No. 20-472

IN THE

Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC, HOLLY-FRONTIER REFINING & MARKETING, LLC, HOLLY-FRONTIER 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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

The question presented is one of exceptional importance that warrants immediate review. The States of Wyoming, Louisiana, Ohio, Oklahoma, Texas, Utah, and West Virginia, as well as other amici, have confirmed the question's importance and that the Tenth Circuit's decision will have dire consequences not just for refineries, but for States, economies, communities, and individuals. Br. of *Amici Curiae* States of Wyoming et al. ("States Br.") 10–16; Br. of CountryMark Refining & Logistics LLC as *Amicus Curiae* ("CountryMark Br.") 11–14; *Amicus Curiae* Br. of American Fuel & Petrochemical Manufacturers ("AFPM Br.") 9–15.

Respondents contend that the lack of a circuit split counsels against granting the petition. But the Refineries asked the Court to grant the petition, not because of a circuit split, but because the Tenth Circuit "has decided an important question of federal law" that should be "settled by this Court." Sup. Ct. R. 10. Respondents have no response to the cases demonstrating that this Court grants certiorari "to resolve … issues, which concern the construction of a major federal statute," *United States* v. *Donovan*, 429 U.S. 413, 422 (1977).

The Federal Respondent does not even bother to defend the Tenth Circuit's misconstruction of the Renewable Fuel Standard's ("RFS") small-refinery exemption provision. And the Biofuels Coalition rests on *ipse dixit* or simply ignores the statute. Neither Respondent offers anything to diminish the importance of the question presented. As the petition explained and amici confirmed, the harm caused to small refineries, communities, and individuals by the Tenth Circuit's decision reinforces the exceptionality of the question presented. On that, Respondents simply turn a blind eye.

This case presents an ideal vehicle. The question presented is a threshold issue that determines whether a small refinery may receive a small-refinery exemption. The issue is cleanly presented here and is ripe for this Court's review. The Court should grant the petition.

I. THE EXCEPTIONAL IMPORTANCE OF THE QUESTION PRESENTED WARRANTS IMMEDIATE REVIEW.

a. Congress included the RFS's small-refinery exemption as a safety valve for small refineries throughout the life of the RFS program. See Pet. 12–17. The provision protects small refineries against the ever-increasing and often-onerous burdens the RFS can impose. However, the Tenth Circuit interpreted the term "extension" in 42 U.S.C. § 7545(o)(9)(B) far too narrowly, putting this exemption on the path to extinction. See Pet. 17–26. Certiorari is warranted because the decision below wreaks havoc on the small-refinery provisions of the RFS, the nation's small refineries, and the employees and communities they serve. Pet. 3.

Respondents critique the lack of a circuit split. See Fed. Opp. 10; Coalition Opp. 13. But, as the Refineries showed, a circuit conflict is not the only basis for granting certiorari. Sup. Ct. R. 10 (providing that certiorari may be appropriate when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").[1] Indeed, the Refineries cited several cases in

[1] The Biofuels Coalition accuses the Refineries of attempting to manufacture a circuit split. Coalition Opp. 13. The Refineries did no such thing. Rather, they pointed out where other federal circuits have rightly noted other applicable definitions of the term "extension." Pet. 19–20. The Refineries cited these cases to high-

which the Court granted certiorari to address an important issue of statutory construction. Pet. 3–4. Respondents have no answer to the fact that this Court has granted certiorari "to review the Court of Appeals' construction" of a statutory phrase, *SEC* v. *Zandford*, 535 U.S. 813, 818 (2002), or "to resolve … issues, which concern the construction of a major federal statute," *Donovan*, 429 U.S. at 422—precisely the situation presented here. The Tenth Circuit's construction of § 7545(o)(9)(B) did more than inaccurately read the small-refinery exemption. It was a wholesale rewrite of the program that violated congressional intent and that will harm the Nation's small refineries. And the RFS is a "major federal statute," *id.*, meant to address the nation's "energy independence and security." Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1492; see also Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501, 119 Stat. 594.

Respondents ignore that this Court grants certiorari to answer important questions of federal law. They do so even as the Federal Respondent concedes "that the question presented has important implications for" the RFS program. Fed. Opp. 13. In addition, the Federal Respondent does not defend the Tenth Circuit's reasoning. Instead, it dodges, suggesting that the decision below "does not violate" principles of statutory interpretation and rests on what the Tenth Circuit "perceived to be the purpose of the exemption-extension provision." *Id.* at 10–11. Yet, Federal Respondent agrees with the Refineries and other courts that—contrary to the decision below—the term "extension" has

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light the serious flaws in the Tenth Circuit's decision and to underscore why the question presented is one of exceptional importance.

multiple dictionary definitions and "that the word 'extend' can mean 'to make available.'" *Id.* at 11.

For its part, the Biofuels Coalition asserts that the question presented raises only "a discrete issue of statutory interpretation that does not implicate an important question of federal law." Coalition Opp. 16. As the petition and amicus briefs explain, this bald assertion is wrong. The Tenth Circuit's decision turns the small-refinery exemption on its head, and the ensuing damage to the RFS, refineries, communities, and individuals cannot be overstated. Pet. 24–33; States Br. 10–16; CountryMark Br. 11–14; AFPM Br. 9–15.

The Biofuels Coalition's defense of the decision is otherwise meritless. It excuses the lower court's failure to engage with alternative dictionary definitions of "extension," asserting that "'[e]xtension' as used in § 7545(o)(9)(B) can *only* mean 'to prolong, enlarge, or add to' the initial small refinery exemption, and cannot mean 'make available.'" Coalition Opp. 24 (citation omitted). This *ipse dixit* is unpersuasive. The statute's text, structure, and purpose prove that the small-refinery exemption provision is a safety valve that protects small refineries from disproportionate economic harm caused by the RFS program throughout the life of the program. Pet. 13–17. And the meaning of "extension" that makes sense of § 7545(o)(9)(B)'s text and structure is "to make available," not a continuous elongation. *Id.*

All of the Biofuels Coalition's arguments to the contrary rest on its flawed assumption—shared by the Tenth Circuit—that continuous exemptions are an essential feature of the provision. For example, the Coalition quotes the Tenth Circuit's conclusion "that 'ordinary definitions of "extension," along with common sense, dictate that the subject of an extension must be in existence before it can be extended.'" Coalition Opp.

24. As the Refineries demonstrated, that conclusion does not follow from the multiple meanings of "extension" and how that term fits into the small-refinery exemption provision. Pet. 18–19.

In response, the Biofuels Coalition inserts words into the text. It says that "§ 7545(o)(9)(B) does not authorize 'extension of *an* exemption,' it authorizes 'extension of *the* [initial temporary] *exemption under Subparagraph (A).*'" Coalition Opp. 25 (alteration in original). From the bracketed insertion, it concludes that the text "indicates continuity of the initial, temporary exemption." *Id.* This argument, however, ignores the statutory structure. As the Refineries explained, Congress intended the "temporary exemption" under subsection (A) to have effect beyond the initial period of the exemption. It indicated this purpose in two distinct ways. The exemptions' effects could apply during the bridge period for the two years following the exemption period, and beyond that as a safety valve whenever a small refinery faced disproportionate economic hardship. See Pet. 14–17; see also § 7545(o)(9)(A)–(B); 75 Fed. Reg. 14,670, 14,735–36 (Mar. 26, 2010) (explaining that EPA could "grant an extension … on a case-by-case basis"). Neither the statutory text nor its structure compels continuity.

The Biofuels Coalition also contends that the decision below "confirmed" certain features of the statute, including the continuity requirement. Coalition Opp. 14. The Biofuels Coalition argues that "extension" can only mean what the Tenth Circuit (wrongly) concluded: that the word "temporary" in § 7545(o)(9)(A)'s subtitle means a small refinery should no longer receive future exemptions after complying with its obligations once. *Id.* at 25–26. But the sole support for this assertion is a quotation from the decision below, which the Refineries showed was based on mistaken logic

and inconsistent with the statutory design. Pet. 22–24. RFS compliance is an annual obligation, and the statutory text includes the phrase "at any time" to make the exemption available to a small refinery experiencing disproportionate economic hardship in a given period.

The Biofuels Coalition also cites the D.C. Circuit's *Hermes* opinion, where the question presented here was not at issue. See *Hermes Consol., LLC* v. *EPA*, 787 F.3d 568 (D.C. Cir. 2015). The issue there was whether EPA properly considered certain economic factors related to a small refinery's exemption petition. See *id.* at 577. In dicta, the D.C. Circuit stated that the statute has "an eye toward eventual compliance," *id.* at 578, but that bare statement offers no support for the conclusion that a single year of compliance should foreclose future opportunities to petition for an exemption. The Biofuels Coalition and the Tenth Circuit nevertheless adopted this language. As explained by the Refineries and amici, this interpretation incorporates an extratextual view of the RFS, subverts Congress's intent, and will create ruinous consequences for small refineries and communities. See Pet. 23; States Br. 16–20; CountryMark Br. 11–14; AFPM Br. 9–15, 18–25.

Ultimately, Respondents offer nothing that diminishes the exceptional importance of the question presented. This Court often grants certiorari when lower courts misconstrue an important federal statute to render key provisions meaningless, and it should do so here.

b. The extraordinary harm the Tenth Circuit's decision will cause confirms that the question presented is an exceptionally important one. Pet. 27–32; States Br. 10–16; CountryMark Br. 11–14; AFPM Br. 9–15. Neither Respondent addresses that harm. Instead, they

minimize it as "indeterminate," Fed. Opp. 9, or "hypothesi[s]," Coalition Opp. 19. Nothing could be further from the truth, as the petition demonstrated and amici confirmed. Amici explained that small refineries will suffer immediate harm. See States Br. 1 ("This decision likely marks the beginning of the end for most small refineries."). In Wyoming and other states, small refineries are "keystone employer[s] in small communities" that provide high-paying jobs, critical tax revenue, and low-cost fuel. *Id.* at 1–2. These refineries—like the Refineries here—face increased compliance costs and decreased revenue, leading to potential shutdowns,[2] which cannot be ameliorated by the RFS under the Tenth Circuit's decision. See *id.* at 6–7, 10. Other amici explained the harm they will suffer if EPA applies the Tenth Circuit's reasoning nationwide. See CountryMark Br. 11 ("The combination of increasing obligations and increasing RIN prices makes continued compliance unsustainable without [small refinery exemptions]."); AFPM Br. 14–15 ("[T]he 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 bear the brunt of these untenable market conditions without any possibility of review.").

Neither Respondent addresses amici's explanations of how detrimental the opinion below is for the small-refining industry and the employees and communities it supports. Nor do they respond to the perverse results CountryMark highlighted: small refineries that reasonably declined to seek exemptions in prior years when they could satisfy their annual obligations are now shut out from future exemptions even in a year

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[2] For instance, HollyFrontier's Cheyenne Refinery has ceased producing petroleum fuels. Pet. 30.

marked with severe market volatility or other economic hardships. CountryMark Br. 11–13.

The Coalition repeats the mistaken assumption that because the Refineries and most other small refineries complied with their RFS obligations in at least one prior year, they will not suffer harm from the inability to petition for future exemptions. Coalition Opp. 19. Again, this misreads the RFS and misapprehends Congress's purpose. RFS compliance requires small refineries to meet annual obligations that increase each year. See Pet. 24–25. The ever-increasing burden to blend renewable fuels or to purchase RINs means that small refineries face a dynamic obligation. Thus, the ability to comply one year might be hindered by some macro- or microeconomic factor the next. In contrast, the Biofuels Coalition treats a small refinery's compliance obligations as static—once able to comply, always able to comply. Given this erroneous view, it is unsurprising that the Biofuels Coalition has no meaningful answer to the fact that Congress created an ongoing safety valve for small refineries facing disproportionate economic hardship in particular years.

The Biofuels Coalition cannot "reconcile" the idea that only seven small refineries received exemptions in 2015 with the notion that the decision below creates an existential threat to small refineries. Coalition Opp. 19. This inability follows from the mistaken view that a small refinery that can comply with the RFS in one year will never need the benefit of an exemption again. Yet, as the coalition's own citation to a study about the COVID-19 pandemic's disruption of oil markets shows, small refineries may face unknown circumstances in a particular year that make compliance more difficult. *Id.* at 19–20 & n.8. And when that difficulty escalates to a disproportionate economic hardship, Congress provided a safety valve—an extension

of the temporary exemption for that period of difficulty. This makes sense: a small refinery is more likely to need a life raft when a storm is raging. But the Tenth Circuit's decision upends this relief. If Congress had intended to limit the statute this way, it would have said so. *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221, 228 (2012); Pet. 23

EPA's actions in the wake of the decision below underscore the decision's sweeping nature and further demonstrate the exceptional importance of the question presented. EPA's Administrator has announced that EPA will take no further action on requests for small-refinery exemptions until the Court addresses this petition. See NAFB News Serv., *Wheeler Waiting on Courts Before Making RFS Decisions*, KTIC Radio (Nov. 4, 2020), https://kticradio.com/agricultural/wheeler-waiting-on-courts-before-making-rfs-decisions/. Although dozens of requests are pending before the agency,[3] the Administrator explained that "we're waiting to see if [the Supreme Court] take[s] [this case] up, *and* what they do with that." *Id.* (emphasis added); see also John Herath, *EPA Administrator: RFS Waiver Requests to Wait on Court Appeal*, AgWeb (Nov. 2, 2020), https://www.agweb.com/article/epa-administrator-rfs-waiver-requests-wait-court-appeal ("I think it would be inappropriate for me to either grant or deny them until that litigation has completely run its course.")

EPA's claims that the decision below is not important enough to review, yet is important enough to put all small-refinery exemptions on hold are irrecon-

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[3] *See* U.S. Envtl. Prot. Agency, *RFS Small Refinery Exemptions* tbl.2, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Dec. 17, 2020).

cilable. This is particularly so because EPA is statutorily required to decide small-refinery exemption petitions within 90 days, but has left dozens of petitions on the table. See 42 U.S.C. § 7545(o)(9)(B)(iii). Relatedly, the RFS requires EPA to publish the annual renewable volume obligations for the coming calendar year by November 30, see *id.* § 7545(o)(3)(B)(i), but EPA has yet to do so. The question presented is unquestionably important and warrants this Court's review.

II. THIS CASE IS AN IDEAL VEHICLE.

As the Refineries demonstrated, this case is a perfect vehicle for addressing the important question presented. Respondents' reasons why the Court should not address the question now lack merit.

a. Respondents contend that the question presented has also been raised in a petition for review pending in the D.C. Circuit and suggest the Court may wish to wait for the D.C. Circuit's review. Fed. Opp. 11; Coalition Opp. 4, 17. However, while the petitioners in that case briefed the issue of EPA's authority to grant small-refinery exemptions, that case will be a poor vehicle for the question presented.

The D.C. Circuit petitioners seek review of thirty-one exemption decisions, compared to the three here. Additionally, the petitioners have raised other fact-bound issues that are likely to eclipse the question of statutory interpretation presented here. These issues include whether EPA "provide[d] a reasonable basis for granting the petitions," whether EPA could grant full relief to refineries where the Department of Energy recommended partial relief, and whether EPA could grant petitions "after the compliance year

ended."[4] Thus, even assuming the D.C. Circuit analyzes the question presented here, the sheer complexity of that case, and the substantially larger record, will make it a less suitable vehicle.

b. Respondents also suggest that review would be fruitless because the Tenth Circuit remanded the Refineries' exemption petitions to the EPA on two additional grounds. Fed. Opp. 13; Coalition Opp. 22–23. The suggestion is inapposite.

The question presented and erroneously decided by the court below is a threshold legal question rendering the Refineries categorically ineligible for a small-refinery exemption. The other issues addressed by the Tenth Circuit concerned individual aspects of EPA's decisions, which the agency could otherwise correct on remand to reach the same outcome. And as demonstrated by the petition, supported by amici, and not refuted by the Respondents, the question presented cuts to the heart of the small-refinery exemption's ongoing validity. If the opinion below stands, small refineries in the Tenth Circuit that do not have a continuous series of exemptions will be ineligible to obtain an exemption ever again. For some small refineries, moreover, this ineligibility will result in closure, contrary to Congress's intent.

Additionally, once the Tenth Circuit wrongly held that EPA lacked the authority to extend these exemptions, its subsequent discussion on the merits of the exemptions was wholly dicta. Accordingly, Respondents' claim that the Tenth Circuit's alternative determinations preclude certiorari is wrong.

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[4] *See* Petitioners' Opening Brief at 4–5, *Renewable Fuels Ass'n* v. *EPA*, No. 19-1220 (D.C. Cir. Dec. 7, 2020).

CONCLUSION

For the foregoing reasons, and those in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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