No. 23-1187

In the Supreme Court of the United States

FOOD AND DRUG ADMINISTRATION, ET AL.,
Petitioner,

v.

R.J. REYNOLDS VAPOR CO., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS[1]

Amicus Curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024); *Heritage Foundation v. Parker*, No. 21A249 (U.S. filed Dec. 18, 2021); and *Pleasant Grove v. Summum*, 555 U.S. 460 (2009); or for amici, *e.g.*, *Republican National Committee v. Genser*, No. 24A408 (U.S. filed Oct. 28, 2024); *Beals v. Virginia Coalition for Immigrant Rights,* No. 24A407 (U.S. filed Oct. 28, 2024); *FDA v. Wages,* No. 23-1038 (U.S. filed Mar. 19, 2024); *Trump v. United States*, 603 U.S. 593 (2024); *Fischer v. United States*, 144 S. Ct. 2176 (2024); addressing various constitutional and statutory issues, including those related to standing, government accountability, and federal jurisdiction.

SUMMARY OF ARGUMENT

Congress has chosen to create a generous venue statute through the Tobacco Control Act. The FDA's arguments against the scope of that statute are ultimately policy arguments to be addressed to

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae state that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus curiae, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

Congress. Federal law provides that if the FDA denies an application related to a tobacco product, any person adversely affected by the denial of such an application "may file a petition for judicial review of such regulation or denial with the United States Court of Appeals for the District of Columbia or for the circuit in which such person resides or has their principal place of business." 21 U.S.C. § 387*l*(a)(1). Congress thereby empowered parties, when seeking review, with a choice among circuit courts. Respondent exercised this choice by petitioning for review of a product denial in the Fifth Circuit.

The FDA attempts to evade this review by, on the one hand, trying to limit those who are "adversely affected" and, on the other hand, by trying to prohibit joinder. Both arguments are inconsistent not just with the statute's plain meaning, but also with the tools of interpretation and this Court's precedent in interpreting similar statutes.

The Tobacco Control Act's plain language permits a wide variety of parties, not just manufacturers, to challenge FDA decisions. The statute uses the phrase "any person adversely affected," a term that this Court has regularly emphasized should be interpreted generously and expansively. Retailers are undoubtedly affected by a marketing denial order that prevents them from selling a product. Nothing in the Tobacco Control Act limits those who may sue based on a denial order only to the "applicants" for approval, or only to those who manufacture the product. There are two key flaws with the FDA's argument for

limiting those who can seek review under the Tobacco Control Act.

First, this Court has made clear that the standard to show that a party is adversely affected is not especially demanding, erring on the side of recognizing standing, and there need be no specific indication of congressional purpose to benefit the would-be plaintiff. The zone-of-interests test for judicial review must be interpreted generously, with the benefit of the doubt given to plaintiffs. The FDA has argued that this generous standard only applies in Administrative Procedure Act ("APA") cases, but this Court has taken the opposite position and regularly applied this principle to all kinds of statutes. That presumption is crucial, whether a case is being reviewed specifically through the APA or not. If Congress gives a cause of action to anyone adversely affected, it does so knowing that this language means what it says and that, like the APA, such language will apply broadly. Congress chose to allow any one adversely affected to sue.

Second, Congress deliberately chose broad language in this portion of the Tobacco Control Act, knowing full well how to use language that would limit judicial review when desired. In this provision of the Tobacco Control Act, in 21 U.S.C. § 387*l*(a)(1), Congress used the terminology "any person adversely affected." That broad and generous language, giving rights to many parties, compares sharply with language used elsewhere in the Tobacco Control Act that only the "holder of an application" may obtain review of a withdrawal order "in accordance with" the statute. *Id.* § 387*j*(d)(2). Congress knew exactly how to

limit the right to obtain review of an FDA decision to just the holder or maker of an application and did so, for example, for the withdrawal of an application. But Congress chose more expansive language, with no such limitation, for the review of product denials.

The FDA also argues that the Tobacco Control Act does not allow joint petitions when at least one petitioner "resides or has their principal place of business" in the circuit where the petition is filed. This argument fails as well. Congress adopted terminology in the Tobacco Control Act's venue provision against a backdrop in which courts have uniformly construed similar language in venue provisions—including the general federal venue provision—to allow multi-party actions so long as at least one party satisfies venue. It is well-established that it is not, in fact, necessary to look at the standing of each joined party, and if one party has standing, that alone suffices. *See infra* Section I(B).

Venue against the federal government is regularly and ordinarily proper where any party resides. Congress enacted the Tobacco Control Act against this backdrop. There is thus no reason to think that Congress intended each and every petitioner to have to establish venue individually under the Tobacco Control Act. If Congress had wanted to create such an onerous requirement, and to deviate from the established rule, it would have so specified.

Finally, the FDA's argument is fundamentally a policy argument against what it views to be forum shopping and the so-called gamesmanship of litigants being able to litigate their cases in multiple circuits. But when Congress does authorize the use of a chosen

forum, there should be no presumption against following Congress's dictates. If Congress chooses to enact a statute that permits petitioners to have certain choices in the courts they select, then Congress has thereby made the relevant policy choice. Congress has the ability to define the venue for federal actions and may well give litigants these options to ensure that one circuit does not decide federal questions for the nation.

ARGUMENT

I. THE TOBACCO CONTROL ACT'S PLAIN MEANING IS THAT ANY PERSON ADVERSELY AFFECTED BY A REGULATION OR DENIAL MAY CHALLENGE THAT DECISION IN HIS OR HER HOME CIRCUIT; THAT MEANING IS NOT CHANGED BY JOINDER.

This case presents a straightforward question of venue. Federal law, the Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, Div. A, 123 Stat. 1776 ("Tobacco Control Act"), provides that if the FDA denies an application related to a tobacco product, "any person adversely affected by such regulation or denial may file a petition for judicial review of such regulation or denial with the United States Court of Appeals for the District of Columbia or for the circuit in which such person resides or has their principal place of business." 21 U.S.C. § 387*l*(a)(1). The statute's meaning is plain; any person that has been adversely affected by the denial of a product authorization can bring a challenge to that denial, *inter alia*, in that person's home circuit.

Here, the FDA denied authorization for a product and several affected entities joined together, including retailers of the product domiciled in the Fifth Circuit, to file a petition for review in the United States Court of Appeals for the Fifth Circuit. Entirely consistent with the statute's plain language, these retailers, adversely affected by an FDA order, petitioned for review of that order in their home circuit. The relevant venue provision, 21 U.S.C. § 387*l*(a)(1), accordingly gives the Fifth Circuit authority to review that order.

The FDA proffers two novel theories to try to evade this review. First, the FDA attempts to limit petitions for review only those who *manufacture* tobacco products, despite Congress's omission of any such limitation in the statute. Second, the FDA argues that even if *retailers* of products may properly bring cases in their home circuits, no party from *outside that circuit* can *join* in an otherwise properly brought petition, despite the fact that the other statutes allowing suit against the federal government are universally understood to allow for such joinder. Both of the FDA's novel arguments disregard the statute's clear language and the principles of statutory interpretation.

A. The Tobacco Control Act Expressly Does Not Limit Its Relief to Manufacturers.

Two parties, Avail Vapor Texas, LLC; and the Mississippi Petroleum Marketers and Convenience Stores Association, both headquartered in the Fifth Circuit, joined respondent Reynolds' Fifth Circuit petition regarding its e-cigarette product. Both

entities are retailers that sell the product. These two entities, as residents of the Fifth Circuit, undoubtedly had the ability to bring a case in the Fifth Circuit, if they have standing to challenge the FDA's decision. As retailers of this product, they are "adversely affected by" the denial of marketing authorization for products they wish to sell. 21 U.S.C. § 387*l*(a)(1).

Nonetheless, the FDA seeks to deny these retailers' ability to file a petition for review. But no relevant limitation exists in the statute. Under the Tobacco Control Act, "any person adversely affected" may seek judicial review of an FDA order denying an application for marketing authorization. *Id.* A retailer that is forbidden from selling a product that the retailer otherwise would sell is undoubtedly affected, and affected adversely, by the FDA's order. The plain text of the Tobacco Control Act's judicial-review provision leaves no alternative.

As a matter of common sense and ordinary meaning, a retailer of a product is adversely affected by an order that that product may not be sold. Nothing in the Tobacco Control Act limits those who may sue based on a denial order to only manufacturers or applicants. Congress used limiting language elsewhere, but here, Congress chose broader, all-encompassing terminology, expressly granting anyone who has been adversely affected by the FDA's decision the ability to challenge the order. Subject, of course, to the limits of Article III, Congress may *and has* chosen to specify that *all* persons (so long as they are adversely affected by the FDA's order) are entitled to bring legal challenges to those orders. Accordingly, these retailers clearly fall within the category of "*any* person."

The FDA argues at length why retailers and manufacturers are closely aligned and why the manufacturers are the primary participants in the administrative process. To the extent this is accurate, it is irrelevant; Congress imposed no "unaligned" requirement to seek review. The FDA also raises a parade of supposed horribles; it expresses concern about "judicial review at the behest of a retailer that has never sold the product but would like to do so once the product is authorized," among other hypotheticals. Pet. Br. 17. But that is no different than the case of someone who would like to picket but does not for fear of arrest. *Steffel v. Thompson*, 415 U.S. 452 (1974). "[W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat." *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128-29 (2007). A thwarted desire to act suffices under Article III and is not a "horrible." Congress has made the explicit policy choice to give anyone adversely affected by an FDA order the right to petition for relief therefrom.

1. The "Adversely Affected" Standard is Not More Onerous under the Tobacco Control Act.

The FDA responds to the straightforward statutory language by relying on this Court's emphasis that "[t]he terms 'adversely affected' and 'aggrieved,' alone or in combination, have a long history in federal administrative law." *Dir. v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995). This Court has held many times that a

plaintiff is adversely affected if his or her interests "fall within the zone of interests protected by the law invoked." *Lexmark International, Inc.* v. *Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). In other words, to be adversely affected a plaintiff must show that his injury is within the "'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

That precedent is certainly relevant here. But this "zone of interests" is an additional overlay in administrative cases on top of the *already-existing requirements* for Article III standing. In other words, it is a "prudential standing test." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). This Court has made clear that this prudential requirement is not "especially demanding[]" and "there need be no indication of congressional purpose to benefit the would-be plaintiff." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399-400 (1987). The right to review is only denied "if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* at 399. In short, when reviewing zones of interest, "the benefit of any doubt goes to the plaintiff." *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225.

This standard favors those who are challenging government action. This Court has emphasized the need to apply this test in the context of "Congress' evident intent to make agency action presumptively

reviewable." *Clarke*, 479 U.S. at 399. This Court has "often 'conspicuously included the word "arguably" in the test to indicate that the benefit of any doubt goes to the plaintiff[.]'" *Lexmark Int'l, Inc.*, 572 U.S. at 130 (quoting *Match-E-Be-Nash-She-Wish*, 567 U.S. at 225).

The FDA relies on and invokes the zone-of-interests test, but simultaneously seeks to avoid this Court's repeated recognition that the test is not difficult and there is a presumption in favor of the plaintiff's access to court. The FDA is right that the Tobacco Control Act brings in language about the zones of interest from the APA and other statutes. But by doing so, it therefore also includes this Court's regular emphasis that the zone of interest test is easy to satisfy.

The FDA tries to have its cake and eat it too, arguing for the application of a zone-of-interest test here but one that lacks the generosity of this Court's traditional "adversely affected" standard. This zone-of-interest test would provide all the benefits to the government of the traditional test but none of the boons for the plaintiff. Instead, this Court has consistently clearly "recognized the presumption in favor of judicial review of agency action." *Clarke*, 479 U.S. at 399. That presumption is crucial, whether a case is being reviewed specifically through the APA or not. It is of course true that "what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (quoting *Clarke*, 479 U.S. at 400, n.16). But when Congress creates similar generous review

provisions, they likewise should be reviewed against the background and precedent of the APA. This Court has never suggested that broad language for review in other statutes, echoing the APA, should be interpreted more narrowly than the APA itself.

On the contrary, such a circumstance requires the application of the principle that "Congress legislates against the background of our prudential standing doctrine." *Bennett*, 520 U.S. at 163. That background is the source of the presumption in favor of judicial review of agency decisions; Congress is presumed to know that the zone-of-interest test is generous, allowing anyone to sue that has been arguably affected by the administrative action. If Congress gives a right of action to anyone adversely affected, it does so knowing that this language means what it says.

The FDA makes a fatal error in its brief, contending that in "non-APA cases, a court should generally ask whether the interest asserted by the plaintiff actually (rather than just arguably) falls within the zone protected by the statute." Pet. Br. 13. No version of this statement appears in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), which the FDA cites for its claim; in fact, the word "actually" never even appears in that decision. On the contrary, this Court has never changed the standard in such a way; the zone-of-interest test *always* asks whether the interest arguably falls within the statute's protection. *Bank of Am. Corp. v. City of Miami,* 581 U.S. 189, 197 (2017) (holding that City's claimed injury was "arguably" within the zone of interests protected by the FHA); *Bennett*, 520 U.S. at 176 (holding that plaintiff's claimed interest was

"arguably" within the zone of interests protected by the Endangered Species Act); *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 151 (1970) (holding that "the test as to the plaintiffs' interest was satisfied, since 4 of the Bank Service Corporation Act of 1962, providing that no bank service corporation may engage in any activity other than the performance of bank services for banks, *arguably* brought a competitor within the zone of interest protected by it.") (emphasis added). The FDA's claim, in other words, that in non-APA cases the "arguably" standard does not apply is clearly wrong. A long line of precedent from this Court has taken the opposite position and applied the "arguably" standard to all manner of non-APA cases.

That basic presumption in favor of a right to challenge administrative actions applies to all manner of administrative cases, APA or not, and it certainly applies here. Retailers who would otherwise sell products cannot do so because of the FDA's conduct, having their business threatened. The statute does not limit standing to applicants, a limitation that Congress certainly could have included if it wished. Instead, Congress allowed any one adversely affected to sue. And "[i]f a manufacturer lack authorization to sell a product, retailers cannot lawfully obtain and resell it." Pet. Br. 14. Those retailers are thus adversely affected.

2. The Tobacco Control Act's Broad Authorization is Evidenced by Its Narrower Language for Other Remedies.

Congress intentionally chose language in 21 U.S.C. § 387*l*(a)(1), "any person adversely affected," that necessarily adopted a broad and generous meaning giving rights to many parties. This is evidenced by contrasting its language with that of another provision in the Tobacco Control Act. Another section empowers the FDA to withdraw a grant of marketing authorization in some circumstances—for instance, if it finds that "the continued marketing of [the] tobacco product no longer is appropriate for the protection of the public health." 21 U.S.C. § 387*j*(d)(1)(A). The Tobacco Control Act provides that only the "holder of an application" may obtain review of such a withdrawal order. *Id.* § 387*j*(d)(2). In other words, Congress knows exactly how to limit the right to obtain review of an FDA decision to just the holder or maker of an application and did just that concerning the withdrawal of an application. It created no such limitation for challenging product denials.

The FDA's position is that when Congress used in its statute "any person adversely affected," it meant the exact same thing as the term "holder of an application" used elsewhere in the same statute. Such a reading simply makes no linguistic sense and conflicts with basic principles of statutory interpretation. The Fifth Circuit rightly contrasted the provision at issue here—under which an "adversely affected" person may challenge a denial

order, 21 U.S.C. § 387*l*(a)(1)—with the provision under which the "holder of an application" may challenge a withdrawal order, 21 U.S.C. § 387*j*(d)(2). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *R.J. Reynolds Vapor Co. v. FDA*, 2024 U.S. App. LEXIS 10992, *6 (5th Cir. 2024) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

"[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 170 (2012); *see Nken v. Holder*, 556 U.S. 418, 430 (2009). Different words mean different things and "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46:06, p. 194 (6th rev. ed. 2000)).

That basic principle is evidenced here: Congress chose carefully to use different language for two separate routes to challenge the FDA's decisions.

> Congress did not limit access to the courts for those challenging a *denial* order in the same way it did for those challenging a *withdrawal* order. If the FDA disagrees with Congress's policy choice in so drafting the Tobacco Control

> Act, its concerns are better directed to Congress than to this court.

R.J. Reynolds Vapor Co. v. FDA, 2024 U.S. App. LEXIS 10992, *6-7.

Congress has made a careful policy judgment, limiting the availability of a remedy in some contexts but not others. It chose language that would not limit those who can challenge Tobacco Control Act decisions to applicants. Instead, operating from a principle that the people should be able to seek accountability for the actions of government officials, it has allowed all those who have been adversely affected to challenge an order. The FDA's dispute with that judgment is one of policy, and that policy dispute does not change the statute's meaning.

B. **If One Party Has Standing Under the Tobacco Control Act, then Other Parties Can Properly Join that Party's Petition.**

It is well-established that if one participant in an action has standing, that will suffice to establish a Court's jurisdiction. Venue must be proper for just one party in multi-party cases challenging government action. The FDA tries to avoid this principle to argue that, even if one party in a case can properly bring a case in his or her home circuit, other parties may not join that proceeding. But Congress enacted the Tobacco Control Act's venue provision in light of similar venue provisions, which have all been regularly interpreted to mean that venue needs to be proper for only one petitioner or plaintiff to bring action against the federal government in a particular

venue.

Under the statute, a group of petitioners may file a petition for review in a circuit so long as "*a* petitioner" resides or maintains its principal place of business within that circuit. *R.J. Reynolds Vapor Co.* v. *FDA*, 65 F.4th 182, 188 (5th Cir. 2023) (emphasis added). Because the retailers have standing, their petition can be brought in the Fifth Circuit. The parties from Texas and Mississippi undisputedly meet the requirement that the petition be brought by a person who "resides or has their principal place of business" in the circuit where the petition was filed. 21 U.S.C. § 387*l*(a)(1). Reynolds' participation in the case does not somehow change or defeat that fact. The FDA, by contrast, would import into the Tobacco Control Act a requirement that *every* petitioner that joins in the petition reside in the same circuit for the statute to apply. Such a statutory change, if desirable, would be the responsibility of Congress, not the FDA.

Congress does not legislate in a vacuum. When Congress utilizes pre-existing terms and provisions, "[i]t is a commonplace of statutory interpretation that 'Congress legislates against the backdrop of existing law.'" *Parker Drilling Mgmt. Servs. v. Newton*, 587 U.S. 601, 611 (2013) (quoting *McQuiggin v. Perkins*, 569 U.S. 383, 398, n.3 (2013)); *see Cannon v. Univ. of Chi.*, 441 U.S. 677, 696 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

The FDA's claim that "courts must evaluate venue party by party, and venue must be proper as to each party," Pet. Br. 27, is flatly contradicted by precedent. Congress adopted language in the Tobacco Control Act's venue provision against a backdrop in which

courts had for decades uniformly construed similar language in venue provisions to allow multi-party actions so long as at least one party satisfies venue.

One statute for federal venue of review of agency decisions is 28 U.S.C. § 2343. That statute, enacted in 1966, provides that venue "is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit." The FDA ignores this statute and the cases construing it. But those cases all hold this language to mean that, if any one petitioner resides or has its principal place of business within the relevant circuit, venue is proper for all petitioners. *Atchison, T. & S. F. Ry. Co. v. United States*, 549 F.2d 1186, 1187 n.1 (8th Cir. 1977) ("Venue is proper in this court in that *several* of the petitioning railroads have their principal offices in this circuit.") (emphasis added); *Global Van Lines, Inc. v. ICC*, 691 F.2d 773, 774 n.1 (5th Cir. 1982) ("Because *one of the petitioners* is a corporation organized and existing under the laws of the state of Texas, venue is properly in this court.") (emphasis added); *Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin.*, 656 F.3d 580, 585 (7th Cir. 2011).

But more strikingly, the general venue statute authorizes suits against the federal government "in any judicial district in which . . . the plaintiff resides." 28 U.S.C. § 1391(e)(1)(C). That statute, enacted in 1962, has been uniformly understood to allow multi-party actions to be brought in any home venue. In *Sidney Coal Co. v. Soc. Sec. Admin.*, 427 F.3d 336, 344–45 (6th Cir. 2005), the court emphasized this point at length; "[e]ach court faced with the same issue has interpreted 'the plaintiff' to mean 'any

plaintiff,' finding that Congress intended to broaden the number of districts in which suits could be brought against government entities." *Id.* The court there went so far as to conclude that the broad interpretation "is not only the majority view -- it is the only view adopted by the federal courts since 1971." *Id.* at 345 (citation omitted) (see cases cited therein).

Likewise, *Exxon Corp. v. FTC*, 588 F.2d 895, 898-99 (3d Cir. 1978), emphasized this principle: an obligation that each "plaintiff in an action against the federal government or an agent thereof to independently meet section 1391(e)'s standards would result in an unnecessary multiplicity of litigation. The language of the statute itself mandates no such narrow construction. There is no requirement that all plaintiffs reside in the forum district." *Id.* (citing *Kenyatta v. Kelley*, 430 F. Supp. 1328, 1330 n.7 (E.D.Pa. 1977); *Candarini v. Attorney General*, 369 F. Supp. 1132, 1135 (E.D.N.Y. 1974)).

Moreover, the FDA concedes that joinder in a complaint is an analogous situation to joinder in a petition. Pet. Br. 29 ("The Federal Rules of Civil Procedure similarly allow multiple plaintiffs to join in one complaint. See Fed. R. Civ. P. 20(a)(1)."). The FDA misses, however, the crucial import of that comparison. It is also well recognized that one plaintiff alone may be sufficient to establish standing, and when at least one plaintiff has demonstrated standing, the court need not consider whether the other plaintiffs also have standing. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement."); *Village of Arlington Heights v. Metro.*

Hous. Dev. Corp., 429 U.S. 252, 264 (1977) ("Because of the presence of this plaintiff, we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit."); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1280 (11th Cir. 2008) ("Because one plaintiff has standing, we need not consider whether the other plaintiffs had sufficient contact with the offensive practice to establish standing."). In other words, it is well-established that it is not, in fact, necessary to look at the standing of *each* joined party, and if *one* party has standing, that alone suffices.

The Tobacco Control Act was enacted in 2009 with this long history of allowing joinder as its foundation. Congress enacted the statute in the light of how multiparty litigation functions. "Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result?" *Reiche v. Smythe*, 80 U.S. 162, 165 (1871); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012).

Congress enacted the Tobacco Control Act in a context where venue against the federal government is regularly and ordinarily proper where any party resides. There is no indication that Congress intended for each and every petitioner to have to establish venue individually under the Tobacco Control Act. Such a reading would render the Tobacco Control Act a radically different statute, with a radically different venue provision, then the other statutes that provide for the challenge of government agency action. Such a

radical, unanticipated revision without explanation is an interpretation fundamentally inconsistent with how this Court interprets statutes. That is not how Congress enacts new laws.

Under such an interpretation, different petitioners would have to file separate lawsuits in different courts challenging the same agency action and the FDA's argument would create a tremendous amount of work for itself (and the courts), requiring multi-circuit litigation of the same issues by prohibiting parties from joining together in the same petitions, regardless of the fact that other administrative petitions can engage in precisely the same joinder. The FDA's proposed reading would create costly and duplicative litigation and burden all parties with unnecessary costs, costs that could eventually become even more wasteful if cases are ultimately consolidated in one circuit anyway.

Federal courts have long allowed other petitioners to join properly venued petitioners in bringing administrative challenges, and there is simply no reason to read this statute differently. Against this backdrop, the FDA bears a heavy burden to show that Congress intended to redefine venue under the Tobacco Control Act in a way radically inconsistent with all other methods for challenging government decisions. It has identified no such evidence.

II. CONGRESS HAS AUTHORITY TO DEFINE THE JURISDICTION OF THE FEDERAL COURTS AND RESPECTING THAT AUTHORITY DOES NOT CONSTITUTE FORUM SHOPPING.

The central tenor of the FDA's argument is an

argument from policy, warning against the dangers of forum shopping and the supposed gamesmanship of litigants being able to litigate their cases in multiple circuits. It cites this Court's statements that this Court has resisted reading venue statutes in a way that would, in practice, "give the plaintiff an unrestrained choice of venues." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 187 n.23 (1979). The Court has likewise avoided interpretations that would "encourage gamesmanship" or "'create or multiply opportunities for forum shopping.'" *Atlantic Marine Construction Co.* v. *United States District Court*, 571 U.S. 49, 65 (2013) (quoting *Ferens v. John Deere Co.*, 494 U.S. 516, 523 (1990)).

The FDA's policy argument misses the crucial point of this Court's warning against interpretations that "create" or "multiply" forum shopping. This Court is appropriately cautious of creating new opportunities for choosing a forum that Congress does not authorize. But when Congress *does* authorize the use of a chosen forum, there is no presumption against following Congress's dictates. If Congress passes a statute that does allow petitioners to have certain choices in the courts they select, then no policy considerations would justify interfering with Congress's authority. "[U]nchecked forum shopping" and various other attendant slurs are not appropriate, if Congress's statute gives litigants the option of choosing the court. And allowing litigants to go to multiple circuits by no means would result in a "self-defeating statute." *Pugin* v. *Garland*, 599 U.S. 600, 607 (2023) (citation omitted), if those options among circuits are what Congress chose to give to parties.

On the contrary, Congress has the ability to, and does, give parties options among the federal circuits and may "spread[] out the work of reviewing denial orders across all the regional circuits." Pet. Br. 35. In fact, here, regardless of which interpretation is chosen, litigants have been given options; under any option they can choose the D.C. Circuit or their own home court. The FDA expresses concern about cases that have "flocked" to the Fifth Circuit, but all parties agree that the statute allows litigants to choose the D.C. Circuit; cases could just as easily flock there. Congress did not set up a system where parties could only appeal within their own regional circuits but chose expressly to allow parties to have at least some choice in their forum. That choice is nothing to be feared when it is the choice Congress authorized.

The edifice of standing and judicial restraint originates in James Madison's warning that the power given to federal courts should "be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to" the federal judiciary. James Madison, *Notes of Debates in the Federal Convention of 1787* 539 (Ohio Univ. Press 1985). But the determination of what cases are of a judiciary nature, or in the Constitution's language, a suit within Article III of the Constitution, is wholly distinct from the question of *which* court should hear a given case. That latter decision belongs to Congress.

Congress possesses broad authority to determine which court shall hear a given case. As Justice Cooley emphasized, "[t]he power to distribute the judicial power, except so far as it has been done by the constitution, rests with the legislature[.]" Thomas M.

Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 108 n.4 (5th Ed. 1883).

Judicial restraint does not mean refusing to allow a day in a particular federal court to those who have been given that day by Congress. So called forum shopping is no evil if Congress authorizes it. Congress can and does authorize litigants to choose practically any court; some federal statutes, for example, authorize suit in "any United States district court," 15 U.S.C. § 1640(e), or by stipulation to "any United States Court of Appeals," 26 U.S.C. § 7482(b)(2).

Another useful example of Congress's willingness to provide multiple avenues to litigants is the aptly named All Circuit Review Act, a statute for the review of agency employment decisions. 5 U.S.C. § 7703(b)(1)(B). Congress created § 7703(b)(1)(B) to allow whistleblower cases—in contrast to ordinary appeals by federal employees which may be filed only in the Federal Circuit—to be filed in any "court of appeals of competent jurisdiction," as long as the petitioning party raises no challenges to the MSPB's decision other than an argument based on whistleblower activity. *Id.* The All Circuit Review Act was first enacted in 2012 "due to displeasure with how the Federal Circuit handled whistleblower cases." *Flynn v. United States SEC*, 877 F.3d 200, 203 (4th Cir. 2017); S. Rep. No. 112-155, at 1-2 (2012) ("Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit.").

Congress specifically chose to enable litigants to choose their forums, based on a conclusion that "the

Federal Circuit has often times misinterpreted Congressional intent when it comes to whistleblowers." H.R. Rep. No. 112-508, at 6 (2012). Section 7703(B)(1)(b) was originally enacted as a temporary right of petition set to expire after a brief trial period. In 2018, however, because of an ongoing desire to give litigants options among circuits Congress made Section 7703(B)(1)(b) permanent. All Circuit Review Act of 2018, Pub. L. No. 115-195, § 2(a), (b), 132 Stat. 1510. It did so with the explicit intent to eliminate "the Federal Circuit's monopoly on whistleblower cases" and to accordingly "make[] it possible for more courts to hear these important issues and for the Supreme Court to consider provisions of the [Whistleblower Protection Act] in the event of a circuit split." H.R. Rep. No. 115-337, at 4 (2017). In other words, Congress made a policy judgment to enable litigants to choose their forum. The House Committee Report emphasized that "Congress has repeatedly criticized both the MSPB and the Federal Circuit's interpretation of [] whistleblower protections" and has reversed MSPB and Federal Circuit actions by legislative amendments to the Whistleblower Protection Act. *Id.* Accordingly, the All Circuit Review Act, which provides the broadest possible right to go to any court of competent jurisdiction, was specifically created by Congress to allow "forum shopping," and interpreting it otherwise would be a rejection of congressional intent.

Likewise here, the FDA assumes that seeking favorable circuit precedent constitutes "forum shopping" that should be prevented. But joining a lawsuit in a venue with a properly venued petitioner

is not impermissible; rather, that is how the statute is designed to function. Congress may, if it chooses, give litigants multiple options to pursue legal challenges to agency decisions. Those options may well even enable what could be called forum shopping, if Congress wishes to enable litigants to select their reviewing court rather than being directed to only one option. If Congress chooses to do so, then no policy considerations should interfere with Congress's authority. Congress alone has the constitutional authority to define the venue of the federal courts.

CONCLUSION

For these reasons, amicus curiae respectfully urges this Court to affirm the Fifth Circuit's decision.

Respectfully submitted,

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