 for you?

7 MR. KEISLER: Well, I'm cognizant of
8 the fact that the Chief Justice implied the
9 opposite in his question, but I -- I certainly
10 think that the second argument avoids some of
11 the trickier aspects of the statutory
12 construction analysis because it at least means
13 this isn't an example in which the Court has to
14 decide whether the word "extension," which we
15 admit is used temporally in other provisions of
16 the statute, is used in a different sense here.

17 JUSTICE KAVANAUGH: Then I want to
18 just focus on how the separation-of-powers angle
19 fits in with the real-world effects of how this
20 program works.

21 Under the other side's reading,
22 Congress has eliminated the possibility of an
23 exemption if a small refinery ever in a
24 particular year didn't get it. Under your view,
25 it's not automatic that you get the exemption,

1 right? It's up to EPA, is that correct?

2 MR. KEISLER: That's correct, subject,
3 of course, to judicial review under the APA.

4 JUSTICE KAVANAUGH: Okay. And then
5 how does it -- and I understand your further
6 point to be if -- if a small refinery is having
7 significant economic hardship in a particular
8 year, the question is, did Congress want -- this
9 is more of a purpose argument -- but did
10 Congress want EPA to be able to give an
11 exemption in that year, or did Congress want the
12 small refineries to go out of business? Is that
13 a fair way of putting your argument there?

14 MR. KEISLER: Yes, Your Honor.

15 JUSTICE KAVANAUGH: Okay. What --
16 last question. EPA doesn't usually set its
17 renewable volume obligations on time. I had a
18 lot of experience with that in my past judicial
19 post. When -- does that affect anything here?

20 MR. KEISLER: I -- I -- I -- I think
21 only in the sense that it gives further credence
22 for the reason that Congress would want these to
23 be sought at any time, because not only does EPA
24 frequently miss deadlines, it has sometimes been
25 reversed for applying too strict a standard.

1 And that means that if a small
2 refinery, say, in 2015 or 2016 didn't apply
3 because EPA was applying too strict a standard
4 in -- in understanding disproportionate economic
5 hardship, and then it got reversed by a court,
6 but all of those small refineries who didn't
7 apply or were denied wrongly would then be out
8 of the program as well.

9 So it gives extraordinary weight to
10 the artifacts of what can be quite random
11 decisions by EPA.

12 CHIEF JUSTICE ROBERTS: Justice --

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: -- Justice
15 Barrett.

16 JUSTICE BARRETT: Mr. Keisler, do you
17 think that a refinery's request for an extension
18 has to have anything to do with the reasons why
19 it received a prior exemption? In other words,
20 even if there's not a required continuity of
21 time, that there would be some sort of
22 continuity of reason for the exemption?

23 MR. KEISLER: Well, I think,
24 certainly, any application that it made would
25 have to be factually consistent with

1 representations it made before. And it would be
2 painting a picture over time of its economic
3 circumstances. So, in that sense, there would
4 need to be consistency over time. But the
5 actual application would focus on what the
6 circumstances of the refinery are for the year
7 for which it's seeking an exemption, we think.

8 JUSTICE BARRETT: But, if there are
9 new circumstances, why wouldn't it be more
10 natural to say that the -- that the refinery is
11 seeking a new exemption?

12 MR. KEISLER: Well, if -- if -- if --
13 if one were to take that view, then that would
14 be the way paragraph (B)(iii) describes it, as
15 simply a petition for a hardship exemption. But
16 it is also, within the meanings of "extension"
17 that we have described, an extension of the
18 exemption under subparagraph (A) because it is a
19 lengthening of the overall period for which that
20 exemption was in effect, and it is also
21 extending in the "make available" sense that
22 exemption from (A) into this different setting
23 of a new hardship petition.

24 JUSTICE BARRETT: Justice Kagan gave
25 you an example in which she posited seeking an

1 exemption in the year 2030, you know, that this
2 could -- this "at any time" language could be
3 stretched pretty far. But, you know, under (B),
4 it relates back to this in (A), the 2008 study
5 that the EPA is supposed to conduct to determine
6 whether compliance would create a
7 disproportionate economic hardship on small
8 refineries.

9 If there's no continuity-of-time
10 requirement, it seems that the temporal
11 connection between that 2008 study and what
12 might happen in 2015, 2020, 2030 gets pretty
13 severed so that there's no connection.

14 Can you say what role the 2008 study
15 would play in your view?

16 MR. KEISLER: Yes, Justice Barrett.
17 The 2008 study wasn't only about picking the 13
18 small refineries that were going to get the
19 additional two-year extension. More broadly, it
20 laid out a whole framework for understanding
21 what the economics of the industry were, what
22 the factors were that DOE at least would
23 consider in deciding what to recommend, and it
24 developed a whole scoring matrix based on
25 capital requirements and financial condition and

1 operating margins and things like that. That's
2 what EPA and DOE look to from that study to
3 determine exemptions going forward. And that
4 would still be applicable in 2030 or 2040.

5 And I would just add, if you did have
6 a -- an application filed in 2030 or 2040 for
7 the year 2015, we do think "at any time" would
8 mean that EPA couldn't just dismiss it as
9 time-barred, but that doesn't mean EPA couldn't
10 take into account the fact that it took 20 years
11 to file that application in thinking about
12 whether the representations were credible and
13 whether the evidence was sufficient.

14 JUSTICE BARRETT: Let me shift gears
15 and see if there's another provision in the
16 statute that might help you. Section
17 7545(o)(7)(A) allows the EPA to waive the RFP
18 requirements upon a finding that they would
19 severely harm the economy of a state or region.

20 I could imagine a small refinery, you
21 know, if it -- if it were struggling or if it
22 were going to be forced out of business, that
23 that might harm the economy of a region. Is
24 that a provision that might help you?

25 MR. KEISLER: Well, we think it's

1 directed to a slightly different circumstance
2 where there needs to be a broader reduction in
3 the applicable requirement that applies to the
4 industry as a whole when there would be harm to
5 a region or -- or a state or the whole country.

6 And I think it does help us some
7 because it shows that Congress wanted to permit
8 EPA to be sensitive to these market conditions.
9 But the key thing is that the small refinery
10 provisions are the only ones that are geared to
11 an individual company and its circumstances, so
12 the broader authorities don't deal with that
13 problem.

14 And the reality is that you can
15 administer a program more forcefully overall if
16 you have the ability to exempt the smallest and
17 most marginal players, rather than letting the
18 concern about driving them out of the market
19 drive the whole program.

20 JUSTICE BARRETT: Thank you,
21 Mr. Keisler.

22 CHIEF JUSTICE ROBERTS: A minute to
23 wrap up, Mr. Keisler.

24 MR. KEISLER: Thank you, Mr. Chief
25 Justice.

1 I'd just like to add that Respondents'
2 interpretation is especially implausible given
3 the structure it would impose. My friends say
4 that these provisions establish only a limited
5 transitional period. But they've identified no
6 other statute with a transition period remotely
7 like what they propose here.

8 There's no defined end date. There's
9 no defined number of years. It instead ends on
10 different customized dates for each small
11 refinery depending on when that refinery first
12 happens to be able to comply even if it can do
13 so only for one year.

14 That's what gives rise to all the
15 anomalies of similarly situated refineries being
16 treated differently. And it's especially
17 implausible that the one and only statute which
18 would structure a transition period in this way
19 would be the one in which the demands are
20 designed to increase substantially over time and
21 which authorizes small refineries to seek relief
22 at any time based on hardship.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 Mr. Michel.

1 ORAL ARGUMENT OF CHRISTOPHER G. MICHEL

2 ON BEHALF OF THE FEDERAL RESPONDENT

3 MR. MICHEL: Mr. Chief Justice, and

4 may it please the Court:

5 Under the key provision in this case,
6 a small refinery may seek an extension of the
7 exemption under subparagraph (A). The meaning
8 of that language is straightforward. If a small
9 refinery has an exemption under subparagraph
10 (A), it can obtain an extension of that
11 exemption from EPA.

12 But, if a small refinery no longer has
13 the exemption, it cannot obtain an extension.
14 EPA cannot grant something that does not exist.
15 That is the ordinary, common-sense meaning of
16 the statutory text. It gives the word
17 "extension" the same meaning in adjacent
18 interconnected clauses, and it reflects the
19 statute's objective to boost production of clean
20 renewable fuel while providing transition time
21 for small refineries to comply.

22 Although the government endorsed
23 Petitioners' alternative readings below, EPA now
24 agrees that the Tenth Circuit correctly rejected
25 them. Petitioners first propose that

1 "extension" in the key provision means grant,
2 but the statutory context forecloses that
3 reading. The subject of the extension at issue,
4 the exemption under subparagraph (A), cannot be
5 granted anew. It can only be lengthened in
6 time.

7 Petitioners alternatively contend that
8 extension has a temporal meaning but allow the
9 extension of an expired exemption. That defies
10 the ordinary meaning of "extension." In common
11 parlance, it would be awkward at best to seek an
12 extension of something that has lapsed,
13 especially if it were described as temporary.

14 Simply put, if Congress wanted to
15 adopt the generally available exemption
16 Petitioners advocate, it would not have enacted
17 the scheme it did here. That scheme does not
18 doom small refineries to failure. The vast
19 majority of small refineries, including
20 Petitioners, have successfully complied with the
21 RFS in many prior years. The statute creates
22 flexibility to facilitate ongoing compliance,
23 and other tools exist to address other
24 challenges. But the court of appeals correctly
25 construed the provision at issue here, and its

1 decision should be affirmed.

2 CHIEF JUSTICE ROBERTS: Mr. Michel,
3 this is a hypothetical-rich case, everyone's
4 different scenarios where "extend" or
5 "extension" is used in different ways. You
6 know, if you miss a deadline for a term paper,
7 it would be normal language for you to go into
8 the professor and ask for an extension. You
9 wouldn't go in and ask for a new deadline.

10 Given all those hypotheticals, both
11 along those lines and the other way, you're not
12 arguing that this term is plain or unambiguous,
13 right? The terms you used in your opening was
14 straightforward and ordinary, but it's --
15 it's -- it's not plain or unambiguous, is it?

16 MR. MICHEL: Yeah, Mr. Chief Justice,
17 we're not arguing that it's unambiguous. But we
18 do think this is clearly the -- the more
19 ordinary use of the term in common parlance, and
20 we think that, you know, the Court's decisions
21 have said it will apply the ordinary meaning of
22 a statute unless there's a good reason not to,
23 and we think there's no good reason not to here.

24 CHIEF JUSTICE ROBERTS: Your -- your
25 friend's interpretation on the other side is one

1 that would be upheld, right, if Chevron
2 deference applied?

3 MR. MICHEL: If Chevron applied, I
4 think that would be correct, although I think
5 there are -- are a lot of reasons why Chevron
6 doesn't apply, starting with the fact that the
7 rule my friend cites does not actually contain
8 any interpretation of the question presented
9 here.

10 He -- he's relying at most on an
11 implicit assumption in the preamble to the rule
12 that leads to a position EPA no longer has, and
13 I don't think there's any case in which the
14 Court has granted Chevron deference to something
15 like that.

16 CHIEF JUSTICE ROBERTS: And you're not
17 arguing for Chevron deference going your way
18 either, right?

19 MR. MICHEL: We are not, Mr. Chief
20 Justice.

21 CHIEF JUSTICE ROBERTS: So that leaves
22 us with the obligation to look at all the
23 available evidence of congressional intent?

24 MR. MICHEL: I -- I think that's
25 right. And I -- I would just start with what we

1 think is the ordinary meaning of the term. I
2 also think it's -- it's highly significant that
3 that's how Congress used the term "extend" in
4 subparagraph (A), clause ii. My -- I think my
5 friend admits that that term is used there in a
6 way that requires both temporal existence and
7 continuity.

8 And this is about as close a case as
9 you can imagine for consistent meaning given
10 that (A)(ii) and (B)(i) have the same title,
11 address the same subject to the same entity, set
12 the same standard, and expressly cross-reference
13 each other.

14 CHIEF JUSTICE ROBERTS: I want to get
15 back to a point Justice Kavanaugh made that the
16 debate here is about whether or not the small
17 refinery can get in the door. In other words,
18 it doesn't automatically get an extension; it
19 just authorizes EPA to grant an extension.

20 And why wouldn't that be something
21 that suggests a broad meaning of the
22 availability of an extension?

23 MR. MICHEL: So a -- a couple of
24 reasons, Mr. Chief Justice. I -- just looking
25 at the -- at the structure of the statute,

1 Congress, of course, labeled this a temporary
2 exemption. It -- it provided for increasingly
3 narrow mechanisms of extension. If you look at
4 (A)(ii) and then (B)(i), you know, you can
5 actually see the funneling effect. It goes from
6 two years to -- you know, to an unstated period,
7 which EPA has -- has construed to be one year.

8 And if you look at the other waiver
9 provisions in the statute, they're -- they're
10 also relatively narrow. So I think --

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas.

14 JUSTICE THOMAS: Thank you, Mr. Chief
15 Justice.

16 Mr. Michel, just a couple of brief
17 questions. The Secretary -- let's say it -- it
18 -- going back to a point that Justice Kavanaugh
19 made that EPA could often or was often late in
20 -- in completing its work or -- and, here, I'm
21 particularly interested in the study that it was
22 required to have done by the end of 2011 or the
23 beginning of 2011.

24 What if it were late and the temporary
25 exemptions expired and then it implemented the

1 rule, let's say, a -- it -- it provided for the
2 extensions a month later? Would those be
3 considered extensions or would we -- or renewal?
4 And -- and how would you deal with those?

5 MR. MICHEL: Justice Thomas, yeah,
6 that's -- I do want to stress the statute -- the
7 study was completed in time, and so all of these
8 extensions under (A)(ii) were, in fact,
9 continuous as -- as a practical matter.

10 I -- I think your question really
11 highlights that Congress expected them to be
12 continuous as well, because the study was due at
13 the end of 2008 and the initial exemption
14 extended through the end of 2010.

15 I -- I have to confess, I'm not sure
16 I -- I've thought about what would have happened
17 in the hypothetical world if -- if EPA had not
18 -- or if DOE had not gotten that study in on
19 time and the initial exemptions had lapsed.

20 I do think that would not be the
21 ordinary meaning of -- of "extension," and then
22 the question would be whether the -- the context
23 of the statute so clearly compels the
24 availability of extensions that you'd have to --
25 to look otherwise, but -- but I don't think that

1 that's presented here.

2 JUSTICE THOMAS: In your definitions
3 that you provide for "extend" in your -- in your
4 brief, they seem to assume words like
5 "continuance" or "continuation," which seem to
6 suggest that at some point there was a -- a
7 termination or an interruption and then a
8 resumption.

9 Do you have any that preclude
10 continuity -- that -- that assume continuity?

11 MR. MICHEL: Well, Justice Thomas, I
12 think that there's a definition on page 66(a) of
13 the court of appeals opinion that does include
14 the word "continuity." But, you know, I'm not
15 sure the dictionary is a complete solution here.

16 I -- what we're relying on really is
17 more what the Tenth Circuit called "dictionary
18 definitions, plus common sense." And I -- I
19 think Justice Kagan's example was a good one.
20 There are many others. You know, I think, if
21 you were at a hotel -- at a hotel on vacation
22 and they said you can extend your stay for a
23 discounted rate and you said well, great, we'll
24 come back in three years, I think they would say
25 that's not what we mean by an extension. And

1 I -- I think that's by far the more natural
2 understanding of the term in common parlance.

3 JUSTICE THOMAS: So do you think -- do
4 you agree with Petitioner that it's
5 context-specific or that context is very
6 important?

7 MR. MICHEL: Absolutely, Justice
8 Thomas. And that's why I think (A)(ii) is so
9 important here. I mean, that is by far the most
10 closely related provision in the statute, and it
11 requires both a temporal extension and
12 continuity.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer.

16 JUSTICE BREYER: Good morning. I
17 mean, talk about common sense. This is a
18 marketable rights program, isn't it?

19 MR. MICHEL: I -- I --

20 JUSTICE BREYER: I think it is. And
21 they sell the rights to pollute more or to, you
22 know, use less ethanol in the marketplace. As I
23 read it, it's a classical such program.

24 Characteristic of such program
25 compared to a tax is, with a tax, you know the

1 price, but you don't know the amount.
2 Marketable rights, you know the amount, but you
3 don't know the price. I think anybody would
4 have -- knowledgeable would have thought that
5 from what I've read here.

6 And so no one would know if we go out
7 two or three years which small refineries will
8 find hardship and which won't, and it'll change
9 from year to year or two years to two years, and
10 it would be, to me, a very peculiar statute
11 which gave rights in such a way that when it
12 changes, as it will change all the time, in and
13 out, in and out, in and out, and they don't know
14 who they're giving it go and they don't know
15 when they'll qualify and they might qualify at
16 time A and time B, and so, from the point of
17 view of a marketable rights program, your
18 interpretation seems to turn it into a kind of
19 chaos.

20 Now what do you say?

21 MR. MICHEL: Well, Justice Breyer,
22 I -- I don't think there's chaos here. There
23 was, of course, complete clarity that the
24 blanket exemption was available for the first
25 five years.

1 JUSTICE BREYER: That wouldn't help.
2 It wouldn't help, you know, because six years
3 out the price of getting the marketable right
4 goes up 30 percent, and now a whole new set of
5 refineries qualify, or it goes down 50 percent,
6 and then those -- the ones who have been getting
7 it are out because they're not in hardship
8 anymore.

9 I mean, that's normally the way such a
10 program works. Maybe it didn't work that way
11 here, but you're the one who would know, which
12 is why I bring it up.

13 MR. MICHEL: Right. So, Justice
14 Breyer, a couple of points. I think, if
15 Congress wanted to create a freely available
16 exemption that would serve the purposes you've
17 just described, it would have done what it did
18 in subsection (o)(7). That was the section that
19 Justice Barrett mentioned to my friend at the
20 end of his argument. That allows for a
21 freestanding waiver of the volume requirements.

22 And Congress instead took a much more
23 roundabout path here by creating the initial
24 blanket exemption and providing for --

25 JUSTICE BREYER: Why is that

1 roundabout? As you read it -- I understand how
2 you read it -- but it seems to me paragraph
3 (A)(i) could be read as follows: Temporary
4 exemption, the requirements of paragraph (2)
5 shall not apply to small refineries -- that's
6 the exemption -- until calendar year 2011.
7 That's the temporary. Okay?

8 And now we go down to the next one,
9 and it says the -- the -- where there's economic
10 hardship, the -- what will happen is
11 requirements in paragraph -- well, there's a
12 study, and then it says that the -- the
13 exemption under clause (i), two more years. The
14 exemption was paragraph (2) didn't apply. And
15 then it says later the exemption of paragraph
16 (A) will apply where there's disproportionate
17 hardship.

18 I mean, I don't have a problem reading
19 it that way. You could read it many ways, but
20 that seems reasonable?

21 MR. MICHEL: So, Justice Breyer, I
22 think the big problem with that is that you're
23 cutting out "until calendar year 2011."

24 JUSTICE BREYER: Sure, that's the
25 temporary.

1 MR. MICHEL: Well, but --

2 JUSTICE BREYER: The sentence
3 describes a temporary exemption.

4 MR. MICHEL: -- I think --

5 JUSTICE BREYER: The exemption is what
6 they say. You don't have to use -- you're
7 exempt.

8 MR. MICHEL: I think the problem with
9 that reading, though, is that in (B)(i), it
10 directly references back to the exemption under
11 subparagraph (A). And there's simply no
12 language in subparagraph (A) that can be freely
13 granted. That, if Congress wanted to do that,
14 it would have done what it did in subsection
15 (o)(7), where it said exactly what you just
16 said, which is a refinery can petition for a
17 waiver of the volume requirements --

18 CHIEF JUSTICE ROBERTS: Justice --

19 MR. MICHEL: -- with no time
20 requirement.

21 CHIEF JUSTICE ROBERTS: Justice Alito.

22 JUSTICE ALITO: My concern here is
23 exactly what you've been discussing with Justice
24 Breyer, or at least it's along the same lines.

25 Is it true that the price of RINs

1 fluctuates quite a bit?

2 MR. MICHEL: It is, Justice Alito.

3 JUSTICE ALITO: All right. Well, tell
4 me why the scheme then that you're proposing is
5 one that Congress would think is sensible. If a
6 small refiner is able to comply for a number of
7 years but then is unable to comply because of
8 the fluctuation of the price, why -- and -- but
9 would be able to comply again after that year,
10 why would that -- why would Congress want that
11 small refinery to be forced out of business?

12 MR. MICHEL: So, Justice Alito, I do
13 want to make clear that we don't think they'll
14 be forced out of business, and I -- I think
15 that's an important point because that would
16 really raise the stakes beyond where they
17 actually are. I also think it's important to
18 note that EPA's longstanding position is that a
19 refinery can recover the costs of compliance
20 through this RIN program.

21 I think -- but even if you -- you
22 didn't accept either one of those, at the end of
23 the day, this is a statute that's aimed at
24 transforming the fuel supply, and, ultimately,
25 it is necessary to bring all the small

1 refineries into compliance. That's after all, I
2 think, what Congress meant by a temporary
3 exemption that can be extended only under
4 certain circumstances.

5 JUSTICE ALITO: So you think this is a
6 sunset provision?

7 MR. MICHEL: I think it's in some ways
8 a -- a particularly generous sunset provision in
9 that the five years is the only clear sunset
10 after 2011, but then small refineries that can
11 show they need it for longer can keep it for
12 longer.

13 The ultimate result is, I think,
14 something of a sunset, but that's exactly what
15 you would expect from a temporary exemption.

16 JUSTICE ALITO: Well, if it's a sunset
17 provision, isn't it a rather strange type of
18 sunset provision? I've never seen a sunset
19 provision like this.

20 MR. MICHEL: Well, I -- I -- I don't
21 think it's a sunset provision in those terms,
22 but there are other, you know, areas of the law
23 where someone can continue to receive exemptions
24 or -- or extensions of a particular status.
25 Visas, for example. You could come into the

1 country on a visa and continue to extend it, and
2 you might say that that's a sort of sunset
3 program in the sense that once you no longer
4 continue to obtain the extensions, you're
5 sunsetted, and it'll happen at different times
6 for different people. I don't think that's a
7 particularly unusual concept.

8 JUSTICE ALITO: What do you think is
9 the standard that the EPA applies under (B)?

10 MR. MICHEL: So it's disproportionate
11 economic hardship.

12 JUSTICE ALITO: What about -- what are
13 these other economic factors?

14 MR. MICHEL: So that, you know, I
15 think that just indicates that the EPA can look
16 beyond the four corners of the DOE study. And I
17 think, in the sealed appendix, there's a pretty
18 good look at what EPA looks at. It's a wide
19 variety of -- of financial information.

20 But -- but, ultimately, it's geared
21 toward determining whether the small refinery
22 has disproportionate economic hardship.

23 JUSTICE ALITO: How do you account for
24 the fact that the number of extensions or
25 exemptions has varied quite a bit from year to

1 year?

2 MR. MICHEL: So, Justice Alito, there
3 -- quite candidly, as we mentioned in the brief,
4 there -- there were a number of statements by
5 individual members of Congress or committees of
6 Congress that said in pretty clear terms they
7 wanted more extensions of the exemption. And
8 EPA, I think, complied with that.

9 And it took this litigation, which was
10 the first litigation presenting this question,
11 for the Tenth Circuit to come in and -- and read
12 the statute according to its text and -- and
13 persuade the agency that it actually couldn't do
14 what it had been asked to do so many times.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel, I'd like
18 to go back to something you said to Justice
19 Alito. You said that this is not going to close
20 -- not going to cause small refineries to close.
21 Please explain why.

22 MR. MICHEL: Sure, Justice Sotomayor.
23 I think, if you look at the history of the RFS
24 program, the vast majority of small refineries
25 have complied for -- for many years, including

1 Petitioners in this case, and that includes
2 years in which they have sought hardship relief
3 under this provision and had it denied. EPA
4 denied about 18 petitions between 2013 and 2015,
5 and as far as we know, only one small refinery
6 went out of business after that.

7 It's also notable that other
8 refineries that don't fall underneath the
9 75,000-barrel-per-day threshold that's in the
10 statutory definition for small refineries have
11 complied all the way back to 2006. And that's
12 true even of refineries that have 80,000,
13 90,000 -- you know, throughput that's not all
14 that different. And it doesn't really present
15 qualitatively different economics than -- than
16 the refineries face here.

17 And -- but, finally, there is
18 flexibility built into the RFS program. As we
19 mentioned, there are waiver authorities.
20 Justice Barrett cited one. There's also an
21 important provision in (o)(5)(D) that allows a
22 small refinery to carry over a deficit, in other
23 words, falling short of its volume requirements
24 for one year, so, if there's a particularly hard
25 year, they can rely on that.

1 I'd also note the Energy Policy Act
2 that adopted this, the RFS, had other provisions
3 that helped refineries, including small
4 refineries, in getting special access to oil
5 from federal lands. And, of course, we are
6 sensitive to the COVID-related hardships that
7 small refineries are suffering, but the federal
8 government has -- has expended a lot of COVID
9 relief that can help them in their capacity as
10 businesses and maybe, more importantly,
11 stimulate the economy to boost demand for -- for
12 fuel, which will help them going forward.

13 JUSTICE SOTOMAYOR: Thank you,
14 counsel.

15 CHIEF JUSTICE ROBERTS: Justice Kagan.

16 JUSTICE KAGAN: Mr. Michel, in
17 thinking of your conversation with Justice
18 Breyer, I mean, it strikes me that there are two
19 possible ways to conceive of the congressional
20 purpose here. And one is Mr. Keisler's way,
21 which is that it was -- is supposed to be a
22 safety valve, it's supposed to allow small
23 refineries that are having difficulty in any
24 given year, it might be this year, it might be
25 10 years from now, to have a way out.

1 And the alternative story is the one
2 that you just suggested, which is that this is
3 really conduct-forcing. It's supposed to be
4 that refineries change their methods of
5 proceeding and get into compliance at some
6 point.

7 So how do we choose between those two
8 different ways of understanding what Congress's
9 purpose is?

10 MR. MICHEL: Sure, Justice Kagan. I
11 mean, I think we do have the better
12 understanding of the purpose, but, to start with
13 the structure, I would look at, for example, if
14 you read (A)(i), (A)(ii), and (B)(i) together,
15 you really can see this funneling effect. So
16 (A) allows or creates an exemption for five
17 years. (B) -- (A)(ii) creates a mandatory
18 exemption for two years. And then (B)(i) allows
19 the exemption for an unstated period, but EPA
20 has made it one year.

21 (A) applies to all small refineries,
22 (A)(i). (A)(ii) applies to just the category of
23 refineries identified by the DOE study. And
24 (B)(i) is case by case.

25 So I think, if you read the statute

1 that way, it -- it sort of exudes the funneling
2 effect that's -- that's consistent with the
3 underlying purpose, which, you know, was to
4 change the -- the fuel supply.

5 I think that the D.C. Circuit's
6 opinion in the Americans for Clean Energy case
7 makes that clear. I think the -- the -- the
8 legislative and -- and executive background
9 makes it clear the statute was enacted at a time
10 when the United States was dependent on foreign
11 oil, and Congress and the President thought it
12 was important to -- to reduce that dependence
13 for national security, economic, and
14 environmental reasons.

15 JUSTICE KAGAN: Thank you, Mr. Michel.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch.

18 JUSTICE GORSUCH: Good morning, Mr.
19 Michel. I'd -- I'd like to address with you the
20 point I -- I discussed with Mr. Keisler about
21 Footnote 6 in his reply brief and whether
22 there's a continuity requirement in (A) which
23 might shed some light on whether we think
24 there's a continuity requirement in (B).

25 Is he correct that it would be

1 possible -- would have been possible for a small
2 refinery to receive an initial two-year
3 exemption or extension -- exemptions in 2008,
4 fall out of -- lose that exemption in 2010 but
5 then regain it in 2011?

6 MR. MICHEL: He -- he's not correct as
7 a factual matter, Justice Gorsuch, and that's
8 for a reason I think you may have suggested in
9 your earlier question. EPA's 2007 regulation,
10 the initial one implementing this program,
11 defined the relevant calendar year as 2004.

12 And then the 2010 regulations defined
13 the relevant calendar year as 2006. That
14 provision is actually -- a vestige is still in
15 the -- in the regulations, and it's at 31(a) of
16 our -- of the appendix to our brief. So,
17 because they were defined by fixed years, there
18 was no falling in and out of -- of the exemption
19 in the way that -- that --

20 JUSTICE GORSUCH: Why wouldn't that --
21 why wouldn't that have been possible, given that
22 we'd be looking at different years in '04 and
23 '06?

24 MR. MICHEL: Well, I mean, as a -- as
25 a practical matter, that -- that certainly

1 didn't happen. I -- I --

2 JUSTICE GORSUCH: No, I understand --
3 I understand, factually, it didn't happen, but,
4 conceptually, could it have happened?

5 MR. MICHEL: Yeah. I -- I think it
6 could have happened because -- if EPA had --
7 particularly if EPA had interpreted the statute
8 differently. But, as a factual matter --

9 JUSTICE GORSUCH: No, no, no, just
10 interpreting it the way they did, the fact that
11 we're looking at different years, at least --
12 doesn't that at least open the possibility that
13 there might be people falling in and out of the
14 small refinery definition even under the period
15 covered by (A) and, therefore, you might have --
16 at least conceptually it was possible for there
17 to be some discontinuity?

18 MR. MICHEL: It -- it is conceptually
19 possible, although I think it's probative that
20 EPA adopted -- ultimately adopted regulations
21 that didn't allow that to happen.

22 JUSTICE GORSUCH: It didn't happen, I
23 got it. Okay.

24 MR. MICHEL: It didn't happen.

25 JUSTICE GORSUCH: All right. And then

1 just to return to a couple questions that the
2 Chief Justice asked and that I'm curious about.
3 You -- if I understood you correctly, you --
4 you're arguing that the ordinary meaning of the
5 structure and the purpose here support your
6 position, but you're not arguing that the text
7 is unambiguous?

8 MR. MICHEL: That's right, Justice
9 Gorsuch.

10 JUSTICE GORSUCH: Okay. And so, in --
11 in circumstances like that, we -- we might in --
12 in another world have applied Chevron, but
13 you're asking us not to do so here, right?

14 MR. MICHEL: Right, because I think
15 that there's nothing to defer to in that there's
16 no agency interpretation of the question
17 presented that -- that you could grant Chevron
18 to. And, of course, as -- as one of your recent
19 opinions, I think, pointed out, it would be
20 atypical to grant Chevron deference to an agency
21 when it no longer holds that position.

22 JUSTICE GORSUCH: So -- so part of the
23 reason why you think it would be inappropriate
24 is because it -- it's just a -- a preamble, but
25 you also indicate, even if it were applicable,

1 you -- you -- you -- you would disavow Chevron
2 deference in this case because you've indicated
3 in a press release you don't intend to continue
4 to enforce the -- the 2014 regulation?

5 MR. MICHEL: Both of those things, and
6 I would also add it's not so much even that --
7 that it's in a preamble. It's that it's also,
8 at -- at best, an implication in the preamble
9 that doesn't --

10 JUSTICE GORSUCH: Okay. But -- but
11 even if it were -- even if it were not in the
12 preamble, even if it were absolutely clear, you
13 still would ask us not to apply Chevron?

14 MR. MICHEL: That would be our -- that
15 would be our position, although, here, I think
16 it's a lot easier because it's not in the rule
17 and it's not even clear in the preamble.

18 JUSTICE GORSUCH: And part of the
19 reason why you don't want us to apply it is
20 because it would be a mistake to supply
21 deference when the agency has changed its
22 position?

23 MR. MICHEL: I -- I think that's
24 right. As -- as the Court observed in Epic
25 Systems, you know, one of the traditional

1 justifications for Chevron is deference to
2 executive officials, you know, and -- and
3 requiring accountability, and it -- it would be
4 a strange understanding of accountability to
5 defer to an executive interpretation that's not
6 the one the executive has now.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE GORSUCH: Thank you, Mr.
10 Michel.

11 JUSTICE KAVANAUGH: Thank you, Chief
12 Justice.

13 Good morning, Mr. Michel. Mr.
14 Keisler's second argument in his brief, which is
15 his lead argument today, the argument that the
16 extension, the word "extension" is temporal but
17 does not have to be continuous, just to set up
18 how I'm thinking about this and then get your
19 response, you know, you -- you admit it's not an
20 unambiguous word. I think Congress uses
21 "extension" sometimes even when something's
22 lapsed. We have the examples -- COVID and other
23 examples.

24 You make a big deal about ordinary
25 usage, but I'll give you three instances in my

1 life where ordinary usage goes the other way
2 from what you -- what you say. So sometimes one
3 that you're teaching and you have a 5:00 p.m.
4 due date for a paper, you know, after the due
5 date, you will get an e-mail entitled Extension
6 Request, you grant a paper extension afterwards.

7 Or when a -- you use a sports contract
8 example in your brief, but oftentimes, if the
9 contract ends at the end of the season, in the
10 off-season, the player signs a new contract.
11 That will be described by most people as player
12 extends for two more years.

13 Or, if you let your print newspaper
14 subscription lapse for a time and then you start
15 it up again, you'll tell your family member or
16 friend, oh, I extended the paper subscription.

17 So I -- I think ordinary usage also,
18 like congressional usage, in my experience at
19 least doesn't tell us exactly. So how do we
20 break this?

21 And the two things he emphasizes are
22 "at any time" and that that's -- there's no
23 sunset date. So I want to get your responses to
24 that.

25 And then also on the purpose and

1 context, if we get to that, to help break
2 what -- I don't want to say tie, but to figure
3 out what Congress was thinking about with the
4 word or what it was doing with the word
5 "extension," your position is that Congress
6 wanted small fine -- refineries to have no
7 outlet at all, to essentially go out of
8 business, whereas the other side's position is
9 simply that EPA would have authority, as a
10 matter of separation of powers, authority to
11 grant an exemption if a small refinery had --
12 had a -- had a problem, and it really seems
13 quite implausible to think Congress wanted
14 refineries in that circumstance to go out of
15 business.

16 So, if I can get your response on the
17 "at any time," no sunset date, and the
18 implausibility of Congress wanting small
19 refineries to go out of business rather than EPA
20 having authority.

21 MR. MICHEL: Thanks, Justice
22 Kavanaugh. And I think I can maybe fold in a
23 little bit of your first question too or your
24 comment.

25 You know, I think "at any time" means

1 exactly what it says, which is that a small
2 refinery can ask for an extension of the
3 exemption at any time, but that doesn't define
4 what an extension of the exemption is.

5 So, in Justice Kagan's example, I
6 think, if that renter originally had a lease
7 that said you can extend your lease at any time,
8 I don't think it would work to come back five
9 years later and ask for an extension. I think,
10 as my friend said, the landlord would still
11 scratch his or her head.

12 So I think, although I take your point
13 that --

14 JUSTICE KAVANAUGH: How about 10 days
15 later?

16 MR. MICHEL: So I -- I -- I do think
17 10 days later would be --

18 JUSTICE KAVANAUGH: I don't think we
19 should base our decision here on absurd -- not
20 absurd but extreme hypotheticals or -- or
21 they're not absurd, they're extreme, though,
22 but, like, a few days later you would call that
23 an extension?

24 MR. MICHEL: I -- I -- I think you
25 might, but I think that would be because you

1 were running it back in a sort of nunc pro tunc
2 sense to the prior.

3 JUSTICE KAVANAUGH: Exactly, exactly.

4 MR. MICHEL: Sure. And -- but I -- I
5 want to make very clear that's not what the
6 small refineries are asking for here. They had
7 extent -- exemptions through 2011 or 2013
8 respectively.

9 JUSTICE KAVANAUGH: Right.

10 MR. MICHEL: And they're asking now
11 for an extension into 2016 or 2017. So it
12 really is Justice Kagan's hypothetical and not
13 the nunc pro tunc extension.

14 On the purpose and context, I -- I
15 think, if you thought they were going to go out
16 of business, this would be a tougher case. They
17 haven't gone out of business in the past when
18 many small refineries have complied, but, of
19 course, the -- the purpose of this program was
20 to drive change in the -- in the fuel market.

21 JUSTICE KAVANAUGH: Drive change --

22 CHIEF JUSTICE ROBERTS: Justice
23 Barrett.

24 JUSTICE KAVANAUGH: -- to the point of
25 driving small refineries out of business? I

1 don't see that anywhere in the -- in the text
2 or -- or history.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.

5 JUSTICE BARRETT: Good morning, Mr.
6 Michel. I want to make sure I have a handle on
7 what you mean by "ambiguous." You said a couple
8 times that the word "extension" is ambiguous,
9 and -- and I would have thought that by that,
10 you mean that it does have several definitions
11 which we've gone over during argument and in the
12 briefs, if you look in a dictionary, but that in
13 the context of this statute, it's clear which of
14 those definitions -- or reasonably clear that
15 there's a better indication of which of those
16 definitions is the right one.

17 Am I understanding your argument
18 correctly?

19 MR. MICHEL: Yeah, I think that's
20 right, Justice Barrett. I -- I don't mean to
21 resist. If -- if the Court wants to say that
22 our -- our reading is unambiguously correct, I'm
23 not here to tell you not to say that. I'm just
24 saying I -- I don't think you have to go that
25 far if you don't want to.

1 JUSTICE BARRETT: Well, I mean, not
2 necessarily unambiguously correct, because, you
3 know, we're here arguing back and forth about
4 what it might mean. But I don't think you mean
5 to say that we could not glean which way in
6 which Congress was using the word "extension"
7 when we look at the context, correct?

8 MR. MICHEL: Absolutely. I agree,
9 Justice Barrett.

10 JUSTICE BARRETT: Okay. And as for
11 Congress not plausibly intending to send the
12 small refineries out of business, is it possible
13 that Congress just didn't anticipate that they
14 wouldn't be able to comply, that it just grossly
15 underestimated how easy it would be for small
16 refineries to meet the standards?

17 MR. MICHEL: I actually think they
18 might. If I understand your question correctly,
19 they might have underestimated how easy it would
20 be, as -- as we explained in -- in the brief.
21 It turns out that because of this RIN trading
22 system, small refineries are able to recover the
23 full costs of their compliance because the
24 marginal cost of RFS compliance is -- is priced
25 into the market price for refined fuels.

1 Now I'm not saying that Congress
2 necessarily would have known that at the time,
3 but, as it's turned out, there's very little
4 risk of going out of business because of the way
5 that the program has -- has been --

6 JUSTICE BARRETT: Well, but they say
7 that they're then at the mercy of the RIN market
8 and it can be very extensive.

9 But putting that aside, let's just
10 posit that, you know, what Justice Kavanaugh was
11 saying is right, that your reading would drive
12 some small refineries out of the market.

13 Which way should that cut? I mean,
14 because, if we think that Congress might not
15 have anticipated that at the time, what are we
16 to make of that?

17 MR. MICHEL: So I -- I think, you
18 know, Congress, of course, included a -- a
19 number of provisions that added flexibility that
20 would keep small refineries from going out of
21 business, but I -- I do want to answer your
22 question directly.

23 I suppose, at the end of the day, if
24 15 years later there were one or two small
25 refineries that couldn't comply because they

1 couldn't find a way after 15 years, I think that
2 Congress would have accepted that outcome
3 because it was trying to change the -- the fuel
4 supply.

5 But I -- I want to stress, I don't
6 think that's what's going to happen, in part
7 because of the other safeguards that Congress
8 wrote into the program.

9 JUSTICE BARRETT: Thank you,
10 Mr. Michel.

11 CHIEF JUSTICE ROBERTS: A minute to
12 wrap up, Mr. Michel.

13 MR. MICHEL: Thank you, Mr. Chief
14 Justice.

15 The key statutory provision here has
16 an ordinary common-sense meaning, to obtain an
17 extension of the exemption under subparagraph
18 (A), a small refinery must have an exemption
19 under subparagraph (A). Petitioners' contrary
20 reading is counterintuitive at best.

21 This Court typically applies the
22 ordinary meaning of statutory language, unless
23 there's a good reason not to, and, here, there's
24 not. Allowing extensions only for small
25 refineries that maintain an exemption fits with

1 the words and structure Congress adopted, not
2 alternatives it could have chosen instead.

3 The ordinary meaning reflects the
4 statutory goals to drive the market toward
5 renewable fuels while giving small refineries a
6 significant but limited benefit. And requiring
7 continued compliance, including with the
8 flexibility that Congress wrote into the RFS,
9 will promote its objectives without causing the
10 harm Petitioners fear.

11 The decision below should be affirmed.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Morrison. Mr. Morrison?

15 ORAL ARGUMENT OF MATTHEW W. MORRISON
16 ON BEHALF OF THE PRIVATE RESPONDENTS

17 MR. MORRISON: Mr. Chief Justice, and
18 may it please the Court:

19 "Extension" may have other possible
20 meanings in different contexts, but its ordinary
21 meaning, to lengthen or prolong, is the only
22 plausible meaning in the context of this
23 statutory provision. And Petitioners have
24 offered no compelling reason to depart from that
25 ordinary meaning.

1 EPA's authority is therefore limited
2 to prolonging the duration of the exemption
3 under subparagraph (A), not creating new
4 exemptions episodically. EPA's unauthorized
5 carveouts have resulted in billions of dollars
6 of lost revenue to biofuels producers,
7 devastating the rural economies anchored by the
8 renewable fuels industry.

9 Petitioners' suggestion that there
10 should be a permanent safety valve to excuse
11 them from their compliance obligations is belied
12 by the text and structure of the statute and is
13 antithetical to Congress's goal of increasing
14 the volume of renewable fuel in the nation's
15 transportation system.

16 CHIEF JUSTICE ROBERTS: Counsel, can
17 EPA grant an extension of the time to file for
18 an extension?

19 MR. MORRISON: Your Honor, yes, EPA
20 could -- could grant an extension of the time --
21 it could file -- it -- it does allow a
22 petitioner to file a petition at any time, and
23 that is very broadly worded in the statute.

24 CHIEF JUSTICE ROBERTS: Well, I mean,
25 let's say that the period is due to expire on,

1 you know, January 3, and on January 4, the
2 representative of the refinery comes into EPA
3 and said: Here's my application for an
4 extension. Sorry I'm late. Everybody had
5 COVID.

6 Is EPA going to give him an extension
7 so that, for example, the period would or
8 wouldn't be continuous?

9 MR. MORRISON: Your Honor, what --
10 what -- the continuity we need is between the
11 exemptions or the extensions of exemptions. The
12 capacious language "at any time" would, I
13 believe, allow EPA to entertain a petition after
14 December 31. It would -- it would, in a nunc
15 pro tunc manner, revert back and allow
16 continuity in the prior exemption.

17 CHIEF JUSTICE ROBERTS: Well, I don't
18 know why that gives the other side all they
19 need. I mean, right? I mean, what -- you could
20 say they can get an extension if they ask for it
21 half -- you know, half a year later, right?

22 MR. MORRISON: That's correct, Your
23 Honor. But the --

24 CHIEF JUSTICE ROBERTS: So why
25 couldn't they -- why couldn't they ask for the

1 extension a year later?

2 MR. MORRISON: They could ask for an
3 extension --

4 CHIEF JUSTICE ROBERTS: I'm sorry, I'm
5 -- I'm being confusing. An extension of the
6 time to apply for an extension.

7 MR. MORRISON: They -- they -- Your
8 Honor, with the phrase "at any time," they
9 really don't need an extension for the
10 submitting the petition. We take that language
11 at its face value that Congress meant to speak
12 very broadly.

13 The critical thing is that for a
14 refinery to be eligible for an extension in a
15 given compliance year, that refinery has to be
16 exempt for the year preceding the compliance
17 year.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 MR. MORRISON: And only then --

21 CHIEF JUSTICE ROBERTS: Justice
22 Thomas.

23 JUSTICE THOMAS: Thank you, Mr. Chief
24 Justice.

25 Counsel, just to satisfy my curiosity,

1 what's your interest in Petitioner not receiving
2 this extension?

3 MR. MORRISON: Well, Your Honor, I --
4 I don't have a -- a personal interest in
5 Petitioner not receiving the exemption other
6 than --

7 JUSTICE THOMAS: No, I don't mean --
8 not you personally but your clients.

9 MR. MORRISON: Your Honor, it's
10 because it was granted after a lapse in the
11 exemption. There is only one --

12 JUSTICE THOMAS: No, I understand
13 that. But how does it affect -- how does it
14 affect your clients?

15 MR. MORRISON: Your Honor, where there
16 are exemptions given from compliance, that
17 affects the demand for their products. It
18 affects the demand for ethanol, which in turn
19 affects the price of RINs, the price of the fuel
20 that they sell.

21 There have been almost 4 -- 4 billion
22 gallons over the last few years that have been
23 lost to small refinery exemptions. That has had
24 a devastating effect on the renewal fuel sector.

25 JUSTICE THOMAS: So your interest is

1 that you're -- you are not selling enough
2 ethanol? Is that what I'm hearing?

3 MR. MORRISON: Your Honor, it is that
4 the -- the ethanol that would otherwise be
5 demanded to meet the congressional levels would
6 no longer be produced and provided by the
7 ethanol companies. That's correct.

8 And Congress's objective in -- in
9 achieving those and in making sure under (o)(3)
10 that those levels are ensured to be met by the
11 agency, it -- it's critical that the agency
12 provide those volumes to make sure the statutory
13 levels are met.

14 JUSTICE THOMAS: But your interest is
15 actually in securing the market for your
16 product?

17 MR. MORRISON: Your Honor, it -- it's
18 in making sure that, yes, we are going to be
19 providing ethanol, blending into the nation's
20 transportation level -- system at the levels
21 Congress contemplated in (o)(2) of the statute.

22 JUSTICE THOMAS: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer.

25 JUSTICE BREYER: Same question about

1 marketable rights. I mean, when you read about
2 the first two extensions -- first extension, it
3 doesn't say 2011 and then two more years. It
4 says 2011 and at least two more years. They
5 could have given 50 more years as far as that
6 wording is concerned. And I guess they wouldn't
7 want to do that because things change all the
8 time. You don't know what the price of the RIN
9 will be. No one knows. Sometimes it's up;
10 sometimes it's down.

11 Now I've just given you an excellent
12 reason why you would lose, because they want
13 small refineries to not have to do this. And
14 who is a small refinery with disproportionate
15 hardship varies tremendously, possibly, across
16 the years.

17 So what do you point to to show I'm
18 wrong? What do you point to in the legislative
19 history? What do you point to in the context in
20 which this was enacted that says no, they're not
21 worried about the fluctuating prices and
22 changes; they're worried only on phasing this
23 out? That's your point. What's your strongest
24 evidence?

25 And I do look at the legislative

1 history, if you have some there.

2 MR. MORRISON: Your Honor, all
3 refineries had 15 years to adjust to the levels
4 that ultimately peak in 2022, and they had time
5 gradually, giving them all the time to build the
6 capacity. And that is explained in Senate
7 Report Number 10974 F(6).

8 Secondly, small refineries had a
9 five-year blanket exemption plus an additional
10 possible two years to invest or adjust.

11 And, thirdly, I would say that the RFS
12 compliance costs, as the government points out,
13 turned out to be recoverable anyway, which would
14 adjust for the fluctuations. If it did become
15 more expensive in a given year, those compliance
16 costs would still be recoverable in the costs of
17 the products sold.

18 And then, finally, I would point to
19 the equities of the situation that in 2015 only
20 seven out of 137 refineries were under the
21 exemption. So about 95 percent of the
22 refineries in the country had complied, were
23 meeting their -- or making their proportional
24 contribution to the RFS demands. These --

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice Alito. Justice Alito.

2 Justice Sotomayor.

3 JUSTICE SOTOMAYOR: Counsel --

4 JUSTICE ALITO: I'm sorry, I -- I --

5 JUSTICE SOTOMAYOR: -- I'd like you to
6 finish --

7 JUSTICE ALITO: -- I --

8 JUSTICE SOTOMAYOR: I'm sorry, Sam, go
9 ahead.

10 JUSTICE ALITO: Let's say there are
11 two refineries. Refinery 1 gets an exemption in
12 year one, and in year two, refinery number 2
13 complies in year one but needs an exemption in
14 year two. And you would say that the second
15 refinery can't get that exemption.

16 Why is that a sensible scheme?

17 MR. MORRISON: Well, Your Honor, I --
18 I guess that -- that hypothetical rests on the
19 false premise that given small refineries
20 suffering a disproportionate economic hardship
21 might not seek an exemption when it could have,
22 but the truth is that all small refineries have
23 every incentive in the world to apply for an
24 exemption in a timely fashion, because,
25 otherwise, they'd have to comply.

1 Moreover, once a refinery has
2 developed a mechanism for compliance, it can
3 actually -- as I just mentioned, it can actually
4 recover those compliance costs, so there is no
5 disadvantage from one to the other.

6 They also have compliance
7 flexibilities in the nature of deficit carryover
8 too if they need so.

9 JUSTICE ALITO: All right, thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Sotomayor.

12 JUSTICE SOTOMAYOR: Counsel, both you
13 and I think the government have said that, as
14 the system has turned out, Congress may not have
15 known that the costs were recoverable.

16 Can you explain that? I mean, what --
17 what is odd about this statute is that there are
18 all sorts of jump-off points away from the
19 statute. The government mentioned a bunch of
20 them. Justice Barrett mentioned one in
21 particular, the regional effect.

22 But there are all sorts of other outs
23 that the EPA can implement, but why would
24 Congress not have anticipated the cost recovery?

25 MR. MORRISON: Your Honor, I -- I

1 believe, in 2005 and 2007, Congress did not have
2 the information that it later gleaned and that
3 EPA provided in analyses that it did on the
4 impact of RFS compliance costs to refineries,
5 small and large.

6 The most comprehensive study came
7 in -- in 20 -- in the 2015 EPA report by
8 Burkholder, and there were other similar reports
9 by Nittle and others that basically found that
10 RFS compliance costs were recoverable in the
11 cost of products sold small and large. That
12 information was not available to Congress in
13 20 -- 2005 and 2007. And I think that's part of
14 the reason why you don't see -- you -- you
15 actually have this exemption on the books.

16 It's also true that the Department of
17 Energy, when it first came out with the -- the
18 study in 2008, its initial reaction was that the
19 further extension was not necessary because it
20 began to see what Burkholder saw in later years,
21 that the costs were recoverable.

22 So I think that's right, Justice
23 Sotomayor. If -- if it were the case that
24 Congress could have seen back in '05 and '07
25 what it learned in later years, we might not

1 have any exemption on the record.

2 JUSTICE SOTOMAYOR: Thank you,
3 counsel.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor.

6 Oh, I'm sorry, Justice Kagan.

7 JUSTICE KAGAN: Mr. Morrison, I want
8 to go back to your conversation with the Chief
9 Justice about what "at any time" means. You
10 said it was quite capacious, but, of course, you
11 don't think it goes so far as to give Mr.
12 Keisler what he wants.

13 So could you explain to me what that
14 term means? What -- what does it include and
15 where does it stop?

16 MR. MORRISON: Yes, Justice Kagan.
17 "At any time" speaks only to the simple
18 procedural question of when a small refinery can
19 submit its petition. It says nothing about the
20 substantive requirements for getting an
21 exemption extended.

22 Congress added that language "at any
23 time" simply to clarify that small refineries
24 can submit petitions outside of the time-limited
25 provisions in (A)(i) and (A)(ii). For example,

1 small refineries can and did submit petitions in
2 2011 and 2012 when the Department of Energy did
3 include them in its study.

4 And I believe this distinction between
5 the procedural question as we view "at any time"
6 and the substantive discussion about what's
7 required for an exemption extension is clear
8 from four things in that language.

9 First is the ordinary meaning of "may
10 at any time petition."

11 Secondly is the nearest reasonable
12 reference canon of statutory construction, which
13 places "at any time" next to "petition."

14 Third is the undisputedly continuous
15 nature of the adjacent provision in (A)(ii).

16 And, lastly, the overall purposes of
17 the RFS, which would be undermined by an
18 open-ended and intermittent exemption.

19 JUSTICE KAGAN: Thank you, Mr.
20 Morrison.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch.

23 JUSTICE GORSUCH: I have no questions
24 at this time. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh.

2 JUSTICE KAVANAUGH: Thank you, Mr.
3 Chief Justice.

4 Mr. Keisler said, if you win this
5 case, the -- it won't add a drop to the volume
6 of renewable fuel into the market. Do you
7 agree?

8 MR. MORRISON: No, Justice Kavanaugh,
9 we would not agree. We've submitted evidence
10 with our briefs that indicate that small
11 refinery exemptions have caused a substantial
12 drop in the price of ethanol, roughly 2.3
13 billion in losses due to reduced revenues during
14 the recent period, about 162 million gallons.
15 That's in the Richmond declaration attached to
16 our Tenth Circuit brief.

17 I would also point you, Justice
18 Kavanaugh, to the State's amicus filing here,
19 which details the economic harm that has been
20 and will be continued upon the -- the biofuels
21 industry if these exemptions continue.

22 JUSTICE KAVANAUGH: Right, the
23 economic harm as distinct from the volume into
24 the market, I'll let Mr. Keisler respond to that
25 if there is a response on rebuttal.

1 Another question picking up on Justice
2 Breyer's questions, it seems like we have a
3 choice whether to interpret this as giving the
4 agency flexibility to give the exemption or kind
5 of a prohibition on granting the exemption.

6 You know, why -- why, when faced with
7 this kind of provision that doesn't have the
8 kind of sunset language that you would often
9 see, wouldn't we interpret this scheme, to the
10 extent there's ambiguity, to give the agency
11 flexibility whether to grant exemptions given
12 the hardships that could result?

13 MR. MORRISON: Justice Kavanaugh, I
14 believe we -- we -- we do begin with the
15 ordinary and common meaning of "extension."
16 And -- and although there may be other
17 definitions possible, the ordinary and common
18 meaning is simply, it remains to prolong or
19 enlarge.

20 I think there are three contextual
21 clues that bring us to the fact that this was
22 meant to be a temporary exemption extension.
23 The first is simple language in (B)(i), which
24 limits EPA's authority only to extending the
25 exemption in (A)(i) which Congress said would be

1 temporary and time-limited.

2 The second is, in the same way
3 Congress used "extension" in the rest of
4 Section 211, all throughout the Clean Air Act,
5 when it uses "extension," it does prolong
6 continuously the duration of something
7 preexisting.

8 And I do believe, lastly, that if
9 continuity is clear in the words Congress did
10 not choose, that if it had chosen "reinstate,"
11 "restart," "renew," or taken the most simple
12 path of just saying that someone could petition
13 for an exemption, that would lend toward a
14 non-continuous --

15 JUSTICE KAVANAUGH: Thank you.

16 MR. MORRISON: -- interpretation.

17 JUSTICE KAVANAUGH: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice --
19 Justice Barrett.

20 JUSTICE BARRETT: Mr. Morrison, I have
21 a question about the word "temporary." So it's
22 part of your argument that in context, there's a
23 continuity requirement to the word "exemption,"
24 but so long as they are continuous, can these
25 exemptions go on into perpetuity?

1 MR. MORRISON: Your Honor,
2 theoretically, if -- if -- it is possible that a
3 small refinery could submit a meritorious
4 petition each year that shows it -- it -- it had
5 a disproportionate economic hardship, as long
6 as, again, it -- it was eligible to receive that
7 exemption that year because it had an exemption
8 extension in the preceding compliance year.

9 We think that there's still going to
10 be a funneling effect that would remove that
11 possibility of something indefinite, though.
12 The -- the harm would have to be
13 disproportionate. And, again, what we're doing
14 is still extending an exemption that Congress
15 itself said would be time-limited and temporary.

16 JUSTICE BARRETT: Well, if it's not
17 really temporary, however, in the sense that --
18 you know, you're -- you're saying that for
19 practical reasons maybe they would phase out,
20 but, as you read the text, as I understand your
21 argument in any event, as you read the text,
22 there's nothing in the text that stops a small
23 refinery from continually getting the exemption
24 year after year.

25 So it seems to me if "temporary"

1 doesn't really mean temporary, then maybe it
2 doesn't cast as much light as you say on what
3 "exemption" means either.

4 MR. MORRISON: Your Honor, I think
5 that's part of the reason why "temporary" was
6 not in the header for (B)(i) and it was in the
7 header for (A), because extensions under (B)(i)
8 could go on for a period of year -- years. Even
9 though (B)(i) references back to the initial
10 temporary exemption, and the disproportionate
11 and economic hardship would create a funneling
12 effect, you're correct that there's no specific
13 limit on the number of continuous extensions
14 that a small refinery may obtain under (B).

15 JUSTICE BARRETT: Thank you.

16 CHIEF JUSTICE ROBERTS: A minute to
17 wrap up, Mr. Morrison.

18 MR. MORRISON: Petitioners have given
19 this Court no compelling reason to depart from
20 the ordinary meaning of the word "extension" and
21 it should not do so here. The context in which
22 this word is used in the statute confirms that
23 this ordinary meaning is also the only
24 appropriate and plausible meaning.
25 Consequently, any extension of the temporary,

1 time-limited exemption for a new compliance year
2 must be preceded by an exemption in the prior
3 compliance years.

4 The statute's purpose of enhancing
5 energy security through the increased production
6 of biofuels further precludes Petitioners'
7 assertion that a compliance exemption Congress
8 provided only on a temporary basis could somehow
9 become permanent.

10 We therefore ask that you affirm the
11 Tenth Circuit's decision on this issue.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Rebuttal, Mr. Keisler.

15 REBUTTAL ARGUMENT OF PETER D. KEISLER

16 ON BEHALF OF THE PETITIONERS

17 MR. KEISLER: Thank you, Mr. Chief
18 Justice.

19 Both of my friends assert, as if it
20 were a matter of fact, that we can simply
21 recover the costs of this program by raising our
22 prices. We can't. In the applications we
23 submitted to the EPA, we said that our margins
24 in many cases were zero or negative once the
25 costs of this program were taken into account,

1 and this cost is the single largest operating
2 cost we have.

3 But we're not -- we don't want the
4 Court to decide as a factual matter whether we
5 can pass through those costs or not. We're just
6 asking the EPA to look at that evidence as part
7 of our submission. But, of course, they won't
8 if, for this entirely irrelevant issue of
9 continuity, they don't get to consider our
10 applications at all. And the issue of
11 continuity doesn't depend on whether we're right
12 or they're right about whether or not these
13 costs can be passed through.

14 Now my friend from the government
15 began by saying that this won't doom small
16 refineries to go out of business. But the key
17 point is that, if he's wrong about that and if
18 it did, he's saying that EPA's hands are tied
19 and that Congress meant EPA's hands to be tied
20 and never meant it to be able to grant relief
21 even in that circumstance. Instead, it meant
22 that we would be funneled out of the market.

23 These are the realities that we
24 explained in our applications. Many small
25 refineries, as Congress recognized, cannot

1 afford the blending infrastructure, and so they
2 have to rely on the marketable rights, the
3 credits, and the RINs. And -- and as everyone
4 has acknowledged, the prices for those are
5 wildly volatile, and Department of Energy found
6 that having to pay those costs will constitute
7 disproportionate economic hardship when those
8 costs exceed the cost of blending, as they
9 generally do.

10 The price of these credits can jump up
11 and down as much as four or five times or more
12 in a single year. So, if they plummet one year
13 and we can comply, we are then completely
14 foreclosed from relief in every future year,
15 even if they go up 10 times.

16 And also, if somebody somehow gave us
17 the blending infrastructure for free at our
18 facility, that would not solve the issues we
19 have because the issues are structural. And
20 Congress did understand and anticipate that,
21 Justice Barrett. That's why they wrote this
22 whole separate subsection about small
23 refineries.

24 Many of these refineries are located
25 in geographically remote areas. They depend on

1 pipelines to reach their markets, and pipelines
2 don't take blended fuel because it's corrosive
3 to pipelines. They don't own retail gas
4 stations like their larger competitors. They
5 can't compel the gas stations to take their
6 blended fuel, and the gas stations often don't.

7 And they have to sell a larger
8 proportion than the rest of the industry of
9 diesel because they're in remote areas, and
10 diesel doesn't take blending to the same degree
11 as the others.

12 So there are all sorts of reasons why
13 Congress understood that small refineries needed
14 this different provision, and that's why they
15 authorized them to seek relief at any time based
16 on hardship.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 11:40 a.m., the case
20 was submitted.)

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Official - Subject to Final Review

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