No. 23-1229

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CALUMET SHREVEPORT REFINING, L.L.C., ET AL.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Miscellaneous: Page

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The Fifth Circuit held that venue in that court was proper for challenges to two agency actions in which the Environmental Protection Agency (EPA) had applied a uniform methodology in denying Renewable Fuel Standard (RFS) exemption petitions filed by small refineries throughout the country. The Fifth Circuit's venue holding directly conflicts with a published decision of the Eleventh Circuit and with unpublished orders of four other circuits. The governing venue provision mandates exclusive venue in the D.C. Circuit for challenges to "nationally applicable" EPA actions, and for challenges to any EPA action that is "based on a determination of nationwide scope or effect * * * if in taking such action [EPA] finds and publishes that such action is based on such a determination." 42 U.S.C. 7607(b)(1). EPA's denial actions belong in the D.C. Circuit under either test, and the Fifth Circuit's contrary

holding subverts Congress's intent to achieve uniformity in judicial review of nationally relevant EPA actions. Respondents' attempts to minimize the significance of the circuit conflict, both in general and in its implications for the ultimate disposition of the exemption petitions at issue here, are unpersuasive. This Court's review is warranted.

A. The Court Of Appeals' Decision Is Incorrect

The denial actions at issue here were "nationally applicable * * * final action[s]" within the meaning of 42 U.S.C. 7607(b)(1). In the alternative, if those actions were "locally or regionally applicable," they were "based on a determination of nationwide scope or effect" and EPA made and published a finding to that effect. *Ibid.* Respondents' contrary arguments lack merit.

1. The denial actions are "nationally applicable" because they apply a uniform methodology to 105 petitions for exemptions from the RFS program, spanning 18 States and eight federal judicial circuits. See Pet. 12-15; Pet. App. 187a, 329a. In directing that challenges to locally or regionally applicable EPA actions should generally be filed in "*the* appropriate circuit," Section 7607(b)(1) indicates that there is only one appropriate regional circuit in which to seek review of such actions. 42 U.S.C. 7607(b)(1) (emphasis added). That in turn implies that, when an EPA action is not confined to a single judicial circuit, the action is "nationally applicable" and subject to review in the D.C. Circuit. See Pet. 13-14.

Respondents dispute none of this. Instead, they contend (Br. in Opp. 18-19) that a reviewing court should treat the two denial actions at issue here as 105 individual denials of exemption petitions. Respondents assert that, because the Clean Air Act (CAA), 42 U.S.C. 7401

et seq., refers to "'*a* petition,'" EPA must "separately consider and decide each petition it receives." Br. in Opp. 19 (citing 42 U.S.C. 7545(*o*)(9)(B)(i) and (ii)). But the Fifth Circuit rejected respondents' claim that EPA had acted contrary to law by "evaluat[ing] multiple petitions simultaneously." Pet. App. 29a; see *ibid.* (explaining that respondents had "fail[ed] to show that the relevant statutory provisions require EPA to consider exemption petitions individually").

EPA acted reasonably in grouping the petitions together.[1] Indeed, such aggregation is encouraged as a means of efficiently adjudicating common issues. See Committee on Adjudication, Administrative Conference of the United States, *Aggregation of Similar Claims in Agency Adjudication* (June 13, 2016), https://perma.cc/2UQS-TJ6F. This Court has likewise recognized the "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 102 (2015) (citation omitted). The decision whether to group petitions presenting common questions falls within that category. Consistent with that view, and with Section 7607(b)(1)'s focus on the "final action taken," 42 U.S.C. 7607(b)(1), other circuits have looked to the face of EPA's action when applying Section 7607(b)(1) and

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[1] Respondents argue (Br. in Opp. 19, 23) that EPA was able to aggregate the petitions here only by violating the CAA's 90-day deadline for the agency to rule on an exemption petition. See 42 U.S.C. 7545(*o*)(9)(B)(iii). But respondent Wynnewood agreed to delay proceedings to allow EPA to account for the implications of this Court's decision in *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382 (2021); the other respondents similarly understood that EPA's delay was tied to that case, and they did not press EPA to act on their petitions within the 90-day window. See Gov't C.A. Br. 11-17.

have rejected attempts to disjoin actions, even when parties describe them as "an amalgamation of many different locally or regionally applicable agency actions." *Southern Ill. Power Coop.* v. *EPA*, 863 F.3d 666, 671 (7th Cir. 2017); see *ATK Launch Sys., Inc.*, v. *EPA*, 651 F.3d 1194, 1200 (10th Cir. 2011); *RMS of Ga., LLC* v. *EPA*, 64 F.4th 1368, 1373 (11th Cir. 2023).

Respondents are also wrong to assert (Br. in Opp. 24-25) that, under EPA's approach, every EPA action is nationally applicable because it will inevitably be based on a "uniform statutory standard." EPA has not argued that application of a uniform standard is sufficient to make an action nationally applicable. Rather, an EPA action qualifies as nationally applicable when it applies a uniform standard to entities in multiple judicial circuits. Consistent with that approach, when EPA has acted on a single RFS exemption petition, the agency has typically asserted that any petition for review should be filed in the appropriate regional circuit. See, *e.g.*, Gov't C.A. Br. at 22-28, *Advanced Biofuels Ass'n* v. *EPA*, No. 18-1115 (D.C. Cir. July 8, 2019); Order at 1-2, *American Petroleum Inst.* v. *EPA*, No. 09-1085 (D.C. Cir. Mar. 15, 2010). By contrast, when EPA has taken a final action that applies a nationally uniform standard to entities in multiple judicial circuits, it has stated that petitions for review belong in the D.C. Circuit. See, *e.g.*, 86 Fed. Reg. 27,756 (May 21, 2021) (final rule promulgating federal plan for municipal solid waste landfills located in multiple States and Indian country); 80 Fed. Reg. 33,840 (June 12, 2015) (final rule finding state implementation plans for 36 States substantially inadequate to meet CAA requirements).

2. Even if the denial actions at issue here were "locally or regionally applicable," they would still be re-

viewable exclusively in the D.C. Circuit because they were "based on a determination of nationwide scope or effect" and EPA made and published a finding to that effect. 42 U.S.C. 7607(b)(1). EPA based the denials on its statutory interpretation that any qualifying hardship "must be caused by compliance with the RFS program," and on its economic determination that, as a matter of market reality, the cost of compliance is the same for all refineries and is reflected in market prices. Pet. App. 248a; see Pet. 15-16; Pet. App. 242a, 249a. EPA seeks to apply those determinations uniformly nationwide to ensure consistent treatment of small refineries.

Like the court of appeals (Pet. App. 15a), respondents contend (Br. in Opp. 22-23) that the challenged EPA actions cannot be reviewable in the D.C. Circuit under Section 7607(b)(1)'s second prong because EPA considered individual refineries' "local facts and data" in determining that the refineries' exemption requests should be denied. *Id.* at 23. That approach would effectively limit the applicability of Section 7607(b)(1)'s second prong to review of EPA actions that are based *solely* on determinations of nationwide scope or effect. But since the "nationwide scope or effect" prong potentially comes into play only when the challenged EPA action is "locally or regionally applicable," 42 U.S.C. 7607(b)(1), and since such EPA actions characteristically rest at least in part on consideration of local or regional circumstances, that approach would largely negate this basis for D.C. Circuit venue. See Pet. 17.

Respondents cannot dispute that the "core determinations" driving EPA's disposition of the individual refineries' exemption requests were the agency's determinations regarding the statute's meaning and the characteristics of the relevant market, which taken together

resulted in denial of the petitions nationwide. Pet. App. 42a (Higginbotham, J., dissenting). Two other features of the denial actions at issue here make it particularly appropriate to regard those actions as "based on a determination of nationwide scope or effect." First, EPA's overarching statutory-interpretation and economic determinations presumptively resolve each of the petitions, subject only to possible *rebuttal* of the presumption based on refinery-specific circumstances. See Pet. 18. And second, EPA's disposition of the petitions will affect other entities in addition to the petitioning refineries because the agency must account for exemptions by shifting burdens to other parties. See Pet. 16; see also Pet. App. 248a & n.139.

Respondents repeat their contention (Br. in Opp. 25-26) that EPA's rationale would result in D.C. Circuit venue for every locally or regionally applicable action. But this ground for D.C. Circuit venue applies only when the challenged agency action is "*based on* a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1) (emphasis added). The italicized language requires a causal connection between the determination and the ultimate decision that will not exist in every case.

B. This Court's Review Is Warranted

Although respondents do not dispute that the question presented is the subject of a circuit split on a recurring issue, they assert (Br. in Opp. 26-31) that this case is an unsuitable vehicle for deciding the question. But respondents identify no concerns that should prevent the Court from granting review here, and this case remains the best available vehicle to clarify Section 7607(b)(1)'s proper application.

1. Respondents contend (Br. in Opp. 26-27) that, even if this Court grants review and ratifies the government's position on venue, the Court's decision will make no difference to the ultimate disposition of the underlying exemption petitions at issue here. As respondents explain (*ibid.*), the D.C. Circuit recently vacated EPA denial actions involving dozens of small-refinery exemption petitions spanning compliance years 2016-2021. See *Sinclair Wyoming Refining Co.*, v. *EPA*, No. 22-1073, 2024 WL 3801747 (D.C. Cir. July 26, 2024) (per curiam). Respondents argue (Br. in Opp. 27) that, even if the Court grants certiorari in the present case and ultimately holds that respondents' petitions for review should have been filed in the D.C. Circuit, "the only result of transfer would be another loss for the government on the merits, with the D.C. Circuit adopting the same reasoning as the Fifth Circuit here."

Respondents are correct that, if the Court grants certiorari in this case and EPA prevails on the venue issue, the agency will ultimately reconsider respondents' exemption petitions under the legal standards announced by the D.C. Circuit in *Sinclair*. In that scenario, however, EPA would have meaningful options for adjudicating those petitions that it lacks under the Fifth Circuit's decision. See Pet. 23 (foreseeing that, "[i]f the D.C. Circuit disagrees with the Fifth Circuit even in part, its order may subject EPA to conflicting guidance on remand").

Most notably, the Fifth Circuit found that refineries had reasonably relied on EPA's prior approach to adjudicating exemption petitions, such that the agency's consideration of updated economic information regarding RFS compliance costs—relating to the "RIN cost passthrough principle"—created impermissible retro-

activity. Pet. App. 16a-23a. The *Sinclair* court did not reach this issue.[2] Under the Fifth Circuit's retroactivity analysis, EPA would be required to evaluate the remanded petitions under its prior approach, which primarily relied on the Department of Energy's 2011 study, without considering updated economic analysis of a small refinery's compliance costs beyond those contemplated by the study and corresponding scoring matrix. Under *Sinclair*, by contrast, EPA may consider any updated economic information about the refinery's compliance costs that is relevant to assessing whether a small refinery actually suffers hardship. That difference between the Fifth and D.C. Circuits' merits analyses is reasonably likely to be outcome-determinative with respect to at least some exemption petitions.

The difference between the two opinions thus creates a realistic prospect that the RFS program—through which Congress directed EPA to ensure a uniform, nationwide framework for increasing renewable fuel use, see, *e.g.*, 42 U.S.C. 7545(*o*)(2)(A)(i) and (*o*)(2)(B)(ii)(III)—will consist of one program for remanded petitions for most of the nation, and a separate, more favorable program for exemption claimants in the Fifth Circuit. EPA estimates that as many as 18 small refineries, with annual aggregate RFS compliance obligations of approximately a billion gallons of renewable fuel, could potentially be entitled to review in the Fifth Circuit under that court's venue holding. If EPA is required to grant exemptions to those refineries based on the Fifth Cir-

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[2] The D.C. Circuit did, however, deny a separate retroactivity challenge to EPA's action. See *Sinclair*, 2024 WL 3801747, at *17-*19; see also *Sinclair Wyoming Refining Co.* v. *EPA*, 101 F.4th 871, 880, 886 (D.C. Cir. 2024) (upholding another EPA retroactive RFS action and collecting past D.C. Circuit cases that did the same).

cuit's ruling, the RFS program will fall short of ensuring the nationwide target volumes for the years at issue in respondents' challenge. And in the future, if Fifth Circuit small refineries remain subject to more favorable standards for newly filed petitions, the exempted volumes will be allocated to other obligated parties, see Pet. 16, resulting in "serious practical harm to the RFS program," Pet. 23. This is precisely the type of disuniformity that the CAA's venue provision is intended to prevent.

Respondents are also incorrect in claiming (Br. in Opp. 27) that the RFS program is "relatively obscure" and does not warrant the Court's attention because it affects only small refineries. About 36 small refineries currently are responsible for approximately ten percent of U.S. refining capacity and an equivalent percentage of the annual RFS obligations, and most such refineries submit exemption petitions each year.[3] Those exemptions have a significant effect on the RFS program. In 2017, for example, approximately 1.6 billion gallons of renewable fuel obligations were not met due to exemptions, which translated into billions of dollars in lost revenue for the biofuels industry. See EPA, *RFS Small Refinery Exemptions Table SRE-1* (July 24, 2024), https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-

[3] The number of small refineries is based on the number of eligible refineries that have previously petitioned EPA for a small-refinery exemption and are still in operation. Refinery capacity information is based on data from Table 5 of the Energy Information Administration's *Refinery Capacity Report for 2024* (Jan. 1, 2024), https://www.eia.gov/petroleum/refinerycapacity/table5.pdf. Total U.S. refining capacity is calculated by summing the capacities of all refineries currently subject to the RFS program. Total refining capacity of the small refineries is calculated by summing the capacities of all small refineries currently subject to the RFS program.

small-refinery-exemptions. EPA has litigated numerous petitions challenging exemption decisions since the RFS program began, and this Court has previously viewed the program's operation as sufficiently important to warrant the Court's review. See *HollyFrontier Cheyenne Refining* v. *Renewable Fuels Ass'n,* 594 U.S. 382 (2021).

Contrary to respondents' suggestion (Br. in Opp. 28), EPA's aggregation of petitions in the relevant actions here is not "novel" or "aberrational." EPA has frequently aggregated related determinations into a single action. See, *e.g.*, *ATK Launch Sys.*, 651 F.3d at 1197 (transferring challenges to a single EPA action promulgating air quality designations for 31 areas across 18 States); *Sinclair Wyoming Refining Co.* v. *EPA*, No. 19-1196 (D.C. Cir.) (challenge to 2019 EPA action on 36 RFS petitions). And when such actions have been challenged, EPA has not acquiesced to venue in the regional circuits. See C.A. Doc. 75, at 9-11 (July 12, 2022).

Finally, respondents contend (Br. in Opp. 29) that EPA's April and June 2022 denial actions raise distinct venue issues because the April denial announced a *new* approach to small-refinery exemptions, while the June denial simply applied that approach to additional refineries. That concern is overstated. Both denial actions here stemmed from a single proposed denial that first announced EPA's new approach to exemptions. Pet. App. 48a, 193a; see 86 Fed. Reg. 70,999, 71,000 (Dec. 14, 2021) (proposing to "deny all pending [exemption] petitions" based on the agency's determinations regarding the meaning of disproportionate economic hardship and the market realities of refinery operations). The fact that a short time passed between the finalization of the two actions—without any court considering the validity

of EPA's new determinations—is an insufficient basis to distinguish between the actions for purposes of venue.

2. This case remains a better vehicle for clarifying the proper application of Section 7607(b)(1) than the pending petitions for writs of certiorari in *Oklahoma* v. *EPA*, No. 23-1067 (filed Mar. 28, 2024), and *PacifiCorp* v. *EPA*, No. 23-1068 (filed Mar. 28, 2024). Unlike the Tenth Circuit in the decision at issue there, the Fifth and Eleventh Circuits in the RFS exemption-denial cases addressed both prongs of Section 7607(b)(1). See Gov't Br. at 20-21, Nos. 23-1067 and 23-1068 (filed May 21, 2024). And contrary to respondents' contention (Br. in Opp. 30-31), the full merits adjudication by the court below should not weigh against granting certiorari in this case. Rather, the divergent views of the Fifth Circuit and the D.C. Circuit on the merits highlight the importance of the venue decision for ensuring national uniformity in the administration of nationwide programs.

Respectfully submitted.

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