No. 23-1068

In the Supreme Court of the United States

PACIFICORP, *et al.*,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*

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

REPLY BRIEF

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REPLY BRIEF

The Petition raises a circuit split over the proper venue under Section 307(b)(1) of the Clean Air Act ("CAA") for challenges to EPA's actions on state implementation plans ("SIPs"). EPA does not dispute that the Question Presented is deeply important, has divided the circuits, and merits review. Instead, it argues that this Court should hold the Petition and grant review in its later-filed petition in *EPA v. Calumet Shreveport Refining, LLC*, No.23-1229.

This Court should reject EPA's request to hold this Petition. Instead, this Court should grant this Petition (along with the States' petition, No.23-1068) before the end of this Term, for three reasons.

First, *Calumet Shreveport* is unlikely to resolve the important Question Presented here. That case does not involve EPA actions on SIPs and does not raise many of the issues at play here, such as EPA's core theory that packaging many SIPs together in a single *Federal Register* notice renders an action "nationally applicable." EPA does not dispute that the parties urgently need clarity over the proper venue for these exceedingly common SIP-action challenges, and *Calumet Shreveport* is unlikely to provide it.

Second, if this Court wanted to grant either this Petition or the *Calumet Shreveport* petition (and, of course, it can just grant both), this Petition is the superior vehicle. *Calumet Shreveport* concerns a nearly defunct exemption program under which EPA used to grant waivers from certain renewable-fuel standards. This case presents the ubiquitous scenario of EPA's periodic review of SIPs and implicates unique venue considerations arising in that important context. Further, this Petition is now fully briefed, whereas EPA just filed its *Calumet Shreveport* petition, many months after the decision below issued.

Third, holding this Petition for *Calumet Shreveport*—or even waiting until *Calumet Shreveport* is briefed to decide whether to grant this Petition—would lead to continued chaos in the ozone-transport-SIP litigation. If this Court does not grant this Petition before the end of this Term, Utah, Oklahoma, and Petitioners may well have to litigate their challenges to EPA's SIP denials in the D.C. Circuit, whereas ten other States and their industries are litigating in their regional circuits. As the Solicitor General explained in a petition filed in this Court just a few weeks ago, regarding a different venue dispute, "[g]ranting review now would ensure that th[e]se petitions are considered in the first instance in the venues required by the [CAA]" and "would also avoid the duplication of effort and waste

of resources that would occur if the [D.C.] Circuit were to consider [these petitions] on the merits, only for this Court to hold later that venue was improper all along[.]" Pet.20–21, *FDA v. R.J. Reynolds Vapor Co.*, No.23-1187 (May 2, 2024) ("*R.J. Reynolds* Pet."). Indeed, the D.C. Circuit has set a schedule indicating that it may lift the temporary abeyance on the challenges below if this Court does not grant review before the end of this Term, meaning that, if this Court follows EPA's suggestion, the D.C. Circuit could resolve these challenges on the merits before this Court rules on the merits in *Calumet Shreveport*.

I. This Court Should Grant This Petition Now Rather Than Waiting For The Later-Filed *Calumet Shreveport* Petition

A. As Petitioners explained, there is an urgent need for this Court to grant this Petition to resolve the acknowledged circuit split over whether EPA's packaging of SIP disapprovals into a single document, while using an allegedly consistent methodology to evaluate those SIPs, renders such actions challengeable only in the D.C. Circuit, or whether any challenge can only be brought in the regional circuit. Pet.4–27. Because EPA frequently acts on SIPs, States and affected industry need guidance on the proper venue for SIP-action challenges. Pet.28–29. This Court's resolution of this "importan[t]" question, *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 586

(1980), is also urgently needed given the ongoing chaos in the ozone-transport-SIP cases, where ten States and their industries are currently litigating in their regional circuits, while Utah, Oklahoma, and their industries have been transferred to the D.C. Circuit. Pet.27–35. This Court brought such order in analogous circumstances in *National Association of Manufacturers v. Department of Defense ("NAM"),* 583 U.S. 109 (2018), even in a less chaotic context, and it should do so here too. Pet.33–35.

B. EPA concedes that "a circuit conflict exists" over the Question Presented, Br. For Fed. Resp'ts ("Resp.") 19, and "agrees" that "this Court should provide guidance" on "the proper application of Section 307(b)(1)," Resp.9. EPA argues that this Court should hold this Petition for its later-filed petition in *Calumet Shreveport*. This Court should reject EPA's approach for three reasons. Indeed, even waiting to grant this Petition until completion of the *Calumet Shreveport* petition briefing over the summer would cause needless confusion and harm.

1. *Calumet Shreveport* is unlikely to resolve the Question Presented here. *Calumet Shreveport* involves the issue of whether EPA's denial of petitions filed by small oil refineries seeking exemptions from the requirements of the CAA's Renewable Fuel Standard program ("RFS") are "nationally applicable" actions or, alternatively, locally or regionally

applicable actions "based on a determination of nationwide scope or effect," such that review of those denials lies in the D.C. Circuit. Pet.I, *EPA v. Calumet Shreveport Refining, LLC*, No.23-1229 (May 20, 2024) ("*Calumet* Pet."); *see also* Pet.I, *Growth Energy v. Calumet Shreveport Refining, LLC*, No.23-1230 (May 20, 2024) ("*Growth Energy* Pet."). The case here, in contrast, involves the venue for EPA's SIP disapprovals—which are state-centric, per 42 U.S.C. § 7410—including whether those disapprovals are "nationally applicable" or "locally or regionally applicable" actions. Pet.i, 7–8.

This difference is critical because venue for SIP actions implicates multiple considerations absent in the RFS-exemption context. Section 307(b)(1) provides that SIP "approv[als]" are "locally or regionally applicable," 42 U.S.C. § 7607(b)(1); Pet.36–37; *Growth Energy* Pet.33, meaning that challenges to such actions clearly belong in the regional circuits, 42 U.S.C. § 7607(b)(1). Section 307(b)(1) does not contain any reference to the locally-or-regionally-applicable character of RFS-exemption actions. *Growth Energy* Pet.33. Further, the denials in *Calumet Shreveport* apparently relied upon a general factual finding applicable to them all, *id.*; *see Calumet* Pet.6, 13, 16, while EPA separately considered and rejected each SIP here based upon state-specific considerations, Pet.35–36. Additionally, EPA's central venue argument here—that packaging together many

"locally applicable" SIP disapprovals in a single *Federal Register* notice transforms them into a single "nationally applicable" SIP disapproval—is absent from *Calumet Shreveport*. *Calumet* Pet.12–18. Lastly, unlike EPA's RFS-exemption actions, SIP decisions implicate core federalism concerns. Pet.5–6; *Growth Energy* Pet.33.

Notably, industry petitioners aligned with EPA in *Calumet Shreveport* did not suggest that holding this Petition for *Calumet Shreveport* is sensible. *Growth Energy* Pet.33–34. Instead, they emphasized the "distinct issues" there, while suggesting that the Court "hear the cases in tandem," if it granted review in both. *Id.* at 34. And EPA described the circuit split here in its *Calumet* petition as "a *separate* circuit conflict." *Calumet* Pet.20–21 (emphasis added).

2. EPA claims that *Calumet Shreveport* is a better vehicle to interpret 42 U.S.C. § 7607, but if this Court had to choose between granting this Petition or the *Calumet Shreveport* petition—and, of course, this Court can just grant both sets of petitions—this Petition is a *far* better vehicle.

This Petition arises in a more practically important context. States submit SIPs every time EPA promulgates a new National Ambient Air Quality Standard; States submit SIPs to comply with EPA's "Regional Haze Program"; and States must

seek approval for SIP revisions. Pet.28–29. In contrast, the RFS-exemption program in *Calumet Shreveport* is near-defunct, with EPA not granting any exemption since 2017, while giving no indication of any forthcoming deviation. EPA, *RFS Small Refinery Exemptions, Tables SRE-1 & SRE-2*.[*]

Further, this Petition is fully briefed, while completion of briefing for the *Calumet Shreveport* petition is some time away. Indeed, unless this Court departs from its standard practice of not granting petitions over the summer recess, this Court is unlikely to grant review in *Calumet Shreveport* until the end of September.

EPA claims that *Calumet Shreveport* is a better vehicle because the split there is between final judgments of multiple circuits, while the split here is between the Tenth Circuit's final judgment and other circuits' nonfinal decisions (including the Fourth Circuit's published decision). Resp.18–20. But in *NAM*, 583 U.S. 109, this Court resolved a split between nonfinal orders of the Sixth Circuit and a district court precisely to bring order to a chaotic situation, and it should do so here. Pet.33–35.

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[*] Available at https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (last visited May 29, 2024).

Indeed, that this Petition involves ongoing cases is an additional reason to *grant* it now, given the need for clarity and basic fairness in these ongoing cases, *see infra* Part I.B.3, just as the Solicitor General argued in her pending *R.J. Reynolds* petition, seeking review (even absent a split) of an interlocutory venue-transfer-denial order, *R.J. Reynolds* Pet.I, 6.

EPA notes that *Calumet Shreveport* "assessed both whether the challenged EPA denial actions were nationally applicable and whether they were based on a determination of nationwide scope or effect" under Section 307(b)(1), while the Tenth Circuit declined to address the latter grounds. Resp.20–21 (citations omitted). But the parties fully briefed whether the SIP disapprovals here were "based on a determination of nationwide scope or effect" below, 42 U.S.C. § 7607(b)(1); Pet.13–16, 31, and EPA agrees that this aspect would be "properly before" this Court, Resp.21. Further, the Fourth, Fifth, and Sixth Circuits decided this issue, with the parties raising extremely similar arguments. Pet.38. Thus, this Court would not be acting as a court "of first view." *Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005).

3. This Court holding this Petition for *Calumet Shreveport* would continue a chaotic and unfair situation in the ongoing ozone-transport-SIP litigation. Indeed, even waiting until the *Calumet Shreveport* petition briefing is completed to grant this

Petition could well prejudice Petitioners, lead to more chaos, and even potentially trigger emergency proceedings before this Court over the summer.

The timing here is important. Because of EPA's months-long wait to file its petition, the *Calumet Shreveport* respondents' response deadline is June 21. Dkt. Entry 05-20-24, *Calumet Shreveport*, No.23-1229. That means that unless this Court departs from its usual practice of not granting petitions over the summer recess, this Court is unlikely to grant in *Calumet Shreveport* before September 30, 2024, and unlikely to enter a merits decision until 2025.

Proceedings on the ten other SIP disapprovals are continuing in the regional circuits—with multiple circuits potentially entering final judgments before this Court would resolve *Calumet Shreveport*. The Fifth and Sixth Circuits already held oral arguments on the SIP disapproval challenges there. Pet.17–18; *Kentucky v. EPA*, No.23-3216, Dkt.92 (6th Cir. May 8, 2024). The Eleventh Circuit tentatively calendared oral argument in September 2024. *Alabama v. EPA*, No.23-11173, Dkt.57 (11th Cir. May 9, 2024). Merits briefing in the Eighth Circuit has concluded, and oral argument should be scheduled in due course. *Arkansas v. EPA,* No.23-1320, Dkts.5355745, 5359307 (8th Cir.).

During this same time, Petitioners (as well Oklahoma and Utah) will confront chaotic and unfair proceedings in the D.C. Circuit. Pet.21–22. The D.C. Circuit placed the cases below in abeyance until July 5, Order 2, *Utah v. EPA*, No.23-1102, Dkt.2051205 (D.C. Cir. Apr. 24, 2024)—the expected date by which this Court would consider Petitioners' and Utah's/Oklahoma's petitions, as these parties had informed the D.C. Circuit that they had petitioned well before their 90-day deadlines to seek venue clarity, *see* Utah & Oklahoma Pet'rs Mot. To Govern 2–3, *Utah*, No.23-1102, Dkt.2047570 (D.C. Cir. Mar. 29, 2024). By July 5, the parties must file motions to govern below, including by "address[ing] any request for expedition." Order 2, *Utah*, No.23-1102, Dkt.2051205 (D.C. Cir. Apr. 24, 2024). EPA's movant-intervenors have already made clear their intent to move to dissolve the Tenth Circuit's stays that are protecting Petitioners, Movant-Intervenors' Mot. To Govern 1–2, *Utah*, No.23-1102, Dkt.2047607 (D.C. Cir. Mar. 29, 2024), thus they likely will request such relief after July 5. EPA has expressed its desire for "expedited consideration" below and "oral argument in September." Resp'ts Mot. To Govern 2, 6, *Utah*, No.23-1102, Dkt.2047551 (D.C. Cir. Mar. 29, 2024).

Thus, if this Court has not granted review here by July 5, Petitioners will face the possibility that the D.C. Circuit will expedite merits consideration over the summer and perhaps even dissolve the Tenth

Circuit's stays—despite the pendency of this Petition before this Court. The D.C. Circuit may require merits briefing and issue its decision before this Court would fully resolve *Calumet Shreveport*. Further, if the D.C. Circuit dissolves the stays, Petitioners would be forced to rush to this Court over the summer seeking emergency stays to restore the status quo.

Subjecting Petitioners to this chaos and unfairness is especially unjustified given their diligence. Petitioners, along with Utah and Oklahoma, expeditiously filed their Petition on March 28—just 30 days after the Tenth Circuit's order below, Pet.App.1a, and 60 days before their deadline, Sup. Ct. R.13.1. Petitioners took this accelerated approach so that this Court would consider the Petition before the summer recess and avoid the chaotic and inequitable proceedings looming in the D.C. Circuit. By contrast, EPA filed its *Calumet Shreveport* petition on May 20, about four months after the *Calumet Shreveport* court of appeals' January 22, 2024 rehearing denial. *Calumet* Pet.1.

Finally, if this Court wishes to consider resolving this case and *Calumet Shreveport* in tandem, this Court should still grant this Petition now rather than waiting for the *Calumet Shreveport* petition briefing to complete, to avoid the possibility of the D.C. Circuit's proceedings resuming after July 5. Thereafter, this Court can decide if it wishes to grant

review of *Calument Shreveport* when briefing on that case completes, setting that case for the same fall argument date to provide prompt resolution.

II. EPA's Merits Arguments Do Not Support Holding Or Denying The Petition And, In Any Event, Are Incorrect

While EPA argues that the Tenth Circuit correctly decided the Question Presented, that is not a traditional basis for denying review of an important issue that involves a split. *See* Sup. Ct. R.10(a). Regardless, EPA's merits arguments are wrong.

A. The Tenth Circuit's decision is incorrect. EPA's SIP disapprovals for Utah and Oklahoma, respectively, are "locally or regionally applicable" actions under Section 307(b)(1). Pet.35. The relevant action under Section 307(b)(1) is EPA's disapproval of these SIPs, respectively, as Section 7410(k)(3) directs EPA to separately consider each SIP, and such action is locally or regionally applicable, as Section 307(b)(1) recognizes. Pet.35–37. EPA cannot transform a SIP disapproval into a nationally applicable action by administratively packaging it with other SIPs in a *Federal Register* notice. Pet.37–38. EPA's alternative determination of "nationwide scope or effect" under Section 307(b)(1)'s third sentence is invalid because, again, EPA's disapprovals rested on intensely factual, state-specific determinations. Pet.38–39.

B. EPA argues that the relevant action under Section 307(b)(1) is EPA's packaged "disapproval action, which applies to 21 States[.]" Resp.11–12 (citations omitted). But EPA cannot dictate whether a SIP disapproval is "nationally applicable" or "locally or regionally applicable" by packing multiple actions into a single *Federal Register* notice. Pet.2, 24, 37, 39–40. EPA's statutory source of authority for its actions determines the relevant action for Section 307(b)(1)'s analysis. Pet.35–36, 39–40. Here, Section 7410(k)(3) is the relevant statute, and it directs that SIP actions are "logically divisible" by State, Resp.14, as they are state-specific, 42 U.S.C. § 7410(k)(3). It is undisputed that EPA could have published its 21 disapprovals here as separate *Federal Register* notices if it desired. While EPA criticizes Petitioners for requiring courts to discern whether EPA's actions are "logically divisible," Resp.14, courts need only consider the statutes authorizing EPA's action.

EPA disputes Petitioners' argument that Section 307(b)(1) directs that review of SIP actions belongs in the regional circuits, Resp.14–15, but the text is clear. Section 307(b)(1) provides that challenges to "action *in approving or promulgating any implementation plan under section 7410* . . . or any other final action . . . (*including any denial or disapproval by [EPA] under subchapter I*) which is locally or regionally applicable *may be filed only in the . . . appropriate circuit*." 42 U.S.C. § 7607(b)(1) (emphases added).

This "statutory text places review of SIP approvals or disapprovals in the regional circuits[.]" *Texas v. EPA,* 829 F.3d 405, 419 n.16 (5th Cir. 2016); *see also Amici* Br. of Arkansas, *et al.*, 4–9, *Oklahoma v. EPA*, No.23-1067 (May 1, 2024).

EPA has nothing to say, *see* Resp.16–17, in defense of the Tenth Circuit's reliance on the agency's alleged "uniform statutory interpretation and common analytical methods," Resp.11. EPA, of course, must apply a consistent approach for SIP actions, as unexplained inconsistency renders agency action unlawfully arbitrary. Pet.40–41. So, if these are attributes of a "nationally applicable" action, "there never could be a local or regional action[.]" *West Virginia v. EPA,* 90 F.4th 323, 329 (4th Cir. 2024). Tellingly, EPA offers no alternative explanation for the Tenth Circuit's reliance on the agency's supposed application of a uniform standard. *See* Resp.16–17. That leaves EPA's packaging of the disapprovals as the sole basis for their alleged national applicability, which is plainly insufficient. *Supra* p.13.

Finally, EPA argues that the SIP disapprovals were "based on a determination of nationwide scope or effect," Resp.12–14, but this is wrong. EPA's use of "a nationally consistent four-step framework" does not give its disapprovals a nationwide "*scope*," Resp.12–13, as EPA's determinations were "intensely

factual" and "unique to each State," Pet. 38–39 (citations omitted). That EPA considered each State's impact on downwind States also does not help EPA, Resp.13–14, as SIP disapprovals are "usually highly fact-bound and particular to the individual State," Pet. 38 (citations omitted).

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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