

No. 20-472

IN THE
Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC,
HOLLYFRONTIER REFINING & MARKETING, LLC,
HOLLYFRONTIER WOODS CROSS REFINING, LLC, &
WYNNEWOOD REFINING CO., LLC,

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 SMALL REFINERIES COALITION AS
AMICUS CURIAE SUPPORTING PETITIONERS**

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March 1, 2021

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INTEREST OF *AMICUS CURIAE*

The Small Refineries Coalition's members¹ ("Coalition") are refineries that produce gasoline and diesel fuel and are subject to the Renewable Fuel Standard ("RFS") program. Each Coalition member qualifies as a "small refinery." *See* 42 U.S.C. § 7545(o)(1)(K).

The Coalition litigates and files amicus briefs when its members' objectives are directly implicated, as here. The Supreme Court's decision in this case will directly affect the ability of Coalition members to maintain eligibility for small refinery hardship exemptions when they need them in light of shifting market conditions now and in the future. If this Court affirms the Tenth Circuit's decision, most Coalition members would be permanently disqualified from receiving hardship exemptions, regardless of how much economic hardship they will suffer in future years due to increasingly burdensome RFS obligations and potentially disparate market conditions. If this Court reverses the Tenth Circuit's decision, by contrast, Coalition members would remain eligible to receive hardship exemptions on a case-by-case basis in future years as needed. The Coalition filed an amicus brief in support of rehearing this case *en banc* in the Tenth Circuit and has

¹ Members of the Coalition are Alon Refining Krotz Springs, Inc.; Alon USA, LP; American Refining Group, Inc.; Calumet Montana Refining, LLC; Calumet Shreveport Refining, LLC; Delek Refining, Ltd.; Ergon Refining, Inc.; Ergon-West Virginia, Inc.; Hunt Refining Company; Lion Oil Company; Par Hawaii Refining, LLC; Placid Refining Company LLC; Sinclair Casper Refining Company; Sinclair Wyoming Refining Company; U.S. Oil & Refining Company; and Wyoming Refining Company. Counsel for a party did not author any part of this brief. *See* Sup. Ct. R. 37.6. Nor did counsel for any party make a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus* or its members or counsel made such a monetary contribution.

intervened or filed *amicus* briefs in other cases involving the small refinery hardship exemption and the broader RFS program. *See, e.g.*, Amicus Brief of Small Refineries Coalition, *Renewable Fuels Assoc. v. EPA* (“*RFA*”), No. 18-9533 (10th Cir. filed Mar. 31, 2020), Doc. #010110327658; Motion for Leave to Intervene, *Renewable Fuels Assoc. v. EPA*, No. 19-1220 (D.C. Cir. filed Nov. 21, 2019), Doc. #1817104; *see also id.*, Doc. #1826369 (order granting motion).²

SUMMARY OF ARGUMENT

Congress designed the small refinery hardship exemption as an ongoing safety valve available for any small refinery that experiences disproportionate economic hardship from RFS compliance during any given year. The Tenth Circuit’s decision eviscerates this protection in contravention of Congress’s intent for small refineries and denies Congress’s promise that small refineries could apply for a hardship exemption “at any time.” Congress did not intend for small refineries to go out of business if, after some period of initial compliance, they later become unable to comply with increasingly burdensome RFS obligations in some future period. Rather, Congress intended for small refineries to remain competitive and profitable under the RFS in order to promote American energy independence.

In enacting the RFS, Congress ordered the U.S. Department of Energy (“DOE”) to study whether and how small refineries would suffer disproportionate economic hardship from complying with the RFS program. The study ultimately concluded that RFS

² Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of Petitioners. Counsel of record for each party provided written consent.

compliance can impose disproportionate economic hardship on small refineries and that the hardship would increase with time. This is because small refineries are not on an even playing field with their larger, vertically integrated competitors: small refineries operate with limited access to resources under constrained market conditions. Small refineries, which are often located in isolated, rural communities, have less access to capital, distribution pipelines and terminals, and branded retail markets. As a result, they lack the infrastructure—both the physical equipment and the sales and market development—necessary to blend enough renewable fuel to meet the increasing RFS requirements (or to export any fuel, which is not subject to the RFS requirements).

Even before the DOE completed its study, Congress was aware that these enduring characteristics of small refineries could result in disproportionate economic hardship in particular years. The risk of such hardship would not disappear once a small refinery came into compliance for a particular period. To the contrary, the risk would only grow more acute over time as RFS requirements increased. Because small refineries cannot blend enough fuel to comply with the RFS, they must buy compliance credits in a volatile, unregulated market. In this unpredictable market, the cost of a single ethanol credit has ranged from one to five cents per gallon to more than \$1.50 per gallon. Larger competitors, on the other hand, can blend enough renewable fuel both to comply with their own RFS obligations and sell excess credits on the market for windfall profits. As a result, small refineries cannot pass on their compliance costs in the fuel they sell if they want their prices to remain competitive. In addition, small refineries' compliance obligations increase with every passing year. These changing circumstances

mean that even if a small refinery can meet its RFS obligations one year without hardship, it might still need the hardship exemption “safety valve” the next year.

All evidence indicates that Congress wanted to maintain, not phase out, the availability of small refinery hardship relief. Specifically, at every opportunity, Congress has spoken in favor of *more* hardship relief for small refineries. And keeping small refineries in business serves Congress’s stated goal for the RFS of promoting American energy independence because small refineries are a critical part of that goal, making up 40 percent of domestic refineries and 12 percent of domestic refining capacity. This Court should reverse the Tenth Circuit’s erroneous decision.

ARGUMENT

I. Small refineries operate with limited access to resources under constrained market conditions, making RFS compliance difficult.

Congress directed the DOE to study the economic hardship that the RFS program would impose on small refineries. The DOE concluded that small refineries “operate with limited access to resources under constrained market conditions” and that those permanent, structural characteristics would make RFS compliance exceptionally difficult when compared with larger competitors in the oil industry. U.S. Dep’t of Energy, Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship 24 (Mar. 2011), <https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf> (“DOE Study”).

As the DOE Study explained, the oil industry covers “a broad spectrum of companies” ranging from large integrated refiners to small refineries. *Id.* at 23. “At one extreme, the multi-national super majors,” such as BP and Chevron, “have full vertical integration.” *Id.* That means they have operations upstream (exploration and development of crude oil deposits), midstream (transportation and storage), and downstream (refining, marketing, distribution, and sales). *Id.*³ These large integrated refiners enjoy economies of scale from ownership of upstream operations, large refining operations, and interests in the refined product distribution supply chain. *Id.* In the middle of the spectrum, some large independent refiners that do not directly engage in upstream operations nevertheless own pipelines and storage facilities or participate in joint ventures involving vertically integrated refiners and/or crude oil suppliers. *Id.* at 23–24 & nn.25–26. As a result, some large independent refiners benefit from their owners’ vertical integration. *Id.* at 24.

At the other extreme, small refineries produce an average aggregate daily crude oil throughput of just 75,000 barrels or fewer, *see* 42 U.S.C. § 7545(o)(1)(K), and lack vertical integration, DOE Study at 24. They “operate with limited access to resources under constrained market conditions,” making compliance with the RFS difficult. *Id.*; *see also* Respondent EPA’s Br. at 1, *RFA*, No. 18-9533 (filed Mar. 25, 2019), Doc. #010110144321 (“EPA Br.”) (“small refineries can suffer from disproportionate structural and economic impacts of the RFS (e.g., due to poor access to capital and credit, and poor refining margins) that disadvantage

³ *See* U.S. EPA, Profile of the Oil and Gas Extraction Industry at 15 (Oct. 2000), <http://www.oilandgasbmps.org/docs/GEN02-EPASectorNotebook-ProfileofOilandGasIndustry.pdf>.

a refinery relative to larger refineries that may not face similar structural challenges”).⁴

First, “small independent refiners generally lack the revenue streams generated by crude oil production and national product marketing to counteract the historic volatility in cash flows from the refining industry.” DOE Study at 36.

Second, and relatedly, small refineries generally lack sufficient capital to invest in blending infrastructure to blend enough renewable fuel into their gasoline and diesel to meet the RFS requirements. *See id.* at 23, 34. Gasoline and diesel fuel produced at domestic refineries is distributed either (1) by truck from the refinery’s loading rack, or (2) through distribution terminals, which receive fuel from refineries by pipeline, barge, or rail.⁵ Due to technical constraints,

⁴ For as long as EPA has applied 42 U.S.C. § 7545(o)(9)(B) and up until February 22, 2021, EPA agreed with Petitioners’ interpretation of the RFS statute based upon canons of statutory interpretation, legislative history, science, and public policy. *See, e.g.,* Br. for the Fed. Respondent in Opp. to Certiorari at 11 (stating that Petitioners were “correct” that “extension” can mean to make available or grant); *see also* EPA Br. EPA abruptly flipped positions following the change in presidential administrations. There have been no relevant legal or factual changes since EPA’s most recent briefing in this case. As a result, EPA’s reversal is unreasonable. *See generally FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (An agency operates outside “the bounds of reasonable [statutory] interpretation” under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), when it reverses position and (1) fails to account for serious legitimate reliance interests engendered by the prior policy or (2) rests upon factual findings that contradict those which underlay its prior policy.).

⁵ *See* U.S. EPA, *Denial of Petitions for Rulemaking to Change the RFS Point of Obligation*, EPA-420-R-17-008, at 9–10 (Nov. 2017), available at <https://nepis.epa.gov/>.

blended fuel generally cannot be transported via pipeline.⁶ Instead, blending gasoline and diesel fuel with renewable fuels (such as ethanol) generally occurs immediately before fuel is distributed for consumption, and this can occur at the refinery’s loading rack (“upstream blending”) or at distribution terminals, bulk storage facilities, and/or retail gas stations (“downstream blending”). DOE Study at B-8–B-9. Small refineries generally lack the capital to invest in blending infrastructure to blend sufficient fuel downstream. *Id.* at vi, vii, 23. Some small refineries have added upstream blending infrastructure at the refinery rack. However, relatively little fuel is distributed through the refinery rack. *Id.* at B-8. As a result, small refineries lack the physical capacity to blend sufficient renewable fuel to meet the RFS requirements.

Third, small refineries have geographic and structural limitations on selling their product. They lack the capital for market development for blended fuels. Small refineries do not have a national reach like their large integrated competitors. Because small refineries serve local customers, regional preferences constrain their ability to sell blended fuel. Some states are less receptive to blended fuel than others. *See, e.g., id.* at 22, 34. “Some locations, due to either logistical obstacles or consumer behavior, still sell clear (unblended) gasoline.” *Id.* at 34. In addition, diesel fuel must generally be blended at a much lower percentage.⁷ In

⁶ See U.S. Gov’t Accountability Office, *Biofuels: Challenges to the Transportation, Sale, and Use of Intermediate Ethanol Blends*, GAO-11-513, at 18–19 (June 2011), <https://www.gao.gov/assets/320/319297.pdf>.

⁷ See Statement of Adam Sieminski, Administrator, Energy Information Administration, before the Subcomm. on Energy and Power Comm. on Energy and Commerce, 113th Cong. 10 (June

Indiana, for example, customers resist biodiesel because it does not work as well in the severe cold.⁸

Fourth, small refineries lack the economies of scale necessary to export fuel, which can reduce a refiner's obligation under the RFS. The RFS applies to transportation fuel sold only within the United States. 42 U.S.C. § 7545(o)(2)(A)(i). Small refineries do not have the tankage, production volume, or ability to afford the shipping and handling costs. Large integrated refiners, on the other hand, can produce fuel in large enough quantities to export to reduce their obligations under the RFS.

Any hardship that befalls small refineries will flow straight through to their local communities. The states and rural communities where these small refineries are located depend on their operations. Small refineries provide the only source of transportation fuels for consumers and businesses, including farmers, in many states and communities that are located far away from major fuel production and transportation hubs. For example, the only refineries in Montana, North Dakota, Utah, West Virginia, Wisconsin, and Wyoming are small refineries.⁹ In their rural communities, small refineries provide critical jobs, resources, and tax revenues. These

26, 2013), https://www.energy.gov/sites/prod/files/2013/06/f1/2-13-13_Adam_Sieminski%20FT%20HSS%26T.pdf.

⁸ See Farm-Energy, *Biodiesel Cloud Point and Cold Weather Issues* (Apr. 3, 2019), <https://farm-energy.extension.org/biodiesel-cloud-point-and-cold-weather-issues/>; *Amicus* Brief of Countrymark Refining and Logistics at 8, *RFA*, No. 18-9533 (filed Mar. 31, 2020), Doc. #010110327255.

⁹ U.S. Energy Info. Admin., *Refinery Capacity Report 38–43* (June 2020) (“Refinery Capacity Report”), <https://www.eia.gov/petroleum/refinerycapacity/refcap20.pdf>.

jobs are often some of the highest paying in the area.¹⁰ As the Governor of Wyoming has noted, “Wyoming is home to five refineries that are disproportionately harmed by the RFS. In Wyoming, the refining and petrochemical industry employs nearly 10,000 individuals and contribute[s] \$266 million dollars in local and state tax revenue.”¹¹ Mississippi’s largest small refiner employs roughly 250 people in the impoverished Mississippi Delta.¹² Ergon, a small refinery in West Virginia, employs more than 400 people with a total gross payroll of \$27 million in 2018 alone and “use[s] many outside services that support local businesses.”¹³ If small refineries are forced to shutter due to the

¹⁰ See, e.g., Letter from the Office of the Governor of Utah to President Donald Trump (Mar. 5, 2020), <https://www.fuelingusjobs.com/library/public/Letters/Utah-Energy-Advisor-Support-of-RFS-Decision-Review-3-5-20.pdf>.

¹¹ Letter from Governor of Wyoming Mark Gordon to President Donald Trump (Feb. 28, 2020), <https://www.fuelingusjobs.com/library/public/Letters/doc06080920200228141613.pdf>; see Press release, Sen. John Kennedy, “Sen. Kennedy Asks Agriculture Secretary Perdue to Stop Threatening Thousands of Louisiana Energy Jobs,” (June 28, 2019), <https://www.kennedy.senate.gov/public/press-releases?ID=64CD14A5-3DD7-4DD8-ABEB-39A2B2A06A55> (cited in CRS Report at 19 n.128).

¹² Letter from Governor of Mississippi Phil Bryant to Admin. Andrew Wheeler, EPA (Aug. 8, 2019), <https://www.fuelingusjobs.com/library/public/Letters/8-8-2019-To-Andrew-Wheeler-at-EPA-RE-SRE-waivers.pdf>.

¹³ Letter from Hon. Mitch B. Carmichael, Senate President, and Hon. Roger Hanshaw, Speaker of the House, State of West Virginia, to Mr. William Crozer, Special Assistant to the President & Deputy Director, Office of Intergovernmental Affairs (Sept. 6, 2019), <https://www.fuelingusjobs.com/library/public/Letters/Renewable-Fuel-Standards.pdf>.

Tenth Circuit’s decision, the economic consequences will ripple through rural communities across the country.

II. The RFS imposes disproportionate economic hardship on small refineries that increases over time.

Congress intended to keep small refineries “competitive and profitable,”¹⁴ and the federal government, including Congress, understood that the burden on small refineries from the RFS would grow heavier, not lighter, over time. Given the basic structural characteristics of small refineries discussed above in Part I, the lack of vertical integration, capital, and market power and the structure of the RFS program, small refineries cannot “funnel[]” themselves “toward compliance over time.” *RFA*, 948 F.3d 1206, 1246 (10th Cir. 2020)¹⁵ (relying on dicta from *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 578 (D.C. Cir. 2015)).

When the Tenth Circuit said that small refineries could be “funnel[ed]” toward permanent compliance, the panel really meant that small refineries that have one good year but later experience disproportionate economic hardship from RFS compliance should just go out of business. *RFA*, 948 F.3d at 1247 (suggesting that small refineries should “ponder . . . whether it ma[kes] sense to . . . remain in the market in light of the statute’s challenging renewable fuels mandate”); *see also id.* at 71 (suggesting that the RFS was intended to be “aggressive” and “forc[e]” small refineries that could not maintain compliance out of the “market”). It is beyond implausible to suggest that despite

¹⁴ S. Rep. No. 114-281, at 70–71 (2016).

¹⁵ The Tenth Circuit’s opinion is reproduced at Petition Appendix 1a–94a.

specifically including a “hardship exemption” for small refineries in the statute, 42 U.S.C. § 7545(o)(9)(B)(iii), Congress actually intended to shut small refineries down if they could not hack it. It is even less plausible to think that Congress wanted to preserve only small refineries that had never come into compliance while showing the door to companies that can comply in some years but not others because of fluctuating market conditions, creating an incentive for small refineries to avoid achieving the program’s goals for fear of forfeiting eligibility for future exemptions.

In fact, the Tenth Circuit (and the dicta in the D.C. Circuit opinion upon which it relied) created the concept of “funnel[ing]” small refineries towards compliance out of whole cloth. That concept does not appear in the statute, the legislative history, or the DOE Study that Congress commissioned. And it does not remotely describe the relevant market dynamics. The *only* support the Tenth Circuit cites for its assertion that small refineries should exit the market is a single sentence of dicta from *Hermes*, see *RFA*, 948 F.3d at 1246 (citing 787 F.3d at 578), which in turn cites only the words “temporary exemption,” the title of 42 U.S.C. § 7545(o)(9)(A), which is *not* the subsection at issue here. The word “temporary” in subsection (A) does not mean that Congress intended to put small refineries out of business if they could not comply with the RFS after a previous year of achieving compliance. Rather, the “temporary exemption” in subsection (A) refers to a distinct two-year exemption that is not at issue here. See Br. of Petitioners at 11, 19, 40–41. This case involves subsection (B), “[p]etitions based on disproportionate economic hardship,” under which a small refinery can apply for an exemption on a case-by-case basis “at any time.” 42 U.S.C. § 7545(o)(9)(B). Put simply, nothing supports the Tenth Circuit’s

assertion that Congress intended the RFS program to gradually put small refineries out of business. Instead, Congress intended the exact *opposite*: to keep small American refineries competitive and profitable and promote American energy independence by providing small refineries an appropriate exemption to the RFS “at any time” compliance would impose disproportionate hardship.

Congress knew that compliance would not become progressively easier for small refineries over time, given their inability to blend the increasing amounts of renewable fuel required under the RFS and their resulting reliance upon purchasing compliance credits from others. *See, e.g.*, DOE Study at 17–18, 23. Small refineries (unlike their large counterparts) must rely on purchasing compliance credits called Renewable Identification Numbers (“RINs”) on a largely unregulated and unpredictable market, because they cannot self-generate the necessary credits through blending. *See Sinclair Wyo. Refin. Co. v. EPA*, 887 F.3d 986, 988–89 (10th Cir. 2017). The pricing of RINs changes from year to year based on unpredictable market dynamics, and the RFS program’s renewable fuel volume mandates increase year after year. DOE Study at 17–18.

A RIN is created when a renewable fuel producer makes renewable fuel—such as ethanol. 40 C.F.R. § 80.1426. Until the renewable fuel is blended into petroleum-based transportation fuel, the RIN remains “assigned” to the physical volume of renewable fuel. *Id.* § 80.1428. The RIN is “separated” when the renewable fuel is blended with transportation fuel. *Id.* § 80.1429. Obligated parties use separated RINs to demonstrate RFS compliance. *Id.* § 80.1427. Each obligated party must turn in enough RINs to equal its

proportionate share of the amount of renewable fuel that Congress wants blended into the country’s transportation fuel that year (known as its “Renewable Volume Obligation” or “RVO”). *Id.* § 80.1406(b). An obligated party that cannot separate enough RINs on its own to meet its RVO must buy RINs from others. RINs are traded on an unregulated spot market or bought and sold through private contracts.¹⁶ The market is unpredictable and subject to manipulation, which disproportionately harms small refineries.¹⁷

In contrast, large integrated oil companies that are involved in multiple segments of the petroleum supply chain—refining, transportation, marketing, distribution, and sales—can “easily obtain financing for blending facilities,” can control the downstream blending of renewable fuel, and are less geographically constrained. DOE Study at 23–24; *see* EPA Br. at 32 (“inherent scale advantages of large refineries”). These entities secure surplus RINs because of the large amount of blending and retail they control. For example, 50 percent of retail outlets sell fuel under the brand of one of the 15 largest refiner-suppliers through supply agreements.¹⁸ As a result, large refiner-suppliers can self-generate

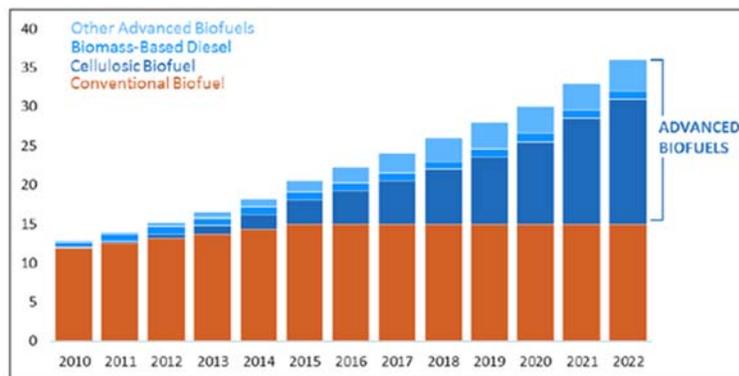
¹⁶ *See* Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program, 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010).

¹⁷ *See* Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 10,584, 10,584 (Mar. 21, 2019) (“EPA is proposing regulatory changes to . . . improve functioning of the renewable identification number (RIN) market and prevent market manipulation.”); *see also id.* at 10,585 (“deter potential manipulative and other anti-competitive behaviors in the RIN market”).

¹⁸ *See* Ass’n for Convenience & Fuel Retailing, *Selling America’s Fuel* (Apr. 12, 2019), <https://www.convenience.org/Topics/Fuels/Who-Sells-Americas-Fuel>.

RINs to meet their annual RFS requirements and then sell their excess RINs into the market. *Id.*

The RFS renewable fuel targets~ and therefore small refineries' compliance obligations~ become more difficult for small refineries to achieve with every passing year. See Cong. Research Serv., *The Renewable Fuel Standard (RFS): Frequently Asked Questions About Small Refinery Exemptions (SREs)* 21 (Mar. 2, 2020), <https://crsreports.congress.gov/product/pdf/R/R46244> (“CRS Report”). The RFS statute specifies minimum annual volume targets (in billions of gallons) from 12.95 billion gallons of renewable fuel in 2010 and ascending to 36 billion gallons in 2022. *Id.* at 2–3.



Source: CRS analysis of the Energy Independence and Security Act of 2007 (EISA; P.L. 110-140)

Id. at 3. At the same time, “[g]asoline consumption has trended downwards for years for a variety of reasons (e.g., fuel economy standards, behavioral choices, economic conditions) and is currently steady.” *Id.* at 21.

Also, as the renewable fuel volume obligation has increased, so has the volatility and overall RIN prices. DOE Study at 17–18. The DOE anticipated that the blendwall¹⁹ was coming, i.e., that it would

¹⁹ A blendwall is “the aggregate limit to which a renewable fuel can be blended into its recipient motor fuel” based on physical

eventually be impossible to blend all of the mandated renewable fuel into conventional transportation fuels and that reaching the blendwall would have “significant economic consequences” for small refineries. *Id.* at 3, 17. Indeed, after the E10 blendwall was reached in 2013, the price for ethanol RINs increased by approximately 5,000 percent, and prices have fluctuated wildly ever since.²⁰ From 2010 to 2018, RIN prices fluctuated from lows of one to five cents per gallon to highs of more than \$1.50 per gallon.²¹ More recently, RIN prices tripled within weeks of when the Tenth Circuit’s decision issued.²² Similar fluctuations mean that projected costs of national compliance with the RFS have ranged from \$5.8 to \$19.3 billion in a given year.²³ Given this volatility, a small refinery’s ability

limitations, regulatory restrictions, and market forces. DOE Study at 3, 13, A-1. A blendwall is specific to a particular renewable fuel and specific to a particular motor fuel. *Id.* at 13.

²⁰ See Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 26,980, 27,013 & n.216 (June 10, 2019); see also DOE Study at 13–19 (describing the blendwall and its implications for small refineries); U.S. EPA, RIN Trades and Price Information, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information> (last updated Feb. 10, 2021) (showing D6 RIN prices ranging from \$0.02/RIN on June 18, 2012 to \$1.05/RIN on Aug. 5, 2013, and from \$0.06/RIN on Jan. 20, 2020 to \$0.18/RIN on Feb. 24, 2020).

²¹ U.S. Gov’t Accountability Office, *Renewable Fuel Standard: Information on Likely Program Effects on Gasoline Prices and Greenhouse Gas Emissions*, GAO-19-47, at 26 (May 2019), <https://www.gao.gov/assets/700/698914.pdf>.

²² See *supra* n.20.

²³ Philip Rossetti, *The Renewable Fuel Standard’s Policy Failures and Economic Burdens*, American Action Forum (Apr. 19, 2018), <https://www.americanactionforum.org/research/renewable-fuel-standards-policy-failures-economic-burdens/>.

to comply with RFS requirements in any given year hardly guarantees its ability to comply in subsequent years.

The volatility and increases in RIN prices disproportionately harm small refineries because, unlike their large competitors that can self-generate RINs through blending, small refineries must purchase RINs to comply with the RFS. As discussed above, obligated parties acquire RINs to satisfy their RVOs by either (1) blending renewable fuels into conventional fuels, or (2) purchasing RINs. Because small refineries lack the financial resources and infrastructure needed to blend renewable fuels cost effectively, they have no choice but to purchase RINs on the open market to satisfy their RFS obligations. *See* DOE Study at 23 (small refineries’ “limited product slates coupled with an inability to blend renewable fuels means that many of the small refiners must enter the market to buy RINs”).

In addition, the harm to small refineries from high RIN prices (which is significant) is compounded because high RIN prices actually *benefit* their competitors, the large integrated refiners and non-refining blenders (e.g., large retail marketing chains). Because large integrated refiners can blend enough renewable fuel to meet or exceed their RVOs, they have lower and often no compliance costs relative to small refineries that must purchase RINs on the market. *See id.* at B-4–B-5. In fact, these large refiners *make money from the RFS* because they can sell excess RINs on the market. *Id.* at B-5. Large refiners have no extra RFS-related costs that they have to pass on to customers or swallow (and may even benefit by selling excess RINs). Non-refining blenders that are exempt from the RFS similarly have no RFS-related costs to pass down the

supply chain. Because these parties do not incur RIN costs, they are positioned to sell fuel at competitive prices without any pressure to recover compliance costs. This is precisely why large refiners can lower the price of their fuel, undercutting their small refinery competition. Large retailers do the same through “RIN theft” contracts with a limited number of small refineries that can blend some renewable fuels into their gasoline and diesel. In a “RIN theft” contract, a downstream blender forces the upstream small refinery to discount its blended fuel, giving a substantial portion of the value of the RIN to the exempt downstream blender. As a result, an increase in RIN prices can “significantly impair the profitability of [] small refineries,” *id.*, because small refineries cannot pass the cost of their RINs through to their customers. The small refineries must instead eat these costs to remain competitive, or else they will be pushed out of the market. *Id.* at 22–23. The DOE clearly demonstrated that small refineries would not be able to pass their compliance costs to customers when their competitors have no compliance costs. *Id.* at B-4–B-5. As the DOE Study explains, when a small refinery must purchase RINs “that are far more expensive than those that may be generated through blending, this will lead to disproportionate economic hardship for those effected [sic] entities.” *Id.* at 2. The President of the Renewable Fuels Association, one of the *respondents* before this Court, made this very point in testimony before Congress:

RINs are primarily traded in a “closed loop” market amongst parties in the gasoline supply chain. That is, a party buying a detached RIN [e.g., a small refinery] will incur an additional cost, but the counterparty selling the RIN [e.g., a large, vertically integrated refiner] will simultaneously incur a profit. In this

manner, one party's RIN expense is exactly offset by the counterparty's RIN revenue, and the net effect is no impact to the consumer. Second, the gasoline market is highly competitive and market actors are compelled to match, or undercut, the wholesale selling prices of their competitors. Thus, a refiner who has purchased RINs on the open market cannot markup the selling price of its gasoline to recoup RIN expenses if it wishes to remain competitive with other refiners who profited from the sale of detached RINs.²⁴

As a result, RFS compliance costs are a large part of operating costs for small refineries, whereas “compliance costs for the larger refiner [are] a small” or non-existent “part of overall operating costs.” DOE Study at 23. Some large refiners make windfall profits from the RFS²⁵ because they can build or buy blending capabilities “at a scale well beyond . . . smaller refiners,” DOE Study at 23, to create excess RINs to sell on the market. “[O]ver the past couple of years, compliance strategies for larger companies included engaging in joint ventures with ethanol producers,

²⁴ *The Renewable Fuel Standard – Implementation Issues Before Subcomm. on Energy and Power on the Energy and Com. Comm.*, 114th Cong. (2016), written witness statement of Bob Dinneen, Renewable Fuels Association at 5 (June 22, 2016), <https://energycommerce.house.gov/committee-activity/hearings/hearing-on-the-renewable-fuel-standard-implementation-issues>.

²⁵ See Comments on Proposed Denial of Petitions for Rulemaking to Change the RFS Point of Obligation at 33–34 (Feb. 22, 2017), Docket ID No. EPA-HQ-OAR-2016-0544-0406, <https://www.regulations.gov/comment/EPA-HQ-OAR-2016-0544-0406> (discussing blenders boasting to investors in their 10-Ks about hundreds of millions of dollars in windfall RIN revenues they earned by selling RINs to obligated parties).

investing in companies in the renewable sector, or conducting research on renewable fuels.” *Id.* Small companies have limited options. *Id.* “They face a number of challenges and access to capital is generally limited or not available.” *Id.* “RFS compliance exacerbate[s] already negative financial outlooks that are consistent with the unique burdens sometimes borne by small refineries, especially in the short term.” EPA Br. at 54–55; *see also id.* at 46–47 (discussing how small refineries’ compliance costs worsened the refineries’ already poor financial outlook). “Even when capital is available, they may have to choose between making substantial investments in blending and investing in other needed facilities to improve operating efficiencies to remain competitive.” DOE Study at 23. For some small refineries, the expense of compliance exceeds the yearly cost of labor, maintenance, and energy.²⁶ For example, for Sinclair Wyoming Refining, “RFS compliance costs [in 2019] represented more than one-third of Sinclair’s net income.” Amicus Brief of Sinclair Wyoming Refining Co. et al. at 7, *RFA*, No. 18-9533 (filed Mar. 31, 2020), Doc. #010110327716.

Indeed, since the Tenth Circuit’s decision, at least three small refineries (including Petitioner HollyFrontier’s Cheyenne, Wyoming refinery) have already shut down. Marathon’s Gallup, New Mexico refinery, also within the Tenth Circuit, has idled operations indefinitely.²⁷ Others likewise face financial

²⁶ 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>.

²⁷ Robert Brelsford, *Marathon permanently idles two US refineries*, Oil & Gas J. (Aug. 3, 2020), <https://www.ogj.com/refiningprocessing/refining/article/14180915/marathon->

distress due to a historic downturn in demand and historically high RIN prices.²⁸ These are exactly the circumstances that Congress intended to avoid by allowing small refineries to seek an exemption “at any time” if complying with the RFS program would impose a disproportionate economic hardship. The Tenth Circuit’s interpretation of § 7545(o)(9)(B)(i) would permanently eliminate that exemption for any small refinery that has even one decent year.

III. Congress could not have meant what the Tenth Circuit says it did.

A. Congress did not intend to force small refineries to comply or go out of business.

The Tenth Circuit panel turned Congress’s intent on its head. Relying on a single sentence of unsupported dicta from a D.C. Circuit opinion, the panel decided that Congress intended small refineries to either comply with the RFS without the continued availability of hardship exemptions or go out of business entirely. *RFA*, 948 F.3d at 1247. In fact, all the evidence indicates that Congress intended the exact opposite. Congress’s stated intention was “that small refineries remain both competitive and profitable.”²⁹ Congress created the small refinery hardship exemption not as a temporary off-ramp or part of a “funnel” but rather

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>.

²⁸ Letter from Brian J. Zolkos et al. to President Donald Trump (Aug. 24, 2020), <https://www.fuelingusjobs.com/library/public/Letters/SaveSmallRefineries-8-24-2020.pdf>.

²⁹ S. Rep. No. 114-281, at 70–71 (2016).

a vital and permanent safety valve that would be available whenever hardship occurred. Congress knew that compliance with the RFS is not permanent when achieved in a particular year. That is why Congress explicitly made the exemption from the RFS available “at any time.” 42 U.S.C. § 7545(o)(9)(B)(i). As Petitioners point out, Congress knows how to sunset or time limit regulatory exemptions when appropriate. Br. of Petitioners at 33 (citing 42 U.S.C. § 7411(j)(1)(E) (setting a maximum number of years beyond which EPA may not grant a waiver)); *see also* 42 U.S.C. § 7412(f)(4) (providing a two-year compliance extension if “such period is necessary for the installation of controls” for hazardous air pollutants including benzene). Congress chose not to sunset the small refinery hardship exemption.

Congress understood that small refineries’ hardship would increase over time and that the degree of hardship also depended on changing market conditions. As the DOE Study explains, small refineries not only face annual RFS compliance obligations, but also those obligations substantially increase each year. DOE Study at 13–17. Moreover, the volatility in the prevailing prices for RINs means compliance in any one year does not presage compliance in subsequent years. As such, changing market conditions can create disproportionate economic hardship in some years even where no such hardship existed before. The DOE created a scoring matrix to assess the degree of hardship a particular small refinery would experience in a given calendar year, grounded in the study’s findings. The structure of the test is evidence that hardship could potentially wane under certain circumstances but could also grow worse. For example, the DOE found that hardship could occur if blending or purchasing RINs “increases [a small refinery’s] costs of products

relative to competitors to the point that [the small refinery is] not viable, either due to loss of market share or lack of working capital to cover the cost[] of” RINs. DOE Study at vii. Also, hardship occurs if RIN prices are “substantially higher than their historical value” or if refineries must buy RINs “that are far more expensive than those that may be generated through blending.” *Id.* at vii, 2. The DOE also mentioned “[r]efinery specific events []such as a shutdown due to an accident” that could have “a temporary negative impact” on a refinery’s ability to comply. *Id.* at 36; *see also* EPA Br. at 45 (Congress did not require RFS compliance to be the sole cause of economic hardship).

EPA’s history of granting hardship exemptions is consistent with Congress’s intent to provide a case-by-case safety valve for refineries experiencing disproportionate economic hardship in any given year. *See* 42 U.S.C. § 7545(o)(9)(B)(i); Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards, 77 Fed. Reg. 1320, 1340 (Jan. 9, 2012) (“[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.”). Hardship is not necessarily linear; indeed, the annual number of hardship exemption applications has fluctuated since the RFS program began.³⁰ The impact of RFS compliance, particularly due to unpredictable increases in RIN prices, can change the economic circumstances facing small refineries, and the overall burden of RFS compliance on these refineries is increasing. The annual RFS mandates that Congress prescribed

³⁰ *See* U.S. EPA, Overview of RFS Small Refinery Exemptions (Table 2), <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last updated Feb. 18, 2021) (ranging from 28 to 44 petitions received).

continuously increase, and RIN prices are volatile. While the economic hardship may not be as severe when RINs cost a few cents each, the same is not true in years when the price of RINs surges. The economic conditions at small refineries are ever-changing, and Congress would not have limited EPA to a certain (small, near zero) number of small refinery exemptions every year. *See id.* “Congress [] envisioned a more programmatic concept of relief that allows EPA flexibility to grant petitions at its discretion ‘at any time’ that small refineries experience disproportionate economic hardship based on changes in the market, the financial health of individual facilities, and ‘other economic factors,’ . . . as needed in future compliance years.” *See EPA Br.* at 32.

Indeed, Congress has spoken in favor of *more* hardship relief for small refineries at every opportunity.³¹ After EPA granted a mere seven hardship petitions in 2015, the Senate issued the agency a stinging rebuke, stating that such a stringent implementation was “inconsistent with congressional intent.”³² The Senate reminded EPA that “Congress explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable.”³³ The Senate instructed that “small entities cannot remain competitive and profitable if they face disproportionate structural or economic metrics such as limitations on access to capital, lack of other business lines, disproportionate production of diesel fuel, or other site specific factors identified in

³¹ Persuasive post-enactment congressional statements are relevant. *United States v. Woods*, 571 U.S. 31, 48 (2013).

³² S. Rep. No. 114-281, at 70.

³³ *Id.*

[the DOE Study].”³⁴ Congress reminded the agencies that RFS compliance “may impose a disproportionate economic hardship on a small refinery even if the refinery makes enough profit to cover the cost of complying with the program,” and that “refinery profitability does not justify a disproportionate regulatory burden where Congress has explicitly given EPA authority, in consultation with [the DOE], to reduce or eliminate this burden.”³⁵ Next, in the Joint Explanatory Statement accompanying the 2016 Consolidated Appropriations Act (Pub. L. 114-113, 126 Stat. 2241 (Dec. 18, 2015)), Congress ordered the DOE to recommend that a refinery that met 50 percent of the requirements for an exemption receive a 50 percent waiver instead of no relief. CRS Report at 6. In 2017, Congress ordered EPA to follow the DOE’s recommendation and to notify Congress ten days before decision if EPA disagreed with the DOE’s recommendation. *Id.* Most recently, in appropriations language in force until the end of the current fiscal year, Congress emphasized that EPA has discretion to provide relief *above and beyond* the DOE’s recommendation.³⁶ Congress would not have made any of these statements if it had intended for small refinery exemptions to phase out.

Adopting the Tenth Circuit’s decision nationwide would run counter to Congress’s repeated statements of intent by effectively eliminating the small refinery hardship exemption (and most small refineries along

³⁴ *Id.* at 70–71.

³⁵ 161 Cong. Rec. H9693, H10105 (daily ed. Dec. 17, 2015).

³⁶ Explanatory Statement at 93, Dep’t of the Interior and EPA’s 2021 Appropriations Bill, <https://www.appropriations.senate.gov/imo/media/doc/INTRept.pdf> (“The Agency is reminded that, regardless of the Department of Energy’s recommendation, additional relief may be granted if the Agency believes it is warranted.”).

with it). As EPA told the Tenth Circuit, Respondents' position "upend[s] the will of Congress and nullif[ies] the statute." EPA Br. at 2. Under the logic of the panel decision, only a small number of the nation's small refineries would even be eligible for future exemptions. At maximum, only seven small refineries could possibly have the necessary history of continuous exemptions. Although the exact number of small refineries that would remain eligible is unknown, some estimate it is as low as two.³⁷ "Congress did not intend so narrow a safeguard." EPA Br. at 33.

B. Congress intended to keep small American refineries in business.

The Tenth Circuit's belief that Congress would have allowed RFS compliance to shutter small refineries, *RFA*, 948 F.3d at 1246–47, is incorrect and at odds with the statute.

Congress intended that the RFS program promote American energy independence, *id.* at 1216–18, and eliminating the small refinery hardship exemption frustrates that goal. "Every Presidential Administration dating back to FDR has found that domestic refining capacity is a critical element to national security

³⁷ Letter from Senator John Barrasso et al. to President Donald Trump (Feb. 27, 2020), https://www.fuelingusjobs.com/library/public/Statements/2-27_Senators-Call-on-President-Trump-to-Fight-for-Small-Refineries.pdf. Moreover, under the Tenth Circuit's opinion, only those small refineries in existence in 2011 would qualify for an exemption. *But cf.* 42 U.S.C. § 7545(o)(1)(K) (statutory definition of a small refinery is based on output for that calendar year, not limited to 2011); *see also* Br. of Petitioners at 37.

preparedness and planning.”³⁸ Small refineries are critically important to America’s transportation fuel industry. Fifty-four of the country’s 135 operating refineries qualify as small refineries under the RFS.³⁹ “[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.” CRS Report at 4. As discussed at length above, both Congress and the DOE Study recognized that the RFS program would impose substantial and disproportionate economic hardship on small refineries throughout the country. *See* 42 U.S.C. § 7545(o)(9)(A). Such hardship could in some circumstances be so significant that small refiners would become bankrupt or be forced to shut down, jeopardizing domestic sources of transportation fuel. In light of fluctuating market conditions, nearly all small refineries have gaps in their exemption histories. Thus, affirming the Tenth Circuit’s decision would effectively eliminate Congress’s carefully crafted small refinery exemption program and undermine a central goal of the RFS.

Moreover, eliminating the hardship exemption would not even further Congress’s goal of promoting biofuel production. In 2019, total ethanol consumption and ethanol blend rates were at all-time highs, unhindered by the prior small refinery exemptions of which Petitioners complain.⁴⁰ E10, a mixture of 10 percent

³⁸ Letter from Cdr. Kirk S. Lippold to EPA at 2 (Feb. 8, 2017), Docket ID No. EPA-HQ-OAR-2016-0544-0143, <https://www.regulations.gov/document?D=EPA-HQ-OAR-2016-0544-0143>.

³⁹ Data extrapolated from information available in the Refinery Capacity Report *supra* n.9.

⁴⁰ *Science and Technology at the Environmental Protection Agency Before the H. Comm. on Science, Space, & Technology*, 116th Cong. (Sept. 19, 2019) (statement of Andrew R. Wheeler,

ethanol and 90 percent gasoline, would still be blended even without a mandate.⁴¹ E10 is widely available and cost effective.⁴² Further, low-level blends of E10 or less require no special fueling equipment and can be used in any conventional gasoline vehicle. As shown in the chart below,⁴³ there is no correlation—much less a causal relationship—between the number of small refinery exemptions (which has varied) and ethanol

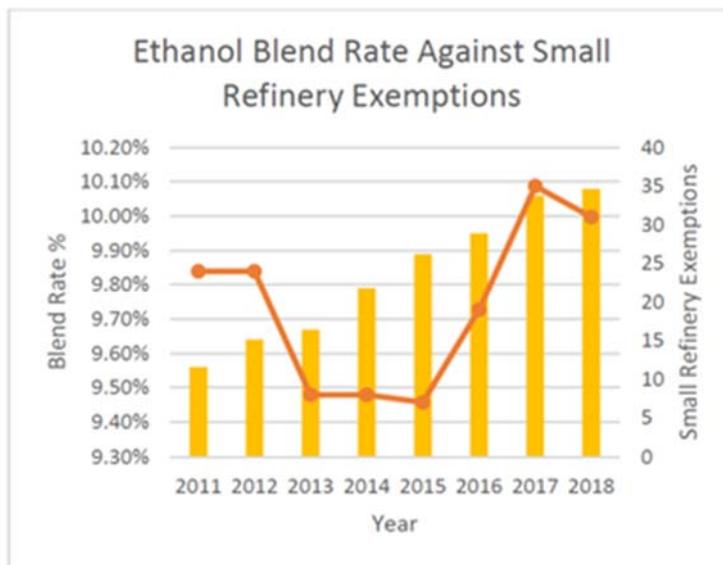
Administrator of the Env'tl. Protection Agency), <https://science.house.gov/hearings/science-and-technology-at-the-environmental-protection-agency>.

⁴¹ Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021, Response to the Remand of the 2016 Standards, and Other Changes, 84 Fed. Reg. 36,763, 36,763 (July 29, 2019) (“Today, nearly all gasoline used for transportation purposes contains 10 percent ethanol (E10)”); Scott Irwin, *Small Refinery Exemptions and Ethanol Demand Destruction*, *farmdoc daily* (8):170 (Sept. 13, 2018), <https://farmdocdaily.illinois.edu/2018/09/small-refinery-exemptions-and-ethanol-demand-destruction.html> (“The price competitiveness of ethanol in E10 means that the conventional ethanol mandate is non-binding up to the E10 blendwall.”).

⁴² U.S. Energy Info. Admin., *Almost all U.S. gasoline is blended with 10% ethanol* (May 4, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=26092> (E10 “account[s] for more than 95% of the fuel consumed in motor vehicles with gasoline engines”); Scott Irwin, *supra* n.41 (“[E]thanol is a [sic] highly price competitive in the E10 gasoline blend in the U.S. at the present time and the conventional ethanol mandate up to the E10 blend wall is non-binding.”).

⁴³ See Am. Fuel & Petrochemical Mfrs., *Strong Domestic Consumption Contradicts Ethanol “Demand Destruction” Claims* (Nov. 18, 2019), <https://www.afpm.org/newsroom/blog/strong-domestic-consumption-contradicts-ethanol-demand-destruction-claims> (showing ethanol blend rate for January through August of each year); Overview of RFS Small Refinery Exemptions, *supra* n.30 (providing number of small refinery exemptions granted for each compliance year).

production and blending (which has increased steadily).



The federal government agrees that there is no demand destruction from small refinery exemptions. The then-EPA Administrator testified to Congress in late 2019 that “[e]thanol demand has not been impacted by the small refinery program. . . . and we do not see any demand disruption from the small refinery program on ethanol production.”⁴⁴ The then-Agriculture

⁴⁴ Erin Voegelé, *Wheeler claims ethanol demand not impacted by SREs*, Ethanol Producer (Sept. 23, 2019), <http://ethanolproducer.com/articles/16562/wheeler-claims-ethanol-demand-not-impacted-by-sres>; see also Final Brief for EPA at 63–68, *Growth Energy v. EPA*, No. 19-1023 (D.C. Cir. Mar. 5, 2020), Doc. #1831996; Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes, 85 Fed. Reg. 7050, 7051 (Feb. 6, 2020).

Secretary attributed ethanol price declines to “lower exports, not small refinery waivers.”⁴⁵

Moreover, despite Congress’s intent to encourage domestic production, EPA has allowed foreign biofuels to become an increasingly large percentage of the renewable fuels used to comply with the RFS program. Approximately 13 percent of the cellulosic biofuel, 13 percent of the biomass-based diesel, and 50 percent of the “other advanced” RFS compliance credits generated between 2015 and 2019 were from fuel imported into the United States.⁴⁶ American imports of biomass-based diesel increased by more than 2,000 percent between 2009 and 2018.⁴⁷

Thus, disqualifying nearly all of the country’s small refineries from receiving hardship relief will not help the biofuels industry. All it will do is irreparably harm small refineries and the communities in which they operate without achieving any of the RFS program’s objectives. The Tenth Circuit plainly erred by reading the statute to reach that absurd and counterproductive result.

⁴⁵ Sonny Perdue, Sec’y of Agric., U.S. Dep’t of Agric. at the Nat’l Ass’n of Farm Broad. Annual Convention (Nov. 15, 2019).

⁴⁶ See U.S. EPA, *Spreadsheet of RIN Generation Data for the Renewable Fuel Standard*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/spreadsheet-rin-generation-data-renewable-fuel> (last updated Feb. 18, 2021) (calculated using “RIN generation data from December 2019 (CVS),” based on a comparison of “Importer”-generated and “Total RINs,” for the D3, D4, D5, and D7 fuel-types).

⁴⁷ U.S. Energy Info. Admin., *U.S. Imports of Biomass-Based Diesel Fuel*, https://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=M_EPOORDB_IM0_NUS-Z00_MBBL&f=A (last updated Jan. 29, 2021).

CONCLUSION

The Tenth Circuit's decision upends Congress's clear intent for the small refinery hardship exemption, which was crafted as a permanent safety valve for small refineries in the face of increasingly burdensome RFS compliance obligations. This Court should reverse the court of appeals' judgment.

Respectfully submitted,

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March 1, 2021