No. 20-472

# In the Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, ET AL.,
PETITIONERS,

*v.*

RENEWABLE FUELS ASSOCIATION, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

## BRIEF FOR NATIONAL BIODIESEL BOARD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*[1]

The National Biodiesel Board ("NBB") is the trade association representing America's first advanced biofuels, biodiesel and renewable diesel. Biodiesel and renewable diesel, collectively referred to as "biomass-based diesel," are clean-burning alternatives to petroleum diesel that can be generated from a wide variety of feedstocks, including soybean oil, canola oil, distiller's corn oil, waste cooking oil, and animal fats. NBB's members include owners and operators of biomass-based diesel production facilities, growers and processors of feedstocks, and technology providers. The outcome of this case is vitally important for NBB and its members because the scope of exemptions authorized under 42 U.S.C. § 7545(o)(9) will have a significant impact on the future of the biomass-based diesel industry.

Biomass-based diesel has been a major success of the Renewable Fuel Standard program (RFS). Before the RFS, there was little commercially produced biomass-based diesel in the United States. The industry had to make significant investments in infrastructure, technology, and personnel to meet the RFS's market-forcing requirements. Just over a decade later, biomass-based diesel production routinely exceeds the volume of biomass-based diesel required by the RFS and comprises more than 90 percent of the advanced biofuel produced each year. In meeting those volumes, biomass-based diesel has enhanced the nation's energy security, reduced greenhouse gas emissions, provided high-paying jobs in rural areas, and supplemented the incomes of farmers.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, no counsel for a party wrote this brief in whole or in part, and no one other than amicus curiae or its counsel contributed money to fund the preparation or submission of this brief. Counsel for all parties have consented to the filing of this brief.

Unfortunately, EPA halted the growth of biomass-based diesel production when it dramatically expanded small-refinery exemptions beginning in 2017. As soon as EPA's new policy regarding exemptions became public knowledge, the price of credits for biomass-based diesel production cratered. That lower price immediately harmed NBB's members by lowering demand for their products. The situation only worsened from there. Because EPA continued to grant expansive exemptions for 2018, the market for biomass-based diesel remained depressed, and it became difficult for biomass-based diesel producers to sustain their operations. A number of biomass-based diesel producers were forced to shut down or idle their plants and lay off employees.

The scope of authority for small-refinery exemptions advocated by Petitioners and their amici would perpetuate the contraction of the biomass-based diesel industry. It would incentivize more and more refiners to apply for exemptions, reducing the volumes of renewable fuel required by the RFS even further. Additional refineries could even game the system by artificially limiting their output to qualify as "small refineries."

Affirmance is necessary to respect the appropriate limits Congress placed on refiners' eligibility for small-refinery exemptions, and to restore the conditions that allowed biomass-based diesel production to flourish, with all the attendant environmental, economic, and energy security benefits that Congress intended in enacting the RFS.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Tenth Circuit correctly held that, under 42 U.S.C. § 7545(o)(9), a small refiner may not "extend" an exemption that the refiner does not currently have. As Respondents explain, that conclusion is compelled by the

statutory text, and this Court should affirm the decision below.

Petitioners and their amici nevertheless claim that the decision below will interfere with the purposes of the RFS. Those policy arguments are inapposite and foreclosed by the plain text of the statute. But even if there were any ambiguity in § 7545(o)(9), the purposes of the RFS support the opposite of what Petitioners and their amici argue. Small-refinery exemptions must be construed narrowly to achieve Congress's goals.

Congress designed the RFS as a "market forcing policy" to increase production of renewable fuels. *Ams. for Clean Energy* v. *EPA*, 864 F.3d 691, 710 (D.C. Cir. 2017), which would in turn reduce greenhouse gas emissions, enhance U.S. energy security, and support rural economies. Expansive small-refinery exemptions directly undermine these congressional purposes by reducing the amount of renewable fuels produced each year. And they harm the small businesses across rural America—including biofuels producers, biotechnology companies, and other businesses that support the industry, as well as retailers of higher biofuel blends and independent farmers—for whom proper implementation of the RFS is essential.

The effect of excessive small-refinery exemptions is particularly severe for the biomass-based diesel industry. Biomass-based diesel includes biodiesel and renewable diesel. Both can be made from a variety of renewable feedstocks, such as vegetable oils, animal fats, and used cooking oil. Biodiesel is chemically different from petroleum diesel but can nonetheless be used in existing diesel engines without modifications. Renewable diesel, on the other hand, is a "drop in" renewable fuel that is chemically identical to petroleum diesel.

As Respondents explain, Fed. Resp. Br. 4–6; Biofuels Resp. Br. 6–7, the RFS sets annual targets for the

volumes of the four types of renewable fuels to be sold as transportation fuel in the United States, which are: (i) cellulosic biofuel, (ii) biomass-based diesel, (iii) advanced biofuel, and (iv) total renewable fuel. 42 U.S.C. § 7545(o)(2)(B)(i)(I)–(IV). These four categories of fuels differ with respect to the renewable biomass sources from which they are produced, as well as their greenhouse-gas emissions. *Id.* § 7545(o)(1)(B), (D), (E), (J). Moreover, "[t]he statutory categories of fuel types are 'nested,' meaning that cellulosic biofuel and biomass-based diesel are kinds of advanced biofuel, and advanced biofuel in turn is a kind of renewable fuel that may be credited toward the total renewable fuel obligation." *Ams. for Clean Energy*, 864 F.3d at 697–98.

Thus, while biomass-based diesel has its own required volume under the RFS, it is also "nested" within the advanced biofuel volume because all biomass-based diesel meets the required 50 percent greenhouse-gas emissions reduction threshold for advanced biofuel.[2] And the advanced biofuel volume is nested within the total renewable fuel volume. In other words, biomass-based diesel may be used to fulfill RFS obligations under all three of those volume requirements. Because demand for biomass-based diesel is thus closely tied to all three of those volumes, the glut of small-refinery exemptions EPA issued between 2016 and 2018 reduced demand for biomass-based diesel by an estimated 2 billion gallons—from about 13 billion gallons to about 11 billion gallons. As a result, biomass-based diesel's benefits for energy security, the environment, and the rural economy—which Congress sought to drive through the RFS—have been reduced.

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[2] Renewable diesel does not meet the specific statutory definition of "biomass-based diesel" for purposes of the biomass-based diesel volume, 42 U.S.C. § 7545(o)(1)(D), but it nonetheless qualifies as advanced biofuel.

Petitioners and their amici claim that the decision below portends disastrous consequences for small refineries. Those consequences are vastly overstated. Refiners—even small ones—have ample ability to comply with the RFS by blending renewable fuels. Indeed, Petitioner HollyFrontier itself is in the process of converting one of the facilities at issue in this case to producing renewable diesel. And even refineries that have no blending capacity are able to comply by purchasing credits from others and passing on the costs of those credits to consumers—indeed, they complied with the RFS before EPA's exemption spree.

This Court should affirm the decision below to allow the RFS to work as Congress intended.

## ARGUMENT

### I. Expansive Small-Refinery Exemptions Undermine The RFS

#### A. The Relatively Recent Explosion Of Small-Refinery Exemptions Has Hurt The Renewable-Fuel Industry, With Severe Impacts On Producers Of Biomass-Based Diesel

One doesn't have to pore over committee reports or floor statements to identify the purpose of the RFS. Congress stated its purposes plainly in the text of the law enacting the program—to "increase the production of clean, renewable fuels." Energy Independence and Security Act of 2007 ("EISA"), Pub. L. No. 110-140, 121 Stat. 1492. And through the promotion of biofuels, Congress sought to "move the United States toward greater energy independence and security." *Ibid.*

To accomplish these important goals, Congress was not content to rely on the market to develop and support a domestic biofuels industry of its own accord; rather, Congress designed the RFS "to force the market to create ways to produce and use greater and greater volumes of

renewable fuel each year." *Ams. for Clean Energy* v. *EPA*, 864 F.3d 691, 710 (D.C. Cir. 2017).

As Respondents and their amici explain, the text of § 7545(o)(9) is clear and defeats Petitioners' contention that EPA may exempt small refineries that did not have extensions when the RFS went into effect or whose prior exemptions have lapsed. But even if the text were unclear or ambiguous, the legislative intent underlying the statute refutes Petitioners' position.

Accepting Petitioners' interpretation of § 7545(o)(9) would create a massive loophole in the RFS. During the few years while EPA shared Petitioners' interpretation of § 7545(o)(9), the ensuing explosion of small-refinery exemptions reduced the mandated volumes by billions of gallons and stopped growth of renewable fuel production dead in its tracks.

In practice, each small refinery exemption EPA grants reduces the volume of renewable fuel used in the economy below the volume that the RFS requires for a given year. That happens because, for each year, EPA adopts a rule that takes the aggregate volume of renewable fuel Congress mandated in the statute and calculates a "percentage standard" that each obligated party uses over the course of the year to determine how much renewable fuel it must blend or credits it must acquire. Because EPA grants small-refinery exemptions after setting percentage standards, those exemptions effectively eliminate a portion of the aggregate volume requirement.

Before 2017, the volumes eliminated by small refinery exemptions were relatively insignificant because only a few refineries continued to receive exemptions. Indeed, the number of exemptions had been declining since the RFS's enactment, just as Congress intended, and renewable fuel producers anticipated that those exemptions

would eventually disappear as the remaining small refiners were able to come into compliance with the program.

But beginning in 2017,[3] EPA suddenly (and secretly) began granting exemptions to nearly all refineries that applied, regardless of whether they had received an exemption in prior years. The total renewable fuel volumes exempted through small-refinery exemptions exploded to 790 million gallons in 2016, 1.82 billion in 2017, and 1.43 billion in 2018. Those exemptions constituted four, nine, and seven percent of the aggregate volume requirements in 2016, 2017, and 2018, respectively. Those lost gallons had real and devastating impacts on renewable fuel producers, who had made significant investments to expand production of renewable fuels relying on the statutory text, as well as EPA's practice.

The impacts on producers of biomass-based diesel have been particularly severe. The RFS is the primary driver behind blending biomass-based diesel with petroleum diesel. (In the gasoline market, by contrast, octane needs independently incentivize blending gasoline with at least ten percent ethanol, which increases octane.) Biomass-based diesel demand in the United States depends on the RFS's requirements, and demand plummets when RFS volumes are lowered.

The fact that "biomass-based diesel is a nested subset of advanced and total renewable fuels," *Alon Ref. Krotz Springs, Inc.* v. *EPA*, 936 F.3d 628, 665 (D.C. Cir. 2019), further compounds the loss of demand. To illustrate, NBB estimates that reductions in the biomass-based diesel volume and the advanced volume as a result of small-refinery exemptions have combined to cause at least 520 million gallons of lost demand for biomass-based diesel

[3] EPA's first expanded exemptions were for the 2016 compliance year, but EPA did not actually grant those exemptions until 2017, and their existence was not made public until early 2018.

between 2016 and 2018. National Biodiesel Board, Comments on Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 (July 29, 2019), https://bit.ly/3frifwL, EPA-HQ-OAR-2019-0136-0451. But the true impact is dramatically larger, given that biomass-based diesel demand can also be driven by the total renewable fuel volume. A University of Illinois economics professor estimates that, when the impact of the total renewable fuel volume on biomass-based diesel demand is taken into account, small-refinery exemptions between 2016 and 2018 caused over *2 billion gallons* of lost demand for biomass-based diesel, including over 900 million gallons in 2018 alone. Scott Irwin, *Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction*, farmdoc daily (March 14, 2019), https://bit.ly/2O6WEhS.

These are not demand shocks that the industry can readily absorb. Small-refinery exemptions have contributed to the shut-down or idling of biomass-based diesel production facilities in recent years. Those facility closings have occurred across the country, including a Renewable Energy Group facility in Texas, an FHR Duonix Beatrice facility in Nebraska, Kolmar facilities in Connecticut and Texas, W2 Fuels facilities in Iowa and Michigan, and World Energy facilities in Pennsylvania, Mississippi, and Georgia.[4] And some biomass-based diesel producers

[4] See, *e.g.*, *Renewable Energy Group Closing Biodiesel Plant*, Texarkana Gazette (July 24, 2019), https://bit.ly/2QCBRUf; Scott Koperski, *Beatrice Biodiesel Plant to Shut Down*, Lincoln Journal Star (July 1, 2019), https://bit.ly/3cVcmEY; *Mississippi Energy Plant, 2 Others To Close After Trump Administration Gives Waivers to Competitors*, Magnolia State Live (Aug. 16, 2019), https://bit.ly/31bzCtb; Donnelle Eller & Barbara Rodriguez, *Another Renewable Fuel Plant Closes as Iowa Leaders Wait for White House Biofuels Fix*, Des Moines Register (Sept. 24, 2019), https://bit.ly/2NOw64T.

have predicted that continued small-refinery exemptions like those in 2016 through 2018 will make it impossible for them to continue their business. See *Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes: Hearing on Notice of Proposed Rulemaking for the Renewable Fuel Standard Program*, EPA-HQ-OAR-2019-0136-0343, at 154 (2019) (statement of Roy Strom, President and Chief Executive Officer, W2 Fuel LLC), https://bit.ly/2QNECCj ("Continued granting of these exemptions could, and likely will, put me out of business.").

Closing facilities not only harms biomass-based diesel producers and their employees, it also impedes the industry's ability to meet Congress's goal of generating additional renewable fuels going forward. Congress designed the RFS program to steadily increase the volumes of renewable fuels introduced into domestic commerce, and in the volumetric tables set by Congress, the annual increases in the minimum volume of *total* renewable fuel consists entirely of increases in the minimum volume of the *advanced* biofuel category beginning in 2017. See 42 U.S.C. § 7545(o)(2)(B)(i). Small-refinery exemptions have hindered the ability of the industry to achieve that growth. Indeed, the market actually *contracted* in 2017 and 2018 because of the unlawful small refinery exemptions. See 85 Fed. Reg. 7016, 7036 (Feb. 6, 2020).

Because producing and distributing biomass-based diesel requires substantial investment in infrastructure, biomass-based diesel producers need clear incentives to be able to expand production in the future. They will not have such incentives unless this Court clarifies that small-refinery exemptions are not an open-ended sink hole in the RFS that could allow an ever-expanding number of refiners to skirt the program's obligations on which the market for biomass-based diesel depends.

### B. Small-Refinery Exemptions Also Harm Energy Security, The Environment, And The Rural Economy

Promoting renewable fuel use has many beneficial effects. It enhances the nation's energy security, protects the environment, reduces greenhouse gas emissions, and supports the rural economy. *See* EISA, 121 Stat. 1492 (expressing Congress's purpose "[t]o move the United States toward greater energy independence and security"); 42 U.S.C. § 7545(o)(2)(B)(ii) (instructing EPA to determine volumes of renewable fuel for calendar years after 2022 based on factors including those fuels' impact on "the environment," "the energy security of the United States," and "rural economic development"); *id.* § 7545(o)(1)(B), (D), and (E) (specifying that "advanced biofuel," "biomass-based diesel," and "cellulosic biofuel" must have lower lifecycle greenhouse gas emissions relative to the petroleum products they replace). Excessive small-refinery exemptions frustrate each of those objectives.

*First*, small-refinery exemptions harm U.S. energy security by decreasing the diversity of fuel available in the United States. Biomass-based diesel is overwhelmingly produced in the United States from a wide variety of domestically-generated feedstocks, including soybean oil, distiller's corn oil, used cooking oil, animal fats, sorghum oil, camelina sativa oil, pennycress oil, and brassica carinata oil. In contrast, petroleum diesel fuel comes from a single feedstock—petroleum—whose supply has historically been highly dependent on foreign sources. See S. Rep. No. 65, 110th Cong., 1st Sess. 2 (2007) (describing the need for the RFS to remedy "the nation's reliance on foreign supplies of petroleum").

The State Amici supporting Petitioners argue that requiring refineries to comply with the RFS harms U.S.

energy security.[5] They contend that applying § 7545(o)(9) as written will "bar any new small refinery from entering the market … and force countless others from the market." Wyoming Br. 13. That contention is unfounded. New refiners might not be eligible for exemptions, but they have the same means to comply with the RFS's requirements as every other refinery—either blending renewable fuel themselves or purchasing credits. See Section II, *infra*. Section 7545(o)(9) was designed to help some small refineries transition from the pre-RFS world to the RFS world; it was never intended to be a permanent shield from the program's requirements.

The States' argument also overlooks the significant costs of small-refinery exemptions for biomass-based diesel producers, who have no means to make up for lost demand due to small-refinery exemptions. The result is a reduction in the supply of a fuel that comes from diverse, domestic feedstocks, thereby making the United States more susceptible to fluctuations in the price and availability of foreign petroleum. And diversification of fuel sources to reduce dependence on foreign oil is *exactly* the type of energy security Congress sought to achieve through the RFS. S. Rep. No. 65, 110th Cong., 1st Sess. 4 (2007) (stating that the RFS "is needed to … improve[] the energy security of the United States and reduc[e] the nation's dependence on imported oil"); see also 80 Fed. Reg. 77,420, 77,421 (Dec. 14, 2015) (acknowledging that Congress "intended to increase the nation's energy security" "by aiming to diversify the country's fuel supply"); see also Fed. Resp. Br. 4, 25; Biofuels Resp. Br. 44–45.

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[5] The State Amici are also incorrect that domestic energy security is the only "true end" of the RFS, State Br. 11. As noted above, and as Respondents explain, the RFS mitigates "both national-security and environmental risks." Fed. Resp. Br. 25.

*Second*, small-refinery exemptions harm the environment by reducing the volume of low-carbon renewable fuels in the nation's fuel supply. This is particularly true for biomass-based diesel and other advanced biofuels, which have at least 50 percent lower greenhouse gas emissions on a lifecycle basis than petroleum fuels. Lifecycle emissions from biomass-based diesel are even lower in practice: on a weighted-average basis, the biomass-based diesel supplied in the U.S. currently achieves more than an 80 percent reduction in greenhouse gas emissions compared to petroleum fuels. See *Standards for 2017 and Biomass-Based Diesel Volume for 2018: Hearing on Notice of Proposed Rulemaking for the Renewable Fuel Standard (RFS) Program*, EPA-HQ-OAR-2016-0004-3558, at 111 (2016) (statement of Don Scott, Director of Sustainability, Nat'l Biodiesel Bd.), https://bit.ly/3d9UBSs. The proliferation of small-refinery exemptions since 2017 has thus increased greenhouse gas emissions in the United States, undermining Congress's objective in the RFS.

*Third*, the shutdown and idling of renewable fuel plants as a result of small-refinery exemptions costs high-paying jobs and has secondary economic impacts that harm the rural economy. Biomass-based diesel production currently supports more than 65,000 U.S. jobs throughout its supply chain. LMC Int'l, The Economic Impact of the Biodiesel Industry on the U.S. Economy 2 (2019), https://bit.ly/3fshm6S (estimating job creation as of August 2019). Every 500 million gallons of biomass-based diesel generates a $3.4 billion overall economic impact, including about $500 million in wages paid. *Id.* at 8–10. And 500 million gallons is just a quarter of the biomass-based diesel demand that has been destroyed by small-refinery exemptions between 2016 and 2018, which means that the two billion-gallon reduction in biomass-based diesel demand as a result of small-refinery

exemptions in those years likely caused around $13 billion in economic impacts and $2 billion in lost wages.

Moreover, unlike petroleum fuels, biomass-based diesel production supports the income of farmers across the country. That impact is amplified because soybean oil and other biomass-based diesel feedstocks generally are co-products—that is, farmers grow crops for one purpose (like feeding animals) and use the co-product oils for fuel. As a result, farmers receive more value for their crops, while simultaneously decreasing the prices of the meal portion of those crops. For example, because U.S. livestock farmers rely on soybean meal as a key source of animal feed, biomass-based diesel production has saved U.S. livestock farmers between $5.9 and $11.8 billion from 2006 to 2015. Informa Economics, Impact of the U.S. Biodiesel Industry on the U.S. Soybean Complex and Livestock 3 (March 2015), https://bit.ly/3u2RrH8. Just like the employment and other economic benefits of biomass-based diesel, those benefits for farmers have been limited by small-refinery exemptions.

## II. The Eventual Phase-Out Of Small-Refinery Exemptions Will Not Cause The Severe Harms Petitioners And Their Amici Claim

Petitioners and their amici claim that they will suffer "financial ruin" if this Court affirms the decision below.

CountryMark Br. 2; see also Pet. Br. 44–46. Those asserted harms are grossly exaggerated.[6]

Regardless, there are a variety of mechanisms in the RFS that allow refiners to readily comply with their RFS obligations without suffering serious financial detriment. The proof is in the pudding—Petitioners themselves complied with the RFS for years before their 2017 windfall.

**A. Refiners Can Blend Renewable Fuels**

Refiners can satisfy their RFS obligations by blending renewable fuels with their products. Amici and Petitioners suggest that they face difficulties doing so because they are small, but those difficulties are overstated or simply incorrect. Biomass-based diesel can be blended using relatively inexpensive equipment or even "splash blended" directly in trucks transporting fuels. Indeed, a large portion of biomass-based diesel is blended by truck stops and other fuel retailers, which are far from highly capitalized. David W. DeRamus & Collin Cain, Bates White Econ. Consulting, Biodiesel Distribution in the U.S. and Implications for RFS2 Volume Mandates 17–19, 23 (2016), https://bit.ly/3fhZwDB.

For example, amicus CountryMark has blended biodiesel since 2006, and indeed, on its own account, "is considered a leader of biodiesel blending in the State of

[6] Before promulgating changes to the RFS program in 2010, see 75 Fed. Reg. 14,670 (Mar. 26, 2010), EPA convened a Small Business Regulatory Enforcement Fairness Act ("SBREFA") panel that found that "all directly regulated small entities would have compliance costs that are less than one percent of their sales over the life of the program" and that any negative impact would decrease over time. *See* 84 Fed. Reg. 36,762, 36,807 (July 29, 2019). Because the actual proposed renewable volume obligations for 2020 are substantially less than the statutory volumes considered by the SBREFA panel when it reached this conclusion, the compliance costs for small businesses going forward are necessarily minimal.

Indiana." CountryMark Br. 9. CountryMark nevertheless asserts that it is difficult to blend renewable fuel in sufficient quantities to meet its RFS obligations because its customers rely largely on diesel fuel and allegedly prefer petroleum diesel to biomass-based diesel. CountryMark Br. 10–11. But that ignores a number of ways in which biomass-based diesel can be readily absorbed into the market. Biodiesel legally can be used in any blend level, from 1 percent to 100 percent, in existing diesel engines. 77 Fed. Reg. 59,458, 59,466 (Sept. 27, 2012). Some automobile manufacturers only warrant their engines for certain blends of biodiesel, but more than 90 percent of manufacturers in the medium- and heavy-duty truck market (which accounts for almost all diesel fuel consumption) support use of up to 20 percent biodiesel blends. And truck stops and other fuel retailers around the country have pumps and other infrastructure to distribute biodiesel blends.

CountryMark's assertion that it "can only sell approximately 2.5% biodiesel," CountryMark Br. 11, therefore rings hollow. The only reason CountryMark posits for why its customers might not accept blend levels warranted for use in the vast majority of diesel engines is that biodiesel "does not work as well in the winter." *Id.* at 10. CountryMark is regurgitating outdated science. In the early years of the RFS, some questioned biodiesel's cold-weather performance, but since 2012, technological developments in biodiesel processing have resolved those issues. Public fleets in cold-weather states like Massachusetts and New York now use biodiesel blends year-round, and a 2016 study on biodiesel use in Minnesota found no user reports of issues with biodiesel during winter months. Kevin Hennessy, Minn. Dep't of Agric., Report to the Legislature: Annual Report on Biodiesel 8 (2016), https://bit.ly/2QLBQNS.

Moreover, as CountryMark acknowledges, there are no obstacles to customer acceptance of *renewable* diesel. CountryMark Br. 11. Renewable diesel is generated from renewable feedstocks using a different chemical process than biodiesel production, and, as a result, it is chemically indistinguishable from petroleum diesel. Renewable diesel production has grown rapidly in recent years as additional facilities have invested in renewable diesel production infrastructure. See EPA, *Public Data for the Renewable Fuel Standard*, https://bit.ly/3m6oW8T (last visited Mar. 31, 2021). CountryMark asserts that retrofitting its facility to generate renewable diesel would be prohibitively expensive given its financial condition, CountryMark Br. 11–12, but the substantial investments it describes are what would be needed to *produce* renewable diesel. Renewable diesel can be *blended* with petroleum fuels (which satisfies RFS compliance obligations) using much less expensive equipment.

And even if it is true that CountryMark lacks the resources to invest in equipment to produce renewable diesel, other small refineries have been able to do so. Notably, Petitioner HollyFrontier recently sought a permit to convert its Cheyenne refinery—*one of the refineries at issue in this case*—to produce renewable diesel. Margaret Austin, *HollyFrontier Seeking Permit, Public Comment for Pivot to Renewable Diesel*, Wyo. Business Report (Feb. 5, 2021), https://bit.ly/3cr43BN. HollyFrontier's plans to generate renewable diesel at one of the very facilities at issue here belies its contention that RFS compliance is "too expensive for small refineries to stay in business." Pet. Br. 10. Once HollyFrontier is generating renewable diesel at its Cheyenne facility, it will become a major beneficiary of the RFS program that is able to supplement its income by selling the credits it generates to other refiners and importers.

To the extent CountryMark's issue with biomass-based diesel blending is simply its perception of a lack of consumer demand, CountryMark Br. 10, that is no reason to excuse CountryMark from compliance with the RFS program. On the contrary, the RFS was designed to "*create* demand pressure to increase consumption." *Ams. for Clean Energy*, 864 F.3d at 710 (internal quotation marks omitted) (emphasis added). The "continued pressure" of the RFS will "tend to solve" the "want of a market" for renewable fuels by creating an incentive for blending and using renewable fuel that the market can then distribute efficiently. *Am. Petroleum Inst.* v. *EPA*, 706 F.3d 474, 481 (D.C. Cir. 2013). Because there are no chemical or physical obstacles to using biomass-based diesel in existing engines, consumers will use it if refiners blend it.

### B. Refiners Can Pass On The Costs Of RINs And Can Take Advantage Of Other Compliance Flexibilities

Any refiners that are truly unable to blend renewable fuels have another option: they can purchase credits known as Renewable Identification Numbers, or "RINs", from others who have produced or blended renewable fuel. Petitioners and their amici claim that purchasing RINs is a disproportionate financial burden. See, *e.g.*, Small Refineries Coalition Br. 13. But refiners can—and indeed EPA expects them to—pass on the costs of those credits to their customers. EPA itself has acknowledged that "[m]erchant refiners, who largely purchase separated RINs to meet their RFS obligations," are "recovering these costs in the sale price of their products." Dallas Burkholder, EPA, Office of Transportation and Air Quality, A Preliminary Assessment of RIN Market Dynamics, RIN Prices, and Their Effects 3 (2015), https://bit.ly/3w9xnEK; see *id.* at 2 ("In order to recover the cost of purchasing RINs … obligated parties are expected to increase the selling price of the petroleum

products they produce."); see also 85 Fed. Reg. at 7,067–68 (reaffirming these findings).

The Small Refineries Coalition argues that market dynamics prevent small refiners from passing on RIN costs in practice. Small Refineries Coalition Br. 3, 16–17. But that argument has been repeatedly rejected by EPA and courts of appeals. See *Alon Ref. Krotz Springs*, 936 F.3d at 649; *Am. Fuel & Petrochemical Mfrs.* v. *EPA*, 937 F.3d 559, 581 (D.C. Cir. 2019). EPA has appropriately relied on analyses showing a difference between fuel produced for domestic consumption and fuel produced for export that can only be explained by refiners passing on RIN costs, and thus has concluded that "(obligated) refiners do not pay excess costs." *Alon Ref. Krotz Springs*, 936 F.3d at 649. And while the Small Refineries Coalition contends that "large refiners *make money from the RFS*" because they can blend enough renewable fuel to meet or exceed their RFS obligations and then can sell excess RINs on the market, Small Refineries Coalition Br. 16–17, EPA has accurately observed that integrated refiners that blend renewable fuels receive no such "windfall": if those refiners sell RINs separately from finished fuel, the market dictates that they sell the RIN-less fuel at a loss. *Alon*, 936 F.3d at 649–50.

Moreover, several flexibilities in the statute and EPA's implementing regulations facilitate compliance with the RFS. For example, if refiners do not acquire sufficient RINs to satisfy their obligation in a particular year, they can carry a deficit as long as they satisfy their obligation the following year. 42 U.S.C. § 7545(o)(5)(D). And if refiners have excess RINs in a particular year, they can carry over those credits to the following year and use them to meet up to 20 percent of the next year's requirement. 40 C.F.R. § 80.1427(a)(5). Finally, there are several waiver authorities in the statute that allow EPA to lower

volume requirements when required by economic or other conditions. See 42 U.S.C. § 7545(o)(7).

Tellingly, Petitioners, their amici, and other refiners like them complied with the RFS for years before EPA granted additional small-refinery exemptions beginning in 2017. During those years, they did not go bankrupt, nor were there any other dire consequences for refiners or local economies. There is thus no reason to believe that affirmance of the decision below—and the return of small-refinery exemptions to pre-2017 levels—would have the severe consequences that Petitioners and their amici claim.

Finally, it also bears noting that small-refinery exemptions have historically been granted for the benefit of "small refineries" that are in fact owned by large multinational corporations. See Jarrett Renshaw & Chris Prentice, *Exclusive: Chevron, Exxon seek "small-refinery" waivers from U.S. biofuels law*, Reuters (April 12, 2018), https://reut.rs/31uYwnL. For example, in the Proposed Rule setting forth renewable fuel volumes for 2020, EPA indicated that it had identified only 9 entities in the United States that qualify as "small refiners,"[7] and explained that these entities own a total of 11 refineries subject to the RFS, all of which are "small refineries" under the statutory definition.[8] 84 Fed. Reg. at 36,807. But EPA has

[7] EPA regulations provide certain exemptions for "small refiners," which are refiners that produced transportation fuel in 2006; employed an average of no more than 1,500 people for all subsidiary companies, all parent companies, all subsidiaries of the parent companies, and all joint venture partners; and had a corporate-average crude oil capacity less than or equal to 155,000 barrels per day in 2006. 40 C.F.R. § 80.1442(a).

[8] The Clean Air Act defines "small refinery" as "a refinery for which the average aggregate daily crude oil throughput for a calendar year … does not exceed 75,000 barrels." 42 U.S.C. §7545(o)(1)(K).

granted exemptions to many more than 11 small refineries each year. Specifically, as EPA noted, "[t]o date, EPA has adjudicated petitions for exemption from 35 small refineries for the 2017 RFS standards ([only] 10 of which are owned by a small refiner)." *Ibid.* In fact, EPA granted all 35 of those petitions—and by EPA's admission 25 of those petitions relate to refineries that are too large to be considered small refiners. EPA, *RFS Small Refinery Exemptions, Table 2: Summary of Small Refinery Exemption Decisions Each Compliance Year*, https://bit.ly/3uazBSu (last visited March 31, 2021).

EPA's continued use of small-refinery exemptions for the benefit of "small refineries" owned by large multinational corporations harms many more small businesses than it aids. As detailed above, hundreds of legitimate small businesses rely on the RFS program to spur demand for domestic biofuels. But granting small-refinery exemptions without ever requiring the industry to fully make up exempt volumes dramatically undermines demand for biofuels. And the benefits of the reduction in demand for renewable fuels caused by extensive small-refinery exemptions inure to the large businesses that received the majority of those exemptions, while its adverse consequences harm the small businesses that benefit from the RFS and are an integral component of the biofuels economy. The Court should affirm the decision below to bring the RFS program back into balance.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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