No. 23-1068

In the Supreme Court of the United States

PACIFICORP, *et al.*,
v.
ENVIRONMENTAL PROTECTION AGENCY, *et al.*

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In their Opening Brief, Industry Petitioners offered a straightforward, text-based approach to the venue provision here, Section 307(b)(1). As to Section 307(b)(1)'s first and second sentences—comprising the default venue rule—the statutory nature of the EPA "action" at issue determines whether the case belongs in the D.C. Circuit or a regional Circuit. A challenge to a statutorily authorized EPA "action" that is "nationally applicable" belongs in the D.C. Circuit. A challenge to an action that is "locally or regionally applicable," on the other hand, belongs in the appropriate regional Circuit. The narrow exception in Section 307(b)(1)'s third sentence only applies when a statutorily authorized "action" that is "otherwise locally or regionally applicable" "ha[s] a nationwide scope or effect" and EPA publishes a "determination" of that "scope or effect." *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013) (Kavanaugh, J.). In that event, a challenge to the action should be reviewed in the D.C. Circuit. *Id.*

EPA now puts forward a convoluted interpretation of Section 307(b)(1), inventing multiple elements found nowhere in the statutory text that, perhaps unsurprisingly, would allow EPA to choose the D.C. Circuit to hear challenges to its actions, whenever that happens to be EPA's preference.

Under EPA's interpretation of the first two sentences' default-venue rule, an "action" is "nationally applicable" if it is packaged in a Federal Register notice with other actions covering States in another Circuit. It would, of course, be trivially easy for EPA to manipulate that framework by packaging multiple actions from different Circuits into a single Federal Register notice, such as by combining its actions on individual state plans in order to funnel challenges to those plans to the D.C. Circuit. In response to this obvious risk of gamesmanship, EPA offers only an atextual, unadministrable "sham" exception, where courts would disregard EPA's packaging of actions if they found that EPA was being somehow too manipulative. EPA also repeatedly points to its claimed discretion to publish Federal Register notices in the way that it wants, but whether EPA has authority to take certain publication actions out of administrative convenience has no relevance to the venue inquiry under Section 307(b)(1)'s text.

EPA's approach to the third sentence's narrow exception is similarly atextual and self-serving. In EPA's view, the agency may force a challenge to a "locally or regionally applicable" action into the D.C. Circuit whenever EPA can identify any one "core justification" or "central rationale"—whatever that means—embodied in a Federal Register notice. Here too, EPA can make the D.C. Circuit the venue for challenges to any "locally or regionally applicable" action because EPA will always be able to identify some rationale that is consistent across multiple

actions. After all, EPA must act consistently when making similarly situated decisions, under basic administrative law principles. EPA tries to address this problem by suggesting yet more tests found nowhere in the statutory text, such as claiming that its "core justification" or "central rationale" approach would only apply to actions resolving "unsettled issues." But those additional tests are not found in the text and would be unadministrable in practice.

There is no reason for this Court to adopt EPA's vague and self-serving approach to a provision that Congress designed to create a neutral rule for determining venue under the Clean Air Act ("CAA"). The rules for "the preliminary question of venue" should be clear. *Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555, 558 (1963). Industry Petitioners' approach follows the statutory text and is easy to apply, ensuring that parties do not "eat[ ] up time and money . . . litigat[ing], not the merits of their claims, but which court is the right court to decide those claims." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (citation omitted); *see also Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 464 n.13 (1980).

ARGUMENT

I. EPA Cannot Transform Its Action Disapproving Utah's SIP And Its Action Disapproving Oklahoma's SIP Into A Combined "Nationally Applicable" Action By Packaging Those Actions With Its Disapprovals Of 19 Other States' SIPs

A. Under Section 307(b)(1), the statutory basis for EPA taking an "action" determines the venue for challenging that same action. Br. For Industry Pet'rs at 30–31, *PacifiCorp v. EPA*, No.23-1068 (U.S. Dec. 13, 2024) ("Industry Br."). A challenge to a "nationally applicable" EPA action—such as "promulgating any national primary or secondary ambient air quality standard"—belongs in the D.C. Circuit under Section 307(b)(1)'s first sentence. Industry Br.28–29 (quoting 42 U.S.C. § 7607(b)(1)). A challenge to a "locally or regionally applicable" EPA action—such as "approving" or "disapprov[ing]" a SIP—belongs "only" in the appropriate regional Circuit, under Section 307(b)(1)'s second sentence. Industry Br.29–30 (quoting 42 U.S.C. § 7607(b)(1)). Here, the challenges to EPA's disapprovals of Utah's SIP and Oklahoma's SIP each belong in the Tenth Circuit. Industry Br.32–40. That is explicit from Section 307(b)(1)'s text, as well as the CAA provisions authorizing EPA to act on a State's SIP. Industry Br.34–35 (citing 42 U.S.C. § 7410(a)(1), (k)). After all, the CAA's SIP provisions authorize state-specific action, contemplating each State "submitt[ing] *a* plan" to EPA and obligating EPA to "act on *the*

submission." Industry Br.33 (quoting 42 U.S.C. § 7410(k)).

Below, the Tenth Circuit offered two rationales for holding that EPA's disapprovals of Utah's SIP and Oklahoma's SIP were just part of a single, "nationally applicable" action, but both rationales are wrong. Industry Br.40–46. First, the Tenth Circuit reasoned that EPA's decision to package 21 state-specific SIP disapprovals into a single Federal Register notice transformed these local actions into a nationally applicable action. Pet.App.11a. But no matter how EPA administratively chooses to publish a SIP disapproval, the relevant "action" under Section 307(b)(1) is EPA's disapproval of the individual SIP under the agency's state-specific CAA authority. Industry Br.41–44. Second, the Tenth Circuit claimed that venue is also proper in the D.C. Circuit because EPA applied a "consistent statutory interpretation and uniform analytical methods" in disapproving all 21 SIPs, making these disapprovals a "nationally applicable" action. Pet.App.14a. That has no grounding in Section 307(b)(1)'s text and would make the D.C. Circuit the venue for virtually every CAA action. Industry Br.43–44.

B. EPA does not defend the Tenth Circuit's rationale that EPA's decision to apply an allegedly uniform methodology across the 21 SIP disapprovals transformed these actions into a single nationally applicable action. Instead, EPA defends only the Tenth Circuit's "packaging" rationale, while offering

a rewrite of Section 307(b)(1) to operationalize that approach. *See* Br. For Fed. Resp'ts at 19–22, *Oklahoma v. EPA*, Nos.23-1067, 23-1068 (U.S. Jan. 17, 2025) ("Resp.Br."). In EPA's view, any Federal Register notice that packages decisions impacting States in more than one Circuit can only be challenged in the D.C. Circuit, Resp.Br.19–22, unless a newly designed "sham" exception applies, *see* Resp.Br.27. This interpretation has no grounding in the statutory text and would render Section 307(b)(1) unadministrable by courts, confusing to petitioners, and easily manipulable by EPA.

EPA's interpretation of Section 307(b)(1)'s first two sentences is contrary to the statutory text. As EPA would have it, to determine whether an action is either "nationally applicable" or "locally or regionally applicable," 42 U.S.C. § 7607(b)(1), courts must assess whether a Federal Register notice "applies to . . . entities 'throughout [the] nation,'" Resp.Br.19 (alteration in original; citation omitted). But the relevant statutory term—"action"—applies to the "*manner[s]* in which an agency may exercise its power," which means the action that Congress has authorized. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (emphasis added). Here, the action that Congress authorized EPA to take is approving or disapproving a particular State's SIP submission, pursuant to Section 110(k) of the CAA. *See* 42 U.S.C. § 7410(k). Under Section 307(b)(1)'s second sentence, a SIP approval or disapproval action is "locally or regionally applicable" and so must be

challenged in "the appropriate circuit," 42 U.S.C. § 7607(b)(1)—which here is the Tenth Circuit, Industry Br.32–40. Section 307(b)(1)'s use of the definite article "*the* appropriate circuit" only confirms this conclusion. *Contra* Resp.Br.20–21. EPA's approval or disapproval of a SIP under Section 110(k) is *the* action that the CAA authorizes EPA to take, and that remains true without regard to EPA's decision to package it (or not) with other statutorily authorized actions in one Federal Register notice.

Nor can EPA reconcile its argument with Section 307(b)(1)'s references to SIP approvals and disapprovals as "locally or regionally applicable" actions. *See* Resp.Br.28–29. According to EPA, because Congress references SIP disapprovals within the catchall provision of Section 307(b)(1)'s second sentence, "whether a particular disapproval is locally or regionally applicable is for the reviewing court to decide." Resp.Br.28. But the catchall provision makes clear that a "final action . . . which is locally or regionally applicable" "*includ[es]* any denial or disapproval" of a SIP. 42 U.S.C. § 7607(b)(1) (emphasis added). When Congress uses an "including" clause, it is typically to "make[ ] clear" that the referenced terms are in fact "includ[ed]" within a statutory provision's scope—not that such terms may or may not be "includ[ed]," as EPA would have it. *See Yellen v. Confederated Tribes of Chehalis Rsrv.*, 594 U.S. 338, 347 (2021). EPA's contrary argument also cannot account for Congress' decision to classify SIP approvals as "locally or regionally

applicable" actions. *See* 42 U.S.C. § 7607(b)(1); Industry Br.33–37. EPA's only response is that its approval of multiple SIPs in a single Federal Register entry would render those approvals "nationally applicable" under Section 307(b)(1)'s first sentence, Resp.Br.29–30, but that again misreads the statutorily relevant "action" for venue purposes.

EPA's argument that "any action that spans more than one judicial Circuit is properly viewed as 'nationally applicable' and subject to review only in the D.C. Circuit" under Section 307(b)(1), Resp.Br.21, is both irrelevant here and incorrect. It is irrelevant because the EPA actions at issue are state-specific: EPA's disapproval of Utah's SIP "spans" only one State within one Circuit; the same is true of EPA's disapproval of Oklahoma's SIP. And EPA's position here is incorrect in any event because even if a different action did "span" more than one Circuit, that would not take that action outside Section 307(b)(1)'s second sentence, which expressly applies to both "locally *or regionally* applicable" actions. 42 U.S.C. § 7607(b)(1) (emphasis added). EPA cites no definition of the term "regionally" that could, for example, justify concluding that Texas and Oklahoma are not in the same region, despite being in different Circuits. Nor can EPA's position be reconciled with the plain meaning of "nationally applicable," which "contemplates an activity with a nationwide scope," *Kentucky v. EPA*, 123 F.4th 447, 459–60 (6th Cir. 2024)—not one that simply spans more than one Circuit. While EPA claims that Section 307(b)(1)'s

reference to "*the* appropriate circuit" means that only one Circuit exists in which to challenge a "locally or regionally applicable" action, Resp.Br.20–21 (quoting 42 U.S.C. § 7607(b)(1)), as EPA itself explains, the Dictionary Act instructs that "words importing the singular include and apply to several persons, parties, and things," Resp.Br.23 (quoting 1 U.S.C. § 1).

EPA's reading of Section 307(b)(1)'s first two sentences would also lead to arbitrary results. Consider a situation where EPA packaged together a group of SIP disapprovals in a single Federal Register notice, while deferring action on other SIPs because EPA lacked sufficient information. Under EPA's view, its disapprovals of the packaged-together SIPs would be "nationally applicable" under Section 307(b)(1)'s first sentence and thus challengeable in the D.C. Circuit. *See* Resp.Br.22. But if EPA published an action disapproving just one of the deferred SIPs after gathering more information a couple of months later, that disapproval would be "locally or regionally applicable" under Section 307(b)(1)'s second sentence and thus challengeable in a regional Circuit. *See* Resp.Br.28. Yet, for all of those actions, EPA is performing the same statutorily authorized "action" under the CAA—disapproving a particular SIP submission. *See* 42 U.S.C. § 7410(k)(3). And something very close to this hypothetical occurred here, with EPA packaging its disapprovals of 21 States' SIPs in one Federal Register notice, while deferring its action on other States' SIPs, like Wyoming's SIP, *see* 88 Fed.

Reg. 9,336, 9,354–61 (Feb. 13, 2023), and then subsequently issuing a notice approving just Wyoming's SIP less than a year later, 88 Fed. Reg. 87,720 (Dec. 19, 2023).

EPA also has no response to Industry Petitioners' point that the Tenth Circuit's "packaging" rationale would allow EPA to handpick the D.C. Circuit as its option. EPA argues that it has administrative discretion to package multiple SIP disapprovals in a Federal Register notice. Resp.Br.23–24 (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940); *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519 (1978)). But whether EPA may choose to publish multiple CAA-authorized actions in a single notice, for its own administrative convenience, has no relevance under Section 307(b)(1)'s statutory text, which focuses upon the statutorily authorized "action" that EPA has taken. 42 U.S.C. § 7607(b)(1); *see Kentucky*, 123 F.4th at 462 (noting that EPA's "argument conflates the *rule* issued in the Federal Register (the EPA's words) with the 'final action' that the EPA takes (the statute's words)"). None of the cases that EPA cites suggest that agencies may pick their own venue to defend their actions through Federal Register publication decisions, especially in the face of a statute designed to govern venue using neutral, pre-defined principles.

And while EPA argues that it has not previously "manipulat[ed] venue by combining unrelated agency

actions," Resp.Br.27, no court before the Tenth Circuit endorsed EPA's packaging rationale. It would "exhibit a naiveté" unsuitable to the judicial branch, *Dep't of Comm. v. New York*, 588 U.S. 752, 785 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)), to endorse an approach that empowers EPA to pick its preferred forum for defending high-stakes actions simply by deciding "whether applications should be heard contemporaneously or successively," Resp.Br.24 (quoting *Pottsville*, 309 U.S. at 138). Courts understand that such power would likely become a significant factor in how EPA decides to publish its actions in the Federal Register going forward.

Recognizing this risk of venue manipulation inherent in its position, EPA asks this Court to adopt an atextual test for rooting out "sham" packaging. Resp.Br.25–27. That test would apparently require courts to ask whether EPA's "aggregation" was "arbitrary," whether its actions were too "unrelated," or whether "a particular grouping" was made to "manipulate venue." Resp.Br.27. EPA's "sham" test finds no grounding in the text of Section 307(b)(1), and would pose serious administrability concerns—contrary to the principle that clear rules should govern "the preliminary question of venue." *Mercantile Nat'l Bank*, 371 U.S. at 558. A court applying EPA's "sham" test will encounter difficult line-drawing problems concerning, for instance, whether bundled EPA actions are sufficiently "related" so as not to reveal an impermissible intent

to manipulate venue. And different courts are likely to answer these questions in different ways, leading to uncertainty for litigants in deciding where to file a petition for review under Section 307(b)(1).

Industry Petitioners' approach to Section 307(b)(1), in contrast, is easy to apply. A petitioner need only identify the statutory nature of the action it wishes to challenge and compare that to the specifically referenced actions in Section 307(b)(1)'s first and second sentences, as well as (if necessary) the catchalls. Industry Br.30–32. This will usually be straightforward, given that Section 307(b)(1) itself lists numerous "nationally applicable" and "regionally or locally applicable" actions. The regionally or locally applicable actions include the very SIP approvals and SIP disapprovals at issue here. *See* 42 U.S.C. § 7607(b)(1). EPA does not identify any instance in which applying Industry Petitioners' interpretation to Section 307(b)(1)'s first and second sentences would be difficult. And none of the regional Circuits applying this test had any trouble concluding that the challenges here belong in those regional Circuits. Industry Br.22–23. Only the Tenth Circuit reached a different conclusion, but that is only because it used the wrong test.

Finally, EPA's legislative-history arguments, Resp.Br.21–22, do not help its position. The 1977 amendments to Section 307 expanded Court of Appeals review over EPA's actions under the CAA, while permitting review of a locally or regionally

applicable action in the D.C. Circuit where a locally or regionally applicable action has a "nationwide scope or effect," and EPA publishes a "determination" to that effect. *See* Clean Air Act Amendments of 1977, Pub. L. No.95-95, § 305(c), 91 Stat. 685, 776 (1977). EPA cannot explain why Congress would have carefully distinguished between EPA actions that are "nationally applicable" and actions that are "locally or regionally applicable" in Section 307(b)(1), only to allow EPA to circumvent that statutory design by packaging locally or regionally applicable actions together in a single Federal Register notice, subject only to an ill-defined and atextual "sham" inquiry.

II. Section 307(b)(1)'s Narrow Exception Does Not Apply Because EPA Made No Valid "Determination Of Nationwide Scope Or Effect" As To Either Its Action On Utah's SIP Or Its Action On Oklahoma's SIP

A. Section 307(b)(1)'s third sentence provides a narrow exception to the default rule found in the first two sentences, specifying that the D.C. Circuit is the proper venue for challenging a "locally or regionally applicable" action that is "based on a determination of nationwide scope or effect," where EPA validly "finds and publishes that such action is based on such a determination." 42 U.S.C. § 7607(b)(1); Industry Br.46–57. This admittedly awkwardly worded provision is best understood as applying to "otherwise locally or regionally applicable regulations [that] have a nationwide scope or effect." *Am. Rd. & Transp.*

Builders Ass'n, 705 F.3d at 455; Industry Br.48. To take advantage of this narrow exception, EPA must correctly identify the statutory "action" at issue, then validly determine that it took that action "based on a determination" of the "nationwide scope or effect" of that action, and then publish this finding. 42 U.S.C. § 7607(b)(1); Industry Br.48–49.

Here, this exception does not apply because EPA failed to identify the statutorily relevant action—EPA's disapproval of Utah's SIP and Oklahoma's SIP, respectively. Further, EPA could not rationally have determined that it took either of those narrow, state-specific actions based upon those SIPs' nationwide "scope" or "effect." Industry Br.49–54. EPA explained in its Federal Register notice that it published its notice denying the SIPs of 21 different States "based on a determination of 'nationwide scope or effect,'" 88 Fed. Reg. at 9,380, but those 21 different SIPs are not the proper statutory focus. Under the statute, EPA must focus on each action, not EPA's hand-selected group of actions. Industry Br.49–51. EPA could not have disapproved Utah's SIP or Oklahoma's SIP "based on" a "determination" of either of those individual SIP's "nationwide *scope*." The scope of those SIPs is to regulate sources only within each respective State. Industry Br.51–53. And EPA could not have disapproved Utah's SIP or Oklahoma's SIP "based on" a "determination" of either SIP's "nationwide *effect*," as EPA only (erroneously) found at most a regional effect from Utah and Oklahoma emissions on receptors in one part of Colorado for

Utah and two receptors in parts of Texas for Oklahoma. Industry Br.51–54.

B. EPA fails to address Industry Petitioners' approach to Section 307(b)(1)'s third sentence, appearing to focus its attack primarily on State Petitioners' different approach.[1] EPA misunderstands Industry Petitioners to be arguing that its disapprovals of Utah's SIP and Oklahoma's SIP "fall[ ] outside Section 7607(b)(1)'s third prong because the States' plan submissions and EPA's analysis had State-specific aspects." Resp.Br.44. But under the third prong, EPA's "finding" of either a "nationwide scope" or a nationwide "effect" under Section 307(b)(1)'s third sentence is invalid because (1) EPA first failed to identify the statutorily relevant actions—namely, its actions on Utah's SIP and

[1] Industry Petitioners' approach to Section 307(b)(1)'s third sentence is different than the approach that State Petitioners urge, although all Petitioners agree that the Tenth Circuit is the proper venue here under either approach. State Petitioners' approach considers EPA's "ultimate reasons" or "ultimate justifications" for EPA taking the "locally or regionally applicable action" at issue, looking to whether those "ultimate reasons" or "ultimate justifications" are of a "nationwide" "scope or effect." Br. For State Pet'rs at 40–41, *Oklahoma*, Nos.23-1067, 23-1068 (U.S. Dec. 13, 2024) (quoting 42 U.S.C. § 7607(b)(1)). Industry Petitioners' approach, by comparison, looks to the "locally or regionally applicable" action itself, asking whether EPA took that action based on its determination that *the action* has "a nationwide scope or effect." Industry Br.47–48 (quoting *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455).

Oklahoma's SIP, respectively—and (2) once the proper action is identified, no valid scope or effect finding by EPA would be possible on the specific facts here. Industry Br.46–54; *supra* p.14. Because EPA never contends with these arguments, *see generally* Resp.Br.31–41, if this Court agrees with Industry Petitioners that Section 307(b)(1)'s third sentence focuses on the relevant statutory "action," the Tenth Circuit is the appropriate venue.

EPA's interpretation of Section 307(b)(1)'s third sentence is hard to cobble together from its Brief, but Industry Petitioners' best attempt at understanding EPA's view is as follows: Section 307(b)(1)'s third sentence applies "when EPA's final action sets out as *a core justification* a principle or conclusion that is intended to govern the agency's decisionmaking in actions throughout the country, or when *a central rationale* for EPA's final action has legal consequences for entities beyond a single judicial circuit," Resp.Br.32 (emphases added), but this rationale only applies if it resolves "an unsettled issue," not if it "merely applies a previously established agency rule, policy, or interpretation to new locally or regionally applicable circumstances," Resp.Br.46 (citations omitted).

EPA's interpretation attempts to add multiple elements to Section 307(b)(1) that have no basis in the statutory text. Nothing in the text instructs litigants deciding where to file their petitions to figure out EPA's multiple "core justification[s]," Resp.Br.32, for

taking the action at issue. Similarly, the statutory text does not support a court inquiring into EPA's various "central rationale[s]," Resp.Br.32, for its action. While EPA attempts to rest these elements on the phrase "based on" in Section 307(b)(1), EPA claims only that this term means a "but-for causal relationship" or a "necessary logical condition." Resp.Br.31 (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007)). Identifying something as a "but-for" cause does not mean that it is a "core" or "central" cause. Resp.Br.32. Nor are there any textual grounds for EPA's position that only actions resolving an "unsettled issue," Resp.Br.46, fall within the scope of Section 307(b)(1)'s third sentence, *see generally* 42 U.S.C. § 7607(b)(1). EPA attempts to justify the "unsettled issue" element by pointing to the term "determination," which EPA defines as "the settling and ending of a controversy, esp. by judicial decision," Resp.Br.46 (citation omitted). But that definition covers both disputes over unsettled principles and the application of settled rules to new factual circumstances. And, as explained above, an action can be regional even if it involves two States in neighboring Circuits. *See supra* pp.8–9.

EPA's approach here is also unadministrable, violating EPA's own observation that venue rules should "allow[ ] courts and litigants to quickly and efficiently determine where venue lies," *contra* Resp.Br.26, which is a goal of venue provisions, *see Mercantile Nat'l Bank*, 371 U.S. at 558; *Hertz Corp.*, 559 U.S. at 94 (citation omitted). Under EPA's

approach, a "locally or regionally applicable" action falls within Section 307(b)(1)'s third sentence as long as "*a* core justification" or "*a* central rationale" for that action covers more than one Circuit in its scope or effect. Resp.Br.32 (emphases added). That justification or rationale need only be "one but-for cause," but at the same time somehow "central" or "core." Resp.Br.31–32 (citations omitted). EPA offers no guidance for how a prospective petitioner or court is to determine whether any given justification or rationale satisfies its convoluted test, but instead just reiterates that the justification or rationale must "lie at the core of the agency action and cannot be merely peripheral or extraneous." Resp.Br.32 (citation omitted). In any event, it appears that such a standard could well be satisfied in every case, as the Administrative Procedure Act requires EPA to apply uniform and consistent methodologies in actions involving similarly situated entities. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *West Virginia v. EPA*, 90 F.4th 323, 329–30 (4th Cir. 2024).

EPA's own Brief inadvertently illustrates the problems with its proposed approach. EPA claims that it has satisfied its test for Section 307(b)(1)'s third sentence because its rulemaking was "based on *at least four* determinations of nationwide scope or effect": EPA's reliance on "updated, 2016-based modeling"; its application of "a 1% contribution threshold across all States"; its rejection of a State's reliance on "relative [emissions] contributions of other

States or countries"; and its rejection of a linked State's reliance "on emission-reduction measures that are not actually incorporated into its state plan." Resp.Br.34–36 (emphasis added; citations omitted). Of course, EPA failed to identify several of these "determinations" in its Federal Register notice, and so cannot now rely on them to justify its approach. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). But, in any event, it is not clear how a litigant or court would decide whether these four determinations are sufficiently "core," rather than "peripheral or extraneous," to EPA's reasoning, Resp.Br.32 (citation omitted)—especially given that venue is a "preliminary question" that should be decided before merits briefing has commenced, *Mercantile Nat'l Bank*, 371 U.S. at 558. Are only two of the four determinations sufficient? *See* Resp.Br.38 n.7 ("[T]he four specified nationwide determinations *taken together* . . . were a but-for cause of EPA's decision[.]" (emphasis added)). And should it not be relevant that the four considerations do not all apply to all 21 SIP disapprovals? *See* Resp.Br.35 (discussing third consideration and citing 88 Fed. Reg. at 9,378, where EPA addressed SIP submissions from only 11 States); Resp.Br.35 (discussing fourth consideration, which is relevant only to "many States"). And so on.

EPA's reference to the Sixth Circuit's vacatur of EPA's disapproval of Kentucky's SIP highlights these same problems—and more. Resp.Br.37–38. EPA argues that the Sixth Circuit's vacatur of EPA's disapproval of Kentucky's SIP in *Kentucky*, 123 F.4th

447, "logically implies that the challenged disapproval action is 'based on' the nationwide determinations" for purposes of Section 307(b)(1)'s third sentence because "judicial invalidation of the relevant determinations provided a sufficient basis for finding the final action itself [unlawful]." Resp.Br.37–38. So, under EPA's test, a "rationale" or "justification" for the action at issue may be "central" or "core" if a court would vacate the action after concluding that the rationale or justification was defective. *See* Resp.Br.38. That further muddles the venue analysis. Perhaps EPA believes that the court considering the venue question would need to conduct a hypothetical severability analysis, asking whether the "determination," if it was ultimately held invalid, would be severable from the rest of the action and whether "the regulation would not have been passed but for its inclusion." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988); *see also Carlson v. Postal Regul. Comm'n*, 938 F.3d 337, 351–52 (D.C. Cir. 2019); 5 U.S.C. § 551(13). Or perhaps EPA means that the court would need to conduct a hypothetical analysis under the D.C. Circuit's two-factor test in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993), asking how "serious[ ]" the agency's error *would be* if the determination was invalidated, and how "the disruptive consequences" of any vacatur would be based on that hypothetical error, *id.* at 150–51. EPA does not provide any answer to these questions. *See* Resp.Br.37–38.

Industry Petitioners' test, in contrast, is easy to apply. A prospective petitioner or court must only consider whether EPA took the "otherwise locally or regionally applicable action" at issue because the agency validly determined that the action itself has a "nationwide scope or effect." *Am. Rd. & Transp. Builders Ass'n*, 705 F.3d at 455. Determining whether the "action" at issue has a nationwide scope or effect will also usually be straightforward. Industry Br.48. An action has "nationwide scope," 42 U.S.C. § 7607(b)(1), if it extends across the Nation, not just a single State or region. And an action has a "nationwide . . . effect," *id.*, if the action has consequences for States across the country, not just locally or within a region, Industry Br.48. None of the four alleged determinations that EPA identifies as "core" to its reasoning here has any relevance to the analysis under Section 307(b)(1)'s third sentence, as all of them relate to the process that EPA used to reach its decisions, not to the scope or effect of either of the two SIP disapprovals themselves. *Compare* Resp.34–36, *with* Industry Br.46–49.

EPA's claim that Petitioners' positions render Section 307(b)(1)'s third sentence "meaningless," Resp.Br.41–42, is also wrong. In the SIP disapproval context, for example, EPA's disapproval of one State's SIP will always be a "locally or regionally applicable" action under Section 307(b)(1)'s second sentence. *See supra* Part I. Because the statute specifically identifies EPA's actions on a SIP as locally or regionally applicable, even if no SIP qualified for the

exception, that sentence would still have meaning for other types of actions. But, in rare exceptions, such as if EPA makes a "determination" that it is issuing a SIP disapproval because a particular State's SIP significantly impacts States throughout the entire Nation, that determination may well be valid under Section 307(b)(1)'s third sentence. This could occur, for example, if a State's downwind pollution problems were so widespread that they significantly impacted receptors across the Nation. Similar examples would arise in other areas of EPA's authority under the CAA, refuting EPA's surplusage concerns.

It is EPA's approach to Section 307(b)(1)'s third sentence that creates surplusage by rendering Section 307(b)(1)'s second sentence a nullity whenever EPA wants it to be. Industry Br.55. After all, EPA could fit virtually every "locally or regionally applicable" action into its view of Section 307(b)(1)'s third sentence because EPA applies policies that are consistent nationwide for every action. Industry Br.55 (citing *West Virginia*, 90 F.4th at 329–30). Indeed, failure to act consistently across States would suggest an arbitrariness to EPA's actions that would itself be unlawful. *See supra* p.18.

None of the three purported "limitations" that EPA points to refute this surplusage concern. Resp.Br.46–49. First, EPA claims that its "determinations" would be subject to "arbitrary-and-capricious review," Resp.Br.46, but it is unclear how a court would decide if EPA arbitrarily applied its test

given the indeterminacy of deciding whether, for example, a "rationale" or "justification" for EPA's action is sufficiently "central" or "core," for purposes of Section 307(b)(1)'s third sentence, *see supra* pp.18–20.[2] Second, EPA's "suggest[ion]" that only actions that resolve "an unsettled issue" fall within Section 307(b)(1)'s third sentence does not provide a meaningful limit either, as EPA offers no guidance for deciding what is a "settl[ed]" issue or when it is clear that an issue is "settl[ed]," such that courts and parties know at the outset the proper venue for a given challenge to an EPA action. Resp.Br.46 (citation omitted). To take just one example, when EPA approved Wyoming's SIP by using several of the same rationales found in the Federal Register notice disapproving 21 States' SIPs several months earlier, was EPA applying a "settl[ed]" interpretation from earlier that year? *See supra* pp.9–10. Finally, EPA's promise that it would not use its proposed test to shoehorn every "locally or regionally applicable" action into Section 307(b)(1)'s third sentence, Resp.Br.48, is no limitation at all, but rather is a tacit admission that EPA has offered no administrable test, *see supra* pp.18–20.

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[2] The Industry Petitioners believe that *de novo* review, rather than arbitrary-and-capricious review, applies to EPA's "determinations" under Section 307(b)(1)'s third sentence. *See Texas v. EPA*, 829 F.3d 405, 421 (5th Cir. 2016). Regardless, even *de novo* review would not offer a meaningful constraint on EPA's approach, given how vague EPA's proposed test is.

The statutory and legislative history surrounding Section 307(b)(1) cast no doubt on Industry Petitioners' approach. *Contra* Resp.Br.38–41, 42–43. As Industry Petitioners explained, Industry Br.36–37, a challenge to an action *related* to SIPs that comprises "uniform determinations of nationwide effect" without "involv[ing] facts or laws peculiar to any one jurisdiction"—such as a uniform extension of the States' "attainment deadlines" by EPA, Resp.Br.39–40 (citation omitted)—may well belong in the D.C. Circuit, including because such an action could well be "nationally applicable" under Section 307(b)(1)'s first sentence, Industry Br.36–37 (referencing the same statutory history as EPA).

Relatedly, EPA claims that this case is "illustrative" of Industry Petitioners' interpretation "lead[ing] to the very problems Congress sought to avoid in amending the CAA's venue provision to include the nationwide-scope-or-effect language," Resp.Br.48, but the opposite is true. The merits briefing in the multiple regional Circuits has involved substantial discussion of state- and region-specific reasons at issue in EPA's discrete, state-specific SIP disapprovals, of just the type that Industry Petitioners highlighted in their Opening Brief. Industry Br.51–54.[3] That reflects Congress' sensible

[3] *See, e.g.*, State Br. at 42–53, *West Virginia v. EPA*, No.23-1418, Dkt.80 (4th Cir. June 3, 2024); State Br. at 21–27, *Ky. Energy & Env't Cabinet v. EPA*, No.23-3225, Dkt.51-1 (6th Cir.

preference, expressed in Section 307(b)(1), for the regional Circuits to review "essentially locally, statewide, or regionally applicable rules or orders," such as actions on SIPs. H.R. Rep. No.95-294, at 323 (1977); Industry Br.10–12. That state-specific focus is usually not possible in a consolidated action before the D.C. Circuit, where parties must often brief with other parties and/or with limited word counts, *see* U.S. Court Of Appeals For The District Of Columbia Circuit, *Handbook Of Practice And Internal Procedures* IX.A.2, 7 (as amd. through Dec. 12, 2024), making thoroughly briefing state-specific issues impossible. Consolidated proceedings would be especially harmful for petitioners in cases like this, where EPA has grouped its actions on 21 different States' SIPs together in one Federal Register notice.

Finally, EPA argues that its approach to Section 307(b)(1)'s first sentence would avoid the inefficiencies and risks of Circuit splits arising from "litigating substantially similar challenges to [this rulemaking] in eight courts of appeals," rather than in the D.C. Circuit only. Resp.Br.48–49. Section 307(b)(1)'s second sentence protects regional Circuit review of States' SIPs, making some differences or contradictions between Circuit decisions inevitable because the Circuits are

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Jan. 29, 2024); EPA Br. at 143–194, *Arkansas v. EPA*, Nos.23-1320, 23-1719, 23-1776, Dkt.5335228 (8th Cir. Nov. 13, 2023); EPA Br. at 60–82, *Utah v. EPA*, Nos.23-9509, 23-9512, 23-9520, Dkt.010110940565 (10th Cir. Oct. 24, 2023).

considering state-specific facts, processes, and actions. And even if Circuit splits were to arise, that may well be beneficial for the development of the law. As the Federal Government recently explained at Oral Argument in separate proceedings, an agency litigating similar cases in Circuits across the country—even "eight different circuits"—"ensur[es] that cases can percolate among multiple courts before they get to this Court." Tr. of Oral Arg. at 30, *FDA v. R.J. Reynolds Vapor Co.*, No.23-1187 (U.S. Jan. 21, 2025); *see Box v. Planned Parenthood of Ind. & Ky., Inc.*, 587 U.S. 490, 496 (2019) (Thomas, J., concurring) (noting that "percolation" among the Circuits can "assist" this Court's "review of [ ] issue[s] of first impression").

CONCLUSION

This Court should reverse the judgment of the Tenth Circuit and remand with instructions to proceed to the merits of these petitions for review.

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