Nos. 23-1067 and 23-1068

In the Supreme Court of the United States

STATE OF OKLAHOMA, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

PACIFICORP, ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

The United States Environmental Protection Agency (EPA) took final action under the Clean Air Act, 42 U.S.C. 7401 *et seq*., to disapprove 21 States' plans for implementing national ozone standards. EPA determined that those state plans would not adequately "prohibit[] * * * emissions activity within the State" from "contribut[ing] significantly to nonattainment in, or interfer[ing] with maintenance by, any other State" of national ambient air-quality standards. 42 U.S.C. 7410(a)(2)(D)(i)(I). The question presented is as follows:

Whether EPA's disapproval action is subject to review only in the D.C. Circuit under 42 U.S.C. 7607(b)(1), which channels to that court petitions to review EPA final actions that are "nationally applicable" or are "based on a determination of nationwide scope or effect."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Miscellaneous:

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OPINION BELOW

The opinion of the court of appeals (No. 23-1067 Pet. App. 1a-19a, No. 23-1068 Pet. App. 1a-17a), is reported at 93 F.4th 1262.

JURISDICTION

The order of the court of appeals was entered on February 27, 2024. The petitions for writs of certiorari were

filed on March 28, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. a. To reduce air pollution and protect public health and the environment, the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, requires the Environmental Protection Agency (EPA) to set and periodically revise national ambient air quality standards (NAAQS) for particular pollutants, including ozone. See 42 U.S.C. 7408, 7409. The CAA authorizes the States, in the first instance, to develop state implementation plans to achieve and maintain those NAAQS, and to submit those plans to EPA within three years after the promulgation of a new or revised NAAQS. 42 U.S.C. 7410(a).

The CAA's requirements for state plans recognize that "[a]ir pollution is transient, heedless of state boundaries," and may be "transported by air currents" from upwind to downwind States. *EPA* v. *EME Homer City Generation, L. P.*, 572 U.S. 489, 496 (2014). When air pollution travels beyond the originating State's boundaries, that State is "relieved of the associated costs," which are "borne instead by the downwind States, whose ability to achieve and maintain satisfactory air quality is hampered by the steady stream of infiltrating pollution." *Ibid.* The problem is particularly acute for ozone, which travels long distances. See *West Virginia* v. *EPA*, 362 F.3d 861, 865 (D.C. Cir. 2004). To account for the "complex challenge" of cross-border pollution, *EME Homer*, 572 U.S. at 496, the CAA requires state plans to include provisions that prohibit in-state emissions that will "contribute significantly to nonattainment" or "interfere with maintenance" of healthy air quality in any other State. 42 U.S.C. 7410(a)(2)(D)(i). This statutory requirement, known as the Good Neighbor provision, is Congress's chosen

method of balancing the interests of upwind and downwind States. *EME Homer*, 572 U.S. at 498-499.

When States submit their plans for NAAQS compliance to EPA, the agency must assess the state plans to determine whether they meet the CAA's requirements. If they do not, EPA must disapprove those plans and promulgate federal plans to implement the requirements. 42 U.S.C. 7410(c)(1), (k)(2) and (3). In evaluating whether the state plans comply with the Good Neighbor provision, EPA evaluates the submissions "with an eye to ensuring national consistency and avoiding * * * inequitable results." 88 Fed. Reg. 9336, 9381 (Feb. 13, 2023).

The CAA also addresses judicial review of challenges to EPA actions, and it includes a venue provision that classifies the agency's actions into three categories. See 42 U.S.C. 7607(b)(1). The first category includes various enumerated types of EPA action "or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter." *Ibid.* Venue for challenges to those "nationally applicable" EPA actions lies exclusively in the D.C. Circuit. *Ibid.* The second category includes any EPA "action in approving or promulgating any implementation plan under section 7410," several other enumerated categories of EPA action, "or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under [Title I of the CAA]) which is locally or regionally applicable." *Ibid.* Venue for those "locally or regionally applicable" actions generally lies only "in the United States Court of Appeals for the appropriate circuit." *Ibid.* The third category, however, establishes a separate rule for a subset of actions that are "locally or regionally applicable." *Ibid.* Exclusive venue for challenges to a "locally or regionally applicable" action will lie

in the D.C. Circuit "if such action 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.*

b. In 2015, EPA revised the NAAQS for ozone to set a more stringent standard, triggering the requirements for States to develop implementation plans. 80 Fed. Reg. 65,292 (Oct. 26, 2015). EPA reviewed the state plan submissions it received using a four-step framework it had developed for assessing Good Neighbor obligations for ozone. See, *e.g.*, 76 Fed. Reg. 48,208, 48,248-48,249 (Aug. 8, 2011); see *EME Homer*, 572 U.S. at 524 (rejecting challenges to this framework). After reviewing the submissions, EPA issued a final rule in which it concluded that 21 States' submissions—each of which proposed no additional emissions reductions to meet the more stringent ozone standard—must be disapproved because they did not comply with the Good Neighbor provision. 88 Fed. Reg. at 9338. EPA found that the 21 States had failed, on both legal and technical grounds, to justify their conclusions that their emissions do not significantly contribute to nonattainment, or interfere with the maintenance, of the relevant NAAQS in downwind States. *Id.* at 9354-9361. Petitioners Oklahoma and Utah were among those 21 States. *Id.* at 9359-9360.

Many of the 21 States offered substantially similar reasons for asserting that they were not required to implement any additional emissions reductions. For example, many States (including Oklahoma and Utah) asserted that their own contributions to air-quality problems in downwind States were not significant because other countries and States also contributed pollution to the same downwind States. 88 Fed. Reg. at 9355-9360, 9,378 & n.331. Many States (including Oklahoma and Utah) asserted

that existing controls would be sufficient to address their Good Neighbor obligations. *Id.* at 9354-9360. And many States (including Oklahoma and Utah) adopted a threshold higher than EPA's standard threshold for identifying potentially significant contributions to downwind-State pollution levels. *Id.* at 9372-9373 & n.311.

In disapproving the States' submissions, EPA made uniform determinations to address the arguments the various States had asserted in support of their plans. With respect to the States' relative contributions, EPA explained that "[w]hether emissions from other states or other countries also contribute to the same downwind air quality issue is typically not relevant in assessing whether a downwind state has an air quality problem, or whether an upwind state is significantly contributing to that problem," because each State is "obligated to eliminate [its] own 'significant contribution'" to downwind States or its "'interference' with the ability of other states to attain or maintain the NAAQS." 88 Fed. Reg. at 9378. In addressing the adequacy of existing controls, EPA explained that "the emissions-reducing effects of all existing emissions control requirements are already reflected in the future year projected air quality results" of its nationwide modeling, which showed continued contributions despite those controls. *Id.* at 9343, see *id.* at 9367. And in discussing the initial threshold for screening the contributions of a particular State, EPA explained that the threshold it had adopted "ensures both national consistency across all states and consistency and continuity with [its] prior interstate transport actions for other NAAQS." *Id.* at 9371; see *id.* at 9371-9374.

After explaining its reasons for disapproving each of the States' submissions based on its four-step framework and national modeling, EPA addressed judicial review of

its action. EPA explained that its rulemaking was "'nationally applicable'" under Section 7607(b)(1) because it disapproved submissions "for 21 states located across a wide geographic area" and did so by "applying a uniform legal interpretation and common, nationwide analytical methods with respect to the [CAA's] requirements * * * concerning interstate transport of pollution." 88 Fed. Reg. at 9380.

"In the alternative," EPA also explained that, "to the extent a court finds [the disapproval] action to be locally or regionally applicable, the Administrator is exercising the complete discretion afforded to him under the CAA to make and publish a finding that th[e] action is based on a determination of 'nationwide scope or effect.'" 88 Fed. Reg. at 9380. EPA explained in particular that, in disapproving the 21 state plans, the agency was implementing "a common core of nationwide policy judgments and technical analysis concerning the interstate transport of pollutants throughout the continental U.S.," and that the agency had applied "the same, nationally consistent 4-step interstate transport framework for assessing obligations for the 2015 ozone NAAQS that it ha[d] applied in other nationally applicable rulemakings" to implement the Good Neighbor provision. *Ibid.* EPA further explained that it had evaluated the plans "with an eye to ensuring national consistency and avoiding inconsistent or inequitable results among upwind states * * * and between upwind and downwind states." *Id.* at 9381. EPA also observed that "consolidated review of this action in the D.C. Circuit will avoid piecemeal litigation in the regional circuits, further judicial economy, and eliminate the risk of inconsistent results for different states." *Ibid.*

2. Various States and industry groups challenged EPA's disapproval action with respect to 12 state plans.

Those challenges were filed in the D.C. Circuit and in seven regional circuits.[1] Petitioners Oklahoma and Utah (State petitioners), as well as eight industry participants (Industry petitioners) within those States, filed petitions for review in both the Tenth and D.C. Circuits.[2] In the Tenth Circuit, EPA promptly moved to transfer venue to the D.C. Circuit or to dismiss for improper venue. Pet. App. 8a.[3] A motions panel stayed the disapproval action as to the state plans submitted by Oklahoma and Utah, and it referred the motion to dismiss or transfer venue to the merits panel. *Id.* at 10a-11a.

A unanimous Tenth Circuit merits panel granted EPA's motion and transferred the petitions to the D.C. Circuit. Pet. App. 1a-19a. The court explained that, under the "plain text" of Section 7607(b)(1), "whether a petition

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[1] See, *e.g.*, *West Virginia* v. *EPA*, No. 23-1418 (4th Cir.) (filed Apr. 14, 2023); *Texas* v. *EPA*, No. 23-60069 (5th Cir.) (filed Feb. 14, 2023); *Kentucky* v. *EPA*, No. 23-3216 (6th Cir.) (filed Mar. 13, 2023); *Arkansas* v. *EPA*, No. 23-1320 (8th Cir.) (filed Feb. 16, 2023); *Missouri* v. *EPA*, No. 23-1719 (8th Cir.) (filed Apr. 13, 2023); *ALLETE, Inc.* v. *EPA*, No. 23-1776 (8th Cir.) (filed Apr. 14, 2023); *Nevada Cement Co.* v. *EPA*, No. 23-682 (9th Cir.) (filed Apr. 14, 2023); *Utah* v. *EPA*, No. 23-9509 (10th Cir.) (filed Feb. 13, 2023); *Oklahoma* v. *EPA*, No. 23-9514 (10th Cir.) (filed Mar. 2, 2023); *Alabama* v. *EPA*, No. 23-11173 (11th Cir.) (filed Apr. 13, 2023); *Nevada* v. *EPA*, No. 23-1113 (D.C. Cir.) (filed Apr. 14, 20233).

[2] See *Utah* v. *EPA*, No. 23-1102 (D.C. Cir.) (filed Apr. 13, 2023); *Oklahoma* v. *EPA*, No. 23-1103 (D.C. Cir.) (filed Apr. 13, 2023); *Oklahoma Gas & Elec. Co.* v. *EPA*, No. 23-1105 (D.C. Cir.) (filed Apr. 14, 2023); *Tulsa Cement LLC* v. *EPA*, No. 23-1106 (D.C. Cir.) (filed Apr. 14, 2023); *Western Farmers Elec. Coop.* v. *EPA*, No. 23-1107 (D.C. Cir.) (filed Apr. 14, 2023); *PacifiCorp* v. *EPA*, No. 23-1112 (D.C. Cir.) (filed Apr. 14, 2023).

[3] Because both sets of petitioners seek review of the same decision, we hereinafter cite only to the appendix to the State petitioners' petition.

for review belongs in the D.C. Circuit turns exclusively on the nature of the challenged agency action," not on "the scope of the petitioner's challenge." *Id.* at 12a.

The court of appeals concluded that, "[o]n its face," the disapproval action is nationally applicable. Pet. App. 12a. The court emphasized that the action disapproves state plans "from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits—because those states all failed to comply with the good-neighbor provision." *Ibid.* The court further explained that, in the disapproval action, EPA had "applied a uniform statutory interpretation and common analytical methods" to examine the "overlapping and interwoven linkages between upwind and downwind states in a consistent manner." *Id.* at 12a-13a.

Petitioners argued that EPA's disapproval action should be treated for venue purposes as multiple individual actions, each applying to a single State. The court of appeals rejected that contention, noting that the text of Section 7607(b)(1) "directs courts to consider only the face of the 'final action.'" Pet. App. 13a. The court therefore viewed it as irrelevant that EPA "could have chosen to issue standalone" disapprovals for each of the 21 States. *Ibid.*

The court of appeals recognized that motions panels of the Fourth, Fifth, and Sixth Circuits had recently denied EPA's motions to transfer petitions challenging the disapproval action. Pet. App. 17a. But the court concluded that those courts had "strayed from § 7607(b)(1)'s text and instead applied a petition-focused approach" that considered the scope of the petitioners' challenge rather than the face of the agency action itself. *Ibid.* The court also noted that the contrary decisions of those other circuits

had "generated strong dissents highlighting critical flaws in the majority opinions." *Id.* at 18a.

Because the court of appeals concluded that the disapproval action is nationally applicable, the court declined to address EPA's alternative argument that the rule "is based on a determination of nationwide scope or effect." Pet. App. 19a n.8 (quoting 42 U.S.C. 7607(b)(1)).

The court of appeals transferred the petitions to the D.C. Circuit. That court subsequently ordered that the cases be held in abeyance pending this Court's disposition of the petitions for writs of certiorari, or until July 5, 2024, whichever comes first. Order, No. 23-1103 (Apr. 24, 2024). The stay of the disapproval action as to Oklahoma and Utah remains in place pending judicial review.

ARGUMENT

The court of appeals correctly held that EPA's disapproval action is nationally applicable. And while motions panels in other circuits have reached the opposite conclusion, no circuit has issued a final decision adopting petitioners' view. The government agrees with petitioners that this Court should provide guidance to the courts of appeals regarding the proper application of Section 7607(b)(1). The government's petition for a writ of certiorari in *EPA* v. *Calumet Shreveport Refining, L.L.C.*, No. 23-___ (filed May 20, 2024), however, is a better vehicle for the Court's provision of such guidance.

As the government's certiorari petition in *Calumet Shreveport* explains, the Fifth and Eleventh Circuits have reached conflicting final judgments regarding the proper venue for challenges to two EPA actions that implement CAA requirements concerning the blending of renewable fuels. Those courts have assessed both whether the challenged EPA actions are "nationally ap-

plicable" and whether they are "based on a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1). Granting review in *Calumet Shreveport* would permit the Court to fully consider the proper interpretation of all three categories of EPA action identified in Section 7607(b)(1). The Court therefore should grant certiorari in *Calumet Shreveport*, *supra*, and hold these petitions pending the Court's decision in that case.

1. The court of appeals correctly held that the D.C. Circuit is the exclusive venue for petitions for review of EPA's disapproval action. The disapproval action is nationally applicable on its face because it applies a uniform process and standard to 21 States across the country. And even if the action could be characterized as locally or regionally applicable, it is based on multiple determinations of nationwide scope or effect. EPA based its rejections of the state plans on numerous legal and technical determinations that applied across the various States, and those determinations had effects well beyond any particular State or judicial circuit. Under either prong of Section 7607(b)(1), the D.C. Circuit is the proper venue for petitioners' challenges.

a. Section 7607(b)(1)'s first prong designates the D.C. Circuit as the exclusive venue for petitions for review of any "nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. 7607(b)(1). The statute differentiates between "nationally applicable" agency actions, which are reviewable only in the D.C. Circuit, and "locally or regionally applicable" actions, which generally should be reviewed in the "United States Court of Appeals for *the* appropriate circuit." *Ibid.* (emphasis added). In drawing that distinction and referring to a singular appropriate circuit, the statutory text indicates that an action

is nationally applicable when it applies within more than one federal judicial circuit. See H.R. Rep. No. 294, 95th Cong., 1st Sess. 324 (1977) (noting that a "determination of nationwide scope or effect" is one that "has scope or effect beyond a single judicial circuit"). And in focusing on the "final action taken," Section 7607(b)(1) requires courts to assess the "face of the [agency] action" being challenged, rather than "the scope of the petitioner's challenge." Pet. App. 12a. 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.'"); *Southern Ill. Power Coop.* v. *EPA*, 863 F.3d 666, 671 (7th Cir. 2017) (Section 7607(b)(1) "assigns judicial review to the D.C. Circuit or the regional circuits based on the nature of the *agency action* in question, *not* the nature or scope of the petition for review."); *ATK Launch Sys., Inc.* v. *EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) ("Th[e] court must analyze whether the regulation itself is nationally applicable, not whether the effects complained of or the petitioner's challenge to that regulation is nationally applicable.").

The action at issue here is EPA's disapproval action, which applies to 21 States spanning "eight EPA regions and ten federal judicial circuits," and which invokes "a uniform statutory interpretation and common analytical methods" to "examine the overlapping and interwoven linkages between upwind and downwind states in a consistent manner." Pet. App. 12a-13a. The court of appeals correctly held that those attributes make the disapproval action nationally applicable. Considering the action "[o]n its face," the court recognized that it applies to States far beyond a single judicial circuit's boundaries; it reflects EPA analyses common across

those States; and it addresses the effects of transient air pollution that travels between States. *Id.* at 12a; see *id.* at 12a-13a. The court also correctly rejected petitioners' attempt to separate the disapproval action into 21 individual "locally or regionally applicable agency actions." *Id.* at 13a. The court emphasized that, because Section 7607(b)(1)'s text focuses "only [on] the face of the 'final action,'" it was irrelevant that EPA had issued proposed rules for smaller numbers of States, and that petitioners had challenged EPA's analysis only as it applies to particular state plans. *Ibid.*; see *id.* at 13a-14a.

b. Although the court of appeals did not reach the issue, exclusive venue for petitioners' current challenges would lie in the D.C. Circuit even if the disapproval action were viewed as "locally or regionally applicable" under Section 7607(b)(1). The disapproval action is "based on a determination of nationwide scope or effect," and EPA published a finding to that effect in the Federal Register notice that announced that action. 42 U.S.C. 7607(b)(1); see 88 Fed. Reg. at 9380-9381; EPA, *2015 Ozone NAAQS Interstate Transport SIP Disapprovals—Response to Comments (RTC) Document* 391-393 (Jan. 31, 2023) (*Response to Comments*).[4]

As for the *scope* of the determinations, the disapproval action evaluated the States' submissions using a nationally consistent four-step framework, within which EPA made multiple legal and technical determinations regarding issues that cut across the various States. 88 Fed. Reg. at 9338, 9361-9379; *Response to Comments* 392. See *Webster's New World Dictionary of the American Language* (2d College ed. 1974) (defining "scope" as "range or extent of action, inquiry, * * * [or] an ac-

[4] https://www.regulations.gov/document/EPA-HQ-OAR-2021-0663-0083.

tivity"). Those determinations were central to the agency's rationale for disapproving the state-plan submissions.

For example, EPA rejected 13 States' arguments that contributions from other emissions sources excused their own contributions to air-quality problems in downwind States. 88 Fed. Reg. at 9359-9360, 9378-9379. EPA based its rejection on the determination that the Good Neighbor provision itself "establishe[s] a contribution standard, not a but-for causation standard." *Id.* at 9379. EPA also rejected assertions from 17 States that relying on existing or future emissions controls would be sufficient to implement the more stringent ozone NAAQS. The agency explained that its modeling had already accounted for existing controls, and that additional controls were needed for state plans to meet the statutory requirements. *Id.* at 9343, 9376-9377. And EPA rejected 13 States' use of a higher threshold to assess States' contributions to downwind States' pollution levels, opting instead to "[c]ontinu[e] to use 1 percent of the NAAQS as the screening metric" for all States, allowing the agency "to apply a consistent framework to evaluate interstate emissions transport under the interstate transport provision from one NAAQS to the next." *Id.* at 9371. Each of those determinations extended far beyond the two States at issue here.

EPA's determinations in the disapproval action also had nationwide *effects*. The core purpose of the Good Neighbor provision is to ensure that each State does its part to address downwind States' ability to attain healthy air quality. See 88 Fed. Reg. at 9381. In analyzing a particular State's plan to determine whether it satisfies Good Neighbor requirements, EPA must con-

sider the effects of emissions from the subject State on the ability of other States to timely attain the relevant NAAQS, and the adequacy of the State's proposed control measures to address those downwind effects.

In the disapproval action at issue here, for example, EPA concluded that Oklahoma contributes air pollution to receptors in Texas, Illinois, and Michigan. 88 Fed. Reg. at 9359. Emissions from other out-of-circuit States likewise contribute to air-quality problems in the same downwind States; EPA was required to analyze those States' contributions as well and to ensure that each contributing State is treated equitably in identifying appropriate control measures. See, *e.g.*, Office of Air Quality Planning and Standards, EPA, *Air Quality Modeling Technical Support Document—2015 Ozone NAAQS—SIP Disapproval Final Action* at C-2 to C-3 (Jan. 31, 2023).[5] In undertaking that analysis, EPA necessarily based the disapproval action on a determination of nationwide effect.

c. Petitioners' contrary arguments are inconsistent with the statutory text and ignore important aspects of the disapproval action.

Petitioners contend (State Pet. 33; Industry Pet. 35-36) that the disapproval action is not nationally applicable because EPA's disapproval of each State's plan is a distinct reviewable action. Under that approach, courts would be required to look beyond the face of the final disapproval action, and to consider whether the rule is logically divisible into separate component parts. In effect, petitioners ask the Court to assess the portion of the agency action that individual petitioners challenge, and to ask whether that discrete aspect of the challenged

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[5] https://www.regulations.gov/document/EPA-HQ-OAR-2021-0663-0085.

rule could be considered locally or regionally applicable. As the court of appeals recognized, that "petition-focused approach," Pet. App. 17a, is inconsistent with the text of Section 7607(b)(1), which focuses on the "regulations promulgated, or final action taken," not on a hypothetical action the agency could have taken, or on the specific aspect of the challenged action that is the subject of a petition for review. 42 U.S.C. 7607(b)(1); see Pet. App. 17a-18a.

Petitioners also assert (State Pet. 30-31; Industry Pet. 36-37) that the disapproval action must be "locally or regionally applicable" because Section 7607(b)(1) refers specifically to "the Administrator's action in approving or promulgating any implementation plan * * * or any other final action of the Administrator * * * which is locally or regionally applicable." 42 U.S.C. 7607(b)(1). But as the court of appeals explained, Section 7607(b)(1) "does not * * * say that any such approval, promulgation, denial, or disapproval *is* locally or regionally applicable." Pet. App. 12a n.5. It "merely provides" that a challenge to any such action "'*which is locally or regionally applicable* may be filed only in the . . . appropriate regional circuit.'" *Id.* at 12a-13a n.5 (quoting 42 U.S.C. 7607(b)(1)) (brackets omitted). Whether a particular action is locally or regionally applicable is for the reviewing court to decide.

In an attempt to avoid that conclusion, petitioners invoke (State Pet. 31-32) the rule of the last antecedent, arguing that the phrase "which is locally or regionally applicable" does not modify the reference to an action approving a state plan. But that interpretive canon does not help petitioners here because the last antecedent—*i.e.*, the language in Section 7607(b)(1) that immediately precedes "which is locally or regionally applicable"—is

the phrase "any other final action of the Administrator * * * (including any denial or disapproval by the Administrator under [Title I of the CAA])." 42 U.S.C. 7607(b)(1). Here, the relevant action is not the approval of a state plan, but a disapproval. Because a disapproval is specifically identified in the antecedent phrase, it is unambiguously modified by the requirement that the action must be "locally or regionally applicable" in order for venue to lie in a court other than the D.C. Circuit.

Petitioners also cite (State Pet. 30; Industry Pet. 36) the D.C. Circuit's statement that EPA's approval of a state plan is the "prototypical 'locally or regionally applicable' action that may be challenged only in the appropriate regional court of appeals.'" *American Rd. & Transp. Builders Ass'n* v. *EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013), cert. denied, 571 U.S. 1125 (2014). But in addition to addressing an approval rather than a disapproval of a state plan, that decision considered EPA's approval of a plan for California alone. *Id.* at 454. Unlike the disapproval action at issue here, that action on its face applied only to a single State, and it did not concern interstate transport of pollution.

Petitioners contend (State Pet. 33-35; Industry Pet. 40-41) that the court of appeals' decision must be incorrect because its holding would render every EPA action nationally applicable, "since EPA is always purporting to apply some consistent standard to administer its portion of a national statute." State Pet. 33. But in holding that the disapproval action is nationally applicable, the court below did not rely solely on EPA's use of a national standard. Rather, the court also emphasized the action's geographic scope, whereby those consistent standards were applied to 21 States in multiple judicial

circuits. Pet. App. 12a-13a. Recognizing that venue for review of such an action lies in the D.C. Circuit does not suggest that challenges to every EPA action belong there.

Industry petitioners also contend that the disapproval action is not based on determinations of nationwide scope or effect because state-plan disapprovals are "usually highly fact-bound and particular to the individual State." Industry Pet. 38 (citation omitted). In determining whether state plans should be approved or disapproved, EPA of course must apply its generally applicable standards and methodologies to the circumstances of particular States. In analyzing the 21 state plans at issue here, however, EPA focused on the effects of those States' emissions on air quality in downwind States, and it made determinations about how to combat those effects nationwide under an equitable and uniform framework. See 88 Fed. Reg. at 9361-9379.

2. Petitioners observe (State Pet. 15-19; Industry Pet. 22-27) that other regional courts of appeals have denied EPA's motions to dismiss or transfer challenges to the disapproval action at issue here. The government agrees that this Court's review is warranted, in an appropriate case, to provide guidance to the courts of appeals concerning the proper application of Section 7607(b)(1). In *EPA* v. *Calumet Shreveport Refining, L.L.C.*, No. 23-___ (filed May 20, 2024), the government recently filed a petition for a writ of certiorari challenging the Fifth Circuit's application of Section 7607(b)(1) to a different EPA action. Because *Calumet Shreveport* is a better vehicle for providing guidance to the courts of appeals, the Court should grant certiorari in that case and hold these petitions pending its decision in *Calumet Shreveport*.

a. Of the seven regional circuits in which challenges to the disapproval action are pending, two courts have not yet issued any ruling on venue. See Docket entry No. 27, *Nevada Cement Co.* v. *EPA*, No. 23-682 (9th Cir. July 3, 2023) (referring the venue question to the merits panel); C.A. Doc. 24, *Alabama* v. *EPA*, No. 23-11173 (11th Cir. July 12, 2023) (same). Motions panels of the Fourth, Fifth, Sixth, and Eighth Circuits have issued interlocutory decisions denying EPA's motions to transfer. *West Virginia* v. *EPA*, 90 F.4th 323 (4th Cir. 2024); *Texas* v. *EPA*, No. 23-60069, 2023 WL 7204840 (5th Cir. May 1, 2023) (per curiam); *Kentucky* v. *EPA*, No. 23-3216 (6th Cir. July 25, 2023); *Arkansas* v. *EPA*, No. 23-1320 (8th Cir. Apr. 25, 2023). Three of those circuits' decisions are unpublished and nonbinding. *Texas*, *supra*; *Kentucky*, *supra*; *Arkansas*, *supra*. The decisions in both *Texas* and *Kentucky* produced forceful dissents, while the decision in *Arkansas* was an unexplained order. In each of those circuits, EPA has preserved its venue arguments in its merits briefs.

Other than the court below, the Fourth Circuit is the only court that has issued a published opinion deciding the question of proper venue for a challenge to the disapproval action at issue here. See *West Virginia*, 90 F.4th 323. Focusing on the disapproval of West Virginia's plan alone, the Fourth Circuit motions panel held that the challenged EPA action is locally or regionally applicable because it addresses circumstances "particular and unique to West Virginia." *Id.* at 328. Judge Thacker dissented, explaining that the majority had "jettison[ed]" the well-established rule of looking to the face of the agency action, and instead had looked "to the nature of West Virginia's challenge." *Id.* at 334. EPA filed a petition for rehearing en banc, C.A. Doc. 64,

West Virginia v. *EPA*, No. 23-1418 (Mar. 29, 2024), but the Fourth Circuit denied the petition as premature, C.A. Doc. 65, *West Virginia*, *supra* (Apr. 16, 2024). Thus, although a circuit conflict exists as to the proper venue for challenges to the disapproval action, no other court of appeals has issued a final judgment, and the venue question remains subject to potential reconsideration in the various regional circuits.

b. As EPA's petition for a writ of certiorari in *Calumet Shreveport* explains, a parallel circuit split exists concerning the application of Section 7607(b)(1) to a different type of EPA action. *Calumet Shreveport* involves two EPA actions, each of which denied petitions filed by numerous small refineries seeking exemptions from CAA requirements concerning the blending of renewable fuels. Six small refineries filed petitions for review in the Fifth Circuit, challenging the denial of their exemption requests. EPA argued, *inter alia*, that venue in the Fifth Circuit was improper and that the petitions for review should be dismissed or transferred to the D.C. Circuit.

A divided panel of the Fifth Circuit issued a final decision that denied EPA's request to dismiss or transfer the petitions and vacated EPA's denial actions as applied to the six small-refinery petitioners. *Calumet Shreveport Refining, L.L.C.* v. *EPA*, 86 F.4th 1121 (2023), petition for cert. pending, No. 23-___ (filed May 20, 2024). That decision conflicts with a published decision of the Eleventh Circuit, see *Hunt Ref. Co.* v. *EPA*, 90 F.4th 1107, 1109-1112 (2024), and with unpublished decisions of four other regional courts of appeals, see Order, *American Ref. Grp., Inc.* v. *EPA*, No. 22-2435 (3d Cir.) (Sept. 23, 2022); Order, *Countrymark Ref. & Logistics, LLC* v. *EPA*, No. 22-1878 (7th Cir. July 20,

2022); Order, *Calumet Mont. Ref., LLC* v. *EPA*, No. 22-70124 (9th Cir. Oct. 25, 2022); Order, *Calumet Mont. Ref., LLC* v. *EPA*, No. 22-70166 (9th Cir. Oct. 25, 2022); Order, *Wyoming Ref. Co.* v. *EPA*, No. 22-9538 (10th Cir. Aug. 23, 2022), all of which have transferred or dismissed challenges to the same denial actions. See Pet. at 18-19, *Calumet Shreveport*, *supra*.

As the *Calumet Shreveport* petition explains, the government agrees that this Court's intervention is warranted to clarify the proper application of Section 7607(b)(1). See Pet. at 20-23, *Calumet Shreveport*, *supra*. Questions concerning Section 7607(b)(1) have arisen repeatedly in connection with a variety of EPA actions. Uncertainty as to whether particular EPA actions are "nationally applicable" or are "based on a determination of nationwide scope or effect," 42 U.S.C. 7607(b)(1), has produced wasteful and time-consuming litigation on the venue issues themselves, and it has created the potential for inconsistent merits rulings on issues for which Congress sought nationwide uniformity.

As between *Calumet Shreveport* and this case, *Calumet Shreveport* is a better vehicle for the Court to clarify the proper application of Section 7607(b)(1). The court of appeals in *Calumet Shreveport* issued a final judgment disposing of the case, and its holding regarding venue is in direct conflict with final decisions of at least five other courts of appeals. More importantly, the courts in *Calumet Shreveport* and *Hunt* assessed both whether the challenged EPA denial actions were "nationally applicable" and whether they were "based on a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1); see *Calumet Shreveport*, 86 F.4th at 1130-1133; *Hunt*, 90 F.4th at 1109-1112. Here, by contrast, the court of appeals declined to address whether EPA's

disapproval action was "based on a determination of nationwide scope or effect." Pet. App. 19a n.8.

Although the court of appeals in this case addressed only the "nationally applicable" prong of Section 7607(b)(1), petitioners have framed their questions presented so as to encompass the "based on a determination of nationwide scope or effect" prong as well. See State Pet. i; Industry Pet. i. They suggest (State Pet. 22-23; Industry Pet. 38-39) that granting review here would allow the Court to consider both aspects of the statute. The government agrees that, if the Court grants certiorari in this case, it should treat both asserted rationales for D.C. Circuit venue as properly before it. The better course, however, is to grant certiorari in *Calumet Shreveport*, where both the panel majority and the dissenting judge addressed both prongs of Section 7607(b)(1). In that case, the Court could potentially clarify both prongs of the venue provision, without departing from its usual role as "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

CONCLUSION

The petitions for writs of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *EPA* v. *Calumet Shreveport Refining, L.L.C.*, No. 23-___ (filed May 20, 2024), and the Court's decision on the merits in that case if that petition is granted, and then disposed of as appropriate.

Respectfully submitted.

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