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Using Skidmore to Dance around the Chevron Two-Step: Sinclair Wyoming Ref. Co. v. EPA, 887 F.3D 986 (10TH Cir. 2017)

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USING SKIDMORE TO DANCE AROUND THE CHEVRON TWO-STEP: SINCLAIR WYOMING REF. CO. V. U.S. EPA, 887 F.3D 986 (10TH CIR. 2017)

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I. INTRODUCTION

This case note reviews *Sinclair v. EPA.* A case in which the Tenth Circuit Court of Appeals applied *Skidmore* deference to review whether the Environmental Protection Agency (EPA) exceeded congressional authority when the agency interpreted "disproportionate economic hardship" into the Renewable Fuel Standards program exemption extension review process.[1]

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[1] Sinclair Wyo. Ref. Co. v. U.S. EPA, 887 F.3d 986 (10th Cir. 2017).

This note argues that the majority opinion applied the wrong type of deference and examined facts of the case too narrowly. By twisting interpretations and focusing on insignificant words, The Tenth Circuit concluded that the EPA inaccurately applied their review standards.[2] The Tenth Circuit's decision resulted in an unnecessary circuit split.

Part II of this note is an analysis of the surrounding doctrinal history,[3] reviewing the specific types of deference discussed in this case, legislative history, and relevant circuit decisions.[4] Next, Part III outlines the *Sinclair* decision.[5] Specifically, it provides an analysis of the court of appeal's main arguments and dissenting opinion.[6] Part IV compares the facts of the case against relevant case law to highlight tensions in the law related to the Tenth Circuit's decision.[7]

II. HISTORY

A. Deference History

In reviewing *Sinclair* and relevant case law, it is important to be familiar with the types of deference courts may grant administrative agencies. This section provides a brief history and summary of the cases that created the types of deference referred to in the *Sinclair* case. Specifically, this section explores *Skidmore* and *Chevron* deference. *Skidmore* deference provides judicial respect to an agency's determination when that decision was made based on internal experience and informed judgement. *Chevron* deference applies a two-pronged test to determine if delegated powers were ambiguous and if the agency interpretation was reasonable. Subsequent sections discuss the significance of the cases and how they are applied within the context of the *Sinclair* case.[8]

1. Skidmore v. Swift & Co.

In 1944, Jim Skidmore and six of his fellow firemen and support staff sued Swift & Company under the Fair Labor Standards Act of 1938 over unpaid overtime wages.[9] An oral employment agreement required

[2] *See infra* Section IV.B.
[3] *See infra* Part II.
[4] *See infra* Part II.
[5] *See infra* Part III.
[6] *See infra* Section III.B–C.
[7] *See infra* Part IV.
[8] *See infra* Part III.
[9] Skidmore v. Swift & Co., 323 U.S. 134, 135 (1944) (referencing 29 U.S.C. §201 (1938)).

employees to stay overnight on or near company property and be available in the event of a fire emergency.[10] The parties argued over whether the time spent waiting for a fire emergency was, in fact, "work time" for which the employees should be compensated.[11] The district court denied the claim, and the Fifth Circuit Court of Appeals affirmed.[12]

The Supreme Court held that the district court and court of appeals erred.[13] The Court pointed out that there was no law distinguishing wait time from work time.[14] This dispute was a question of fact that required resolution by interpretation of the construction of the employment agreement.[15] The Court stated that this was a difficult task, one which Congress did not provide clarification for nor grant power to administrative agencies to assist in.[16] Due to this oversight, courts were left to determine if wait time was work time.[17] In *Skidmore*, the Office of Administrator[18] was available and provided an opinion within an amicus brief.[19] The Office had expertise in interpreting activities that could constitute compensated wait time.[20] The Court remanded the case for further proceedings in which the Office of Administrator's opinions were to be considered.[21]

The Supreme Court's decision thus created a deference test known as *Skidmore* deference. While a court is not required to defer to an agency, deference should be granted if the agency's interpretation is persuasive.[22] To determine an agency's persuasiveness, a court must consider how thorough the investigation was, how consistent the interpretation has been over time,

[10] *Id.*
[11] *Id.* at 136.
[12] *Id.* at 135.
[13] *Id.* at 140.
[14] *Id.* at 136.
[15] *Id.* at 137.
[16] *Id.*
[17] *Id.* at 139.
[18] Congress created the Office of Administrator, within the Wage and Hour Division of the Department of Labor (DOL), and imposed powers within that office to become familiar with industry standards and make interpretations of laws. *Id.* at 138. "They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it." *Id.* at 139.
[19] *Id.*
[20] *Id.* at 138–39.
[21] *Id.* at 140.
[22] U.S. v. Mead Corp., 533 U.S. 218, 228 (2001).

how valid the argument is, the agency's expertise in the field, and other persuasive factors important to the agency's position.[23]

Skidmore deference has been applied in cases where a statutory interpretation was made by an agency, but the interpretation did not carry the force of law.[24] In *EEOC v. Arabian American Oil Co.*, the Court was faced with a decision as to whether the EEOC's interpretation of Title VII, as it related to discrimination of non-U.S. citizens in other countries, was persuasive.[25] The Court found that the appropriate deference test to apply was *Skidmore*, as the interpretation was not part of a legislative rulemaking.[26] In *Christensen v. Harris County*, the Court determined whether an interpretation of the Fair Labor Standards Act published in official documents was persuasive.[27] Again, the Court found the interpretation lacked the force of law and determined that *Skidmore* was the appropriate test to apply.[28] In both of these cases, the Court ruled against the agency, finding the agency's reasoning for their interpretation unpersuasive.[29]

2. Chevron v. Natural Resources Defense Council

Following the 1977 Clean Air Act Amendments, the EPA was tasked with creating rules to allow states that had not met ambient air quality standards to establish a permit program "regulating 'new or modified major stationary sources' of air pollution."[30] In 1981, the EPA promulgated a rule within a permit requirement allowing states to "adopt a plantwide definition of the term 'stationary source.'"[31] The rule essentially allowed entities to

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[23] *Id.*; *see also Skidmore*, 323 U.S. at 139–40 (stating that the Administrator's policies and standards may be entitled to respect because they are based upon specialized experience and broader investigations).

[24] *See generally* Christensen v. Harris Cty., 529 U.S. 576 (2000); EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

[25] *Arabian Oil*, 499 U.S. at 257.

[26] *Id.*

[27] *Christensen*, 529 U.S. at 587.

[28] *Id.*

[29] *Id.*; *Arabian Oil*, 499 U.S. at 257.

[30] Chevron, Inc., v. NRDC, 467 U.S. 837, 840 (1984) (quoting 42 U.S.C. § 7502(b)(6) (1977)).

[31] *Id.* (citing 40 C.F.R. §§ 51.18(j)(1)(i), (ii) (1983)). The regulation reads as follows:

> (i) 'Stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.
> (ii) 'Building, structure, facility, or installation' means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel.

40 C.F.R. §§ 51.18(j)(1)(i) and (ii) (1983).

group their industrial equipment under one "bubble."[32] Any modification or installation within this "bubble" or grouping that did not increase the total emissions produced did not require additional permitting.[33]

The Natural Resource Defense Council filed a timely petition to challenge the EPA's adoption of the "bubble concept."[34] The D.C. Circuit Court of Appeals set aside the EPA's regulation, stating that the Clean Air Act "does not explicitly define what Congress envisioned as a 'stationary source,' to which the permit program [applies]."[35] In addition, the court of appeals noted that the "bubble concept" was not expressly addressed within the legislative history.[36] Furthermore, the court of appeals emphasized that the purpose of the legislation should be considered with regard to any associated regulation.[37] Congress's intention was to reduce emissions in states that did not meet the ambient air quality standards.[38] The court of appeals found that the "bubble concept" would undermine congressional intent by creating a loophole where operators could avoid updating their facilities with pollution-reducing technologies as long as their entire facilities' emissions did not increase.[39]

Ultimately, the Supreme Court rejected the arguments of the Natural Resource Defense Council and court of appeals.[40] The Court pointed out that the legislative history related to this issue was not specific enough to establish "a Congressional desire."[41] Next, the Supreme Court noted that, given the ambiguity around this issue, the EPA must be allowed discretion to meet both the economic and environmental concerns within this regulation.[42] Upon review of the public record created during the rulemaking process, the EPA showed a rational explanation behind the "bubble concept."[43]

The result of this decision created a two-pronged test "requiring courts to defer to interpretations of statutes made by those government agencies charged with enforcing them, unless such interpretations are

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[32] *Chevron*, 467 U.S. at 840.
[33] *Id.*
[34] NRDC v. Gorsuch, 685 F.2d 718, 720 (D.C. Cir. 1982), *rev'd sub nom. Chevron*, 467 U.S. 837.
[35] *Id.* at 723.
[36] *Id.*
[37] *Id.* at 725–26.
[38] *Id.* at 726.
[39] *Id.*
[40] Chevron v. NRDC, 467 U.S. 837, 866 (1984).
[41] *Id.* at 862.
[42] *Id.* at 863.
[43] *Id.*

unreasonable."[44] The test is referred to as *Chevron* deference, or the *Chevron* two-step. A court must consider two questions when reviewing an agency's statutory interpretation.[45] First, or *Chevron* step one, the court must determine if Congress has discussed the exact question at issue.[46] Second, or *Chevron* step two, if Congress has not spoken directly to the issue, the court must ask if the agency's reasonable interpretation is a "permissible construction of the statute."[47]

For *Chevron* deference to apply, the agency must be making a statutory interpretation under the direction of Congress.[48] For example, in *Northern California River Watch v. Wilcox*, the Ninth Circuit determined that the California Department of Fish and Game's action of digging up plants was a violation of the Endangered Species Act.[49] The issue was whether the statutory phrase of "areas under Federal jurisdiction" was interpreted correctly.[50] The Ninth Circuit noted that *Chevron* only applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency's interpretation claiming deference was promulgated in the exercise of that authority."[51] The Ninth Circuit determined that Congress had not delegated authority to the state of California to interpret "areas under Federal jurisdiction."[52] As such, *Chevron* deference was not granted.[53] It was noted that some degree of deference should be granted to the California Department of Fish and Game, but the deference should be that of a reasonable interpretation, or *Skidmore* deference.[54]

In *City of Arlington v. FCC*, the Court explained in greater detail when to apply *Chevron*. Here, the Court determined that the Federal Communications Commission (FCC) properly interpreted an ambiguous statutory requirement for reasonable timeframes under the

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[44] David Kemp, *Chevron Deference: Your Guide to Understanding Two of Today's SCOTUS Decisions*, JUSTIA L. BLOG (May 21, 2012), https://lawblog.justia.com/2012/05/21/chevron-deference-your-guide-to-understanding-two-of-todays-scotus-decisions/ [https://perma.cc/4VFF-JFVS].

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *See generally* City of Arlington v. FCC, 569 U.S. 290 (2013); N. Cal. River Watch v. Wilcox, 633 F.3d 766 (9th Cir. 2011).

[49] *Wilcox*, 633 F.3d at 769.

[50] *Id.*

[51] *Id.* at 776 (quoting U.S. v. Mead Corp., 533 U.S. 218, 226–27 (2001)).

[52] *Id.*

[53] *Id.*

[54] *Id.* at 776, 780.

Telecommunications Act.[55] The FCC required state zoning authorities to make a determination of wireless siting applications "within a reasonable amount of time."[56] The Court determined that the decision to apply *Chevron* should turn on whether the agency's decision was within the scope of its granted authority.[57] The Court held that the "preconditions to deference under *Chevron* are satisfied because Congress had unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication, and the agency interpretation at issue was promulgated in the exercise of that authority."[58]

3. When Deference is Applied

When determining which type of deference to apply, it is important to note the agency activity being reviewed.[59] Is the agency carrying some delegation from Congress in which an ambiguous statute requires interpretation?[60] Or is the agency making an interpretation without a legal requirement?[61] *Chevron* deference is given when an agency interprets a law through promulgated rules which are enforced by law.[62] Because of this high regard, the decision is binding unless a court determines it unreasonable.[63] For circumstances where an interpretation does not carry the force of law, *Skidmore* is the appropriate deference to give.[64]

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[55] City of Arlington v. FCC, 569 U.S. 290 (2013).
[56] *Id.* at 294.
[57] *Id.* at 297.
[58] *Id.* at 307. There is a third form of deference that may be provided. *Auer* deference applies to interpretations of an agency's ambiguous regulation. Borgen, *infra* note 59, at 5. This style of deference arose out of *Auer v. Robbins*, in which the DOL was challenged on an interpretation within its own regulation. *Auer v. Robbins*, 519 U.S. 452, 456 (1997) (holding the Fair Labor Standards Act granted the DOL the authority to "define and delimit" the scope of statutory exemptions under 29 U.S.C. § 213(a)(1)). However, because the *Sinclair* case is a controversy over an EPA interpretation rising from a Congressional delegation, *Auer* deference will not apply in this analysis.
[59] David Borgen & Jennifer Liu, *Significant Legal Developments in Wage and Hour Law: Deference Standards*, 3 (Oct. 19, 2007), https://gbdhlegal.com/wp-content/uploads/article/NELA_Paper.2007.pdf [https://perma.cc/6LD5-SSCG].
[60] *Id.*
[61] *Id.*
[62] *Id.* at 4.
[63] *Id.*
[64] *Id.*; *see, e.g.*, Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (*Skidmore* deference is appropriate in instances such as "interpretations contained in policy statements, agency manuals and enforcement guidelines.").

United States v. Mead Corp. is an important decision that provides direction as to when *Chevron* or *Skidmore* deference should be used.[65] In *Mead*, the Supreme Court determined whether a tariff schedule was to be given "judicial deference."[66] Mead Corporation, the Respondent, was importing day planners that fell within the scope of the Harmonized Tariff Schedule of the United States (HTSUS).[67] Items belonging under subheading 4820 could have a four percent tariff or could be tariff free depending on the specific classification.[68] In 1993, the United States Customs Service changed how it identified Mead's products, which historically were placed under the tariff-free category and began imposing a four percent tariff.[69] The change occurred based on the definition given to the planners.[70] While ruling on the case, the Federal Circuit Court of Appeals did not apply deference.[71]

The Supreme Court provided guidance as to when *Chevron* and *Skidmore* deference should be applied. A court should apply *Chevron* deference when ruling on an administrative implementation that Congress has delegated to an agency through a statutory provision.[72] In addition, that authority must require that the agency promulgate a rule carrying the force of law, without the agency exceeding its authority in doing so.[73] The Court noted that when the standards for *Chevron* deference are not met, an agency is not disqualified from deference.[74] *Skidmore* deference should apply if the agency meets the necessary criteria.[75] In *Mead*, the Court determined that

[65] U.S. v. Mead Corp., 533 U.S. 218 (2001).
[66] *Id.* at 221.
[67] 19 U.S.C. § 1202. U.S. Customs further identified Respondent's products as fitting under HTSUS subheading 4820.10. *Mead*, 533 U.S. at 224.
[68] *Mead,* 533 U.S. at 224. Under HTSUS subheading 4820.10, items such as account books, receipt books, letter pads, and diaries were subject to the four percent tariff. *Id.* Under subheading 4820.10.40, which covered a broad "other" category, items were not subject to a tariff. *Id.* at 224–25.
[69] *Id.* at 225.
[70] *Id.* (noting that Customs changed the classification of day planners to "'diaries . . . bound' subject to tariff under subheading 4820.10.20.").
[71] *Id.* at 225–26.
[72] *Id.* at 226.
[73] *Id.* at 226–27.
[74] *Id.* at 234.
[75] *Id.* at 227. The criteria a court should use in determining whether Skidmore deference applies includes the thoroughness of the investigation, the consistency of the interpretation over time, the validity of the argument, the agency's expertise in the field, and the persuasiveness of the agency's arguments. *Id.* at 228; s*ee also id.* at 234 (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) ("[C]lassification rulings are best treated like 'interpretations contained in policy statements, agency manuals, and enforcement guidelines.' They are beyond the *Chevron* pale.")).

classification of an item did not rise to the level in which *Chevron* deference should be applied.[76]

Building on *Mead*, an important distinction was raised in *Barnhart v. Walton*.[77] In *Barnhart*, the Court reviewed whether a definition of the word "disability" was applied correctly to Social Security benefits.[78] Specifically, the Social Security Administration determined that if a physical impairment did not prohibit a person from gaining meaningful, successful employment for more than twelve months, that person did not qualify for disability benefits.[79] The Court held that, based on *Chevron*, this interpretation was within "the Agency's lawful interpretive authority."[80]

The Court found some rules that go through an informal rule-making process may still be afforded *Chevron* deference.[81] In fact, *Mead* was used to show that *Chevron* was applied in previous cases to agency interpretations that did not go through notice-and-comment rule making.[82] The Court determined that, for those situations, considerations for deference should be based on the method the agency used to interpret the statute and what is being asked.[83] The key factors the Court considers in these situations are:

> [T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.[84]

This approach seeks to answer the larger question of what power Congress intended to delegate to the agency.[85] In this manner, the Supreme Court has effectively established that determining whether *Chevron* should apply requires a case-by-case analysis.[86] Essentially, *Barnhart* sets a process

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[76] *Id.* at 238.
[77] Barnhart v. Walton, 535 U.S. 212 (2002).
[78] *Id.* at 214.
[79] *Id.* at 214–15.
[80] *Id.* at 215.
[81] *Id.* at 221.
[82] *Id.* at 222.
[83] *Id.*
[84] *Id.* (referencing U.S. v. Mead Corp., 533 U.S. 218, 231–34 (2001)).
[85] William S. Jordan, III, *Chevron and Hearing Rights: An Unintended Combination*, 61 ADMIN. L. REV. 249, 293 (2009).
[86] *Id.* at 294.

in which "a search for thoughtful exercise of agency expertise" is conducted.[87]

B. Legislative History

This section will review the key components of the history surrounding the Renewable Fuels Standards Program at issue in the *Sinclair* case and the Department of Energy's 2011 study. These components are important to understand as they help clarify what the Court of Appeals is considering.

1. The Renewable Fuels Standards Program Under the Energy Policy Act of 2005

In 2005 Congress passed, and President George W. Bush signed into law, the Energy Policy Act of 2005 (the Energy Act).[88] The Energy Act was an amendment to the Clean Air Act (CAA), designed to promote the use of renewable fuels.[89] The Energy Act encompassed a wide array of topics, but the central focus was energy production in the United States.[90] Proponents argued that it was a necessary bill to combat the rising fuel costs in America.[91] The bill provided tax incentives and guaranteed loans for innovative greenhouse gas reducing technology.[92]

Opponents to the Energy Act pointed out numerous flaws and environmentally dangerous provisions. Some felt that the Energy Act was nothing more than unnecessary subsidies granted to the nuclear and oil industries.[93] Specifically, the Energy Act "include[d] an estimated $85 billion worth of subsidies and tax breaks for most forms of energy . . . ."[94] In

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[87] *Id.* at 294 n.248 (summarizing Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 ADMIN. L. REV. 1, 22 (2004)).

[88] Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (codified as amended at 42 U.S.C. § 15801 (2005)); *see also Energy Policy Act of 2005*, BALLOTPEDIA, https://ballotpedia.org/Energy_Policy_Act_of_2005 [https://perma.cc/K986-WGLF] [hereinafter BALLOTPEDIA].

[89] *See* 42 U.S.C. § 7545(o) (2009); *see also* 40 C.F.R. § 80.1429 (2014).

[90] *Summary of the Energy Policy Act*, ENVIRONMENTAL PROTECTION AGENCY: LAWS AND REGULATIONS, https://www.epa.gov/laws-regulations/summary-energy-policy-act [https://perma.cc/36DG-7J4F].

[91] Energy Policy Act of 2005, *supra* note 88; *see also* BALLOTPEDIA, *supra* note 88.

[92] *Summary of the Energy Policy Act*, *supra* note 90.

[93] Michael Grunwald & Juliet Eilperin, *Energy Bill Raises Fears About Pollution, Fraud*, WASH. POST (Jul. 30, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/29/AR2005072901128.html?noredirect=on [https://perma.cc/BT8M-4GWZ].

[94] *Id.*

addition, opponents felt many provisions weakened environmental protections. For example, the Energy Act undermined the Safe Drinking Water Act of 1974 by exempting fracking operations from regulation.[95] Specifically, the Energy Act removed the EPA's obligation from regulating the oil and gas operations associated with fracking.[96] For the purposes of this case note, the provisions of the Energy Act that will be reviewed are those associated with the Renewable Fuel Standards (RFS) program.[97]

The RFS program places a requirement on oil refineries to produce fuels from "renewable biomass" or to purchase credits from other refineries.[98] The renewable fuel produced is categorized under Renewable Identification Numbers (RINs).[99] To be in good standing, a refinery must obtain the requisite number of RINs by the end of a year.[100] In addition, a time scale was set in place for clear goals that refineries were meant to hit by certain dates.[101] Congress delegated authority to the EPA to promulgate rules to ensure that the goals of the program were achieved.[102]

Congress recognized that there could be unintended consequences to small refineries with this new program. As such, a provision within the amendment provided small refineries experiencing "disproportionate economic hardship" an exemption from the program.[103] This exemption was set in place for all small refineries and ended in 2011.[104]

The Department of Energy (DOE) was charged with conducting a study to determine if the regulations placed a "disproportionate economic hardship" on small refineries.[105] For those refineries found to suffer a "disproportionate economic hardship," an additional two-year exemption would be granted.[106] The study concluded that "[i]f certain small refineries must purchase RINs that are far more expensive than those that may be

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[95] Renee Lewis Kosnik, *The Oil and Gas Industry's Exclusions and Exemptions to Major Environmental Statutes,* EARTH WORKS & OIL AND GAS ACCOUNTABILITY PROJECT 1, 8 (2007), https://www.minnesotaikes.org/resolutions/2016-08Background-NEPA.pdf [https://perma.cc/3W3J-AM7R].

[96] *Id.*

[97] *See* 42 U.S.C. § 7545(o) (2009).

[98] *Id.* at § 7545(o)(2).

[99] Sinclair Wyoming Ref. Co. v. EPA, 887 F.3d 986, 989 (10th Cir. 2017) ("A RIN is created when a producer makes a gallon of renewable fuel, blends the renewable fuel with petroleum-based fuel, and sells the resulting product domestically.").

[100] 42 U.S.C. § 7545(o)(5).

[101] *Id.* at § 7545(o)(2)(B).

[102] *Id.* at § 7545(o)(2)(A)(i).

[103] *Id.* at § 7545(o)(9).

[104] *Id.* at § 7545(o)(9)(A)(i).

[105] *Id.* at § 7545(o)(9)(A)(ii)(I).

[106] *Id.* at § 7545(o)(9)(A)(ii)(II).

generated through blending, . . . [a] disproportionate economic hardship for those effected entities" will occur.[107]

Additionally, Congress assigned the EPA the task of overseeing an additional exemption program.[108] Under the Act, refineries that met the definition of a small refinery could petition the EPA for an exemption.[109] Congress provided that if a small refinery suffered a "disproportionate economic hardship" because of the RFS program, the refinery could petition the EPA for an exemption extension.[110] Congress specifically directed the EPA to "consult with DOE and consider the findings of DOE's study in addition to 'other economic factors.'"[111] The statute does not provide a definition for "disproportionate economic hardship."[112]

In 2010 the EPA promulgated rules through a formal rule-making process for the RFS program.[113] Within these rules, the EPA codified the process by which a small refinery may apply for an exemption extension petition and created a timeline for the EPA to rule on that petition.[114] Within the preamble of the Federal Register, where the final rule was published, the EPA discussed how the agency would approach factors that could create a "disproportional economic impact" to small refineries.[115] The EPA noted that the agency would follow the direction provided by the results of the DOE's 2011 study.[116]

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[107] Sinclair Wyo. Ref. Co. v. EPA, 887 F.3d 986, 989 n.2 (10th Cir. 2017).

[108] 42 U.S.C. § 7545(o)(9)(B).

[109] *Id.* at § 7545(o)(9)(B)(ii). "The term 'small refinery' means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels." *Id.* at § 7545(o)(1)(K).

[110] *Id.* at § 7545(o)(9)(B).

[111] *Sinclair,* 887 F.3d at 989; *see also* 42 U.S.C. § 7545(o)(9)(B)(ii); S. REP. NO. 111-45, at 109 (2009).

[112] *See* 42 U.S.C. § 7545(o)(1).

[113] Regulation of Fuels and Fuel Additives, 75 Fed. Reg. 14,670 (Mar. 26, 2010) (codified at 40 C.F.R. pt. 80); *see also* 42 U.S.C. § 7545(o)(2)(A)(i) (delegating authority to the EPA to promulgate rules to regulate the RFS program).

[114] 40 C.F.R. 80.1441(e)(2) (2014).

[115] Regulation of Fuels and Fuel Additives, 75 Fed. Reg. at 14,736.

[116] *Id.* At the time the final rule had been codified, the DOE had yet to complete the 2011 study. *Id.* The EPA noted the small refineries' concerns about the conclusions of the DOE's first study, which was completed in 2005. *Id.* The agency made assurances that once the DOE's new study was completed, the EPA would revisit the petition standards and that any decision would be consistent with 42 U.S.C. § 7545(o)(9)(A)(ii). *Id.*

2. The Department of Energy's 2011 Study

The DOE's 2011 study outlined the impact the new RFS regulations had on small refineries and established a system of factors to review when determining whether a refinery qualified for further exemptions.[117] At the conclusion of that study, fifty-nine small refineries in the United States were deemed to face continual "disproportionate economic hardship" if not exempted from the regulation.[118] Those refineries were given an exemption extension through 2013.[119] The study determined that two factors should be analyzed for each refinery: "a high cost of compliance relative to the industry average, and an effect sufficient to cause a significant impairment of the refinery operations."[120] These factors are referred to, respectively, as an impacts index and a viability index. To qualify for an exemption, a refinery needs to score higher than a one on both indices.[121]

The impacts index (sometimes referred to as the disproportionate impacts index) is assessed by examining eight components.[122] The original scoring for this index was either a zero (no impact) or a ten (high impact).[123] However, the DOE added an intermediate score (five) in 2013.[124]

The viability index measures three components. "[First,] whether compliance costs would eliminate efficiency gains to the refinery; [second] whether individual special events would adversely affect the refinery; and [third] whether compliance costs would likely lead to a shutdown of the refinery."[125] The scores are again either a zero, five, or ten. The scores are tallied and divided by six to get the viability score.[126] If a score is greater than one, then a viability hardship is determined to exist.[127]

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[117] Sinclair Wyoming Ref. Co. v. EPA, 887 F.3d 986, 993–94 (10th Cir. 2017).
[118] *Id.* at 990.
[119] *Id.*
[120] Hermes Consol., LLC v. EPA, 787 F.3d 568, 573 (D.C. Cir. 2015).
[121] *Hermes*, 787 F.3d at 573.
[122] *Sinclair*, 887 F.3d at 1000 (Lucero, J., dissenting). The eight components are percentage of diesel production, access to capital/credit, availability of other cash flows, local market, state regulation, relative refining margin, blending capability, and niche market. *Id.*
[123] *Hermes*, 787 F.3d at 576.
[124] *Id.* "DOE added an 'intermediate score[ ]' in order to 'more accurately characterize the impacts of compliance costs . . . on a refinery.'" *Id.* "The intermediate score 'allows for more nuanced and accurate characterization of the' refinery's situation." Lion Oil Co. v. EPA, 792 F.3d 978, 983 (8th Cir. 2015).
[125] *Id.* at 575–76.
[126] *Id.* at 576.
[127] *Id.*

C. Case Law History

1. Hermes Consolidated v. EPA

One of the more recent cases that evaluates the economic hardship exemption is *Hermes Consolidated v. EPA*.[128] Hermes Consolidated, doing business as Wyoming Refining Company (WRC), is a small refining company operating in Newcastle, Wyoming.[129] Due to the refinery's production size, it was eligible for the small refinery exemption and the two-year DOE exemption extension.[130] In 2013, WRC petitioned the EPA to extend the hardship exemption, claiming "financial stress caused by the skyrocketing price of RINs."[131] The EPA denied WRC's request.[132] WRC challenged the EPA's finding, claiming that the interpretation of "disproportionate economic hardship" contradicted the plain language of the statute and that the evaluation method adopted was arbitrary and capricious.[133]

In determining whether WRC qualified for the exemption extension, the EPA consulted with the DOE.[134] The EPA provided the DOE with WRC's data, which was then analyzed pursuant to the methodology established in the DOE's 2011 study.[135] "WRC scored higher than 1 on the disproportionate impacts index but less than 1 on the viability index. Because the viability index fell below the threshold of 1, and a value greater than 1 in both indices is required, the DOE declined to recommend [extension of] WRC's exemption."[136] The EPA then reviewed the data and came to the same conclusion, "finding . . . no disproportionate economic hardship."[137]

The D.C. Circuit Court of Appeals used *Chevron* deference to determine whether the EPA interpreted "disproportionate economic hardship."[138] WRC argued that considering a viability index within the framework of "disproportionate economic hardship" contradicted the plain

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[128] *See Hermes*, 787 F.3d 568.
[129] *Id.* at 571.
[130] *Id.* at 573.
[131] *Id.* at 574.
[132] *Id.*
[133] *Id.* at 574–76.
[134] *Id.* at 574 (citing 42 U.S.C. § 7545(o)(9)(B)(ii) (2009) (Congress directed the EPA to consult with the DOE in evaluating hardship petitions.)).
[135] *Id.* at 574.
[136] *Id.*
[137] *Id.*
[138] *Id.*

language of the statute.[139] The D.C. Circuit Court pointed out that Congress did not provide a precise definition but rather gave the EPA general guidance to evaluate exemption extensions.[140] Specifically, the EPA was required to consult with the DOE and "consider the findings of the [2011 study] and other economic factors."[141] As Congress did not provide more explicit instructions, *Chevron* step one was met, and the D.C. Circuit Court moved on to *Chevron* step two.[142]

The EPA's use of the DOE's 2011 study methodology as it related to the viability index was determined to be a permissible construction of the statute under *Chevron* step two.[143] The EPA's rationale for why "disproportionate economic hardship" modeled the 2011 study was because "[t]he basis for any grant of an exemption extension by EPA in response to an individual petition is the same as the basis of evaluation in the [2011 study] . . . ."[144] As both steps of the *Chevron* two-step were satisfied, deference and discretion of the exemption extension reviewal processes lay with the EPA.[145]

WRC also challenged the review process, stating that the evaluation change, which incorporated an intermediate score within the tested indices, was effectively a rule change and, without explanation, that the rule was arbitrary and capricious.[146] The D.C. Circuit disagreed because the EPA had addressed the change. Specifically, the EPA noted that "the addition of an intermediate score to the efficiency-gains metric allows for more nuanced and accurate characterization of the impact of compliance costs."[147] Furthermore, the 2011 study explained that the original score was meant to protect refineries from "immediate shutdown" and that it was expected for exemption holders to take steps to reduce the program impacts in the future.[148] Specifically, the study pointed out that refineries could reduce the initial score, so the adoption of an intermediate scoring system was in line with the findings of the DOE's study.[149] The D.C. Circuit held that, because the EPA consulted with the DOE, and because Congress did not provide the DOE any further direction on how to prepare the study, the change in

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[139] *Id.*
[140] *Id.* at 575.
[141] *Id.* (citing 42 U.S.C. § 7545(o) (9)(B)(ii) (2009)).
[142] *Id.* at 575.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 576.
[147] *Id.*
[148] *Id.* at 577.
[149] *Id.*

scoring was not arbitrary and capricious.[150] Because the change was reasonably explained, the D.C. Circuit was unable to conclude a rulemaking process was necessary.[151] The case was remanded but only for the limited purpose of further evaluation of a calculation error by the EPA.[152]

2. Lion Oil Co. v. EPA

A second case involving similar circumstances was *Lion Oil Company v. EPA*.[153] This case was argued before the Eighth Circuit instead of the D.C. Circuit.[154] Lion Oil is a small refinery in El Dorado, Arkansas.[155] Like the previous case, the refinery received RFS program exemptions in 2012 and petitioned the EPA for additional exemptions in 2013.[156] The EPA denied the petition.[157] The EPA objected to this venue.[158]

The EPA's decision was made in a similar fashion to *Hermes*. The DOE was consulted, reviewed the refineries' data, and applied that data to both the disproportionate impacts and viability indices.[159] The DOE concluded that Lion Oil did not indicate a disproportionate economic hardship, as they did not score high enough on the viability index.[160] Unlike *Hermes*, the EPA did not re-analyze either index, stating that they "evaluate[d] viability . . . in the same manner that the DOE considers viability in its own methodology."[161]

Like *Hermes*, Lion Oil argued that the change in the scoring structure of the indices was unlawful.[162] The Eighth Circuit disagreed. Specifically, the EPA stated that the addition of an intermediate scoring system "more accurately characterize[s] the impacts of compliance costs . . . or individual special events . . . on a refinery."[163] The Eighth Circuit pointed out:

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[150] *Id.*
[151] *Id.*
[152] *Id.* at 579.
[153] Lion Oil Co. v. EPA, 792 F.3d 978 (8th Cir. 2015).
[154] *Id.* at 982.
[155] *Id.* at 980.
[156] *Id.*
[157] *Id.* at 979.
[158] *Id.* The EPA argued that the D.C. Circuit was the appropriate venue to bring this action because their decision had a nationwide scope. *Id.* The Eighth Circuit disagreed, pointing out that to have the effect of nationwide scope the EPA must publish their findings in denying the petition, not just provide them to the petitioner. *Id.* at 982. Because the EPA did not make their findings available to the public, the Eighth Circuit could hear the case. *Id.*
[159] *Id.* at 980.
[160] *Id.*
[161] *Id.*
[162] *Id.* at 983.
[163] *Id.*

> [An agency] need not demonstrate to a court's satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.[164]

This means, just like in *Hermes*, that if a reasonable explanation is given, the agency can implement an adjusted policy. Lion Oil further argued that this change should have gone through a rule-making process.[165] The Eighth Circuit disagreed, stating that the EPA conducted its decision from the direction of Congress by consulting with the DOE and considering the conclusions of the 2011 study.[166]

Lion Oil also argued that the EPA's use of viability within the interpretation of "disproportionate economic hardship" was unreasonable.[167] Again, the Eighth Circuit applied *Chevron* deference and found ambiguity under *Chevron* step one, and a reasonable statutory interpretation under *Chevron* step two.[168] Specifically, the Court of Appeals quoted *Hermes* when concluding that EPA's interpretation was reasonable:

> [T]he relative costs of compliance alone cannot demonstrate economic hardship because all refineries face a direct cost associated with participation in the program. Of course, some refineries will face higher costs than others, but whether those costs impose disproportionate hardship on a given refinery presents a different question.169 EPA adopted DOE's determination "that the best way to measure 'hardship' entailed examining the impact of compliance costs on a refinery's ability to maintain profitability and competitiveness—i.e., viability—in the long term."[170]

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[164] *Id.* (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009)).
[165] *Id.* at 983–84.
[166] *Id.* at 984.
[167] *Id.*
[168] *See id.*
[169] *Id.* (quoting Hermes Consol., LLC v. EPA, 787 F.3d 568, 575 (D.C. Cir. 2015)) (emphasis omitted).
[170] *Id.*

III. THE *SINCLAIR* DECISION

A. Facts and Procedural Posture

Sinclair's two Wyoming refineries met the RFS program definition of "small refinery."[171] Thus, the refineries were exempt from the RFS statutory requirements until 2011.[172] In addition, through the 2011 study, the DOE found that Sinclair's refineries met the "disproportionate economic hardship" definition and extended its exemption to 2013.[173]

Nearing the end of the exemption period, Sinclair petitioned the EPA to allow their small refineries to remain exempt.[174] They argued that their business would continue to experience "disproportionate economic hardships" should the exemptions from the RFS program be lifted.[175] The EPA consulted with the DOE, who recommended a partial exemption be granted to Sinclair.[176] The EPA disagreed with the DOE's approach and denied the petition after considering the aspects of the viability index as the agency had considered before.[177] The EPA concluded that Sinclair's refineries were capable of remaining profitable after covering the program costs.[178] Sinclair filed a petition for review with the Tenth Circuit Court of Appeals.[179] Under the Administrative Procedure Act, the Tenth Circuit granted the petition.[180]

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[171] Sinclair Wyo. Ref. Co. v. U.S. EPA, 887 F.3d 986, 989 (10th Cir. 2017); *see also* 42 U.S.C. § 7545(o)(1)(K) (defining "small refinery" as "a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.").

[172] *Sinclair*, 887 F.3d at 989–90.

[173] *Id.* at 990.

[174] *Id.*

[175] *Id.*

[176] *Id.* at 1002 (Lucero, J., dissenting). Contained within the Consolidated Appropriations Act of 2016, Congress directed the DOE to adjust their recommendations when a refiner scoring matrix was greater than one for viability or structural impact categories. *Id.* Congress stated that the recommendation to the EPA should be a fifty percent waiver. *Id.* Judge Lucero pointed out that this direction came in an "explanatory statement" and did not amend § 7545(o)(9). *Id.* (citing Consolidated Appropriations Act of 2016, Pub. L. No. 114–113, 129 Stat. 2242 (2015)).

[177] *Id.* at 994.

[178] *Id.* at 990.

[179] *Id.*

[180] *Id.*; *see also* 5 U.S.C. § 706(2)(C) (requiring courts to review agency actions and determine if final decisions were made within the scope of power granted by Congress).

B. The Tenth Circuit's Decision

The court of appeals first analyzed the issue of deference, as ultimately, the court's final decision stemmed from its determination of this issue. Prior to making a final decision, both the EPA and Sinclair were afforded the opportunity to argue which type of deference, if any, should be applied.

The EPA argued that *Chevron* deference should apply.[181] The agency pointed to the ruling in *Hermes* and *Lion Oil*, indicating that the scenarios were on point with the case at hand.[182] The EPA spelled out the facts of the case as they applied to deference determination. It argued:

> *Chevron* deference applies here because (1) Congress delegated authority to EPA to interpret the phrase "disproportionate economic hardship;" (2) other relevant factors identified by the Supreme Court weigh heavily in favor of affording *Chevron* deference in this context; and (3) EPA's decisions carry the force of law and constitute precedent within the agency.[183]

The analysis broke each of these points down. The first is a restatement of the direction Congress gave the EPA with respect to the RFS program.[184] Under the second point, the EPA pointed out that this interpretation is an interstitial issue, or an issue which is a portion of a broader definition which Congress delegated to the agency to determine.[185] Because Congress required the EPA to administer and promulgate rules for the RFS program, creating a definition for "disproportionate economic hardship" was within the scope of their authority.[186] The EPA also argued for further congressional authority because the determination to grant an exemption extension petition would affect the obligations a refinery needed to meet in subsequent years.[187] Thus, according to the EPA, the decision carried the weight of law.[188]

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[181] Respondent's Supplemental Brief on the Applicability of Chevron Deference at 5, Sinclair Wyo. Ref. Co. v. EPA, 887 F.3d 986 (10th Cir. 2017) (No. 16-9532) [hereinafter Resp't's Suppl. Br.]. Specifically citing *Mead*, the EPA noted *Chevron* applies "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* (quoting U.S. v. Mead Corp., 533 U.S. 218, 226–27 (2001)).

[182] *Id.* at 7.

[183] *Id.*

[184] *Id.* at 8.

[185] *Id.* at 9 (citing Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 165 (2007)).

[186] *Id.*; Resp't's Suppl. Br., *supra* note 181, at 9.

[187] *Id.* at 11.

[188] *Id.*

Sinclair disagreed and challenged the applicability of deference.[189] The analysis focused on *Edelman v. Lynchburg College*, in which the Supreme Court held "there is no need to resolve deference issues when there is no need for deference."[190] Sinclair stated that there is no need to "settle on any degree of deference" to an agency's statutory interpretation where that interpretation "is clearly wrong."[191] Specifically, Sinclair argued that the interpretation did not follow the plain meaning of the words "disproportionate economic hardship" and congressional intent.[192] The analysis continued by rejecting both *Chevron* and *Skidmore* deference arguments. For *Skidmore*, Sinclair conceded that the court could grant a review of this type of deference but still asserted the interpretation would fail because it was not persuasive.[193] Sinclair argued four points in opposing the application of *Chevron*.

First, the record did not reflect that Congress gave authority to define "disproportionate economic hardship."[194] Congress authorized the EPA to promulgate rules for some of the RFS program but not for the "small refinery exemption provisions."[195] Sinclair claimed that the statute failed to provide guidance on how to define "disproportionate economic hardship."[196] Specifically, it did not address whether the EPA should change the meaning to an element involving a total refinery shut down.[197]

Second, the EPA did not have a review process—one which included notice and comment periods—for Sinclair's petition.[198] A petition for an exemption extension was filed and denied without a review process.[199] Furthermore, while the review process requirements were known from past petition denials, there was no opportunity for comment by outside sources prior to the process being adopted.[200]

Third, the head of the agency did not make this interpretation. Instead, a mid-level official made the denial.[201] On this point, Sinclair

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[189] Pet'r's Suppl. Br. at 9, Sinclair Wyo. Ref. Co. v. U.S. EPA, 887 F.3d 986 (10th Cir. 2017) (No. 16-9532) [hereinafter Pet'r's Suppl. Br.].
[190] *Id.* (quoting Edelman v. Lynchburg Coll., 535 U.S. 106, 114 n.8 (2002)).
[191] Pet'r's Suppl. Br., *supra* note 189, at 9.
[192] *Id.*
[193] *Id.* at 10 n.2.
[194] *Id.* at 10.
[195] *Id.*
[196] *Id.* at 11.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*
[201] *Id.* at 12.

appeared to be pointing to the final petition decision rather than the adoption of an interpretation. Their argument relied on *Mead*, claiming that the only appropriate time for *Chevron* to apply is when the head of an agency makes the ruling.[202]

Fourth, the interpretation scenario did not reflect the requirements of *Chevron* deference.[203] Sinclair stated that there are indicators an agency must satisfy to initiate the *Chevron* discussion. These include "the agency's expertise, the importance of the question to the agency's administration of the statute, and the degree of consideration the agency has given the question."[204] Sinclair argued that the EPA's expertise lies in environmental matters but not in the "economic issues involved in operating a refinery or what may amount to 'disproportionate economic hardship' in the refinery business."[205] In addition, the small refinery exemption is a relatively insignificant portion of the EPA's day to day requirements regulating the RFS program under the CAA.[206] Finally, the record did not indicate that the EPA explored what Congress intended as the definition of "disproportionate economic hardship."[207] The EPA merely inserted its own meaning for the term.[208] For these reasons, Sinclair contended that *Chevron* deference was not appropriate.

In their decision, The Tenth Circuit determined that *Skidmore* deference was appropriate. The analysis relied on the guidance of *Mead*, where the Supreme Court determined classification rulings should carry the same weight as "interpretations contained in policy statements, agency manuals, and enforcement guidelines."[209] *Mead* determined that agency action "'does not automatically deprive that interpretation of the judicial deference otherwise its due,' but rather, whether courts provide *Chevron* deference 'depends in significant part upon the interpretive method used and the nature of the question at issue.'"[210] Specifically, a court must analyze "the interstitial nature of the legal question, the related expertise of the agency, the importance of the question to administration of the statute, the

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[202] *Id.* at 13.
[203] *Id.*
[204] *Id.* at 13–14 (quoting WildEarth Guardians v. NPS, 703 F.3d 1178, 1188 (10th Cir. 2013)).
[205] Pet'r's Suppl. Br., *supra* note 189, at 14.
[206] *Id.*
[207] *Id.*
[208] *Id.* Additionally, Sinclair points out that while the EPA did promulgate rules, the agency did not define the term "disproportionate economic hardship." *Id.* at 10.
[209] U.S. v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000)).
[210] Sinclair Wyo. Ref. Co. v. EPA, 887 F.3d 986, 991 (10th Cir. 2017) (quoting Barnhart v. Walton, 535 U.S. 212, 221–22 (2002)).

complexity of that administration, and the careful consideration the agency had given the question over a long period of time."[211] Put simply, the focal inquiry is whether the decision was created through a rulemaking process with the force of law or on a case-by-case analysis.[212]

The Tenth Circuit concluded that while Congress appointed the EPA to promulgate RFS program regulations, they did not do so for small refinery exemptions.[213] Therefore, the EPA was not required to go through a rule-making process. Furthermore, because Sinclair submitted the application and the EPA's decision was made without a notice and comment period or oral arguments, the exemption extension decision was not formally adjudicated.[214] Finally, the decision does not have a precedential effect for other petitioners as each petition must be decided on a case-by-case basis.[215]

The Tenth Circuit, using *Skidmore* deference, concluded that the "EPA's interpretation takes the statutory language too far."[216] Specifically, the EPA's analysis misinterpreted the definition of hardship and ignored two metrics of the DOE's three-factored test for measuring the viability index.[217] The Tenth Circuit noted that the EPA's decision was primarily based on the long-term viability of the refinery.[218] The interpretation shows that the EPA is interested solely in this effect, which is outside the scope of statutory authority.[219]

The Tenth Circuit distinguished this case from *Hermes* and *Lion Oil* based on two factors. First, the D.C. and Eighth Circuits applied the wrong deference test.[220] The Tenth Circuit reaffirmed that *Mead* established *Skidmore* deference as the appropriate standard for "informal adjudication

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[211] *Id.*

[212] *Mead*, 533 U.S. at 234.

[213] *Sinclair*, 887 F.3d. at 992. Interestingly, the Tenth Circuit did not mention 40 C.F.R. § 80 1441(e)(2) in this analysis, and thus, the question of whether promulgating exemption extension rules fell within the EPA's granted authority was never examined.

[214] *Id.*

[215] *Id.* The Court also discussed two more factors. *Id.* The first factor was that the head of the EPA did not make the decision; *Chevron* deference should be granted when an agency action was "formal and culminate[d] in a formal written decision by the head of the agency, not a nonbinding disposition by a low-level agency official." *Id.* (quoting *Groff v. U.S.*, 493 F.3d 1343, 1352 (Fed. Cir. 2007)). The second factor was that viability analysis is a relatively new practice. *Sinclair*, 887 F.3d at 992.

[216] *Sinclair,* 887 F.3d at 996.

[217] *Id.* at 997.

[218] *Id.* at 996.

[219] *Id.*

[220] *Id.* at 998. Both the D.C. and Eighth Circuit Court of Appeals applied *Chevron* deference instead of *Skidmore* deference. *Id.*

that 'does not carry the force of law.'"[221] Second, in *Sinclair*, the EPA's determination was based on the long-term viability as the "*necessary*, if not the sole, factor."[222] The Tenth Circuit argued this determination distinguished the case because the EPA's rejection was based on a single term, and the *Hermes* and *Lion Oil* cases were determined on the DOE's multi-factor indices.[223] As a result, the analysis agreed with the Tenth Circuit's decision to vacate the EPA's decision and remanded for further proceedings.[224]

C. Judge Lucero's Dissenting Opinion

Judge Lucero made three arguments in his dissent. First, the majority's analysis was flawed regarding the EPA's determination of Sinclair's petition.[225] Second, there was no need to determine deference, as Congress was clear that petitions should be analyzed with the DOE's input, the DOE's 2011 study, and any other economic factors.[226] Third, Judge Lucero argued the majority tried to distinguish this case from *Hermes* and *Lion Oil*, but its analysis and comparison were inaccurate.[227]

Judge Lucero pointed out that the EPA considered and used the DOE's three-factor test in making its decision, which specifically included claims from Sinclair that fit under the special events metric (i.e. a onetime loss due to a fire in the refinery).[228] Furthermore, the EPA invited the DOE's opinion due to the DOE's "expertise in evaluating economic conditions at U.S. refineries, which [the EPA] used in developing an assessment process for identifying when 'disproportionate economic hardship' exists in the context of the [RFS] program."[229] After the EPA received the DOE's recommendation, they reviewed the data and applied the same indices the DOE employed.[230] The EPA determined that the refinery scored a 1.6 on the compliance cost index and a zero on the viability index.[231] In order to receive the exemption, a refinery must score greater than one in both categories.[232] Judge Lucero noted the EPA went to great lengths in their

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[221] *Id.*
[222] *Id.* at 999.
[223] *Id.*
[224] *Id.*
[225] *Sinclair,* 887 F.3d at 999 (Lucero, J., dissenting).
[226] *Id.* at 1001.
[227] *Id.* at 1002.
[228] *Id.* at 1000.
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] Hermes Consol., LLC v. EPA, 787 F.3d 568, 573 (D.C. Cir. 2015).

reasoning to explain what metrics were used to calculate this score. The dissenting opinion concluded that the only interpretation to take from that analysis was that a multi-factored—not a single factor—test was applied.[233]

Judge Lucero's second argument was that determining which deference standard to apply was unnecessary.[234] Congress directed the EPA to use the DOE's study when determining exemption petitions.[235] Because the study outlined the basic test the EPA adopted, the agency did not exceed their statutory authority.[236] The Supreme Court has held that in matters where a reasonable interpretation of the law exists, determining deference is unnecessary.[237] Judge Lucero argued that the EPA's interpretation to read into the refinery's health was reasonable, as the agency considered both the DOE's recommendation and the study's findings.[238]

Finally, Judge Lucero pointed out that *Hermes* and *Lion Oil* are cases in which two other circuits agreed with the approach adopted by the EPA. The majority erroneously focused on specific words within the EPA's decision.[239] The analysis led to a conclusion that the EPA was considering only one factor in the viability index, when in fact the agency was using the same factored tests used in *Hermes* and *Lion Oil*.[240] The majority's argument that this case was distinct from *Hermes* and *Lion Oil* cases relies on that conclusion, as well as the type of deference granted. Judge Lucero disagreed and pointed out that the majority's conclusion was misguided.[241] Judge Lucero supported the conclusions of *Hermes* and *Lion Oil*, holding this nuanced approach to the evaluation of exemption extension petitions was appropriate.[242]

IV. ANALYSIS

A. Was Deference Applied Correctly?

The first question to focus on when analyzing deference for the *Sinclair* case is what the court was trying to determine. Did the EPA exceed the statutory authority when adding an interpretation to the definition of

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[233] *Sinclair*, 887 F.3d at 1001 (Lucero, J., dissenting).
[234] *Id.*; *see also* Edelman v. Lynchburg Coll., 535 U.S. 106 n.8 (2002) (explaining "there is no need to resolve deference issues when there is no need for deference").
[235] *Sinclair*, 887 F.3d at 1001 (Lucero, J., dissenting).
[236] *Id.*; *see also* 42 U.S.C. § 7545(o)(9)(B)(ii).
[237] *Sinclair,* 887 F.3d at 1001 (Lucero, J., dissenting) (citing *Edelman*, 535 U.S. at 114).
[238] *Id.* at 1002.
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] *Id.* at 1002–03.

"disproportionate economic hardship?" Determining which deference standard to apply is important as different types of deference carry different weights for the decision maker.[243] Because *Chevron* deference is applied to interpretations with the force of law, it is regarded as carrying more weight within courts.[244] As two other circuits, which both applied *Chevron*,[245] came to alternate conclusions, it is possible that the type of deference applied impacts the outcome.

1. Arguments that Deference Should Not Apply

The arguments made by Sinclair and Judge Lucero that no deference should apply are misguided. While Sinclair discussed at length why *Chevron* deference should not apply, their initial argument was because the EPA's definition of "disproportionate economic hardship" includes a potential refinery shutdown, the agency has effectively created a term inconsistent with the plain meaning of the words.[246] Sinclair used *Edelman* and *General Dynamics* to support their claim.[247] However, the court in *Edelman* pointed out that determining deference is unnecessary when the rule or definition used is "not only a reasonable one but the position [the court] would adopt even if there were no formal rule and we were interpreting the statute from scratch."[248] In this context, *Edelman* would only apply where the court could completely agree with the agency's interpretation. Thus, Sinclair pointed to *General Dynamics*, where the court explained that deference does not need to be determined when an agency's interpretation is "clearly wrong."[249] However, two other circuit courts have ruled in favor of the EPA's interpretation.[250] Because other courts have ruled in an agency's favor regarding the same issue, the argument that the EPA is "clearly wrong" loses weight.

Sinclair also argued that the interpretation did not go through any notice-and-comment rulemaking, formal adjudication, or "relatively formal procedure."[251] However, that is not an accurate representation. Under the direction of § 7545(o)(2)(A)(i), the EPA promulgated regulations for the

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[243] Borgen, *supra* note 59, at 3.
[244] *Id.* at 4.
[245] Hermes Consol., LLC v. EPA, 787 F.3d 568, 575 (D.C. Cir. 2015); Lion Oil Co. v. EPA, 792 F.3d 978, 984 (8th Cir. 2015).
[246] Pet'r's Suppl. Br., *supra* note 189, at 9.
[247] *See generally* Edelman v. Lynchburg Coll., 535 U.S. 106 (2002); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).
[248] *Edelman*, 535 U.S. at 114.
[249] *Gen. Dynamics*, U.S. 581 at 600.
[250] *See generally Hermes*, 787 F.3d 568; *Lion Oil*, 792 F.3d 978.
[251] Pet'r's Suppl. Br., *supra* note 189, at 11.

RFS program.[252] Those regulations are listed under 40 C.F.R. § 80.1441 and include a provision about exemption extension petitions.[253] This regulation was not listed in the *Hermes* or *Lion Oil* cases, and the only party to mention § 80.1441(e)(2), interestingly enough, was Sinclair in their supplemental brief.[254] The exemption extension program did go through a notice-and-comment rulemaking process.[255] There is little direction provided to the regulated community with respect to what exactly the EPA will consider within a petition application. However, within the preamble to the Federal Register, where the rule was listed, the EPA specifically addressed that the decision-making process must consider the DOE's economic impacts study.[256] Sinclair was correct that the specific question as to the definition of "disproportionate economic hardship" was not raised during the promulgation of § 80.1441, but it was part of the DOE's study which was discussed and commented on by the EPA and third parties.[257]

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[252] 42 U.S.C. § 7545(o)(2)(A)(i) (2009). The regulation reads:

> Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B).

Id.

[253] 40 C.F.R. § 80.1441(e)(2) (2014). The regulation reads as follows:

> A refiner may petition the Administrator for an extension of its small refinery exemption, based on disproportionate economic hardship, at any time.
>
> (i) A petition for an extension of the small refinery exemption must specify the factors that demonstrate a disproportionate economic hardship and must provide a detailed discussion regarding the hardship the refinery would face in producing transportation fuel meeting the requirements of § 80.1405 and the date the refiner anticipates that compliance with the requirements can reasonably be achieved at the small refinery.
>
> (ii) The Administrator shall act on such a petition not later than 90 days after the date of receipt of the petition.
>
> (iii) In order to qualify for an extension of its small refinery exemption, a refinery must meet the definition of "small refinery" in § 80.1401 for the most recent full calendar year prior to seeking an extension and must be projected to meet the definition of "small refinery" in § 80.1401 for the year or years for which an exemption is sought. Failure to meet the definition of small refinery for any calendar year for which an exemption was granted would invalidate the exemption for that calendar year.

Id.

[254] Pet'r's Suppl. Br., *supra* note 189, at 10.

[255] Regulation of Fuels and Fuel Additives, 75 Fed. Reg. 14,670, 14,735–14,736 (Mar. 26, 2010) (codified at 40 C.F.R. pt. 80).

[256] *Id.*

[257] *Id.*

Judge Lucero also argued that deference should not apply under *Edelman*.[258] It is important to note that the argument used is the opposite argument made by Sinclair in their supplemental brief. Because Congress instructed the EPA to review exemption extension petitions while considering the DOE's 2011 study, and because the definition of "disproportionate economic hardship" stemmed from that study, congressional intent is clear.[259] Stated simply, because Congress directed the EPA to consider the study, and the study defined "disproportionate economic hardship," the EPA did not exceed its authority.

However, Judge Lucero's point is too narrow to answer whether the direction from Congress was ambiguous. Section 7545(o)(9)(B)(ii) provides clear direction: "In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors."[260] However, ambiguity lies in whether authority was granted to adopt definitions laid out in the DOE's 2011 study. Under Judge Lucero's line of reasoning, the concept of why deference is given in the first place is overlooked. Deference is given when ambiguity exists within congressional direction.[261] Because this case examines whether Congress intended the EPA to interpret what a "disproportionate economic hardship" means, some form of deference should be granted.

2. Should Skidmore *Deference be Applied?*

Next, the focus shifts to whether the definition, "disproportionate economic hardship," should be granted *Skidmore* deference as the Tenth Circuit Court of Appeals applied to it in *Sinclair*. For *Skidmore* to apply, the agency must have made a statutory interpretation of "disproportionate economic hardship" without a legal requirement.[262] Specifically, did Congress intend for the EPA to promulgate rules to create a definition? The Court of Appeals relied on *Mead* to determine that *Chevron* deference was not appropriate because any decision would not carry the force of law.[263]

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[258] Sinclair Wyo. Ref. Co. v. U.S. EPA, 887 F.3d 986, 1001 (10th Cir. 2017) (Lucero, J., dissenting) (citing Edelman v. Lynchburg Coll., 535 U.S. 106, 114 (2002) ("[T]here is no need to resolve deference issues when there is no need for deference.")).

[259] 42 U.S.C. § 7545(o)(9)(B)(ii); *Sinclair*, 887 F.3d at 1001 (Lucero, J., dissenting).

[260] 42 U.S.C. § 7545(o)(9)(B)(ii).

[261] Borgen, *supra* note 59, at 4.

[262] *Sinclair*, 887 F.3d at 992-93.

[263] *Id.* at 998.

In its analysis, the Tenth Circuit examined the four components[264] for determining which type of deference to apply.[265] The Tenth Circuit's conclusion that Congress did not intend to grant the EPA authority to promulgate rules for the small refinery exemption extension is significant.[266] However, the fact that 40 C.F.R. § 80.1441[267] exists was not discussed in the Tenth Circuit's analysis.

The EPA determined that the small refinery exemption program fell within the guidelines of § 7545(o)(2)(A)(i).[268] As such, regulations were promulgated through a rulemaking process.[269] As the court of appeals did not address constitutionality or make any mention of the regulation in its analysis, it is clear that when determining the deference standard, § 80.1441 was not taken into consideration. Because a regulation was promulgated, the court of appeals can no longer conclude that the EPA is making interpretations like those "contained in policy statements, agency manuals, and enforcement guidelines."[270] Their analysis is incomplete, and thus, the conclusion to apply *Skidmore* deference over *Chevron* deference is misguided.

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[264] *Id.* at 991. The court of appeals quoted *Skidmore* directly, laying out "the weight courts provide an administrative judgment 'will depend upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Id.* (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

[265] The four points the court of appeals makes are as follows. First, Congress did not intend to grant the EPA authority to promulgate rules for the small refinery exemption. *Id.* at 992. As such, the review process was informal, and the definition of "disproportionate economic hardship" was not considered under a formal rulemaking process. *Id.* Second, the head of the EPA did not make the final decision. *Id.* (citing Groff v. United States, 493 F.3d 1343, 1352 (Fed. Cir 2007) (finding that for *Chevron* to apply the decision must be "formal and culminate[d] in a formal written decision by the head of the agency, not a nonbinding disposition by a low-level agency official."). Third, because the EPA did not publish the decision and make it available to third parties, it was not precedential and revealed that all decisions will be determined on a case-by-case basis. *Id.* Finally, the disproportionate economic hardship analysis was relatively new. *Id.*

[266] *Id.*

[267] *See generally* 40 C.F.R. § 80.1441(e)(2) (2014) (promulgating regulations for the RFS Program).

[268] 42 U.S.C. § 7545(o)(2)(A)(i) (2009).

[269] *See generally* Regulation of Fuels and Fuel Additives, 75 Fed. Reg. 14,670, 14,735–14,736 (Mar. 26, 2010) (codified at 40 C.F.R. pt. 80).

[270] Christensen v. Harris County, 529 U.S. 576, 587 (2000).

3. Should Chevron *Deference be Applied?*

As rules have been promulgated, any decision created would carry the force of law, which signifies *Chevron* deference could be appropriate.[271] However, for *Chevron* to apply, both prongs of the *Chevron* two-step must be met.[272] Under *Chevron* step one, The question at issue is whether Congress gave clear directions as to the definition or how to determine a "disproportionate economic hardship."[273] Within the framework of § 7545(o), Congress did not define the term and provided limited guidance for how the exemption program should be established.[274] Thus, because the statute directs the EPA to create an exemption extension program but does not define the exact process in which it is to be conducted and Congress has not discussed the question at issue, *Chevron* step one is met.

The reasonableness of the EPA's interpretation of a "permissible construction of the statute" is *Chevron* step two.[275] Section 7545(o)(9)(B)(ii) directs the EPA to evaluate exemption extension petitions in consultation with the DOE and consider the DOE's 2011 study in addition to any other economic factors. Congress did not provide additional direction. When a statute is silent with respect to all potentially relevant factors, it is eminently reasonable to conclude that silence is meant to convey "nothing more than a refusal to tie the agency's hands."[276] Had Congress been more specific with their directions under the statute, potential unforeseen conflicts could have arisen once the DOE's study concluded. As the D.C. Circuit pointed out in *Hermes*, incorporating the methodology from the 2011 study with a set viability index to determine whether a refinery experienced a "disproportionate economic hardship" was a reasonable interpretation of the statute.[277] In fact, by keeping the same language as the 2011 study, the EPA created continuity in the decision-making process, which is well within the scope of the statute.[278] Thus, *Chevron* step two is met, and the Tenth Circuit should have applied *Chevron* deference.

Further, the court of appeal's approach should have incorporated the guidelines set out in *Barnhart*, as the definition of interpretive rules were

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[271] Borgen, *supra* note 59, at 4.
[272] Kemp, *supra* note 44.
[273] Hermes Consol., LLC v. EPA, 787 F.3d 568, 574 (D.C. Cir. 2015).
[274] *Id.* at 575.
[275] *See* Kemp, *supra* note 44.
[276] Monroe Energy, LLC v. EPA, 750 F.3d 909, 915 (D.C. Cir. 2014).
[277] *Hermes*, 787 F.3d at 575.
[278] *Id.*

like the kind at issue in that case.[279] The question is whether adopting the two-pronged test and the definition of "disproportionate economic hardship" laid out in the DOE's 2011 study falls within congressional intent. As the statute clearly points out, the EPA should consider the findings of the study in developing their exemption extension program.[280] Congressional intent is clear. Congress entrusted the EPA with this task as an expert agency, and any shortcomings in their expertise would be addressed through their required consultation with the DOE.[281]

The only issue a *Barnhart* analysis would face is the length of time the EPA spent in deciding these cases. As the program was new, the agency had relatively few years of experience issuing decisions on these cases. In a concurring opinion, Justice Scalia pointed out that this time requirement is a relic of the pre-*Chevron* era.[282] He stated that the time requirement should simply enforce the rationale for an outcome under the analysis.[283] When considering the policy behind giving deference under *Chevron*, the time component seems to be a small point, one that focuses on how consistent an agency decision has been.[284] While the EPA ruled on relatively few of these exemption extensions, their analysis has been consistent.[285] The larger question of legislative intent is the more important aspect of the analysis and should be given greater weight.[286] More specifically, *Chevron* should apply because Congress instructed the EPA to follow the 2011 study prior to the completion of the study, thus intending for the agency to make program interpretations.[287]

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[279] *See* Barnhart v. Walton, 535 U.S. 212, 218 (2002) (holding that on review, the court must decide "(1) whether the statute unambiguously forbids [a given] interpretation, and if not, (2) whether the interpretation exceeds permissible bounds.") (citing Chevron, Inc. v. NRDC, 467 U.S. 837, 843 (1984)).

[280] *Barnhart*, 535 U.S. at 217.

[281] *See* 42 U.S.C. § 7545(o)(9)(B)(ii).

[282] *Barnhart*, 535 U.S. at 226 (Scalia, J., concurring).

[283] *Id.*

[284] Brendan C. Selby, *Internal Agency Review, Authoritativeness, and* Mead, 37 HARV. ENVTL. L. REV. 539, 556 (2013).

[285] *See generally* Hermes Consol., LLC v. EPA, 787 F.3d 568 (D.C. Cir. 2015); Lion Oil Co. v. EPA, 792 F.3d 978 (8th Cir. 2015).

[286] Linda Jellum, Chevron's *Demise: A Survey of* Chevron *from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 778 (2007) (quoting Cass R. Sunstein, Chevron *Step Zero,* 92 VA. L. REV. 187, 218 (2006)).

[287] *See id.* (noting that *Mead* shifted the court's focus to intention and when "Congress intends courts to defer, courts should defer.").

B. Interpretations of the EPA's "Disproportionate Economic Hardship"

1. The D.C. and Eighth Circuit's Interpretation

In both the *Hermes* and *Lion Oil* cases, the EPA assessed "disproportionate economic hardships" using the DOE's viability and disproportionate impacts indices.[288] The Eighth Circuit held that the EPA followed the direction of Congress by consulting with the DOE and considering the 2011 study.[289] The D.C. Circuit made the same conclusion, and the most important message to take away from *Hermes* is the following:

> DOE concluded, and EPA agreed, that the relative costs of compliance alone cannot demonstrate economic hardship because all refineries face a direct cost associated with participation in the program. Of course, some refineries will face higher costs than others, but whether those costs impose disproportionate *hardship* on a given refinery presents a different question. DOE determined that the best way to measure "hardship" entailed examining the impact of compliance costs on a refinery's ability to maintain profitability and competitiveness—i.e., viability—in the long term. EPA adopted DOE's understanding, and that choice [granted through *Chevron* deference] lies well within the agency's discretion.[290]

The requirements of the RFS program created costs for all refineries.[291] However, those costs will not affect each refinery in the same manner.[292] The purpose of the exemption was to make sure those refineries having the most difficulty recovering from the associated costs (such as small refineries) would not fail and competition in the market would remain high.[293] The exemption was not created for small refineries suffering from a minor hardship.[294] The EPA and the DOE established a system in which a line was drawn to ensure that the refineries still needing the exemption would receive the relief sought.[295] While the agency's decisions were not published, the methodology was nonetheless consistent between petitions, a fact

[288] *Hermes*, 787 F.3d at 573*; Lion Oil,* 792 F.3d at 980.
[289] *Lion Oil*, 792 F.3d at 982.
[290] *Hermes*, 787 F.3d at 575.
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.* at 574.

recognized between the D.C. and Eighth Circuit but not shared with the Tenth Circuit.[296]

2. The Tenth Circuit's Interpretation

The majority recognized the methods used by the EPA in the *Sinclair* case as being the same applied in *Hermes* and *Lion Oil*.[297] However, the majority opinion focused on a very specific word in an unusual way. To analyze that process, it is important to evaluate the Tenth Circuit's analysis. First, it discusses the EPA's rationale for not following the DOE's partial exemption recommendation:

> In the discussion that follows, EPA independently reviews the information as we consider other economic factors in our analysis, including, but not limited to, profitability, net income, cash flow and cash balances, gross and net refining margins, ability to pay for refinery improvement projects, corporate structure, debt and other financial obligations, RIN prices, and the cost of compliance through RIN purchases. After considering all of this information, EPA finds [the Sinclair, Wyoming refinery] will not experience "disproportionate economic hardship" from compliance with the RFS program. As an initial matter, *EPA recognizes its decision differs from DOE's recommendation*. The CAA requires that EPA act on a small refinery's petition "in consultation with" DOE, "consider[ing] the findings of" the DOE Small Refinery Study and "other economic factors." EPA gives weight to DOE's technical evaluation and scoring of the refinery, recognizing that DOE has more experience in assessing, e.g., the impact of a particular [sic] special event, and how to balance short-term events with longer term planning and concerns over viability. *However, EPA has responsibility for making the ultimate decision after considering DOE's evaluation and recommendation, and continues to believe that the proper interpretation of the statutory prerequisite—disproportionate economic hardship—involves "examining the impact of compliance costs on a refinery's ability to maintain profitability and competitiveness—i.e. viability—in the long term."*[298]

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[296] *See generally Hermes*, 787 F.3d 568; Lion Oil Co. v. EPA, 792 F.3d 978 (8th Cir. 2015) (holding that the EPA must consider the DOE study, review other economic factors, and engage in the DOE consultation when evaluating refinery petitions for exemption extensions).

[297] Sinclair Wyo. Ref. Co. v. EPA, 887 F.3d 986, 998 (10th Cir. 2017).

[298] *Id.* at 995 (quoting J.A. Vol. 1 at 17–18 (quoting 32 U.S.C. § 7545(o)(9)(B)(ii) and, in the last sentence, *Hermes*, 787 F.3d at 575) (emphasis added)).

The Tenth Circuit used this rationale to conclude that the EPA is only considering whether a refinery will face a closure if an exemption extension is not granted.[299] Next, the majority opinion used the following excerpt from the EPA's decision to clarify their point:

> EPA does not doubt that Sinclair incurred costs, both planned and unplanned, which affected profitability. However, as discussed above, *EPA believes that it is necessary to show that RFS compliance will have an impact on the refinery's ongoing future viability to be eligible for an exemption*. After considering the full financial picture of [the Sinclair refinery] for 2014 and prior years, EPA does not find that compliance with RFS for 2014 would threaten [the Sinclair refinery]'s viability. Given [the Sinclair refinery]'s situation, we do not believe that an RFS exemption for [the Sinclair refinery] is justified under the statutory requirement of a disproportionate economic hardship.[300]

From that excerpt, the majority's opinion focuses on the word "necessary".[301] Specifically, the Tenth Circuit claimed that because the EPA used this word, they were no longer considering all three metrics of the viability index laid out in the DOE's 2011 study.[302] However, this argument is a very narrow interpretation of the word "necessary." To say that the EPA is only considering long-term effects does not fall in line with the rationale laid out in the agency's explanation.[303] In consideration of the first two metrics (compliance costs and special events), the EPA argues that it is "necessary "to also consider the third metric of the viability index: long-term effects.[304] Such a consideration must not be interpreted to mean that long-term viability is the only factor being considered.[305] The EPA is simply showing that while a refinery may have costs associated with compliance or special events, it also needs to show that those costs will have a long-standing impact that could result in a shutdown, although a potential shutdown is not necessary.[306] In effect, one needs to show that the cost of compliance will have a disproportionate economic hardship and place the future of the

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[299] *Id.* (citing J.A. Vol. 1. at 19–20).
[300] *Id.* at 996. (citing J.A. Vol. 1 at 20–21 (emphasis added)).
[301] *Id.*
[302] *Id.*
[303] *Id.* at 1001 n.2 (Lucero, J., dissenting) (citing Resp't's. Suppl. Br., *supra* note 181, at 38–39).
[304] *Id.* at 996. (citing J.A. Vol. 1 at 20–21).
[305] *Id.* at 1001 n.2 (Lucero, J., dissenting). "The viability factor addresses three types of metrics that could impact long-term competitiveness, none of which necessarily would cause a closure of the facility in the near term . . . ." *Id.* (citing Resp't's. Suppl. Br., *supra* note 181, at 38–39).
[306] *Id.*

refinery at risk.[307] Without this showing, the bar for the viability index would be low, and an exemption could be easily granted to any small refinery (assuming they score greater than one on the impacts index), which is not the purpose of the exemption. The exemption's purpose is to mitigate the impacts of the program and maintain strong competition.[308]

In his dissent, Judge Lucero points out the inaccuracy of the majority's claim.[309] The dissent's argument comes down to this point: if the EPA intended to focus only on long-term viability, why mention the other measurable impacts at all?[310] The EPA spends a lot of time discussing the two indices and the process in which they determine whether an exemption extension should be granted.[311] Judge Lucero argues that had the majority paid attention to those comments, their conclusion would reflect consideration consistent with previous decisions of the three factors of the viability index approach.[312] Specifically, the EPA stated that an indication that the cost of compliance or a special event creates "an inability to increase efficiency to remain competitive" in the long term is all that is necessary to meet the requirements of the index.[313] An impending closure is not required to score high enough on the viability index.[314]

Interestingly, the majority does address Judge Lucero's point.[315] They state that their review of the arguments does not take the EPA's comments in isolation and that the process employed is taken wholly into consideration.[316] However, their conclusion is inconsistent with this statement. Judge Lucero is correct in his assertion that had the majority considered the EPA's process in its entirety, they would have concluded that this nuanced approach has a multiple-step requirement. In addition, had the majority seen this approach, their conclusion would have been consistent with the conclusions discussed in both the *Hermes* and *Lion Oil* cases.[317]

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[307] *See* Hermes Consol., LLC v. EPA., 787 F.3d 568, 577 (D.C. Cir. 2015) (citing J.A. 59). The exemption was meant to allow refineries to continue to invest in efficiency improvements. Without improvements a small refinery may not be able to compete, the result of which could be a future shutdown. *Id.*

[308] *Id.*

[309] Sinclair Wyo. Ref. Co. v. EPA, 887 F.3d 986, 1001 (10th Cir. 2017) (Lucero, J., dissenting).

[310] *Id.* at 1000 (Lucero, J., dissenting).

[311] *Id.*

[312] *Id.*

[313] *Id.* at 1001 n.2 (citing Resp't's. Suppl. Br., *supra* note 181, at 38–40).

[314] *Id.*

[315] *Id.* at 995 n.5.

[316] *Id.*

[317] *Id.* at 1002 (Lucero, J., dissenting).

C. Outcome of the Case

While the arguments of this case are narrow, Sinclair still should have prevailed but for several different reasons. The court of appeals applied the wrong form of deference, and their interpretation of the EPA's reviewal process was narrow and misguided. However, Sinclair could have won for the procedural reason under 40 C.F.R. § 80.1441(e)(2)(ii), which requires that the EPA administrator is required to act on exemption extension provisions.[318] Both Sinclair and the court of appeals discussed, a mid-level EPA agent made the decision,[319] which is a violation of 40 C.F.R. § 80.1441(e)(2)(ii). However, the result of Sinclair prevailing would simply have the case remanded to the EPA administrator's review pursuant to the regulation standard.

Upon remand, the result should be consistent with *Hermes* and *Lion Oil*. The standard set in place upon the direction of the DOE's 2011 study was determined a reasonable interpretation of the authority granted to the EPA by Congress.[320] As the EPA did not deviate from that standard, the Tenth Circuit should have had a conclusion consistent with the D.C. and Eighth Circuits.

V. CONCLUSION

Within the Energy Policy Act of 2005, Congress directed the EPA to promulgate rules to create a Renewable Fuel Standards program.[321] Within that program, Congress delegated authority to the EPA to create an exemption extension program.[322] Specifically, exemptions would be reviewed after consultation with the DOE and careful consideration of the DOE's 2011 study and other economic factors.[323] The EPA promulgated rules for the RFS program through a rulemaking process, including rules for the exemption extension program.[324]

Following the guidelines set in the DOE's 2011 study, the EPA adopted a two-prong test to determine if a refinery met the requirements for

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[318] 40 C.F.R. § 80.1441(e)(2)(ii) (2014) ("The Administrator shall act on such a petition not later than 90 days after the date of receipt of the petition.").

[319] *Sinclair*, 887 F.3d at 992; Pet'r's Suppl. Br., *supra* note 189, at 7–8.

[320] *See generally* Hermes Consol., LLC v. EPA, 787 F.3d 568 (D.C. Cir. 2015); Lion Oil Co. v. EPA, 792 F.3d 978 (8th Cir. 2015) (both holding the EPA interpretation of "disproportionate economic hardship" reasonable).

[321] *See* Energy Policy Act of 2005, *supra* note 88.

[322] 42 U.S.C. § 7545(o)(2)(A)(i) (2009); *see also id.* § 7545(o)(9)(A)(ii).

[323] *Id.* at § 7545(o)(9)(B)(ii).

[324] 40 C.F.R. § 80.1441 (2014).

an exemption due to "disproportionate economic hardship."[325] Those prongs include a disproportionate impacts index and a viability index.[326] In order to qualify for an exemption, a refinery would need to score above one on each of the indices.[327]

The D.C. Circuit in *Hermes* and the Eighth Circuit in *Lion Oil* both reviewed the EPA's exemption program and came to similar conclusions. Both granted *Chevron* deference regarding the question of whether the term "disproportionate economic hardship" was defined correctly within the scope of power granted to the EPA.[328] Both concluded that the interpretation was reasonable and affirmed the decision.

When presented with a similar case, however, the Tenth Circuit Court of Appeals came to a different conclusion.[329] Using *Mead*, the Tenth Circuit concluded that *Chevron* deference was not appropriate and applied *Skidmore* deference.[330] However, the court failed to consider 40 C.F.R. § 80.1441. Because the EPA subjected the exemption extension program to a rulemaking process, the court of appeals should have applied *Chevron* deference. Furthermore, using a *Barnhart* analysis, *Chevron* should apply because the adoption of the two-pronged test fell within the agency's interpretive authority. The decision was based on a rule granted through congressional authority.[331] As the D.C. and Eighth Circuits pointed out, that standard is a reasonable interpretation.[332]

Judge Lucero's dissent as to the majority's focus on the word *necessary* was accurate.[333] The majority opinion applied a narrow review of the EPA's standard.[334] By focusing on insignificant words, the Tenth Circuit inaccurately applied the facts and thus misinterpreted the extension exemption reviewal process. The EPA applied a process in which both

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[325] *Hermes,* 787 F.3d at 573; *see also Sinclair,* 887 F.3d at 1000 (Lucero, J., dissenting). Eight metrics are measured under "disproportional structural impacts": "percentage of diesel production, access to capital/credit, availability of other cash flows, local market, state regulation, relative refining margin, blending capability, and niche market." Three metrics are measured under "viability": "whether compliance costs 'would reduce the profitability of the firm enough to impair future efficiency improvements'; '[r]efinery specific events . . . in the recent past that have a temporary negative impact on the ability of the refinery to comply'; and whether compliance costs are 'likely to lead to shut down.'" *Id.*

[326] *Hermes*, 787 F.3d at 573.

[327] *Id.*

[328] *Id.* at 575; Lion Oil Co. v. EPA, 792 F.3d 978, 984 (8th Cir. 2015).

[329] *Sinclair,* 887 F.3d at 992.

[330] *Id.*

[331] Borgen, *supra* note 59, at 4.

[332] *Hermes*, 787 F.3d at 575; *Lion Oil*, 792 F.3d at 984.

[333] *See Sinclair*, 887 F.3d at 1001 (Lucero, J., dissenting).

[334] See *id.*

indices were required to meet a certain score.[335] Within the viability index, it is *necessary* to consider the long-term impacts of the program on the refinery's ability to compete and not necessarily on whether the refinery will shut down.[336] Had the court of appeals considered the EPA's comments on the matter, their conclusion would have been similar to other circuit decisions.[337]

While Sinclair still should have won on a procedural technicality, the overall result should have been in favor of the EPA's decision. The point of the RFS exemption program is to provide some relief to small refineries. The idea is to level the playing field and foster competition. The program is designed to assist facilities that face an inability to compete in the market, which could lead to a closure due to a "disproportionate economic hardship" caused by the RFS program. It is not a means to grant relief for any hardship, only those which have dire consequences and will harm market competition in the long run.

[335] *Id.*
[336] *Id.*
[337] Hermes, 787 F.3d at 575; Lion Oil, 792 F.3d at 984.