No. 23-1067

In the Supreme Court of the United States

STATE OF OKLAHOMA, ET AL.,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS

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

REPLY BRIEF FOR PETITIONERS

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REPLY

I. Respondents agree that review is warranted, and this case is an optimal vehicle for review.

The federal government, the States, and regulated industry agree this Court's review is necessary. As Respondents put it, "the courts of appeals" need "guidance … regarding the proper application of Section 7607(b)(1)." Resp.9. This "[u]ncertainty" has "produced wasteful and time-consuming litigation on the venue issues themselves." Resp.20. The question presented has divided the circuits, recurs frequently, and arises in the context of legally and practically important cases. Resp.19-20; *see also* Pet.21-26. EPA itself seeks review of the same issues raised here in a just-filed petition for a writ of certiorari. *See EPA v. Calumet Shreveport Refining L.L.C.*, No. 23-1229 (filed May 20, 2024).

Rather than oppose certiorari, the federal government asks the Court to hold this petition pending a decision in *Calumet*, which it claims "is a better vehicle." Resp.20-22. That argument is not only wrong but threatens to excise the States as parties to a dispute over a statute that centers around the "'core principle' of cooperative federalism." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 511 n.14 (2014). In comparison to *Calumet*, this petition more squarely presents all relevant issues critical to both states and industry, presents the question in a more important and more frequently recurring context, and was filed first on an issue that requires urgent resolution. This Court should grant the petition in this case now and, in the normal course, decide whether it should also grant *Calumet*.

A. This petition is an ideal vehicle to resolve the question presented for numerous reasons.

First, this petition and that in *PacificCorp, et al. v. EPA*, No. 23-1068 (filed March 28, 2024), involve all three types of entities that are primary participants in Clean Air Act programs: the federal government, States, and regulated industry. Because *Calumet* involves only challenges brought by small refineries, holding this petition pending *Calumet* would cut the States out of litigation over critical, recurring venue questions impacting their rights. Doing so would be particularly ironic in the context of a statute that "envisions extensive cooperation between federal and state authorities, generally permitting each State to take the first cut" at implementing regulatory programs under the Act. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (citation omitted).

Moreover, the States have textual arguments not present in *Calumet*: Section 7607(b)(1) expressly provides that venue for challenges to EPA's "approv[al,] … denial or disapproval" of state plans lies in the regional circuits. If this Court reviews only *Calumet*, it would sideline State arguments addressing the important question of proper venue for review of EPA's actions on state implementation plans. Given how integral state implementation plans are to the Clean Air Act, and to State sovereign prerogatives under the Act, this Court should ensure that does not occur.

Second, the state implementation plan issues involved in this petition allow the Court to answer the question presented in a context that is more central to the Act and will recur more frequently than the renewable fuel standard issues presented in *Calumet*. At the core of the Clean Air

Act is a system of cooperative federalism in which States prepare and EPA approves or disapproves state plans implementing numerous provisions of the Act. *See* 42 U.S.C. §§ 7410, 7411(d)(1), 7429(b)(2), 7502(c), 7504(a). These cases involve implementation of National Ambient Air Quality Standards under Section 110, one of the Act's "three main regulatory programs" for stationary source emissions. *W. Virginia v. EPA*, 597 U.S. 697, 707 (2022). Litigation over EPA's approval or disapproval of these state plans is constant. Pet.24-25. The proper interpretation of § 7607(b)(1) directly implicates whether EPA may force States to challenge disapproval of their individual, state-specific plans in a consolidated challenge, implicating core state sovereign interests. Pet.27; Senators' Br.3-5 (explaining § 7607(b)(1) tracks the Act's system of cooperative federalism).

The *Calumet* petition, by contrast, focuses on the renewable fuel standard program. *See* 42 U.S.C. § 7545(o)(2). That EPA-run program requires transportation fuel to include specified amounts of renewable fuel. *Calumet* involves EPA's decision to deny small refineries a waiver from certain requirements under that program. *Id.* § 7545(o)(9)(A)(ii) (allowing EPA to exempt small refineries from the program if they would suffer "disproportionate economic hardship"). EPA denied all pending waiver requests after "conclud[ing] that small refineries do not face [disproportionate economic hardship] … no matter the location or market in which they operate." 87 Fed. Reg. 34,873, 34,874 (June 8, 2022). If that is correct, future waivers are likely to be rare. The *Calumet* petition therefore raises less-likely-to-recur venue questions in a scenario that impacts few.

Third, certiorari in this case is urgently needed, and because this petition was filed first, it can be resolved first. It can be considered before this Court's summer recess. The *Calumet* petition was filed in late May, so even assuming no extensions are granted, the brief in opposition in *Calumet* will not be due until late June. The earliest this Court would consider *Calumet* in the normal course is the September 30, 2024, conference.

The unnecessary months-long delay that would come from holding this petition pending *Calumet* should be avoided. Respondents all-but-ignore petitioners' arguments why resolution of the question presented is needed quickly, given the ongoing litigation in multiple circuits. Pet. 19-23. Without a grant of certiorari now, the D.C. Circuit may choose to move forward with adjudicating the merits of EPA's disapproval of Oklahoma's and Utah's plans before this Court clarifies the proper venue. *Cf.* Resp.9 (noting D.C. Circuit's order in this case, in which the case is being held in abeyance but requiring motions to govern after the earlier of July 5, 2024, or disposition of this petition). This Court's immediate review would help avoid that potentially wasted effort.

B. Respondents' vehicle arguments for holding these petitions pending *Calumet* go nowhere. To start, this Court should not wait for the courts of appeals to reach final decisions on the merits before granting certiorari. *See* Resp.18-19. Venue is a "separate and independent matter" from "the factual and legal issues comprising the [merits]." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963). The fact that the courts of appeals have yet to address the merits of the State petitions does not undermine their square rulings on venue. *Contra* Resp.20.

To the contrary, the existence of these threshold questions is *why* review is appropriate now, before the parties and courts spend time and resources litigating the merits in the wrong venue.

Although there is a theoretical possibility that one of the courts could "reconsider[]," Resp.19, such speculation cannot overcome the fact that the circuit split is entrenched. The Tenth Circuit below rejected venue and transferred the petitions to the D.C. Circuit—there is no possibility the Tenth Circuit will reverse itself and the D.C. Circuit is unlikely to revisit venue and send the cases back. *See* Pet.22. The Fourth Circuit issued a published opinion and has denied as premature Respondents' motion for en banc rehearing of its venue decision. *West Virginia v. EPA*, No. 23-1418, Doc. 65 (April 16, 2024). And the Fifth Circuit's published decision in *Calumet* simply confirms that that court will not reverse its consistent interpretation of § 7607(b)(1) in the state implementation plan cases. *Texas v. EPA*, No. 23-60069, 2023 WL 7204840 (5th Cir. May 1, 2023). Respondents concede this existing "circuit conflict," Resp.19, is sufficiently established and important to warrant review, Resp.17. This disagreement over how to interpret § 7607(b)(1) in the state implementation plan cases will not resolve itself.

Nor would delaying review further clarify the issues before the Court. Five circuits have squarely ruled on the question presented. Pet.9-14. Four issued detailed written opinions, two included dissenting opinions. Pet.10-12. Those decisions fully "explain and formulate the underlying principles this Court … must consider." *Obergefell v. Hodges*, 576 U.S. 644, 663 (2015). Thus, the venue issues in the underlying cases require no further percolation,

and the disagreement among the courts in these cases is at least as well developed, if not more so, as the three opinions at issue in the renewable fuel standard cases. Further, there is no barrier to this Court considering the reasoning of the opinions underlying the *Calumet* petition when deciding the venue question in the context of the state implementation plan cases. The question presented is ripe for this Court's resolution in its "usual role as 'a court of review.'" *Contra* Resp.21 (citation omitted).

Finally, the fact that the Tenth Circuit did not address whether EPA's disapprovals were "based on a determination of nationwide scope or effect" creates no barrier to comprehensive interpretation of § 7607(b)(1). Respondents agree that EPA's reliance on that savings clause from § 7607(b)(1) would be "properly before" this Court. Resp.21. The Fourth, Fifth, and Sixth Circuits have squarely ruled on that clause's applicability, with two dissenting judges advancing counterarguments. Pet.23. This aspect of the issue, fairly encompassed within the question presented, is ready for resolution.

The best course is therefore to grant review in this case now and decide later whether to also grant *Calumet* in the normal course.

II. Respondents' defense of the Tenth Circuit's flawed decision fails.

Respondents incorrectly interpret § 7607(b)(1) to give EPA boundless discretion to manipulate venue.

A. Under Respondents' view, EPA may make local or regional actions "national" simply by packaging them into a single *Federal Register* notice. Pet.30. Respondents contend that "an action is nationally applicable" if it covers "more than one federal judicial circuit," and that the

"action" is identified by looking only to "the face" of the relevant *Federal Register* notice. Resp.10-11, 14-15.

That glosses over the crucial question: what is the relevant "action" under review? Pet.17. The Act makes clear that the "relevant unit of administrative action here is the EPA's individual [state plan] denials." *Texas*, 2023 WL 7204840, at *4. That is because "[e]ach State shall" submit a plan implementing air standards "within such State." 42 U.S.C. § 7410(a)(1). And EPA then approves or disapproves each State's plan, *id.* § 7410(k)(1)-(3), based on "the contents of each individual state's submission," 88 Fed. Reg. 9,336, 9,354 (Feb. 13, 2023); *see also* Pet.34. The relevant action therefore is each state plan disapproval.

The question thus becomes whether EPA's action purporting to exercise its statutory authority to review *individual* state plans is "nationally applicable" action. Section 7607(b)(1) confirms it is not. Congress included "approving or promulgating any implementation plan under section 7410" *and* "any denial or disapproval by [EPA] under subchapter I" in its list of actions reviewable in the regional circuits. 42 U.S.C. § 7607(b)(1); *see* Pet.30-32; Arkansas Br.7-9. Approval or disapproval of state plans is therefore the "prototypical 'local or regionally applicable' action." *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013). This is not a "petition-focused approach," *contra* Resp.15 (citation omitted)—it turns on the type of action at issue.

Respondents have no real response. They admit that *approvals* of state plans are "locally or regionally applicable" actions, at least when EPA chooses to approve "only … a single State['s]" plan. Resp.16; *see also* Pet.31. They

simply contend that *disapprovals* are different, Resp.15-16, without explaining why.

EPA suggests that when it relies on "uniform statutory interpretation and common analytical methods," locally applicable actions become national. Resp.11. But that cannot be right. *Every* EPA action "purportedly applies a national standard created by the national statute and its national regulations." *W. Virginia v. EPA*, 90 F.4th 323, 330 (4th Cir. 2024); *see also Chevron U.S.A. Inc. v. EPA*, 45 F.4th, 380t 387 (D.C. Cir. 2022) (explaining that *all* "locally or regionally applicable actions may require interpretation of the Clean Air Act's statutory terms"); Pet.33. Respondents thus admit, as they must, that "EPA's use of a national standard" is not sufficient to render an action nationally applicable. Resp.16-17 (explaining the action must still apply "in multiple judicial circuits").

Respondents' argument thus reduces the venue analysis to whether EPA's action "applies within more than one federal judicial circuit," Resp.11, looking solely at "the face of the" *Federal Register* notice, Resp.14. Under that theory, the form of publication completely controls venue. But EPA never offers a reason why its decision to publish actions on multiple state plans in the same notice changes the nature of the underlying actions. Pet.15-18, 32-33. And § 7607(b)(1) itself specifically distinguishes between the "action" being challenged and EPA's "*notice* of such … action … in the Federal Register." (emphasis added). Respondents' form-over-substance reading of § 7607(b)(1) is thus textually unsupportable.

Moreover, Respondents' reading gives EPA total power to manipulate venue through how it publishes

otherwise state-specific actions. *See* Resp.16 (implying that if EPA had approved plans for more than "a single state" in a single notice, those approvals could be challenged only in the D.C. Circuit); *but see* Pet.32 & n.6. EPA could, for example, publish a single disapproval when a State falls in what EPA perceives to be a favorable forum, but group others States in the same notice whenever the agency prefers the D.C. Circuit. *See* Senator's Br.7-9. This would only "encourage gamesmanship." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). Section 7607(b)(1) does not grant EPA the power to ensure "the choice of 'a tribunal favorable' to it." *Travis v. United States*, 364 U.S. 631, 634 (1961) (citation omitted).

B. EPA's reliance on § 7607(b)(1)'s savings clause fails for similar reasons. Resp.12-14.

1. Section 7607(b)(1) provides that venue for "locally or regionally applicable" actions, can lie in the D.C. Circuit *if* (1) "such action is based on a determination of nationwide scope or effect" *and* (2) "in taking such action the Administrator finds and publishes that such action is based on such a determination." In disapproving Petitioners' state plans, EPA asserted that it was "exercising the complete discretion afforded to" it to find that the action was "based on a determination of 'nationwide scope or effect.'" 88 Fed. Reg. at 9,380. But courts must "make an independent assessment" of whether the "action" in question was truly based on a determination of nationwide scope or effect. *Texas v. EPA*, 829 F.3d 405, 421 (5th Cir. 2016).

"Because the statute speaks of the determinations the action 'is based on,' the relevant determinations are those that lie at the core of the agency action," not

determinations that are "peripheral or extraneous." *Id.* at 419. EPA must "identify" those "core determinations in the action." *Id.* EPA's final disapproval of Petitioners' state plans asserted that EPA applied "a common core of nationwide policy judgments and technical analysis," including a "nationally consistent 4-step interstate transport framework for assessing obligations" and "the results from nationwide photochemical grid modeling." 88 Fed. Reg. at 9,380.

But those aspects of EPA's analysis are not "the reason the agency [took] the action" that it did. *Texas*, 829 F.3d at 419. EPA used its same "4-step framework" and relied on national air quality modeling when it *approved* state plans in separate notices. Pet.33. EPA's decision whether to approve or disapprove a state plan thus turned upon the content of each plan.

Consider the record here. Pet.34. EPA disapproved Oklahoma's plan "[b]ecause" it concluded Oklahoma failed to correctly "analyze emissions from the sources and other emissions activity from within the State to determine whether its contributions [to downwind States] were significant." 87 Fed. Reg. 9,798, 9,823-24 (Feb. 22, 2022). And EPA reached that conclusion by evaluating "the contents of each individual state's submission … on [its] own merits." *Id.* at 9,354. It likewise rejected Oklahoma's reliance on alternative air quality modeling and Oklahoma's approach to calculating whether a downwind "receptor" was likely to struggle to "maintain[]" attainment with the NAAQS. *Id.*

Meanwhile, Utah argued that "certain receptors in Colorado should not be counted as receptors," but EPA rejected that argument as "insufficient." 88 Fed. Reg. 9,336, 9,360.

It also asserted that Utah "included an insufficient evaluation of additional emissions control opportunities" and found "technical and legal flaws in the State's arguments related to relative contribution, international and non-anthropogenic emissions, and the relationship of upwind versus downwind-state responsibilities." *Id.*

EPA therefore disapproved Petitioners' plans based on state-specific findings and conclusions. Because those core determinations were not "nationwide in scope or effect," EPA's reliance on § 7607(b)(1)'s savings clause fails.

2. Respondents nevertheless contend that EPA's state plan disapprovals had "nationwide scope and effect" because "EPA made multiple legal and technical determinations regarding issues that cut across the various states" and because the Good Neighbor provision regulates cross-border air quality. Resp.12-14.

These are, at best, "peripheral or extraneous" determinations. *Texas*, 829 F.3d at 419. EPA points to commonalities between its individual analyses of state plans. Resp.13. But EPA's application of consistent legal standards and interpretations does not change the fundamentally state-specific analysis it conducted. *See* Pet.33. If that were enough, § 7607(b)(1)'s requirement that EPA's determinations *in fact* be "based on a determination of nationwide scope or effect" would be superfluous. *Supra* 9.

The cross-border nature of air pollution does not make EPA's determinations "nationwide" in effect, either. *Contra* Resp.13-14. The "effect" of EPA's determinations was the disapproval of specific state plans, which will change how specific sources within Oklahoma and Utah are regulated. Those are plainly local effects. And although those regulatory changes may have some impact downwind, that kind of second- or third-order effect cannot be

enough to make an otherwise state-specific determination "nationwide." While "the effects" of any given EPA action "may be felt in other regions, that would be true of any major action by the EPA under the Clean Air Act, since air currents do not respect state boundaries." *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998). Section 7607(b)(1)'s savings clause should not be interpreted in a way that would swallow the rest of the provision.

CONCLUSION

The Court should grant this petition now, rather than hold the petition pending a decision in *Calumet Shreveport Refining, L.L.C.*, No. 23-1229 (filed May 20, 2024).

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