

In The
Supreme Court of the United States

HOLLYFRONTIER CHEYENNE
REFINING, LLC, ET AL.,

Petitioners,

v.

RENEWABLE FUELS ASSOCIATION, ET AL.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

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

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STATEMENT OF INTEREST¹

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

Petitioners have amply demonstrated that the Tenth Circuit's interpretation of the Renewable Fuel Standard is deeply flawed. *Amici curiae*—the States of Wyoming, Louisiana, Ohio, Oklahoma, Texas, Utah, and West Virginia—write separately to underscore the exceptional importance of this Court's review. The decision below will have significant consequences for States with small refineries. These refineries often are the keystone employer in small communities. They

¹ Pursuant to Supreme Court Rule 37.2(a), *amici* have timely notified counsel of record of their intent to file an *amicus* brief in support of Petitioners.

provide high paying jobs and tax revenues and keep the cost of fuel low in the localities they serve. *Amici* States have a strong interest in ensuring that these important economic engines are not forced to close their doors and lay off their workers because of the misinterpretation of one word in the Renewable Fuel Standard.



SUMMARY OF THE ARGUMENT

While seemingly a simple matter of statutory construction, the functional elimination of the hardship exemption warrants this Court's review because of the near certainty that it will destroy the small refining industry, causing severe economic harm to the States, their communities, and the people who depend on this industry for their livelihoods.

According to the Tenth Circuit's interpretation, small refineries can only receive an exemption under the Renewable Fuel Standard if they sought and received an extension of the exemption in 2011 and every year thereafter. Nationwide, no more than seven small refineries currently qualify for an exemption under this standard.² The vast majority of small refineries will never again receive a hardship exemption under

² U. S. EPA, *RFS Small Refinery Exemptions* (last updated October 15, 2020), <https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions> (showing that only seven refineries qualified for an exemption in 2015).

the Tenth Circuit's test. Absent the exemption, small refineries are not economically viable.

Loss of the small refining industry will cause substantial harm to the communities these businesses serve and the thousands of jobs they support. For example, all of Wyoming's five refineries are small refineries. Each of these refineries provides significant economic benefits to the community where they are located and the State as a whole. As a result of the decision below, Petitioner, HollyFrontier Cheyenne, has already laid off roughly 200 employees. Similar losses will likely occur in other States and communities with small refineries.

This outcome directly contradicts one of Congress's core purposes in enacting the Renewable Fuel Standard, namely to ensure stability in the domestic supply of fuels. Congress never intended the Renewable Fuel Standard to force the closure of small refineries. Instead, Congress recognized that compliance by small refiners would be difficult and provided a lenient avenue for exemption to ensure that those businesses remained viable.

◆

ARGUMENT

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

Congress amended the Clean Air Act in 2005 and 2007 in response to the country's once dwindling oil

reserves to “move the United States toward greater energy independence and security” through “increase[d] production of clean renewable fuels[.]” Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501, 119 Stat. 594, 1067 (2005); Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 202, 121 Stat. 1492, 1521-22 (2007); *see also* 146 Cong. Rec. S3519 (daily ed. May 4, 2000) (statement of Sen. Lugar) (regarding biofuels’ ability to insulate the economy from disruptive spikes in the oil market). In short, Congress believed that it could reduce dependence on foreign oil by mixing gasoline and diesel fuel with increasing amounts of domestically produced renewable fuels.

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

to satisfy their own RVOs. *Id.* §§ 80.1425-1429, 80.1427(a)(1).

Congress recognized that the Renewable Fuel Standard would impose undue costs and operational burdens on small refineries which would, in turn, undermine the statute's central goal of stabilizing the domestic energy market. Accordingly, Congress built in a hardship exemption for small refiners producing an average aggregate daily crude oil throughput of 75,000 barrels or less. 42 U.S.C. § 7545(o)(9). Initially, the critical relief measure took the form of a two-year blanket exemption for all refiners meeting the throughput criteria. *Id.* at § 7545(o)(9)(A)(i). Thereafter, the blanket exemption could be extended for an additional two years for reasons of economic hardship. *Id.* at § 7545(o)(9)(A)(ii)(II). Following that second extension, a small refinery could petition the EPA for a calendar-year hardship exemption at any time if the fuel mandates subjected the refiner to disproportionate economic hardship. *Id.* at § 7545(o)(9)(B)(i).

These sequential exemptions provide an essential safety valve for the nation's small refining sector, allowing members to stay competitive and profitable in light of the statute's costly compliance obligations. Whenever EPA has applied the hardship exemption in a restrictive manner, both Congress and the courts have consistently disapproved. In 2015, when the EPA granted a mere seven hardship petitions, the Senate subsequently issued a stinging rebuke stating that such a stringent implementation was "inconsistent with congressional intent. . . ." S. Rep. No. 114-281, at

70 (2016). Rather, “Congress explicitly authorized the Agency to grant small refinery hardship relief to ensure that small refineries remain both competitive and profitable.” *Id.* Similarly, in a legal challenge to the EPA’s restrictive 2015 application of the exemption, the Tenth Circuit found that the agency’s view went beyond the statute, making hardship relief for small refineries contingent on “a death knell” rather than “simple privation.” *Sinclair Wyo. Ref. Co. v. EPA*, 887 F.3d 986, 996-97 (10th Cir. 2017).

Over time, as the renewable fuel obligation under the statute has increased so have RIN prices. From 2006 to 2018, RIN prices fluctuated from lows of one to five cents per gallon to highs of more than \$1.50 per gallon.³ This fluctuation means that projected costs of national compliance with the Renewable Fuel Standard ranges from \$5.8 to \$19.3 billion in a given year.⁴ For some small refineries, the expense of compliance exceeds the yearly cost of labor, maintenance, and energy.⁵ Today these increasing costs are set in an

³ U. S. Gov’t Accountability Office, *Renewable Fuel Standard: Information on Likely Program Effects on Gasoline Prices and Greenhouse Gas Emissions*, at 26 (May 2019), <https://www.gao.gov/assets/700/698914.pdf>

⁴ Philip Rossetti, *The Renewable Fuel Standard’s Policy Failures and Economic Burdens*, American Action Forum (April 19, 2018), <https://www.americanactionforum.org/research/renewable-fuel-standards-policy-failures-economic-burdens/>

⁵ Clifford Krauss, *High-Price Ethanol Credits Add to Refiners’ Woes*, N.Y. Times (Aug. 22, 2016), <https://www.nytimes.com/2016/08/23/business/energy-environment/high-price-ethanol-credits-add-to-refiners-woes.html>

economic climate where even massive refiners like Exxon have reported a 67% drop in refining revenue.⁶ To make matters worse, the price of RINs tripled following the Tenth Circuit’s decision.⁷

Increasing RIN costs strain the profit margins of small refiners, a problem often magnified by unique regional factors. Wyoming’s small refiners, for example, suffer from constant RIN deficiency. The Renewable Fuel Standard requires that refiners blend renewable fuels with diesel fuel and gasoline. The blend requirement is reasonably achievable for gasoline because the market and the existing fleet of U. S. vehicle engines can tolerate a gasoline blend containing ten-percent ethanol.⁸ Diesel fuel, however, must generally be blended at a much lower percentage.⁹ The Administrator recognized that “typical biodiesel blending yields

⁶ Jennifer Hiller, *Exxon quarterly profit falls 5.2% on weak refining, chemical margins*, Reuters (Jan. 31, 2020), <https://www.reuters.com/article/us-exxon-mobil-results/exxon-quarterly-profit-falls-52-on-weak-refining-chemical-margins-idUSKBN1ZU1OI>; Jordan Blum, *Exxon Mobil’s profit tumbled 30% in 2019, 5% in final quarter*, Houston Chronicle (Jan. 31, 2020), <https://www.chron.com/business/energy/article/Exxon-Mobil-s-5-7B-profit-dips-5-percent-in-15019311.php?cmpid=ffcp>

⁷ *Sens. Urge EPA To Appeal 10th Circ. Refinery Waiver Ruling*, Law 360 (March 4, 2020), <https://www.law360.com/articles/1250020/sens-urge-epa-to-appeal-10th-circ-refinery-waiver-ruling>

⁸ U. S. Energy Info. Admin., *Biofuels explained*, <https://www.eia.gov/energyexplained/biofuels/use-of-biodiesel.php>

⁹ See Statement of Adam Sieminski, Administrator, Energy Information Administration, before the Subcommittee on Energy and Power Committee on Energy and Commerce, 113th Cong., at 10 (June 26, 2013), https://www.eia.gov/pressroom/testimonies/sieminski_06262013.pdf

only about one-third of the RINs required” and that refiners “must make up for the shortfall by purchasing the now higher-priced RINs.”¹⁰ That issue continues to plague small refiners across Wyoming.

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

For refiners in Wyoming, the strain from purchasing RINs can be particularly immense. Wyoming drivers own a higher percentage of diesel passenger vehicles than any other state.¹¹ Accordingly, demand for diesel in Wyoming is high. This exacerbates the RIN deficiency that small refiners in Wyoming face and makes them more vulnerable to the negative financial impacts of the Renewable Fuel Standard.

On its face, the decision below only impacts refiners in the Tenth Circuit. However, there is a very real possibility that the EPA will apply the decision below

¹⁰ *Id.*

¹¹ *Diesel vehicles are big in Wyoming*, Casper Star Tribune (June 17, 2014), https://trib.com/business/energy/diesel-vehicles-are-big-in-wyoming/article_c7aa54bd-dbda-5283-b0fb-ba1aff4463d.html

nationwide. *See, e.g.*, U. S. EPA, *RFS Small Refinery Exemptions* (showing an across-the-board upward trend in hardship petition approval in 2017 and 2018, following the Tenth Circuit's *Sinclair* decision). Small refineries across the country are anticipating this outcome. After the Tenth Circuit's decision, the EPA received fifty-two petitions asking for retroactive exemptions to fill in missing years between 2011 and the present, but the agency denied each of these requests.¹²

To put the severity of this issue in perspective, fifty-four of the country's 135 operating refineries qualify as a small refinery under the Renewable Fuel Standard.¹³ Together, these fifty-four refineries account for 1.97 million of the nation's 18.5 million barrel-per-day refining capacity.¹⁴ In other words, small refineries make up forty percent of all U. S. refineries and ten percent of the U. S. domestic refining capacity. Considering that each of the retroactive exemption petitions may be tied to fifty-two of the nation's fifty-four small refineries, the Tenth Circuit's decision presents a clear threat to the small refining industry as a whole.

¹² Marc Heller, *Agency denies retroactive RFS waivers for small refiners*, E&E News (Sept. 14, 2020), https://www.eenews.net/greenwire/2020/09/14/stories/1063713647?utm_medium=email&utm_source=eenews%3Agreenwire&utm_campaign=edition%2BiZ%2B%2FftFV%2B2LxUfHtN5bxJQ%3D%3D

¹³ Data extrapolated from information available in the Energy Information Administration's annual Refinery Capacity Report. *See* U. S. Energy Information Administration, *Refinery Capacity Report* (June 2020), <https://www.eia.gov/petroleum/refinerycapacity/refcap20.pdf>

¹⁴ *Id.*

Removing the Renewable Fuel Standard’s hardship exemption risks returning the nation to 2006 refining capacity levels, erasing all gains in domestic refining since the statute took effect.¹⁵

II. Small refinery shutdowns will have devastating consequences.

Closure of any refinery would cause devastating consequences. For example, although Wyoming has the smallest population in the United States, in 2018 it was ranked first in the nation for overall per capita energy consumption, and second for energy devoted to the transportation sector.¹⁶ Forty-seven percent of the State’s residents live in frontier areas—areas where there are fewer than six people per square mile—and studies show that Wyoming drivers must travel a greater annual distance than drivers in any other state.¹⁷ If Wyoming residents must purchase gasoline and diesel fuel from out of state refineries, costs will

¹⁵ See U. S. Energy Information Administration, *Total Energy: Annual Energy Review* (Sept. 2012), <https://www.eia.gov/total-energy/data/annual/showtext.php?t=ptb0509>

¹⁶ See U. S. Energy Information Administration, *State Profiles and Energy Estimate*, <https://www.eia.gov/state/?sid=US>

¹⁷ Wyoming Department of Health, Office of Rural Health, *What is Rural*, <https://health.wyo.gov/publichealth/rural/office-of-rural-health/what-is-rural/> (last visited March 26, 2020); Steven Peters, *States Where People Drive the Most*, 24/7 Wall St. (July 8, 2016), <https://247wallst.com/special-report/2016/07/08/states-where-people-drive-the-most/> (estimating that, based off of data from the Federal Highway Administration, Wyoming citizens drove an average of 22,306 miles in 2015).

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

To make matters worse for residents, increased fuel costs would be paired with substantial workforce reductions and lost revenues across the State's rural economy. Already, following the Tenth Circuit's decision, the HollyFrontier Cheyenne refinery has been forced to close its petroleum refining operations resulting in more than 200 citizens losing their high-paying jobs. *See* Letter from Marian Orr, Mayor, Cheyenne, Wyo., to U. S. President Donald J. Trump (Feb. 29, 2020).¹⁸ And, while the City of Cheyenne with a population of 60,000 might be better situated to bear these losses, the State's other refiners are located in much smaller communities. For example, the Sinclair refining facility in Carbon County, Wyoming, is the largest employer in the county.¹⁹ If the Sinclair facility closes, the people of Carbon County will face crippling unemployment, severely diminished economic activity, and substantially reduced tax revenues. It is these sort of consequences for some of the nation's most rural and

¹⁸ <https://www.fuelingusjobs.com/library/public/Letters/Letter-to-POTUS.pdf>

¹⁹ Rocky Mountain Power, *Gateway South Transmission Project Wyoming Industrial Development Information and Siting Act Section 109 Permit Application*, p. 11-8—11-11 (July 2020), http://deq.wyoming.gov/media/attachments/Industrial%20Siting/Application%20and%20Permits/Gateway%20South%20Transmission%20Project/GatewaySouth_Final_Application_20200728.pdf

vulnerable communities, on top of broader statewide losses to Wyoming's \$266 million petrochemical industry, that warrant this Court's review. *See* Letter from Mark Gordon, Governor, State of Wyo., to Hon. Donald J. Trump, President of the U. S. (Feb. 28, 2020) (discussing how the Tenth Circuit's decision will risk the loss of thousands of jobs from Wyoming's 10,000 man petrochemical workforce).²⁰

The potential impacts from the Tenth Circuit's decision are by no means limited to Wyoming. Since 2019, numerous states, trade associations, and members of the United States Congress have written the EPA and the President to explain the profound market disruption that would occur if access to the small refinery exemption was sharply constrained. *See, e.g.*, Letter from Hon. Mitch B. Carmichael, Senate President, Hon. Roger Hanshaw, Speaker of the House, State of WV, to Mr. William Crozer, Special Assistant to the President & Deputy Director, Office of Intergovernmental Affairs (Sept. 6, 2019) (discussing the fact that eliminating the small refinery exemption will endanger roughly 400 high-paying jobs in the state's rural Appalachian communities)²¹; Letter from Mark McManus, General President, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. of the U. S. and Can., to Hon. Donald J. Trump, President of the U. S. (Aug. 30, 2019) (highlighting that the importance of

²⁰ <https://www.fuelingusjobs.com/library/public/Letters/doc06080920200228141613.pdf>

²¹ <https://www.fuelingusjobs.com/library/public/Letters/Renewable-Fuel-Standards.pdf>

the small refinery exemption extends well-beyond the oil and gas industry, as its absence likewise risks the jobs of the union’s 355,000 members)²²; Letter from Members of Congress, to Hon. Donald J. Trump, President of the U. S. (Mar. 3, 2020) (explaining that the Tenth Circuit’s ruling twists Congressional intent and fails “to fully grasp” the harm it will inflict on the American economy).²³

To illustrate the breadth of practical impacts wrought by the Tenth Circuit’s decision to forever close access to the small refinery exemption, it is important to recognize that even the nation’s largest refining markets will suffer enormous consequences. The State of Texas, for example, produces 5.7 million barrels of oil daily and operates approximately one-third of the nation’s refining capacity. *See* Letter from Greg Abbott, Governor, State of Tex., to Hon. Andrew Wheeler, Admin., EPA (July 12, 2019).²⁴ Although many of the refineries in the state are large operations, nearly 25% meet the definition of a small refinery under the Renewable Fuel Standard.²⁵ These small refineries employ a significant workforce, account for a substantial share of the \$14 billion in state and local taxes and royalties paid by the Texas refining industry, and

²² <https://www.fuelingusjobs.com/library/public/Letters/20190905-UA-RFS-POTUS-ltr.pdf>

²³ https://www.fuelingusjobs.com/library/public/Letters/030320_Letter_SRE_POTUS.pdf

²⁴ <https://www.fuelingusjobs.com/library/public/Letters/O-WheelerAndrew201907120355.pdf>

²⁵ *Id.*

supply a quarter of the state's refining capacity.²⁶ Alarmingly, the Tenth Circuit's order imperils this industry by stripping from those refineries what Governor Abbott referred to as "an essential safety valve" for the state's industry.²⁷

The situation is not different in other major refining states like Pennsylvania, Utah, and Mississippi whose Governors and Congressional Representatives have separately implored the EPA and President to preserve the hardship exemption for small refineries. In his 2020 letter to the EPA, Pennsylvania's Governor, Tom Wolf, explained that the absence of the small refinery exemption could greatly undermine the state's energy supply, workforce, and broader economy. *See* Letter from Tom Wolf, Governor, State of Pa., to Hon. Andrew Wheeler, Admin., EPA (May 11, 2020)²⁸. Pennsylvania's Congressional delegation likewise informed the President that in 2012 alone the state's largest refiner needed to purchase \$832 million dollars' worth of RINs under the Renewable Fuel Standard. *See* Letter from Members of the Pa. Congressional Delegation, to President Donald J. Trump (July 26, 2019).²⁹ The scaled cost of RINs would be untenable for the state's small refiners. *See* Letter from Tom Wolf, Governor, State of Pa., to Hon. Andrew Wheeler, Admin., EPA

²⁶ *Id.*

²⁷ *Id.*

²⁸ <https://www.fuelingusjobs.com/library/public/Letters/2020-5-11-TWW-v3-Wheeler-EPA-renewable-fuel-standard.pdf>

²⁹ <https://www.fuelingusjobs.com/library/public/Letters/PA-RFS-Refinery-Letter-to-POTUS.pdf>

(May 11, 2020). Similarly, Utah Governor, Gary Herbert, in a separate 2019 letter wrote the President to emphasize that the small refinery exemption offers an “essential” form of relief to the state’s five billion dollar small refining sector. *See* Letter from Gary Herbert, Governor, State of Utah, to President Donald J. Trump (Sept. 16, 2019).³⁰ Without the “crucial small refinery RFS exemption in place[,]” Governor Herbert explained that the state’s small refining sector would face “unfair economic disadvantage,” thereby imperiling “hundreds of high-paying jobs” and a “critical market for Utah’s rural oil and gas producers.”³¹

Echoing the concerns of Pennsylvania and Utah, Mississippi Governor, Phil Bryant, likewise wrote to the EPA Administrator in 2019 to explain that limiting the small refinery exemption would “threaten the viability of small refineries, their employees, and the local communities that rely on them.” *See* Letter from Phil Bryant, Governor, State of Miss. to Admin. Andrew Wheeler, EPA (Aug. 8, 2019).³² According to Governor Bryant, Mississippi’s largest small refiner employs roughly “250 people in the impoverished Mississippi Delta” and supplied over \$24 million dollars to the

³⁰ <https://www.fuelingusjobs.com/library/public/Letters/Governor-Herbert-to-President-Trump-RFS-Relief-Refinery-Letter.pdf>

³¹ *Id.*

³² <https://www.fuelingusjobs.com/library/public/Letters/8-8-2019-To-Andrew-Wheeler-at-EPA-RE-SRE-waivers.pdf>

community.³³ Accordingly, closing access to the exemption would cause severe harm to the state.³⁴

Today, in light of numerous exacerbating factors like the historic downturn in the oil and gas industry and the pandemic, the magnitude of the nationwide impact from the Tenth Circuit's decision cannot be overstated.³⁵ In one fell swoop, the court has gutted the safety valve Congress created to ensure the continued viability of small refiners. Rather than providing domestic energy security, the decision below threatens that very interest. The Renewable Fuel Standard has become a serious threat to the economy and refining capacity of the nation. Accordingly, it is critically important for the Court to review this matter before America's small refining industry disappears.

III. Shutdowns were not what Congress intended when it created the Renewable Fuel Standard.

The Tenth Circuit selectively construed the legislative and executive history of the Renewable Fuel Standard to force the conclusion that the overriding

³³ *Id.*

³⁴ *Id.*

³⁵ Liz Hampton, *Wave of North American oil and gas bankruptcies to continue at \$40/bbl crude: Report*, Reuters (July 9, 2020), <https://www.reuters.com/article/us-north-america-oil-bankruptcy/wave-of-north-american-oil-and-gas-bankruptcies-to-continue-at-40-bbl-crude-report-idUSKBN24A2U1> (discussing that low oil prices and surges in virus cases have fueled a wave of bankruptcies in the oil and gas sector).

purpose of the statute was to increase biofuel production at all costs. *See Renewable Fuels Ass'n*, 948 F.3d at 1247 (finding that the law is “designed to force the market to create ways to produce and use greater and greater volumes of renewable fuel each year”). That conclusion, however, misunderstands that the biofuel production mandate was simply the means by which the statute achieved its true end—domestic energy security. S. Rep. No. 109-78, at 6, 18-19 (2005) (stating that the need for the statute arose from a “widening gap between supply and demand, accompanied by reliance on foreign sources to close that gap”). Congress enacted the Renewable Fuel Standard at a time when the United States faced escalating insecurity over the availability of domestic fuel sources.³⁶ The period between 2005 and 2007 was a time of war in the Middle East, dramatic market instability, and all-time high prices for oil.³⁷ Accordingly, to avoid revisiting the domestic turmoil wrought by the oil and gas shortages of the 1970s’ OPEC embargo, Congress enacted the Renewable Fuel Standard with a central goal of breaking dependence on foreign energy through a stable supply of domestically manufactured fuel. H.R. Rep. No. 109-215, pt. 1, at 169 (“Energy security is critical in a world

³⁶ Garlan Joseph VanHook, *EPA Not to Blame for RFS Pitfalls: A Call to Congress to Restructure the RFS Program*, 9 Ky. J. Equine, Agric. & Nat. Res. L. 165, 185 (2017) (asserting it “should not be ignored . . . [that] Congress’s prevailing goal was energy independence”).

³⁷ *See* James D. Hamilton, *Causes and Consequences of the Oil Shock of 2007–08*, Brookings Papers on Econ. Activity (2009), https://www.brookings.edu/wp-content/uploads/2016/07/2009a_bpea_hamilton-1.pdf

of growing demand and regional political instability. Dependence on any single source of energy, especially from a foreign country, leaves America vulnerable to price shocks and supply shortages.”).

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

The legislative history actually reveals that Congress did not design the Renewable Fuel Standard to increase ethanol production at all costs, but rather to secure national energy reserves through the production of domestic fuels. 53 Cong. Rec. S15421, S15431 (daily ed. Dec. 13, 2007) (stating that “the increase in renewable fuels represent[s] a step forward in our common effort to make America more energy independent”). The Tenth Circuit’s analysis undermines this core goal by essentially creating a blind ethanol

production mandate that skews implementation of the statute in favor of secondary environmental and agricultural justifications for the law's enactment. While important, those incentives cannot justify an outcome that undermines the core purpose behind the Renewable Fuel Standard. *King v. Burwell*, 576 U.S. 473, 498 (2015) (“A fair reading of legislation demands a fair understanding of the legislative plan.”). Taken to its logical end, the court's view would mean that Congress fully intended to bar any new small refinery from entering the market after 2006 and force countless others from the market in the near-term; and, incredibly, that Congress did this on the precipice of another global energy crisis.³⁸ This cannot have been the case. *Cf. King*, 576 U.S. at 498 (finding that “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them[,]” and it would therefore be improper to embrace a statutory reading that might undermine that larger statutory purpose).

Indeed, the Tenth Circuit's interpretation requiring small refiners to continuously receive exemptions creates perverse incentives for non-compliance with the Renewable Fuel Standard. In other words, even if a small refiner were capable of satisfying the Act's requirements in a particular year without an exemption, the small refiner would nonetheless be motivated

³⁸ See Jad Mouawad, *Rising Demand for Oil Provokes New Energy Crisis*, N.Y. Times (Nov. 9, 2007), http://www.nytimes.com/2007/11/09/business/worldbusiness/09oil.html?_r=1&hp&oref=slogin

to seek the exemption or risk forever forfeiting an exemption in future years.

It is far more reasonable and congruent with the goals of the statute to conclude that Congress intended to provide a flexible, readily available safety valve for small refineries. *See Sinclair*, 887 F.3d at 989 (reasoning that Congress was “aware the RFS Program might disproportionately impact small refineries” and therefore sought “to protect these small refineries.”). This reading preserves the function of the Renewable Fuel Standard, while avoiding an ethanol or death mandate for small refiners. Because Congress did not intend for the Renewable Fuel Standard to force the shutdown of small refineries, this Court should grant the Petition.

◆

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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