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Senate Committee on Environment and Public Works
Renewable Fuel Standard Hearing

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Thank you for the opportunity to discuss the Renewable Fuel Standard. My name is LeAnn Johnson Koch and I am a Partner with the law firm Perkins Coie, LLP here in D.C. I've had the privilege, over the past thirty years of my career, to represent the petroleum refining industry and particularly small refineries. I know their companies, their people, their communities, and now I also know the very real threat they face as a result of EPA's proposal to end small refinery hardship relief under the Renewable Fuel Standard.

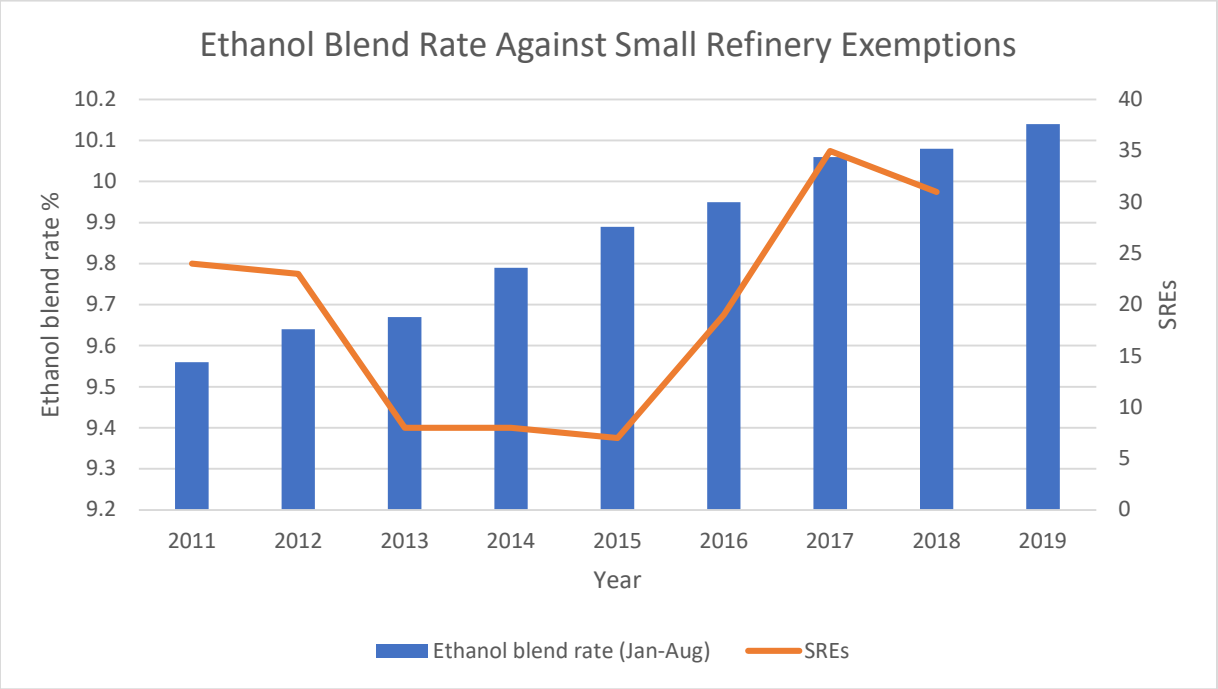
I'm referring to EPA's December 7, 2021 proposal to issue a blanket denial of all 65 pending small refinery hardship petitions, as well as the already-issued exemptions for 2018, and soliciting feedback from the biofuels industry, and other small refinery adversaries, on its plans to do so. Most important and most telling is the fact that EPA's proposed denial did not mention the results of its legally required consultation with the Department of Energy in which DOE concluded that without hardship relief small refineries would be at risk of shutdown and bankruptcy. Certainly, this was material information that should have been made available to the parties asked to provide comments on the fate of small refineries and it is material information for this Committee to consider.

Senators, I am sure you are acutely aware of the fact that gas prices are at their highest levels in the past 8 years and that the inflation rate is increasing faster now than it has in the last 40 years. We are at a crossroads. If EPA persists, ignoring its statutory duty and deliberately taking aim at America's small refineries through a mass adjudication and denial of four years of small refinery hardship petitions, it will not only violate the law, it will exacerbate the already adverse economic conditions that our country faces. The harm to small refineries and the US economy will be for harm's sake because denying small refinery hardship will not result in one more drop of blending of biofuels.

At Congress's direction, the Department of Energy, in a 2011 report, studied the risk of harm to small refineries and predicted that small refinery hardship would grow increasingly acute due to increasing renewable fuel volume mandates (the blendwall), the resulting increases in the price of compliance credits/RINs, and the inability of small refineries to position themselves to avoid the high cost of RINs. EPA's 2021 Proposed Denial concludes just the opposite—that a small refinery with limited access to renewable fuel blendstocks, no downstream blending or retail, or pipelines to access lucrative product markets will have the exact same cost (to the penny) of compliance with the RFS as the largest integrated oil company, companies with the ability to export their fuel and avoid the RFS obligation, blend others' fuel and generate excess RINs, and earn windfall profits speculating in the RIN market. EPA's theory is unsupported. It is described

by impartial academics as "implausible"[1] and demonstrated to be wrong by a second impartial academic study based on empirical data from small refineries.[2]

I listened to a January 20, 2022 hearing in which a Congresswoman was remarking about harm to the biofuels industry as a result of small refinery hardship relief. Yet, the years in which small refinery hardship relief was the greatest, (2016–2018) the biofuels blend rate increased. In fact, the data demonstrates that small refinery hardship relief has no impact on the blend rate. *See* figure below.



The reasons are straightforward and logical. Small refineries are harmed by the RFS because of their limited ability to blend biofuels, forcing them to buy RINs that are more expensive than complying through blending.[3] In addition, small refineries disproportionately produce diesel fuel and biodiesel is not available in all markets and/or is blended at lower rates than ethanol. When a small refinery receives hardship relief, it is being relieved of its obligation to buy RINs for blending that has already occurred downstream, making it impossible, as the data demonstrates, to impact biofuels blending.

You may not recognize my clients' names. Nevertheless, you may have driven here today on a gallon of gas that my client produced and, just because you do not see their name at the pump, you should not underestimate their critical role in the fuel supply. EPA's campaign is being

[1] Cody Nehiba & Gregory B. Upton Jr., Comment: U.S. Environmental Protection Agency's Proposed RFS Small Refinery Exemption Decision, Louisiana State University Center for Energy Studies at iv, vi (Feb. 7, 2022) (hereinafter "LSU Economic Report") [attached at Tab A].
[2] *See* Timothy Fitzgerald, Ph.D., Empirical Analysis (2022) (hereinafter "Fitzgerald Empirical Analysis") [attached at Tab B].
[3] *See* Timothy Fitzgerald, Ph.D., Comments on EPA Proposed RFS Small Refinery Exemption Decision (2022) (hereinafter "Fitzgerald Economic Report") [attached at Tab C].

undertaken without regard to the impact of the loss of small refinery production on the already exorbitantly high gas prices, the risk of increasing inflation, job loss—including *union* job loss—in rural communities, the loss of fuel supply in rural communities serviced by small refineries, and the resultant harm to the states in which they operate, from Pennsylvania to California. If EPA is successful, by mid-summer or the fall, the devastating effects of EPA's actions will be seen far and wide at the pump and in the states that small refineries call home.

Senators, EPA is deliberately ignoring your direction to grant small refinery hardship relief to prevent disproportionate economic hardship and after being told by the Department of Energy that it would be putting small refineries at risk of closure and bankruptcy if it failed to do so. EPA must honor Congress' direction and abandon its plan to write small refinery hardship relief out of the Clean Air Act on the ill-conceived notions that every single refinery in the US has the exact same cost of compliance and recovers 100% of its costs of RFS compliance or that granting hardship relief lowers the blend rate. If EPA doesn't, Senators, we should expect to see noncompliance, shutdown, and closure of small refineries adding to the already crippling gas prices. America stands to lose critical supply, with zero benefit to the biofuels industry.

I. Small refineries are disproportionately harmed by the RFS program.

The Department of Energy ("DOE"), in a 2011 report for Congress, performed a detailed analysis of how the RFS program would evolve over time and cause harm to small refineries.[4] As explained in the 2011 DOE Study, small refinery hardship is caused by the increasing renewable fuel volume mandates (blendwall), the resulting increase in the price of RINs, and the inability of small refineries to position themselves to avoid the harm due to their lack of vertical integration, lack of market power, and capital constraints. Therefore, small refinery harm was expected to grow worse over time, not diminish, as the volume mandates increased.

> As the RFS mandate increases, obligated parties will demand more RINs, adding upward price pressure. As the mandate increases, increasing the supply of RINs becomes difficult or nearly impossible. In anticipation of the blend wall, obligated parties may stockpile RINs through discretionary blending in anticipation of a shortage of blending opportunities. Those parties that are short, i.e. cannot generate enough RINs through their own facilities to meet their RVO, will need to purchase RINs and could suffer significant economic hardship. Declining ethanol prices would probably be favorable to refiners/blenders that predominately blend ethanol rather than purchase RINs for blending. Many small refiners do not retain control over the blending of their products, and must purchase additional RINs. *Obligated parties that rely on purchasing RINs would be adversely affected when the blend wall is reached and their RINs inventory has been depleted*.[5]

The 2011 DOE Study also explained that the size and scope of an obligated party affects the party's compliance options under the RFS:

[4] U.S. Department of Energy, Small Refinery Exemption Study: An Investigation Into Disproportionate Economic Hardship (2011) (hereinafter "2011 DOE Study"), available at https://www.epa.gov/sites/production/files/2016-12/documents/small-refinery-exempt-study.pdf [attached at Tab D].
[5] 2011 DOE Study at 17–18 (emphasis added).

> The response to the RFS2 requirements depends in large measure on the size and scope of the operations of individual companies. Large integrated refiners can more easily obtain financing for blending facilities, generate options, accommodate their needs efficiently and shift emphasis from one sector to another as opportunities indicate. For example, over the past couple of years, compliance strategies for larger companies included engaging in joint ventures with ethanol producers, investing in companies in the renewable sector, or conducting research on renewable fuels. As a result, RFS2 compliance costs for the larger refiner may be a small part of overall operating costs.
>
> Small companies are more limited in their options. They face a number of challenges and access to capital is generally limited or not available. Even when capital is available, they may have to choose between making substantial investments in blending and investing in other needed facilities to improve operating efficiencies to remain competitive.[6]

Just as EPA predicted, large integrated refiners have positioned themselves to respond to the increasing volume mandates by entering joint ventures with biofuels producers and through their control of blending and retail. Instead of either buying renewable fuel for blending or purchasing RINs for compliance, these companies are producing renewable fuels. Large, integrated refiners are tremendously efficient, due in large part to their size, market reach and capital resources. This in turn allows them to lower their overall costs of production, so that they can capitalize further on their ability to secure RINs through the large amount of blending and retail they control. At the same time, small refineries have been more limited in their ability to enter new business areas in other geographic regions to displace established, well-funded, long time market players from the wholesale and retail markets they control. This is not easily, cheaply, or quickly accomplished and requires changing how small refineries operate. DOE understood that the refiner that blends in excess of its RVO and the unobligated gasoline marketer would have a significant cost advantage over small refineries at the rack.[7]

One aspect of the RFS program that DOE did not predict in 2011 is the magnitude of the volatility and price spikes in the RIN market. RIN prices have increased by 4000%, exempt distributor/retailer chains have retained windfall RIN revenues rather than investing in renewable fuel blending, retailers are "fuel agnostic" and unmotivated to sell higher ethanol blends,[8] the RIN market has experienced unprecedented fraud, and distributor/retailers are lining their pockets instead of passing along RIN value to encourage E15/E85 use. While DOE predicted the disproportionate economic hardship ("DEH") caused by the structural and economic differences between small refineries and other market players, it did not understand how the dysfunctional RIN market would further exacerbate the disproportionate harm.

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[6] 2011 DOE Study at 23.

[7] 2011 DOE Study at B-5.

[8] Letter from David Masuret, Senior Vice President of Petroleum Supply and Operations, and Matthew Durand, Manager of Government Affairs and Public Policy, Office of the General Counsel, Cumberland Farms, to Gina McCarthy, Administrator, U.S. Environmental Protection Agency 9 (Nov. 2, 2016), available at EPA-HQ-OAR-2016-0544-0055.

II. EPA's denial of small refinery exemptions is based on a new and incorrect interpretation of the Clean Air Act.

On December 7, 2021, EPA issued a proposal to deny all 65 pending hardship petitions and effectively remove the ability for small refineries to receive SREs moving forward ("Proposed Denial").[9] In the Proposed Denial, EPA bases its decision upon two new conclusions. Specifically, EPA concluded that: (1) a now-disavowed Tenth Circuit case requires small refineries to demonstrate that any disproportionate economic hardship is caused *only* by compliance with the RFS program; and (2) the RFS program does not cause small refineries *any* economic hardship because all small refineries always pass their compliance costs on to customers, no matter their market or situation. As explained in this testimony, EPA's Proposed Denial contravenes the Clean Air Act ("CAA"), as well as the information provided by small refineries in their hardship petitions.

A. As an initial matter, the Tenth Circuit has vacated the *RFA* decision on which EPA purports to rely for its new statutory interpretation.

EPA states that the "change in its interpretation" of the Clean Air Act is "compelled by" the Tenth Circuit's 2020 ruling in *Renewable Fuels Association, et al. v. EPA*, 948 F.3d 1206 (10th Cir. 2020) ("*RFA*").[10] That is incorrect because *RFA* has no force. The Tenth Circuit vacated the *RFA* judgment *in its entirety* and recalled the mandate, disclaiming its prior rulings on all issues.

RFA involved EPA's decision to grant SREs to three small refineries for the 2016 and 2017 compliance years. On January 24, 2020, the Tenth Circuit vacated those grants because (1) it interpreted the Clean Air Act as requiring small refineries to have consistently received SREs for all previous years of the RFS program to remain eligible for future exemptions (and the refineries had gaps in their exemption histories); (2) it interpreted the Clean Air Act to authorize EPA to extend exemptions only where RFS compliance costs were the sole cause of the small refinery's disproportionate economic hardship ("DEH"), and EPA had granted exemptions based on other economic factors; and (3) EPA did not explain whether or why the passthrough principle (i.e., that merchant refiners pass through to consumers most or all of their RIN purchase costs) was inapplicable to the refineries. *See RFA*, 948 F.3d at 1253-56. The Tenth Circuit remanded the case "for further proceedings consistent" with its opinion, *id.* at 1258, and issued the mandate on April 15, 2020, *Renewable Fuels Ass'n v. U.S. EPA*, Case No. 18-9533 (10th Cir. Apr. 15, 2020), Doc. No. 010110333954.

The U.S. Supreme Court granted certiorari in *RFA* and reversed the Tenth Circuit's decision on June 25, 2021. *HollyFrontier Cheyenne Refin. v. Renewable Fuels Ass'n*, 141 S. Ct. 2172 (2021) ("*HollyFrontier*"). The Court held that the Clean Air Act does not require a refinery to receive an exemption for all prior years to remain eligible for future exemptions from RFS compliance. *Id.* at 2183.

On remand from the Supreme Court, the Tenth Circuit vacated its prior judgment *in its entirety* and recalled the mandate. *See Renewable Fuels Ass'n v. U.S. EPA*, 854 F. App'x 983 (10th

[9] Proposal to Deny Petitions for Small Refinery Exemptions, Docket ID No. EPA–HQ–OAR–2021–0566, available at https://www.epa.gov/renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions.
[10] E.g., Proposed Denial at 1, 2, 16–17.

Cir. July 29, 2021). On July 29, 2021, the Tenth Circuit issued a new judgment *affirming* EPA's grants of the SRE petitions and issued a new mandate. *See id.*; *see also* Case No. 18-9533 (10th Cir. July 29, 2021), Doc. No. 010110555246 (docket entry accompanying new judgment "[a]ffirm[ing]" EPA's SRE grants); *id.*, Doc. No. 010110555262 (new mandate). Unlike the prior vacated judgment, which remanded for "further proceedings in accordance with the [Tenth Circuit's] opinion," *id.*, Doc. No. 010110294793 (Jan. 24, 2020), the new operative judgment and mandate merely transferred jurisdiction back to the agency without instructions, *see id.*, Doc. No. 010110555262 (July 29, 2021) (mandate).

The Tenth Circuit quashed any possible ambiguity about the survival of its alternative holdings in *RFA* when it denied EPA's motion for clarification of the court's July 29, 2021 mandate. Recognizing that the Tenth Circuit had vacated its alternate holdings, EPA moved the Tenth Circuit on August 19, 2021, to clarify that "the alternative holdings in the Court's January 24, 2020 opinion not addressed by the Supreme Court remain in effect" and that the court's new "mandate returns the challenged agency actions back to EPA . . . for further proceedings in accordance with the alternate holdings," *id.*, Doc. No. 010110564301 (Aug. 19, 2021), despite the clear absence of such instructions. The Tenth Circuit swiftly denied EPA's motion just a week later. *Id.*, Doc. No. 010110567206 (Aug. 26, 2021). Thus, *RFA* does not "compel" EPA to change its interpretation of the Clean Air Act.

And even if the Tenth Circuit's interpretation of the statute were still in place, it would not be binding in other circuits. As EPA conceded, EPA's own regulations provide that decisions from the Tenth Circuit do not apply nationwide. 40 C.F.R. § 56.3(d); EPA's Motion for Voluntary Remand Without Vacatur at 11 n.7, Case No. 18-9533 (10th Cir. Aug. 25, 2021), Doc. No. 1911608. Only decisions from the Supreme Court and certain decisions of the U.S. Court of Appeals for the D.C. Circuit apply nationwide. 40 C.F.R. § 56.3(d).

EPA cannot rely on *RFA* as an excuse to reverse its interpretation of the Clean Air Act.

B. EPA's prior interpretation of the RFS was correct.

EPA's prior interpretation—that RIN costs do not pass through to customers with perfect efficiency and that other economic factors besides the cost of RFS compliance are relevant to the evaluation and determination of DEH—was consistent with the text of the Clean Air Act, the 2011 DOE Study,[11] and the Supreme Court's reasoning in *HollyFrontier*. EPA's new interpretation is not. Under EPA's proposed untethered approach, SREs would *never* be available. That is an unreasonable interpretation that would effectively repeal a portion of the statute. EPA does not have that power.

EPA's unsupported assertion that RIN costs are *always* passed on to customers by *all* refineries—no matter the market, no matter the situation—ignores both Congress's intent and the findings in the DOE study on which EPA has based its evaluation of SRE petitions for a decade.

[11] EPA attempts to rely on DOE's 2009 study [attached at Tab E], but Congress disapproved of that study and it was superseded by DOE's 2011 Study. There can be no doubt that when the Clean Air Act orders EPA to "consider the findings of *the* study" when "evaluating a petition," 42 U.S.C. § 7545(o)(9)(B)(ii) (emphasis added), EPA is required to consider the findings of the 2011 DOE Study—the only one Congressionally approved and still in force.

Congress drew a distinction between small and large refineries,[12] because it knew that small refineries were already disadvantaged in the market relative to large refineries and did not want to place an additional economic burden on them.[13] So Congress directed DOE to study those hardships.[14] DOE's 2011 Study found not only that small refineries can and do suffer hardship, but also that this hardship would grow more acute over time as renewable fuel volumes and RIN prices increase.[15] Despite those findings and the volumes and RIN prices increasing as predicted,[16] EPA proposes to thumb its nose at Congress[17] and DOE and pretend that there are no distinctions between small refineries and large, vertically integrated oil companies with massive blending and export operations.

EPA's new causation interpretation also contravenes the text of the statute and evinces a misunderstanding of the RFS program. EPA asserts that the Clean Air Act requires that DEH be caused by, and only by, RFS compliance,[18] "meaning that a small refinery may not simply experience a year of poor economic performance or struggle with disadvantageous operational or market constraints to merit an SRE."[19] But protecting struggling small refineries is precisely what Congress intended.[20] As EPA has always agreed (until now), Congress "did not constrain the scope of EPA's [DEH] determination or use language requiring that RFS compliance be the sole cause of hardship."[21] And as the D.C. Circuit has held, Congress required more than a bare consideration of compliance costs, "Congress required EPA to consult with DOE and to consider the findings of the 2011 Study *and other economic factors*."[22] It is only *after* doing all three—consulting with DOE, considering the 2011 Study, and considering other economic factors—that the statute grants EPA "substantial discretion to decide how to evaluate hardship petitions."[23] The Proposed Denial improperly eschews the 2011 DOE Study[24] and fails to address the statutorily required "other economic factors" beyond the cost of compliance.

EPA's interpretation also contravenes the statute because it fails to read "disproportionate" in context. Small refineries seeking an SRE must demonstrate "disproportionate economic harm."[25] But EPA proposes to sever "disproportionate" from that phrase, asserting that small refineries must demonstrate that their "*RFS compliance costs* are disproportionate compared to other refineries' RFS compliance costs."[26] EPA also tries to smuggle in a non-statutory severity

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[12] 42 U.S.C. § 7545(k), (o)(9).
[13] *Sinclair Wyoming Ref. Co. v. EPA*, 887 F.3d 986, 989 (10th Cir. 2017) ("Congress was aware the RFS Program might disproportionately impact small refineries because of the inherent scale advantages of large refineries and therefore created three classes of exemptions to protect these small refineries."); *see also* 2011 DOE Study at 23 ("Larger refiners have options available on a scale well beyond those available to smaller refiners.").
[14] 42 U.S.C. § 7545(o)(9)(A)(ii)(I).
[15] 2011 DOE Study at 17–18, 23.
[16] *See infra* Part I.
[17] Proposed Denial at 58 n.205.
[18] *Id.* at 23.
[19] *Id.* at 24.
[20] *See HollyFrontier*, 141 S. Ct. 2172, 2175–76, 2182 (2021) (describing Congress's goal in including the SRE program as one to "protect small refineries").
[21] *See e.g.*, EPA Br. in *RFA v. EPA*, 2019 WL 4597468, at *45; Proposed Denial at 58 n.205.
[22] *Hermes Consol., LLC v. EPA*, 787 F.3d 568, 575 (D.C. Cir. 2015) (cleaned up).
[23] *Id.*
[24] *See* 42 U.S.C. § 7545(o)(9)(B)(ii); *infra* n.8.
[25] 42 U.S.C. § 7545(o)(9)(B)(i).
[26] Proposed Denial at 16 (emphasis added).

requirement, insisting that any disproportionality must be "of sufficient magnitude to warrant the exemption."[27] That is not what the statute says. If RFS compliance—on its own or in conjunction with "other economic factors"—causes a small refinery to suffer any greater hardship relative to large refineries, it has suffered DEH and EPA must grant an exemption.[28]

EPA's reading is also unreasonable because it renders the SRE program a nullity. Taken to its logical conclusion, the Proposed Denial implies that a small refinery could be considered for an exemption only in years it experiences no economic hardship from any noncompliance factors (i.e., a "good year"). Yet EPA would undoubtedly deny the refinery an SRE during this "good year" because it is not experiencing sufficient economic hardship. And when a small refinery is having a "bad year," EPA would likewise deny the SRE because RFS compliance is not the sole cause of the refinery's hardship. This is nonsensical. EPA cannot effectively repeal SREs from the statute; no level of judicial deference permits the agency to do that.

Additionally, this exclusion of SREs directly contradicts the foundational assumption of *HollyFrontier*. There, the Supreme Court not only assumed the ongoing availability of SREs, but it also expressly rejected arguments for the exemptions' demise.[29] In response to arguments that Congress intended for the SRE provisions to eventually sunset on their own, the Court observed that "[i]f Congress really had wanted all exemptions to cease," it "surely [chose] an odd way to achieve it."[30] That goes double for drafting an exemption provision that never authorizes an exemption. EPA's new interpretation will undoubtedly fare no better before our nation's highest Court.

Finally, EPA's approach further demonstrates the agency is distorting the RFS program. As already discussed, Congress created SREs because it understood that small refineries are inherently disadvantaged in the fuel market and that "the RFS Program might disproportionately impact small refineries because of the inherent scale advantages of large refineries."[31] Said differently, Congress understood that the RFS was a new, additional burden on fuel producers and had the potential to harm small refineries in particular. So, Congress required EPA to relieve small refineries of this additional burden if compliance would cause hardship—on its own or in combination with "other economic factors"—and did so disproportionately.[32] Yet the Proposed Denial misinterprets RFS compliance not as an additional burden, but as the baseline, characterizing an exemption as "a significant windfall."[33] This turns the statute on its head. The grant of an SRE does not confer a benefit on a struggling small refinery, it relieves a burden. EPA's position is akin to a passerby claiming she has conferred a benefit on a fallen man by deciding not to kick him while he is down. Congress does not grant affirmative aid to struggling refineries through the SRE program, it merely prohibits EPA from kicking small refineries while they are down.

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[27] *Id.*
[28] 42 U.S.C. § 7545(o)(9)(B).
[29] *See HollyFrontier*, 141 S. Ct. at 2180–81.
[30] *Id.* at 2180.
[31] *Sinclair*, 887 F.3d at 989.
[32] 42 U.S.C. § 7545(o)(9)(B)(i).
[33] Proposed Denial at 19.

III. EPA has failed to follow the statutory process for issuing decisions on SREs.

A. EPA violated Congress's mandate to consult with the Secretary of Energy.

1. EPA's consultation with DOE is patently deficient.

The Clean Air Act requires EPA to consult with DOE when evaluating a small refinery hardship petition. 42 U.S.C. § 7545(o)(9)(B)(ii) ("In evaluating a petition under clause (i), the Administrator, *in consultation with the Secretary of Energy*, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors."). While it is true that the Act "does not dictate any particular action that EPA must take following consultation,"[34] a patently deficient consultation contravenes the purpose of Section 211(o)(9)(B). And EPA's consultation with DOE is patently deficient here.

Since EPA began issuing SREs under Section 211(o)(9)(B), the Agency consistently consulted with DOE by considering the scores that DOE assigned to each small refinery per the scoring matrix that DOE included in in its 2011 Study. In fact, EPA would incorporate DOE's scores into the SRE decision documents and discuss whether EPA agreed with DOE's recommendation. In the Proposed Denial, EPA abruptly ends that practice. The Agency does not cite DOE's scores or recommendations, nor does EPA explain the extent of its "consultation" with DOE beyond the fact that EPA had "discussions in meetings and phone conversations" with DOE.[35] EPA's purported consultation with DOE is documented nowhere in the Proposed Denial docket, leaving small refineries with no sense of the substantive communications between DOE and EPA, or whether those communications rise to the level of "consultation." The extreme contrast between EPA's prior consultation process and its purported new methodology only emphasizes the insufficiency of the latter.

In communications with the Agency after the issuance of the Proposed Denial, we have learned that EPA did not "consider" DOE's scores in its evaluation of the 2019 petitions under the 2011 DOE Study.[36] And because EPA chose not to consider DOE's 2019 scores, DOE did not send 2020 scores to EPA until small refineries requested access to those scores. EPA's refusal to "consider" DOE's scores contravenes the Clean Air Act and belies EPA's failure to consult with DOE.

The word "consultation" is not bereft of meaning. The word ordinarily means "[t]he act of asking the advice or opinion of someone."[37] Where the Secretary of Commerce did not proffer any evidence in the administrative record showing that the National Marine Fisheries Service affirmatively solicited the advice or opinion of the Regional Councils regarding its proposed regulations, the Secretary failed to meet the requirement under the Atlantic Coastal Act to consult

[34] Proposed Denial at 21.
[35] Proposed Denial at 21.
[36] Small refineries originally requested the DOE scores associated with their 2019 and 2020 hardship petitions on December 10, 2021, after learning in the Proposed Denial that EPA has decided it no longer will consider DOE's evaluation of DEH under the 2011 DOE Study scoring matrix. EPA did not provide copies of DOE's scoring documents associated with the pending SREs until January 7 and January 19, 2022. EPA has access to these correspondences.
[37] *See Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 117 (1st Cir. 2002); Consultation, *Black's Law Dictionary* (11th ed. 2019).

with the Regional Councils, which were "presumed to have expertise that the Secretary does not."[38] Failure to consult amounts to an agency action "without observance of procedure required by law," 5 U.S.C. § 706(2)(D), warranting EPA's proposal, if finalized, to be set aside.[39]

2. EPA's newfound reliance on superseded analysis does not qualify as the required consultation with DOE.

In lieu of consultation with DOE, EPA is now trying to rehabilitate the study DOE produced in 2009 ("2009 DOE Study").[40] But because the 2011 Study superseded the 2009 Study, EPA may not rely on it.[41] EPA claims "the 2009 DOE Study accurately forecasted what was likely to occur given the highly competitive fuels market with which DOE was familiar."[42] EPA specifically cites to the conclusion in the 2009 DOE Study that "small refineries would not face DEH from compliance with the RFS program . . . *provided that the RIN market proved to be liquid and competitive*."[43] The assertion that follows—that the RIN market has "developed to be open, competitive, liquid, and functioning as intended"—is inconsistent with reality[44] and EPA knows that. The same day that EPA issued the Proposed Denial, EPA announced the proposed RFS renewable fuel blending volumes for 2020, 2021, and 2022.[45] In that proposal, the Agency acknowledged that the RIN market currently is illiquid, that there is a shortfall of available RINs, and that RINs are not in the hands of the parties that need them for compliance:

> . . . [I]t may be challenging for the market to satisfy the 2022 annual standards and the 2022 supplemental standard entirely with renewable fuel use in 2022. Given this, *the projected shortfall in RIN generation in 2019, and the uneven holding of carryover RINs among obligated parties*, we expect that further increasing the standards with the intent to draw down the carryover RIN bank would lead to significant deficit carryovers and potential noncompliance by some obligated parties that own relatively few or no carryover RINs.[46]

EPA's attempt to characterize the RIN market as liquid and competitive is also belied by the Agency's own past public statements. EPA has acknowledged that RIN prices are not merely the result of the supply and demand for RINs themselves, but "are a function of multiple factors including but not limited to changes in petroleum prices, agricultural feedstock (e.g., corn, soy) prices," as well as EPA's own manipulation of "RFS standards and expectations of future EPA

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[38] *Evans*, 311 F.3d at 116 n.7.
[39] *Id.* at 116.
[40] EPACT 2005 Section 1501 Small Refineries Exemption Study, DEPT. OF ENERGY (Jan. 2009), available at https://downloads.regulations.gov/EPA-HQ-OAR-2010-0133-0139/content.pdf.
[41] *See* 42 U.S.C. § 7545(o)(9)(B)(ii); *Hermes*, 787 F.3d at 575 (holding that "Congress required EPA to . . . consider the findings of the 2011 Study"); *infra* n.8.
[42] Proposed Denial at 21.
[43] Proposed Denial at 21 (emphasis added).
[44] *See supra* Part I.
[45] Renewable Fuel Standard (RFS) Program: RFS Annual Rules, 86 Fed. Reg. 72436 (Dec. 21, 2021) ("Proposed Volumes Rule") (EPA announced the proposal on December 7, but it was not published in the Federal Register until December 21).
[46] *Id.* at 72455 (emphasis added).

policy decisions."[47] Because EPA consistently misses statutory deadlines and erratically reevaluates volume limits, EPA's actions on their own render the market illiquid and noncompetitive. But EPA also "entered into a Memorandum of Understanding . . . with the Commodity Futures Trading Commission" to facilitate EPA's investigation into "RIN market manipulation."[48] Obligated parties warned EPA about this pervasive manipulation.[49] The 2009 DOE Study's findings are inconsistent with EPA's past statements and current realities.

Congress considered the 2009 DOE Study deficient when it was prepared, and time has made it even clearer that the 2009 analysis does not accurately reflect the realities of the RFS program, the RIN market, or small refinery hardship. Now, EPA downplays Congress' rejection of the 2009 DOE Study, stating only that "some members of Congress directed DOE to revisit the [2009 DOE Study]."[50] However, the Senate Committee on Appropriations was clear that the 2009 study was entirely insufficient and needed to be redone:

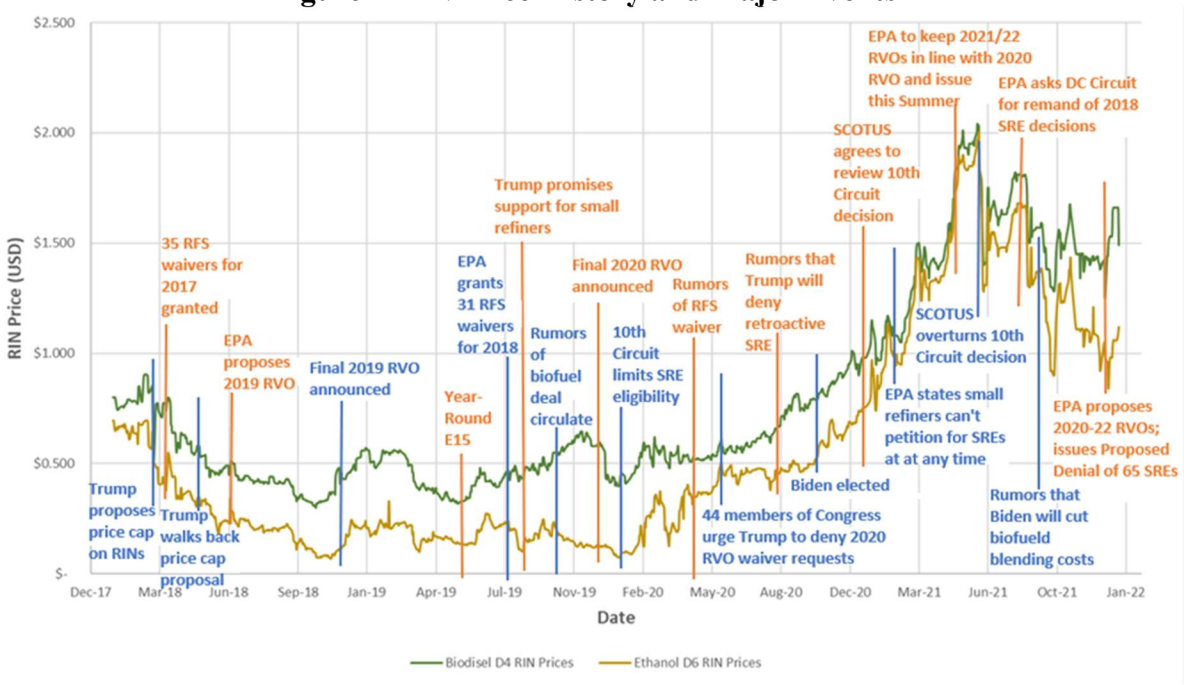
> "[T]he [2009] study contained inadequate small refinery input, did not assess the economic condition of the small refining sector, take into account regional factors or accurately project RFS compliance costs. Therefore, the Committee *does not believe the study is complete* . . . . the Department is directed to reopen and reassess the Small Refineries Exemption Study by June 30, 2010."[51]

The RIN market projections relied upon in the 2009 DOE Study grossly underestimated the increase in RIN prices and the volatility of the marketplace during the life of the RFS program. In the 2009 study, DOE cited to RIN prices from May through November 2008, which were trading for less than $0.05/gallon, as evidence that the market—at that time—was "over-supplied with RINs."[52] DOE also used the U.S. Energy Information Administration's ("EIA") projected RFS compliance cost per gallon of product for the years 2009 through 2022 as a proxy for the value of RINs during those years. EIA projected that even after 2013, when the blend wall would be reached, there would be "only two years in which the RFS2 program raises produced prices more than $0.03 per gallon."[53] DOE interpreted that projection "to indicate that credits should be available and that credit prices will not be excessive."[54] In reality, RIN prices skyrocketed once the E10 blend wall was reached and, due in large part to increasing RVOs as well as market speculation, the market remains volatile. In 2021, RIN prices reached an all-time high—D6 RINs were priced nearly *4,000% higher* than the prices DOE cited in the 2009 study.[55] Since 2017 in particular, the disconnect between the flawed 2009 DOE Study and the reality of the RIN market

[47] Modifications to Fuel Regulations To Provide Flexibility for E15; Modifications to RFS RIN Market Regulations, 84 Fed. Reg. 27013 (Jun. 10, 2019).
[48] *Id.*
[49] Comment Letter submitted by LeAnn Johnson Koch, Perkins Coie, regarding Modifications to RFS RIN Market Regulations at 3–4, 7–9, Docket ID EPA-HQ-OAR-2018-0775-0839 (Apr. 29, 2019) (discussing RIN theft and other market manipulation methods).
[50] Proposed Denial at 12.
[51] Senate Report 111-45, at 109 (2009) (emphasis added) [attached at Tab F].
[52] 2009 DOE Study at 7.
[53] 2009 DOE Study at 9.
[54] 2009 DOE Study at 9.
[55] *See* Ethanol RINs Fetch $2 for First Time Ever; More Record Highs for D6, D4, RVO, OPIS (June 10, 2021).

has been breathtaking. RIN prices have been volatile, reacting to rumor, rulemaking (or lack thereof), judicial determinations, suggesting the market is far from operating "as intended":[56]

Figure – RIN Price History and Major Events



Because the projections in the 2009 DOE Study were wildly inaccurate, there is no merit to EPA's attempts to revive the study.

In addition to the inaccurate projections, DOE also littered the 2009 study with caveats and assumptions, rendering its conclusions unreliable and not useful. At the time DOE was preparing the study, credits were readily available at a "nominal value" and "compliance volumes [had] been in excess of the RFS requirements."[57] DOE based its assumption that small refineries would not experience DEH on those conditions, which have not existed for nearly a decade. DOE rightly observed that, at the time the study was prepared, "[i]t is too early to project whether these [RIN] markets will continue to be liquid and competitive."[58] And it is true that the 2009 DOE Study failed to predict the "economic downturn [that] reduced the profitability of the refining industry, which has disproportionately impacted some small refiners," "the expiration of the biodiesel production credit [that] reduced production and [ ] caused the price of biomass-based diesel RINs to increase," and, importantly, the 2009 DOE Study did not "capture the unique factors contributing to disproportionate economic hardship" because DOE had failed to consult with individual small refineries.[59]

[56] Proposed Denial at 21.
[57] 2009 DOE Study at 2.
[58] 2009 DOE Study at 13.
[59] 2011 DOE Study at 1–2.

3. EPA has abandoned its over ten-year practice of adopting the 2011 DOE Study because it does not support the Agency's new conclusions.

The projections relied upon in the 2009 DOE Study could not be further from the realities of the RIN market. That is precisely why Congress required DOE to reassess the market and the effects of the RFS on small refineries. Once DOE performed the detailed analysis missing from the 2009 study of how the RFS program would evolve over time and cause harm to small refineries, Congress approved the 2011 DOE Study. In 2016, the Senate Committee on Appropriations directed EPA "to follow DOE's recommendations *which are to be based on the original 2011 Small Refinery Exemption Study*" and if EPA ever disagreed with DOE's recommendation, EPA was directed to "provide a report to the Committee on Appropriations and to the Secretary of Energy that explains the Agency position. Such report shall be provided 10 days prior to issuing a decision on a waiver petition."[60] The Senate's language and directive has been carried forward for several years, most recently in the Consolidated Appropriations Act for 2021.[61] In the Proposed Denial, EPA fails to explain why it is defying the Senate's directive.

4. EPA has not established a legitimate basis for abandoning the 2011 DOE Study.

EPA is proposing to resurrect the 2009 DOE Study, despite not only Congress' admonishment of that study and DOE's subsequent assessment that the findings were incorrect, but also a decade's worth of real data that contradicts the projections made in the 2009 DOE Study. Quite simply, EPA is abandoning its longstanding adoption of the 2011 DOE Study because the findings in that study do not support EPA's newfound and politically motivated interpretation of small refinery hardship relief.

For nearly a decade, EPA adopted the 2011 DOE Study and its findings, acknowledging the expertise DOE provides to the evaluation process:

> DOE's expertise in evaluating economic conditions at U.S. refineries is fundamental to the process both DOE and EPA use to identify whether DEH exists for petitioning small refineries in the context of the RFS program. After evaluating the information submitted by the petitioner, DOE provides a recommendation to EPA on whether a small refinery merits an exemption from its RFS obligations. As described in the DOE Small Refinery Study, DOE assesses the potential for DEH at a small refinery based on two sets of metrics. . . . DOE's recommendation informs EPA's decision about whether to grant or deny an SRE petition for a small refinery.[62]

[60] S. Rep. No. 114–281 at 71 (2016).
[61] *See* Pub. L. No. 116-260 (Mar. 2021), https://www.congress.gov/117/cprt/HPRT43750/CPRT-117HPRT43750.pdf.
[62] Memorandum from A. Idsal, Acting Assistant Administrator, EPA Office of Air and Radiation, to S. Dunham, Director, EPA Office of Transportation and Air Quality (Aug. 9, 2019) [attached at Tab G].

Also during that time, EPA made clear that it was consulting with DOE by considering DOE's recommendation whether a refinery merited exemption from the RFS, which was based on DOE's evaluation of a refinery on the basis of the two sets of metrics.[63]

For as long as DOE has been applying the scoring matrix, and EPA has been evaluating petitions for small refinery hardship relief, DOE has made clear that there was insufficient information to score metric 2.d, which measures whether a small refinery's RVO is a net cost or a net revenue. While this metric was not scored in the 2011 Study because of an alleged "lack of consistency" among the responders to the DOE small refiner survey, DOE expressly noted that "depending upon the business model of the small refiner, complying with their RVO can either be a net cost if they purchase all of their RINs or can generate revenue should they be able to actively trade RINs in the open marketplace."[64]

Now, EPA claims DOE never "assess[ed] in [the 2011 DOE Study] whether their assumptions that refiners bear different costs for RINs and that they may not be able to pass these costs onto consumers in the marketplace actually occurred."[65] That is not true. DOE understood that parties would experience RFS costs differently—that is why DOE included metric 2.d ("RINs net revenue or cost") in the scoring matrix. It particularly understood that RIN prices would become untethered from the price of blending after the E10 blend wall[66] was reached—a concept that has grounded our understanding of the RFS for nearly 10 years but is not mentioned once in the Proposed Denial. As stated above, DOE predicted that as the RFS mandate increases, RIN-short parties "will need to purchase RINs and could suffer significant economic hardship."[67]

B. EPA's transformation of the individual hardship petition process contravenes the Clean Air Act.

The Clean Air Act mandates that EPA's decision on an individual SRE petition be based on (1) the refinery-specific information provided in SRE petitions and (2) consultation with DOE.[68] What the statute does *not* contemplate is inviting adversaries of small refineries, such as biofuels groups, to participate and attack SREs without *any* information about small refineries.

Until now, EPA consistently has issued decisions on SRE petitions through the informal adjudication process, and there is good reason for that. SRE petitions provide information to the federal government that demonstrates the disproportionate economic hardship caused by RFS compliance. That information is extremely sensitive and candid in its description of the refineries' hardship due to RFS compliance. It illustrates the vulnerability experienced by small refineries, both financially and commercially. Small refineries have gone to great lengths to maintain and defend the confidentiality of the financial and business information they provide in their hardship petitions. That is because, if released, the information could allow competitors, customers, and

[63] *See* Excerpt from redacted 2017 decision document [attached at Tab H].
[64] 2011 DOE Study at 35.
[65] Proposed Denial at 22.
[66] "A blend wall is the aggregate limit to which a renewable fuel can be blended into its recipient motor fuel. The blend wall reflects both physical limitations and regulatory restrictions on the ability of the vehicle/fuel system to absorb renewable fuels. As a result, a blend wall is specific to a particular renewable fuel and specific to a particular motor fuel." 2011 DOE Study at 13.
[67] *Id.* at 17–18.
[68] 42 U.S.C. § 7545(o)(9)(B)(ii).

suppliers to seize upon the identified vulnerabilities to inflict reputational harm and gain a competitive advantage through any number of methods. And yet, EPA is not only allowing but *encouraging* input from biofuels groups and others vehemently opposed to any form of relief for small refineries, even though these outside parties have no understanding of the confidential business information provided by small refineries.

In fact, EPA is the only party with access to all the information informing its conclusions on the SRE petitions. EPA has not disclosed any of its underlying data to the public, let alone the small refinery petitioners. EPA's assertion that "all obligated parties recover the cost of acquiring RINs by selling the gasoline and diesel fuel they produce at the market price, which reflects these RIN costs (RIN cost passthrough)" is based on scant data that EPA has interpreted incorrectly.[69] In total, EPA cites to only one academic study[70] and the working paper version of the published article.[71] Otherwise, EPA relies heavily on an internal memorandum from 2015.[72] EPA does not address additional studies that directly contradict its assertion of full RIN cost passthrough, and even the single study that the Agency does cite does not support EPA's position.

Also missing from the Proposed Denial is any form of in-depth analysis of the voluminous small refinery information provided to EPA over the past three years. EPA only selectively discusses small refinery information and, in doing so, gravely mischaracterizes that information. As discussed above, the small refinery information, without question, is CBI and should not be discussed by EPA in a public adjudication or rulemaking involving small refineries' direct competitors. The confidentiality of this information underscores the absurdity of (1) EPA's attempt to characterize its public and industry-wide analysis as an adequate evaluation of individual small refinery petitions and (2) EPA's request for public comment on the fate of confidential small refinery petitions.

In the Proposed Denial, EPA employs an administrative "process" that includes the hallmarks of both rulemaking[73] and adjudication (though not the individualized, informal adjudication required by the statute).[74] Like a rulemaking, the Proposed Denial attempts to provide "the whole or part of [EPA's] statement . . . designed to . . . interpret, or prescribe law or policy."[75] EPA is explicit: the Proposed Denial "articulat[es] EPA's current interpretation of its statutory authority."[76] EPA's chosen notice and comment procedure is its "process for formulating" that rule.[77] The Proposed Denial also acts like an adjudication by attempting to resolve pending

[69] Proposed Denial at 26.
[70] Knittel, C.R., Meiselman, B.S., and Stock, J.H. 2017. The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard. Journal of the Association of Environmental and Resource Economists 4(4), 1081–1119.
[71] The working paper examining subsequent data: Knittel, C.R., Meiselman, B.S. and Stock, J.H., 2016. The Pass-Through of RIN Prices to Wholesale and Retail Fuels under the Renewable Fuel Standard: Analysis of Post-March 2015 Data. Working Paper.
[72] Burkholder, D., 2015. A preliminary assessment of RIN market dynamics, RIN prices, and their effects. Office of Transportation and Air Quality, US EPA.
[73] The Proposed Denial eschews the label "rulemaking," asserting that it "is not subject to the various statutory or other provisions applicable to a rulemaking." Proposed Denial at 7.
[74] *See* 42 U.S.C. § 7545(o)(9)(B)(ii).
[75] 5 U.S.C. § 551(4) (defining a "rule" under the APA).
[76] Proposed Denial at 7.
[77] 5 U.S.C. § 551(5) (defining a "rule making" under the APA).

petitions by applying EPA's rule retroactively—something that cannot be done through rulemaking.[78] But as an adjudication, the Proposed Denial is unlawful because it is not an individual, informal adjudication that addresses the refinery-specific facts raised in each SRE petition. (At a recent hearing, EPA called the Proposed Denial a "mass decision."[79]) Instead, EPA's request for public comment on the Proposed Denial appears to be a means to amass political support for the wholesale denial of 65 pending SRE petitions and the dramatic change in the Agency's evaluation of SRE petitions that effectively renders meaningless the SRE provision in the Clean Air Act.

C. EPA's decision to upend the SRE program appears to be influenced by inappropriate political concerns.

Media reports indicate that in November 2021, Agriculture Secretary Tom Vilsack assured that EPA has "committed" that the forthcoming renewable fuel blending quotas "won't be undercut by waivers."[80] The Secretary's statement suggests that he knew EPA's decision on the pending SRE petitions before EPA issued the Proposed Denial. As a matter of law, any influence from the United State Department of Agriculture ("USDA") is improper. The Clean Air Act does not give USDA any authority or role over SRE decisions. *See* 42 U.S.C. §7545(o)(9)(B)(ii) (the CAA authorizes only "the Administrator [of EPA], in consultation with the Secretary of Energy," to act on petitions from small refineries). Thus, there is no valid rationale for USDA's participation in or influence over the decision-making process.

While Secretary Vilsack's statement is alone cause for serious concern about the integrity of the SRE decision-making process, his statement is not the only example of USDA's apparent involvement in, and potential influence over, SRE decisions. Media reports indicated that USDA also tried to influence EPA to reduce the number of small refinery hardship exemptions for the 2018 compliance year. Prior to the issuance of EPA's decisions, former Secretary of Agriculture Sonny Perdue was tasked with reconsidering the Administration's approach to granting hardship relief to small refineries.[81] And roughly one week after the 2018 hardship decisions were released, former President Trump held a meeting to discuss those decisions with not only former Administrator Wheeler, but also officials from USDA, including the Secretary and former Deputy Secretary of Agriculture Stephen Censky,[82] as well as Terry Branstad, the Ambassador to China at that time and former Governor of Iowa, the largest corn producer in the United States.[83] The

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[78] *E.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208–09 (1988); *Treasure State Res. Indus. Ass'n v. EPA*, 805 F.3d 300, 305 n.1 (D.C. Cir. 2015) ("[T]he APA prohibits retroactive rulemaking." (citing 5 U.S.C. § 551(4), defining a "rule" as "an agency statement of general or particular applicability and *future effect*")).

[79] Tr. at 8, Status Conference, *Cross Oil Refin. & Mktg., Inc. v. Regan*, Case No. 21cv1825 (D.D.C. Jan. 20, 2022) [attached at Tab I].

[80] Jennifer A. Dlouhy, Biofuel Quotas Won't Be Undercut by Refinery Waivers: Vilsack, BLOOMBERG LAW (Nov. 4, 2021).

[81] *See* Rob Hotakainen and Marc Heller, Trump under growing pressure to block refinery waivers, E&E GREENWIRE, June 21, 2019; *see also* Chris Clayton, Backlash Over Perdue Influence: Senators Want President to Keep Ag Secretary Out of EPA Small-Refinery Decisions, PROGRESSIVE FARMER, July 1, 2019; Refiners: Restrict USDA Access to Small-Refinery Waivers Information, PROGRESSIVE FARMER, Jul. 9, 2019.

[82] Before becoming the former Deputy Secretary, Stephen Censky served as chief executive officer of the American Soybean Association for 21 years, an organization openly opposed to small refinery exemptions.

[83] See Jennifer Jacobs, Jennifer A Dlouhy, and Mario Parker, Trump Seeks to Allay Farm-State Uproar in Oval Office Meeting, BLOOMBERG, Aug. 20, 2019; *see also* Marc Heller, Leaked memo: Trump admin mulls effort to boost ethanol, E&E NEWS, Aug. 23, 2019.

mere fact of communications between EPA and USDA regarding SREs is evidence of improper influence. These communications threaten the integrity of the SREs decision-making process, which EPA already is attempting to write out of the Clean Air Act in its Proposed Denial.

Congress has been alerted to USDA's apparent attempts to influence EPA to reduce the number of SREs the Agency granted in the past to garner further political support from the biofuels industry. The Government Accountability Office ("GAO") is now investigating the extent of inappropriate outside influence on the SRE decision-making process.[84]

IV. EPA's decision to deny the SREs is arbitrary and capricious on the merits.

A. Independent economic analyses refute EPA's conclusions that RFS compliance costs are the same for all obligated parties and that *all* obligated parties pass through their compliance costs to customers.

Timothy Fitzgerald, Ph.D.[85] reviewed and commented on the economic analysis presented by EPA in the Proposed Denial.[86] Dr. Fitzgerald concludes that EPA's "RIN cost passthrough" position "is not consistent with the empirical results relevant to this issue in the academic literature."[87] EPA's assertion that "all transactions fully recover RIN costs . . . is relying too heavily on a very small number of results and making an interpretation that is unduly strong given the entire available empirical record. EPA has chosen its interpretation, but in so doing ignores completely evidence that helps paint a more complete picture of how RFS compliance is achieved by different obligated parties."[88] The fact that EPA is "[i]gnoring the substantial evidence from other academic papers that pass-through is imperfect further undermines the . . . interpretation that EPA has elected to make based on results from a single external study."[89]

To test EPA's hypothesis regarding "the extent of pass-through of RIN costs," Dr. Fitzgerald performed an empirical analysis using "[d]aily bulk sales data from a collection of small refiners."[90] As a starting point, Dr. Fitzgerald utilized the same methodology that "seems to be the preferred methodology of EPA" in the Proposed Denial.[91] However, Dr. Fitzgerald used far more recent and relevant data, which "provides an opportunity to test [EPA's] assumption in a large number of applications to determine if it is justified."[92] Dr. Fitzgerald draws several conclusions from this empirical analysis, which refute the outdated, flawed, and overly simplistic "analysis" on which EPA based the Proposed Denial.

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[84] On January 30, 2020, as part of GAO's ongoing investigation of SRE decision-making under the RFS, Senator Barrasso and nine other senators requested that GAO expand the investigation to address additional aspects of the small refinery hardship relief, including the extent to which inappropriate political interference is affecting the implementation of the program [attached at Tab J].
[85] Timothy Fitzgerald, Ph.D. is an Associate Professor at the Rawls College of Business at Texas Tech University.
[86] *See* Fitzgerald Economic Report, [Tab C].
[87] Fitzgerald Economic Report at 1.
[88] *Id.*
[89] *Id.* at 5.
[90] Fitzgerald Empirical Analysis at 1, [Tab B].
[91] *Id.*
[92] *Id.*

Separately, the Louisiana State University Center for Energy Studies ("LSU") analyzed EPA's claims in the Proposed Denial that: (1) RFS compliance costs are the same for all obligated parties, and thus no party bears RFS compliance costs that are disproportionate relative to others' costs; and (2) all obligated parties—including small refineries—recover their compliance costs through the market price they receive when they sell their fuel products and, thus, do not experience any hardship from RFS compliance.[93] LSU's analysis utilizes economic theory, prior empirical research, and public data.

LSU concludes that "EPA's claim that RFS compliance costs are the same for all obligated parties is implausible."[94] In terms of economic theory, "[t]he fundamental economic rationale for implementing a tradable permit program [like the RFS] in lieu of a simple requirement for each individual firm is *because the costs of compliance differ across firms*."[95] The purpose of a tradable permit program "is to achieve the lowest possible compliance cost market-wide," but "this does not imply that the *average* compliance costs per unit of output is the same for all individual firms."[96] While each refinery may have the option to purchase RINs from the market at the same price, each refinery will have different compliance costs and be impacted differently.[97] EPA's claim is thus contrary to economic theory and belied by EPA's creation of the RIN market in the first place.

LSU also concludes that EPA's claim that all obligated parties, including small refineries, fully recover their compliance costs is not supported. "[T]he evidence does not suggest full pass-through of all RINs to all fuels in all locations. Thus, it is unlikely that market participants *in all situations* are able to recover their firm-specific compliance costs through the market price they receive when they sell fuel."[98] In other words, EPA's assertion that "the [RFS] program cannot impose hardship on an individual firm[] is implausible in our opinion . . ."[99]

B. EPA concedes that there are circumstances under which obligated parties cannot pass through their RIN costs.

1. EPA's theory that all RINs are passed through rests on an assumption divorced from the realities of the transportation fuels market.

EPA acknowledges in the Proposed Denial that the passthrough theory can occur only under certain conditions, and RIN costs are *not* passed through when small refineries do not purchase RINs ratably.[100] However, EPA's framing of the issue suggests that all obligated parties can buy RINs on a "ratable basis" to exactly match the volume of their fuel sales.[101] EPA states as follows:

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[93] *See* LSU Economic Report, [Tab A].
[94] *Id.* at 30.
[95] *Id.* at 17 (emphasis in original).
[96] *Id.* at iv.
[97] *Id.* at 17–21.
[98] *Id.* at 35 (emphasis in original).
[99] *Id.* at vi.
[100] *See* Proposed Denial at 48–49.
[101] EPA defines "ratable basis" as "purchase on a systematic, regular basis the number of RINs needed to satisfy their obligation for all the fuel sold each day." Proposed Denial at 48.

> Obligated parties that *choose* to purchase the RINs they need for compliance on a ratable basis . . . will recover the cost of the RINs they purchase in the sales price of the petroleum fuel they sell. Conversely, obligated parties that *choose* to delay RIN purchases, or to purchase excess RINs in advance of producing or importing petroleum fuel, may recover more or less than the price they paid for RINs in the sales price of the petroleum fuel they sell, depending on whether the RIN price on the purchase date is higher or lower than the RIN price on the date the petroleum fuel is sold.[102]

Contrary to EPA's assertion, small refineries cannot simply *choose* to buy RINs ratably. In other words, EPA's RIN passthrough theory relies on laboratory conditions that in no way resemble the real-world conditions small refineries experience when deciding how to comply. For many small refineries, purchasing RINs ratably is not possible or reasonable for several reasons (volatile and restricted cash flow, lack of access to credit, etc.). Even when small refineries can purchase RINs on a regular basis, they cannot adjust the prices of their fuel in real time to ensure that they recoup their RIN costs.

Even if small refineries could buy RINs ratably, they had reason not to do so. Because many small refineries received SREs in the past, they reasonably relied on that fact when deciding whether to acquire RINs to show compliance for the years for which they again applied for hardship relief. Small refineries had no reason to think EPA would upend the SRE evaluation process and deny all SREs moving forward, and that it would do so years after it was supposed to issue SRE decisions in the first place. Again, EPA fails to take accountability for the ways in which its failures to properly implement the RFS program have negatively affected small refineries.

To present a simplified picture of how small refineries can achieve compliance and recover their costs, the Proposed Denial contains zero discussion of how RIN trading actually works. Instead, EPA claims that "individual business decisions made by an obligated party not to ratably accrue RINs as the obligation accrues, but instead to either purchase RINs in advance or delay RIN purchases until a later date, are speculation in the RIN market, a business activity not required to comply with the RFS program."[103] To characterize small refinery behavior as "speculation"[104] is disingenuous. EPA's statement reflects a naïve understanding of business behavior. Speculation is defined as "investment in stocks, property, or other ventures in the hope of gain but with the risk of loss."[105] Small refineries are not entering the RIN market in an attempt to make profit. They are RIN-short obligated parties *required* to show compliance with the RFS program and, because they are dependent on the RIN market to do so, they have no choice but to purchase RINs in the marketplace. If small refineries could avoid the RIN market altogether, they certainly would. Put simply, small refineries are making decisions about regulatory compliance, not speculating.

In contrast to small refineries, other parties do speculate in the RIN market, because EPA allows them to do so. The Clean Air Act directed EPA to create a credit trading program in which the credits, or RINs, could be generated by parties that "over complied" and sold only to parties

[102] Proposed Denial at 48–49 (emphasis added).
[103] Proposed Denial at 49.
[104] Proposed Denial at 50.
[105] *Speculation*, LEXICO (2022), https://www.lexico.com/en/definition/speculation.

that needed them for compliance.[106] Instead, EPA created a program in which any person may participate, generating credits for blending at any level they choose and selling RINs to anyone for any purpose. As a result, the RIN market has been captured and is controlled by large integrated refineries that generate excess RINs, large retailers (who control their own blending but are not obligated parties), and traders, all of whom are seeking to make a profit in the market.

EPA's theory that there is full RIN cost passthrough rests on the assumption that all obligated parties can buy RINs to exactly match their fuel sales in real time. Because that assumption is incorrect, EPA's theory necessarily falls apart. By characterizing the costs incurred by small refineries as a mere consequence of not buying RINs ratably, EPA concedes its passthrough phenomenon fails in real-world conditions. Its only remaining argument is a bad one made in an attempt to effectively rewrite SREs out of the statute—that RIN costs are not *caused* by the RFS and therefore cannot be "considered" by the Agency.[107]

C. EPA ignores the structural characteristics of small refineries that Congress and DOE understood made them susceptible to hardship.

EPA summarily concludes no small refineries are experiencing hardship. This contradicts the U.S. Court of Appeals for the Fourth Circuit's admonition that EPA must consider the ability of the individual small refinery to pass through its RIN costs and may not rely on an industry-wide conclusion. When assessing the RFS compliance costs for an individual small refinery, EPA must do more than cite to conclusions about "the refining industry *as a whole*."[108] The Fourth Circuit determined that it was arbitrary and capricious for EPA to rely on "an industry-wide study and a nonspecific nationwide trend" while "ignor[ing] specific evidence suggesting that [RIN] prices had a negative effect" on an individual small refinery.[109] To ignore a small refinery's "specific evidence" would render meaningless the analysis of a small refinery's DEH and would, therefore, be arbitrary and capricious.[110]

To supports its position that RIN costs are fully passed through by all parties, EPA claims that if passthrough were not occurring, "we would expect to see refiners avoiding RFS obligations"[111] by shifting production to non-obligated fuel (e.g., jet fuel or exports). This statement completely ignores the physical and financial impediments that prevent small refineries from pivoting business portfolios.[112] Moreover, many small refineries have made adjustments, including increasing blending capabilities, yet still experience hardship. Small refineries are submitting individual confidential comments showing why the Proposed Denial is inaccurate as applied to their refineries. It is critical that EPA evaluate these comments and assess each small refinery on an individual basis.

Ultimately, EPA's position that effectively writes SREs out of the Clean Air Act contradicts congressional intent. The RFS is not an "adapt or die" program. Rather, Congress

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[106] 42 U.S.C. § 7545(o)(5)(A)(i).
[107] *See supra* Part II.B. regarding the proper interpretation of the Clean Air Act's DEH causation requirement.
[108] *Ergon-W. Va., Inc. v. EPA*, 896 F.3d 600, 613 (4th Cir. 2018) (emphasis added).
[109] *Id.*
[110] *Ergon-W. Va.*, 896 F.3d at 613.
[111] Proposed Denial at 26.
[112] *Supra* Part I.

established the possibility of hardship relief "at any time" to help small refineries remain competitive and profitable.[113] The United States Supreme Court recently upheld this logic, finding that if Congress intended the small refinery hardship relief provision to be a sunset provision, under which small refineries' ability to seek relief due to DEH had a time limit, then Congress chose "an odd way to achieve it."[114]

V. EPA's new interpretation cannot apply retroactively to the pending petitions or the 2018 SREs.

EPA aims to apply the Proposed Denial to not only the pending hardship petitions, but also the 2018 remanded decisions issued two and a half years ago. On December 8, 2021, the day after EPA issued the Proposed Denial, the U.S. Court of Appeals for the D.C. Circuit remanded the 2018 SREs to the Agency.[115] On January 3, 2022, nearly a month after the remand order and nearly halfway through the comment period for the Proposed Denial, EPA notified small refineries *for the first time* that the Agency was considering including the 2018 SREs under the Proposed Denial, which could result in the reversal of more than 30 previously granted exemptions. Thus, EPA intends to apply the Proposed Denial to all pending petitions and previously granted petitions from compliance year 2018.[116] The pending petitions include at least 63 petitions that, by statute, EPA should have decided before EPA issued the Proposed Denial.[117] And, of course, EPA *already granted* the 2018 SREs. EPA cannot retroactively apply the Proposed Denial to any of the pending hardship petitions or the 2018 SREs.

A. Pending petitions

Even assuming that EPA's new interpretation is permissible (it is not, *see supra* Part II), and regardless of whether the Proposed Denial is a rulemaking, an adjudication, or both,[118] retroactive application is impermissible here. "[A]dministrative rules will not be construed to have retroactive effect unless their language requires this result."[119] And even when a rule itself purports to be retroactive and there are other "substantial justification[s] for" that application, courts will "be reluctant to find such authority absent an express statutory grant."[120] Although EPA intends to apply its new rule retroactively,[121] the Clean Air Act does not provide the necessary "express statutory grant." But even if it did, "the APA prohibits retroactive rulemaking."[122] EPA cannot retroactively apply its new rule to any of the pending hardship petitions.

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[113] 42 U.S.C. § 7545(o)(9)(B)(i).
[114] *HollyFrontier*, 141 S. Ct. 2172, 2180 (2021); *see also supra* Part II.B regarding the Supreme Court's rejection of an argument that Congress intended for the SRE provisions to eventually sunset on their own.
[115] Order, *Sinclair Wyo. Refin. Co. v. EPA*, No. 19-1196 (D.C. Cir. Dec. 8, 2021), Doc. No. 1925942.
[116] Proposed Denial at 6.
[117] 42 U.S.C. § 7545(o)(9)(B)(iii); 40 C.F.R. § 80.1441(e)(2)(ii).
[118] *See supra* Part III.B.
[119] *Georgetown Univ. Hosp.*, 488 U.S. at 208.
[120] *Id.* at 208–09
[121] Proposed Denial at 6–7 (explaining that EPA intends to apply EPA's new interpretation to "deny all the pending petitions" for hardship relief).
[122] *Treasure State*, 805 F.3d at 305 n.1 (citing 5 U.S.C. § 551(4), defining a "rule" as "an agency statement of general or particular applicability and *future effect*")).

Retroactive application of any adjudicatory aspect of the Proposed Denial is equally unlawful. EPA did not provide fair notice of this new interpretation, which eliminates SREs, in violation of small refineries' due process rights.[123] "Notice is fair if it allows regulated parties to identify, with *ascertainable certainty*, the standards with which the agency expects [them] to conform."[124] Retroactive application of a new legal rule is unlawful if a party has conformed its conduct to a prior legal regime.[125] In addition, courts disfavor retroactivity when the agency is merely effectuating a change in policy, not correcting a legal error.[126]

Here, small refineries did not receive constitutionally adequate notice that SREs would not exist, and retroactive application of the new interpretation would be unlawful and inappropriate for many reasons. *First*, under the statute, EPA should have decided the small refinery petitions at issue long ago (90 days after receipt), and small refineries were entitled to exemptions at that time.[127] EPA repeatedly missed deadlines and delayed decision[128] on pending petitions to now retroactively apply a new statutory interpretation to petitions that should have been decided under the old, correct interpretation. If EPA had timely issued decisions, small refineries that were denied hardship relief would have been able to buy RINs at significantly lower cost than the current RIN prices. *Second*, small refineries conformed their conduct to the prior legal regime when they used in their petitions the criteria in the 2011 DOE Study, including the PI-588 survey, not the defunct 2009 study or the Proposed Denial, to make the case for hardship relief. Small refineries also relied on the existence of exemptions based on DEH to their detriment. Those refineries that always or often received hardship relief reasonably believed that they would again receive hardship relief from EPA in compliance years 2019 and 2020 and did not make the significant capital or other investments (that might have put them out of business) necessary to comply.[129] *Third*, EPA switched interpretations merely to effectuate a change in policy, not to correct a legal error. As discussed *supra* Part II.A, EPA cannot claim "correction" based on *RFA* because the Tenth Circuit vacated *RFA* in its entirety and, even if *RFA* were still good law, it would not dictate how EPA should address petitions filed outside of that circuit.

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[123] "A fundamental principle in our legal system," enshrined in the Fifth Amendment's Due Process Clause, "is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-58 (2012); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012). That principle is "thoroughly incorporated into administrative law." *Gen. Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), *as corrected* (June 19, 1995) (cleaned up); *see also SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1043 (D.C. Cir. 2017).

[124] *Id.* (emphasis added) (cleaned up).

[125] *See Air Transport Assn. v CAB*, 732 F.2d 219, 227-28 (D.C. Cir. 1984); *Patel v INS*, 638 F.2d 1199, 1203-04 (9th Cir. 1980); *see also Natural Gas Pipeline Co. v FERC*, 590 F.2d 664, 668 (7th Cir. 1979); *Drug Package, Inc. v NLRB*, 570 F.2d 1340, 1346-47 (8th Cir. 1978).

[126] *See Verizon Tel. Companies v. FCC*, 269 F.3d 1098, 1111 (D.C. Cir. 2001); *Gun South, Inc. v. Brady*, 877 F.2d 858, 859, 862 (11th Cir. 1989). "[T]he more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.).

[127] 42 U.S.C. § 7545(o)(9)(B)(iii).

[128] EPA likely knew that it was going to reverse its interpretation when it held an open-forum meeting for small refineries in August 2021. Instead, EPA delayed three more months to announce its reversal.

[129] Indeed, DOE's scores for compliance year 2019 indicate that almost all refineries would have received hardship relief if EPA had decided the petitions by the statutory deadline.

B. 2018 remanded SREs

Applying this new interpretation to the 2018 SREs raises additional issues. Reconsidering *already granted* petitions is especially inappropriate and inequitable due in part to small refineries' detrimental reliance on 2018 exemptions granted two and a half years ago.[130] And even if EPA were to reconsider and deny the 2018 SREs, EPA cannot enforce compliance. At most, it could issue only "paper denials." That is because it would be impossible for previously exempt small refineries to now comply for 2018 when the 2017- and 2018-vintage RINs necessary to demonstrate compliance are no longer available.

[130] *See, e.g.*, *Citizens Against Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 418 (6th Cir. 2004) ("detrimental reliance on the previous [agency determination] would militate against allowing the agency to withdraw" it); *see also Rosebud Sioux Tribe v. Gover*, 104 F. Supp. 2d 1194, 1201 (D.S.D. 2000) (declining to accord the BIA the inherent authority to reconsider its approval of a lease of tribal land, in part because the developers had "already spent more than $5,000,000 in reliance on [the Bureau's] action[s]"), *rev'd on other grounds sub nom. Rosebud Sioux Tribe v. McDivitt*, 286 F.3d 1081 (8th Cir. 2002); *Prieto v. United States*, 655 F. Supp. 1187, 1188 (D.D.C. 1987).