No. 20-

IN THE

Supreme Court of the United States

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

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

PETITION FOR A WRIT OF CERTIORARI

MELISSA M. BUHRIG
CVR ENERGY, INC.
2277 Plaza Drive
Suite 500
Sugar Land, TX 77479
(281) 207-3200
mmbuhrig@cvrenergy.com

Counsel for Wynnewood Refining Co., LLC

RYAN C. MORRIS*
PETER C. WHITFIELD
CHRISTOPHER S. ROSS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
rmorris@sidley.com

Counsel for HollyFrontier Cheyenne Refining, LLC, HollyFrontier Refining & Marketing, LLC, and HollyFrontier Woods Cross Refining, LLC

* Counsel of Record

September 4, 2020

QUESTION PRESENTED

The Renewable Fuel Standard requires refiners, blenders, and importers of transportation fuel to blend increasing amounts of renewable fuels into their products each year. Recognizing that this mandate could harm small refineries, Congress provided that small refineries facing "disproportionate economic hardship" could petition EPA for an exemption "at any time." 42 U.S.C. § 7545(o)(9)(B)(i). The Tenth Circuit, however, interpreted this provision to add an additional requirement, namely that a small refinery may obtain an exemption only when it has received uninterrupted, continuous extensions of the exemption for every year since 2011—an interpretation that excludes nearly all small refineries.

Accordingly, the question presented is:

In order to qualify for a hardship exemption under § 7545(o)(9)(B)(i) of the Renewable Fuel Standards, does a small refinery need to receive uninterrupted, continuous hardship exemptions for every year since 2011.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are HollyFrontier Cheyenne Refining, LLC, HollyFrontier Refining & Marketing, LLC, HollyFrontier Woods Cross Refining, LLC, and Wynnewood Refining Co., LLC. Respondents are Renewable Fuels Association, American Coalition for Ethanol, National Growers Association, and National Farmers Union. The United States Environmental Protection Agency, who was respondent below, is also a Respondent.

HollyFrontier Cheyenne Refining, LLC, HollyFrontier Refining & Marketing LLC, and HollyFrontier Woods Cross Refining, LLC are each a wholly owned subsidiary of HollyFrontier Corporation, a Delaware corporation publicly traded on the New York Stock Exchange under the symbol HFC. Other than HollyFrontier Corporation, no publicly held company holds a 10% or greater interest in HollyFrontier Refining & Marketing LLC, HollyFrontier Cheyenne Refining, LLC, or HollyFrontier Woods Cross Refining, LLC.

Wynnewood Refining Company, LLC ("Wynnewood") is a wholly owned subsidiary of CVR Refining, LLC, a Delaware limited liability company. CVR Refining, LLC is a wholly owned subsidiary of CVR Refining, LP, which is an indirect wholly owned subsidiary of CVR Energy, Inc., a Delaware corporation publicly traded on the New York Stock Exchange under the Symbol "CVI."

RELATED PROCEEDINGS

This case arises from a petition for review of final agency action of the United States Environmental Protection Agency: *Renewable Fuels Association, et al.* v.

United States Environmental Protection Agency, No. 18-9533 (10th Cir. Jan. 24, 2020).

No other case is directly related to this one, whether in state or federal trial or appellate courts, or in this Court.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES AND REGULATIONS

RULES

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

HollyFrontier Cheyenne Refining LLC, HollyFrontier Refining & Marketing LLC, HollyFrontier Woods Cross Refining, LLC, & Wynnewood Refining Co., LLC, (the "Refineries") respectfully petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Tenth Circuit's opinion is reported at 948 F.3d 1206 and is reproduced in the appendix to this petition at Pet. App. 1a–94a. The underlying EPA orders are confidential, not reported, and reproduced in a supplemental, sealed appendix to this petition at Suppl. App. 1a–31a, 32a–39a, and 40a–46a

JURISDICTION

The Tenth Circuit entered judgment on January 24, 2020, Pet. App. 1a, and denied the Refineries' petitions for rehearing en banc on April 7, 2020, Pet. App. 95a–96a. On March 19, 2020, in light of the ongoing public health concerns relating to COVID-19, the Court entered an order extending the time to file a petition for a writ of certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 211(o)(9)(B)(i) of the RFS provides that:

> A small refinery may at any time petition the Administrator for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship.

42 U.S.C. § 7545(o)(9)(B)(i). Other relevant provisions of the RFS, *id.* § 7545(o), are set forth in statutory appendix D to this petition. See Pet. App. 97a–103a.

INTRODUCTION

In the decision below, the Tenth Circuit declared the eventual extinction of small-refinery exemptions under the RFS. It did so despite Congress's express provision that EPA may extend these exemptions to small refineries "at any time" upon a showing of disproportionate economic hardship. 42 U.S.C. § 7545(o)(9)(B). The Tenth Circuit reached its result through a contorted interpretation of the RFS, concluding that Congress's use of the term "extension" means that a small refinery must show that it continuously maintained the exemption in each year preceding the one for which it requested the extension. Few, if any, small-refineries can meet this judicially imposed test, and once a small refinery does not require EPA to extend it an exemption for a single year, it will be forever barred from receiving one.

Properly interpreted, the text and structure of the RFS's small-refinery hardship exemption demonstrate that it serves as a safety valve. "[A]t any time" a small refinery suffers from a disproportionate economic hardship, EPA may grant an extension of the exemption. Nothing in the statute suggests that Congress saw fit to remove this protection at some point. To the contrary, because Congress directed that the burden to blend renewable fuels into transportation fuel should increase each and every year, Congress provided an ongoing means of relief for small refineries contending with their ever-escalating RFS burdens.

The Tenth Circuit's decision ignored the plain text and treated the hardship exemption as a temporary

measure, rather than available at any time. Its decision is inconsistent with fundamental principles of statutory interpretation and this Court's precedents. Among other things, the Tenth Circuit ignored the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Tenth Circuit reached its flawed conclusion by reading the term "extension" in an unduly narrow fashion, even though dictionaries, courts, and Congress use the term in ways that vary based on context.

The inevitable result of this decision will be the elimination of a statutory exemption for a class of economically disadvantaged refineries that Congress believed should be available "at any time." And because these exemptions are critical to small refineries, the decision below poses an existential threat to these businesses, and will wreak havoc upon the communities they serve and the thousands of jobs they support.

The decision below upsets an exemption scheme Congress carefully calibrated to afford relief to small refineries in limited circumstances. And it will deprive small refineries of economic relief that Congress specifically authorized. Because the Tenth Circuit's interpretation "negate[s]" the exemptions' "own stated purposes," it cannot stand. *N.Y. Dep't of Soc. Servs.* v. *Dublino*, 413 U.S. 405, 419–20 (1973). This Court's immediate review is necessary to resolve an important question of federal statutory interpretation. See *SEC* v. *Zandford*, 535 U.S. 813, 818 (2002) (granting certiorari "to review the Court of Appeals' construction" of a statutory phrase); *United States* v. *Donovan*, 429 U.S. 413, 422 (1977) (granting certiorari "to resolve ... issues,

which concern the construction of a major federal statute").

Review is also warranted to eliminate the dire consequences to and disparate treatment of small refineries caused by the Tenth Circuit's decision. The Tenth Circuit recognized that its construction of the RFS would force small refineries out of business. But the court below did not face the very human consequences that flow from this result—shuttering a small refinery does not mean just the end of a business entity; it means the end of refining capabilities, jobs, and resources to sustain surrounding communities. Indeed, the Tenth Circuit's decision is already causing this damage. Several small refineries have ended operations since the Tenth Circuit's decision below, including one of the petitioning refineries. Critically, these adverse effects of the decision below extend to only those small refineries and communities within the Tenth Circuit. Every other small refinery outside that Circuit will remain eligible for a hardship exemption, even if they have not continuously received one. That type of disparate outcome caused by a decision of a court of appeals should not be allowed to persist. The Court should grant the petition.

STATEMENT OF THE CASE

I. STATUTORY BACKGROUND

A. Overview of the RFS

In 2005, and then again in 2007, Congress amended the Clean Air Act to include the present-day RFS program. See 42 U.S.C. § 7545(o). This program regulates the nation's transportation-fuel industry by requiring that the fuel sold each year contain a percentage of renewable fuels, advanced biofuels, cellulosic biofuels, and biomass-based diesel. *Id.* § 7545(o)(2)(B)(i)–(ii).

The program achieves this goal by requiring "obligated parties"—entities that produce or import gasoline and diesel fuel in the 48 contiguous states or Hawaii—to blend renewable fuels, such as ethanol, into their transportation-fuel products. See *id.* § 7545(o)(3)(B)(ii)(I); 40 C.F.R. § 80.1406.

The RFS establishes nationwide, annual targets for the volume of renewable fuels that obligated parties must blend into their transportation fuels. See 42 U.S.C. § 7545(o)(2)(B)(i)–(ii). Each year, EPA converts the annual obligation into a percentage standard, which it codifies by regulation. See *id.* § 7545(o)(3)(B)(ii)(II); 40 C.F.R. § 80.1405. Each obligated party uses the percentage standard to determine its individual RFS obligation based on the volume of gasoline and diesel it produces that year. 42 U.S.C. § 7545(o)(3)(B)(ii)(III); 40 C.F.R. §§ 80.1405–.1407. Because the annual targets established by Congress increase year after year, the RFS imposes an ever greater burden on obligated parties.

These obligated parties demonstrate compliance with their RFS obligations by retiring "Renewable Identification Numbers" ("RINs"). See 40 C.F.R. §§ 80.1401, 80.1425–.1426. A RIN is a unique number generated to represent a volume of renewable fuel. See *id.* § 80.1401. A RIN represents an individual gallon of renewable fuel and is used for compliance purposes. See *id.* When a party purchases a batch of renewable fuel, it also obtains the RINs that go with that batch. Once a party blends the renewable fuel into transportation fuel, the RINs are separated. *Id.* §§ 80.1426(e), 80.1429(b). But an obligated party does not need to blend renewable fuel itself to satisfy its RFS obligation. Instead, it may obtain RINs from other parties through a credit-based market erected by Congress and EPA to enable obligated parties to demonstrate

their RFS compliance. See 42 U.S.C. § 7545(o)(5); 40 C.F.R. §§ 80.1427(a)(6), 80.1451. Thus, obligated parties that are unable to satisfy their obligation through blending alone must retire RINs they have purchased in this marketplace.

B. Small-Refinery Exemptions

The RFS imposes heavy burdens on obligated parties, who must purchase and blend a sufficient amount of renewable fuel on their own or demonstrate equivalent compliance by purchasing market-based RINs. Congress recognized that this program could prove especially harsh for small refineries, which it defined as those with an "average aggregate daily crude oil throughput" of 75,000 barrels per day or less each calendar year. See 42 U.S.C. § 7545(o)(1)(K), (o)(9); see also 40 C.F.R. § 80.1401. This is because small refineries lack the "inherent scale advantages of large refineries." See *Sinclair Wyo. Ref. Co.* v. *EPA*, 887 F.3d 986, 989 (10th Cir. 2017); see also *Hermes Consol., LLC* v. *EPA*, 787 F.3d 568, 572 (D.C. Cir. 2015).

For example, small refineries tend to be less integrated than their larger counterparts. See *Hermes Consol.*, 787 F.3d at 572. Larger refineries participate in more segments of the petroleum supply chain, including transportation, marketing, distribution, and sales. Smaller refineries do not have the same reach and often lack the capital necessary to invest in the infrastructure for blending renewable fuels on their own. See *id.* This deprives them of significant cost savings. Likewise, a small refinery might be located in a remote geographic area with little local demand, requiring it to ship most of its refined product by pipelines. Pipelines, however, prohibit transportation of blended fuels, so these refineries have limited ability to comply with the RFS through blending short of acquiring additional infrastructure downstream of the

refinery. When these constraints limit the small refinery's ability to blend renewable fuel, the refinery must rely heavily on purchasing RINs to satisfy its annual obligation. Such costs can strain a small refinery's already tapped resources.

"[T]o protect these small refineries," *Sinclair*, 887 F.3d at 989, Congress enacted an exemption program that applies in three distinct phases of the RFS. See 42 U.S.C. § 7545(o)(9)(A)–(B). First, under subsection (A), Congress created an initial "[t]emporary exemption" that relieved all small refineries of any obligations under the RFS from its enactment until 2011. See *id.* § 7545(o)(9)(A)(i). Second, Congress provided that the initial exemption under subsection (A) could be extended for an additional two years (*i.e.*, until 2013) if the Department of Energy ("DOE") found that the RFS program would impose a "disproportionate economic hardship" on the refinery. *Id.* § 7545(o)(9)(A)(ii)(I)–(II).

While the first two phases of this program addressed the inception of the RFS program, and thus are included within the subsection entitled "Temporary exemption," the third phase addresses the operation of the RFS after that inception period, and noticeably appears in a different subsection lacking the term "temporary." In that separate subsection—subsection (B)—Congress provided that a "small refinery may *at any time* petition" EPA "for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." *Id.* § 7545(o)(9)(B)(i) (emphasis added). When a small refinery petitions EPA, EPA must consult with DOE and, in addition to DOE's recommendation, consider "other economic factors" to determine whether that refinery has shown a disproportionate economic hardship, and thus, whether EPA may extend the exemption to that refinery. *Id.* § 7545(o)(9)(B)(ii).

In furtherance of subsection (B), EPA adopted "a hardship provision" in its regulations under which "any small refinery may apply for a case-by-case hardship at any time on the basis of disproportionate economic hardship." 75 Fed. Reg. 14,670, 14,737 (Mar. 26, 2010). To qualify, a refinery must meet the statutory definition of "small"—having an average aggregate daily crude oil throughput of 75,000 barrels or less—for the year for which it applies and the prior year. 40 C.F.R. §§ 80.1401, 80.1441(e)(2)(iii).

II. BACKGROUND OF THE CASE

A. Factual Background

The Refineries at issue here own and operate three individual small refineries within the Tenth Circuit. HollyFrontier's Cheyenne and Woods Cross refineries petitioned EPA for extensions of the hardship exemption for their 2016 RFS obligations. Pet. App. 29a–30a, 32a. And the Wynnewood Refinery sought an exemption for its 2017 RFS obligations. *Id.* at 34a. Each application explained the financial and structural factors that demonstrated disproportionate economic hardship. After consulting with DOE and considering other economic factors, EPA granted each petition and extended the requested exemption to each refinery. *Id.* at 30a–36a.

B. Proceedings Below

Several associations representing the renewable-fuel industry petitioned the Tenth Circuit for review of the EPA orders extending exemptions to Cheyenne, Woods Cross, and Wynnewood. The associations challenged the orders on several grounds. Among other things, they argued that EPA could only extend the hardship exemption to a small refinery that had received a hardship exemption under subsection (B) each

year since the initial temporary exemption under subsection (A) had expired.

After briefing and argument, the Tenth Circuit granted the associations' petitions and vacated EPA's orders. Among other things, the court below held that a small refinery is eligible to receive an extension of the hardship exemption under subsection (B) only if it has continuously received such an extension each year since the beginning of the RFS program. Pet. App. 65a–75a.

The Tenth Circuit rested its conclusion on the purported meaning of the term "extension." Pet. App. 65a–68a. It relied on a "common definition" of the word that it found "apparent" from several online dictionaries. *Id.* at 66a. Selecting one of several alternative meanings within those dictionaries, the court reasoned that the word "extension" in § 7545(o)(9)(B) meant "to prolong" rather than "to grant." *Id.* at 66a–67a. "These ordinary definitions of 'extension,' along with common sense," according to the court, "dictate that the subject of an extension must be in existence before it can be extended." *Id.* at 67a. Under this definition, a small refinery may only seek an extension if it has sought and obtained an extension of the hardship exemption each year since the start of the RFS program. Thus, "a small refinery which did not seek or receive an exemption in prior years is ineligible for an extension." *Id.*

The Tenth Circuit supported this conclusion by adopting the view that under the RFS, small refineries should be "funnel[ed] ... toward compliance over time." Pet. App. 68a (citing *Hermes*, 787 F.3d at 578). Thus, "once a small refinery figures out how to put itself in a position of annual compliance, that refinery is no longer a candidate for extending (really 'renewing' or 'restarting') its exemption." *Id.*

The court, moreover, embraced the inescapable result of its conclusion: some small refineries facing disproportionate economic hardship will be forced to shutter due to RFS compliance obligations. According to the court, the RFS was meant "to be aggressive and 'market forcing.'" Pet. App. 70a. The court surmised that small-refinery exemptions were not meant to protect small refineries throughout the life of the RFS program, but merely to extend "small refineries a substantial amount of time to adapt." *Id.* In the Tenth Circuit's view, "a small refinery in 2016 or 2017 had an ample opportunity to study and understand any disproportionate economic impact likely to be occasioned by meeting Congressional targets" and "ponder ... whether it made sense to ... remain in the market." *Id.* So if a small refinery could no longer survive after experiencing one year without disproportionate economic hardship, it was part of Congress's plan, according to the court, that these refineries should close if the RFS mandates imposed a disproportionate economic hardship on them again. The requirement that an "extension" be available only to a currently exempt small refinery "limits but preserves the small refinery exemption while giving meaning to the remainder of 42 U.S.C. § 7545(o)(9)." *Id.* at 70a–71a.

With respect to the statement in subsection (B) that a small refinery may petition for an extension of the exemption "at any time," the Tenth Circuit acknowledged the "expansive" nature of the word "any." Pet. App. 72a. But in its view, "even if a small refinery can *submit* a hardship petition at any time, it does not follow that every single petition can be *granted*." *Id.* Because the Refineries had not received uninterrupted extensions of the exemption prior to the year in which they petitioned, the court concluded that EPA acted

beyond its statutory authority and vacated EPA's orders.

REASONS FOR GRANTING THE PETITION

The question presented is one of exceptional importance, and the Court should grant the petition to prevent a lower court from disrupting Congress's carefully crafted exemption program under the RFS. Nothing in the text of the RFS suggests that Congress intended to phase out hardship exemptions for small refineries. To the contrary, Congress provided that such exemptions would be available "at any time" to a small refinery that experiences "disproportionate economic hardship." The Tenth Circuit, however, turned this on its head, holding that once a small refinery has a single year where it does not experience disproportionate economic hardship, it is forever precluded from receiving an exemption. This holding will eventually foreclose all small refineries within the Tenth Circuit from receiving a subsection (B) hardship exemption.

Indeed, since the decision below, small refineries within the Tenth Circuit have begun to limit or cease petroleum refining operations or started to close their doors. The loss of a small refinery does not affect the company alone; it affects individuals who lose employment and surrounding communities. And if allowed to stand, the Tenth Circuit's decision will likely cause many more closures, with the resulting loss of refining capabilities, loss of jobs, and damage to surrounding communities. Even worse, this will affect only those small refineries within the Tenth Circuit. That court's erroneous construction does not extend to all other small refineries in the contiguous United States, which remain eligible for small refinery exemptions, even if they have not continuously received an extension.

This Court's immediate review is necessary to preserve Congress's goal of protecting American small refineries from the often-onerous burdens of the RFS program. *Sinclair*, 887 F.3d at 991. And it is necessary to address the anomalous result that small refineries in the Tenth Circuit may no longer petition for hardship exemptions while refineries elsewhere in the nation may.

I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE THAT WARRANTS THIS COURT'S REVIEW.

The Court should grant the petition because the Tenth Circuit has interpreted a term in the RFS so restrictively that it "transform[s]" the RFS "into something far beyond what Congress plausibly intended." *Sinclair*, 887 F.3d at 996–97; *Owasso Indep. Sch. Dist. No. 1* v. *Falvo*, 534 U.S. 426, 436 (2002) (when "Congress is not likely to have mandated this result," it is error to "interpret the statute to require it."). Despite any indication in the statutory text that Congress intended to phase out the hardship exemption in subsection (B), the panel interpreted an "extension of the exemption" to mean that EPA may grant extensions only to those small refineries that have continuously received extensions in all prior years. The eventual effect of this interpretation will be to foreclose all small refineries from receiving any hardship extension under subsection (B), depriving EPA of a tool for regulatory relief that Congress meant it to have and potentially preventing some small refiners—who may, for structural reasons, never be able to blend fuel on their own—from "remain[ing] in the market." Pet. App. 70a.

According to the plain terms of the statute, Congress intended the hardship exemption in subsection (B) to be a safety valve for small refineries throughout the life of the RFS program and to be available at any

time. The Tenth Circuit's construction is inconsistent with this Court's precedent on statutory interpretation, particularly the principle that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis*, 489 U.S. at 809.

A. Congress Intended The Subsection (B) Hardship Extension To Be A Safety Valve, Available At Any Time Throughout The RFS.

The text, structure, and purpose of the RFS establish that Congress intended the subsection (B) hardship exemption to be an ongoing safety valve available throughout the RFS program to small refineries disproportionately affected by the RFS.

Recognizing that the RFS program may be particularly burdensome to small refineries, Congress adopted a three-phase program for exempting small refineries from the RFS's obligations. These three phases consist of (1) an initial blanket exemption at the outset of the RFS program, (2) a potential two-year bridge extension of that exemption, and (3) the ongoing safety valve available to individual small refineries on an as-needed, case-by-case basis. See 42 U.S.C. § 7545(o)(9)(A)–(B).

The ongoing availability of the subsection (B) hardship exemption is apparent from the face of the provision. It authorizes a small refinery "at any time" to "petition the Administrator [of EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." *Id.* § 7545(o)(9)(B)(i). The phrase "at any time" "suggests a broad meaning," because "'read naturally, the word 'any' has an expansive meaning.'" See *Ali* v. *Fed. Bu-*

reau of Prisons, 552 U.S. 214, 218–19 (2008) (alterations omitted) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). It would be counterintuitive for Congress to use this phrase if it intended to limit the hardship exemption to small refineries that already had one, or if it intended to imply a sunset provision for the exemption. On the contrary, Congress knows how to incorporate time limits when it creates exemptions and has done so in other amendments to the Clean Air Act. See 42 U.S.C. § 7411(j)(1)(E) (setting a maximum number of years beyond which EPA may not grant a waiver to a regulated entity). With no statutory hint to the contrary, "at any time" "must be construed to mean exactly what it says." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980).

That subsection (B) provides an "extension of the exemption in subsection (A)" in no way limits the ongoing availability of a hardship extension on an as-needed basis. A well-accepted meaning of "extension" is "to make available" or "to grant." See, *e.g.*, *Field* v. *Mans*, 157 F.3d 35, 43 (1st Cir. 1998) (defining "extension" as (a) to make something available (grant) and (b) to increase the length of time of something); *Webster's Third New International Dictionary* 804 (1986) (defining "extend" as "to make available (as a fund or privilege) often in response to an explicit or implied request; GRANT"). That meaning fits comfortably within subsection (B), making clear that, "at any time," EPA can grant or make available the exemption in subsection (A)—*i.e.*, the "requirements" of the RFS "shall not apply."

The structure of the statute reinforces that conclusion. Congress placed the subsection (B) hardship exemption in its own subsection, instead of including it with the initial and bridge exemptions. This suggests that Congress had a distinct purpose in mind for its

safety valve provision. See *United States* v. *Bishop*, 412 U.S. 346, 356 (1973) ("[C]ontext is important in the quest for [a] word's meaning."). Under the heading "Temporary exemption," subsection (A) defines the terms of "the exemption," which was initially in place for all small refineries until 2011. See 42 U.S.C. § 7545(o)(9)(A)(i). In this first phase, "[t]he requirements" of the RFS "shall not apply to small refineries." *Id.* In other words, this is "the exemption," and the remainder of subsection (A) and then subsection (B) describe its application in two other ways—the bridge and the as-needed extension. The bridge exemption provided that the initial exemption could be extended for an additional two years if DOE found that a small refinery would face a disproportionate economic hardship under the RFS. See *id.* § 7545(o)(9)(A)(ii).

The subsection (B) hardship exemption allows EPA to extend to a qualifying small refinery "the exemption under subparagraph (A) for the reason of disproportionate economic hardship." *Id.* § 7545(o)(9)(B)(i). This extension is available "at any time," and nothing in the text confines EPA's ability to extend the hardship exemption to a certain period of time. See *id.*; see also *Davis*, 489 U.S. at 809 ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Indeed, the lack of any time limit stands in stark contrast to the initial exemptions in subsection (A). There the initial exemption was available until 2011 and the bridge exemption was available for two more years. The subsection (B) hardship exemption, on the other hand, has no comparable limits and is not found under the subsection entitled "Temporary exemption." To the contrary, it provides that a small refinery may

petition EPA at any time when it experiences "disproportionate economic hardship." And it instructs EPA to consult with DOE and then evaluate "other economic factors" to determine if an extension is warranted. This creates an ongoing instruction to the agencies to look at a small refinery's present situation without reference to past circumstances. Subsection (A) shows that "Congress knew how to impose" a deadline "when it chose to do so," but it chose *not* to do so in subsection (B). *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176 (1994). Thus, as EPA recognized in its initial rulemaking related to the small-refinery exemption provisions, the hardship exemption gives the agency discretion to "grant an extension ... on a case-by-case basis." 75 Fed. Reg. at 14,735–36.

The plain text of the statute and the structural division of the exemption program reflects Congress's intention to address particular periods in which small refineries might experience difficulty under the RFS. *First*, in the nascent years of the RFS program, small refineries needed blanket relief to prepare their infrastructure and modify their business plans to account for their new obligations. The initial and bridge exemptions account for these early years.

Second, Congress recognized that small refineries might face ongoing difficulties—perhaps just for a year or two at a time—throughout the life of the RFS program. These difficulties would not necessarily fade over time, especially as Congress increased the annual volume obligation every year. So the subsection (B) hardship exemption gives EPA discretion to extend relief to individual small refineries on an ongoing basis. Indeed, Congress's definition of a "small refinery," which looks to a refinery's throughput "for a calendar year," instead of at the time the RFS began, confirms

Congress anticipated that a refinery's eligibility for exemptions could change from year to year. See 42 U.S.C. § 7545(o)(1)(K).[1] And as a practical matter, the variable and often volatile nature of RIN prices might mean that a small refinery is able to comply with the RFS in a year where prices are low, but face disproportionate economic hardship the next year when prices are higher.

The text, structure, and purpose of the subsection (B) hardship exemption establish that Congress intended it to be a safety valve, available "at any time" to a small refinery experiencing disproportionate economic hardship. Indeed, it is a particularly important safety valve because the RFS's obligations increase year after year.

B. The Tenth Circuit's Interpretation Of Subsection (B) Is Inconsistent With Congressional Intent And This Court's Statutory Interpretation Principles.

The Tenth Circuit rejected a plain reading of the subsection (B) hardship exemption. Instead, it concluded that the term "extension" in subsection (B) limits EPA to extending exemptions to only those small refineries that have previously and continuously received an extension of the exemption from the beginning of the RFS program. The lower court's approach to interpreting this provision is inconsistent with this

---

[1] EPA initially promulgated rules defining a "small refinery" as a refinery whose "average aggregate daily crude oil throughput *for calendar year 2006*" did "not exceed 75,000 barrels." 75 Fed. Reg. at 14,866 (emphasis added). EPA amended the rule in 2014 to remove the "calendar year 2006" language and "to require that throughput be no greater than 75,000 barrels in the most recent full calendar year prior to an application for hardship." *See* 79 Fed. Reg. 42,128, 42,152 (July 18, 2014); 40 C.F.R. § 80.1441(e)(2)(iii).

Court's precedents and congressional intent. The effect of this narrow reading is eventually to render the subsection (B) hardship exemption a dead letter, eliminating a safety valve specifically designed by Congress. Because "Congress is not likely to have mandated this result," the Tenth Circuit erred by "interpret[ing] the statute to require it." *Falvo*, 534 U.S. at 436.

1. The Tenth Circuit's interpretation of "extension" is inconsistent with the approach taken by other courts and Congress.

The Tenth Circuit limited the scope of the subsection (B) hardship exemption by focusing on a single term and a single definition for that multifaceted term. In doing so, it failed "to construe statutes," instead focusing on "isolated provisions." *King* v. *Burwell*, 135 S. Ct. 2480, 2489 (2015). However, even if one were to isolate the term "extension," the Tenth Circuit's decision is inconsistent with the approach taken by other courts and Congress.

The court below recognized only a single, limited definition of "extension"—to increase a length of time. Pet. App. 66a–67a. It reached this conclusion by consulting a handful of internet dictionaries and selecting only the definitions that supported its notion that a small refinery must have had a continuous, uninterrupted extension in order to be eligible for a further extension of the exemption. See *id.*

The term "extension," however, is not so limited and has several other equally applicable meanings. As the dictionaries cited below reveal, the term has numerous meanings, not all of which require continuity. For example, one dictionary defines "extension" as "an enlargement in scope or operation" and "the total range over which something extends." *Extension*, Merriam-

Webster.com Dictionary, https://www.merriam-webster.com/dictionary/extension (last visited Sept. 1, 2020). Yet another defines "extension" as "a development ... that includes or affects more people, things, or activities." *Extension*, Collins Online English Dictionary, https://www.collinsdictionary.com/dictionary/english/extension (last visited Sept. 1, 2020).

The verb form of the term "extension"—"to extend"—means simply "to make available (as a fund or privilege) often in response to an explicit or implied request; GRANT." *Extend*, *Webster's Third New International Dictionary*, *supra*, at 804. "Extend" can also mean "to ... prolong," see *Extend*, *Black's Law Dictionary* 583 (6th ed. 1990), or to "widen the range, scope, area of application of ... a law," see 5 *Oxford English Dictionary* 595 (2d ed. 1989).

Indeed, the Tenth Circuit's approach to the term "extension"—as limited to increasing the time period of something that has continuously been in existence—is inconsistent with the approach other courts have taken to the term, as well as the ways in which Congress has used "extension" in other statutes. In contrast to the court below, the First Circuit has explained that "[t]here are at least two meanings of the word 'extension' that could apply" to a statute. See *Field*, 157 F.3d at 43. These two definitions are (a) to make something available (grant) and (b) to increase the length of time of something. See *id.* The Third and Ninth Circuits have similarly recognized that the word "extension" can also mean "renewal," as EPA urged before the Tenth Circuit. See *Pa. Co. for Ins. on Lives & Granting Annuities* v. *Rothensies*, 146 F.2d 148, 152 (3d Cir. 1944) ("The word 'renewal' ... has been construed as synonymous with extension."); *Campbell River Timber Co.* v. *Vierhus*, 86 F.2d 673, 674–75 (9th

Cir. 1936) (collecting authorities "including federal decisions" showing "that the terms 'extension' and 'renewal' may be used interchangeably").

The First Circuit's analysis further reflects the ways that Congress often uses the term "extension" in federal statutes. It is a word whose meaning varies based on context, and Congress has used it to mean a grant of something or to make something available to a person. For example, in the Privacy Act of 2016, Congress provided for an "extension of privacy act remedies" to citizens of certain foreign countries—citizens who had not in prior years enjoyed those remedies. See Judicial Redress Act of 2015, Pub. L. No. 114-126, § 2, 130 Stat. 282, 282 (2016). In other words, Congress did not intend "extension" to limit the availability of remedies to those who could show an uninterrupted and continuous possession of remedies.

In addressing yet other exemptions, Congress has also used the term "extend" to mean "to make available" or "to 'proffer.'" Cf. *Field*, 157 F.3d at 43; *Extend, Webster's Third New International Dictionary*, *supra*, at 804. In the copyright context, for instance, Congress exempted certain performances from the definition of copyright infringement, stating that "the exemption provided by this clause shall extend to any liability for copyright infringement that would otherwise be imposed on such body or organization." See 17 U.S.C. § 110(6). This use of the term is not about lengthening or adding to an existing exemption, but about the scope of the exemption. And Congress took a similar approach in the Social Security laws. See 42 U.S.C. § 1314(h)(2)(A)–(B). Likewise, Federal Rule of Civil Procedure 6(b)(1)(B) allows a court to "extend the time" to file, in certain circumstances, "after the time has expired." Fed. R. Civ. P. 6(b)(1)(B).

The Tenth Circuit's view that an extension of the exemption requires continuity or is unavailable to new entities is simply inconsistent with Congress's use of the term.

2. The Tenth Circuit's ruling is inconsistent with principles of statutory interpretation from this Court and effectively renders the subsection (B) hardship extension a dead letter.

The Tenth Circuit's interpretation of the subsection (B) hardship exemption, Pet. App. 66a–67a, is also inconsistent with core principles of statutory interpretation from this Court. The "words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis*, 489 U.S. at 809. Even if the Tenth Circuit's reading were permissible, the "existence of alternative dictionary definitions of" a key statutory term, "each making some sense" within a statute is a quintessential indicator "that the statute is open to interpretation." *Nat'l R.R. Passenger Corp.* v. *Bos. & Main Corp.*, 503 U.S. 407, 418 (1992); cf. *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 989 (2005) (explaining that an agency's chosen definition receives deference "where a statute's plain terms admit of two or more reasonable ordinary usages"). And in those circumstances, courts must still "interpret the words 'in their context and with a view to their place in the overall statutory scheme,'" not "in a vacuum." *Tyler* v. *Cain*, 533 U.S. 656, 662 (2001) (quoting *Davis*, 489 U.S. at 809). The Tenth Circuit's narrow view of "extension" created an eligibility requirement that appears nowhere in the statutory text and upends the statute's structure and purpose. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident

when placed in context."); see also *Extend, Black's Law Dictionary*, *supra* at 583 (explaining that the "[t]erm lends itself to great variety of meanings, which must in each case be gathered from context").

According to the Tenth Circuit, no small refinery may receive a subsection (B) hardship exemption unless it has maintained an exemption since the RFS's enactment. In other words, a small refinery must have petitioned for and obtained a hardship exemption in each prior year of the RFS to qualify for any further extension. And once a small refinery does not experience "disproportionate economic hardship" in a given year, it is forever cut off from receiving any further extensions.

This view of the subsection (B) hardship exemption disrupts the RFS's small-refinery and broader statutory scheme. And because this interpretation "negate[s]" the exemptions' "own stated purposes," it cannot stand. *Dublino*, 413 U.S. at 419–20.

To reach its result, the Tenth Circuit fixated on a single term and ignored the overall structure and context of the small-refinery exemption. As explained, the small-refinery exemption provisions respond to the two ways in which the RFS program could burden small refineries. See *supra*, 16–17. In subsection (A), Congress defined a temporary exemption and provided two specified time periods for an initial blanket period of its applicability while the RFS program was getting off the ground. Subsection (B), by contrast, establishes an ongoing, case-by-case safety valve available to a small refinery "at any time" upon a specific showing of disproportionate economic hardship in the year for which a refinery seeks the exemption—this safety valve is not temporary.

The court below disregarded the distinction between subsection (A) and subsection (B), reasoning that the RFS had a supposed policy that all small refineries should be "funnel[ed]" into compliance over time. Pet. App. 68a (citing *Hermes*, 787 F.3d at 578). This view, however, not only ignores the structure of the statute but also its operation. First, the court's focus on funneling small refineries toward compliance elevates subsection (A) and ignores subsection (B). Through subsection (A), Congress expressed the view that small refineries had specific periods of time to prepare for RFS obligations. But subsection (B) demonstrates Congress's view that this preparatory period would not be enough and that small refineries may experience disproportionate economic hardship throughout the life of the RFS. Second, and relatedly, the RFS assesses compliance annually; there is not a single point at which an obligated party is "in compliance." Compliance depends on a party's generating and/or purchasing sufficient RINs and then retiring those RINs to EPA, depending on the amount of fuel produced or imported in a particular year. In recognition of the hardships that might befall a small refinery in a given year, Congress made the subsection (B) hardship extension available "at any time." Nothing suggests Congress intended this hardship extension to become unnecessary at some point. "Had Congress intended this result, it most certainly would have said so." *Credit Suisse Sec. (USA) LLC* v. *Simmonds*, 566 U.S. 221, 228 (2012).

The Tenth Circuit, nonetheless, used its view of the purported policy of the RFS to justify its conclusion. And it even went a step further to conclude that Congress intended small refineries to either profit or perish under the RFS, surmising that by 2016, small refineries had sufficient time to "ponder ... whether it

made sense to ... remain in the market." Pet. App. 70a. This subverts the intent of the RFS. That Congress allowed small refineries to petition "at any time" demonstrates that it envisioned a much different purpose for the subsection (B) hardship extension than the one envisioned by the Tenth Circuit. See 42 U.S.C. § 7545(o)(9)(B)(i). The word "any" has an expansive meaning. See *supra*, 13–14. Yet, the Tenth Circuit brushed aside this expression of congressional intent by reasoning that even if a small refinery may *petition* for an extension "at any time," that does not mean one can be *granted* at any time. See Pet. App. 72a. In other words, the court below thought Congress gave small refineries a right without a remedy, an entirely hollow gesture.

Such a construction violates the "'cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)). The Tenth Circuit's ruling excises "at any time"—and eventually the entire subsection (B) hardship extension—from the RFS program. In the absence of any indication to the contrary, it was error for the court to find that this phrase "means anything other than what it says." *Harrison*, 446 U.S. at 589.[2]

Moreover, the Tenth Circuit's view that the subsection (B) hardship extension would eventually serve no purpose is inconsistent with that provision's purpose. Congress gave no suggestion that it intended its

---

[2] The Tenth Circuit also ignored the fact that its ruling might have the perverse effect of encouraging small refineries to petition for an extension merely to maintain continuous receipt of extensions. That incentive cannot be squared with the statute.

safety-valve provision to be welded shut at some point. On the contrary, the ongoing availability of exemptions aligns with Congress's overall purposes. Congress provided a means of relief for small refineries on an as-needed basis when confronted with "disproportionate" hardship. Cf. *Sinclair*, 887 F.3d at 989. And, when implementing the RFS small-refinery exemptions in its regulations, EPA recognized that it would review these petitions "on a case-by-case basis" and that it "has discretion to determine the length of any exemption that may be granted in response." 75 Fed. Reg. at 14,735–76. This ongoing relief was necessary in light of refineries' annually escalating burdens under the RFS. Indeed, the Tenth Circuit noted that Congress's "targets were designed to be aggressive and 'market forcing.'" Pet. App. 70a. But it failed to appreciate that Congress's aggressive targets are precisely why Congress felt the availability of an ongoing hardship exemption was necessary. Congress anticipated that as the RFS's burdens increased year after year, small refineries may experience disproportionate economic hardship in certain years and require an extension of the exemption in those years. Requiring small refineries to continuously receive an extension without interruption in order to qualify for any additional extension disrupts this scheme and the discretion vested with EPA.

The three-phased structure of the small-refinery exemption provisions illustrates how Congress intended to protect small refineries in the long run. There is no reason—and certainly none provided by the Tenth Circuit—why Congress would expect to withhold relief from a small refinery *presently* suffering a disproportionate economic hardship simply because that refinery did not experience similar hardship in a prior year.

By instructing EPA to consult with the DOE and consider "other economic factors" for each hardship petition, Congress gave EPA discretion to assess the circumstances a small refinery confronts in a given year. These circumstances could include a heavier volume obligation, business disruption in the refinery's small market, a spike in RIN prices, or a negative refining margin, just to name a few. Congress meant to provide relief when circumstances such as these would provoke disproportionate economic hardship; the Tenth Circuit's reading of the hardship provision failed to "be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

II. IMMEDIATE REVIEW IS WARRANTED.

The Tenth Circuit's flawed interpretation of the subsection (B) hardship exemption requires this Court's immediate review. The ongoing validity of the RFS's exemption program is an important question of federal law, and this Court has not before addressed the RFS's small-refinery provisions. See Sup. Ct. R. 10. Additionally, the decision below threatens the livelihood of small refineries in the Tenth Circuit, their employees, and the communities they serve, and that threat will create inequities nationwide because small refineries outside the Tenth Circuit are not subject to the same interpretation of the hardship exemption.

First, the discrete question of statutory interpretation presented by this petition is one of exceptional importance. See *Zandford*, 535 U.S. at 818 (granting certiorari "to review the Court of Appeals' construction" of a statutory phrase); *Donovan*, 429 U.S. at 422 (granting certiorari "to resolve ... issues, which con-

cern the construction of a major federal statute"). Congress made its purposes clear: exemptions on the basis of hardship may be extended "at any time" to a small refinery facing disproportionate economic hardship. The Tenth Circuit's opinion upends this purpose by excising this key phrase and adopting a judicially imposed requirement that has no basis in the statutory text. The resulting unavailability of the hardship exemption to numerous small refineries will result in their facing hundreds of millions of dollars of RFS compliance costs. The court below interpreted the statute to be something beyond what Congress intended, and this Court's review is necessary to preserve Congress's intent.

Second, small refineries and the communities they serve within the Tenth Circuit face dire consequences as a result of the opinion below. If allowed to stand, it will soon render the safety-valve provision, § 7545(o)(9)(B), a dead letter within that Circuit. Small refineries rely on that provision in order to stay in business, but the loss of the exemption is already affecting small refineries. For instance, until recently, five refineries were operating in the state of Wyoming.[3] Each is a small refinery and thus presumptively eligible to petition for an extension of the hardship exemption—until, according to the Tenth Circuit, each no longer needs one for a single year. Petitioner Cheyenne Refinery was one of these five small refineries in Wyoming, but the loss of future hardship extensions from the decision below, coupled with other fac-

---

[3] U.S. Energy Info. Admin., *Table 5. Refiners' Total Operable Atmospheric Crude Oil Distillation Capacity as of January 1, 2020* (2020), https://www.eia.gov/petroleum/refinerycapacity/table5.pdf. As noted, the Cheyenne refinery no longer produces transportation fuel.

tors, has led Cheyenne to cease its petroleum-fuel operations, resulting in the loss of hundreds of jobs.[4] Thus, the opinion below has and will continue to disrupt an industry across the State. Other small refineries in the Tenth Circuit face a similar fate as they encounter additional hardships.

The "hardship" that a small refinery may encounter can take a number of forms, ranging from decreased profitability and unsustainable margins because of compliance costs to being forced to buy RINs on the market due to the lack of infrastructure needed to blend renewable fuels. When assessing a small refinery's petition, DOE considers these factors, as well as other non-financial factors, such as the local market's acceptance of renewable fuels, whether the refinery's state has exceptional regulations, and whether the refinery serves a niche market. See U.S. Dep't of Energy, *Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship* 33–35 (Mar. 2011).[5] DOE has also explained that small refineries "generally lack the revenue streams generated by crude oil production and national product marketing to counteract the historic volatility in cash flows from the refining industry." *Id.* at 36. In "some circumstances," DOE has found, "a small refinery may face compliance costs that would significantly impact the operation of the firm, leading eventually to an inability to increase efficiency to remain competitive, eventu-

---

[4] *See* Press Release, HollyFrontier Corp., *HollyFrontier Announces Expansion of Renewables Business* (June 1, 2020), https://www.hollyfrontier.com/investor-relations/press-releases/Press-Release-Details/2020/HollyFrontier-Announces-Expansion-of-Renewables-Business/default.aspx.

[5] https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf.

ally resulting in closure." *Id.* In other words, compliance costs can compound other factors, transforming into a disproportionate economic hardship. Accordingly, DOE has recognized that the RFS poses a heightened threat to a small refinery's viability, and it accounted for that when addressing the RFS exemptions.

Small refineries, including the Refineries here, will be crippled without the ability to seek a subsection (B) hardship exemption. The cost of RFS compliance can amount to hundreds of millions of dollars. Many small refineries lack the infrastructure needed to blend renewable fuels on their own, and are therefore entirely dependent on the RIN market for RFS compliance. In those circumstances, these refineries must rely on purchasing RINs from more-established, integrated obligated parties. The RIN market has historically been volatile, increasing the economic uncertainty that is already built into the RFS's ever-increasing obligations.

Without the hardship exemption, small refineries will have no recourse if circumstances create a disproportionate economic hardship. This ongoing business concern is magnified in light of recent events: RIN prices have skyrocketed after the Tenth Circuit released its opinion,[6] while gasoline prices have cratered.[7] RIN prices are currently at their highest rate

---

[6] *See* U.S. Envtl. Prot. Agency, *RIN Trades and Price Information*, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rin-trades-and-price-information (last updated Aug. 10, 2020) (apply Fuel (D Code) filter for "D6" and Transfer Year Filter for 2020) (D6 (ethanol) price was $0.07 on January 20, 2020, and $0.28 on June 15, 2020).

[7] *See* Arathy S. Nair & Shradha Singh, *U.S. Refiners' Biofuel Bills Soar in Oil Market Slump*, Reuters (Aug. 11, 2020), https://www.reuters.com/article/us-usa-biofuels/u-s-refiners-biofuel-bills-

in two years.[8] These harms are so detrimental to small refineries that small refineries are already reacting. Marathon Petroleum Corporation announced it would shutter its small refinery in Gallup, New Mexico, which is expected to result in layoffs of the refinery's 220 employees in October 2020.[9] And the Cheyenne Refinery no longer produces petroleum fuels.[10] Similarly, Wynnewood has had to defer a $117 million project that would have enhanced its refining of crude oil and announced a project that, if approved, would result in the reduction of crude oil processing at the refinery.[11] These are precisely the situations in which the hardship exemption should be available, but no relief is possible for the Tenth Circuit's small refineries.

The Tenth Circuit recognized that its opinion could lead to small refineries closing. But it dismissed this reality based on a flawed assumption that small refineries should have simply figured out how to comply. Pet. App. 70a. This ignored not only the statutory

---

soar-in-oil-market-slump-idUSKCN2571Q2#:~:text=(Reuters)%20%2D%20U.S.%20oil%20refiners,in%20global%20prices%20and%20demand.

[8] *See id.*

[9] *See* News Release, Marathon Petroleum Corp., *Marathon Petroleum Corp. Reports Second-Quarter 2020 Results* (Aug. 3, 2020), https://ir.marathonpetroleum.com/investor/news-releases/news-details/2020/Marathon-Petroleum-Corp.-Reports-Second-Quarter-2020-Results/default.aspx.

[10] *See HollyFrontier Announces Expansion of Renewables Business*, *supra* note 4.

[11] *See* CVR Energy, Inc., *May 2020 IR Presentation*, at 23, https://www.sec.gov/Archives/edgar/data/1376139/000137613920000036/investorpresentationmay2.htm; CVR Energy, Inc., Quarterly Report (10-Q) (Aug. 4, 2020), https://www.sec.gov/ix?doc=/Archives/edgar/data/1376139/000137613920000045/cvi-20200630.htm.

scheme, but also the harm that a small refinery's closing will do to the refining capabilities, jobs, and resources needed to sustain the surrounding community. Small refineries often operate in distinct, rural locations, supplying quality jobs and resources to support local communities. Shuttering a small refinery does not merely affect that business; it adversely affects the individuals and communities that rely on it.[12] The Tenth Circuit's decision, therefore, could have far-reaching adverse effects in many pockets of America.

Moreover, the Refineries here and similarly situated small refineries may be excluded from the hardship exemption through no fault of their own. Some small refineries actively sought hardship exemptions in prior years, only to have relief improperly denied by EPA. As the Tenth Circuit recognized elsewhere, EPA applied an unduly restrictive reading of the RFS in the past. See *Sinclair*, 887 F.3d at 997. Accordingly, small refineries may be denied exemption eligibility not because they reached "compliance," but because they were improperly denied an exemption in the past. Moreover, small refineries did not know that they had to petition for review in an effort to maintain eligibility. Until the Tenth Circuit's ruling, there was no basis to believe petitioning for review was a prerequisite to

---

[12] *See, e.g.*, News Release, Mike Enzi, U.S. Senator for Wyo., *Wyoming Delegation: Relief for Small Refineries Critical for the Jobs, Communities They Support* (July 17, 2019), https://www.enzi.senate.gov/public/index.cfm/2019/7/wyoming-delegation-relief-for-small-refineries-critical-for-the-jobs-communities-they-support; Press Release, U.S. Senate Comm. on Env't & Pub. Works, *Barrasso: Trump Administration Defends Small Refineries* (Mar. 6, 2020), https://www.epw.senate.gov/public/index.cfm/2020/3/barrasso-trump-administration-defends-small-refineries (statement of Sen. Barrasso) ("In communities across the country, small refineries employ tens of thousands of Americans and support local economies.").

ensuring a small refinery would remain eligible for hardship exemptions in the future. Indeed, EPA itself has not imposed the same eligibility criteria now mandated by the Tenth Circuit, as demonstrated by its revised regulation defining "small refinery," see *supra*, 17 n.1, and its history of granting petitions for many years without regard to prior receipt of the extension. Now, however, a past denial under EPA's overly stringent standard—or a refinery seeking a new extension after a period of compliance—will nevertheless erect a permanent bar against further exemptions.

Third, the decision below will result in disparate treatment in different Circuits, as small refineries within the Tenth Circuit will be held to a different standard than refineries across the rest of the country. Inequitable treatment based on geographic location will have significant consequences. All small refineries face the possibility of economic hardship under the RFS. Small refineries in any location outside the Tenth Circuit, however, continue to have recourse under the RFS regardless of their exemption history. They may petition for an extension of the exemption on the basis of disproportionate economic hardship "at any time," as the statute permits. Small refineries in the Tenth Circuit, by contrast, have no parallel safeguard if they have not been continually exempted from the RFS. Instead, when faced with substantial financial difficulties, these refineries face an existential threat to their business not borne by their counterparts elsewhere in the country. This patchwork approach is unfair to regulated parties, will create difficulties in EPA's administration of the RFS program, and highlights the need for this Court's immediate review.

Many small refineries have been able to comply with the RFS in at least one compliance year, so the reach

of the Tenth Circuit's decision could be broad. According to EPA data on the number of refineries that have sought and obtained an extension of the hardship exemption, no more than seven small refineries received an extension of the hardship exemption in 2015. See U.S. Envtl. Prot. Agency, *RFS Small Refinery Exemptions* tbl.2.[13] Accordingly, the Tenth Circuit's decision will likely have far reaching implications within that Circuit. Yet, small refineries elsewhere can continue to enjoy the protections explicitly afforded by Congress. Such unequal treatment under the RFS should not stand. Immediate review is warranted to preserve congressional intent and to ensure that the RFS's exemption provisions are applied uniformly across the nation.

---

[13] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last updated Aug. 20, 2020).

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

MELISSA M. BUHRIG
CVR ENERGY, INC.
2277 Plaza Drive
Suite 500
Sugar Land, TX 77479
(281) 207-3200
mmbuhrig@cvrenergy.com

Counsel for Wynnewood Refining Co., LLC

RYAN C. MORRIS*
PETER C. WHITFIELD
CHRISTOPHER S. ROSS
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
rmorris@sidley.com

Counsel for HollyFrontier Cheyenne Refining, LLC, HollyFrontier Refining & Marketing, LLC, and HollyFrontier Woods Cross Refining, LLC

* Counsel of Record

September 4, 2020