No. 20-472

IN THE

Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC,
HOLLY-FRONTIER REFINING & MARKETING, LLC,
HOLLYFRONTIER WOODS CROSS REFINING, LLC, &
WYNNEWOOD REFINING CO., LLC,

Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, *et al.*,

Respondents.

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

BRIEF OF COUNTRYMARK REFINING AND LOGISTICS, LLC AS *AMICUS CURIAE* SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE

Countrymark Refining and Logistics, LLC ("CountryMark")[1] is a farmer-owned cooperative that began in 1919. Its Board of Directors is controlled by farmers, and each year, its profits are distributed back to farmers through the cooperative system. In 2012, CountryMark was recognized as the 12th largest agriculture cooperative in the nation,[2] and today it is owned by over 140,000 farmers in Indiana, Michigan, Illinois, and Ohio.

CountryMark has a significant interest in this appeal because the Tenth Circuit's decision threatens financial ruin for CountryMark. Much like the small refineries Petitioners discussed, the demise of CountryMark would significantly harm the rural regions in which it operates. In particular, CountryMark employs nearly 500 workers, mostly in the rural economy of southwest Indiana and southeast Illinois. In just Posey County, Indiana alone, a county with only 26,000 residents, CountryMark provides over $30 million in wages and benefits each year. In 2019, it purchased over $500 million of crude oil primarily from the Illinois Basin, and those purchases provided income to the 40,000 royalty owners in the Illinois Basin. Its products are

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[1] Pursuant to Rule 37.3(a), CountryMark states that counsel for Petitioners and Respondents have provided written consent to the filing of this brief. Pursuant to Rule 37.6, CountryMark affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than CountryMark, its members, or its counsel made such a monetary contribution.

[2] *See* United States Department of Agriculture, *Rural Cooperatives*, p.3 (September/October 2013), *available at* https://www.rd.usda.gov/files/rdRuralCoop_Sept_Oct13Vr_Web.pdf.

also sold and distributed through its branded dealer network, providing employment throughout rural communities in Indiana and surrounding states.

CountryMark is the only farmer-owned integrated oil company in the United States, and it is recognized in Indiana as a leader in the distribution of biodiesel and ethanol.[3] Its refinery, which uses 100% American crude oil, processes 30,000 barrels of crude per day. It supplies over 65% of agricultural market fuels and 50% of school district fuels in the State of Indiana.

CountryMark is subject to the Renewable Fuels Standard. But even without federal requirements, CountryMark has long been supportive of renewable fuels. Indeed, the patronage refunds to its farmer-owners are adjusted based on customer renewable fuels usage to provide incentives for higher blends of ethanol and biodiesel.

While CountryMark plays a critical role in its regional market, it is a small refinery on a relative basis—its capacity is 1/10 the size of the average refinery in its region. It is therefore the very sort of small refinery that Congress had in mind when enacting Small Refinery Exemptions ("SREs"). The Tenth Circuit's decision threatens financial ruin for small refineries like CountryMark because it effectively eliminates those exemptions, and without those exemptions CountryMark's financial viability would be in significant doubt.

[3] Meggie Foster, *CountryMark debuts new brand, re-energized vision*, Farm World (June 21, 2007), *available at* http://www.farmworldonline.com/news/ArchiveArticle.asp?newsid=4377.

SUMMARY OF ARGUMENT

Petitioners have described that SREs are critical to small refineries within the Tenth Circuit and across the nation, that the decision below poses an existential threat to these businesses, and that the decision will wreak havoc upon the communities they serve and the thousands of jobs they support. Brief of Petitioners pp.4, 10. Petitioners are correct. While Petitioners focus primarily on the impact to small refineries within the Tenth Circuit, the decision below is just as devastating to CountryMark's farmer-owned cooperative operating a small refinery serving members and customers in the State of Indiana and the surrounding region.

CountryMark is the quintessential example of a small refinery Congress sought to protect. It is a farmer-owned cooperative that was advancing the use of renewable fuels even before it was subject to a mandate. However, it faces disproportionate economic hardship compared to other refiners—even other small refineries.

CountryMark has invested in blending infrastructure that remains capable of blending enough renewable fuels to meet its annual obligation. Even though CountryMark has the infrastructure to blend its obligation, and even with a customer base that embraced renewable fuels early, the increasingly higher percentages of renewable fuels required for compliance to be blended in gasoline and diesel now well exceed levels customers demand. Customers select the percentage of renewable fuels in their gasoline and diesel when they choose which fuel mix to purchase. Since these percentages are below the compliance requirement, CountryMark must purchase Renewable Identification Numbers ("RINs")—compliance credits—to achieve RFS compliance. The combination of increasing volume obligations and increasing RIN prices makes continued compliance practically impossible, and SREs vital. So without SREs, CountryMark's long-term viability is questionable.

Critically, even though CountryMark may be able to achieve compliance in some years without SREs, it still needs SREs in other years. There are several reasons for this. To begin with, SREs in one compliance year may be reflected in a refinery's financial accounting for a subsequent year. That means an SRE in one year may make a refinery ineligible for the hardship exemption in a subsequent year, but the hardship returns once the refinery is no longer receiving the benefit of the exemption. Also, the criteria for disproportionate economic hardship change over time, and it is unpredictable when EPA will release the annual Renewable Volume Obligations, as those are sometimes published more than a year late.

CountryMark operates in a volatile market—the plummeting fuel demand resulting from the Covid-19 pandemic, and plummeting fuel prices from the price war between Saudi Arabia and Russia are recent illustrations—and its disproportionate economic hardship is structural. As a result, EPA needs to reevaluate each year whether the exemption should be extended to CountryMark, just as Congress directed.

ARGUMENT

I. CountryMark, as a farmer-owned cooperative, has long advanced the cause of renewable fuels.

For CountryMark, SREs are a vital tool to maintain its economic vitality while continuing to further the goal of increasing renewable fuel usage. SREs are not a way of CountryMark avoiding a Congressional mandate. In fact, as a farmer-owned cooperative, CountryMark was promoting renewable fuels long before being mandated to do so.

As a small refinery, CountryMark was not an obligated party subject to the Renewable Volume Obligations ("RVOs") until 2011. Nevertheless, CountryMark began blending biodiesel in 2006 in response to the demands of its members and their customers. CountryMark even became a quality expert in biodiesel and a leader in sales.[4] Indeed, at one time, it operated four of the twelve direct biodiesel rack injection systems in the nation. CountryMark was even recognized by Senator Richard Lugar with an Energy Patriot Award for its leadership in biodiesel.[5] It has also spent over $3.5 million for its refinery and terminals to allow both ethanol and biodiesel blending.

Because it is a farmer-owned small refinery in Indiana, CountryMark faces challenges to increasing renewable fuels, especially with ever increasing blending obligations. Even with a customer base that embraced renewable fuels early, CountryMark's customers are unwilling to blend enough renewable fuels for CountryMark to meet its annual obligation. At the outset of the Renewable Fuel Standard program, the obligation requirements were at a level where CountryMark could meet them primarily

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[4] Written statement of CountryMark Cooperative Holding Corporation as submitted to the Subcommittee on Energy and the Subcommittee on Oversight, p.3 (July 23, 2015), *available at* https://science.house.gov/imo/media/doc/CountryMark%20Written%20Testimony%20-%20House%20Science%20July%202015%20rev%20final.pdf.

[5] Morning AgClips, *CountryMark CEO retires after oil industry career* (October 29, 2019), *available at* https://www.morningagclips.com/countrymark-ceo-retires-after-oil-industry-career/.

through blending renewable fuels. However, even though CountryMark has invested in and maintains sufficient blending infrastructure, with the annual obligation continuing to increase every year, the only way it can maintain RFS compliance is to purchase RINs while satisfying its customers' requirements. But the combination of increasing obligations beyond levels that customers demand and increasing RIN prices makes continued compliance unsustainable.

II. Because it is a farmer-owned small refinery in Indiana, CountryMark faces unique challenges to increasing renewable fuels.

A. Ethanol

The EPA has proposed standards that require more than 10% ethanol to be blended into gasoline (i.e., higher than "E10"[6]) for compliance since 2016. 40 C.F.R. § 80.1405. Even with this mandated volume, the marketplace reality is that E10 continues to be the dominant gasoline blend for at least three reasons.

First, the regulatory framework still favors E10. As the U.S. Energy Information Administration reports, while "[a]ll gasoline engine vehicles can use E10," "[c]urrently only flex-fuel and light-duty vehicles with a model year of 2001 or newer are approved by the EPA to use E15." U.S. Energy Information

[6] U.S. Energy Information Administration, *Frequently Asked Questions* ("E10 is gasoline with 10% ethanol content. E15 is gasoline with 15% ethanol content, and E85 is a fuel that may contain up to 85% fuel ethanol."), *available at* https://www.eia.gov/tools/faqs/faq.php?id=27&t=10#:~:text=E10%20is%20gasoline%20with%2010,up%20to%2085%25%20fuel%20ethanol.

Administration, *FAQs, How much ethanol is in gasoline, and how does it affect fuel economy?*[7]

Also, in June 2019, the EPA extended the 1 pound per square inch (psi) Reid Vapor Pressure (RVP) waiver for gasoline blends containing 15% ethanol in an effort to allow E15 blends year-round.[8] But the EPA only regulates gasoline RVP from June 1 through September 15, and the remainder of the year is regulated by the State of Indiana. Ind. Code § 16-44-2-8. For its part, the State of Indiana has declined to extend the RVP waiver to E15 gasoline blends. As a result, E15 cannot be blended year-round unless RVP levels are reduced, creating a negative economic impact.

Second, the infrastructure required to dispense higher ethanol blends is cost prohibitive for independent gas station owners. (CountryMark does not own retail stations; it pays for branding those stations.) Installation requires multiple blender pumps and a dedicated underground tank for ethanol or E85. All combined, in CountryMark's experience, a new installation to accommodate E15 with ethanol blend pumps generally costs in excess of $120,000 per station. Typical retail station net margins are small—less than a few pennies per gallon[9]. In addition, most members'

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[7] https://www.eia.gov/tools/faqs/faq.php?id=27&t=10#:~:text=E10%20is%20gasoline%20with%2010,up%20to%2085%25%20fuel%20ethanol.

[8] EPA Press Office, *EPA Delivers on President Trump's Promise to Allow Year-Round Sale of E15 Gasoline and Improve Transparency in Renewable Fuel Markets* (May 31, 2019), *available at* https://www.epa.gov/newsreleases/epa-delivers-president-trumps-promise-allow-year-round-sale-e15-gasoline-and-improve.

[9] West Virginia Oil Marketers and Grocers Association, *How much money do businesses make on fuel purchases*, *available at*

retail facilities are located in rural areas where gasoline sales are less than a half million gallons per year.

Nevertheless, to help build out E15 infrastructure, CountryMark started a program to subsidize its branded retailers to install tanks and blender pumps. Regardless of this incentive package, there have only been a few members that have requested more information on the program. CountryMark currently has six branded stations that offer E15, and over half of those investments were subsidized by CountryMark and/or grants from groups such as state corn organizations or the federal government. Even then, CountryMark was only financially able to start that program because of the SRE relief it received in 2017 and 2018.

The burden of ever increasing RFS obligation requirements coupled with an apparent end to SREs will of course require CountryMark to reconsider this program. Instead of building infrastructure to help its farmer-owners, without the ability to seek financial relief through SREs, CountryMark will need to spend that money on RFS compliance.

Third, demand remains low for higher ethanol blends. For example, E85 is not widely accepted by consumers regardless of price because it has less energy per gallon compared to E10. U.S. Dep't of Energy, *Ethanol* ("Due to ethanol's lower energy content, [flex fuel vehicles] operating on E85 get roughly 15% to 27% fewer miles per gallon than when operating on regular gasoline, depending on the ethanol content. Regular gasoline typically contains about 10% ethanol.").[10] The retail economics therefore do not support the investment

https://www.omegawv.com/faq/140-how-much-money-do-businesses-make-on-fuel-purchases.html.

[10] https://www.fueleconomy.gov/feg/ethanol.shtml.

for dedicated infrastructure for higher ethanol blends like E15 or E85. Due to the high cost and the apparent lack of consumer acceptance and demand, retailers do not see the return on this investment.

Finally, SREs enable RINs to be unretired and sold back into the RIN markets, which provides those markets liquidity and stability, key considerations in regulating the RFS. *See Americans for Clean Energy v. EPA*, 864 F.3d 691 (D.C. Cir. 2017) (agreeing with the EPA's consideration of the need for "flexibility and liquidity" in the RIN market to avoid "obligated parties facing the unexpected shortfalls or increased demand for transportation fuel" with "no way to comply with the statute"). Without SREs, CountryMark projects a steady decline of the ethanol-related RIN (referred to as "D6 RINs") supply, leading to decreased liquidity and increased instability in that RIN market by 2022. Indeed, the market is already reflecting this—with fewer D6 RINs, their price has increased by roughly 585% from their low point over the last 12 months. *See* EPA, *RIN Trades and Price Information.*[11] As a result, the supply of D6 RINs will be insufficient for the industry, and CountryMark, to achieve compliance. Customer demand cannot solve this problem because the demand for renewable fuel has nothing to do with, and is completely unaffected by, RIN prices.

B. Diesel and Biodiesel

CountryMark began blending biodiesel in 2006, and it is considered a leader of biodiesel blending in the State of Indiana.[12] As would be expected of a farmer-

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[11] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information.

[12] Meggie Foster, *CountryMark debuts new brand, re-energized vision*, Farm World (June 21, 2007), *available at* http://

owned cooperative, its members and their customers require more diesel fuel than gasoline. Consequently, CountryMark operates its refinery to maximize diesel fuel production so that it can meet the requirements of this diesel-centric business. In fact, CountryMark sells more diesel fuel through its member retail network than it can produce at its refinery, so it must purchase diesel from other suppliers to meet customer demand. Even though biodiesel helps meet this demand, customers strongly disfavor it, and therefore buy much less of it. This results in a disproportionate economic hardship for CountryMark compared to other refiners.

To preclude all doubt, the Department of Energy has recognized that high diesel production is a criteria for disproportionate economic harm in its small refiner exemption survey.[13] This is exacerbated for CountryMark.

Its customers are integrated with the agricultural community, and they are knowledgeable users of renewable fuels—both ethanol and biodiesel. Biodiesel faces significant headwinds in the marketplace, much like the challenges for ethanol discussed above. Most significantly, it does not work as well in the winter, so customers are hesitant to blend biodiesel in the severe Indiana cold. The market reality is that CountryMark

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www.farmworldonline.com/news/ArchiveArticle.asp?newsid=4377; *CountryMark Co-op moves B5 through private pipeline*, Biodiesel Magazine (September 1, 2006), *available at* http://www.biodieselmagazine.com/articles/1091/countrymark-co-op-moves-b5-through-private-pipeline.

[13] U.S. Department of Energy, *Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship*, p.33 (March 2011), *available at* https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf.

can only sell approximately 2.5% biodiesel on an annual average of all its diesel fuel sales.

CountryMark therefore does not have the same opportunity to blend biodiesel into diesel fuel as there is for ethanol into gasoline. Even if CountryMark were to force a 5% biodiesel blend on customers, that would not be enough to meet CountryMark's RFS obligations. Since higher biodiesel blends are not as accepted in the market, CountryMark does not sell as many biodiesel blends at 10% or higher, as is possible with ethanol in gasoline.

Without the ability to sell higher renewable blends in diesel fuel, CountryMark is structurally disadvantaged compared to other refiners. By favoring the production of diesel fuel to meet the agricultural requirements of a farmer-owned cooperative, CountryMark does not produce enough gasoline for ethanol blending at any percentage that would eliminate the need to purchase high price RINs.

This cannot be overcome with even more infrastructure. CountryMark has evaluated producing more renewable diesel to overcome the low blend percentages for biodiesel. Renewable diesel is similar in characteristics to diesel fuel so blending percentages are not limited. U.S. Energy Information Admin., *Biofuels explained*, https://www.eia.gov/energyexplained/biofuels/ ("Renewable diesel fuel, sometimes called green diesel, is a biofuel that is chemically the same as petroleum diesel fuel.").

However, the capital required to construct a renewable diesel facility of adequate size to meet CountryMark's obligation is nearly $100 million. To achieve the necessary economies of scale, a larger facility would be required at multiples of this investment. This level of investment is cost prohibitive for CountryMark.

Other incentives, such as renewable diesel blender credits and California Low Carbon Fuel Credits (LCFS), would be required to make such an investment economical. But to capture the value of the LCFS credit, the renewable diesel must be sold in California, so CountryMark and its members in Indiana would not receive the benefits of using the renewable diesel that the cooperative produced.

Finally, as with ethanol, CountryMark projects a steady decrease in RINs for biomass-based diesel and advance biofuels (referred to as "D4" and "D5" RINs), leading to decreased liquidity and increased instability in D4 and D5 RIN prices by 2021. Again, the market has already begun to react. Over the last 12 months, D4 RIN prices have increased from their low point roughly 67%, and D5 RIN prices have increased around 133%. *See* EPA, *RIN Trades and Price Information.* [14] And as with ethanol-related RINs, the supply of D4 and D5 RINs will be insufficient for the industry to achieve compliance.

III. CountryMark requires an SRE in some years even though it has been able to comply with its RVO obligations without an SRE in other years.

As Petitioners point out, small refineries may require an SRE in some years even though they were able to comply with their RVO obligations without SREs in other years, which is why Congress designed the SREs as a safety valve. Brief of Petitioners pp.39–46. That

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[14] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information.

has been CountryMark's experience for a number of reasons.

First, SREs in one compliance year may be reflected in a refinery's financial accounting for a subsequent year. *See* Kelsi Bracmort, *The Renewable Fuel Standard* p.19, Congressional Research Service (Mar. 2, 2020)[15] ("[T]he small refinery may not be able to receive the benefit of the exemption for the year it was granted (e.g, if an SRE is granted after the end of a compliance period and the small refinery has already complied with its obligation. Instead, in some cases the small refinery has been credited the RINs it retired to demonstrate compliance with the year that was exempted, and it may use those RINs in a future year."). As a result, an SRE in one compliance year may make a refinery ineligible for the hardship exemption in a subsequent year. Of course, the economic hardship may return once the refinery is no longer receiving the benefit of the exemption. It would not make sense for Congress to impose a requirement of continuous exemptions when an exemption may preclude eligibility in a subsequent year and the economic hardship returns after the exemption expires.

Second, the criteria for disproportionate economic hardship changes. From 2007 through 2010, CountryMark qualified for the original small refinery exemption and, thus, was exempt from its RFS obligations for those compliance years ("the blanket exemption"). 42 U.S.C. § 7545(o)(9)(A). Then, from 2011 through 2016 CountryMark had no avenue for relief from its RVO obligations because the Department of Energy's revised scoring methodology under the

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[15] *Available at* https://crsreports.congress.gov/product/pdf/R/R46244.

May 2014 Addendum to the 2011 Department of Energy Study would cause CountryMark to receive a score below 1.0 for the viability index which, in turn, would result in EPA denying the request for an extension. *See U.S. Dep't of Energy,* Addendum to the Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship (May 2014), *available at* https://www.epa.gov/sites/production/files/2016-12/documents/rfs2-small-refiner-study-addendum-05-2014.pdf.

This changed in 2017 when another panel in the Tenth Circuit invalidated EPA's methodology. *Sinclair Wyoming Ref. Co. v. United States Envtl. Prot. Agency*, 887 F.3d 986, 988 (10th Cir. 2017) ("We conclude the EPA has exceeded its statutory authority under the CAA in interpreting the hardship exemption to require a threat to a refinery's survival as an ongoing operation."). Based on that decision, EPA granted CountryMark SREs for the 2017 and 2018 compliance years (which were accounted for in 2018 and 2019), recognizing that CountryMark experienced disproportionate economic impact. With the exemptions, the RFS costs returned to manageable levels in 2018 and 2019.

Third, it is also unpredictable when EPA will even release its RVO. Although it is statutorily required to release the obligation each year by November 30, 42 U.S.C. § 7545(o)(3)(B)(i), EPA sometimes misses that deadline by years. *See, e.g.*, U.S. Congressional News, *Heitkamp Joins Klobuchar, Grassley in Bipartisan Call to Maintain Strong Renewable Fuel Standard*, 2017 WLNR 8392108 (March 16, 2017) ("The EPA is required by law to set fuel blending levels annually so biodiesel and ethanol producers can plan for the future, but the agency failed to do so for years, creating uncertainty for farmers as well as advanced biofuels research and development."). For example, on December 14, 2015, EPA published the RVO for 2014, 2015, 2016, and 2017 even though the deadline for the 2014 RVO was due more than 2 years earlier. *See* Renewable Fuel Standard Program: Standards for 2014, 2015, and 2016 and Biomass-Based Diesel Volume for 2017, 80 Fed, Reg. 77,420 (to be codified at 40 C.F.R. pt. 80)[16]; *see also* 40 C.F.R. § 80.1405. Even now, the 2021 RVO has not been published even though it was due November 30, 2020.

The practical result is that a small refinery like CountryMark must make compliance decisions—RIN purchases, input purchases, other compliance expenditures, business changes, etc.—without the benefit of knowing what the RVO is at the time. As a result of that, a refinery undertaking this guesswork may end up ensuring compliance in one year while compounding its hardship in the next.

When EPA goes years without publishing the RVO, it is all the more important to adhere to the language in the statute, which is that "[a] small refinery may *at any time* petition the Administrator for an extension of the exemption . . . for the reason of disproportionate economic hardship." 42 U.S.C. § 7545(o)(9)(B)(i) (emphasis added). For example, refineries like CountryMark had to manage compliance for 2014 and 2015 before even learning the RVO. But if they had learned of the RVO when they were supposed to, they would have had the opportunity to accurately and thoughtfully manage compliance costs. Instead, EPA's RVO delay forced speculation into compliance decisions with the result that small refineries could not minimize

[16] *Available at* https://www.govinfo.gov/content/pkg/FR-2015-12-14/pdf/2015-30893.pdf.

compliance costs and optimize their operations. Yet, compliance costs factor into hardship, so EPA's delays can be the progenitor of hardship for a small refinery subsequent to a year without hardship.

Fourth, CountryMark operates in a volatile market. For example, fuel prices plummeted last year as a result of a price war between Saudi Arabia and Russia, which was then greatly exacerbated by plummeting demand resulting from the COVID-19 pandemic. Grant Smith, *OPEC Nations Howl for Mercy as Saudi-Russia Oil War Deepens*, Bloomberg (March 27, 2020), *available at* https://www.bloomberg.com/news/articles/2020-03-27/opec-nations-howl-for-mercy-as-saudi-russia-oil-war-deepens. For a period, CountryMark reduced the refinery crude rate to its minimum stable operating levels. After averaging a crude rate of 30,179 barrels per day from January 1st through March 16th 2020, CountryMark reduced refinery crude rate by an average of 7,800 barrels per day from March 17th through May 31st, a nearly 26% reduction.

The economic impact to CountryMark has been devastating. For full year 2020, the company's pre-tax income is *negative* and the estimated 2020 RFS compliance cost is a whopping \$18.3 million. Even if CountryMark were granted a SRE for 2020, it would not return to profitability.

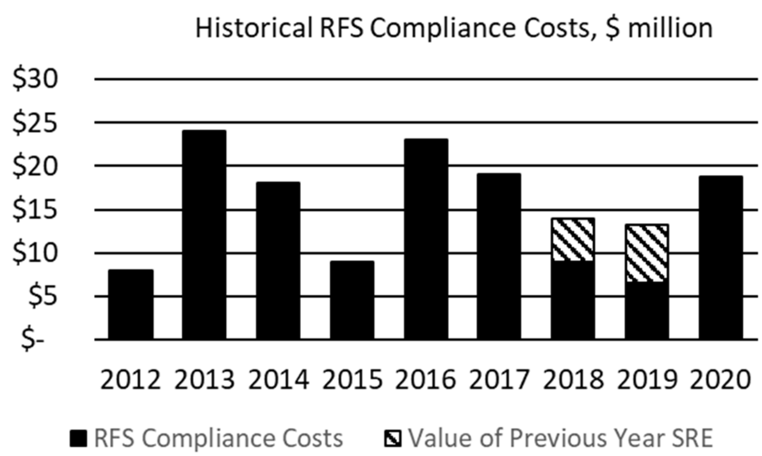
Finally, CountryMark's disproportionate economic hardship is structural. When CountryMark received the SREs for calendar year 2017 and 2018, the Department of Energy scoring indicated that CountryMark had disproportionate economic harm based on three items. First, as discussed above, CountryMark produces a larger proportion of diesel fuel to ensure its members' businesses and their farmer customers are adequately supplied. Higher diesel production reduces the potential to blend renewable fuels. Second, Countrymark does not have another business line that can offset poor financial performance other than refining and marketing. Third, since CountryMark is located in a region of the country with multiple competitive refineries and served by a multitude of pipelines and terminals, CountryMark is not considered a niche refinery. These disadvantages cannot realistically be overcome permanently.

CountryMark will therefore frequently face disproportionate economic hardship. While CountryMark may be able to manage its RFS compliance cost in certain years without a SRE, these structural disadvantages—combined with the timing of the EPA granting SREs, rising RVOs, and the uncertainty of future rising RIN prices—have compelled CountryMark to submit exemption petitions for 2019 and 2020. The ability to petition for that relief is critical to CountryMark's future economic viability.

IV. The Tenth Circuit's decision threatens financial ruin for CountryMark.

Petitioners point out that the Tenth Circuit's decision poses an existential threat to small refiners. Brief of Petitioners pp.4, 13. Again, CountryMark is illustrative.

The following graph provides CountryMark's annual RFS compliance costs from 2012 through 2020. While the average compliance cost for 2012 through 2015 was $14.8 million, without the benefit of SREs the average compliance costs for 2016 through 2020 would have risen to $17.6 million. However, CountryMark was granted SREs for the 2017 and 2018 compliance years. These were realized in 2018 and 2019 with the value of the SRE being reflected in the last crosshatched sections in the graph below. In essence, these exemptions reduced CountryMark's compliance costs in subsequent years as opposed to the calendar year for which the exemption was provided. The SREs shown in 2018 and 2019 reduced CountryMark's 2016 through 2020 compliance costs to $15.3 million.



Now, as a result of the panel's decision, CountryMark is no longer eligible for an SRE. So again, CountryMark confronts the same reality Petitioners describe—it must rely on RINs, but the price of RINs have increased because of the Tenth Circuit's decision, and demand for transportation fuel has plummeted.

That foretells a return to the economic dynamic in 2016. In that year, RIN prices were high and refining margins were low. CountryMark's RFS compliance cost was $23 million while its Pre-Tax Income was only $6.5 million. Obviously, that is unsustainable. Yet, with the future uncertainty of RIN pricing and escalating obligations, the Tenth Circuit's decision creates the prospect that 2016 becomes the norm for CountryMark. This is reflected in 2020's performance, which shows a return to increasing compliance costs in a low margin environment, resulting in negative income.

The Tenth Circuit's opinion discussed the possibility that refiners may be able to pass RIN compliance costs through to their customers. *Renewable Fuels Ass'n v. U.S. Envtl. Prot. Agency*, 948 F.3d at 1255–57 (10th Cir. 2020). CountryMark's market experience contradicts this notion. When soliciting bids for term fuel purchases, many wholesale retail customers require sellers like CountryMark to share the cost of the RIN. In other words, the purchaser wants a discounted price based on the cost of RINs. Non-obligated parties are able to share this value through contracts or at the wholesale rack because they do not have compliance obligations like CountryMark. CountryMark must also discount product based on the value of RINs to be competitive and sell fuel. This results in reduced wholesale margins and is the precise opposite of passing through the RIN compliance cost to the wholesale purchaser.

Without SREs, and without the ability to pass its compliance costs on to customers, CountryMark's structural disadvantages will prevent it from being able to comply with its RVO. If affirmed, the Tenth Circuit's decision therefore threatens to be the death knell for small refineries like CountryMark, which is precisely what Congress sought to avoid when it created SREs in the first place.

CONCLUSION

Before the Tenth Circuit's decision in this case, CountryMark has never been denied an SRE. Each time it applied, EPA granted the request, just as Congress intended, because CountryMark demonstrated a disproportionate economic hardship. With no reason to believe that failing to apply for an SRE in 2011 through 2016 would foreclose a future request, CountryMark did not request an exemption in those years because the volume obligations were low, RIN prices were low, RFS compliance costs were manageable, and/or EPA was applying an incorrect standard that foreclosed CountryMark's eligibility.

Another Tenth Circuit panel finally corrected the EPA's standard in 2017, but now the Tenth Circuit panel in this case has precluded eligibility for companies like CountryMark for a completely unrelated reason: because CountryMark does not have a continuous history of requesting an SRE every year. But CountryMark was entitled to rely on the EPA's interpretation of the law between 2011 and 2016, and it is grossly unfair to impose a new requirement of continuous exemption requests 9 years after the fact.

The Tenth Circuit's decision should be reversed.

Respectfully submitted,

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