

No. 20-472

In the Supreme Court of the United States

HOLLYFRONTIER CHEYENNE REFINING, LLC,
et al.,

Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, *et al.*,
Respondents.

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

**BRIEF OF ADVANCED BIOFUELS
ASSOCIATION AS AMICUS CURIAE
SUPPORTING RESPONDENTS**

Rafe Petersen
Counsel of Record
Holland & Knight LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 419-2481
rafe.petersen@hkllaw.com

Counsel for Amicus Curiae
Advanced Biofuels Association

March 31, 2021

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

OVERVIEW OF THE RFS PROGRAM AND
SMALL REFINERY EXEMPTIONS..... 2

SUMMARY OF ARGUMENT..... 11

ARGUMENT 13

 I. The ability of EPA to issue sporadic,
 unforeseeable, and largely unreviewable
 exemptions to small refineries imposes
 significant economic damage on biofuels
 producers..... 13

 II. Affirming the Tenth Circuit’s opinion
 will rightfully undercut EPA’s ability to
 arbitrarily award secret financial
 windfalls to small refineries that escape
 judicial review and disrupt biofuels
 markets. 18

CONCLUSION..... 24

TABLE OF AUTHORITIES

Page(s)

Cases

Advanced Biofuels Ass’n v. EPA,
792 Fed. Appx. 1 (D.C. Cir. 2019) *passim*

Advanced Biofuels Ass’n v. EPA,
No. 18-1115, 2019 WL 2615356 (D.C.
Cir. June 25, 2019).....17, 19, 22

Renewable Fuels Ass’n v. EPA,
No. 19-1220 (D.C. Cir. Oct. 22,
2019)22

Renewable Fuels Ass’n v. EPA,
No. 18-2031, 2021 WL 602913 (D.C.
Cir. Feb. 16, 2021).....5, 21

Statutes

42 U.S.C. §7545(o)(9)(A)(i)3

42 U.S.C. § 7545(o)(9)(B)(i)4, 18, 24

Other Authorities

Calumet Specialty Products Partners,
L.P. 2017 Form 10-K, p.19,
[https://www.sec.gov/Archives/edgar/
data/1340122/000134012218000067/
clmt-20171231x10k.htm](https://www.sec.gov/Archives/edgar/data/1340122/000134012218000067/clmt-20171231x10k.htm)5

EPA, *Denial of Small Refinery Gap-Filling Petitions* (Sept. 14, 2020), <https://www.epa.gov/sites/production/files/2020-09/documents/rfs-denial-small-refinery-gap-filling-petitions-2020-09-14.pdf>.6, 7

Jarrett Renshaw, *U.S. Refiners Reap Big Rewards from EPA Biofuel Waivers*, Reuters (May 8, 2018)21

Letter from William Wehrum, EPA Assistant Administrator, to Charles Grassley, U.S. Senate (July 12, 2018)5

Office of Policy & Int’l Affairs, Dep’t of Energy, *Small Refinery Exemption Study* (Mar. 2011), p. vii, <https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf>.3

Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction, FarmDoc Daily (9):45 (Mar. 14, 2019), <https://farmdocdaily.illinois.edu/2019/03/small-refinery-exemptions-and-biomass-based-diesel-demand-destruction.html>9

U.S. Energy Information Administration, <i>EPA refinery exemptions reduced renewable fuel blending requirements in 2018</i> , https://www.eia.gov/todayinenergy/ detail.php?id=41794	8
U.S. Energy Information Administration, U.S. Biodiesel Plant Production Capacity (Oct. 23, 2020), https://www.eia.gov/biofuels/biodiese l/capacity/	17
U.S. EPA, Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-420-R-17- 008 (Nov. 2017),	16
U.S. EPA, <i>Fuels Registration, Reporting, and Compliance Help: RINS Generated Transactions</i> , https://www.epa.gov/fuels- registration-reporting-and- compliance-help/rins-generated- transactions	8
U.S. EPA, <i>Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule</i> , 72 Fed. Reg. 23900, 23926 (May 1, 2007).....	16
U.S. EPA, Renewable Fuel Standard Program, 72 Fed. Reg. 23900, 23924 (May 1, 2007)	3

U.S. EPA, *RFS Small Refinery Exemptions*,
<https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>6

U.S. Ethanol Groups Bristle as EPA Frees Refiners from Biofuels Law,
Reuters (Apr. 4, 2018), available at
<https://www.reuters.com/article/us-usa-biofuels-epa-refineries/u-s-ethanol-groups-bristle-as-epa-frees-refiners-from-biofuels-law-idUSKCN1HB2AH> (last visited Dec. 19, 2018).....9

INTEREST OF AMICUS CURIAE

The Advanced Biofuels Association (“ABFA”)¹ is an independent 501(c)(6) nonprofit trade association. ABFA represents more than 35 companies in the United States and around the world engaged in the production, marketing, and distribution of advanced renewable fuels. Currently, ABFA members produce over 4.7 billion gallons of renewable fuel each year, including billions of gallons of biodiesel and renewable diesel as well as a variety of drop-in fuels such as renewable gasoline, isobutanol, dimethyl ether, cellulosic diesel, and cellulosic heating oil.

ABFA’s mission is to secure on behalf of its members a stable and predictable regulatory environment and level playing field for advanced renewable fuels. ABFA has been particularly active, including through litigation, in connection with disputes about how the EPA has used or abused its authority regarding small refinery exemptions because the issuance of such exemptions affects the market for advanced renewable fuels as well as the market value for “Renewable Identification Numbers,” as discussed below.

¹ Pursuant to Sup. Ct. R. 37.3(a), ABFA states that counsel for Petitioners and Respondents have provided written consent to the filing of this brief. Pursuant to Sup. Ct. R. 37.6, ABFA affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than ABFA, its members, or its counsel made such a monetary contribution.

OVERVIEW OF THE RFS PROGRAM AND SMALL REFINERY EXEMPTIONS

Advanced biofuels are regulated under the Clean Air Act's Renewable Fuel Standard ("RFS") provisions. The background, purpose, and structure of the RFS program are set forth succinctly in the briefs of Respondents and Federal Respondent. Resp'ts' Br. 6-8, Fed. Resp't's Br. 4-9.

Through the RFS program, the percentage of biofuels required to be blended into the nation's gasoline and diesel supplies is slowly but steadily increased by EPA, furthering the goal of the RFS program to help achieve national energy independence.² From the inception of the RFS program in 2005 until approximately 2017, the program functioned largely as intended. This predictable market for biofuels allowed American innovation to flourish and biofuels began to be produced across the nation from a wide variety of feedstocks. ABFA's members are able to generate biofuels from used cooking oil, landfill gas, grease collected at wastewater treatment plants, soybean oil, corn oil, and organic waste biodigesters.

In 2005, at the outset of the RFS program, there were 59 petroleum refineries defined as "small refineries."³ These refineries were awarded a blanket

² The RFS program sought "to reduce dependence on foreign sources of petroleum, increase domestic sources of energy, and help transition to alternatives to petroleum in the transportation sector." U.S. EPA, Renewable Fuel Standard Program, 72 Fed. Reg. 23900 (May 1, 2007).

³ Small refineries, defined at 42 U.S.C. § 7545(o)(1)(K), have an average aggregate daily crude oil throughput of 75,000 barrels or less per day.

temporary exemption from complying with the biofuel blending mandates until calendar year 2011. *See* 42 U.S.C. §7545(o)(9)(A)(i). At the end of the temporary blanket exemption, “small refineries would be required to meet the same renewable fuel obligations as all other refineries, unless their exemption is extended”⁴ To determine whether an additional blanket exemption was warranted, the U.S. Department of Energy (“DOE”) solicited detailed information from each of the 59 facilities that qualified as a “small refinery” to determine the economic impact of the RFS program. Of those 59 facilities, only 18 came forward with information about the hardships they might face if they were required to comply with RFS requirements.⁵ DOE attributed the industry’s low participation rate to the fact that many small refineries operating as “part of large integrated oil companies or large geographically diverse refiners . . . notified DOE that they were not going to respond to the survey because they did not believe they faced disproportionate economic hardship.”⁶ In light of this record, EPA decided to extend the temporary small refinery exemption for two years – compliance years 2011 and 2012 – to 24 small refineries. The other 35 small refineries did not get such an exemption, meaning that they were

⁴ U.S. EPA, Renewable Fuel Standard Program, 72 Fed. Reg. 23900, 23924 (May 1, 2007).

⁵ Office of Policy & Int’l Affairs, Dep’t of Energy, *Small Refinery Exemption Study* (Mar. 2011), p. vii, <https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf>.

⁶ *Id.*

required to comply with RFS requirements starting in 2011.

The only avenue provided to small refineries to avoid RFS obligations once these temporary exemptions ended was a process where “[a] small refinery may at any time petition the Administrator [of EPA] for an extension of the exemption under subparagraph (A) [temporary exemptions] for the reason of disproportionate economic hardship.” 42 U.S.C. § 7545(o)(9)(B)(i).

Although the statute allowed a small refinery to come forward to ask for an extension of its exemption, EPA refused to make even basic information available about the number of petitions received, the number of petitions granted, the identity of the small refineries benefitting from such exemptions, or the volume of renewable fuel that would no longer have to be blended as a result of the exemptions. The rationale given for this unprecedented veil of secrecy was that small refineries who were petitioning for exemptions claimed that all the information in their petitions was confidential business information (“CBI”). When EPA makes a final decision on a small refinery exemption petition, the agency treats all information in the decision document—including information as simple as the name of the company applying for and receiving the lucrative exemption—as CBI. EPA maintains that it is bound by 40 C.F.R. §§ 2.204, 2.205, and 2.208 to treat as CBI any information that small refineries claim is confidential until EPA can evaluate the veracity of that claim. In practice, however, EPA makes no effort to review the small refineries’ over-inclusive claims of CBI. For example,

the identity of the small refineries awarded exemptions for the 2013 compliance year are still secret eight years later.

Because of EPA's treatment of exemption requests as confidential, EPA has issued small refinery exemptions free from oversight or scrutiny from the public, Congress, the judicial branch, or industry, including ABFA. EPA has even refused, based on claims of CBI, to provide detailed information about its small refinery exemption decisions in response to requests from Congress.⁷ EPA maintains this policy even after a refinery publicly discloses its receipt of a small refinery exemption in public filings to the U.S. Securities and Exchange Commission.⁸ Even in the face of protracted Freedom of Information Act litigation, EPA refused to identify the name or location of small refineries receiving exemptions, thereby shielding those decisions from judicial review. *See Renewable Fuels Ass'n v. EPA*, No. 18-2031, 2021 WL 602913 at *1 (D.C. Cir. Feb. 16, 2021).

⁷ Letter from William Wehrum, EPA Assistant Administrator, to Charles Grassley, U.S. Senate (July 12, 2018) https://www.eenews.net/assets/2018/07/13/document_daily_01.pdf (“Your letter requests information related to those small refineries granted exemptions in 2016, 2017, and 2018. EPA is unable to provide information that is fully responsive to your request, as we treat both the names of individual petitioners and EPA’s decision on those petitions as Confidential Business Information”)

⁸ *See, e.g.*, Calumet Specialty Products Partners, L.P. 2017 Form 10-K, p.19 (“We have received small refinery exemptions for our fuel products refineries for the full year 2016 and 2017.”), <https://www.sec.gov/Archives/edgar/data/1340122/000134012218000067/clmt-20171231x10k.htm>.

Finally, in the summer of 2018, this veil of secrecy was partially lifted when EPA – facing political and media scrutiny and legal pressure from ABFA – began to publish basic data⁹ about the functioning of its small refinery exemption program on an online dashboard. For compliance years 2013 to 2015, it is now known that an average of only 14 small refineries petitioned EPA for extensions of their temporary exemptions. Over that three-year period, EPA granted 23 of the 43 petitions received, an approval rate of 53 percent.¹⁰

Today, EPA’s Small Refinery Exemption Dashboard indicates that additional petitions for small refinery exemptions for compliance years 2013 to 2015 were received. This reflects an effort by small refineries, in response to this case, to apply for extensions years after the fact so as to present the illusion of having been continuously exempted from the RFS program. To date, EPA has rejected these attempts to obtain retroactive exemptions.¹¹

Although it was not publicly known at the time, for compliance year 2017, the number of small

⁹ *Advanced Biofuels Ass’n v. EPA*, 792 Fed. Appx. 1, 4 (D.C. Cir. 2019) (“The dashboard does not identify the refineries that received extensions, the date of decisions, the regulatory standards being applied to evaluate applications, or the reasons for granting or denying the exemptions.”)

¹⁰ U.S. EPA, *RFS Small Refinery Exemptions*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions>.

¹¹ EPA, *Denial of Small Refinery Gap-Filling Petitions* (Sept. 14, 2020), <https://www.epa.gov/sites/production/files/2020-09/documents/rfs-denial-small-refinery-gap-filling-petitions-2020-09-14.pdf>.

refineries submitting petitions for extensions of exemptions for compliance year 2016 increased markedly from 14 the previous year to 20. Included in these petitions were filings by at least a dozen petitioners who did not have active exemptions—in other words, they were seeking “extensions” of a nonexistent exemption. The rate at which EPA granted these petitions also increased dramatically, without public explanation, to 95 percent (19 out of 20 petitions).¹² This sudden and significant increase in the number of SRE requests would soon ripple through the market for biofuels and impact ABFA members.

While EPA at this time did not publish any information about the number of small refinery petitions received or granted, the small refining industry clearly got the message that the odds of receiving an exemption had dramatically improved. For compliance year 2018, the number of small refineries seeking exemptions grew again, from 20 to 37, a year-over-year increase of 80 percent. Of those 37 petitions, 35 were granted exemptions, zero were rejected, one was withdrawn, and one is still pending, an approval rate that again approached 95 percent. In two short years from 2016 to 2018, therefore, the number of small refinery exemptions granted increased fivefold, from seven to 35.¹³

The increased traffic in small refinery exemptions had a direct effect on the market for Renewable Identification Numbers (“RINs”). RINs are the currency of the RFS program and a robust,

¹² EPA Small Refinery Exemption Dashboard, *supra* note 10.

¹³ *Id.*

nationwide marketplace exists in which obligated parties that need RINs to satisfy RFS obligations can purchase them from companies, such as ABFA's members, that produce and blend renewable fuels. In compliance year 2020, over 18 billion RINs were generated.¹⁴

With the sudden and dramatic increase in the number of small refinery exemptions came a corresponding decrease in the number of RINs that exempt small refineries needed to buy or generate. The number of RINs exempted from the RFS program grew from 290 million in compliance year 2015 to 1.82 billion in compliance year 2017.¹⁵ A sudden decrease in the need of obligated parties to purchase RINs to comply with the RFS naturally reduced the amount of biofuels that producers of renewable fuels—such as ABFA's members—generate, and in turn caused RIN prices to drop precipitously.¹⁶ Moreover, because RINs have a two-year shelf life and no value outside of the RFS program, producers of renewable fuel cannot cure or minimize losses in the event of a sudden drop in RIN demand.

Due to the secrecy surrounding EPA's administration of the small refinery exemptions, ABFA and its members were not immediately aware of EPA's drastic increase in the number of exemptions

¹⁴ U.S. EPA, *Fuels Registration, Reporting, and Compliance Help: RINS Generated Transactions*, <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rins-generated-transactions>.

¹⁵ EPA Small Refinery Exemption Dashboard, *supra* note 10.

¹⁶ U.S. Energy Information Administration, *EPA refinery exemptions reduced renewable fuel blending requirements in 2018*, <https://www.eia.gov/todayinenergy/detail.php?id=41794>

that would be granted to small refineries. On April 4, 2018, Reuters published a newspaper story that EPA had granted approximately 25 small refinery waivers.¹⁷ The market price for RINs immediately declined on the news and remained suppressed as additional information emerged over the coming years about the number of exemptions being granted by EPA and the corresponding volume of renewable fuels that were exempted from the RFS program. EPA and the obligated refineries caused the RIN market to plummet by reducing both the number of RINs that would need to be purchased and the purchase price for those RINs. The economic damage to renewable-fuels producers caused by EPA's small refinery exemptions for compliance years 2017 to 2019 is estimated to be \$7.6 billion.¹⁸

In May 2018, ABFA petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of what it alleged was a change to the methodology used by EPA to evaluate petitions from small refineries alleging “disproportionate economic hardship” and EPA's unlawful practice of granting extensions of temporary exemptions to small refineries that did not receive exemptions in all prior

¹⁷ Jarrett Renshaw and Chris Prentice, *U.S. Ethanol Groups Bristle as EPA Frees Refiners from Biofuels Law*, Reuters (Apr. 4, 2018), available at <https://www.reuters.com/article/us-usa-biofuels-epa-refineries/u-s-ethanol-groups-bristle-as-epa-frees-refiners-from-biofuels-law-idUSKCN1HB2AH> (last visited Dec. 19, 2018).

¹⁸ Scott Irwin, *Small Refinery Exemptions and Biomass-Based Diesel Demand Destruction*, FarmDoc Daily (9):45 (Mar. 14, 2019), <https://farmdocdaily.illinois.edu/2019/03/small-refinery-exemptions-and-biomass-based-diesel-demand-destruction.html>.

compliance years. *See Advanced Biofuels Ass'n v. EPA*, 792 Fed. Appx. 1, 4 (D.C. Cir. 2019). In doing so, ABFA was the first to advance the argument that is now before this Court, namely that EPA lacks authority to grant an extension of a temporary exemption from the RFS program that has lapsed. However, because of the blanket assertion that all aspects of considering requests for extensions are CBI, ABFA faced numerous challenges in framing its case.

As a result of its lawsuit, ABFA ultimately obtained – after more than eight months of objections from EPA and subject to a protective order – copies of all of EPA’s final decision documents on small refinery exemption applications for compliance years 2017 and 2018. As a general matter, these documents confirm the story that the raw numbers tell, namely that EPA issued dozens of “extensions” of temporary exemptions to small refineries in 2017 and 2018 that had not received – and in most cases had not applied for – exemptions in preceding years. By its own words EPA changed its methodology for determining what constitutes “disproportionate economic hardship” in order to allow for a flood of small refinery exemptions.

Ultimately, the D.C. Circuit held that it lacked jurisdiction over ABFA’s claims given that the agency had not memorialized its change in methodology in a written memo or guidance document that constitutes final agency action, but only expressed it in small refinery decision documents, which amount to individual adjudications. The D.C. Circuit acknowledged, however, that “EPA’s briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left

those aggrieved by the agency's actions without a viable avenue for judicial review. *Id.*

SUMMARY OF ARGUMENT

Petitioners claim that small refineries will shutter if they are not permitted to receive sporadic and essentially limitless exemptions from complying with the renewable-fuel-blending obligations of the RFS program. Pet'rs' Br. 4, 17. Petitioners do not acknowledge the adverse economic impact that the renewable fuels industry must absorb when dozens of small refineries are excused from their statutory RFS obligations.

The briefs of Respondents and Federal Respondent both explain at length how the small refinery exemption mechanism in the RFS program was designed by Congress to serve as a bridge to compliance that would provide to struggling small refineries the ability to use the economic windfall from the exemptions to invest in infrastructure upgrades or other measures to strengthen long-term prospects for success. Resp'ts' Br. 42-46 and Fed. Resp't's Br. 24-29. This reading is consistent with the text of the statute and the underlying purpose of the RFS program.

The maximum downside from a small refinery complying with the RFS program is that it must offset its renewable fuels deficit by purchasing RINs from the marketplace, the cost of which can largely be passed on to consumers.¹⁹ The downside to a producer

¹⁹ 85 Fed. Reg. 7,016, 7,067–68 (Feb. 6, 2020) (“We have reviewed and assessed the available information, which shows that obligated parties, including small entities, are generally able to recover the cost of acquiring the RINs necessary for compliance

of biofuels—especially advanced biofuels produced by ABFA’s members which tend to have high production costs—from the sudden and unexpected reduction in the volume of biofuels that must be blended is that producers will be left holding fuel for which they can no longer command a fair price. When small refineries are excused from the obligation to blend their own fuels or to obtain RINs, that excuse directly harms the biofuels industry. While Petitioners and their supporting amici curiae go to great lengths to try to link isolated small refinery closures and conversions to the lack of small refinery exemptions, these closures clearly relate to external factors such as the recent COVID-19 pandemic that have no relation to the RFS program. ABFA’s members, on the other hand, have suffered losses – ranging from business closures to shelving expansion plans – that are directly attributable to dozens of small refineries receiving extensions of exemptions for which they were statutorily ineligible.

This Court’s decision should be driven by the clear intent of Congress, through the express language used in 42 U.S.C. §7545(o)(9), to limit small refineries’ relief from complying with the RFS obligations to continuous extensions of their earlier temporary exemptions. The Court should take comfort, however, that such a ruling will have the additional benefit of largely ending EPA’s practice of awarding large economic windfalls to unidentified

with the RFS standards. . . . Even if we were to assume that the cost of acquiring RINs was not recovered by obligated parties . . . a cost-to-sales ratio test shows that *the costs to small entities of the RFS standards are far less than 1 percent of the value of their sales.*”)

small refineries, in unknown amounts, for unknown reasons, through the issuance of confidential decision documents that are largely immune from judicial review yet send economic ripple effects through the RINs market to the detriment of biofuels producers and traditional refineries not receiving such largess.

ARGUMENT

I. The ability of EPA to issue sporadic, unforeseeable, and largely unreviewable exemptions to small refineries imposes significant economic damage on biofuels producers.

Petitioners portray the small refinery exemption provisions of the RFS program as a flexible tool created by Congress to guarantee small refineries perpetual financial success. Regardless of the underlying cause of a small refinery's financial trouble – from a global COVID-19 pandemic to its inability to adapt to the slow and foreseeable increases in biofuel blending requirements of the RFS program – Petitioners believe the solution is for EPA to issue small refineries extensions of their exemptions from RFS obligations “at any time” regardless of how long it has been since the small refinery last held an exemption. Curtailing EPA's supposed authority to issue dozens of exemptions, Petitioners argue, will produce a wave of small refinery failures. Pet'rs' Br. 4, 17. This argument ignores the original purpose of the RFS program, its structure, the recent history of small refinery viability, and the countervailing harm that a RFS program administered in that manner causes to biofuels producers across the country.

Congress did not grant EPA unilateral authority to put its thumb on the scale in order to influence the price of biofuels. The briefs of Respondents and Federal Respondent explain that the small refinery exemption aspect of the RFS program was designed by Congress to serve as a bridge that would allow initially disadvantaged small refineries to eventually attain the ability to ensure perpetual compliance with the RFS biofuel blending mandates. Resp'ts' Br. 42-46 and Fed. Resp't's Br. 24-29. Respondents and Federal Respondent further explain that the plain and most logical reading of the relevant statutory text at 42 U.S.C. §7545(o)(9) uses the term "extension" in its temporal sense and includes a continuity element. Resp'ts' Br. 19-33 and Fed. Resp't's Br. 17-23.

Petitioners' claim that small refineries are on the cusp of closure if the availability of small refinery exemptions is curtailed is not supported by the evidence. For compliance years 2013 to 2015, a mere eight, seven, and seven small refinery exemptions were granted, respectively.²⁰ Nevertheless, Petitioners do not provide evidence that any of the remaining 50+ refineries that did not receive exemptions during that time were forced to close.

The reason for the refineries' continued success without the crutch of a small refinery exemption is their ability to purchase RINs from the open market to compensate for their inability to blend biofuels at a reasonable price. The refineries are able to large pass the costs of those RINs to consumers. While EPA's administration of the RFS program and its

²⁰ EPA Small Refinery Exemption Dashboard, *supra* note 10.

interpretation of relevant provisions has been inconsistent over the years, EPA has consistently maintained that the cost to purchase RINs on the open market can largely be passed to consumers.

While the CAA is sprinkled with several mandates that provide regulated parties the ability to apply for general hardship exemptions or temporary exemptions based on unforeseen circumstances, EPA explained in its promulgation of its initial RFS program regulations that the ability of obligated parties to purchase RINs from the nationwide trading program rendered such exemptions unnecessary under the RFS program.

In recent rulemakings, we have included a general hardship exemption for parties that are able to demonstrate severe economic hardship in complying with the standard. We proposed not to include provisions for a general hardship exemption in the RFS program. Unlike most other fuels programs, the RFS program includes inherent flexibility since compliance with the renewable fuels standard is based on a nationwide trading program, without any per gallon requirements, and without any requirement that the refiner or importer produce the renewable fuel. By purchasing RINs, obligated parties will be able to fulfill their renewable fuel obligation without having to make capital investments that may otherwise be necessary in order to blend renewable fuels into gasoline. We believe that

sufficient RINs will be available and at reasonable prices, given that EIA projects that far greater renewable fuels will be used than required. Given the flexibility provided in the RIN trading program, including the provisions for deficit carry-over, and the fact that the standard is proportional to the volume of gasoline actually produced or imported, we continue to believe a general hardship exemption is not warranted. As a result, the final rule does not contain provisions for a general hardship exemption.²¹

A decade later and under a different Presidential Administration, EPA's conclusion on that critical aspect of the RFS program had not changed. "All obligated parties, including merchant refiners, are generally able to recover the cost of the RINs they need for compliance with the RFS obligations through the cost of the gasoline and diesel fuel they produce."²²

Even if Petitioners could supply evidence of scattered small refinery closures during the years in which few exemptions were granted, that outcome does not run contrary to the larger purpose of the RFS program when you consider that during that same time a plethora of new domestic biofuels production facilities were constructed. For example, as of October

²¹ U.S. EPA, *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program; Final Rule*, 72 Fed. Reg. 23900, 23926 (May 1, 2007).

²² U.S. EPA, Denial of Petitions for Rulemaking to Change the RFS Point of Obligation, EPA-420-R-17-008 (Nov. 2017), <https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockkey=P100TBGV.pdf>.

of 2020, there are 91 operating biodiesel plants in the United States.²³ The market worked efficiently because every party was playing by the same rules. That changed in 2017.

Unlike traditional refineries, who always retain the ability to purchase market rate RINs to account for any compliance shortfall under the RFS program, producers of renewable fuels—particularly advanced biofuels—are left economically vulnerable by sudden changes to the nationwide demand for their products, which is primarily driven by the mandates of the RFS program. When market demand for renewable fuels declines, which occurred when EPA removed 1.8 billion gallons of renewable fuel demand through its issuance of an unprecedented number of small refinery exemptions, some biofuels can no longer be economically produced. EPA's previous actions destroyed demand and killed the market.

In the face of declining RIN prices following the unprecedented wave of small refinery exemptions, ABFA members experienced negative impact to their revenues, delayed long-term renewable fuel investments, and reduced biofuel blending activities that left underutilized the blending infrastructure in which they had already heavily invested.²⁴ Some

²³ U.S. Energy Information Administration, U.S. Biodiesel Plant Production Capacity (Oct. 23, 2020), <https://www.eia.gov/biofuels/biodiesel/capacity/>.

²⁴ Brief of Petitioner at 81-84, 89-92 (Decl. of ABFA members M. Whitney and J. Baines), *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, 2019 WL 2615356 (D.C. Cir. June 25, 2019)(explaining reduced blending of biofuels using existing equipment and delayed long-term investment in biofuels in response to lower RIN demand following large number of small refinery exemptions).

smaller ABFA members that produce biofuels were unable to economically produce and market their biofuels in the wake of low RIN prices and were forced to cease production and lay off workers.²⁵

Accordingly, it is clear that the practical effect of allowing EPA to grant sporadic and wildly varied numbers of small refinery exemptions from year-to-year undermines the purpose of the RFS program to promote domestic energy independence through the increased utilization of renewable biofuels.

II. Affirming the Tenth Circuit’s opinion will rightfully undercut EPA’s ability to arbitrarily award secret financial windfalls to small refineries that escape judicial review and disrupt biofuels markets.

The briefs of Respondents and Federal Respondent present compelling explanations as to why the only logical and practical reading of RFS small refinery extension language is for the word “extension” in 42 U.S.C. § 7545(o)(9)(B)(i) to have a temporal meaning and to include an inherent continuity requirement. Resp’ts’ Br. 19-46 and Fed. Resp’t’s Br. 17-30. It is worth noting that in ABFA’s litigation against EPA in the D.C. Circuit, which was the first time the question at issue regarding extensions of exemptions was raised in federal court, Petitioner HollyFrontier Refining and Marketing LLC (then acting as Intervenor-Respondent in support of EPA) agreed that the “plain meaning of the

²⁵ *Id.* at 85-88 (Declaration of ABFA member S. Lamb explaining that business creating renewable fuels from waste grease from wastewater treatment plants was required to cease production and lay off the majority of its workforce following a drop in RINs prices).

noun ‘extension’ (or its verb, ‘extend’)” is “prolong” or “to increase the length or duration of” Brief of Intervenor-Respondents at 48, *Advanced Biofuels Ass’n v. EPA*, No. 18-1115, 2019 WL 2615358 at *38 (D.C. Cir. June 25, 2019). Petitioner HollyFrontier Refining and Marketing LLC now argues that “extension” means “to grant.” Pet’rs’ Br. 18-19.

This Court’s decision should be driven by the clear intent of Congress, through the express language used in 42 U.S.C. §7545(o)(9), to limit small refineries relief from complying with the RFS obligations to extensions of their earlier temporary exemptions. The Court should take comfort, however, that such a ruling will have the additional benefit of largely ending EPA’s practice of awarding large economic windfalls to unidentified small refineries, in unknown amounts, for unknown reasons, through the issuance of confidential decision documents that are largely immune from judicial review yet send economic ripple effects through the RINs market to the detriment of biofuels producers and refineries not receiving such largess.

As explained above, EPA’s small refinery exemption decisions are shrouded by secrecy. While EPA now publishes on an online dashboard basic data about the number of petitions for extensions of small refinery exemptions that it has received, granted, or denied as well as the estimated number of gallons of renewable fuel and RINs exempted from the RFS program, the agency still refuses to publish the identifies of the refineries that have applied for or received extensions of exemptions or the rationales for those decisions. Incredibly, only EPA, the companies and ABFA’s counsel knows who received

exemptions for compliance years 2016 and 2017 and why, which is subject to a protective order.

The dubious legal rationale underpinning this veil of secrecy is that all small refineries that petition for extensions of exemptions claim that the information in the petitions is confidential business information (“CBI”). EPA then unquestioningly treats as CBI all information in its final decision document, even down to the name of the company seeking the exemption. EPA claims that regulations at 40 C.F.R. §§ 2.204, 2.205, and 2.208 require it to treat as CBI any information that small refineries claim is confidential until EPA can evaluate that claim. In reality, however, EPA makes no effort to review the small refineries’ over-inclusive claims of CBI and never releases additional information about the recipients of the exemptions.

EPA and the refineries had every reason to proceed in secrecy. This practice allows EPA to issue small refinery exemptions free from oversight or scrutiny from the public, Congress, or courts. EPA has refused, based on claims of CBI, to provide detailed information about its small refinery exemption decisions in response to requests from Congress.²⁶ EPA maintains this policy even after a refinery publicly discloses its receipt of a small refinery exemption in public filings to the U.S. Securities and Exchange Commission. Even in the face of protracted Freedom of Information Act litigation, EPA refused to identify the name or location of small refineries receiving exemptions, thereby shielding those decisions from judicial review. *See Renewable Fuels*

²⁶ *See* Grassley letter, *supra* note 7.

Ass'n v. EPA, No. 18-2031, 2021 WL 602913 at *1 (D.C. Cir. Feb. 16, 2021).

These exemptions are lucrative for the small refineries that receive them. While privately-owned refineries hold their exemption status close to the chest, public companies that must update shareholders with the news have trumpeted their windfalls in financial disclosures.²⁷ It is worth noting here that the case at hand filed by Respondents was only made possible thanks to public disclosures made by the companies themselves. Privately held small refineries that may have received exemptions based on identical agency rationales cannot, as a practical matter, be subject to any legal challenges because their identities remain unknown. Before EPA began publishing its online Small Refinery Exemption Dashboard, this secrecy would have also allowed the small refineries that received exemptions to dump their now unnecessary RINs into the marketplace, where they were privy to information that other market participants were not. The biofuel producers, on the other hand, were unaware that EPA was undermining its own renewable volume obligation (“RVO”) through dozens of small refinery exemptions and continued to produce biofuels to meet an

²⁷ Jarrett Renshaw, *U.S. Refiners Reap Big Rewards from EPA Biofuel Waivers*, Reuters (May 8, 2018), <https://www.reuters.com/article/us-usabiofuels-savings/u-s-refiners-reap-big-rewards-from-epa-biofuel-waiversidUSKBN1I91ZG>

(documenting claims of cost savings of \$100 million by Andeavor, \$120 million by CVR Refining, and \$79 million by Delek U.S. Holdings).

anticipated market demand for RINs that never materialized.

With its final decision documents shielded from the public scrutiny and facing an unprecedented volume of petitions, the level of detail and legal analysis that EPA began to provide in its final decision documents became shockingly sparse. As ABFA explained in the undisputed allegations in its litigation against EPA in the D.C. Circuit, where previous decision documents had contained 20 pages of refinery-specific analysis, EPA's decision documents for compliance years 2016 and 2017 were typically only five pages of legal boilerplate following by a few paragraphs, or in some cases a few sentences, of refinery specific information.²⁸ Apparently even this minimal amount of work proved too much for EPA, such that for compliance year 2018 the agency issued final determinations on 42 petitions through a two-page letter that is currently subject to a separate legal challenge in the D.C. Circuit.²⁹

ABFA's 2018 litigation against EPA was not successful due to the fact that EPA had not yet reduced its change in methodology for compliance years 2016 and 2017 to a written memo or guidance document. Hence, the D.C. Circuit found that EPA's

²⁸ Brief of Petitioner at 39-40, *Advanced Biofuels Ass'n v. EPA*, No. 18-1115, 2019 WL 2615356 (D.C. Cir. June 25, 2019) ("After May 4, 2017, however, most of EPA's decision documents are only five pages and after setting aside boilerplate language contain only a short paragraph—often a single sentence—justifying a full exemption")

²⁹ Petition for Review at 10-11, *Renewable Fuels Ass'n v. EPA*, No. 19-1220, (D.C. Cir. Oct. 22, 2019), https://www.epa.gov/sites/production/files/2019-11/documents/rfa_19-1220_pfr_10222019.pdf.

acknowledgement of changed methodologies in individual decision documents were informal adjudications that, in its estimation, did not amount to final agency action announcing the adoption of a new rule or methodology.³⁰ While the D.C. Circuit dismissed ABFA's petition on these technical grounds, it did not do so without first raising an alarm about EPA's secretive conduct that leaves aggrieved parties without a viable avenue for judicial review:

To be sure, the EPA's briefing and oral argument paint a troubling picture of intentionally shrouded and hidden agency law that could have left those aggrieved by the agency's actions without a viable avenue for judicial review. But we need not decide in this case whether or how an ongoing pattern of genuinely secrete law might be challenged because the EPA's changed rules of decisions have been disclosed both through the numerous information adjudication decisions recently releases to the Association and, of particular import, the August 2019 formal and public memorandum announcing the EPA's new decisional framework and applying it to forty-two refineries. During oral argument, the EPA acknowledged that the August 2019 Memorandum is 'final agency action' to which a challenge

³⁰ *Advanced Biofuels Ass'n v. EPA*, 792 Fed. Appx. 1, 5 (D.C. Cir. 2019)(While the [ABFA's] petition's identification of a pattern across myriad circumstances may be evidence of a final agency action, it is not itself a final agency action that, without more, can support a petition for review.")

could be brought if filed within the required limitations period.³¹

By ruling that the plain language of 42 U.S.C. § 7545(o)(9)(B)(i) provides that a small refinery may only receive an extension of its prior temporary exemption if they have continuously received exemptions for all previous compliance years, this Court can restore the use of small refinery exemptions to the approximately seven small refineries for which it remains appropriate fourteen years after the requirements of the RFS began to take effect and this Court can simultaneously prevent EPA from ever again using this system of secretive agency law to issue an estimated \$7 billion dollars of windfalls to small refineries without any judicial or Congressional oversight.

CONCLUSION

For the reasons set forth above, ABFA respectfully requests that this Court affirm the Tenth Circuit's decision that a small refinery that did not seek or receive an exemption under 42 U.S.C. § 7545(o)(9)(B)(i) in prior years is ineligible to receive a further extension of exemption because at that point there is nothing to be added to or prolonged.

³¹ *Id.*

25

Respectfully submitted,

Rafe Petersen
Counsel of Record
Holland & Knight LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
(202) 419-2481
rafe.petersen@hklaw.com

Counsel for Amicus Curiae
Advanced Biofuels Association

March 31, 2021