

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

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF OF
COUNTRYMARK REFINING AND
LOGISTICS, LLC AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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November 12, 2020

**MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF
IN SUPPORT OF PETITIONERS**

Pursuant to Rule 37.2(b), Countrymark Refining and Logistics, LLC (“CountryMark”) respectfully requests leave to submit a brief as *amicus curiae* in support of the petition for writ of certiorari filed by Petitioners HollyFrontier Cheyenne Refining, LLC, HollyFrontier Refining & Marketing, LLC, HollyFrontier Woods Cross Refining, LLC, and Wynnewood Refining Co., LLC. Pursuant to Rule 37.2(a), CountryMark timely notified all parties’ counsel of its intent to file this brief more than 10 days before the due date. Petitioners and Respondent United States Environmental Protection Agency consented to the filing of this brief. Respondents Renewable Fuels Association, American Coalition for Ethanol, National Corn Growers Association, and National Farmers Union declined consent to file this brief.

CountryMark offers a unique perspective to aid the Court in evaluating the petition for certiorari, especially with respect to the practical implications for the Tenth Circuit’s decision. Founded in 1919, CountryMark is a farmer-owned cooperative that has grown to one of the largest agriculture cooperatives in the nation, and it is recognized as a leader in the distribution of biodiesel and ethanol. It is the only farmer-owned integrated oil company in the United States. CountryMark has a significant interest in this appeal because the Tenth Circuit’s decision threatens financial ruin for CountryMark, and as the certiorari petition describes, that will in turn significantly harm the rural regions in which CountryMark operates.

There are at least two respects in which CountryMark’s perspective is unique among even small refineries. To begin with, even without federal requirements,

CountryMark has long supported renewable fuels, and it has invested in infrastructure that even today could meet the volume requirements for renewable fuels if there were sufficient customer demand for those fuels. That is unsurprising given that the cooperative's owners, and many of its customers, are farmers.

Moreover, CountryMark has never had a request for the small refinery exemption at issue here denied. The only period in which it did not receive an exemption was a period where the EPA was applying an incorrect standard that precluded CountryMark's eligibility, which standard was overturned in another Tenth Circuit case in 2017. However, now that another panel of the Tenth Circuit has introduced a new requirement for continuous receipt of exemptions, the Tenth Circuit's most recent decision means that CountryMark is no longer eligible, which threatens its economic viability even though CountryMark is precisely the sort of refinery Congress meant to protect with the small refinery exemptions.

Because CountryMark's perspective will likely be helpful to the Court in evaluating the petition for certiorari, the Court should grant this motion for leave.

Respectfully submitted,

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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 discussed in the certiorari petition, 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, 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

¹ Counsel for all parties received notice of CountryMark’s intent to file this brief more than 10 days before the deadline to file the brief. Because some respondents did not consent to CountryMark filing this brief, CountryMark has moved for leave to file 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.

income to the 40,000 royalty owners in the Illinois Basin. Its products are 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 (“RFS”). 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

The certiorari petition describes 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.” Cert. Pet. p.3. Petitioners are correct. While the certiorari petition focuses primarily on the impact to small refineries within the Tenth Circuit, CountryMark submits this brief to illustrate that 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.

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 simply 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 2003 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

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>.

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 unique challenges to increasing renewable fuels. 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 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.

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/>.

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 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

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.”), <https://www.eia.gov/tools/faqs/faq.php?id=27&t=10#:~:text=E10%20is%20gasoline%20with%2010,up%20to%2085%25%20fuel%20ethanol> (last visited Nov. 10, 2020).

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> (last visited Nov. 10, 2020).

⁸ U.S. EPA Press Office, *EPA Delivers on President Trump’s Promise to Allow Year-Round Sale of E15 Gasoline and Improve*

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 gallon⁹. In addition, most members' retail facilities are located in rural areas where gasoline sales are less than a half million gallons per year.

Third, demand remains low for higher 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

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 <https://www.omegawv.com/faq/140-how-much-money-do-businesses-make-on-fuel-purchases.html> (last visited Nov. 10, 2020).

gasoline, depending on the ethanol content. Regular gasoline typically contains about 10% ethanol.”).¹⁰ The retail economics therefore do not support the investment 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.

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. And even then, CountryMark was only able to start that program because of SREs 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, CountryMark will need to spend that money on RFS compliance.

Finally, SREs enable RINs to be unretired and sold back into the RIN markets, which provides 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 draw on the ethanol-related RIN (referred to as “D6 RINs”) supply, leading to decreased liquidity and

¹⁰ <https://www.fueleconomy.gov/feg/ethanol.shtml> (last visited Nov. 10, 2020).

instability in that RIN market by 2022. Indeed, the market is already reflecting this—with fewer D6 RINs, their price has increased by roughly 500% from their low point over the last 12 months. *See* U.S. EPA, *RIN Trades and Price Information*.¹¹ As a result, the supply of D6 RINs will be insufficient for the industry 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 2003, and it is considered a leader of biodiesel blending in the State of Indiana.¹² As would be expected of a farmer-owned cooperative, its members and their customers require more diesel fuel than gasoline. As such, 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.

¹¹ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information> (last visited Nov. 10, 2020).

¹² 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>; *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>.

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 can only sell approximately 2.5% biodiesel on an annual average in all diesel fuel.

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.

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 instability in the D4 and D5 RIN prices by 2021. Again, the market has already begun to react, as D4 and D5 RIN prices have

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>.

increased by around 85% from their low point over the last 12 months. *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. THE TENTH CIRCUIT'S DECISION THREATENS FINANCIAL RUIN FOR COUNTRYMARK.

With the annual obligation continuing to increase without a corresponding increase in customer demand for renewable fuels, the only way CountryMark can keep up with the requirements is to purchase RINs. The combination of increasing obligations and increasing RIN prices makes continued compliance unsustainable without SREs. Yet, the Tenth Circuit's decision makes those SREs unavailable to refineries like CountryMark because there were years in which they did not previously request an SRE.

Beyond the fact that Congress never imposed a requirement for continuous exemptions, CountryMark's own SRE history illustrates why that requirement would be flawed as a matter of policy. 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 May 2014 Addendum to the 2011 Department of Energy Study would cause CountryMark to

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

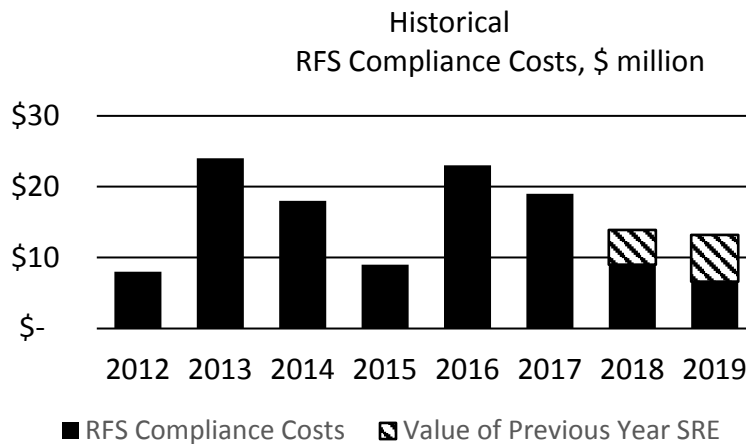
receive a score below 1.0 for the viability index which, in turn, would result in the EPA denying the request for an extension. See U.S. Dep't of Energy, *Addendum to the Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship* (May 2014), available at <https://www.epa.gov/sites/production/files/2016-12/documents/rfs2-small-refin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

This changed in 2017 when another panel in the Tenth Circuit invalidated the EPA's methodology. *Sinclair Wyoming Ref. Co. v. United States Env'tl. 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, the 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.

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.

To illustrate further, the following graph provides CountryMark's annual RFS compliance costs from 2012 through 2019. 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 2019 would have risen to \$17.3 million.

However, CountryMark was granted SREs in the 2017 and 2018 compliance years. These were realized in 2018 and 2019 with the value of the SRE being reflected in the last two bars 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 2019 compliance costs to \$14.3 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 the certiorari petition describes—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.

Finally, in 2020, the higher RFS costs that have plagued CountryMark since 2015 have become even more acute in light of the COVID-19 pandemic and related economic downturn. The dramatic nationwide decline in demand for transportation fuel is significantly affecting CountryMark. For a period, the company reduced the refinery crude rate to its minimum stable operating levels. After averaging a crude rate of 30,179 barrels per day from January 1 through March 16, CountryMark reduced refinery crude rate by an average of 7,800 barrels per day from March 17 through May 31, a nearly 26% reduction. The economic impact of 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.

CONCLUSION

Before the Tenth Circuit's decision in this case, CountryMark has never been denied an SRE. Each time it applied, the 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 the 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 nine years after the fact.

The petition for a writ of certiorari should be granted.

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