No. 20-472

IN THE

# Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, et al.,
*Petitioners*,

v.

RENEWABLE FUELS ASSOCIATION, et al.,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## *AMICUS CURIAE* BRIEF OF THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS IN SUPPORT OF PETITIONERS


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## INTEREST OF THE *AMICUS CURIAE*[1]

The American Fuel & Petrochemical Manufacturers (AFPM) is the leading trade association for the domestic refining and petrochemical industry, and its members produce most of the refined petroleum products and petrochemicals manufactured in the United States.

Many of AFPM's members operate small refineries whose survival depends on the continued availability of small refinery economic hardship exemptions from the Renewable Fuel Standards program under the Clean Air Act. These refineries provide a crucial source of transportation fuel to local communities located far from major fuel production and transportation hubs. AFPM's members have a strong and direct interest in ensuring the continued operation and success of the program's hardship exemption provision, which the decision below has cast into uncertainty.

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[1] In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Counsel for the *amicus curiae* further certifies that, pursuant to Rule 37.3(a), all parties have consented to the filing of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted the Clean Air Act's Renewable Fuel Standards (RFS) program, it specifically exempted all small refineries for several years and authorized the Environmental Protection Agency to issue additional small refinery exemptions ("hardship exemptions") "at any time" thereafter on a showing of disproportionate economic hardship. 42 U.S.C. § 7545(o)(9)(A)-(B). In this way, Congress recognized that small refineries often lack the financial resources, infrastructure, and economies of scale needed to comply with the RFS program's general mandate that fuel manufacturers blend renewable fuels (e.g., ethanol) into their products or purchase credits known as "Renewable Identification Numbers" (RINs) on the open market. *See id.* at § 7545(o)(5). Following Congress's instruction, EPA has regularly issued exemptions to small refineries that demonstrate disproportionate economic hardship, with 32 of the 56 small refineries in the United States receiving exemptions for compliance year 2018.

The decision below threatens to impair this necessary safety valve at a time when the entire fuel industry is struggling due to the COVID-19 pandemic, causing a double-blow to small refineries, some of which have already been forced to cease operations. And it does so based on a backwards reading of the Clean Air Act that not only disregards the plain meaning of the term "extension," but nonsensically creates a hollow statutory right for

small refineries to petition for exemptions that EPA is bound by statute to deny. This Court should apply the traditional tools of statutory construction to hold that the Clean Air Act means what it says: small refineries are eligible for hardship exemptions any time they are disproportionately burdened by the RFS program. Doing so would ensure national uniformity to the RFS program as Congress intended and prevent the destruction of an entire sector of the refining industry.

## ARGUMENT

### I. Section 7545(o)(9)(B)(i) Does Not Require Consecutive Exemptions in all Prior Compliance Years

Congress could not have been clearer that hardship exemptions for small refineries are available "at any time." Text, context, implementation history, and logic all demonstrate that Congress intended for hardship exemptions to be available "at any time" a small refinery applies for an exemption and EPA determines that the exemption is justified "based on disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B). The Tenth Circuit plainly erred by failing to give effect to the statute's clear language and Congress's equally clear intent.

#### A. The Text

The hardship exemption provisions of the Clean Air Act's RFS program are set forth at 42 U.S.C. § 7545(o)(9). The program contains two types of exemptions from the program's increasing renewable volume obligations (RVOs): (A) a temporary

exemption for all small refineries until 2011 that could be extended for at least two years if a study by the Secretary of Energy determined the small refineries would be subject to disproportionate economic hardship under the program; and (B) exemptions "based on disproportionate economic hardship." § 7545(o)(9)(A)-(B). This case, and all small refinery exemptions to the RFS program in effect today, concern this second type of exemption based on economic hardship. For these types of exemptions, Congress expressly stated that "[a] small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." § 7545(o)(9)(B)(i). Upon receipt of the petition, the EPA Administrator is directed to act within 90 days, and to evaluate the petition in consultation with the Secretary of Energy, considering the economic factors and findings of DOE's prior hardship study. § 7545(o)(9)(B)(ii)-(iii).

Congress afforded these exemptions to small refineries because it understood the RFS program's potential threat to their economic viability and did not intend the RFS program to wipe out this industry segment through attrition in years with unfavorable market conditions. The problem is that small refineries typically depend solely on RIN-credit purchases to comply with RFS obligations, and RIN prices can vary dramatically from year to year. Unlike larger refineries of transportation fuels, smaller refineries often lack the financial resources and appropriate infrastructure needed to blend renewable fuels cost-effectively or spread out, and recover, their

RFS compliance costs across the entire fuel supply chain. *See Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 989 (10th Cir. 2017) (explaining that "Congress was aware the RFS Program might disproportionately impact small refineries because of the inherent scale advantages of large refineries and therefore created three classes of exemptions to protect these small refineries"). Because they generally cannot blend renewable fuels themselves, small refineries often have no choice but to purchase variably priced RIN credits on the open market to satisfy their RFS obligations.

That is why Congress provided that small refineries may petition for exemptions "at any time," a statutory term that is construed to mean "at any time at all." *Castiglia v. INS*, 108 F.3d 1101, 1103-04 (9th Cir. 1997). It would have made no sense, given Congress's express recognition of the economic hardships that small refineries can suffer in years with unfavorable market conditions, to impose any temporal limitation on the availability of exemptions. And so Congress made crystal clear what would otherwise have been implied in the statutory scheme: that exemptions are available "at any time." To ensure that this was unmistakable, it used language that it well understood to denote breadth and the absence of limitation: "Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (citations and quotations omitted); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012).

Given Congress's injunction that small refineries may petition for exemptions "at any time," it naturally follows that the "ordinary meaning" of "extension" in § 7545(o)(9)(B)(i) is simply "to make available." This is a case where, as "ordinarily" occurs, "all but one" of a word's potential meanings is "eliminated by context." *Deal v. United States*, 508 U.S. 129, 131-32 (1993). The "at any time" temporal flexibility rules out definitions of "extension" that would impose conflicting timing limitations. What remains is an ordinary meaning of "extension" that has been recognized and applied by many courts.

In *Field v. Mans*, for example, the First Circuit noted that, absent definition, an "ordinary meaning" of the term "extension" in a statute can be "an offer to make available (as a fund or privilege)." 157 F.3d 35, 43 (1998). Likewise, in *United States v. Principie*, the Second Circuit found there was an "extension" of a previous authorization for a wiretap even though the original order had expired before the extension was granted, and even though the renewed authorization was amended to cover a new location. 531 F.2d 1132, 1142 (1976). Furthermore, in *Pennsylvania Co. for Ins. v. Rothensies*, the Third Circuit noted "[t]he word 'renewal,' when used in like context, has been construed as synonymous with extension." 146 F.2d 148, 152 (1944). *See also Campbell River Timber Co. v. Vierhus*, 86 F.2d 673, 674-75 (9th Cir. 1936) (same). As these decisions recognize, the word "extension" does not demand continuity of something already in existence.

Indeed, Congress itself has frequently used the word "extend" or "extension" as a way of making

something available (such as an exemption) that previously was not. In the Copyright Act, Congress stated "the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed …." 17 U.S.C. § 110(6) (emphasis added). In that context, "extend" was not used as a way of lengthening a period of time or adding to an existing exemption. *See also* 42 U.S.C. § 1314(h)(2)(A)-(B) ("The exemption granted by paragraph (1) shall not extend" to certain payments or during certain times); Pub. L. No. 114-126, § 2 "Extension of Privacy Act Remedies to Citizens of Designated Countries."

These judicial and statutory uses of the term "extension" are also consistent with dictionary definitions of "extension," as evidenced by the very same dictionaries used by the court below. Merriam-Webster defines "extension" as "an enlargement in scope or operation." *Extension*, Merriam-Webster Online Dictionary.[2] Cambridge Online Dictionary states that "extension" can mean "an increase in the size or range of something." *Extension*, Cambridge Online Dictionary.[3] Lexico Online Dictionary notes that an "extension" can mean "[a]n application of an existing system or activity to a new area." *Extension*,

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[2] Available at https://www.merriam-webster.com/dictionary/extension (last visited Feb. 23, 2021).

[3] Available at https://dictionary.cambridge.org/us/dictionary/english/extension (last visited Feb. 11, 2021).

Lexico Online Dictionary.[4] Similarly, Webster's Third defines "extend" as "to make available (as a fund or privilege) often in response to an explicit or implied request; GRANT." Webster's Third New International Dictionary 804 (1986). Accordingly, the plain text of § 7545(o)(9)(B)(i) does not require an unbroken line of hardship exemptions.

Confirming as much is the principle that Congress does not grant hollow or meaningless rights. In *United States v. Nordic Village, Inc.*, for instance, this Court favored a particular interpretation because a contrary meaning would have reduced a statutory provision to "trivial application." 503 U.S. 30, 35-36 (1992). The Court went on to reason that an interpretation without "practical consequences" would violate the "settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *Id. See also Johnson v. U.S. R.R. Retirement Bd.*, 969 F.2d 1082, 1089 (D.C. Cir. 1992) (finding it "unreasonable to conclude that Congress meant to create an entitlement with one hand and snatch it away with the other"). Because Congress specifically provided that small refineries may petition for exemptions "at any time," it necessarily follows that EPA is authorized to grant such exemptions, absent some clear indication in the statute to the contrary. There being no such thing, the "at any time" language" controls the question of timing, and any interpretation that arbitrarily reads an across-the-board timing restriction into a word like

[4] Available at https://www.lexico.com/definition/extension (last visited Feb. 11, 2021).

"extension" must be rejected as inconsistent with Congress's mandate.

The decision below illustrates the problem with the contrary interpretation. Under that decision's interpretation, while small refineries may petition "at any time," EPA is bound by statute to deny every single petition as out of time when there has been any break in the temporal continuity of a refinery's exemption status. In this way, that interpretation nullifies Congress's precise prescription of when a small refinery may seek an exemption: at any time. That interpretation obviously violates the canon against superfluity. *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003). And it contravenes the cardinal rule that "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory." ANTONIN SCALIA & BRYAN GARNER, READING LAW § 27 (2012).

### B. Statutory Context

The structure of § 7545(o)(9)(A) and (B) further evidences that Congress intended petitions for hardship exemptions to be judged on their merits, and not based on continuity of a prior exemption.

The structure of a statute as a whole is a critical interpretive tool in determining the meaning of individual statutory provisions. *See, e.g., Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (statutory interpretation begins with "the ordinary meaning and structure of the law itself"); *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144

(2d Cir. 2002) (the "meaning of a particular section in a statute can be understood in context with and by reference to the whole statutory scheme, by appreciating how sections relate to one another" (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). In addition, descriptive section headings in a statute are another available tool for the "resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (internal quotations omitted). *See also Lawson v. FMR LLC*, 571 U.S. 429, 466 (2014) (Sotomayor, J., dissenting) ("[W]here the captions favor one interpretation so decisively, their significance should not be dismissed so quickly."). Both of those tools weigh against the Tenth Circuit's interpretation here.

As both the statutory structure and the section headings show, one subsection here is based on time, the other is available "at any time" and based on merit. If Congress intended for hardship exemptions to be limited to continuous "extensions" of the blanket exemptions established under subsection (A) that would become permanently unavailable once there was even a single year in which a small refinery could comply without one, then why did it establish a separate subsection for hardship exemptions in subsection (B) apart from the "[t]emporary" exemptions in subsection (A)? The most logical answer, and the one best supported by the overall statutory text, is that Congress did not intend hardship exemptions under subsection (B) to be available only if a temporary exemption under subsection (A) remained in place. Rather, the

reference in subsection (B)(i) to the "exemption under subparagraph (A)" is best viewed as just that—a *reference* to the exemption of RFS obligations established under subsection (A), but available "based on disproportionate economic hardship" instead of on a "temporary" basis.

If Congress sought to impose temporal or continuity restrictions on small refineries seeking hardship exemptions under § 7545(o)(9)(B)(i), then it certainly knew how to do just that, as § 7545(o)(9) includes the type of temporal or continuity restrictions that the court below improperly read into eligibility for such hardship exemptions. Most notably, § 7545(o)(9)(A) uses terms like "temporary" and "until" and "not later than" in connection with certain dates that set an explicit temporal limit on the duration of the exemption available under that subsection. And in § 7545(o)(9)(B)(iii), which is just below the provision at issue here, Congress explicitly imposed a temporal "[d]eadline" for EPA action on a petition for hardship exemptions "not later than 90 days" after receipt. That Congress did not provide any similar time-restricted language in subpart (B)(i)—and instead used the contrary phrase "at any time"—confirms that Congress did not intend for small refinery hardship exemptions to be restricted temporally. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176-77 (1994); *Ass'n for Cmty. Affiliated Plans v. U.S. Dep't of Treasury*, 392 F. Supp. 3d 22, 39 (D.D.C. 2019); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 981 F.3d 1360, 1385 (Fed. Cir. 2020).

Congress likewise could have chosen (but did not choose) to include an "anti-backsliding" provision in § 7545(o)(9)(B)(i), as it has in other parts of the Clean Air Act to ensure that EPA will not relax certain standards already in place. *See, e.g.*, 42 U.S.C. §§ 7502(e) (ensures EPA's alteration of ambient air quality standards does not result in any less stringent standards for areas not in currently compliance); § 7410(*l*) (prohibiting EPA from approving revisions to state implementation plans (SIPs) if the revision would interfere with attainment of national ambient air quality standards (NAAQS) or reasonable further progress towards obtaining the NAAQS).

Just like with the non-existent temporal or continuity restrictions in § 7545(o)(9)(B)(i), if Congress had wished to prevent small refineries from obtaining discontinuous exemptions in the future and "relapsing" on their RFS obligations, then it could easily have included such an "anti-backsliding" provision in the Act. But again, it did not. An interpretation of "extension" based on the assumption that Congress implicitly sought to prevent small refineries from "backsliding" on their RFS obligations is, therefore, demonstrably wrong. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 228 (2012) ("Had Congress intended this result, it most certainly would have said so.").

### C. The History

In addition to the text and structure of the Act, there is also considerable evidence that Congress expected hardship exemptions to be openly available for small refineries that are disproportionately

burdened by the RFS program. For example, after DOE initially determined in 2009 that small refineries would not face disproportionate economic hardships under the RFS program, the Senate explicitly rejected those findings, since DOE "did not assess the economic condition of the small refining sector, take into account regional factors or accurately project RFS compliance costs." S. REP. NO. 111-45, at 109 (2009). It also instructed DOE to "reopen and reassess" the study. *Id.* And a subsequent House Conference Report echoed the Senate's directives to DOE in response to the deficient study. H.R. Rep. No. 111-278, at 126 (2009).

Following Congress's direction, DOE's revised study in 2011 confirmed that certain small refineries were, in fact, subject to disproportionate economic hardships when "blending renewable fuel … or purchasing [RIN credits] increases their costs of products relative to competitors to the point they are not viable, either due to loss of market share or lack of working capital to cover the costs of purchasing RINs."[5] Many factors determined by DOE to create a disproportionate economic hardship to small refineries were found to be variable from year to year based on changing market conditions. For example, RFS costs in "lower refining margin environment[s]" can have "a material effect on small refinery

[5] DEPT. OF ENERGY, SMALL REFINERY EXEMPTION STUDY: AN INVESTIGATION INTO DISPROPORTIONATE ECONOMIC HARM vii (March 2011), https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf.

profitability."[6] The same is true in scenarios where RIN prices "might be substantially higher than their historical value"[7] or when small refineries "must purchase RINs that are far more expensive than those that may be generated through blending[.]"[8]

Similarly, in 2015 and 2016 in response to EPA's denial of hardship exemptions for small refineries that could incur RFS compliance costs without substantially impacting their viability, the Senate rebuked the agency, explaining that "Congress directed [EPA], in consultation with ... [DOE], to grant hardship relief to small refineries if compliance with the … [RFS] would impose a disproportionate economic hardship," regardless of whether "the small refinery remained profitable notwithstanding the disproportionate economic impact." S. REP. NO. 114-281, at 70-71 (2016). As the Senate explained, Congress instead "explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remained both competitive and profitable," recognizing that "[i]n the intensely competitive transportation fuels market, small entities cannot remain competitive and profitable if they face disproportionate structural or economic metrics such as limitations on access to capital, lack of other business lines, disproportionate production of diesel fuel, or other site specific factors." *Id*.

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[6] *Id*. at 23.

[7] *See id*. at vii.

[8] *Id*. at 2.

As such, EPA's historic administration of hardship exemptions under § 7545(o)(9)(B)(i) was on a case-by-case basis—considering a small refinery's competitive position in the marketplace and corresponding demonstration of disproportionate economic hardship in a given compliance year. *See* 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012), available at 2012 WL 32558 ("[S]eparate from the DOE determination, EPA may extend the exemption for individual small refineries on a case-by-case basis if they demonstrate disproportionate economic hardship."). This practice reflected the reality that economic circumstances facing small refineries vary substantially from year to year. As RFS mandates are continuously increasing by design and RIN prices are unpredictably volatile, small refineries may not face disproportionate economic hardship when RINs cost a few pennies apiece and market conditions are lucrative. But the same is not true in years when the price of RIN credits has surged. For example, in the past year alone RIN prices fluctuated between 10 cents in early 2020 and approximately $1.10 thus far in 2021.[9]

EPA's past implementation of "extension[s]" under § 7545(o)(9)(B)(i) thus permitted small refineries to receive an exemption from RFS mandates "at any time" upon a showing of disproportionate economic hardship, without regard to whether a small refinery had received continuous exemptions in each prior

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[9] *This Week in Petroleum*, ENERGY INFORMATION ADMINISTRATION (Feb. 18, 2021), https://www.eia.gov/petroleum/weekly/archive/2021/210218/includes/analysis_print.php.

compliance year. That consistent agency practice—and the absence of any objection by Congress, in an area that it is clear Congress was closely monitoring—confirms that the proper interpretation of § 7545(o)(9)(B)(i) provides for hardship exemption eligibility for small refineries regardless of whether those refineries have maintained a continuous line of prior exemptions. *See Zuni Pub. Sch. Dist. No. 89 v. Dept. of Educ.*, 550 U.S. 81, 90 (2007) ("As far as we can tell, no Member of Congress has ever criticized the method the 1976 regulation sets forth nor suggested at any time that it be revised or reconsidered."); *N.L.R.B. v. General, Inc.*, 137 S. Ct. 929, 954 (2017) (Sotomayor, J., dissenting) ("And yet, this legion of would-be-violations promoted no response…. Congressional silence in the face of a decade-plus practice of [a particular interpretation] casts serious doubt on the [contrary] interpretation."). Even the Tenth Circuit itself, in an opinion that now stands in stark contrast to the decision below, previously held that EPA wrongly withheld hardship exemptions in 2015 based on an overly restrictive view that a meritorious economic hardship demonstration required showing that RFS compliance meant a near-certain "death knell" rather than "simple privation"—without ever suggesting that the exemption should be denied anyway if the small refinery had ever failed to obtain one in the past. *Sinclair*, 887 F.3d at 996-97.

Each of these cues points in the same direction, and together they overwhelmingly support an interpretation of "extension" under § 7545(o)(9)(B)(i) that makes hardship exemptions available to small

refineries whenever they are necessary for the refineries to remain "competitive and profitable" in the marketplace, regardless of whether the refinery received a hardship exemption in every prior compliance year. The decision below manifestly erred by reaching the opposite conclusion.

### D. Congress's Logic

Finally, construing "extension" under § 7545(o)(9)(B)(i) to mean "making available" is the only interpretation that makes sense given Congress's overarching purposes in the RFS program and how it operates in practice.

This Court does not "interpret federal statutes to negate their own stated purposes." *N.Y. State Dept. of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973). *See also SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943) ("[C]ourts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permit so as to carry out in particular cases the generally expressed legislative policy.").

Congress's overriding interest in the RFS program was to secure American energy independence and security in response to the United States' reliance on unpredictable foreign energy markets. *See Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1215, 1218-19 (10th Cir. 2020). It would thus be a distortion of the RFS program to interpret key provisions (like the hardship exemption program) in a way that detracts from the central purpose of promoting a stable supply of domestic transportation fuels.

Yet disproportionate hardships, and negative impacts to domestic fuel supply, are exactly what a narrow interpretation of § 7545(o)(9)(B)(i) threatens to cause. "[S]mall refineries consist of about 40% of the nation's total number of operating refineries" and "comprise about 12% of total crude oil distillation capacity in the United States."[10] In many states and communities that are located far from major fuel production and transportation hubs, small refineries provide the only economic source of transportation fuels for consumers and businesses. For example, the only refineries in Montana, North Dakota, Utah, West Virginia, Wisconsin, and Wyoming are small refineries. Without these domestic small refineries producing much-needed transportation fuels for millions of Americans, the RFS program's main objectives will be at best curtailed, and at worst impossible.

The apparent belief of the court below that small refineries will never be disproportionately economically harmed "once a small refinery figures out how to put itself in a position of annual compliance" defies basic economics. 948 F.3d at 1246. RFS compliance costs for small refineries are not static and are not reasonably predictable. Neither are oil prices, fuel demand, small refinery profits, compliance budgets, and regional market conditions. The same is true for annual RVOs which, by design,

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[10] CONG. RESEARCH SERVS., THE RENEWABLE FUEL STANDARD (RFS): FREQUENTLY ASKED QUESTIONS ABOUT SMALL REFINERY EXEMPTIONS (SRES) 4 (March 2, 2020), https://crsreports.congress.gov/product/pdf/R/R46244.

increase every year. *See* 42 U.S.C. § 7545(o)(2). A small refinery that annually produces 200 million gallons of transportation fuel with an RVO of 10 percent and RIN prices around fifteen cents ($0.15) per gallon (as was the case shortly before the decision below in January 2020), would face RFS compliance costs of approximately $3 million.[11] But if RIN prices increase to more than a dollar per gallon or higher (in line with current market prices), the same refinery's compliance costs would increase *almost 700 percent* to $20 million or more as a result. This rudimentary example demonstrates why a small refinery cannot simply be funneled into complete RFS compliance over time: there are too many economic variables changing each year.

Congress, which designed the RFS program to include variable conditions like RIN prices and increasing RVOs, understood these challenges and thus created exemptions "based on disproportionate economic hardship" that could be sought "at any time." § 7545(o)(9)(B)(i). It would thus be implausible to believe that Congress meant the RFS program to operate in a manner that (i) ignores the necessary consequences of its regulatory scheme, and (ii) destabilizes the viability of the very small refineries Congress sought to protect.

Furthermore, a restrictive view of "extension" under subpart (B)(i) creates the harsh result of effectively punishing small refineries for meeting the goals of the RFS program. The fact that the RFS

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[11] 200 million gallons, multiplied by 10 percent RVO (0.10), multiplied by RIN price of $0.15 equals $3 million.

program may not disproportionately burden a small refinery in favorable or neutral economic conditions should not forever exclude it from seeking relief when conditions change and that refinery is disproportionately burdened. This is especially true when, as here, small refineries are subject to countless circumstances affecting their economic performance that are entirely outside their control. Currently, that includes a raging global pandemic, but it also includes other circumstances such as hurricanes and volatile crude oil prices.

Any interpretation of "extension" under § 7545(o)(9)(B)(i) that does not allow for flexible hardship relief for small refineries—including the one adopted by the court below and supported by Respondents—would therefore result in consequences that could not have been intended by Congress and would negate the very relief Congress sought to afford.

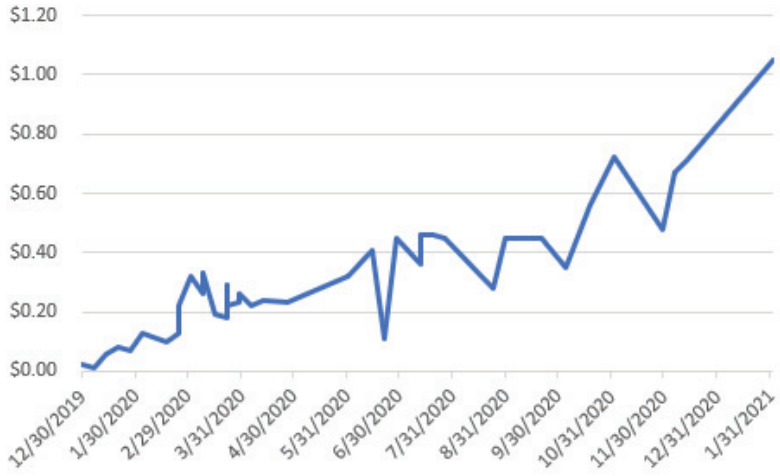
## II. The Small Refining Industry is Still Reeling from the Decision Below

The crippling effects of the decision below on the small refinery industry remain ongoing and are unlikely to subside unless this Court returns the RFS program to the *status quo ante* by holding that eligibility for a hardship exemption under § 7545(o)(9)(B)(i) does not require an unbroken line of prior exemptions.

The decision below has thrown the industry and RFS program into disarray. Small refineries—who are heavily dependent on purchasing RINs to comply with their RFS obligations—have seen RIN prices

skyrocket in the past year. Before the Tenth Circuit's decision in early January 2020, average RIN prices traded around $0.10 to $0.15.[12] In the months following, however, RIN prices skyrocketed by several factors, reaching a high of approximately $1.10 in late January and early February of 2021—almost *eleven times* their pre-decision levels.[13]

**Figure 1: 2020-2021 RIN Prices (D6 Ethanol)**[14]




This exponential increase in RFS compliance costs coincided with historically low fuel prices caused by reduced fuel demand during the COVID-19 pandemic. In April of 2020, analysts reported that the coronavirus outbreak cut global gasoline demand by

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[12] RIN Trades and Price Information (Annual RIN Sales Report Table), EPA, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information (last updated Feb. 10, 2021).

[13] Note 9, *supra*.

[14] *Id.*; Note 12, *supra*.

50% and jet fuel demand by 70%.[15] The U.S. Energy Information Administration (EIA) later found that as of September 2, 2020, average gasoline retail prices were at their lowest seasonal levels since 2004.[16] As a result, refineries saw their margins crater by up to 95%.[17]

Due to these combined blows, at least three small refineries nationwide (two alone in the Tenth Circuit, including Petitioner HollyFrontier's Cheyenne, Wyoming, refinery) have either permanently shut down or idled operations indefinitely.[18] This prompted a public outcry from many state governors and U.S. Senators who called attention to how the decision below will likely have devastating effects on

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[15] Erwin Seba & Laura Sanicola, *Oil Refiners Face Reckoning as Demand Plummets*, REUTERS (Apr. 2, 2020), https://www.reuters.com/article/us-health-coronavirus-refinery-runcuts/oil-refiners-face-reckoning-as-demand-plummets-idUSKBN21K0C8.

[16] *This Week in Petroleum*, ENERGY INFORMATION ADMINISTRATION (Sept. 2, 2020), https://www.eia.gov/petroleum/weekly/archive/2020/200902/includes/analysis_print.php.

[17] Stephanie Kelly, *U.S. Gasoline Refining Profits Slump to 2008 Levels Amid Coronavirus Fears*, REUTERS (Mar. 16, 2020), https://financialpost.com/pmn/business-pmn/u-s-gasoline-refining-profits-slump-to-2008-levels-amid-coronavirus-fears-2.

[18] Robert Brelsford, *Marathon Permanently Idles Two US Refineries*, OIL & GAS J. (Aug. 3, 2020), https://www.ogj.com/refining-processing/refining/article/14180915/marathon-permanently-idles-two-us-refineries; Elliot Blackburn, *Marathon Petroleum to shut two US refineries: Update*, ARGUS MEDIA (Aug. 3, 2020), https://www.argusmedia.com/en/news/2128888-marathon-petroleum-to-shut-two-us-refineries-update.

small refineries and the communities that rely upon them:

- February 27, 2020 letter from Sen. John Barrasso et al. to President Trump: "If allowed to stand and applied or adopted nationwide, it is believed that only two small refineries would still be eligible for hardship relief, putting tens of thousands of jobs at dozens of ineligible small refineries at risk."[19]
- February 28, 2020 letter from Wyoming Governor Mark Gordon to President Trump: "Wyoming is home to five refineries that are disproportionately harmed by the RFS. In Wyoming, the refining and petrochemical industry employees [sic] nearly 10,000 individuals and contribute $266 million dollars in local and state tax revenue."[20]
- March 2, 2020 letter from Oklahoma Governor Kevin Stitt to EPA Administrator Wheeler: "[S]everal entities that are vital to Oklahoma's economy will be negatively impacted by this decision. Within the 10th Circuit alone, it is estimated that this decision will put nearly a

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[19] Letter from Senator John Barrasso et al. to President Trump (Feb. 27, 2020) (available at https://www.fuelingusjobs.com/library/public/Statements/2-27_Senators-Call-on-President-Trump-to-Fight-for-Small-Refineries.pdf).

[20] Letter from Wyoming Governor Mark Gordon to President Trump (Feb. 28, 2020) (available at https://www.fuelingusjobs.com/library/public/Letters/doc06080920200228141613.pdf).

dozen small refineries under severe financial stress and put many jobs at risk."[21]

- March 3, 2020 letter from Utah Energy Advisor Robert Simmons to President Trump: "Utah's refineries are at the center of Utah's thriving energy economy, providing hundreds of high-paying jobs and over a billion dollars annually to Utah's economy. These refineries also provide a critical market for Utah's rural oil and gas producers."[22]

Market conditions have not improved in the months since. EIA reports that RIN credits "have been steadily rising in recent months and are approaching their highest nominal levels in the history of the [RFS] program."[23] Corn ethanol (D6) RIN prices are at their highest prices since 2013—the previous all-time high.[24] EIA attributes these highly inflated RIN prices to "limited fuel production as a result of lower fuel demand related to responses to COVID-19, fewer approved new Small Refinery

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[21] Letter from Oklahoma Governor J. Kevin Stitt to EPA Administrator Andrew Wheeler (Mar. 2, 2020) (available at https://www.fuelingusjobs.com/library/public/Letters/10th-Circut-Court-Letter.pdf).

[22] Letter from Utah Energy Advisor Robert Simmons to President Trump (March 5, 2020) (available at https://www.fuelingusjobs.com/library/public/Letters/Utah-Energy-Advisor-Support-of-RFS-Decision-Review-3-5-20.pdf).

[23] Note 9, *supra*.

[24] *Id.*

Exemptions [] since 2018, and uncertainty around future RFS levels."[25]

At the same time, EIA also predicts that, while U.S. gasoline consumption will rise in 2021, overall demand and average fuel prices will nonetheless remain lower than 2019 levels.[26] More conservative estimates, however, fear that depressed oil demand may extend into 2022 or 2023 based on the spread of newer strains of the coronavirus.[27] For small refineries with mounting RFS compliance costs and all-time low profit margins, this bleak outlook is likely to result in more small refineries exiting the market.[28]

Moreover, the decision below has sowed confusion and inaction with EPA on how to implement the RFS program nationwide. This has caused a substantial backlog of more than 35 currently outstanding

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[25] *Id.*

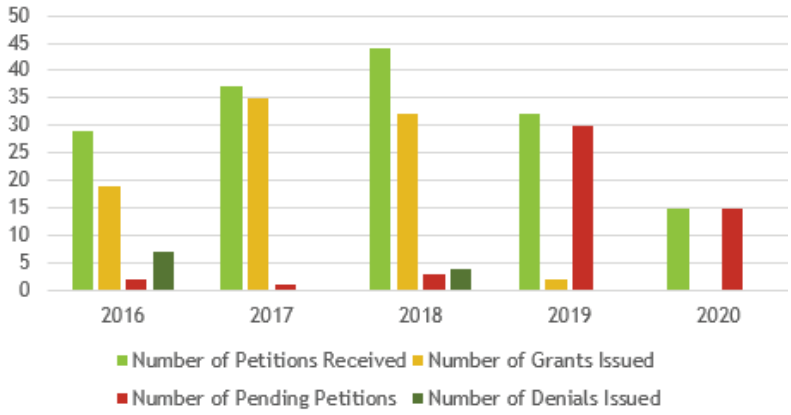
[26] *Short-Term Energy Outlook*, ENERGY INFORMATION ADMINISTRATION (Feb. 9, 2021), https://www.eia.gov/outlooks/steo/report/us_oil.php.

[27] Sathya Narayanan, *Oil Outlook for 2021 Hit by New COVID-19 Strain: Reuters Poll*, REUTERS (Dec. 31, 2020), https://www.reuters.com/article/us-oil-prices-poll/oil-outlook-for-2021-hit-by-new-covid-19-strain-reuters-poll-idUSKBN2950Y9.

[28] *See U.S. Petroleum Refining Capacity Falls to Its Lowest Level Since May 2016*, ENERGY INFORMATION ADMINISTRATION (Dec. 10, 2020), https://www.eia.gov/todayinenergy/detail.php?id=46216.

petitions for hardship exemptions situated before EPA.[29]

**Figure 2: Hardship Exemption Petition Data (2016-2020)[30]**




Despite this backlog, EPA has signaled that it has no intention of acting on these outstanding petitions until this case is resolved by the Court.[31] Nor has EPA released RVOs for 2021 so that refineries can anticipate and rationally plan for their 2021 compliance costs.

All the while, small refineries that need RFS compliance relief due to untenable market conditions and agency indecision are being left out in the cold.

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[29] Overview of Small Refinery Exemptions Data (Table 2), EPA, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Feb. 18, 2021).

[30] *See id.*

[31] *See* Petitioners' Reply Cert. Br. at 9.

Beyond mere agency indecision, EPA announced *in a press release*[32] on the date Petitioners' brief was due in this Court that it has reversed its position on the issue under review and that continuous exemptions are required for small refinery hardship exemptions. EPA's new position purports to allow one EPA Administration to forever sever small refineries right to receive hardship exemptions, no matter how severe the economic consequences in later years. But EPA's midnight reversal of its longstanding interpretation, without notice to affected refineries and the opportunity for public comment, is entitled to no deference. Given Congress's unambiguous directive that small refineries be permitted to petition EPA "at any time," the Court should interpret the Act according to its plain terms and prevent the hardship exemption program from becoming an unstable game of political football that undermines certainty and ultimately will harm both small refineries and consumers.

Returning the RFS program to the *status quo ante*—so that EPA retains authority to grant hardship exemptions on a case-by-case basis "at any time" there is a showing of disproportionate economic hardship—would not only read the Clean Air Act correctly but would also ensure that small refineries around the nation, and the communities that rely on them, receive the protection Congress intended that they should have at a time when it is needed most.

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[32] *EPA Signals New Position on Small Refinery Exemptions*, EPA (Feb. 22, 2021), https://www.epa.gov/renewable-fuel-standard-program/epa-signals-new-position-small-refinery-exemptions.

## CONCLUSION

The Court should reverse.

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