ORAL ARGUMENT NOT YET SCHEDULED

No. 16-1005 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICANS FOR CLEAN ENERGY, et al.,

Petitioners

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent

On Petition for Review of an Order of the
United States Environmental Protection Agency

BRIEF FOR CVR ENERGY, INC. AS AMICUS CURIAE SUPPORTING PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties, Intervenors, and Amici. Except for amicus CVR Energy, Inc., all parties, intervenors, and amici known to amicus are identified in the Obligated Party Petitioners' Opening Brief.

B. Rulings Under Review. Reference to the ruling under review appears in the Obligated Party Petitioners' Opening Brief.

C. Related Cases. All related cases known to amicus are identified in the Obligated Party Petitioners' Opening Brief.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, CVR Energy, Inc., discloses that Icahn Enterprises, L.P., a publicly held company, holds a greater than 10% ownership interest in it.

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GLOSSARY

CVR	CVR Energy, Inc.
EPA	Environmental Protection Agency
RIN	Renewable Identification Number
RFS	Renewable Fuel Standard

INTEREST OF AMICUS CURIAE

CVR Energy, Inc. ("CVR") is engaged in refining and fertilizer manufacturing through its ownership in CVR Refining, LP, which owns refineries in Kansas and Oklahoma, and its ownership in CVR Partners, LP, which owns fertilizer manufacturing plants in Kansas and Illinois. This case involves a challenge to EPA's implementation of the Renewable Fuel Standard Program. Because of its ownership of refineries that must comply with the RFS regulations and fertilizer plants that supply critical products to renewable fuel producers, CVR has a strong interest in the resolution of this case.

CVR submits this brief in support of certain petitioners' arguments that EPA was required to determine whether the definition of "obligated party" should include blenders. CVR's interests are not adequately represented by the petitioners because no petitioner has brought to the Court's attention that (1) the root cause of the market manipulation, speculation, and fraud in the credit trading program is EPA's departure from Section 211(o)(5) of the Clean Air Act, 42 U.S.C. § 7545(o)(B), which precludes unobligated parties from generating, buying and selling RINs, or (2) the unique harm suffered by CVR as an owner of regulated refineries and fertilizer manufacturing plants, both of which will be adversely affected by the agency's failure to close the blender loophole.

While petitioners argue in their opening brief that leaving blenders unobligated has caused the dysfunction in the RIN market, they did not identify for the Court the root cause of the market dysfunction, which was EPA's departure from Section 7545(o)(5) in its implementing regulations.[1] The statute required EPA to develop regulations for the generation of credits only by parties that over-comply—in other words, parties that are subject to the regulations and that blend renewable fuel in excess of their obligation—and for the sale of credits only to parties for purposes of compliance.[2]

CVR's interests are not represented by petitioners because they did not present this argument to the Court. CVR believes that this brief will assist the Court in understanding the root cause of the market manipulation and fraud in the RIN market and the agency's need to use its general waiver authority to reduce the statutory volumes. CVR is differently situated from the individual petitioners because of its ownership interest in fertilizer manufacturing plants, which benefit

[1] CVR is not challenging the underlying regulations, which were promulgated in 2010, but is explaining that the regulations' departure from the statute in EPA's implementing regulations, together with the agency's failure to determine whether it remains appropriate to leave blenders unobligated, explains the RIN market dysfunction, which compelled the agency to exercise its statutory waiver authority.

[2] "[T]he program incorporates a market solution to the process of fulfilling the mandates, allowing trading between the obligated parties from those who over-comply to those who find it less advantageous to blend renewable fuels into the transportation fuel mix." Department of Energy, *Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship* 2 (Mar. 2011).

from the production of renewable fuel and are harmed by the agency's use of its statutory waiver authority. With the possible exception of Valero Energy Corporation, no other petitioner that supports changing the definition of "obligated party" to include blenders is harmed by the agency's use of its statutory waiver authority. While Valero owns renewable fuel production facilities, because of its size, it has access to capital and markets that CVR does not. CVR is also not represented by the American Fuel & Petrochemical Manufacturers because AFPM represents the refining industry as a whole, including large, vertically integrated refiners that are also members of the American Petroleum Institute, which opposes changing the definition of "obligated party" to include blenders in favor of broader reforms to the RFS regime. So far as CVR is aware, no other amicus has interests similar to its own, and no other petitioner has raised the unique issues being raised by CVR.

RULE 29 DISCLOSURE

This brief was drafted in substantial part by Perkins Coie, LLP, which is also counsel for petitioners Alon Refining Krotz Springs, Inc., American Refining Group, Inc., Calumet Specialty Products Partners, L.P., Ergon-West Virginia, Inc., Hunt Refining Company, Lion Oil Company, Placid Refining Company, U.S. Oil & Refining Co., and Wyoming Refining Company ("the Coalition"). Perkins Coie has been CVR's environmental counsel for more than ten years, and therefore

CVR sought Perkins Coie's assistance when it determined that an important issue in which it has a unique interest was not addressed by petitioners' brief. This brief is not being filed to circumvent the word limit on petitioners' brief. Rather, because of Perkins Coie's role as counsel to the Coalition, Perkins Coie is able to ensure that this brief is not duplicative of the issues raised by the petitioners. The Advisory Committee Notes to the 2010 amendments to Federal Rule of Appellate Procedure 29 note "that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to avoid duplicative arguments," which it will do in this case.

SUMMARY OF ARGUMENT

CVR agrees with the obligated party petitioners that EPA erred in placing the compliance obligation on refiners and importers, but not blenders. EPA's failure to determine the appropriate obligated party in the current rulemaking was arbitrary and capricious not only for the reasons set out in petitioners' briefs but also for two additional reasons. First, EPA's decision to allow non-obligated parties to participate in the RIN market is the root cause of the dysfunction in the RIN market, necessitating the agency's use of its statutory waiver authority to reduce the annual renewable fuel volume targets set by Congress. Second, the dysfunctional RIN market harms CVR's fertilizer and refining business because it creates a need for EPA to use its waiver authority and because CVR's refineries

are not vertically integrated—that is, they do not own downstream blending and retail operations—and therefore cannot generate sufficient RINs from blending but must purchase RINs from non-obligated blenders and market speculators for compliance.[3]

ARGUMENT

A. EPA has created a dysfunctional RIN market because its regulations governing the market violate the Clean Air Act

Congress directed EPA to provide "for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required." 42 U.S.C. § 7545(o)(5)(A)(i). The statute provides that an entity that generates RINs "may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying" with the obligations imposed by the regulations. *Id.* § 7545(o)(5)(B). Significantly, the statute contemplates that obligated parties will be the only participants in the RIN market and that RINs will be generated only for volumes of renewable fuel blended in excess of the statutory volumes. Under Section 7545(o)(5)(B), a party that "generates credits"—that is, by blending—may choose to "use the credits" or to "transfer all or a portion of the credits to another

[3] An "non-obligated blender" is a blender that is not an "obligated party" under the rule or is a vertically integrated refiner that generates excess RINs from blending. For refiners that generate excess RINs from blending, unobligated blending refers to the generation of RINs in excess of their compliance obligation, known as the "renewable volume obligation."

person," but only "for the purpose of complying" with the RFS requirements, not for the purpose of speculation. EPA, however, has chosen to allow non-obligated parties, such as banks, to speculate in the RIN market and has allowed non-obligated blenders to generate RINs from blending below statutory volumes. *See* 40 C.F.R. § 80.1450(e).

Because EPA has chosen to place the compliance obligation on refiners, independent refiners, who do not control the blending and retail sale of their fuel, are obligated to purchase RINs at the end of each compliance year to demonstrate compliance. *See* Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program, 72 Fed. Reg. 23,900, 23,904 (May 1, 2007) ("2007 Rule") (acknowledging that "[m]any obligated parties do not have access to renewable fuels or the ability to blend them, and so must use credits to comply"); *Am. Petroleum Inst.* v. *EPA*, 706 F.3d 474, 480 (D.C. Cir. 2013) (noting that refiners "are in no position to ensure, or even contribute to, [the statutory goal of] growth" in the use of renewable fuels by blenders). While these "merchant" refineries are required to comply with the rule by purchasing and retiring RINs to demonstrate compliance, downstream non-obligated blenders and retailers generate and control the RINs. Refineries must have RINs to deliver to EPA by a date certain, but the only persons they can purchase these RINs from are non-obligated blenders and market speculators.

The non-obligated blenders understand the refineries' predicament and their own market power and have realized they can squeeze higher and higher prices from merchant refiners. RINs are now selling at many times what it would cost the refineries to produce them if they were able to do so, putting merchant refiners at an extreme competitive disadvantage that serves no regulatory purpose and, in fact, has acted as a market constraint preventing more renewable fuel blending. *See* Obligated Party Pet. Br. 15-17.

Worse, because of the sharp rise in the price of RINs—4,000 to 5,000 percent since the start of the program—speculators and large investment banks have entered the picture and are competing with refineries to purchase RINs. In a classic "short squeeze," these speculators are buying and selling RINs, hoping to get much higher prices as the time nears when refineries are obligated to deliver RINs to the EPA for compliance. These market speculators have no ability to expand renewable fuel use. They are in the market solely to earn a profit from speculating on RINs, an activity that is prohibited by Section 7545(o)(5)(B), which contemplates that only obligated parties will participate in the market.

Market speculation has also occurred because of the extraordinary value of the RIN market, conservatively estimated to be worth more than $16 billion for

2014 alone.[4] The size of the market is a function of EPA's decision to disregard 42 U.S.C. § 7545(o)(5)(A)(i) by allowing parties to generate RINs from blending below statutory levels—for example, a non-obligated party can generate RINs by blending 1% ethanol with gasoline in the face of a 10% mandate. Had EPA, in accordance with Section 7545(o)(5), allowed RINs to be generated only for volumes blended in excess of the standards, the RIN market would be a small fraction of its current size and would not be attracting Wall Street speculators.[5]

[4] This value is based on the number of RINs generated in 2014, as provided by EPA at https://www.epa.gov/fuels-registration-reporting-and-compliance-help/2014-renewable-fuel-standard-data; the price of 2014-vintage RINs on August 1, 2016, as provided by the Oil Price Information Service ("OPIS"); and the price EPA set for cellulosic waiver credits for compliance year 2014. These calculations exclude the small number of cellulosic diesel RINs generated in 2014 because prices for these RINs are not readily available from OPIS. If cellulosic diesel RINs were included, the value of the RIN market would be even higher.

[5] EPA previously refused to produce documents in response to a Freedom of Information Act request seeking the identity of parties buying, selling, and trading RINs for purposes of determining whether and to what extent market speculation was occurring. *Perkins Coie LLP v. McCarthy*, No. 13-cv-1799 (D.D.C. 2013). EPA claimed that the information was confidential because it would disclose the competitive positions of the market participants. Non-obligated parties should not have a competitive market position in a credit trading program designed to facilitated regulated entities' compliance with environmental regulations. *See* 5 U.S.C. § 552(b)(4); *Nat'l Parks & Conserv. Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (FOIA Exemption 4 protects information involuntarily provided to the government only if (1) the disclosure of the information is likely to impair the government's ability to obtain necessary information in the future, or (2) the person submitting the information will suffer significant competitive harm if the information is released.).

If the RIN trading system were working as intended, RIN prices would be comparable to blending costs. *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010); Department of Energy, *Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship* 2-3 (Mar. 2011) ("Economic theory suggests that the price of RINs would reflect the marginal cost of compliance with the RFS, that is, the most expensive cost of blending renewable fuels.") ("DOE Study"). In fact, RIN prices are now many times higher than blending costs.[6]

The result has been a windfall for entities that can generate and sell RINs. *See, e.g.*, Michael Lewis, *Murphy USA Makes a Mint From Convenience Store Goods and Fuel Credits*, The Motley Fool (Feb. 22, 2014), http://www.fool.com/investing/general/2014/02/22/murphy-usa-makes-a-mint-from-convenience-store-goo.aspx; Geoff Cooper, *What do Big Oil's Quarterly Earnings Say About the Real Impact of RINs on U.S. Gas Prices?*, Renewable Fuels Association (Aug. 1, 2013), http://ethanolrfa.org/2013/08/what-do-big-oils-quarterly-earnings-say-about-the-real-impact-of-rins-on-u-s-gas-prices. It has also been a windfall for entities that speculate in the RIN market. *See* Gretchen Morgenson and Robert Gebeloff, *Wall*

[6] *See* Chris Prentice, *Niche RINS prices jump to 2013 highs as supply jitters return*, Reuters (June 29, 2016), http://www.reuters.com/article/usa-biofuels-idUSL1N19L14A.

Street Exploits Ethanol Credits, and Prices Spike, N.Y. Times, Sept. 13, 2013, at A1. And because that market lacks the regulatory safeguards associated with other markets, it invites not merely speculation, but fraud and manipulation. *See id.* (noting that the "rules that apply to almost every other market—on transparency, disclosure and position limits, for example—are not imposed on the trade of RINs"); *see also*, *e.g.*, Mark Drajem, *EPA to Invalidate 30 Million Fuel Credits After Fraud*, Bloomberg (Dec. 18, 2013), http://www.bloomberg.com/news/articles/2013-12-18/epa-to-invalidate-30-million-fuel-credits-after-fraud; Environmental Protection Agency and Commodity Futures Trading Commission, *Memorandum of Understanding on the Sharing of Information Available to EPA Related to the Functioning of Renewable Fuel and Related Markets* (Mar. 15, 2016), https://www.epa.gov/sites/production/files/2016-03/documents/epa-cftc-mou-2016-03-16.pdf.

EPA theorized that high prices in the RIN market should encourage the distribution and use of more renewable fuels, but it has since acknowledged that this is not the case. In adopting the final rule at issue here, EPA conceded that the RIN market "was not sufficiently responsive to higher RIN prices to drive large increases in E85 sales volumes" and that it was "unlikely to be able to significantly impact the supply of ethanol in the United States." Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume

for 2017, 80 Fed. Reg. 77,420, 77,457, 77,459 (Dec. 14, 2015). That is because unobligated blenders choose to retain their RIN revenues, rather than passing them along to consumers in the form of discount on higher ethanol blends. They are able to do so because of EPA's choice to obligate refiners and importers, but not blenders. Essentially, EPA is trying to encourage more renewable fuel use by increasing the profits of non-obligated blenders in the hopes that they may voluntarily choose to invest in more blending and distribution infrastructure, rather than obligating them directly, which would create both a legal obligation and financial incentive to blend more fuel and generate more RINs.

More fundamentally, RINs were never intended to be a tool to drive investments in more renewable fuel use. They were intended to be a compliance tool for refiners that could not comply through blending. *See* Obligated Party Pet. Br. 7-8.

The harms caused by EPA's design of the RIN market thus cannot be justified by any offsetting benefits. As designed by EPA, the market violates the Clean Air Act, and EPA acted arbitrarily and capriciously in refusing to reconsider its decision to leave blenders unobligated.

B. CVR exemplifies the harms caused by EPA's dysfunctional RIN market

The market constraints caused by EPA's creation of a dysfunctional and unlawful RIN market—and EPA's failure to reconsider whether it remained

"appropriate" to leave blenders unobligated—compelled the agency to use its statutory waiver authority to lower the statutory volumes. This has caused harm to CVR's fertilizer manufacturing facilities because it has discouraged increased production of renewable fuel.

At the same time, CVR's refineries are harmed by the dysfunctional RIN market because they have a far higher cost of compliance than their direct market competitors, who control the blending and retail distribution of their fuel. That is precisely the harm anticipated by the Department of Energy, which observed that "[t]hose parties that are short, i.e. cannot generate enough RINs through their own facilities to meet their [compliance obligation], will need to purchase RINs and could suffer significant economic hardship" if the price of RINs were to exceed the cost of blending. DOE Study 18. CVR initially obtained relief as a small refinery, *see* 42 U.S.C. § 7545(o)(9)(B)(i), but it no longer qualifies as a small refinery. Nevertheless, it has continued to suffer hardship from the compliance obligation in all of the ways described in the DOE Study.

CVR's hardship does not reflect a failure to make investments in the use of renewable fuel. To the contrary, CVR has made significant investments in increasing its refineries' ability to blend renewable fuel. As a result of its multi-million dollar investments, the company is now able to blend approximately 20%

of the fuel it produces, but the remaining 80% of its obligation must be satisfied through the purchase of RINs.

Congress intended for RINs to be one method of demonstrating compliance. It did not intend to force competitively disadvantaged refiners to become vertically integrated in order to avoid the harm of the RIN market. *See* 2007 Rule, 72 Fed. Reg. at 23,904 ("Many obligated parties do not have access to renewable fuels or the ability to blend them, and so must use credits to comply. . . . This creates the need for trading mechanisms that ensure that the means to demonstrate compliance will be readily available for use by obligated parties."). Indeed, there is no need for all refiners to invest in blending infrastructure because the infrastructure already exists; the problem is that it is owned by non-obligated blenders who have no incentive to increase blending. Rather, their incentive is to increase the value of their RINs by forestalling investments in more renewable fuel blending.[7] The result is that in order to avoid the extreme competitive disadvantage of having to buy RINs in the dysfunctional and unlawful RIN market, CVR would need to become a vertically integrated refiner by buying a blender/retailer chain.

Forcing merchant refiners to become vertically integrated refiners would be inefficient and undesirable, reversing the last 20 years of de-integration in the

[7] *See* Letter from Ronald Minsk, former Special Assistant to the President for Energy and Environment, to Janet McCabe, Acting Assistant Administrator for Air and Radiation, Environmental Protection Agency (July 24, 2015) (Attachment B to June 13, 2016 petition for rulemaking of Valero Energy Corporation).

refinery industry.[8] The current regime is contrary to the Clean Air Act, which contemplated that RINs would be a tool that *all* refineries could use for compliance.

CONCLUSION

The petitions for review should be granted.

Respectfully submitted.

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September 15, 2016

[8] *Id.*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 3,183 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that the brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

s/ Lee M. Smithyman
Lee M. Smithyman

Dated: September 15, 2016

CERTIFICATE OF SERVICE

I certify that on September 15, 2016, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Lee M. Smithyman
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