No.

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CALUMET SHREVEPORT REFINING, L.L.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a pair of final actions, the United States Environmental Protection Agency (EPA) denied 105 petitions filed by small oil refineries seeking exemptions from the requirements of the Clean Air Act's Renewable Fuel Standard program. Six of those refineries petitioned for review of EPA's decisions in the Fifth Circuit, which denied the government's motion for transfer to the D.C. Circuit. The question presented is as follows:

Whether venue for the refineries' challenges lies exclusively in the D.C. Circuit because the agency's denial actions are "nationally applicable" or, alternatively, are "based on a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1).

PARTIES TO THE PROCEEDING

Petitioner was the respondent in the court of appeals. It is the United States Environmental Protection Agency.

Respondents were petitioners and intervenors in the court of appeals. They are Calumet Shreveport Refining, L.L.C.; Placid Refining Company, L.L.C.; Wynnewood Refining Company, L.L.C.; Ergon Refining, Inc.; Ergon-West Virginia, Inc.; San Antonio Refinery, L.L.C.; Renewable Fuels Association; Growth Energy; American Coalition for Ethanol; National Farmers Union; and National Corn Growers Association.

RELATED PROCEEDINGS

United States Court of Appeals (5th Cir.):

Calumet Shreveport Ref., L.L.C. v. *EPA*,
No. 22-60266 (Nov. 22, 2023)

Wynnewood Ref. Co., L.L.C. v. *EPA*,
No. 22-60425 (Nov. 22, 2023)

Ergon Ref., Inc. v. *EPA*,
No. 22-60433 (Nov. 22, 2023)

Placid Ref. Co., L.L.C. v. *EPA*,
No. 22-60434 (Nov. 22, 2023)

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Environmental Protection Agency, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 86 F.4th 1121.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2023. Petitions for rehearing were denied on January 22, 2024 (Pet. App. 331a-333a). On April 11, 2024, Justice Alito extended the time to file a petition for a writ of certiorari to and including May 21, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. Pet. App. 334a-365a.

STATEMENT

1. a. The Clean Air Act (CAA), ch. 360, 69 Stat. 322 (42 U.S.C. 7401 *et seq.*), establishes a Renewable Fuel Standard (RFS) program, under which transportation fuel sold or introduced into commerce in the United States must contain specified volumes of renewable fuel. See 42 U.S.C. 7545(*o*)(2)(A)(i) and (B)(i). To implement the program, the Environmental Protection Agency (EPA) expresses renewable-fuel targets as a percentage of overall transportation fuel projected to be sold in the upcoming year and adopts regulations to ensure compliance. See 42 U.S.C. 7545(*o*)(2)(A)(i); see also 42 U.S.C. 7545(*o*)(3). Obligated parties "use that annual-percentage standard to determine their volume obligations" for the year. Pet. App. 3a.

Refineries that produce transportation fuel are subject to RFS requirements. See Pet. App. 205a; see also 42 U.S.C. 7545(*o*)(2) and (3)(B)(ii)(I). To track whether a refinery has satisfied its obligations under the RFS program, EPA uses a credit system that offers obligated parties flexibility in achieving compliance. See 42 U.S.C. 7545(*o*)(5). Each year, a refinery may either generate its own credits—called Renewable Identification Numbers (RINs)—by blending renewable fuel into transportation fuel, or it may purchase the requisite number of credits. See Pet. App. 206a-207a; see also 42 U.S.C. 7545(*o*)(5)(B) and (E); 40 C.F.R. 80.1428(b), 80.1429(b).

Obligated parties meet their renewable-fuel-volume obligations by "retir[ing]" RINs in an annual compliance demonstration. 40 C.F.R. 80.1427(a)(1). A

refinery may use a particular RIN only during the calendar year in which it was generated or the following calendar year. 40 C.F.R. 80.1427(a)(6), 80.1428(c). An obligated party who fails to demonstrate full compliance in one year may carry forward a compliance deficit to the following year. 42 U.S.C. 7545(*o*)(5)(D).

Congress created a three-tiered scheme through which obligated parties that qualify as "[s]mall refineries" may obtain exemptions from RFS program requirements. 42 U.S.C. 7545(*o*)(9) (emphasis omitted); see 42 U.S.C. 7545(*o*)(1)(k) (defining "small refinery").

First, Congress granted all small refineries a blanket exemption until 2011. 42 U.S.C. 7545(*o*)(9)(A)(i).

Second, Congress directed the U.S. Department of Energy (DOE) to study "whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries." 42 U.S.C. 7545(*o*)(9)(A)(ii)(I). For any small refinery that DOE determined "would be subject to disproportionate economic hardship if required to comply," Congress directed EPA to extend the exemption for at least two years. 42 U.S.C. 7545(*o*)(9)(A)(ii)(II).

Third, Congress established a mechanism through which 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." 42 U.S.C. 7545(*o*)(9)(B)(i). In evaluating a petition under paragraph (B), EPA, "in consultation with" DOE, "shall consider the findings of [DOE's study] and other economic factors." 42 U.S.C. 7545(*o*)(9)(B)(ii).

b. A small refinery that is denied an exemption may challenge that "final action" directly in a court of appeals. 42 U.S.C. 7607(b)(1).

Under the CAA, the D.C. Circuit is the exclusive venue for a petition for review of certain specified actions or "any other nationally applicable regulations promulgated, or final action taken," by EPA. 42 U.S.C. 7607(b)(1). By contrast, a petition for review of an action that is "locally or regionally applicable may" generally "be filed only in the United States Court of Appeals for the appropriate circuit." *Ibid.* But a petition for review of a locally or regionally applicable action must be filed in the D.C. Circuit if it "is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." *Ibid.*

2. In April 2022, EPA denied 36 exemption petitions filed by small refineries for the 2018 compliance year. Pet. App. 193a; see *April 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program*, 87 Fed. Reg. 24,300 (Apr. 25, 2022) (*April Notice*). In June 2022, EPA denied an additional 69 petitions for the 2016-2021 compliance years. Pet. App. 48a; see *Notice of June 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program*, 87 Fed. Reg. 34,873 (June 8, 2022) (*June Notice*). The two denial actions reflect the same reasoning and are based on two principal rationales, one statutory and one economic.[1] The denial actions contain express agency findings that the actions are nationally applicable or, in the alternative, that they are based on determinations of nationwide scope or effect.

Statutory interpretation. In 2020, the Tenth Circuit vacated and remanded three of EPA's prior exemption

[1] For ease of reference, this petition cites only the April 2022 denial when discussing reasoning common to both actions.

grants. *Renewable Fuels Ass'n* v. *EPA*, 948 F.3d 1206 (*RFA*). The court held that "[t]he plain language of [the relevant CAA] provisions indicates that renewable fuels compliance must be the cause of any disproportionate hardship," and that "[g]ranting extensions of exemptions based at least in part on hardships not caused by RFS compliance was outside the scope of the EPA's statutory authority." *Id.* at 1253-1254. Although that decision was subsequently vacated for unrelated reasons, see *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382 (2021); 18-9533 C.A. Doc. 010110554160 (10th Cir. July 27, 2021), EPA undertook to reassess its interpretation of the statute in light of the Tenth Circuit's reasoning, see Pet. App. 219a-221a.

In the April and June 2022 denial actions, EPA concluded, consistent with the Tenth Circuit's opinion, that an exemption under paragraph (B) may be granted only if disproportionate economic hardship was "caused by RFS compliance." Pet. App. 242a. For relevant context, the agency turned to paragraph (A), which established the initial blanket exemption for small refineries and the two-year extension based on the DOE study. See 42 U.S.C. 7545(*o*)(9)(A) and (B). The agency observed that paragraph (A) focuses on "whether compliance with the requirements of [the RFS program] would impose a [disproportionate economic hardship] on small refineries," Pet. App. 243a (quoting 42 U.S.C. 7545(*o*)(9)(A)(ii)(I)), and it construed paragraph (B) to require a similar causal connection, *id.* at 245a. The agency found it "hard to imagine that Congress intended" to permit exemptions for hardships resulting from "a broad array of circumstances unrelated to the RFS program." *Id.* at 247a.

Economic analysis. In implementing the RFS program, EPA has made "longstanding and consistent findings" that obligated parties can pass the costs of RFS compliance on to purchasers, a phenomenon called RIN cost passthrough. Pet. App. 248a; see, *e.g.*, *Alon Ref. Krotz Springs, Inc.* v. *EPA*, 936 F.3d 628, 649-650 (D.C. Cir. 2019) (per curiam) (discussing earlier studies reaching this conclusion), cert. denied, 140 S. Ct. 2792 (2020). The Tenth Circuit in *RFA* held that EPA had acted arbitrarily and capriciously by granting exemptions without addressing RIN cost passthrough. 948 F.3d at 1255; see *id.* at 1257.

In the April and June 2022 denial actions, EPA reassessed and reaffirmed its prior findings about RIN cost passthrough. Pet. App. 248a-303a; see *id.* at 240a-241a (explaining related concept of "RIN discount"). After reviewing extensive market data, the agency determined 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." *Id.* at 249a. EPA further concluded that "RINs are generally and widely available in an open and liquid market," and that the "cost of acquiring RINs is the same for all parties." *Ibid.*

Given that all refineries bear the same costs of RFS compliance and can recover those costs by selling at market price, EPA found that such costs presumptively do not cause disproportionate economic hardship to any obligated party. Pet. App. 248a-249a. It determined that none of the petitioning small refineries had rebutted that presumption through evidence about their specific circumstances. *Id.* at 251a-252a; see *id.* at 305a-310a.

Venue. EPA determined that the denial actions are subject to review exclusively in the D.C. Circuit because they are "'nationally applicable'" or, in the alternative, because they are "based on a determination of 'nationwide scope or effect.'" Pet. App. 328a; *id.* at 187a (same for June 2022 denial action); see *April Notice*, 87 Fed. Reg. at 24,300-24,301; *June Notice*, 87 Fed. Reg. at 34,874. The agency explained that the April 2022 denial action encompasses petitions from more than 30 small refineries located within 18 States in seven of the ten EPA regions and in eight different federal judicial circuits. Pet. App. 329a; see *id.* at 187a (similar for June denial). It further observed that the denial actions are "based on EPA's revised interpretation of the relevant CAA provisions and the * * * RIN cost passthrough principles that are applicable to all small refineries no matter the location or market in which they operate." *Id.* at 329a; see *id.* at 187a-188a.

3. Six small refineries filed petitions for review in the Fifth Circuit, collectively challenging both denial actions. Pet. App. 2a, 6a. Various renewable-fuel trade associations were granted leave to intervene as respondents. See 22-60266 Doc. 303-1 (Mar. 16, 2023). The court of appeals granted the petitions for review, vacated the denial actions as to the six petitioners, and remanded to EPA for further proceedings. Pet. App. 1a-34a.

a. The court of appeals denied EPA's motion to transfer the petitions to the D.C. Circuit. Pet. App. 9a-15a. The court held that the denial actions are "locally or regionally applicable" rather than "nationally applicable," 42 U.S.C. 7607(b)(1), because their "legal effect" is limited to the petitioning refineries and they do not "bind[] EPA in any future adjudication." Pet. App. 11a-

12a (emphases omitted). The court further held that neither denial action is "based on a determination of nationwide scope or effect," 42 U.S.C. 7607(b)(1). The court acknowledged, but disagreed with, EPA's express findings that the denial actions were based on such determinations. Pet. App. 12a-14a. The court concluded that, because "there is still a non-zero chance [EPA] will grant small refinery petitions" based on "data and evidence" about particular refineries' circumstances, "the Denial Actions rely on refinery-specific determinations and are not based on a determination of nationwide scope or effect." *Id.* at 15a.

On the merits, the Fifth Circuit held the denial actions unlawful on three grounds. Pet. App. 16a-33a. First, it found that small refineries have a protectable property right in being exempt from RFS program obligations, and that EPA had impermissibly applied its new analysis retroactively to deprive them of that right. *Id.* at 16a. Second, the court rejected the agency's interpretation of the governing statutory language. The court characterized the agency's position as requiring that "compliance costs must be *the sole cause* of" hardship, *id.* at 23a, and it disagreed on the ground that hardship may have "myriad causes," *id.* at 25a. Third, the court concluded that the agency had acted arbitrarily and capriciously. *Id.* at 29a-33a. Without questioning the agency's RIN cost passthrough analysis as a general matter, *id.* at 31a n.44, the court found that the analysis was undermined as to the petitioning refineries by data concerning the particular local markets in which they operate, *id.* at 31a-33a.[2]

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[2] Although EPA disputes the Fifth Circuit's merits holdings, and is currently defending the April and June 2022 denial actions in the D.C. Circuit, see pp. 9-10, *infra*, those holdings are not presently

b. Judge Higginbotham dissented as to venue. Pet. App. 35a-43a. He would have held that the denial actions are "nationally applicable" because they "apply one consistent statutory interpretation and economic analysis to thirty-six small refineries, located in eighteen different states, in the geographical boundaries of eight different circuit courts." *Id.* at 38a. In the alternative, he concluded that the denial actions are "'based on a determination of nationwide scope or effect'" because the "two determinations at the[ir] core"—the agency's statutory interpretation and economic analysis—"are applicable to all small refineries no matter the location or market in which they operate." *Id.* at 40a-42a.

4. Other small refineries petitioned for review of the April and June 2022 denial actions in the Third, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. Each of those other regional circuits either dismissed the petitions without prejudice based on improper venue[3] or

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the subject of a circuit conflict. This petition therefore does not seek review of the Fifth Circuit's merits decision.

[3] See *Hunt Ref. Co.* v. *EPA*, 90 F.4th 1107 (11th Cir. 2024); *Calumet Mont. Ref., LLC* v. *EPA*, No. 22-70124, Doc. 16 (9th Cir. Oct. 25, 2022); *Par Haw. Ref., LLC* v. *EPA*, No. 22-70125, Doc. 16 (9th Cir. Oct. 25, 2022); *San Joaquin Ref. Co.* v. *EPA*, No. 22-70126, Doc. 16 (9th Cir. Oct. 25, 2022); *Kern Oil & Ref. Co.* v. *U.S. Environmental Protection Agency*, No. 22-70128, Doc. 13 (9th Cir. Oct. 25, 2022); *Calumet Mont. Ref., LLC* v. *EPA*, No. 22-70166, Doc. 14 (9th Cir. Oct. 25, 2022); *Par Haw. Ref., LLC* v. *U.S. Environmental Protection Agency*, No. 22-70168, Doc. 13 (9th Cir. Oct. 25, 2022); *San Joaquin Ref. Co.* v. *EPA*, No. 22-70170, Doc. 12 (9th Cir. Oct. 25, 2022); *Kern Oil & Ref. Co.* v. *U.S. Environmental Protection Agency*, No. 22-70172, Doc. 14 (9th Cir. Oct. 25, 2022).

transferred them to the D.C. Circuit.[4] The D.C. Circuit has consolidated the various petitions challenging the denial actions, and the court held oral argument on April 16, 2024. See *Sinclair Refining* v. *EPA*, No. 22-1073, Doc. 2049836 (D.C. Cir. Apr. 16, 2024).

REASONS FOR GRANTING THE PETITION

The CAA's venue provision reflects a clear congressional preference for "uniform judicial review of regulatory issues of national importance." *National Envtl. Dev. Ass'n Clean Air Project* v. *EPA*, 891 F.3d 1041, 1054 (D.C. Cir. 2018) (Silberman, J., concurring). Under the decision below, however, EPA's April and June 2022 denial actions are subject to judicial review in multiple circuits. That outcome creates precisely the risk of duplicative litigation and inconsistent rulings that Congress sought to avoid, and it interposes substantial obstacles to the orderly operation of EPA programs.

The denial actions satisfy the statutory criteria for centralized review in the D.C. Circuit. They are "nationally applicable" because they apply a uniform methodology to small refineries across the country. 42 U.S.C. 7607(b)(1). And they are "based on a determination of nationwide scope or effect," *ibid.*, because the lynchpin for the decisions is an interpretation of the

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[4] See *American Ref. Grp., Inc.* v. *United States Environmental Protection Agency*, No. 22-1991, Doc. 23 (3d Cir. Aug. 9, 2022); *American Ref. Grp.* v. *United States Environmental Protection Agency*, No. 22-2435, Doc. 20 (3d Cir. Sept. 23, 2022); *Countrymark Ref. & Logistics, LLC* v. *Environmental Protection Agency*, No. 22-1878, Doc. 13 (7th Cir. July 20, 2022); *Countrymark Ref. & Logistics, LLC* v. *Environmental Protection Agency*, No. 22-2368, Doc. 9 (7th Cir. Sept. 8, 2022); *Wyoming Ref. Co.* v. *EPA*, No. 22-9538, Doc. 010110728295 (10th Cir. Aug. 23, 2022); *Wyoming Ref. Co.* v. *EPA*, No. 22-9553, Doc. 010110737506 (10th Cir. Sept. 12, 2022).

statutory text and an economic analysis that are "applicable to all small refineries no matter the location or market in which they operate." Pet. App. 329a.

In deciding otherwise, the court of appeals held that the denial actions are not nationally applicable because they do not formally bind the agency "in all future exemption petitions." Pet. App. 12a. But nothing in Section 7607(b)(1)'s text makes that sort of binding prospective effect a prerequisite to D.C. Circuit venue. The court also held that the denial actions were not based on determinations of nationwide scope or effect because the agency considered refinery-specific circumstances in determining that particular exemption petitions should be denied. *Id.* at 15a. But a challenged action need not be based *solely* on a nationwide determination in order for venue to lie in the D.C. Circuit. And if D.C. Circuit venue is unavailable whenever a challenged agency action is premised even in part on consideration of local circumstances, the "determination of nationwide scope or effect" prong, 42 U.S.C. 7607(b)(1), will serve little practical purpose.

Multiple circuits have recently addressed the question of proper venue for challenges to EPA's April and June 2022 denial actions. The decision below squarely conflicts with the Eleventh Circuit's decision in *Hunt Refining Co.* v. *EPA*, 90 F.4th 1107 (2024), and with a host of unpublished orders. And even apart from those denial actions, a multitude of EPA decisions in various contexts reflect consideration of *both* nationally applicable criteria *and* local circumstances. This Court's review here would help to clarify Section 7607(b)(1)'s application to such EPA actions more generally. The Court should grant certiorari and vacate the Fifth Circuit's judgment.

A. The Decision Below Is Incorrect

Under the CAA, the D.C. Circuit is the exclusive venue for challenges to (a) "nationally applicable" EPA actions and (b) EPA actions that are "locally or regionally applicable" but that are "based on a determination of nationwide scope or effect" and for which EPA has made and published a finding to that effect. 42 U.S.C. 7607(b)(1). The denial actions at issue here fall in the first category. In the alternative, if those actions are viewed as "locally or regionally applicable," they are "based on * * * determination[s] of nationwide scope or effect," and the agency made and published the requisite finding when it issued the denial actions. *Ibid.* The Fifth Circuit erred in concluding otherwise.

1. The denial actions are "nationally applicable." 42 U.S.C. 7607(b)(1). The statute's text makes clear that whether an agency action applies "nationally," or instead "locally or regionally," turns on the nature of the action rather than on the scope of a petitioner's challenge. *Ibid.*; see *RMS of Ga., LLC* v. *EPA*, 64 F.4th 1368, 1373 (11th Cir. 2023) ("The phrase 'nationally applicable' describes the 'regulations promulgated, or final action taken,' not the nature of the 'petition for review.'"). The term "nationally" means "on a national scale: throughout a nation." *Webster's Third New International Dictionary* 1505 (1976) (*Webster's*); see *The Oxford English Dictionary* 235 (2d ed. 1989) (similar).

Here, the April 2022 denial action covers "36 * * * petitions for exemptions from the RFS program for over 30 small refineries across the country and applies to small refineries located within 18 states in 7 of the 10 EPA regions and in 8 different federal judicial circuits." Pet. App. 329a. The June 2022 denial action has a similar geographic scope. See *id.* at 187a. EPA acted

responsibly and efficiently in combining the dozens of exemption petitions for decision in two agency actions. Each of the petitioning small refineries sought substantially the same relief, and both denial actions "apply one consistent statutory interpretation and economic analysis" to all of the covered refineries. *Id.* at 38a (Higginbotham, J., dissenting). On a plain-text understanding, the denial actions apply "throughout [the] nation." *Webster's* 1505; see Pet. App. 38a (Higginbotham, J., dissenting) (concluding that the denial actions "are, for all intents and purposes, 'applicable' across the 'nation'").

The statutory context confirms that understanding. Under Section 7607(b)(1), each EPA action is *either* "nationally applicable" *or* "locally or regionally applicable." 42 U.S.C. 7607(b)(1); see *Southern Ill. Power Coop.* v. *EPA*, 863 F.3d 666, 671-673 (7th Cir. 2017). And unless a "locally or regionally applicable" action is based on a determination of nationwide scope or effect, it may be challenged "only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. 7607(b)(1). The statute's use of the definite article—"*the* appropriate circuit," *ibid.* (emphasis added)—indicates that, for any given locally or regionally applicable EPA action, there is only one appropriate regional court of appeals in which to seek review. That in turn implies that an EPA action is "locally or regionally applicable" only if it is confined to a single judicial circuit, and that any action spanning more than one judicial circuit is "nationally applicable." *Ibid.*

The legislative history reflects the same understanding. The House Report explained that the statute "provides for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court

of appeals for the circuit in which such locality, State, or region is located." H.R. Rep. No. 294, 95th Cong., 1st Sess. 323 (1977); see *id.* at 324 (stating that "a determination of nationwide scope or effect" "includ[es] a determination which has scope or effect beyond a single judicial circuit"); see also Pet. App. 329a n.252.

Although the April and June 2022 denial actions each encompassed exemption requests from refineries in *eight* different federal judicial circuits, see Pet. App. 187a, 329a, the court of appeals determined that those EPA actions were properly subject to review in the Fifth Circuit. But the Fifth Circuit has no more connection to those actions than the other circuits where covered refineries are located. There is consequently no sense in which the Fifth Circuit is "*the* appropriate circuit" for review of those actions. 42 U.S.C. 7607(b)(1) (emphasis added).

The court of appeals concluded that the denial actions are not "'nationally applicable'" because they are limited to the petitioning refineries and do not "bind[ ] EPA in any future adjudication." Pet. App. 12a (emphasis omitted). But the petitioning refineries are scattered "throughout [the] nation," *Webster's* 1505, and the agency's statutory interpretation and economic analysis will apply to future exemption petitions as well. Regardless, the court did not explain why the presence (or absence) of prospective effect would be relevant in applying the statute, which focuses on whether a challenged action applies nationally.

One evident effect of the court of appeals' test is to distinguish for venue purposes between EPA's regulations and its adjudicatory actions. Because adjudications typically "lack 'legal effect' beyond the parties involved," they will rarely if ever "be 'nationally

applicable' as defined by the [Fifth Circuit] majority." Pet. App. 39a (Higginbotham, J., dissenting). But the statute refers broadly to "any other nationally applicable regulations promulgated, *or final action taken*." 42 U.S.C. 7607(b)(1) (emphasis added); see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (noting that the word "'action'" in Section 7607(b)(1) is "meant to cover comprehensively every manner in which an agency may exercise its power"); cf. *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980). Elsewhere in Section 7607(b)(1), Congress used terms like "regulation" and "order[]" when it intended a narrower meaning. 42 U.S.C. 7607(b)(1). Given the breadth of coverage of the phrase "any other nationally applicable * * * final action," *ibid.*, there is no sound basis for importing into the test for national applicability a requirement that adjudications cannot satisfy. Cf. *Nielsen* v. *Preap*, 586 U.S. 392, 414 (2019) (presuming that "every word and every provision" in a statute "is to be given effect") (citation omitted).

2. Even if the denial actions were "locally or regionally applicable," they would still be reviewable exclusively in the D.C. Circuit because they are "based on a determination of nationwide scope or effect" and EPA made and published a finding to that effect. 42 U.S.C. 7607(b)(1). There is no dispute that EPA published the requisite finding. See Pet. App. 12a-13a; see also *April Notice*, 87 Fed. Reg. at 24,301; *June Notice*, 87 Fed. Reg. at 34,874. That finding was correct.

The denial actions at issue here are based on two determinations of nationwide scope or effect. See *April Notice*, 87 Fed. Reg. at 24,301; *June Notice*, 87 Fed. Reg. at 34,874. First, the agency interpreted the statute to require that any qualifying hardship "must be

caused by compliance with the RFS program" rather than by some other circumstance. Pet. App. 242a (capitalization and emphasis omitted). Second, the agency determined, as a matter of economic reality, that the cost of compliance is the same for all refineries and is reflected in market prices. *Id.* at 249a. "The scope and effect of these core determinations are nationwide, as they are applicable to all small refineries no matter the location or market in which they operate." *Id.* at 41a-42a (Higginbotham, J., dissenting).

The consequences of granting or denying an exemption confirm the point. The RFS program is national, see 42 U.S.C. 7545(*o*)(2), and EPA establishes percentage standards each year that all obligated parties must use to satisfy their portion of the nationwide target volumes, see p. 2, *supra*. When EPA anticipates granting an exemption petition at the time it establishes the percentage standard, it accounts for that exemption by shifting the pro rata burden to other obligated parties. See Pet. App. 248a & n.139. If EPA later grants a petition it did not anticipate, the result is that the national target volumes will not be reached for that year. See *id.* at 246a & n.135. The determination whether to grant or deny a petition thus has a concrete "nationwide * * * effect" on the operation of the RFS program. 42 U.S.C. 7607(b)(1).

The Fifth Circuit erred in rejecting the agency's finding of nationwide scope or effect. The court stated that the agency's statutory interpretation and economic analysis—"without more"—"fail to provide the agency with a sufficient basis to adjudicate exemption petitions." Pet. App. 15a. Rather, in ruling on specific exemption requests, EPA necessarily must examine "refinery-specific" facts to ensure that those local

circumstances do not warrant a departure from its general economic analysis for any particular refinery. *Ibid.* In treating that aspect of EPA's methodology as decisive, the court effectively limited D.C. Circuit venue to review of EPA actions that are based *solely* on determinations of nationwide scope or effect.

Nothing in the statutory text supports that approach. Where Congress intended to require such a connection, it said so explicitly. See, *e.g.*, 42 U.S.C. 7607(b)(1) (providing an exception to the statute of limitations where the "petition is based *solely* on grounds arising after" that period expires) (emphasis added). "By introducing a limitation not found in the statute," the court of appeals "alter[ed], rather than * * * interpret[ed]," Section 7607(b)(1). *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 677 (2020).

The Fifth Circuit's interpretation also drains the "determination of nationwide scope or effect" prong of practical significance. 42 U.S.C. 7607(b)(1). The prong applies by its terms only to actions that are "locally or regionally applicable." *Ibid.* By their nature, such actions can be expected to rest at least in part on consideration of local or regional circumstances. Yet on the Fifth Circuit's view, EPA's consideration of such circumstances as one aspect of its analysis suffices to render the prong inapplicable. Few locally or regionally applicable EPA actions will be based *exclusively* on a nationwide determination, and it is implausible to think that Congress drafted the clause with such a limited scope in mind. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001).

To be sure, "there can be multiple determinations that influence an agency's actions," Pet. App. 42a

(Higginbotham, J., dissenting), and the statute does not specify exactly what degree of causal connection is needed for an agency action to be "based on" a nationwide determination, 42 U.S.C. 7607(b)(1). But whatever the precise standard, it is plainly satisfied here, where the agency's "*core* determinations * * * were of nationwide scope and effect," and the agency considered refinery-specific circumstances only in deciding whether to depart from its presumptive methodology. Pet. App. 42a (Higginbotham, J., dissenting); see, *e.g.*, *id.* at 305a-310a.

B. The Decision Below Warrants Review

The question presented implicates a square circuit conflict on an issue of national importance, and this case is a suitable vehicle for answering it. This Court's review is warranted.

1. The decision below directly conflicts with the Eleventh Circuit's decision in *Hunt Refining Co.* v. *EPA*, 90 F.4th 1107 (2024), which similarly involved a challenge brought by a small refinery to the April and June 2022 denial actions, *id.* at 1109. The Eleventh Circuit determined that the petition for review should have been filed in the D.C. Circuit, and it dismissed the petition without prejudice. *Id.* at 1113.

The Eleventh Circuit concluded that the denial actions are "nationally applicable" because they are "nationwide [in] scope" and are premised on "a new statutory interpretation and analytical framework that is applicable to all small refineries no matter their location or market." *Hunt*, 90 F.4th at 1110-1111. In the alternative, the court found that, "[e]ven if [the denial actions] were only locally or regionally applicable, they were based on a determination of nationwide scope or effect because they announced a new, universally

applicable approach to evaluating hardship petitions, and the EPA published a finding to that effect." *Id.* at 1112; see *id.* at 1113. Addressing the Fifth Circuit's decision in this case, the court explained that it found "Judge Higginbotham's dissent * * * more persuasive." *Id.* at 1112.

The decision below also conflicts with unpublished orders in which other circuits have transferred challenges to the denial actions to the D.C. Circuit or dismissed them for improper venue. The Third Circuit reasoned that the June 2022 denial action "is 'nationally applicable' because, on its face, it denies exemptions sought by 30 small refineries across the county and applies to small refineries located within 15 states in 7 of the 10 EPA regions." Order at 2, *American Refin. Grp. Inc.* v. *EPA*, No. 22-2435, Doc. 20 (Sept. 23, 2022) (citation omitted). In the alternative, the court concluded that "even if" that denial action were "only 'locally or regionally applicable,'" that action would be reviewable only in the D.C. Circuit because it is "'based on a determination of nationwide scope or effect'" and EPA published a finding to that effect. *Ibid.* (citations omitted). The Seventh, Ninth, and Tenth Circuits have all issued summary orders reaching the same outcome. See pp. 9-10 nn.3-4, *supra* (citing cases).

The decision below also is in significant tension with *Southern Illinois Power Cooperative*, *supra*, and *ATK Launch Systems, Inc.* v. *EPA*, 651 F.3d 1194 (10th Cir. 2011). At issue in each case was a final action issued by EPA designating as "nonattainment" various geographic areas that had failed to satisfy national air quality standards. And in each case, the petitioners brought as-applied challenges to the agency's designation. See

Southern Ill. Power Coop., 863 F.3d at 669; *ATK Launch Sys.*, 651 F.3d at 1196.

Both courts transferred the petitions to the D.C. Circuit on the ground that the challenged actions were "nationally applicable." 42 U.S.C. 7607(b)(1); see *Southern Ill. Power Coop.*, 863 F.3d at 668; *ATK Launch Sys.*, 651 F.3d at 1195. The Seventh Circuit reasoned that the challenged action was "of broad geographic scope containing air quality attainment designations covering 61 geographic areas across 24 states—from New York to Hawaii—and promulgated pursuant to a common, nationwide analytical method." *Southern Ill. Power Coop.*, 863 F.3d at 671. Similarly, the Tenth Circuit observed that the "nonattainment designation was assigned to thirty-one areas across the country, areas which include portions of states with no local or regional connection to one another, such as California, Pennsylvania, and Alabama," and that the agency had "applie[d] a uniform process and standard across the country." *ATK Launch Sys.*, 651 F.3d at 1197.

The reasoning and outcome of both *Southern Illinois Power Cooperative* and *ATK Launch Systems* are inconsistent with the decision below. Like the national air quality designations in those cases, the denial actions here apply across the country and are premised on a nationwide analytical framework. Under the Seventh and Tenth Circuit's reasoning, they are "nationally applicable." 42 U.S.C. 7607(b)(1).

2. Questions concerning the proper application of Section 7607(b)(1) arise frequently. In addition to the numerous decisions cited above, a separate circuit conflict has arisen in the context of state implementation plans under the CAA's good neighbor provision. In February 2023, EPA disapproved 21 state plans in a

single action. See *Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards*, 88 Fed. Reg. 9336 (Feb. 13, 2023). Numerous parties filed petitions for review of EPA's disapproval action in regional circuits, and EPA moved to transfer those petitions to the D.C. Circuit or to dismiss them for improper venue.

The circuits have thus far reached differing results as to whether transfer is appropriate. The Tenth Circuit concluded that the agency's action was "nationally applicable" and accordingly granted transfer. *Oklahoma ex rel. Drummond* v. *EPA*, 93 F.4th 1262, 1269 (2024). The court observed that the petitions before it challenged "a final rule disapproving [state plans] from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits"—and that "in promulgating that rule, the EPA applied a uniform statutory interpretation and common analytical methods." *Id.* at 1266. By contrast, a Fourth Circuit motions panel declined to transfer or dismiss a similar petition. *West Virginia* v. *EPA*, 90 F.4th 323, 332 (2024). In the panel's view, EPA's disapproval of West Virginia's plan—one of the many state plans addressed by the single agency action—"was based entirely on West Virginia's particular circumstances and [EPA's] analysis of those circumstances." *Id.* at 329. Motions panels of the Fifth, Sixth, and Eighth Circuits have likewise declined to transfer or dismiss petitions for review of the state plan disapproval action, albeit in unpublished or summary orders. See *Texas* v. *EPA*, No. 23-60069, 2023 WL 7204840, at *3-*6 (5th Cir. May 1, 2023); Order at 2-6, *Kentucky* v. *EPA*, No. 23-3216, Doc. 39 (6th Cir. July 25, 2023); Order, *Arkansas* v. *EPA*, No. 23-1320 (8th Cir. Apr. 25, 2023); Order, *Missouri* v. *EPA*, No. 23-1719 (8th Cir.

May 26, 2023); Order, *Allete, Inc.* v. *EPA*, No. 23-1776 (8th Cir. May 26, 2023).

Petitioners in the Tenth Circuit case involving the disapproval action have filed two petitions for writs of certiorari arising out of that decision. See *Oklahoma* v. *EPA*, No. 23-1067 (filed Mar. 28, 2024); *PacifiCorp* v. *EPA*, No. 23-1068 (filed Mar. 28, 2024).[5] The parallel circuit conflict in that context provides further evidence of widespread uncertainty regarding Section 7607(b)(1)'s proper application.

3. The question presented is important. Cf. *Harrison*, 446 U.S. at 586 ("We granted certiorari because of the importance of determining the locus of judicial review of the actions of EPA.") (citation omitted). In enacting Section 7607(b)(1), "Congress intended review in the D.C. Circuit of 'matters on which national uniformity is desirable.'" *Recommendations of the Administrative Conference of the United States*, 41 Fed. Reg. 56,767, 56,769 (Dec. 30, 1976) (statement of G. William Frick). When an EPA action applies nationally or is based on a determination of nationwide scope or effect, centralized review conserves judicial resources, avoids inconsistent rulings, and facilitates the orderly implementation of the CAA.

The Fifth Circuit's approach, by contrast, promotes "[o]verlapping, piecemeal, multicircuit review," an effect that "is potentially destabilizing to the coherent and consistent interpretation and application of the Clean Air Act." *Southern Ill. Power Coop.*, 863 F.3d at 674. This case highlights the problem. The Fifth Circuit invalidated the denial actions on multiple grounds that

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[5] In its forthcoming response brief, the government will recommend that the Court hold those petitions pending resolution of this case and then dispose of them as appropriate.

apply nationwide, including rejecting the agency's key statutory interpretation. See Pet. App. 25a (holding that "EPA's interpretation is foreclosed by the statute's text"). Meanwhile, the same statutory challenge to the denial actions is pending in the D.C. Circuit. See, *e.g.*, Pet. Br. at 44-49, *Sinclair Wyoming Ref. Co.* v. *EPA*, No. 22-1073, Doc. 2003725 (D.C. Cir. June 15, 2023). If the D.C. Circuit disagrees with the Fifth Circuit even in part, its order may subject EPA to conflicting guidance on remand. And even if the D.C. Circuit fully agrees with the Fifth Circuit's analysis, the result will be a needless duplication of judicial resources.

The prospect of differing outcomes also threatens serious practical harm to the RFS program. If the D.C. Circuit were to uphold the April and June 2022 denial actions as applied to the petitioning refineries in those cases, then refineries able to obtain review in the Fifth Circuit would enjoy a market advantage over competitors located in other circuits. That advantage could be extremely significant, as "the magnitude of the RIN cost per gallon in comparison to typical refinery margins could turn the least profitable refineries into the most profitable ones." Pet. App. 309a.

4. This case is a suitable vehicle for resolving the question presented. The court below squarely addressed both statutory bases for transfer to the D.C. Circuit, finding that the denial actions are neither nationally applicable nor based on a determination of nationwide scope or effect. See Pet. App. 15a. The fact that the court also addressed the merits poses no impediment to this Court's resolution of the venue question. If the Court grants review and finds that venue properly lay in the Fifth Circuit, the court of appeals' merits holdings will remain intact; if the Court finds

that exclusive venue lay in the D.C. Circuit, vacatur of the Fifth Circuit's judgment would be appropriate. See, *e.g.*, *SEC* v. *Johnson*, 650 F.3d 710, 716 (D.C. Cir. 2011) (citing cases).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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