

No. 20-472

IN THE

Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, et al.,

Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, et al.,

Respondents.

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

**MOTION FOR LEAVE TO FILE
BRIEF AND *AMICUS CURIAE* BRIEF OF
THE AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS IN SUPPORT OF
PETITIONERS**

RICHARD MOSKOWITZ	MARK W. DELAQUIL
TYLER KUBIK	ANDREW M. GROSSMAN
AMERICAN FUEL &	<i>Counsel of Record</i>
PETROCHEMICAL	CHRISTOPHER H. MARRARO
MANUFACTURERS	CORY N. BARNES
1800 M Street, NW,	BAKER & HOSTETLER LLP
Ste. 900 North	1050 Connecticut Ave., N.W.
Washington, D.C. 20036	Washington, D.C. 20036
(202) 844-5474	(202) 861-1697
rmoskowitz@afpm.org	agrossman@bakerlaw.com

Counsel for the Amicus Curiae

MOTION FOR LEAVE TO FILE
***AMICUS CURIAE* BRIEF**

Pursuant to Supreme Court Rule 37.2(b), the American Fuel & Petrochemical Manufacturers (AFPM) respectfully moves for leave to file the accompanying *amicus* brief in support of Petitioners. As required under Supreme Court Rule 37.2(a), all parties were timely notified of AFPM's intent to file this *amicus* brief. Petitioners consented, as did Respondent Environmental Protection Agency. Respondents the Renewable Fuels Association, American Coalition for Ethanol, National Corn Growers Association, and National Farmers Union did not consent.

The Petition for Certiorari involves a question of paramount importance and consequence for the small refineries that produce transportation fuels used by countless citizens and businesses across the United States. AFPM's *amicus* brief explains how the court's decision below upends a carefully balanced statutory scheme designed to protect these refineries, while simultaneously creating untenable market conditions and disparate adverse effects for small refineries and communities already reeling from the ongoing pandemic. It also sets forth textual arguments and relevant congressional history overlooked by the court below. AFPM respectfully submits that this analysis would inform the Court's consideration of the question presented by the Petition.

As the leading trade association for the domestic refinery industry, AFPM's interest in this case is advocating in support of the small refineries that will be irreparably harmed, and likely forced out of the marketplace altogether, if the decision below stands.

For the foregoing reasons, the motion should be granted.

Respectfully submitted,

RICHARD MOSKOWITZ
TYLER KUBIK
AMERICAN FUEL & PET-
ROCHEMICAL
MANUFACTURERS
1800 M Street, NW,
Ste. 900 North
Washington, D.C. 20036
(202) 844-5474
rmoskowitz@afpm.org

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
CHRISTOPHER H. MARRARO
CORY N. BARNES
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

NOVEMBER 2020

No. 20-472

IN THE

Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, et al.,

Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, et al.,

Respondents.

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

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

RICHARD MOSKOWITZ
TYLER KUBIK
AMERICAN FUEL &
PETROCHEMICAL
MANUFACTURERS
1800 M Street, NW,
Ste. 900 North
Washington, D.C. 20036
(202) 844-5474
rmoskowitz@afpm.org

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
CHRISTOPHER H. MARRARO
CORY N. BARNES
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for the Amicus Curiae

TABLE OF CONTENTS

INTEREST OF THE *AMICUS CURIAE*1
INTRODUCTION AND SUMMARY OF
ARGUMENT.....2
ARGUMENT3
I. The Question Presented Is Important and
Requires Review.....3
A. Congress Understands the Importance of
Small Refineries and Intended to Shield
them from Disproportionate Economic Harm
on an Ongoing Basis3
B. The Decision Below Threatens Small
Refineries and the Communities that
Depend on Them9
C. The Decision Below Upends the RFS
Program’s National Uniformity, and Creates
an Unequal Playing Field for Small
Refineries 15
D. The Decision Below Undermines the RFS
Program.....17
II. The Decision Below Is Obviously Wrong18
CONCLUSION.....25

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Astoria Federal Savings & Loan Association v. Solimino</i> , 501 U.S. 104 (1991).....	19
<i>Central Bank of Denver v. First Interstate Bank</i> , 511 U.S. 164 (1994).....	21
<i>Field v. Mans</i> , 157 F.3d 35 (1st Cir. 1998)	19
<i>Renewable Fuels Association v. United States EPA</i> , 948 F.3d 1206 (10th Cir. 2020).....	18, 21, 24
<i>Sinclair Wyoming Refining Co. v. United States EPA</i> , 887 F.3d 986 (10th Cir. 2017).....	6
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2003).....	19
<i>United States v. Principie</i> , 531 F.2d 1132 (2d Cir. 1976)	19
 Statutes	
33 U.S.C. § 1342	22

42 U.S.C. § 7545 passim

Other Authorities

161 CONG. REC. H9693 (daily ed. Dec. 17, 2015).....	24
77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012).....	6, 16
80 Fed. Reg. 77,231, 77,511 (Dec. 14, 2015).....	16
85 Fed. Reg. 7016.....	17
CONG. RESEARCH SERVS., THE RENEWABLE FUEL STANDARD (RFS): FREQUENTLY ASKED QUESTIONS ABOUT SMALL REFINERY EXEMPTIONS (SRES) (March 2, 2020)	4
DEPT. OF ENERGY, SMALL REFINERY EXEMPTION STUDY: AN INVESTIGATION INTO DISPROPORTIONATE ECONOMIC HARM (March 2011).....	5, 6
Elliot Blackburn, <i>Marathon Petroleum to shut two US refineries: Update</i> , ARGUS MEDIA (Aug. 3, 2020).....	12
Erwin Seba & Laura Sanicola, <i>Oil Refiners Face Reckoning as Demand Plummets</i> , REUTERS (Apr. 2, 2020)	10

<i>Extend</i> , Webster’s Third New International Dictionary (1986)	20
<i>Extension</i> , BLACK’S LAW DICTIONARY (11th ed. 2019)	20
<i>Extension</i> , Cambridge Online Dictionary.....	20
<i>Extension</i> , Lexico Online Dictionary	20
<i>Extension</i> , Merriam-Webster Online Dictionary.....	19
Kelly Tyko, <i>How Much is Gas? Prices Continue to drop due to coronavirus. Here's where gas is selling for under \$1.</i> , USA TODAY (Apr. 18, 2020)	10
Letter from Brian J. Zolkos et al. to President Trump (Aug. 24, 2020).....	11
Letter from Oklahoma Governor Kevin J. Stitt to EPA Administrator Andrew Wheeler (Mar. 2, 2020)	13
Letter from Senator John Barrasso et al. to EPA Administrator Andrew Wheeler (May 19, 2020).....	17
Letter from Senator John Barrasso et al. to President Trump (Feb. 27, 2020).....	8

Letter from Utah Governor Gary R. Herbert to President Trump (March 5, 2020).....	14
Letter from Wyoming Governor Mark Gordon to President Trump (Feb. 28, 2020).....	13
Overview of Small Refinery Exemptions Data (Table 2)	2, 7
Press Release, Env'tl. Prot. Agency, EPA Takes Action to Protect Integrity of the Renewable Fuel Standard Program, Support American Farmers (Sept. 14, 2020)	8
Robert Brelsford, <i>Marathon</i> <i>Permanently Idles Two US</i> <i>Refineries</i> , OIL & GAS J. (Aug. 3, 2020).....	12
Rebecca Elliot, <i>Gasoline Is Cheap This</i> <i>July Fourth. Fuel Retailers Aren't</i> <i>Complaining</i> , WALL ST. J. (July 4, 2020).....	11
S. REP. NO. 114-281 (2016).....	8, 24

Shalini Nagarajan, <i>Oil Hits Five-Month Lows After New Lockdowns in Europe and US COVID-19 Cases Trigger 'Fire-Sales,' but the Market is Still Far Off from Black April,</i> BUS. INSIDER (Nov. 2, 2020).....	10
Stephanie Kelly, <i>U.S. Gasoline Refining Profits Slump to 2008 Levels Amid Coronavirus Fears,</i> REUTERS (Mar. 16, 2020).....	11
<i>This Week in Petroleum,</i> ENERGY INFORMATION ADMINISTRATION (Sep. 2, 2020).....	10
U.S. ENERGY INFO. ADMIN., REFINERY CAPACITY REPORT 38-43 (June 2020)	passim

INTEREST OF THE *AMICUS CURIAE*¹

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

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

¹ Pursuant to Rule 37.2(a), all parties received at least 10 days' notice of the *amicus curiae's* intent to file this brief. In accordance with Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted the Clean Air Act’s Renewable Fuel Standards program, it specifically exempted all small refineries altogether for several years and authorized the Environmental Protection Agency to issue additional small refinery exemptions (SREs) “at any time” thereafter on a showing of disproportionate economic hardship. *See* 42 U.S.C. § 7545(o)(9)(A)-(B). In this way, Congress recognized that small refineries often lack the financial resources, infrastructure, and economies of scale needed to comply with the RFS program’s general mandate that fuel manufacturers blend renewable fuels (e.g., ethanol) into their products or purchase credits known as “Renewable Identification Numbers” (RINs) on the open market. *See id.* at § 7545(o)(5). Following Congress’s instruction, EPA has regularly issued exemptions to small refineries that demonstrate disproportionate economic hardship, with 31 of the 56 total small refineries in the U.S. receiving exemptions for compliance year 2018.²

The decision below throws this well-functioning program into turmoil, holding that almost no refineries are eligible for exemptions irrespective of the economic hardship that RFS compliance would im-

² EPA has yet to issue any SREs for compliance years 2019 or 2020. *See* Overview of Small Refinery Exemptions Data (Table 2), EPA, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last updated Oct. 15, 2020).

pose on them, up to and including closure. In so doing, the Tenth Circuit eviscerated a central provision of the RFS program that Congress intended to protect small refineries and the communities they serve. Worse, it did so at a time that the entire fuel industry is struggling due to the COVID-19 pandemic, causing a double-blow to small refineries, some of which have already been forced to shut down. Given the importance of small refineries and the transportation fuel they produce, and the distorting impact of the decision below on fuel and RIN markets, review is required to restore Congress's carefully articulated statutory scheme, restore the national uniformity in the RFS program's operation that Congress intended, and prevent the destruction of an entire sector of the refining industry.

ARGUMENT

I. The Question Presented is Important and Requires Review

A. Congress Understands the Importance of Small Refineries and Intended to Shield them from Disproportionate Economic Harm on an Ongoing Basis

Small refineries are critically important to the nation's transportation fuel industry. “[S]mall refineries consist of about 40% of the nation's total number of operating refineries” and “comprise about 12% of total crude oil distillation capacity in the United

States.”³ But capacity figures alone understate their importance. In many states and communities that are located far from major fuel production and transportation hubs, small refineries provide the only economic source of transportation fuels for consumers and businesses. For example, the only refineries in Montana, North Dakota, Oklahoma, Utah, West Virginia, Wisconsin, and Wyoming are small refineries. In these rural areas, small refineries also provide much needed jobs, resources, and tax revenues for local communities.

Because of these refineries’ importance, Congress understood the RFS program’s potential to damage small refineries’ economic viability. Unlike larger refineries of transportation fuels, smaller refineries often lack the financial resources and appropriate infrastructure needed to blend renewable fuels cost-effectively. Most small refineries operate solely as manufacturers, and thus cannot easily spread RFS compliance costs across the entire supply chain or other lines of business like their larger counterparts. Moreover, many small refineries operate in rural areas and rely on pipelines to transport their fuel products to consumers—but those pipelines prohibit the transport of ethanol-blended fuels. As a result, small refineries often have no choice but to purchase

³ CONG. RESEARCH SERVS., THE RENEWABLE FUEL STANDARD (RFS): FREQUENTLY ASKED QUESTIONS ABOUT SMALL REFINERY EXEMPTIONS (SRES) 4 (March 2, 2020), <https://crsreports.congress.gov/product/pdf/R/R46244>.

RIN credits on the open market instead of blending renewable fuels to satisfy their RFS obligations.

In 2011, the Department of Energy—at Congress’s direction—confirmed that these inherent limitations can, in fact, create disproportionate economic hardships for small refineries “if blending renewable fuel...or purchasing [RIN credits] increases their costs of products relative to competitors to the point they are not viable, either due to loss of market share or lack of working capital to cover the costs of purchasing RINs.”⁴ The Department also identified numerous other factors that could create a disproportionate economic hardship for small refineries based on changing market conditions:

- When the costs of RFS compliance are in “lower refining margin environment[s]” that have “a material effect on small refinery profitability.”⁵
- Scenarios where RIN prices “might be substantially higher than their historical value[.]”⁶
- Scenarios where small refineries “must purchase RINs that are far more expensive than those that may be generated through blending[.]”⁷

⁴ DEPT. OF ENERGY, SMALL REFINERY EXEMPTION STUDY: AN INVESTIGATION INTO DISPROPORTIONATE ECONOMIC HARM vii (March 2011), <https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf>.

⁵ *Id.* at 22-23.

⁶ *Id.* at vii.

⁷ *Id.* at 2.

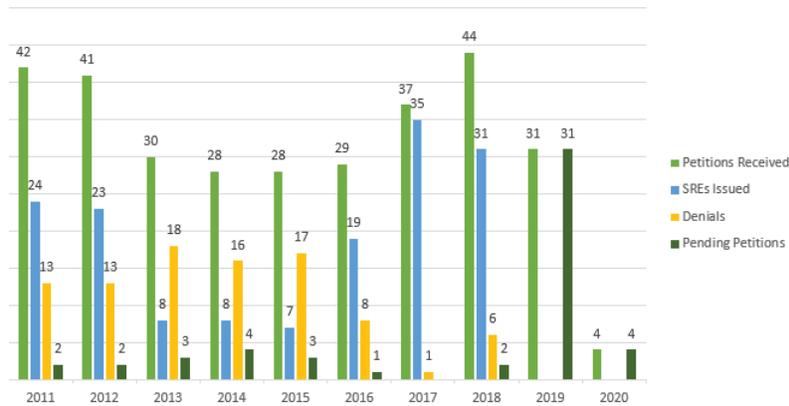
- When “compliance costs and characteristics” that are “unique to each small refinery” “make them more vulnerable to financial distress[.]”⁸

To account for these hardships, Congress created a safeguard for small refineries by authorizing EPA, in coordination with the Department of Energy, to grant SREs “at any time.” See 42 U.S.C. § 7545(o)(9)(B)(i); *Sinclair Wyoming Ref. Co. v. EPA*, 887 F.3d 986, 989 (10th Cir. 2017) (“Congress was aware the RFS Program might disproportionately impact small refineries because of the inherent scale advantages of large refineries and therefore created three classes of exemptions to protect these small refineries.”).

Since then, EPA has administered the RFS program by granting SREs on a case-by-case basis considering a small refinery’s competitive position in the marketplace and corresponding demonstration of disproportionate economic hardship in any given compliance year. See 42 U.S.C. § 7545(o)(9)(B)(i); 77 Fed. Reg. 1,320, 1,340 (Jan. 9, 2012), available at 2012 WL 32558 (“[S]eparate from the DOE determination, EPA may extend the exemption for individual small refineries on a case-by-case basis if they demonstrate disproportionate economic hardship.”).

⁸ *Id.* at 3.

FIGURE 1: Annual SRE Data for 2013–2019⁹



As shown in Figure 1, EPA granted a program low of only seven SREs in 2015. In the three following compliance years, however, EPA granted 19, 35, and 31 SREs, respectively. This implementation practice reflects EPA’s recognition that the economic circumstances facing small refineries vary substantially from year to year and that the burden of RFS compliance on these refineries is worsening. RFS mandates are continuously increasing and RIN prices are volatile; there may not be economic hardship when RINs cost a few pennies apiece, but the same is not true in years when the price of RIN credits has surged. Sensitivity to RFS compliance costs is ever changing, and EPA requires flexibility in the number of SREs it can grant on a yearly basis to implement § 7545(o)(9)(B) in a manner consistent with congressional intent.

⁹ Note 2, *supra*.

But such flexibility is impossible under the Tenth Circuit’s reading of § 7545(o)(9)(B). The decision below leaves no room for EPA to account for the variable market conditions raised in the 2011 DOE study that can impose a disproportionate economic effect on small refineries in some years but not others. In this way, the decision below directly frustrates Congress’s stated intention in authorizing RFS exemptions: “that small refineries remain both competitive and profitable.”¹⁰

If adopted nationwide, the court’s reasoning would effectively eliminate the SRE program altogether. EPA granted only seven SREs in 2015 and has refused to grant any “gap-filling” petitions to cover years in which small refineries did not previously apply for and receive an exemption,¹¹ and so only a small number of the nation’s small refineries could even be eligible for future SREs under the logic of the decision below. While the total number of small refineries that would remain eligible for exemptions is not publicly known, it is estimated to be as low as two.¹²

¹⁰ S. REP. NO. 114-281, at 70-71 (2016).

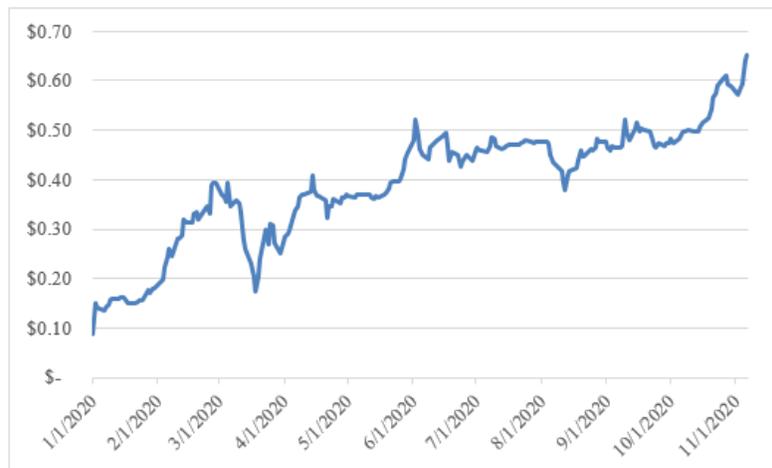
¹¹ Press Release, Env’tl. Prot. Agency, EPA Takes Action to Protect Integrity of the Renewable Fuel Standard Program, Support American Farmers (Sept. 14, 2020), available at <https://www.epa.gov/newsreleases/epa-takes-action-protect-integrity-renewable-fuel-standard-program-support-american-1>.

¹² Letter from Senator John Barrasso et al. to President Trump (Feb. 27, 2020) (available at <https://www.fuelingusjobs.com/library/public/Statements/2->

B. The Decision Below Threatens Small Refineries and the Communities that Depend on Them

As most small refineries cannot economically comply with their RFS obligations through renewable fuel blending alone, the decision below forces small refineries to rely substantially or even entirely on the RIN marketplace. But since that decision—and likely because of that decision—RIN prices have skyrocketed, hitting five times previous price levels.

FIGURE 2: 2020 Ethanol RIN Prices (as of Nov. 6, 2020)



At the same time, refiner profits are in free fall across the industry, due to the COVID-19 pandemic and resulting drop in demand for transportation

fuel. While RIN prices are soaring, gasoline prices have plummeted. “The coronavirus outbreak has cut global gasoline demand by 50% and jet fuel demand by 70%.”¹³ And in April of 2020, three states in the Tenth Circuit had gasoline prices under \$1 per gallon.¹⁴ The U.S. Energy Information Administration even noted that as of September 2, 2020, average gasoline retail prices were at their lowest seasonal levels since 2004, with gasoline consumption (measured by product supplied) at its lowest levels since 1974.¹⁵ And while fuel markets recovered somewhat during the summer months, recent spikes in COVID-19 cases globally have caused oil prices to drop once again.¹⁶

¹³ Erwin Seba & Laura Sanicola, *Oil Refiners Face Reckoning as Demand Plummet*, REUTERS (Apr. 2, 2020 12:05 AM), <https://www.reuters.com/article/us-health-coronavirus-refinery-runcuts/oil-refiners-face-reckoning-as-demand-plummet-idUSKBN21K0C8>.

¹⁴ Kelly Tyko, *How Much is Gas? Prices continue to drop due to coronavirus. Here's where gas is selling for under \$1.*, USA TODAY (Apr. 18, 2020), <https://www.usatoday.com/story/money/2020/04/18/gas-prices-2020-coronavirus-lowest-gasoline-prices-covid-19/5160056002/>.

¹⁵ *This Week in Petroleum*, ENERGY INFORMATION ADMINISTRATION (Sep. 2, 2020), https://www.eia.gov/petroleum/weekly/archive/2020/200902/incl udes/analysis_print.php.

¹⁶ Shalini Nagarajan, *Oil Hits Five-Month Lows After New Lockdowns in Europe and US COVID-19 Cases Trigger 'Fire-Sales,' but the Market is Still Far Off from Black April*, BUS. INSIDER (Nov. 2, 2020), <https://markets.businessinsider.com/news/stocks/oil-prices-europe-lockdowns-us-covid-cases-record-trigger-firesales-2020-11-1029752531>.

Moreover, losses from depressed fuel prices are borne most heavily by refineries. As both the *Wall Street Journal*¹⁷ and *Reuters*¹⁸ have recognized, refinery margins have tanked by as much as 95 percent or more in response to near-historic low wholesale prices of fuel. Small refineries, which are often unable to blend renewable fuels and instead must purchase currently-inflated RIN credits, are being hit hardest of all.

On top of these dismal market conditions, the decision below has, unsurprisingly, already proved too much to bear for multiple small refineries. In an August 24, 2020 letter from multiple small refinery executives to President Trump, it was noted that “[s]ince the COVID-19 crisis began, at least three small refineries have already permanently shut down while others face financial distress due to the historic downturn in demand and historically high RIN prices.”¹⁹ This includes the shutdown of Petitioner HollyFrontier’s Cheyenne, Wyoming, refinery

¹⁷ Rebecca Elliot, *Gasoline Is Cheap This July Fourth. Fuel Retailers Aren’t Complaining*, WALL ST. J. (July 4, 2020), <https://www.wsj.com/articles/gasoline-is-cheap-this-july-fourth-fuel-retailers-arent-complaining-11593855001>.

¹⁸ Stephanie Kelly, *U.S. Gasoline Refining Profits Slump to 2008 Levels Amid Coronavirus Fears*, REUTERS (Mar. 16, 2020), <https://financialpost.com/pmn/business-pmn/u-s-gasoline-refining-profits-slump-to-2008-levels-amid-coronavirus-fears-2>.

¹⁹ Letter from Brian J. Zolkos et al. to President Trump (Aug. 24, 2020) (available at <https://www.fuelingusjobs.com/library/public/Letters/SaveSmallRefineries-8-24-2020.pdf>).

and the indefinite idling of operations at Marathon's Gallup, New Mexico refinery—both small refineries within the Tenth Circuit.²⁰ There are also five refineries in Utah, all of which are small refineries, that are jeopardized by the decision below.²¹

Small refineries lack the means to offset these highly inflated costs of RFS compliance and current market realities in response to the Tenth Circuit's decision. And this hardship is not limited to just small refineries within the Tenth Circuit. The marketplace for RINs is national—skyrocketing RIN prices in response to the decision below must be borne by struggling small refineries everywhere in the U.S. on top of the crushing impacts caused by COVID-19.

Moreover, it is not just the small refineries themselves that are threatened by this string of economic blows. Numerous executive officials and Members of Congress from Tenth Circuit states have publicly called attention to how the decision below will likely

²⁰ Robert Brelsford, *Marathon Permanently Idles Two US Refineries*, OIL & GAS J. (Aug. 3, 2020), <https://www.ogj.com/refining-processing/refining/article/14180915/marathon-permanently-idles-two-us-refineries>; Elliot Blackburn, *Marathon Petroleum to shut two US refineries: Update*, ARGUS MEDIA (Aug. 3, 2020), <https://www.argusmedia.com/en/news/2128888-marathon-petroleum-to-shut-two-us-refineries-update>.

²¹ U.S. ENERGY INFO. ADMIN., REFINERY CAPACITY REPORT 38-43 (June 2020), available at <https://www.eia.gov/petroleum/refinerycapacity/refcap20.pdf>.

have devastating effects to communities that rely on the small refineries that support them:

- February 28, 2020 letter from Wyoming Governor Mark Gordon to President Trump: “Wyoming is home to five refineries that are disproportionately harmed by the RFS. In Wyoming, the refining and petrochemical industry employees nearly 10,000 individuals and contribute \$266 million dollars in local and state tax revenue.”²²
- March 2, 2020 letter from Oklahoma Governor Kevin Stitt to EPA Administrator Wheeler: “[S]everal entities that are vital to Oklahoma’s economy will be negatively impacted by this decision. Within the 10th Circuit alone, it is estimated that this decision will put nearly a dozen small refineries under severe financial stress and put many jobs at risk.”²³
- March 3, 2020 letter from Utah Governor Gary Herbert to President Trump: “Utah’s refineries are at the center of Utah’s thriving energy economy, providing hundreds of high-paying jobs and over a billion dollars annually to

²² Letter from Wyoming Governor Mark Gordon to President Trump (Feb. 28, 2020) (available at <https://www.fuelingusjobs.com/library/public/Letters/doc06080920200228141613.pdf>).

²³ Letter from Oklahoma Governor Kevin J. Stitt to EPA Administrator Andrew Wheeler (Mar. 2, 2020) (available at <https://www.fuelingusjobs.com/library/public/Letters/10th-Circuit-Court-Letter.pdf>).

Utah's economy. These refineries also provide a critical market for Utah's rural oil and gas producers."²⁴

The decision below also jeopardizes the financial well-being of numerous other states and communities outside of its jurisdiction that also depend on small refineries for sources of local fuel, jobs, and tax revenues. Manufacturers of transportation fuel in Montana, North Dakota, West Virginia, and Wisconsin also consist exclusively of small refineries, and thus small refineries represent 100 of the refining capacity and refining jobs in those states.²⁵ Montana alone has four refineries, all of which are small refineries that produce transportation fuel.²⁶ If the federal circuits with jurisdiction over these states adopt the Tenth Circuit's reasoning, or if the EPA does so on a nationwide basis, small refineries around the nation will face unprecedented and irreparable economic hardship, notwithstanding Congress's choice to enact a safeguard against just that.

In these ways, the decision below will continue to cause widespread uncertainty and volatility in the RIN market, and the small refineries and the communities where they are located will continue to

²⁴ Letter from Utah Governor Gary R. Herbert to President Trump (March 5, 2020) (available at <https://www.fuelingusjobs.com/library/public/Letters/Utah-Energy-Advisor-Support-of-RFS-Decision-Review-3-5-20.pdf>).

²⁵ See note 21, *supra*.

²⁶ *Id.*

bear the brunt of these untenable market conditions without any possibility of review.

C. The Decision Below Upends the RFS Program's National Uniformity, and Creates an Unequal Playing Field for Small Refineries

The decision below casts aside EPA's nationwide, uniform review criteria and creates an uneven playing field for small refineries based solely on their geographic location.

The Tenth Circuit is home to 11 small refineries that are potentially eligible for a SRE.²⁷ There are more small refineries in the Tenth Circuit than any other judicial circuit in the nation.²⁸ In fact, just *two* states in the Tenth Circuit (Wyoming and Utah, with four and five small refineries, respectively) comprise a substantial percentage of the nations' small refineries.²⁹ As there are no larger refineries in these states, Wyoming and Utah citizens and communities are uniquely reliant on the continued viability of these facilities. Under the decision below, however, these refineries are now subject to a novel regulatory scheme that places them at a severe competitive and economic disadvantage.

There is no indication that Congress intended the RFS program to operate in this way and be imple-

²⁷ See note 21, *supra*.

²⁸ See *id.*

²⁹ See *id.*

mented differently across the U.S. based on varying judicial decisions. EPA sets yearly renewable volume obligations (RVOs) for the nation as a whole, and the RIN market is not limited to certain geographic boundaries. But now, under the Tenth Circuit's decision, EPA must administer the RFS program and SRE petitions separately based on a small refinery's location, even though all refineries nationwide are subject to the same RVO metrics and the same volatility in the RIN market caused by one circuit's decision. This outcome is in stark contrast to a proper interpretation of the Clean Air Act, which requires both the availability of SREs for *all* small refineries and a single, uniform yearly standard so that obligated parties under the RFS program can have sufficient advanced notice and regulatory certainty. *See, e.g.*, 80 Fed. Reg. 77,231, 77,511 (Dec. 14, 2015) ("EPA believes the Act is best interpreted to require issuance of a single annual standard...thereby providing advance notice and certainty to obligated parties regarding their regulatory requirements. Periodic revisions to the standards...would be inconsistent with the statutory text, and would introduce an undesirable level of uncertainty for obligated parties."); 77 Fed. Reg. 1320, 1340 (Jan. 9, 2012) (same), available at 2012 WL 32558.

This arbitrary and disproportionate impact on Tenth Circuit refineries, and corresponding disruption to the RFS program's uniformity nationwide, should not stand.

D. The Decision Below Undermines the RFS Program

Restricting EPA's ability to grant SREs to small refineries within the Tenth Circuit jeopardizes EPA's administration of the entire RFS program. For 2020, EPA's calculation of the total renewable fuel volume obligations for the entire nation was based on a presumption that 770 million gallons would be exempted from the program via SREs.³⁰ This presumption included SREs expected to be issued to small refineries within the Tenth Circuit, which is home to 11 small refineries.³¹ But if EPA can no longer grant SREs to ineligible Tenth Circuit refineries (or even more ineligible small refineries if extended nationwide), then the entire foundation of the agency's 2020 RVO determination will be in doubt, and refineries will be left to comply with inflated RVO obligations that even EPA did not expect them to meet. In other words, EPA's 2020 RVO calculation is substantially undermined and frustrated by the decision below.

At the same time, that decision calls into question the legitimacy of every SRE the EPA has granted since 2015, to the extent those SREs were granted to a small refinery who did not maintain continuous

³⁰ See 85 Fed.Reg. 7016; Letter from Senator John Barrasso et al. to EPA Administrator Andrew Wheeler (May 19, 2020) (available at <https://www.fuelingusjobs.com/library/public/Letters/Senators-letter-5-19-20-jb-et-al-to-epa-pd.pdf>).

³¹ Note 21, *supra*.

exemptions. As discussed above, in the last few years alone, EPA has issued dozens of SREs to small refineries that would not be eligible under the logic of the decision below. This situation creates further uncertainty for small refineries nationwide.

II. The Decision Below is Obviously Wrong

By interpreting Section 7545(o)(9) to require an unbroken line of SREs for a refinery to remain eligible for future SREs, the decision below makes a hash of the statutory text.

Section 7545(o)(9) provides, first, that RFS obligations “shall not apply to small refineries” until a set date³² and, second, that “[a] small refinery may at any time petition the Administrator for an extension of [that] exemption...for the reason of disproportionate economic hardship.” 42 U.S.C. § 7545(o)(9)(A)-(B).

The decision below interpreted the word “extension” in section 7545(o)(9)(B)(i) to mean “an increase in length of time” or to “prolong, enlarge, or add to,” such that any break in a refinery’s exemption status renders it ineligible for further exemptions. 948 F.3d at 1245. But that interpretation is untenable, because it reads the words “at any time” out of the statute entirely. It is a cardinal rule of statutory interpretation that statutes should be construed “so as

³² After DOE’s 2011 study confirmed disproportionate economic hardships on small refineries, EPA applied the exemptions under subpart (A)(i) for an additional two years up to 2013, pursuant to § 7545(o)(9)(A)(ii)(II).

to avoid rendering superfluous” any statutory language. *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *see also Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2003). Yet that is precisely what the decision below did.

By far the better reading here is one that gives effect to all of the statutory language. What the court below overlooked is that the word “extension” need not, and often does not, denote unbroken continuity. For example, in *Field v. Mans*, the First Circuit noted that, absent definition, an “ordinary meaning” of the term “extension” in a statute can be “an offer to make available (as a fund or privilege).” 157 F.3d 35, 43 (1998). Likewise, in *United States v. Principie*, the Second Circuit found there was an “extension” of a previous authorization for a wiretap even though the original order had expired before the extension was granted, and even though the renewed authorization was amended to cover a new location. 531 F.2d 1132, 1142 (1976). The pinched interpretation of this word adopted by the decision below was not at all required.

Indeed, the same dictionaries cited by the court below recognize that “extension” is often used in ways that do not require unbroken continuity, but rather to refer to a grant or expansion of something to a new area. For example, Merriam-Webster’s leading alternative definition of “extension” is “an enlargement in scope or operation.” *Extension*, Merri-

am-Webster Online Dictionary.³³ Likewise, the Cambridge Online Dictionary states that “extension” can mean “an increase in the size or range of something.” *Extension*, Cambridge Online Dictionary.³⁴ And the Lexico Online Dictionary notes that an “extension” can mean “[a]n application of an existing system or activity to a new area.” *Extension*, Lexico Online Dictionary.³⁵

Moreover, *Webster’s Third* defines “extend” as “to make available (as a fund or privilege) often in response to an explicit or implied request; GRANT.” *Webster’s Third New International Dictionary* 804 (1986). Black’s Law Dictionary provides an alternative definition of “extension” as “[a] period of additional time to take an action, make a decision, accept an offer, or complete a task.” *Extension*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Given that the word “extension” readily encompasses non-continuous applications, the adoption by the court below of a narrow definition that defies the statutory text as a whole was obviously wrong.

Worse, that interpretation conflicts with Congress’s evident intention in establishing the exemption program: relieving small refineries from the

³³ Available at <https://www.merriam-webster.com/dictionary/extension> (last visited Nov. 10, 2020).

³⁴ Available at <https://dictionary.cambridge.org/us/dictionary/english/extension> (last visited Nov. 10, 2020).

³⁵ Available at <https://www.lexico.com/definition/extension> (last visited Nov. 10, 2020.)

“disproportionate economic impact” of RFS compliance. Congress defined the central requirement for obtaining an exemption as such hardship, 42 U.S.C. § 7545(o)(9)(B)(i), and it went on to identify the exemptions specifically as “hardship exemption[s].” Economic hardship of the sort addressed by the statute is not static, unchanging from year to year, which is precisely why Congress provided that small refineries could apply for exemptions “at any time.”

Confirming as much, where Congress sought to address the temporal aspects of extensions, it did so specifically, as in an adjacent provision providing for an earlier extension period “of not less than 2 additional years.” *Id.* at § 7545(o)(9)(A)(ii)(II). “Congress knew” how to impose temporal limitations on EPA’s exemption authority “when it chose to do so,” *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176–77 (1994), and it did not do so in its open-ended grant of authority to issue SREs, for the good reason that small refineries do not face the same economic hardships year after year. The decision below ascribes to Congress an understanding of energy markets that is not only ahistorical, but absurd.

To justify its novel construction of the statute, the court below posited that Congress’s intention may have been to “funnel[] small refineries toward compliance over time.” 948 F.3d at 1246. Even putting aside the conflicting “at any time” language, that supposition ignores that Congress regularly legislates what are commonly known as “anti-backsliding” requirements, including in the Clean Air Act, and that is not what it did here. *Compare* 42

U.S.C. § 7545(o)(9)(B)(i) *with* 33 U.S.C. § 1342(o)(1). If Congress wanted to impose an anti-backsliding rule with respect to RFS obligations, it could easily have done so. It did not.

The statutory language here, however, does not look anything like that. And that is because Congress understood RFS compliance costs for small refineries are not static and are not reasonably predictable. Neither are oil prices, fuel demand, small refinery profits, compliance budgets, and regional market conditions. For example, if a small refinery annually produces 200 million gallons of transportation fuel with an RVO of 10 percent and RIN prices around fifteen cents (\$0.15) per gallon (as was the case shortly before the Tenth Circuit’s decision in January 2020), RFS compliance costs for that year would be approximately \$3 million.³⁶ However, if RIN prices increase to around sixty cents (\$0.60) per gallon or higher (in line with current market prices³⁷), the same refinery’s compliance costs would *quadruple* to \$12 million or higher as a result. This rudimentary example demonstrates why a small refinery cannot simply be funneled into to complete RFS compliance over time, as there are too many economic variables changing each year.

Nor should small refineries be ineligible for economic hardship relief in response to circumstances, like the current global pandemic, that are unforesee-

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

³⁷ See Figure 2, *supra*.

able and out of their control simply because an exemption was not granted in prior years. Yet, under the Tenth Circuit's reasoning, those refineries must now weather even the most drastic changes in circumstances without receiving the economic hardship relief Congress intended. This result is untenable, effectively punishing small refineries (and perhaps even forcing them out of business altogether) for not receiving a SRE when market conditions were favorable.

As a result, the Tenth Circuit's overly restrictive interpretation of the statute is fundamentally at odds with how Congress has expected the EPA and DOE to administer SREs under the RFS program. For example, in 2015 the House of Representatives issued the following explanatory statement concerning EPA's proper issuance of SREs:

Under section 211(o)(9)(B) of the Clean Air Act, a small refinery may petition the [EPA] for an exemption from the Renewable Fuel Standard (RFS) on the basis that the refinery experiences a disproportionate economic hardship under the RFS [even if the refinery is profitable enough to cover the costs of compliance, since] profitability does not justify a disproportionate regulatory burden where Congress has explicitly given EPA authority, in consultation with the Secretary, to reduce or eliminate this burden.

161 CONG. REC. H9693, H10105 (daily ed. Dec. 17, 2015) (emphasis added). The Senate subsequently echoed this directive in 2016 when, in response to EPA’s denial of SREs to certain small refineries that remained profitable notwithstanding a disproportionate economic impact, it clarified that the denials were “inconsistent with congressional intent because [§ 7545(o)(9)(B)] does not contemplate that a small refinery would only be able to obtain an exemption by showing that the RFS program threatens its viability.” S. REP. NO. 114-281, at 70.

Congress has therefore reminded EPA on several occasions that it is “explicitly authorized...to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable. In the intensely competitive transportation fuel market, small entities cannot remain competitive and profitable if they face disproportionate structural or economic metrics...or other site-specific factors identified in DOE’s original 2011 Small Refinery Exemption Study Prepared for Congress.” *Id.* (emphasis added).

There is no support at all for the contrary view of the decision below that Congress intended the RFS program to be so “aggressive and market forcing”³⁸ as to jeopardize the economic viability of small refineries altogether. To the contrary, Congress directed the EPA to “ensure...small refineries remain competitive and profitable.”³⁹ If the Tenth Circuit’s decision

³⁸ 948 F.3d at 1247.

³⁹ Note 10, *supra*.

stands, however, Congress's mandate will be impossible.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

RICHARD MOSKOWITZ
TYLER KUBIK
AMERICAN FUEL & PETROCHEMICAL
MANUFACTURERS
1800 M Street, NW,
Ste. 900 North
Washington, D.C. 20036
(202) 844-5474
rmoskowitz@afpm.org

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
CHRISTOPHER H. MARRARO
CORY N. BARNES
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for the Amicus Curiae

NOVEMBER 2020