

**In The
Supreme Court of the United States**

—◆—
HOLLYFRONTIER CHEYENNE
REFINING, LLC, et al.,

Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, et al.,

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

—◆—
**BRIEF OF AMICI CURIAE STATES OF WYOMING,
TEXAS, LOUISIANA, UTAH, OKLAHOMA,
WEST VIRGINIA, AND MONTANA
IN SUPPORT OF PETITIONERS**

—◆—
BRIDGET HILL
Attorney General
JAMES KASTE
Deputy Attorney General
MATT VANWORMER*
Senior Assistant Attorney General
**Counsel of Record*
Office of the Wyoming Attorney General
2320 Capitol Avenue
Cheyenne, Wyoming 82002
(307) 777-7895
matt.vanwormer@wyo.gov
Counsel for Amicus Curiae State of Wyoming
[Additional Counsel Listed At End]

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STATEMENT OF INTEREST

This case will determine whether small refineries in Wyoming and across the nation survive. In the decision below, the Tenth Circuit determined that small refineries could no longer obtain a hardship exemption from the progressively more onerous requirements of the Renewable Fuel Standard unless they had continuously received exemptions from 2011 to the present. *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206 (10th Cir. 2020). This decision likely marks the beginning of the end for most small refineries. Few small refiners can currently meet the Tenth Circuit's test, and eventually none will be able to meet it. Absent access to the hardship exemption, the whole small refining industry may soon disappear.

The decision below will have devastating economic consequences for states with small refineries. These refineries often are the keystone employer in small communities. They provide high paying jobs and tax revenues and keep the cost of fuel low in the localities they serve. *Amici* States have a strong interest in ensuring that these important economic engines are not forced to close their doors and lay off their workers because of the misinterpretation of one word in the Renewable Fuel Standard.



SUMMARY OF THE ARGUMENT

According to the Tenth Circuit, small refineries can only receive a hardship exemption under the

Renewable Fuel Standard if they sought and received an extension of the exemption in 2011 and every year thereafter. The vast majority of small refineries will never again receive an exemption under the Tenth Circuit's test.

The Tenth Circuit erred by affording no deference to the Environmental Protection Agency's interpretation of the exemption. The EPA's decision to approve exemptions for small refineries that missed prior exemption years was reasonable and persuasive. The court below should have given the EPA's reasoning in the adjudications at least some weight under *Skidmore*. Instead, the court overlooked ambiguity in the statutory language, supported its conclusion by referencing only an isolated example of agency practice, and arrived at an outcome that undermines a core purpose of the Renewable Fuel Standard – namely, to ensure stability in the domestic supply of fuels.

Absent the hardship exemption, small refineries are not economically viable. Structural and geographic limitations force small refiners to comply with the Renewable Fuel Standard by purchasing credits on an open market. Volatility in this market, which increased after the Tenth Circuit's decision, makes the cost of compliance unsustainable.

Loss of the small refining industry will cause substantial harm to the communities these businesses serve and the thousands of jobs they support. For example, all of the refineries in Wyoming are small refineries. Each provides significant economic benefits to

the community where it is located and the State as a whole. As a result of the decision below, Petitioner, HollyFrontier Cheyenne, has already laid off roughly 200 employees. Similar losses will likely occur in other States and communities with small refineries.

The Clean Air Act includes mechanisms, apart from the hardship exemption, that are designed to ease the burdens of the Renewable Fuel Standard. For example, the EPA may reduce national renewable fuel volume requirements to avert severe economic harm to states or regions. The Clean Air Act also grants individual refineries an extra one-year period to correct non-compliance with the Renewable Fuel Standard. Neither of these remedies, however, can meaningfully offset the impacts of the Tenth Circuit's decision on the nation's small refineries.

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ARGUMENT

Congress amended the Clean Air Act in 2005 and 2007 in response to the country's once dwindling oil reserves to "ensure jobs for our future with secure, affordable, and reliable energy" and to "move the United States toward greater energy independence and security" through "increase[d] production of clean renewable fuels[.]" Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007); *see also* 146 Cong. Rec. S3519 (daily ed. May 4, 2000) (statement of Sen. Lugar) (regarding biofuels'

ability to insulate the economy from disruptive spikes in the oil market). In short, Congress believed that it could reduce dependence on foreign oil by mixing gasoline and diesel fuel with increasing amounts of domestically produced renewable fuels.

To achieve that goal, Congress designed the Renewable Fuel Standard to set annual, increasing target volumes for renewable fuels in the transportation sector, known as Renewable Volume Obligations (RVOs). 42 U.S.C. § 7545(o)(2)(B)(i)(I)-(IV). The EPA then established a tradable credit system in which refiners and importers can satisfy their annual RVOs by producing or purchasing Renewable Identification Numbers (RINs). 40 C.F.R. § 80.1426(a)-(g); 42 U.S.C. § 7545(o)(5)(A)-(C). Refiners and importers can create a RIN by either blending a gallon of renewable fuel into conventional fuel or importing a gallon of renewable fuel. 40 C.F.R. §§ 80.1426(e), 80.1429(b). Refiners and importers can then either use the produced RINs to achieve compliance with the RVO or sell them on an open market so that other refiners without blending or importing facilities can purchase enough RINs to satisfy their own RVOs. *Id.* §§ 80.1425 through .1429, 80.1427(a)(1).

Congress recognized that the Renewable Fuel Standard would impose undue costs and operational burdens on small refineries which would, in turn, undermine the Renewable Fuel Standard's central goal of stabilizing the domestic energy market. Accordingly, Congress built in a hardship exemption for small refiners producing an average aggregate daily crude

oil throughput of 75,000 barrels or less. 42 U.S.C. § 7545(o)(9).

Initially, the critical relief measure took the form of a two-year blanket exemption for all refiners meeting the throughput criteria. *Id.* at § 7545(o)(9)(A)(i). Thereafter, the blanket exemption could be extended for an additional two years for reasons of economic hardship. *Id.* at § 7545(o)(9)(A)(ii)(II). Following that second extension, a small refinery could petition the EPA for a calendar-year hardship exemption at any time if the fuel mandates subjected the refiner to disproportionate economic hardship. *Id.* at § 7545(o)(9)(B)(i). These sequential exemptions provide an essential safety valve for the nation's small refining sector, allowing members to stay competitive and profitable in light of the statute's costly compliance obligations.

However, in the decision below, the Tenth Circuit drastically curtailed eligibility for future hardship exemptions. The court held that small refineries can only qualify for an exemption if they sought and received an exemption in 2011 and all years thereafter. *Renewable Fuels Ass'n*, 948 F.3d at 1249. Nationwide, no more than seven small refineries could qualify for an exemption under this standard.¹

But following the Tenth Circuit's decision, fifty-two of the nation's small refineries sought retroactive

¹ U.S. EPA, *RFS Small Refinery Exemptions* (last updated January 21, 2021), <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (showing that only seven refineries qualified for an exemption in 2015).

exemptions.² With only fifty-four small refiners in the entire United States, the number that could qualify for an exemption under the Tenth Circuit’s restrictive standard may actually be as low as two.³

The Tenth Circuit acknowledged the consequences of its holding, noting that “a small refinery in 2016 or 2017 had many years to ponder operational issues and compliance costs, including whether it made sense to enter or remain in the market. . . .” *Renewable Fuels Ass’n*, 948 F.3d at 1247. The Tenth Circuit sought to “limit[] but preserve[] the small refinery exemption,” but instead it ensured the full eradication of the exemption. *Id.* This outcome was far from necessary and contrary to law.

I. The Tenth Circuit did not afford proper deference to the EPA.

The Tenth Circuit acknowledged it must review the EPA’s informal adjudications of hardship petitions using *Skidmore* deference. 948 F.3d at 1244. Under *Skidmore*, a court must afford weight to an agency’s decisions according to “the thoroughness evident in

² Stephanie Kelly, *U.S. EPA receives 52 new petitions for retroactive biofuel blending waivers*, Reuters (June 18, 2020), <https://www.reuters.com/article/us-usa-biofuels-epa/u-s-epa-receives-52-new-petitions-for-retroactive-biofuel-blending-waivers-idUSKBN23P36G>

³ Data extrapolated from information available in the Energy Information Administration’s annual Refinery Capacity Report. See U.S. Energy Information Administration, *Refinery Capacity Report* (June 2020), <https://www.eia.gov/petroleum/refinerycapacity/refcap20.pdf>

[the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade. . . .” *Skidmore v. Swift*, 323 U.S. 134, 140 (1944). But the Tenth Circuit did not apply *Skidmore* deference to the EPA’s adjudications of hardship petitions. The court afforded no weight to the EPA’s view of the hardship exemption, basing its decision instead on a narrow construction of a single word. In doing so, the court overlooked ambiguity in the statutory language, found confirmation in an isolated example of agency practice, and created an outcome that conflicts with a core purpose of the Renewable Fuel Standard.

The Tenth Circuit cut short any deference it might afford to the EPA at the outset, finding that an “extension” can mean only one thing. In the court’s view, the ordinary meaning of “extension” would “dictate that the subject of an extension must be in existence before it can be extended.” 948 F.3d at 1245. This rigid construction ignores the possibility that “extension” can have multiple meanings. In addition to prolonging something already in existence, “extend” can also mean to “proffer” or “make available.” *Extend*, Merriam-Webster Online Dictionary;⁴ *see also Field v. Mans*, 157 F.3d 35, 43 (1st Cir. 1998) (finding that, absent a statutory definition, the term “extension” can mean “to make available (as a fund or privilege)”).

The Tenth Circuit’s singular understanding of the term “extension” foreclosed the possibility of a broader

⁴ <https://www.merriam-webster.com/dictionary/extend>.

analysis of the hardship exemption. The court viewed its role as enforcing “[p]lain and unambiguous statutory language according to its terms.” 948 F.3d at 1243 (internal quotation marks and citation omitted). The court also drew support from *Americans for Clean Energy v. EPA*, where the District of Columbia Circuit identified plain language in the Clean Air Act as the “primary guide to Congress’ preferred policy” sufficient to override even persuasive policy arguments from the EPA. *Id.* at 1249 (quoting *Ams. for Clean Energy v. EPA*, 864 F.3d 691, 712 (D.C. Cir. 2017)).

While the Tenth Circuit did not end its analysis in the text of the statute, it exercised a constrained review of the EPA’s treatment of the hardship exemption in an attempt to show that its reading of “extension” matched agency practice. To this end, the court pointed to the EPA’s rejection of a prior hardship petition from Dakota Prairie Refining, LLC. 948 F.3d at 1247. In this prior adjudication, the EPA explained that “only small refineries that previously had received the initial exemption . . . qualify for an extension of that exemption.” Petition for Review at 4, *Dakota Prairie Refining, LLC v. EPA*, No. 16-2692 (8th Cir. June 13, 2016).

The Tenth Circuit’s exclusive focus on *Dakota Prairie* is problematic because the EPA addressed a separate question in that adjudication. Dakota Prairie Refining began operating after the Renewable Fuel Standard’s initial two-year exemption for small refineries had expired. *Id.* at 5. Thus, the EPA had to consider whether a small refinery, not in existence during the first exemption period, could later petition for a

hardship exemption. *Id.* The EPA said no, explaining that “newer small refineries have the ability to consider whether they believe the establishment of the RFS program and its requirements will cause economic hardship before beginning operations.” *Id.* But the EPA did not address the issue in this case – whether small refineries that received the initial exemption would need to continuously maintain that exemption in order to successfully petition in future years.

Even if *Dakota Prairie* were more on point, the Tenth Circuit should not have elevated the EPA’s pronouncements in a single adjudication above broader trends in the EPA’s treatment of the hardship exemption. If the EPA’s practices truly matched the Tenth Circuit’s understanding of an “extension,” it would have granted at most seven hardship petitions in any year after 2015. Yet the EPA approved thirty-five out of thirty-seven hardship petitions for the 2017 compliance year and thirty-two out of forty-four petitions for the 2018 compliance year.⁵ Without a doubt, the EPA’s practice at the time of the Tenth Circuit decision confirms the agency’s broader understanding of the term “extension.”

The Tenth Circuit characterized the EPA’s increased approval of hardship petitions after 2016 as “open[ing] up a gaping and ever-widening hole in the statute.” 948 F.3d at 1248. To the contrary, the EPA sought to harmonize its treatment of the hardship

⁵ U.S. EPA, *RFS Small Refinery Exemptions*, *supra* note 1.

exemption with explicit guidance from Congress and the courts on how the exemption was meant to operate.

After the EPA granted a mere seven hardship petitions in 2015, a Senate committee issued a stinging rebuke stating that such a stringent implementation was “inconsistent with congressional intent. . . .” S. Rep. No. 114-281, at 70 (2016). Rather, “Congress explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable.” *Id.* Similarly, in a legal challenge to the EPA’s restrictive application of the exemption, the Tenth Circuit found that the agency’s view went beyond the statute, making hardship relief for small refineries contingent on “a death knell” rather than “simple privation.” *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 996-97 (10th Cir. 2017).

From 2013 to 2015, the EPA applied an unduly restrictive test for disproportionate economic hardship, thereby denying hardship exemptions to small refineries that may have otherwise qualified. *See Sinclair*, 887 F.3d at 999. Aware of this, the EPA could not reasonably require small refineries in 2016, or any future year, to show continuous receipt of hardship exemptions. Doing so would punish small refineries for actions beyond their control. The Tenth Circuit erred by overlooking the EPA’s broader approach to the hardship exemption, which evolved in response to critical feedback from the Senate and another panel of the Tenth Circuit.

Finally, the Tenth Circuit justified its narrow reading of “extension” by selectively construing the legislative and executive history of the Renewable Fuel Standard and forcing the conclusion that the overriding purpose of the statute was to increase biofuel production at all costs. 948 F.3d at 1247 (finding that the law is “designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year”). That conclusion, however, misunderstands that the biofuel production mandate was simply the means by which the statute achieved its true end – domestic energy security. S. Rep. No. 109-78, at 6, 18-19 (2005) (stating that the need for the statute arose from a “widening gap between supply and demand, accompanied by reliance on foreign sources to close that gap”).

Congress enacted the Renewable Fuel Standard at a time when the United States faced escalating insecurity over the availability of domestic fuel sources.⁶ The period between 2005 and 2007 was a time of war in the Middle East, dramatic market instability, and all-time high prices for oil.⁷ To avoid revisiting the domestic turmoil wrought by the oil and gas shortages of the 1970s’ OPEC embargo, Congress enacted the

⁶ Garlan Joseph VanHook, *EPA Not to Blame for RFS Pitfalls: A Call to Congress to Restructure the RFS Program*, 9 Ky. J. Equine, Agric. & Nat. Res. L. 165, 185 (2017) (asserting it “should not be ignored . . . [that] Congress’s prevailing goal was energy independence”).

⁷ See James D. Hamilton, *Causes and Consequences of the Oil Shock of 2007-08*, Brookings Papers on Econ. Activity (2009), <https://www.nber.org/papers/w15002>

Renewable Fuel Standard with a central goal of breaking dependence on foreign energy through a stable supply of domestically manufactured fuel. H.R. Rep. No. 109-215, pt. 1, at 169 (“Energy security is critical in a world of growing demand and regional political instability. Dependence on any single source of energy, especially from a foreign country, leaves America vulnerable to price shocks and supply shortages.”).

The Tenth Circuit’s review of the Congressional intent behind the statute discounts this core purpose by fixating on the Renewable Fuel Standard’s ancillary benefits. 948 F.3d at 1215-20. The court closely explored Congress’s remarks on the environmental and agricultural advantages of renewable fuels, including jobs created from increased corn cultivation, potential reductions in greenhouse gases from widespread use of cellulosic fuels, and the unspecified “geopolitical benefits” from having a robust supply of ethanol. *Id.* Based on these remarks, the Tenth Circuit concluded that the Renewable Fuel Standard should force certain small refiners out of the market over time. *Id.* at 1248-49 (reasoning that allowing a durable exemption would decrease the overall volume of biofuel and thereby undermine the statute’s central directives and purpose).

The legislative history actually reveals that Congress did not design the Renewable Fuel Standard to increase ethanol production at all costs, but rather to secure national energy reserves through the production of domestic fuels. 153 Cong. Rec. S15421, S15431 (daily ed. Dec. 13, 2007) (statement of Senator McConnell) (stating that “the increase in renewable

fuels represent[s] a step forward in our common effort to make America more energy independent”). The Tenth Circuit’s analysis undermines this core goal by essentially creating a blind ethanol production mandate that skews implementation of the statute in favor of secondary environmental and agricultural justifications for the law’s enactment. While important, those incentives cannot justify an outcome that undermines the core purpose behind the Renewable Fuel Standard. *King v. Burwell*, 576 U.S. 473, 498 (2015) (“A fair reading of legislation demands a fair understanding of the legislative plan.”).

Taken to its logical end, the court’s view would mean that Congress fully intended to bar any new small refinery from entering the market after 2006 and force countless others from the market in the near-term; and, incredibly, that Congress did this on the precipice of another global energy crisis.⁸ This cannot have been Congress’s intended outcome. *Cf. King*, 576 U.S. at 498 (finding that “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them[,]” and it would therefore be improper to embrace a statutory reading that might undermine that larger statutory purpose).

Indeed, the Tenth Circuit’s interpretation requiring small refiners to continuously receive exemptions creates perverse incentives for non-compliance with

⁸ See Jad Mouawad, *Rising Demand for Oil Provokes New Energy Crisis*, N.Y. Times (Nov. 9, 2007), http://www.nytimes.com/2007/11/09/business/worldbusiness/09oil.html?_r=1&hp&oref=slogin

the Renewable Fuel Standard Act. In other words, even if a small refiner were capable of satisfying the Act's requirements in a particular year without an exemption, the small refiner would nonetheless be motivated to seek the exemption or risk forever forfeiting an exemption in future years.

It is far more reasonable and congruent with the goals of the statute to conclude that Congress intended to provide a flexible, readily available safety valve for small refineries. *See Sinclair*, 887 F.3d at 989 (reasoning that Congress was “aware the RFS Program might disproportionately impact small refineries . . . and therefore” sought “to protect these small refineries”). This reading preserves the function of the Renewable Fuel Standard, while avoiding an “ethanol or death” mandate for small refiners.

The Tenth Circuit should have at least given “some weight” to the EPA's view of the hardship exemption. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991). But instead of evaluating the persuasiveness of the EPA's position, the Tenth Circuit rejected it outright. The Tenth Circuit reached its decision by ignoring ambiguity in the statutory text, focusing on a single agency action dealing with an inapplicable, unique circumstance, and overlooking a core purpose of the Renewable Fuel Standard. For these reasons, this Court should overturn the decision below.

II. Small refineries cannot survive without access to the hardship exemption.

In 2011, the Department of Energy evaluated the potential for renewable fuel mandates to impose disproportionate economic hardship on small refiners. U.S. DOE, *Small Refinery Exemption Study* (Mar. 2011).⁹ The DOE recognized that small refineries often have “less integration with upstream and downstream operations” and “limited access to capital,” making them more vulnerable to volatility in the refining industry. *Id.* at vi, 36. According to the DOE, the additional costs of complying with the Renewable Fuel Standard could “significantly impact the operation of the firm, leading eventually to an inability to increase efficiency to remain competitive, eventually resulting in closure.” *Id.* at 36. The DOE’s concerns were well-founded.

Over time, as the renewable fuel obligation under the statute has increased, so have RIN prices. From 2006 to 2018, RIN prices fluctuated from lows of one to five cents per gallon to highs of more than \$1.50 per gallon.¹⁰ This fluctuation means that projected costs of national compliance with the Renewable Fuel Standard ranges from \$5.8 to \$19.3 billion in a given year.¹¹

⁹ <https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf>

¹⁰ U.S. Gov’t Accountability Office, *Renewable Fuel Standard: Information on Likely Program Effects on Gasoline Prices and Greenhouse Gas Emissions* 26 (May 2019), <https://www.gao.gov/assets/700/698914.pdf>

¹¹ Philip Rossetti, *The Renewable Fuel Standard’s Policy Failures and Economic Burdens*, American Action Forum (April

For some small refineries, the expense of compliance exceeds the yearly cost of labor, maintenance, and energy.¹² Today these increasing costs are set in an economic climate where even massive refiners like Exxon have reported a 67% drop in refining revenue.¹³ To make matters worse, the price of RINs tripled following the Tenth Circuit's decision.¹⁴

Increasing RIN costs strain the profit margins of small refiners, a problem often magnified by unique regional factors. For example, small refiners in Wyoming suffer from constant RIN deficiency. The Renewable Fuel Standard requires that refiners blend renewable fuels with diesel fuel and gasoline. The blend requirement is reasonably achievable for gasoline because the market and the existing fleet of United States vehicle engines can tolerate a gasoline blend containing

19, 2018), <https://www.americanactionforum.org/research/renewable-fuel-standards-policy-failures-economic-burdens/>

¹² Clifford Krauss, *High-Price Ethanol Credits Add to Refiners' Woes*, N.Y. Times (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/business/energy-environment/high-price-ethanol-credits-add-to-refiners-woes.html>

¹³ Jennifer Hiller, *Exxon quarterly profit falls 5.2% on weak refining, chemical margins*, Reuters (Jan. 31, 2020), <https://www.reuters.com/article/us-exxon-mobil-results/exxon-quarterly-profit-falls-52-on-weak-refining-chemical-margins-idUSKBN1ZU1OI>; Jordan Blum, *Exxon Mobil's profit tumbled 30% in 2019, 5% in final quarter*, Houston Chronicle (Jan. 31, 2020), <https://www.chron.com/business/energy/article/Exxon-Mobil-s-5-7B-profit-dips-5-percent-in-15019311.php?cmpid=ffcp>

¹⁴ *Sens. Urge EPA To Appeal 10th Circ. Refinery Waiver Ruling*, Law 360 (March 4, 2020), <https://www.law360.com/articles/1250020/sens-urge-epa-to-appeal-10th-circ-refinery-waiver-ruling>

ten-percent ethanol.¹⁵ Diesel fuel, however, must generally be blended at a much lower percentage.¹⁶ The Administrator recognized that “typical biodiesel blending yields only about one-third of the RINs required” and that refiners “must make up for the shortfall by purchasing the now higher-priced RINs.”¹⁷ That issue continues to plague small refiners across Wyoming.

To close this gap, certain refiners can export diesel fuel to foreign markets, thereby escaping the Renewable Fuel Standard requirement. *See* 40 C.F.R. § 80.1407(f)(5). For refiners fortunate enough to maintain operations near a coast, such as those in Louisiana or Texas, this option for relief is at least theoretically available. However, for small, landlocked refiners situated in places like Wyoming, export is not economically feasible. Consequently, small refiners in Wyoming must purchase costly RINs from a volatile market.

For refiners in Wyoming, the strain from purchasing RINs can be particularly immense. Wyoming drivers own a higher percentage of diesel passenger

¹⁵ U.S. Energy Info. Admin., *Biofuels explained*, <https://www.eia.gov/energyexplained/biofuels/use-of-biodiesel.php>

¹⁶ *See* Statement of Adam Sieminski, Administrator, Energy Information Administration, before the Subcommittee on Energy and Power Committee on Energy and Commerce, 113th Cong., at 10 (June 26, 2013), https://www.eia.gov/pressroom/testimonies/sieminski_06262013.pdf

¹⁷ *Id.*

vehicles than any other state.¹⁸ Accordingly, demand for diesel in Wyoming is high. This exacerbates the RIN deficiency that small refiners in Wyoming face and makes them more vulnerable to the negative financial impacts of the Renewable Fuel Standard.

On its face, the decision below only impacts refiners in the Tenth Circuit. However, there is a very real possibility that the EPA will apply the decision below nationwide. *See, e.g.*, U.S. EPA, *RFS Small Refinery Exemptions* (showing an across-the-board upward trend in hardship petition approval in 2017 and 2018, following the Tenth Circuit's *Sinclair* decision).¹⁹ The slew of petitions for retroactive hardship exemptions after the Tenth Circuit's decision shows that small refineries across the country are anticipating this outcome.

To put the severity of this issue in perspective, fifty-four of the country's 135 operating refineries qualify as small under the Renewable Fuel Standard.²⁰ Together, these fifty-four refineries account for 1.97 million of the nation's 18.5 million barrel-per-day refining capacity.²¹ In other words, small refineries make up forty percent of all U.S. refineries and ten percent of domestic refining capacity. Removing the

¹⁸ *Diesel vehicles are big in Wyoming*, Casper Star Tribune (June 17, 2014), https://trib.com/business/energy/diesel-vehicles-are-big-in-wyoming/article_c7aa54bd-dbda-5283-b0fb-ba1aff4463d.html

¹⁹ U.S. EPA, *RFS Small Refinery Exemptions*, *supra* note 1.

²⁰ *See* U.S. Energy Info. Adm., *Refinery Capacity Report* (June 2020), *supra* note 3.

²¹ *Id.*

Renewable Fuel Standard's hardship exemption risks returning the nation to 2006 refining capacity levels, erasing all gains in domestic refining since the statute took effect.²²

III. Small refinery shutdowns will have devastating consequences.

Closure of any refinery would cause devastating consequences. For example, although Wyoming has the smallest population in the United States, in 2018, it was ranked first in the nation for overall per capita energy consumption, and second for energy devoted to the transportation sector.²³ Forty-seven percent of the State's residents live in frontier areas – areas where there are fewer than six people per square mile – and studies show that Wyoming drivers must travel a greater annual distance than drivers in any other state.²⁴ If Wyoming residents must purchase gasoline and diesel fuel supplied by out-of-state

²² See U.S. Energy Info. Admin., *Total Energy: Annual Energy Review* (Sept. 2012), <https://www.eia.gov/totalenergy/data/annual/showtext.php?t=ptb0509>

²³ See U.S. Energy Info. Admin., *State Profiles and Energy Estimate*, <https://www.eia.gov/state/?sid=US>

²⁴ Wyoming Department of Health, Office of Rural Health, *What is Rural*, <https://health.wyo.gov/publichealth/rural/officeofruralhealth/what-is-rural/>; Steven Peters, *States Where People Drive the Most*, 24/7WallStreet (July 8, 2016), <https://247wallst.com/special-report/2016/07/08/states-where-people-drive-the-most/> (estimating that, based off of data from the Federal Highway Administration, Wyoming citizens drove an average of 22,306 miles in 2015).

refineries, costs will inevitably increase due to increased transportation expenses and decreased competition. Consequently, continued operation of small refiners in Wyoming is essential to the State and the livelihood of its residents who must bear any substantial increases in fuel costs.

To make matters worse for residents, increased fuel costs would be paired with substantial workforce reductions and lost revenues across the State's rural economy. Already, following the Tenth Circuit's decision, the HollyFrontier Cheyenne refinery has been forced to close its petroleum refining operations resulting in more than 200 citizens losing their high-paying jobs. *See* Letter from Marian Orr, Mayor, Cheyenne, Wyo., to U.S. President Donald J. Trump (Feb. 29, 2020).²⁵

And, while the City of Cheyenne with a population of 60,000 might be better situated to bear these losses, the other refiners in Wyoming are located in much smaller communities. For example, the Sinclair refining facility in Carbon County, Wyoming is the largest employer in the county.²⁶ If the Sinclair facility closes, the people of Carbon County will face crippling

²⁵ <https://www.fuelingusjobs.com/library/public/Letters/Letter-to-POTUS.pdf>

²⁶ Rocky Mountain Power, *Gateway South Transmission Project Wyoming Industrial Development Information and Siting Act Section 109 Permit Application*, p. 11-8–11-11 (July 2020), http://deq.wyoming.gov/media/attachments/Industrial%20Siting/Application%20and%20Permits/Gateway%20South%20Transmission%20Project/GatewaySouth_Final_Application_20200728.pdf

unemployment, severely diminished economic activity, and substantially reduced tax revenues. Consequences of this nature, on top of broader statewide losses to Wyoming's \$266 million petrochemical industry, warrant this Court's correction of the lower court's constrained interpretation of the hardship exemption. *See* Letter from Mark Gordon, Governor, State of Wyo., to Hon. Donald J. Trump, President of the U.S. (Feb. 28, 2020) (discussing how the Tenth Circuit's decision will risk the loss of thousands of jobs from Wyoming's 10,000-man petrochemical workforce).²⁷

The potential impacts from the Tenth Circuit's decision are by no means limited to Wyoming. Since 2019, numerous states, trade associations, and members of the United States Congress have written the EPA and the President to explain the profound market disruption that would occur if access to the small refinery exemption was sharply constrained. *See, e.g.*, Letter from Hon. Mitch B. Carmichael, Senate President & Hon. Roger Hanshaw, Speaker of the House, State of WV to Mr. William Crozer, Special Assistant to the President & Deputy Director, Office of Intergovernmental Affairs (Sept. 6, 2019) (discussing the fact that eliminating the small refinery exemption will endanger roughly 400 high-paying jobs in the state's rural Appalachian communities);²⁸ Letter from Mark McManus, General President, United Ass'n of Journeymen & Apprentices

²⁷ <https://www.fuelingusjobs.com/library/public/Letters/doc06080920200228141613.pdf>

²⁸ <https://www.fuelingusjobs.com/library/public/Letters/Renewable-Fuel-Standards.pdf>

of the Plumbing & Pipe Fitting Indus. of the U.S. and Can., to Hon. Donald J. Trump, President of the U.S. (Aug. 30, 2019) (highlighting that the importance of the small refinery exemption extends well beyond the oil and gas industry, as its absence likewise risks the jobs of the union’s 355,000 members);²⁹ Letter from Members of Congress, to Hon. Donald J. Trump, President of the U.S. (Mar. 3, 2020) (explaining that the Tenth Circuit’s ruling twists congressional intent and fails “to fully grasp” the harm it will inflict on the American economy).³⁰

To illustrate the breadth of practical impacts wrought by the Tenth Circuit’s decision to forever close access to the small refinery exemption, it is important to recognize that even the nation’s largest refining markets will suffer enormous consequences. The State of Texas, for example, produces 5.7 million barrels of oil daily and operates approximately one-third of the nation’s refining capacity. *See* Letter from Greg Abbott, Governor, State of Tex., to Hon. Andrew Wheeler, Admin., EPA (July 12, 2019).³¹ Although many of the refineries in Texas are large operations, nearly 25% meet the definition of a small refinery under the Renewable Fuel Standard.³² These small refineries employ a

²⁹ <https://www.fuelingusjobs.com/library/public/Letters/20190905-UA-RFS-POTUS-ltr.pdf>

³⁰ https://www.fuelingusjobs.com/library/public/Letters/030320_Letter_SRE_POTUS.pdf

³¹ <https://www.fuelingusjobs.com/library/public/Letters/O-WheelerAndrew201907120355.pdf>

³² *Id.*

significant workforce, account for a substantial share of the \$14 billion in state and local taxes and royalties paid by the Texas refining industry, and supply a quarter of the state’s refining capacity.³³ Alarminglly, the Tenth Circuit’s order imperils this industry by stripping from those refineries what Governor Abbott referred to as “an essential safety valve” for the state’s industry.³⁴

The situation is not different in other major refining states like Pennsylvania, Utah, and Mississippi. Governors and congressional representatives from these states have implored the EPA and President to preserve the hardship exemption for small refineries. In his 2020 letter to the EPA, Pennsylvania’s Governor, Tom Wolf, explained that the absence of the small refinery exemption could greatly undermine the state’s energy supply, workforce, and broader economy. *See* Letter from Tom Wolf, Governor, State of Pa., to Hon. Andrew Wheeler, Admin., EPA (May 11, 2020).³⁵ Pennsylvania’s Congressional delegation likewise informed the President that in 2012 alone the state’s largest refiner needed to purchase \$832 million dollars’ worth of RINs under the Renewable Fuel Standard. *See* Letter from Members of the Pa. Congressional Delegation, to President Donald J. Trump (July 26, 2019).³⁶ The

³³ *Id.*

³⁴ *Id.*

³⁵ <https://www.fuelingusjobs.com/library/public/Letters/2020-5-11-TWW-v3-Wheeler-EPA-renewable-fuel-standard.pdf>

³⁶ <https://www.fuelingusjobs.com/library/public/Letters/PA-RFS-Refinery-Letter-to-POTUS.pdf>

scaled cost of RINs would be untenable for the state's small refiners. *See* Letter from Tom Wolf, Governor, State of Pa., to Hon. Andrew Wheeler, Admin., EPA (May 11, 2020).³⁷

Similarly, Utah Governor, Gary Herbert, in a separate 2019 letter, wrote the President to emphasize that the small refinery exemption offers an “essential” form of relief to the state’s five billion dollar small refining sector. *See* Letter from Gary Herbert, Governor, State of Utah, to President Donald J. Trump (Sept. 16, 2019).³⁸ Without the “crucial small refinery RFS exemption in place[,]” Governor Herbert explained that the state’s small refining sector would face “unfair economic disadvantage” thereby imperiling “hundreds of high-paying jobs” and a “critical market for Utah’s rural oil and gas producers.”³⁹

Echoing the concerns of Pennsylvania and Utah, Mississippi Governor, Phil Bryant, likewise wrote to the EPA Administrator in 2019 to explain that limiting the small refinery exemption would “threaten the viability of small refineries, their employees, and the local communities that rely on them.” *See* Letter from Phil Bryant, Governor, State of Miss., to Admin. Andrew Wheeler, EPA (Aug. 8, 2019).⁴⁰ According to Governor

³⁷ *Supra*, note 35.

³⁸ <https://www.fuelingusjobs.com/library/public/Letters/Governor-Herbert-to-President-Trump-RFS-Relief-Refinery-Letter.pdf>

³⁹ *Id.*

⁴⁰ <https://www.fuelingusjobs.com/library/public/Letters/8-8-2019-To-Andrew-Wheeler-at-EPA-RE-SRE-waivers.pdf>

Bryant, Mississippi's largest small refiner employs roughly "250 people in the impoverished Mississippi Delta" and supplied over \$24 million dollars to the community.⁴¹ Accordingly, closing access to the exemption would cause severe harm to the state.⁴²

Today, in light of numerous exacerbating factors like the historic downturn in the oil and gas industry and the pandemic, the magnitude of the nationwide impact from the Tenth Circuit's decision cannot be overstated.⁴³ In one fell swoop, the court has gutted the safety valve Congress created to ensure the continued viability of small refiners. Rather than providing domestic energy security, the Tenth Circuit's decision threatens that very interest. The Renewable Fuel Standard has become a serious threat to the economy and refining capacity of the nation.

IV. No alternative remedies will alleviate the harm caused by the Tenth Circuit's decision.

The small refinery hardship exemption is one of several statutory tools the EPA can use to adjust Renewable Fuel Standard requirements. Congress also has

⁴¹ *Id.*

⁴² *Id.*

⁴³ Liz Hampton, *Wave of North American oil and gas bankruptcies to continue at \$40/bbl crude: report*, Reuters (July 9, 2020), <https://www.reuters.com/article/us-north-america-oil-bankruptcy/wave-of-north-american-oil-and-gas-bankruptcies-to-continue-at-40-bbl-crude-report-idUSKBN24A2U1> (discussing that low oil prices and surges in virus cases have fueled a wave of bankruptcies in the oil and gas sector).

authorized the EPA to reduce the annual renewable fuel volume targets after determining that “implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States” or when “there is an inadequate domestic supply.” 42 U.S.C. § 7545(o)(7)(A). The EPA Administrator may grant these national reductions upon petition of a party or upon the Administrator’s own motion. *Id.*

Separately, an individual refinery that is unable to generate or purchase sufficient RINs can carry a deficit forward, without penalty, into the following compliance year. *Id.* § 7545(o)(5)(D). However, the refinery then has only one year to generate or purchase enough RINs to cover both the past year’s deficiency and the current year’s obligation. *Id.*

While the above measures may reduce some burdens of the Renewable Fuel Standard, they will not alleviate the harm created by the Tenth Circuit’s decision. As the past illustrates, nationwide reductions of the renewable fuel requirement do not prevent small refineries from suffering disproportionate impacts. Starting in 2014, the EPA has reduced annual renewable fuel requirements below the statutory targets. U.S. EPA, *Annual Compliance Data for Obligated Fuel Exporters under the Renewable Fuel Standard (RFS) Program*, Table 2;⁴⁴ *cf.* 42 U.S.C. § 7545(o)(2)(B)(i)(I).

In 2018, for example, the Clean Air Act’s target for renewable fuels was twenty-six billion gallons. 42

⁴⁴ <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and>

U.S.C. § 7545(o)(2)(B)(i)(I). The EPA reduced this target to 19.29 billion gallons, more than twenty-five percent below the prescribed volume. Renewable Fuel Standard Program: Standards for 2018 and Biomass-Based Diesel Volume for 2019, 82 Fed. Reg. 58486, 58487 (December 12, 2017).

Unfortunately, across-the-board reductions in the renewable fuel requirements do not lessen the burden on small refineries. As evidence, forty-four small refineries petitioned the EPA for hardship exemptions for the 2018 compliance year.⁴⁵ Nationwide reductions may protect the larger class of obligated parties, but they do not offset the disproportionate compliance costs suffered by the small refineries that purchase most or all of their RINs in a highly volatile market.

The second mechanism – a one-year carryover of RIN deficiencies – provides no additional benefit for struggling small refineries. Carrying a RIN deficiency forward forces a small refinery, in the next year, to satisfy both their annual RVO and the outstanding RIN deficiency. Without a hardship exemption, small refineries that carry over deficiencies would only end up having to dig themselves out of a deeper hole.

The lack of any suitable fallback protections for small refineries and the communities they benefit makes correction of the Tenth Circuit's error even more critical.



⁴⁵ U.S. EPA, *RFS Small Refinery Exemptions*, *supra* note 1.

CONCLUSION

The Court should reverse the court of appeals.

Respectfully submitted,

BRIDGET HILL
Attorney General
JAMES KASTE
Deputy Attorney General
MATT VANWORMER*
Senior Assistant Attorney General
**Counsel of Record*
OFFICE OF THE WYOMING ATTORNEY GENERAL
2320 Capitol Avenue
Cheyenne, Wyoming 82002
(307) 777-7895
matt.vanwormer@wyo.gov

Counsel for Additional Amici

JEFF LANDRY
Attorney General
STATE OF LOUISIANA

KEN PAXTON
Attorney General
STATE OF TEXAS

SEAN D. REYES
Attorney General
STATE OF UTAH

MIKE HUNTER
Attorney General
STATE OF OKLAHOMA

PATRICK MORRISEY
Attorney General
STATE OF WEST VIRGINIA

AUSTIN KNUDSEN
Attorney General
STATE OF MONTANA