

No. 20-472

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

HOLLYFRONTIER CHEYENNE REFINING, LLC, ET AL.,  
PETITIONERS,

v.

RENEWABLE FUELS ASSOCIATION, ET AL.,  
RESPONDENTS.

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

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**BRIEF *AMICI CURIAE* FOR COALITION FOR  
RENEWABLE NATURAL GAS AND  
PRODUCERS OF RENEWABLES UNITED FOR  
INTEGRITY TRUTH AND TRANSPARENCY  
IN SUPPORT OF RESPONDENTS**

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## STATEMENT OF INTEREST OF AMICI CURIAE<sup>1</sup>

Coalition for Renewable Natural Gas (“RNG Coalition”), a trade association, provides public policy advocacy and education for the renewable natural gas industry in North America. The more than 270 companies and organizations that comprise RNG Coalition’s membership provide more than 95 percent of the fuel that is used to meet the Renewable Fuel Standard (“RFS”) program’s cellulosic biofuel requirements.

Producers of Renewables United for Integrity Truth and Transparency is a coalition of companies that produce biomass-based diesel and ethanol, including cellulosic ethanol. Together they advocate for changes to the recent handling of small refinery exemptions under the RFS program, particularly with respect to the retroactive nature of these exemptions.

The RFS, first enacted in 2005 and expanded in 2007, establishes volume mandates to promote the production and use of renewable fuels, including advanced biofuels such as cellulosic biofuel, in the transportation fuel market. The statute requires the U.S. Environmental Protection Agency (“EPA”) to “ensure”

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<sup>1</sup> In accordance with Rule 37.6, counsel for the *amici curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the brief’s preparation or submission. This brief is filed with the written consent of all parties pursuant to this Court’s Rule 37.3(a).

these volume mandates. 42 U.S.C. §§7545(o)(2)(A)(i), (o)(3)(B)(i).

This case involves the significant expansion of exemptions from the RFS's volume requirements granted to small refineries since 2017, all of which were granted after the relevant compliance years began (*i.e.*, retroactively). As a result of this expansion, the volume requirements, which were intended to provide certainty to the market to support investments in biofuels, became uncertain. The market experienced unpredictable and significant volatility in pricing of Renewable Identification Numbers ("RINs"), which are generated upon production of renewable fuel and are needed to show compliance with the program's volume requirements. This uncertainty and volatility undermined the investments that had been made by renewable natural gas developers, biofuel producers, marketers, and distributors in expectation of enforcement of the volume requirements. It also affected plans and financing for further investment in the biofuels industry. Where their members have invested in and participate in the RFS program, *Amici* have a strong interest in affirming the decision of the U.S. Court of Appeals for the Tenth Circuit ("Tenth Circuit"), which would bring rationality back into the market and further the intent and goals of Congress.

### STATEMENT OF THE CASE

The RFS program seeks to "reduce the nation's dependence on fossil fuels" by setting "ambitious targets for replacing specified volumes of crude oil fuel with renewable fuels." *Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206, 1214 (10th Cir. 2020). The program sets

forth four categories of volume requirements: (1) renewable fuel which includes a specified amount of (2) advanced biofuels which includes a specified amount of (3) biomass-based diesel and (4) cellulosic biofuel. 42 U.S.C. §7545(o)(2)(B). Advanced biofuels are distinguished by their superior lifecycle greenhouse gas emissions reductions (50 percent) compared to the baseline petroleum. *Id.* §7545(o)(1)(B). Cellulosic biofuels, which are produced from “any cellulose, hemicellulose, or lignin that is derived from renewable biomass,”<sup>2</sup> must show a 60 percent reduction. *Id.* §7545(o)(1)(E). These volume requirements apply to “obligated parties,” which EPA defined as refiners and importers of gasoline and diesel fuel. 40 C.F.R. §80.1406(a).

The Tenth Circuit addressed Section 7545(o)(9) of the Clean Air Act in which Congress provided small refineries a “temporary exemption” from being obligated parties. Subparagraph (A)(i) of Section 7545(o)(9) provided a blanket exemption until 2011. 42 U.S.C. §7545(o)(9)(A)(i). This exemption could be extended for small refineries that would experience “disproportionate economic hardship” if required to comply based on (a) the findings of a U.S. Department of Energy (“DOE”) study under subparagraph (A)(ii) and/or (b) EPA’s grant of a petition submitted by the small refinery under subparagraph (B). *Id.* §7545(o)(9)(A)(ii), (B). This case involves the meaning of “an extension” under subparagraph (B).

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<sup>2</sup> Cellulosic feedstocks come from a variety of organic matter, such as agricultural residues, wood wastes and residues, grasses, animal wastes, municipal wastes, and other waste materials.

This case involves three exemptions granted for compliance year 2016 or 2017 to small refineries that had received the initial exemption under subparagraph (A)(i) but allowed the exemption to lapse prior to submitting a petition under subparagraph (B) for a new “extension of the exemption under subparagraph (A).” The case was brought after press reports indicated that the number of exemptions granted by EPA had substantially expanded since 2017 (for compliance years 2016, 2017, and 2018). Because these exemptions were granted after the compliance obligations began to accrue (*i.e.*, retroactively), these exemptions freed up RINs that were no longer required for compliance, allowing them to be “carried over” and used for compliance in a later year. As a result, the Tenth Circuit found, “the approach followed by the agency from 2016-forward has opened up a gaping and ever-widening hole in the statute” *Renewable Fuels Ass’n*, 948 F.3d at 1248. The Tenth Circuit also recognized the exemptions’ “ongoing effects as a result of the carryover *process*.” *Id.* at 1236.

Since subparagraph (B) provides for an “extension of the exemption under subparagraph (A),” the Tenth Circuit considered the meaning of “extension” in the context of the statutory structure. It found the ordinary definitions of extension “dictate that the subject of an extension must be *in existence* before it can be extended.” *Renewable Fuels Ass’n*, 948 F.3d at 1245 (emphasis added). Requiring a continuous extension, the Tenth Circuit reasoned, “funnels small refineries toward compliance over time,” consistent with statutory intent. *Id.* at 1246. This made sense because a “small refinery in 2006 did not have a meaningful opportunity to consider in advance whether or how it

could comply with renewable fuel obligations.” *Id.* at 1247. Because the three exemptions before the court involved refineries that “sought to renew or restart their exemptions in 2016 or 2017,” the Tenth Circuit held that the Clean Air Act “did not authorize the EPA to grant the petitions.” *Id.* at 1249.

### SUMMARY OF ARGUMENT

Petitioners and their supporting *amici* here argue that, because Congress provided that small refineries could seek “an extension of the exemption under subparagraph (A)” “at any time,” it intended to create a never-ending “free-standing” exemption for small refineries, creating a “safety-valve” in later years of the program, regardless of the impacts on the RFS volume mandates. This is inconsistent with the text, structure, and history of the statute and EPA’s regulations.

Because of the volatility in the global crude oil market, Congress recognized that energy independence required this country to diversify its energy sources, but it also knew that biofuels faced significant obstacles in the transportation fuel market. The RFS sought to overcome those obstacles by creating a certain market through volume mandates intended to incentivize investments to promote production and use of biofuels, particularly advanced biofuels. Congress was deliberate in how it structured the RFS program to create an enforceable mandate for *production*. Petitioners’ “free-standing” exemptions undermine these carefully crafted incentives by removing the certainty Congress sought.

“Free-standing” exemptions, which have been granted retroactively, fundamentally change the schedule Congress established to meet its goals. While Congress gave small refineries more time before becoming obligated parties, nothing in the structure or history of the statute indicates Congress sought to give them a free pass to invoke at their discretion. Petitioners’ reliance on the phrase “at any time” ignores the purpose of getting an “exemption” in the first place and leads to absurd results. Facing increasing volumes should incentivize action. Indeed, many refineries have taken numerous steps to promote biofuels.

Finally, Petitioners’ request to defer to a 2014 regulatory change must be rejected. *Amici* are not aware of any rulemaking where EPA explained to the public that it read “extension” or “at any time” so broadly as to support “free-standing” hardship exemptions. Instead, EPA rejected similar attempts, and nothing in the 2014 rule indicates EPA changed this view.

## ARGUMENT

### I. FREE-STANDING “EXTENSIONS” OF SMALL REFINERY EXEMPTIONS, AS PETITIONERS SEEK HERE, UNDERMINE THE GOALS OF CONGRESS.

#### A. Petitioners Cannot Ignore the Carefully Crafted Incentives Congress Created to Promote Production of Biofuels.

Petitioners acknowledge that “the text of the whole statute” can give instruction as to the meaning of a phrase. *Petr’s’ Br.* at 26 (quoting *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017)).

Rather than tackle how “free-standing” exemptions fit into the structure of the statute “as a whole,” Petitioners largely cite to post-enactment Congressional statements or other, unrelated statutes. This ignores that, here, Congress established a *mandate* intended to increase “production” of renewable fuels. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492; *see also Nat’l Petrochemical & Refiners Ass’n v. EPA*, 630 F.3d 145, 156 (D.C. Cir. 2010). Not once, but twice, Congress made clear EPA was to “ensure” these volume requirements. 42 U.S.C. §§7545(o)(2)(A)(i), (o)(3)(B)(i). While providing some flexibility toward how obligated parties meet the mandated volumes, Congress also included strict limitations on those provisions to steer the market toward incorporating greater and greater volumes of renewable fuel, promoting *increasing production*.

The RFS program was established by the Energy Policy Act of 2005 to promote renewable fuels, which included, among other things, “natural gas produced from a biogas source.” Pub. L. No. 109-58, §1501(a). Because the statute focused on the gasoline market and ethanol was already used for octane purposes in gasoline, however, the volumes Congress set in 2005 were basically insufficient to spur action, particularly with respect to advanced biofuels.

In January 2007, then-President Bush introduced his “Twenty in Ten” initiative that sought to reduce gasoline usage by 20 percent in ten years by expanding the RFS to require 35 billion gallons of renewable fuels by 2017 to “displace 15 percent of

projected annual gasoline use in 2017.”<sup>3</sup> White House, *Twenty In Ten: Strengthening America’s Energy Security* (2007), <https://georgewbush-whitehouse.archives.gov/stateoftheunion/2007/initiatives/energy.html>. President Bush recognized the diversification of fuel sources to include alternative fuels was key to the nation’s energy security. *Id.*

Congress also recognized that “challenges remain if biofuels are to become a cornerstone of U.S. efforts to improve national energy security.” S. Rep. No. 110-65 at 2 (2007). Among those challenges was the need to diversify the feedstocks “to include a broader array of renewable biomass.” *Id.* This would “promote regional diversity in biofuels production and distribution, spreading economic benefits to rural communities across the country and relieving pressure on corn commodity prices.” *Id.* at 2-3. In addition, “it can lead to greater efficiency in the fuel-production process and help save on fossil fuel emissions.” *Id.* at 3. Congress sought to address these challenges by “increasing and extending the existing RFS—with specific incentives for the production of biofuels from new sources of renewable biomass—... to provide market certainty to both the existing ethanol industry and the next generation of advanced biofuels producers.” *Id.*

In December 2007, Congress passed the Energy Independence and Security Act of 2007. Pub. L. No. 110-140. This Act did substantially expand the RFS program, requiring annual increases of renewable fuel be introduced into the transportation fuel market to

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<sup>3</sup> Gasoline demand also would be reduced through increasing fuel economy.

reach 36 billion gallons by 2022. 42 U.S.C. §7545(o)(2)(B)(i)(I). To move toward the “next generation” of biofuels, Congress established specific requirements for “advanced biofuels,” which included specific requirements for “cellulosic biofuel” and “biomass-based diesel,” within the overall renewable fuel requirement. *Id.* §7545(o)(2)(B)(i)(II-IV). Under the schedule created by Congress, advanced biofuels would increasingly make up a larger portion of the overall program, and cellulosic biofuel would increasingly make up a larger portion of the advanced biofuels required. *Id.*

Because cellulosic biofuels were still emerging, Congress recognized its statutory volumes may be ambitious and so included a waiver provision to give EPA authority to adjust those volumes to the volumes projected to be available. 42 U.S.C. §7545(o)(7)(D). Congress also provided EPA with “general” waiver authority to reduce the statutory volumes, which is limited to cases of inadequate domestic supply or severe economic or environmental harm and included procedural protections before they could be used, such as requiring public notice and comment. *Id.* §7545(o)(7)(A).

Congress also provided some flexibility to assist with compliance. Congress required a credit program, which EPA implemented through the RIN-system, recognizing some areas of the country, at that time, may be better equipped to produce and use renewable fuels. 42 U.S.C. §7545(o)(5); S. Rep. No. 109-74 at 7 (2005) (noting “credit trading provisions allow the [renewable fuel] to be used where it makes the most economic and environmental sense ...”). Here, again,

Congress limited when those credits could be generated and limited the duration of credits to 12 months. 42 U.S.C. §7545(o)(5)(A), (C), (E). The credit program was to be created by *regulation*, also allowing for public oversight. *Id.* §7545(o)(5)(A). Congress allowed refineries that cannot obtain enough “credits” in one year to carry a deficit into the next year, deferring compliance. *Id.* §7545(o)(5)(D). Again, Congress imposed limits on its use, requiring the volumes be made up the next year. *Id.* These limitations provide safeguards intended to promote actual new *production*, supporting the investments being made to reach the statute’s overall volume goals. In other words, while providing some flexibility, Congress carefully crafted the RFS program to “ensure” the mandated volumes.

Petitioners, however, make no attempt to explain how the program created by Congress is not disrupted by their reading of subparagraph (B). Indeed, in allowing small refineries to seek exemptions “at any time,” as requested by Petitioners, many of the safeguards noted above can be avoided, including the limits on EPA’s waiver authority. While these safeguards may be considered too stringent by some, *see* Br. of *Amici Curiae* States of Wyoming, *et al.*, at 25-27, this does not mean Congress intended expansive small refinery exemptions. Rather, it means Congress was serious about forcing the market to comply with the mandated volumes, including small refineries. Congress “does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 468 (2001) (citations omitted); *Hall v. Hall*, 138 S. Ct. 1118, 1129 (2018).

## **B. Ensuring Growth of Advanced Biofuels Requires a Certain Market.**

Today, corn ethanol makes up the largest portion of biofuels used under the RFS. But there has been substantial growth in production of advanced biofuels based on the certainty the volume requirements were intended to provide.

The renewable natural gas industry exemplifies all of the goals Congress sought in enacting the RFS program. Renewable natural gas is derived from “[b]iogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.” 42 U.S.C. §7545(o)(1)(B)(ii)(V). To produce renewable natural gas, the biogas is treated to remove contaminants and produce a pipeline quality fuel that can be used interchangeably with geologic natural gas in the same infrastructure and applications, including as a transportation fuel.

Renewable natural gas provides numerous environmental and economic benefits. It allows for the capture of methane, a potent greenhouse gas, that may otherwise be flared or released directly into the atmosphere. As a result, renewable natural gas facilities have among the lowest carbon intensity scores of any renewable fuels as determined by Argonne National Labs’ Greenhouse Gases, Regulated Emissions, and Energy Use in Technologies (“GREET”) model, as adopted by the California Air Resources Board, Oregon Department of Environmental Quality, and others. Renewable natural gas runs in natural gas vehicles that also

provide reduced tailpipe emissions of other air pollutants compared to petroleum-diesel. See NGV America, *Breathe Cleaner Air Right Now*, <https://ngvamerica.org/environment/> (last visited Mar. 25, 2021).

A new renewable natural gas facility creates jobs, “requiring design and engineering services, 20 to 40 local trade positions during construction, and typically 3 to 5 permanent employees for on-site operations.” Bates White Economic Consulting, *Renewable Natural Gas Supply and Demand for Transportation*, at 3 (2019) (“Bates White Report”), available at [https://www.bateswhite.com/media/publication/179\\_BW%20RNG%20Report.pdf](https://www.bateswhite.com/media/publication/179_BW%20RNG%20Report.pdf). It is estimated these production facilities generate 4.7 to 6.2 jobs per million ethanol-equivalent gallons of renewable natural gas. *Id.* Job impacts are generally concentrated in rural areas, where the effects are more likely to be significant relative to the size of the local economy and the availability of well-paying jobs. *Id.*

However, renewable natural gas projects require substantial investments. “Total capital costs for smaller landfill projects are in the range of \$5 million to \$25 million, and upwards of \$100 million for larger projects, including agricultural and wastewater projects.” Bates White Report at 31-32. Renewable natural gas projects “typically have a 20-year life, so developers need some amount of certainty that they can realize a return on their investments.” Arlene Karidis, *RNG Infrastructure Opportunities: A Project Developer’s Perspective*, *Waste 360*, Oct. 2, 2018, <https://www.waste360.com/fuel/rng-infrastructure-opportunities-project-developer-s-perspective>.

Renewable natural gas is an essential piece of the puzzle when it comes to moving away from the country's dependence on fossil fuel and toward low-carbon, carbon neutral, and carbon-negative advanced biofuels. But long-term stability in the market is needed to support these investments and ensure their success.

In 2014, EPA clarified that renewable natural gas (*i.e.*, renewable compressed natural gas, renewable liquified natural gas, and renewable electricity) can qualify as "cellulosic biofuel." 79 Fed. Reg. 42,128, 42,128 (July 18, 2014). EPA noted that this action had "the potential to provide notable volumes of cellulosic biofuel for use in complying with the RFS program." *Id.* Since then, renewable natural gas production for transportation fuel increased from 32.6 million ethanol-equivalent gallons in 2014 to over 500 million ethanol-equivalent gallons in 2020. *See* EPA, *RINs Generated Transactions*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rins-generated-transactions> (last updated Mar. 10, 2021); *see also* Bates White Report at 1 (noting renewable natural gas production averaged 30 percent growth annually from 2015 through 2018). In 2020, renewable natural gas comprised over 99 percent of the cellulosic biofuel program.

While renewable natural gas technology has been known and renewable natural gas has a variety of applications, only about 30 projects were constructed from the 1980s through 2011. *See* Anna Simet, *RNG Revolution*, *Biomass Magazine*, Oct. 31, 2020, <http://biomassmagazine.com/articles/17470/rng-revolution/>. Today, there are 157 operational projects in North America, with 76 projects under construction

and another 79 projects in a pre-construction planning phase. See RNG Coalition, *RNG Production Facilities in North America*, <https://www.rngcoalition.com/rng-production-facilities> (last visited Mar. 26, 2021). “There remains substantial technical potential for increased production of [renewable natural gas],” with estimates of additional potential production ranging from about 4,800 million ethanol-equivalent gallons to over 7,000 million ethanol-equivalent gallons annually. Bates White Report at 2.

The growth of the renewable natural gas industry since 2014 illustrates how the mandate Congress established was intended to work. With more than ample feedstock sources available, this growth is likely to continue, *so long as there is enough stability and certainty to incentivize and support the investments needed.*

**C. Petitioners’ Claimed Free-Standing “Extensions” of Small Refinery Exemptions Have Undermined the Certainty Sought by Congress.**

Investment and production decisions in the biofuels industry are made largely based on the volumes EPA indicates will be required. When implemented properly, the RFS program provides the stability and certainty needed to grow the program, as illustrated by the renewable natural gas industry’s experience described above. This all changed in recent years based on an apparent shift in the handling of small refinery exemptions that allowed the free-standing exemptions Petitioners here claim Congress intended.

Prior to 2017, the number of small refineries receiving extensions of their exemption had dwindled to seven for compliance year 2015. See EPA, *RFS Small Refinery Exemptions*, Table 2, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (last updated Mar. 18, 2021) (“EPA SRE Data”). Even with these exemptions, the volume requirements for compliance year 2015 were met. See EPA, *Annual Compliance Data for Obligated Parties and Renewable Fuel Exporters under the Renewable Fuel Standard (RFS) Program*, Table 2, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/annual-compliance-data-obligated-parties-and> (as of Nov. 10, 2020) (“EPA Annual Compliance Data”).

Since then, however, the number of exemptions grew to 19 for compliance year 2016, 35 for compliance year 2017, and 32 for compliance year 2018. See EPA SRE Data, Table 2. Unlike in 2015, volume requirements for those years were no longer met after the exemptions were granted. See EPA Annual Compliance Data, Table 2. This is illustrated for cellulosic biofuel in the table below:

Compliance year	EPA volume (ethanol gallons) <sup>4</sup>	Reported obligations after exemptions (ethanol gallons)
2015	123,000,000	123,111,779
2016	230,000,000	222,267,401
2017	311,000,000	287,861,443
2018	288,000,000	275,413,556

The minimum volumes were no longer “ensured” because these exemptions have been sought during or after the compliance year and granted after the compliance year (*i.e.*, “at any time”). This cannot be what Congress intended.

Petitioners may argue that, since the exemptions are granted after the compliance year is over, actual production of biofuels is not impacted in that year. These impacts, however, go beyond the compliance year in question. Because of the late-granted exemptions, RINs no longer needed to show compliance can be carried over into the next year (referred to as “carryover RINs”). 40 C.F.R. §80.1427(a)(6)(i). Often, RINs were already retired by the refinery and then “unretired” after the exemption was granted (with no notice to the public), allowing them to re-enter the market. *See* Br. of *Amicus Curiae* CountryMark

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<sup>4</sup> The statute lists the minimum volumes required for cellulosic biofuels through 2022, after which time EPA is to set those volumes. 42 U.S.C. §7545(o)(2)(B). EPA used its cellulosic waiver authority to reduce the statutory volumes. *Id.* §7545(o)(7)(D).

Refining & Logistics at 9 (“CountryMark Br.”).<sup>5</sup> Demand is affected by supply, *i.e.*, RIN availability. Where the market believed these RINs were retired or would be retired and, therefore, no longer available, the influx of these newly available carryover RINs into the market creates volatility in RIN prices that impact the return on investments.

These newly available carryover RINs also undermine the need for *production* of renewable fuels in later years, disincentivizing further investments. This is because, with each exemption granted retroactively, there is a change in the supply-and-demand calculus, as further explained and illustrated as follows.

First, the volume requirements are to be “ensured” by EPA through setting “percentage standards” based on the projected consumption of gasoline and diesel fuel for the upcoming compliance year. 40 C.F.R. §80.1405(c). This is to occur by November 30 prior to the start of the compliance year. *Id.* §80.1405(b).

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<sup>5</sup> *Amicus Curiae* CountryMark (Br. at 9, 13) claims unretiring RINs creates liquidity in the RIN market and causes refineries to lose their ability to seek continuous exemptions. CountryMark is wrong. The statute and EPA’s regulations say nothing about what happens when a refiner retires RINs awaiting an exemption decision. *Cf.* 42 U.S.C. §§7545(o)(2)(A)(iii), (o)(5)(A) (requiring regulations). This is because exemptions were to be forward-looking. *See, e.g.*, 40 C.F.R. §80.1441(e)(2)(i) (requiring petition for extension to include, *inter alia*, “detailed discussion regarding the hardship the refinery *would face*”) (emphasis added). And EPA regulations prohibit a retired RIN from being used for compliance again. *Id.* §80.1427(a)(6)(ii); *cf.* 40 C.F.R. §§80.1427(a)(4)(iv), 80.1429(g) (Dec. 1, 2020). In fact, because of this practice, certain refiners gain an advantage that could be used to manipulate the RIN market.

When EPA set the standards for compliance years 2016, 2017, and 2018, it assumed *all refineries* would participate in the program. Because EPA assumed all refineries would participate, the exemptions granted after the standards were set for those years resulted in the actual volume obligations to be less than what otherwise would be required, as shown above.

Second, upon granting small refinery exemptions retroactively, RINs expected to be retired in a compliance year by the now exempt small refineries become available carryover RINs. The number of these newly available carryover RINs (“SRE RINs”) can be estimated by multiplying the volume of gasoline and diesel fuel no longer subject to the volume obligations times the standard for the applicable compliance year, which for cellulosic biofuel results in the following number of SRE RINs:

2016 SRE RINs:

$$7,840 \text{ million gallons} \times 0.128\% = 10,035,200;$$

2017 SRE RINs:

$$17,050 \text{ million gallons} \times 0.173\% = 29,496,500;$$

2018 SRE RINs:

$$14,420 \text{ million gallons} \times 0.159\% = 22,927,800.^6$$

This results in lost demand for new *production* in the next year as illustrated in the following tables.

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<sup>6</sup> EPA SRE Data, Table 1; 40 C.F.R. §80.1405(a)(7-9).

Changing Demand for Compliance Year 2017	
311,000,000	Planned for demand based on EPA volumes
287,861,443	RFS demand based on reported obligations (as of 11/10/2020)
277,826,243	RFS demand after applying 10,035,200 2016 SRE RINs
10.7% reduction from planned for demand	

Changing Demand for Compliance Year 2018	
288,000,000	Planned for demand based on EPA volumes
275,413,556	RFS demand based on reported obligations (as of 11/10/2020)
273,823,556	RFS demand after one exemption granted Jan. 2021 <sup>7</sup>
244,327,056	RFS demand after applying 29,496,500 2017 SRE RINs
15.2% reduction from planned for demand	

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<sup>7</sup> See John Herath, *EPA Grants RFS Waivers on Eve of Inauguration*, Farm Journal AgWeb, Jan. 19, 2021, <https://www.agweb.com/news/policy/politics/epa-grants-rfs-waivers-eve-inauguration>. This one exemption exempted one billion gallons of petroleum, representing another reduction of 1,590,000 gallons.

Changing Demand for Compliance Year 2019	
418,000,000	Planned for demand based on EPA volumes
421,069,080	RFS demand based on reported obligations (with no exemptions granted as of 11/10/2020)
417,872,080	RFS demand after two exemptions granted Jan. 2021 <sup>8</sup>
394,944,280	RFS demand after applying 22,927,800 2018 SRE RINs <sup>9</sup>
5.5% reduction from planned for demand	

These tables show how granting just one exemption retroactively can change market expectations regarding supply and demand. The carryover RINs continue to “roll over” into later years, as obligated parties seek to exhaust prior-year RINs before seeking RINs for the current year (*i.e.*, RINs from new production), creating the “ongoing effects” noted by the Tenth Circuit. Even anticipation of an influx of RINs causes the market to react. If, according to Petitioners, small refineries can seek these exemptions “at any time,” the market can never be certain what volumes will be needed because there may be an influx of newly available RINs “at any time.” This uncertainty slows down investment and creates RIN price volatility that

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<sup>8</sup> See Herath, *supra*, n.7. While 30 petitions remain pending, these two exemptions exempted 1,390,000,000 gallons from the program, representing 3,197,000 lost cellulosic biofuel gallons. See EPA SRE Data, Table 1; 40 C.F.R. §80.1405(a)(10)(i).

<sup>9</sup> EPA has extended the 2019 compliance deadline for small refineries from March 31, 2020 to November 30, 2021.

impacts investments already made. This is a strange way for Congress to “ensure” the volume mandates.

This is particularly problematic for the cellulosic biofuel category because EPA already reduced the statutory volume requirements using its cellulosic waiver authority. 42 U.S.C. §7545(o)(7)(D). Under that authority, if projected *production* of cellulosic biofuels in the upcoming compliance year is less than the statutory minimum applicable volumes, then EPA is to reduce those volumes “to the projected volume available” when setting the percentage standards. *Id.* §7545(o)(7)(D)(i). This projection is to be based on a “neutral aim at accuracy.” *Am. Petroleum Inst. v. EPA*, 706 F.3d 474, 476 (D.C. Cir. 2013). But, by allowing these retroactive exemptions and reducing the required *production*, the standards EPA sets for cellulosic biofuels are decidedly not based on expected available *volumes* and are intentionally inaccurate.

## **II. CONGRESS PROVIDED ONLY FOR A CONTINUOUS EXTENSION TO GIVE SMALL REFINERIES MORE TIME TO PREPARE.**

Despite clear Congressional intent to move toward advanced biofuels, Petitioners assert “Congress balanced and supported renewable fuel production *and* the continued survival of small refineries,” because protecting domestic refining capacity promotes “energy independence.” Pet’rs’ Br. at 41 (citation omitted). The Tenth Circuit determined that this balancing resulted in giving small refineries more time to prepare for the volume obligations. *See Renewable Fuels Ass’n*, 948 F.3d at 1246 (citing *Hermes Consolidated, LLC v. EPA*, 787 F.3d 568, 578 (D.C. Cir.

2015)). Rejecting the Tenth Circuit’s finding, Petitioners contend the result of this balancing was to create a never-ending number of “free-standing” exemptions for small refineries, regardless of the cause of the refineries’ economic difficulties or, importantly, of the impact those exemptions would have on Congress’s market-forcing policy. Petitioners are wrong.

**A. Allowing Free-Standing “Extensions” “at Any Time at All” Changes the Statutory Schedule for Meeting the Volume Requirements.**

Industries often must shift operations with changing demand, whether due to government policy or other market factors. Recognizing the RFS would change demand, Congress established a phased-in schedule, ramping up the volumes required to reach 36 billion gallons by 2022. This would require *action* by biofuel producers and refiners, large and small.

The RFS “sets forth a comprehensive program to increase the use of renewable fuels, in the United States.” S. Rep. No. 109-74 at 6. The “essential components of the program, which have been carefully designed to achieve the overall goals,” included “the overall size of the renewable fuels mandate, and the schedule for its implementation.” *Id.* The schedule for implementation was a phased-in approach intended to give biofuel producers time to ramp-up production capacity and the petroleum industry an opportunity to make adjustments to the refining, supply, and distribution system. *Id.* at 6-7. Changes to these “essential” components were viewed as undermining the program. *Id.* at 6.

Congress anticipated “participation by small refiners.” *Renewable Fuels Ass’n*, 948 F.3d at 1215 (quoting S. Rep. No. 109-78, at 2, 18–19 (2005)). The initial blanket exemption until 2011 gave small refineries five years to make the necessary adjustments to the refining, supply, and distribution system. Congress also allowed for this initial time-period to be *extended* based on “disproportionate economic hardship.” 42 U.S.C. §7545(o)(9)(A)(ii), (B). The extension in subparagraph (B) simply allows EPA to consider case-specific circumstances that may require a refinery to need more time to adjust. *See* 40 C.F.R. §80.1441(e)(2)(i) (requiring petition explain when refinery may reasonably achieve compliance). While some refineries may have determined they would largely rely on the purchase of separated RINs (*i.e.*, actions taken by others) to comply, this does not alter the intent of *Congress*.<sup>10</sup>

Extension petitions are kept confidential, but the requested extensions, in practice, appear to have only sought one-year extensions and have generally been submitted well into the compliance year and even after the compliance year ended. *Cf.* EPA, *Renewable Fuel Standard Program - Standards for 2018 and Biomass-Based Diesel Volume for 2019: Response to Comments*, at 216 (2017), available at <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockkey=P100TDDH.pdf> (stating EPA “disagrees with commenters that stated

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<sup>10</sup> RINs are generated upon production of renewable fuels. 40 C.F.R. §80.1426. They can be “separated” from the physical gallons in certain cases, including when those gallons are blended, used directly as transportation fuel, or purchased by obligated parties. *Id.* §80.1429(b). Separated RINs can be used for compliance or transferred to others. *Id.* §80.1428(b).

that it is impractical to grant small refinery exemptions before the annual standards are established”). But the historical failure to follow the statute and regulations as written is not justification to re-write their plain terms. If, as Petitioners assert, small refineries face ongoing structural impediments, Pet’rs’ Br. at 41, a longer extension or continued extensions may have been appropriate to address those impediments. These could be identified during the initial blanket exemption phase; during the time of the automatic extension based on the DOE study; or prior to the end of any subsequent extension. In other words, the petition could be submitted “at any time” the impediment is discovered that requires the refinery to seek more time before becoming an “obligated party.”<sup>11</sup>

This does not mean the petition can be submitted “at any time at all.” A “free-standing” exemption that can be turned on and off would fundamentally alter the phased-in schedule. The schedule of increasing volumes creates the incentive for *action sooner rather than later*. Allowing a “free-standing” exemption essentially removes this threat, which, in turn, limits the ability of the market to increase the production and use of renewable fuels. This, as Congress predicted, undermines the program as illustrated above.

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<sup>11</sup> While the Tenth Circuit noted that the petition could be submitted after the standards are required to be set (November 30 of the prior year), any extension would presumably lapse in December. *Renewable Fuels Ass’n*, 948 F.3d at 1248.

**B. Only an Exemption “in Existence” can be Extended.**

*1. Exemptions seek avoidance of liability.*

The Tenth Circuit properly determined that the “extensions” allowed by statute must be of exemptions “in existence.” *Renewable Fuels Ass’n*, 948 F.3d at 1245. This makes sense because Congress used the term “exemption,” defined as “the act of exempting or the state of being exempt.” Merriam-Webster, Exemption, <https://www.merriam-webster.com/dictionary/exemption>. It is a synonym of “immunity,” defined as “the quality or state of being immune.” Merriam-Webster, Immunity, <https://www.merriam-webster.com/dictionary/immunity>. Being exempt or immune allows for the *avoidance* of liability in the first instance. When an extension lapses, the refinery is no longer in “the state of being” exempt or immune. An “extension” of this “state of being” here only makes sense if the exemption is continuous.

If Congress knew small refineries must purchase RINs from the open market to comply and they could not recoup their costs as some contend, *see* Country-Mark Br. at 19, Congress also must have understood that including a “temporary exemption” would allow the avoidance of those costs for at least five years. These avoided costs would allow a refinery to make the necessary investments to prepare to use an increasing amount of renewable fuels, such as building refining, blending, or distribution systems as needed to accommodate renewable fuels. Indeed, it is generally harder to build new infrastructure than to expand existing infrastructure to accommodate incremental

increases in later years of the program. To the extent exempt small refineries do blend renewable fuels during the exemption period, this “will be reflected as RINs available in the market,” and the exempt small refinery can use money received from the sale of those RINs to expand its capabilities. 72 Fed. Reg. 23,900, 23,911 (May 1, 2007); 42 U.S.C. §7545(o)(5)(A)(i).

The RFS volume obligations are based on fuel production or imports from January 1 through December 31 of the compliance year. Once the prior extension of the exemption lapses on January 1, the refinery becomes an “obligated party,” and the volume obligations begin to accrue. It is expected that RINs will be acquired by obligated parties throughout the year. Whether a small refinery is an obligated party at the start of the year makes a difference. *See* 40 C.F.R. §80.1429(b)(8) (imposing limits on separation of RINs by exempt small refineries). If the extensions were not continuous, the refinery would not be able to take advantage of the time it is not an obligated party but would be able to avoid or undermine the incentives to require it to *actually blend and use renewable fuels*.

While Petitioners may claim small refineries generally seek their exemptions prior to the compliance deadline, which is typically March 31 of the next year, that is simply a reporting requirement to confirm the appropriate number of RINs had been acquired and

retired. 40 C.F.R. §80.1451(a)(1). RIN trading occurs throughout the year.<sup>12</sup>

All of the exemptions granted for compliance years (“CY”) 2016, 2017 and 2018, when EPA expanded the number of exemptions, were granted after the compliance year was over and even after the refineries retired RINs to show compliance. This is shown in the following table:

Granted	2017	2018	2019	2020	2021	Total
CY2016	14	5	0	0	0	19
CY2017	0	29	6	0	0	35
CY2018	0	0	31	0	1	32

References:

Freedom of Information Act Request EPA-HQ-2018-010014 (FOIA Online), Productions dated July 31, 2019, Jan. 31, 2020, and Feb. 18, 2020.

EPA Memorandum, *Decision on 2018 Small Refinery Exemption Petitions* (Aug. 9, 2019).

Herath, *supra* n.7.

But that is not granting an exemption to avoid incurring a liability, that is providing reimbursement after

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<sup>12</sup> See EPA, *RIN Transaction Volume Report*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information>, and *RIN Holdings Report*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/available-rins>.

the liability is incurred. The reimbursement is in the form of freeing up or “unretiring” RINs that can be used in the next year or sold to other parties. While some refineries rely on separated RINs for compliance, this indicates that small refineries *can comply* and are trying to use an on-again, off-again exemption to guard against *other economic factors*. See, e.g., Pet’rs’ Br. at 45; CountryMark Br. at 4; Br. of Am. Fuel & Petrochemical Manufacturers at 21-22 (“AFPM Br.”). But the Tenth Circuit made clear that the hardship must be from RFS compliance, which Petitioners did not appeal. *Renewable Fuels Ass’n*, 948 F.3d at 1253-1254.

## 2. *Petitioners’ reading creates absurd results.*

Petitioners contend the “at any time” language in subparagraph (B) provides no temporal limitation “whether it be the filing of a petition after the annual percentages deadline or the absence of an unbroken temporal stream of prior exemptions.” Pet’rs’ Br. at 36; see also AFPM Br. at 5 (claiming “at any time” is construed to mean “at any time at all”) (citation omitted). But “strange and indeterminate results” can also define “any.” *Nixon v. Missouri Municipal League*, 541 U.S. 125, 133 (2004). Reading the statute to allow exemptions “at any time at all” has resulted in exemptions being granted after the compliance year and even after the compliance deadline. This has raised a host of issues that are nowhere contemplated in the statute. See, *supra*, Section I.C., n.5.

While the refiners here attempt to characterize these actions as “consistent” practice, EPA created a whole new regime for small refinery exemptions since

2017 outside the public view and largely outside judicial scrutiny. None of these actions are allowed under the statute or EPA's regulations. Instead, they purport to flow from Petitioners' claim that exemptions can be sought "at any time" with no temporal limitations. The Tenth Circuit, however, rejected this reading because: "By [their] logic, the EPA could grant a 2019 petition seeking a small refinery exemption for calendar year 2009 – more than a decade after the fact." *Renewable Fuels Ass'n*, 948 F.3d at 1248. Indeed, in response to the Tenth Circuit's decision, about 72 petitions were filed since March 2020 seeking exemptions for compliance years 2011-2018—precisely what the Tenth Circuit warned against. See EPA Memorandum, *Denial of Small Refinery Gap-Filling Petitions*, at 3 (2020), available at <https://www.epa.gov/sites/production/files/2020-09/documents/rfs-denial-small-refinery-gap-filling-petitions-2020-09-14.pdf>; EPA SRE Data, Table 2. While EPA refers to these as "gap-filling" petitions and has denied many (but not all) of them,<sup>13</sup> several are immaterially different from the retroactive exemptions EPA has been granting since 2017, which, as described above, have had detrimental impacts on the program and have allowed the avoidance of the strict limitations Congress placed on EPA's authority under the statute. Where Congress carefully crafted incentives to promote investment in renewable fuels, it is simply absurd to give those three words—"at any time"—so much power.

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<sup>13</sup> This refers to the refiners attempt to fill "gaps" in years for which they had not sought or had not received an exemption as an end-around the Tenth Circuit's decision.

**C. Since the Start of the Program, Obligated Parties Have Developed Numerous Ways of Obtaining RINs for Compliance.**

The refining sector has long complained of the compliance costs associated with the RFS—in their view, high RIN prices. But, after ten years, many refineries of all sizes have figured out a variety of ways to comply. *See Monroe Energy, LLC v. EPA*, 750 F.3d 909, 919 (D.C. Cir. 2014) (noting “high RIN prices” “incentivize precisely the sorts of technology and infrastructure investments and fuel supply diversification that the RFS program was intended to promote”).

Renewable natural gas, for example, does not face the impediments cited by the small refineries in claiming they must rely on purchasing separated RINs. *See, e.g., Br. of Amicus Curiae Small Refineries Coalition* at 6-8; *CountryMark Br.* at 6-12. Renewable natural gas can be used interchangeably with geologic natural gas in all infrastructure and equipment. Renewable natural gas projects have diverse sources of feedstock, including landfills, wastewater treatment plants, and agricultural waste operations. The locations are chosen carefully to ensure better market access, such as proximity to commercial pipelines. These waste streams exist throughout the country, and renewable natural gas is already being produced in at least 30 states. While mostly used for heavy-duty and medium-duty vehicles, such as long-haul trucks, refuse trucks, and buses, renewable natural gas is a cost-effective alternative fuel. *See* NGV America, *Breathe Cleaner Air Right Now*, <https://ngvamerica.org/environment/> (last visited Mar. 26, 2021). Large fleets have been converting to natural gas

vehicles and using renewable natural gas. In fact, renewable natural gas developers, producers and marketers often partner with obligated parties to provide them access to necessary RINs. While still a relatively small portion of the overall RFS program, there is room to grow. This illustrates the diversity of fuels available, and the growth of the program since 2011.

*Amicus Curiae* Small Refineries Coalition (Br. at 4-8), nonetheless, relies largely on the 2011 DOE study to claim that small refineries are and will remain disadvantaged. But it is now 2021, more than ten years later, and some of the concerns raised in that study have not materialized. *See Ergon-W.Va. v. EPA*, 980 F.3d 403, 414-418 (4th Cir. 2020). This is because the biofuels industry has taken numerous steps to address the concerns raised since the start of the program. While small refineries may have chosen to rely on the open RIN-market to obtain separated RINs for compliance, EPA has “explained that the mere fact that [the small refinery] had to spend money to purchase RINs to comply with its obligations is not, in itself, evidence of a particular hardship.” *Id.* at 417.

### **III. EPA’S 2014 REGULATION DOES NOT EVIDENCE THAT EPA MUST ALLOW PETITIONS “AT ANY TIME AT ALL.”**

Petitioners ask this Court to ignore the statute’s plain text and defer, instead, to a 2014 rulemaking in which EPA declined to require a small refinery to show that it did not exceed the 75,000-barrel threshold for all full calendar years between 2006 and the date of the petition’s submission to seek “an extension of the exemption.” Petr’s’ Br. at 46-50 (quoting 78 Fed.

Reg. 36,042, 36,064 (June 14, 2013)). Comments supporting the proposed amendment referred to the statutory requirement limiting exemptions to “extensions.” *Id.* at 47. Petitioners claim that the Tenth Circuit should have deferred to EPA’s purported rejection of the definition that an “extension” must be continuous. But EPA has not, via rulemaking, defined “extension” as Petitioners ask this Court to do.

The small refinery exemption provisions were enacted by the Energy Policy Act of 2005, with no changes as part of the 2007 amendments. When establishing the regulations for the initial RFS program, EPA made no mention of any “free-standing” exemptions. *See* 72 Fed. Reg. at 23,924 (“Beginning in 2011, small refineries will be required to meet the same renewable fuel obligation as all other refineries, unless their *exemption is extended* pursuant to §80.1141(e).”) (emphasis added); 40 C.F.R. §80.1141. This is telling because, in that same rulemaking, EPA rejected requests to establish general “hardship” exemptions or “temporary hardship exemption[s] based on unforeseen circumstances.” *Id.* at 23,926-23,927. At least one commenter argued for a temporary hardship exemption based on unforeseen circumstances “since it is impossible to predict how the RFS program will impact small refiners.” *Id.* EPA did not reference the availability of later free-standing exemptions that provide a “safety-valve” that a small refinery could seek in rejecting this request.

In 2010, EPA retained the same small refinery exemption provisions in its regulations implementing the 2007 amendments. 75 Fed. Reg. 14,670, 14,737 (Mar. 26, 2010); 40 C.F.R. §80.1441. EPA recognized

that “the criteria specified by statute for providing a *further compliance extension* to small refineries is a demonstration of ‘disproportionate economic hardship.’” 75 Fed. Reg. at 14,736 (emphasis added). In that rulemaking, there was discussion on whether EPA, having applied the “small refinery” exemption to “small refiners,” should grant a blanket extension to small refiners until 2014 to give them more time to prepare for the volume requirements. *Id.* at 14,736-14,738. EPA found it could not grant additional extensions to small refiners beyond that available to small refineries. *Id.* At the time, DOE had found that no further extensions would be needed, although EPA noted this could change based on the revised DOE study or petitions it received, allowing for “extensions beyond December 31, 2010.” *Id.* at 14,738. This is consistent with a *further compliance extension*, not additional, later *exemptions from compliance*. In 2014, EPA amended 40 C.F.R. §80.1441, but “neither the preamble nor the administrative rule contains any discussion of what the word ‘extension’ actually means.” *Renewable Fuels Ass’n*, 948 F.3d at 1251. It was incumbent on EPA to explain this claimed change in policy.

Instead, Congress and EPA consistently referred to seeking “extensions,” not free-standing exemptions (or reimbursement). The plain and common-sense reading can only be that such extensions must be “continuous.”

**CONCLUSION**

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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