No. 23-1229

IN THE

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

CALUMET SHREVEPORT REFINING, LLC, ET AL.,
Respondents.

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

BRIEF FOR RESPONDENTS SUPPORTING PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Growth Energy has no parent company and no publicly held company has a 10% or greater ownership interest in Growth Energy.

The Renewable Fuels Association has no parent company and no publicly held company has a 10% or greater ownership interest in the Renewable Fuels Association.

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INTRODUCTION

Section 307(b)(1) of the Clean Air Act specifies the proper circuit in which to review any "action" by EPA under the Act. A petition for review "may be filed only in" the D.C. Circuit "if" either (a) the action is "nationally applicable" or (b) the action "is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." 42 U.S.C. §7607(b)(1). Otherwise, the petition for review "may be filed only in the United States Court of Appeals for the appropriate circuit." *Id.*

The Renewable Fuel Program ("RFP") is a Clean Air Act program that mandates the amount of renewable fuel to be blended annually into the nation's supply of gasoline and diesel fuel. In 2022, EPA issued two actions that together denied 105 requests by 36 "small refineries" around the country to be exempted from their RFP obligations for certain compliance years because of their alleged economic hardship. In the actions, EPA adopted, applied, and announced for future use a general standard comprising (a) a legal requirement that any petitioning refinery must show that its alleged hardship would be caused by its RFP compliance and (b) a general presumption that RFP compliance does not cause refineries hardship because refineries can recoup their compliance costs. EPA concluded that no refinery had rebutted its presumption or otherwise showed the requisite causation.

Disappointed refineries sought review of EPA's exemption actions in the Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. In the decision below, a divided Fifth Circuit panel held that it was the appropriate venue under §307(b)(1) because the exemption actions are "neither nationally applicable nor based on a determination of nationwide scope or effect." Pet.App.17a. All the other numbered circuits disagreed and transferred their cases to the D.C. Circuit. Consequently, two circuits—the Fifth and the D.C. Circuits—rendered judgments on the merits of the general standard EPA used to adjudicate the refineries' exemption petitions. Although both circuits vacated EPA's actions, they did not fully agree on the reasons, resulting in one rule for refineries in the Fifth Circuit and another rule for refineries everywhere else going forward. This split injects uncertainty into a program that governs the entire nation's supply of transportation fuel and affects

every level of the supply chain, from farmers growing renewable-fuel feedstocks, to producers of renewable and petroleum-based fuels, to distributors, retailers, and consumers of transportation fuel.

This state of affairs is exactly what Congress sought to avoid when it wrote §307(b)(1). Both the text and legislative history of §307(b)(1) show clearly that Congress enacted it to ensure "even and consistent national" rules for EPA and affected actors, S. Rep. No. 91-1196, at 41 (1970), by centralizing in the D.C. Circuit review of all actions involving "generic" or "national issues," *Miscellaneous Amendments*, 41 Fed. Reg. 56,767, 56,768:3-56,769:1 (Dec. 30, 1976); *see* H.R. Rep. No. 95-294, at 324 (1977). Thus, §307(b)(1) creates a comprehensive scheme to ensure that every action raising a general issue for review—that is, an issue that is not limited to an individual actor or to actors in a single judicial circuit—is reviewable in the D.C. Circuit. Only such an understanding provides a clear rule by which to achieve Congress's goal of avoiding duplicative litigation and inconsistent rules, while also avoiding wasteful threshold litigation over the proper venue.

The 2022 exemption actions at issue are reviewable exclusively in the D.C. Circuit, for three independent reasons. First, they are "nationally applicable" because *every* adjudication of a small-refinery exemption petition inherently affects, by operation of law, national RFP requirements. Alternatively, the actions are "nationally applicable" because they prescribed general standards for adjudicating all pending and future small-refinery exemption petitions, irrespective of the refinery's location. And finally, the actions are (and EPA published its finding that they are) "based on … determination[s] of nationwide scope or effect": EPA's general causation requirement and general presumption of cost recoupment,

which apply to all small refineries seeking exemption, were essential premises on which the exemption denials rested.

All these reasons hold regardless of whether the relevant "action" is defined as each of the 105 individual exemption denials or as the integrated actions through which EPA issued those denials. Each disappointed refinery challenged EPA's general standard for adjudicating small-refinery petitions, reaching partially different results. That the fragmented litigation resulted in disparate rules between circuits proves that the exemption actions should have been reviewed only in the D.C. Circuit, as should all future RFP exemption actions.

STATEMENT OF THE CASE

A. The Clean Air Act's Venue Provision

Section 307(b)(1) of the Clean Air Act establishes rules for determining "the proper venue as between the District of Columbia Circuit and the other Federal Circuits" to review EPA actions under the Act. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 590 (1980); *see* 42 U.S.C. §7675(k)(1)(C) (extending Act's venue provision to actions under American Innovation and Manufacturing Act).

The venue provision establishes three cascading tests. First, the Act directs that petitions for review of "any … nationally applicable regulations promulgated, or final action taken, by the Administrator under [the Act] may be filed only in" the D.C. Circuit. 42 U.S.C. §7607(b)(1). Second, the Act prescribes a *presumptive* venue for petitions for review of any action that is *not* "nationally applicable": petitions for review of "any other final action of the Administrator under [the Act] … which is locally or regionally applicable may be filed

only in the United States Court of Appeals for the appropriate circuit." *Id.* But, third, the Act allows EPA to rebut the second test's presumption in certain circumstances: "Notwithstanding the [second test,] a petition for review of any action referred to in [the second test] may be filed only in the [D.C. Circuit] if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." *Id.*

B. The Renewable Fuel Program

1. Annual national volume requirements

Congress created the Act's Renewable Fuel Program ("RFP")—or, as EPA calls it, the "Renewable Fuel Standard" ("RFS")—"to 'move the United States toward greater energy independence and security' and 'increase the production of clean renewable fuels.'" *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 697 (D.C. Cir. 2017) (Kavanaugh, J.) (quoting Pub. L. No. 110-140, §§201-202, 121 Stat. 1492, preamble (2007)). The program achieves these goals by "requir[ing] an increasing amount of renewable fuel to be introduced into the Nation's transportation fuel supply each year." *Id.* at 696; *see* 42 U.S.C. §7545(*o*)(2)(A)(i), (B). "Therefore, … [national] demand for renewable fuel [is] a function of the renewable fuel standards." *Americans for Clean Energy*, 864 F.3d at 710 (quotation cleaned).

Under the RFP, there are annual national volume requirements for four categories of renewable fuel. *Americans for Clean Energy*, 864 F.3d at 697-698, 701. EPA must "translat[e] the[se] annual volume requirements into 'percentage standards,'" which "represent the percentage of transportation fuel introduced into commerce that must consist of renewable fuel." *Id.* at

699; *see* §7545(*o*)(3)(B)(i)-(ii); 40 C.F.R. §80.1405(c). That is, the percentage standards roughly equal the national mandated renewable-fuel volumes divided by the total national volume of gasoline and diesel fuel that EPA projects will be used in the relevant year. The Act charges EPA with establishing the percentage standards before the relevant year begins. §7545(*o*)(2)(B)(ii), (3)(B)(i).

EPA has designated refineries and importers of petroleum-based gasoline and diesel fuel as the "obligated parties" that must comply with the RFP's percentage standards. 40 C.F.R. §80.2; *see* §7545(*o*)(2)(A)(iii), (3)(B)(ii). Obligated parties "must ensure" that the required volumes of renewable fuel are used. *Americans for Clean Energy*, 864 F.3d at 697. Although there are myriad obligated parties, there is only one percentage standard for each category of renewable fuel. §7545(*o*)(3)(B)(ii)(III). "The percentage standards inform each obligated party of how much [of each category of] renewable fuel it must introduce into U.S. commerce based on the volumes of fossil-based gasoline or diesel it imports or produces." *Americans for Clean Energy*, 864 F.3d at 699; *see* 40 C.F.R. §80.1407(a). "In other words, the EPA estimates what percentage of the overall fuel supply each renewable-fuel [category] should constitute and then requires each obligated party to replicate those percentages on an individual basis." *Growth Energy* v. *EPA*, 5 F.4th 1, 11 (D.C. Cir. 2021).

EPA "polices these mandates with a system of credits." *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 386 (2021); *see* §7545(*o*)(5). "Each credit"—called a RIN—"represents the blending of [an ethanol-equivalent gallon] of renewable fuel" into gasoline or diesel fuel. *HollyFrontier*, 594 U.S. at 386; *see* 40 C.F.R. §80.1415. "A refinery that blends renewables may either 'retire' the credits it has

earned (*i.e.*, use them) to satisfy its own RFP volume obligation—or sell those credits to a different [obligated party] that needs them." *HollyFrontier*, 594 U.S. at 386; *see* 40 C.F.R. §§80.1428-80.1429.

To illustrate with a simplified example: If the required national renewable-fuel volume for 2025 is 10 billion gallons and the total projected transportation-fuel use for 2025 is 100 billion gallons, EPA would set the 2025 percentage standard at 10%. Then, if an obligated party introduced 5 million gallons of transportation fuel into commerce during 2025, its RFP obligation would be 500,000 gallons of renewable fuel, which it would satisfy by blending that amount of renewable fuel into its gasoline and diesel, buying that number of RINs in the market, or doing a mix of both.

2. Small-refinery exemptions

Congress allowed "small refineries"—refineries whose "throughput" is below a specified level, §7545(*o*)(1)(K)—to be exempted from their RFP obligations under limited circumstances. Relevant here, individual small refineries may "petition" EPA for an exemption (technically, for an extension of their prior exemption) by showing that they "would be subject to a disproportionate economic hardship if required to comply with" their RFP obligations. §7545(*o*)(9)(A)(ii), (B)(i).

Although small-refinery exemptions ("SREs") are granted to individual small refineries, they affect RFP obligations nationally by operation of law. Under EPA's formula for computing the annual percentage standards that apply to all non-exempt obligated parties, EPA accounts for small-refinery exemptions to a certain extent: when setting the standards for a given year, EPA "increas[es] the [percentage] standards on [all] non-exempt

obligated parties" for that year by the amount needed to offset all exemptions that either were already granted for that year or are projected to be granted for that year. *Renewable Fuel Standard (RFS) Program: RFS Annual Rules*, 87 Fed. Reg. 39,600, 39,632:2 (July 1, 2022); *see Sinclair Wyoming Refining Co.* v. *EPA*, 101 F.4th 871, 890-892 (D.C. Cir. 2024); 40 C.F.R. §80.1405(c).

EPA does not adjust the percentage standards to account for exemptions to the extent they exceed EPA's projection of exemptions for a given year. For example, EPA (explicitly or implicitly) projected zero exemptions for compliance years 2016-2022, *see* 87 Fed. Reg. at 39,633, 39,632:1, so if EPA eventually grants an exemption for one of those years, the exemption will not be accounted for in annual percentage standards. Whenever EPA does not adjust the percentage standards to account for an exemption, the exemption "hinder[s] the achievement of the applicable renewable-fuel volumes because [the exemption] artificially inflate[s] the denominator—the nation's total supply of petroleum-based transportation fuel—and thereby reduce[s] the percentage standards applied to nonexempt refiners and importers." *Sinclair Wyoming*, 101 F.4th at 881. In other words, exemptions that are not accounted for in the percentage standards lower the nationally required volume of renewable fuel, creating a "renewable-fuel shortfall." *American Fuel & Petrochemical Manufacturers* v. *EPA*, 937 F.3d 559, 571, 588 (D.C. Cir. 2019).

In short, every individual small-refinery exemption adjudication automatically affects RFP obligations nationally: accounted-for exemptions increase the RFP obligations of all non-exempt obligated parties nationally, whereas unaccounted-for exemptions reduce the nationally required volume of renewable-fuel use.

C. EPA's 2022 Exemption Actions

In 2017 and 2018, EPA granted 54 exemptions for the 2016 and 2017 compliance years, covering about 2.6 billion gallons of renewable fuel. *Renewable Fuels Ass'n* v. *EPA*, 948 F.3d 1206, 1225-1226 (10th Cir. 2020). Representatives of the renewable-fuels industry challenged three of those exemptions in the Tenth Circuit. *Id.* at 1226. That court held that the exemptions were invalid for three reasons. First, the refineries were ineligible because they had not been continuously exempt through all prior years of the RFP. *Id.* at 1245-1249. Second, EPA erroneously interpreted the statute not to require that the refinery's RFP "compliance … be the cause of any disproportionate hardship"; instead, EPA allowed exemptions based on hardship suffered "as a result of something other than RF[P] compliance" that would exist regardless of the RFP. *Id.* at 1253-1254. Third, EPA "ignored or failed to provide reasons for deviating from [its own] prior studies showing that RIN purchase costs do not disproportionately harm refineries" because refineries can "recover the cost of the RINs they purchase by passing that cost along in the form of higher prices for the petroleum based fuels they produce." *Id.* at 1254-1257 (quotation cleaned). This Court subsequently rejected the Tenth Circuit's first ground—the "continuity requirement"—but did not opine on the other two grounds. *HollyFrontier*, 594 U.S. at 389-390.

Meanwhile, in 2019, EPA adjudicated 36 small-refinery exemption petitions for 2018, granting 31 and denying 5 under the same flawed approach it had applied in granting the 2016-2017 exemptions. Pet.App.48a, 177a n.248, 185a. Representatives of the renewable-fuels industry challenged those denials in the D.C. Circuit. Pet.App.7a; Pet.App.48a, 78a.

In December 2021, EPA publicly noticed and solicited comment on a proposal "to deny all pending SRE petitions," including the three 2016-2017 exemptions remanded by the Tenth Circuit, under a new approach that corrected the two remaining errors identified by the Tenth Circuit. *Notice of Opportunity to Comment on Proposed Denial of Petitions for Small Refinery Exemptions*, 86 Fed. Reg. 70,999, 71,000:2 (Dec. 14, 2021); *see* Pet.App.48a-49a & n.4, 52a, 184a.

At the same time, the D.C. Circuit remanded the 36 exemptions before it to EPA for reconsideration in light of the decisions by this Court and the Tenth Circuit, and in light of EPA's proposed denial of all pending exemptions under a revised approach. Pet.App.78a. Whereas the Tenth Circuit had not imposed a deadline on EPA's reconsideration, the D.C. Circuit gave EPA until April 7, 2022, to issue new decisions on the exemptions it was remanding. Pet.App.78a. In January 2022, EPA announced that it was "expanding" its proposed denial "to include" those 36 exemption petitions. Pet.App.48a n.1. All administrative materials and comments relating to all the proposed denials were maintained on a single administrative docket. *See* Dkt. ID No. EPA-HQ-OAR-2021-0566[1]; *see* Pet.App.53a.

After receiving comments from the petitioning refineries and other interested parties, EPA finalized its proposal in two parts. On April 7, 2022—the D.C. Circuit's deadline—EPA issued and published notice of a final action denying the 36 exemption petitions for 2018 that had been remanded by the D.C. Circuit and added to the administrative proceeding in January 2022. Pet.App.190a, 193a; *April 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel*

[1] https://www.regulations.gov/docket/EPA-HQ-OAR-2021-0566.

Standard Program, 87 Fed. Reg. 24,300 (Apr. 25, 2022). In June 2022, EPA issued and published notice of a final action denying the remaining 69 pending exemption petitions before it, including the three remanded by the Tenth Circuit. Pet.App.45a, 48a; *Notice of June 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program*, 87 Fed. Reg. 34,873 (June 8, 2022).

The two actions together denied all pending exemption petitions based on a "change in approach" that corrected the two remaining errors identified by the Tenth Circuit. Pet.App.80a-85a; Pet.App.224a-228a. First, EPA interpreted the Act to require that a petitioning "small refinery … demonstrate a direct causal relationship between its RF[P] compliance costs and the [disproportionate economic hardship] it alleges"; "financial difficulties" that are "unrelated" to compliance "will not satisfy" the exemption standard anymore. Pet.App.80a; *see also* Pet.App.102; Pet.App.224a, 244a. Second, EPA determined, based on old and new studies of the national RIN market and of various fuel markets, that small refineries, irrespective of their location, "have the ability … to pass through their RIN costs." Pet.App.154a; *see also* Pet.App.66a-68a, 82a, 106a-109a, 167a-168a; Pet.App.210a-212a, 226a, 248a-251a, 296a, 308a-310a; *see also* C.A.J.A.00081; C.A.J.A.0227. Accordingly, EPA found that, as a general matter, RFP compliance "cannot cause" small refineries to incur any net compliance costs, let alone the requisite disproportionate economic hardship. Pet.App.68a, 83a-84a; *see also* Pet.App.212a, 227a-228a.

EPA invited the petitioning small refineries to rebut its general presumption that they incur no net RFP compliance costs, by submitting refinery-specific evidence showing that in fact they are unable to recoup their RIN

costs or that they otherwise do incur net compliance costs (and in turn that those costs inflict disproportionate economic hardship). Pet.App.54a-55a; Pet.App.198a-199a. After reviewing all the evidence submitted by each refinery, EPA concluded that none had rebutted its presumption that they can recoup their RFP compliance costs. Pet.App.55a, 57a, 84a, 107a-110a, 162a-163a; Pet.App.199a, 201a, 228a, 249a-252a, 304a-305a.

In EPA's published notices of the final exemption actions, EPA stated that the actions are "nationally applicable" and found that they are "based on a determination of 'nationwide scope or effect.'" 87 Fed. Reg. at 24,300:3-24,301:1 (quoting §7607(b)(1)); 87 Fed. Reg. at 34,874:2. The notice for the April denial explained that it "denies petitions for exemptions … for over 30 small refineries across the country and applies to small refineries located within 18 states in 7 of the 10 EPA regions and in 8 different Federal judicial circuits." 87 Fed. Reg. at 24,301:1. The notice for the June denial included the same statement, except that it covered small refineries located in 15 States. 87 Fed. Reg. at 34,874:2. The notices added that the exemption actions are "based on EPA's revised interpretation of the relevant [statutory] provisions [requiring causation] and the RIN discount and RIN cost passthrough principles that are applicable to all small refineries no matter the location or market in which they operate," 87 Fed. Reg. at 24,301:1; 87 Fed. Reg. at 34,874:2-3, *i.e.*, based on the presumption that "all refineries" can "recover their RIN costs through the market price of the fuel they produce" because those prices "increase[] to reflect the cost of the RIN," 87 Fed. Reg. at 24,300:3; 87 Fed. Reg. at 34,874:1. Therefore, under §307(b)(1), the notices stated, "petitions for judicial review of th[ese] action[s] must be filed in" the D.C. Circuit. 87 Fed. Reg. at 24,301:1; 87 Fed. Reg. at 34,874:3.

D. Litigation Challenging The 2022 Exemption Actions

1. Numerous small refineries filed petitions for review in the Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. Many of the petitions filed in numbered circuits were duplicative of ones filed in the D.C. Circuit. In all the cases filed in numbered circuits, EPA moved under §307(b)(1) to dismiss or transfer to the D.C. Circuit.

Motions panels in the Third, Seventh, Ninth, and Tenth Circuits concluded that the D.C. Circuit was the only proper venue for reviewing the 2022 exemption actions and therefore granted EPA's motions.[2] Motions panels in the Fifth and Eleventh Circuits deferred the venue issue to merits panels.

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[2] *See* Order, *American Refining Group* v. *EPA*, No. 22-1991, ECF #23 (3d Cir. Aug. 9, 2022); Order, *American Refining Group* v. *EPA*, No. 22-2435, ECF #20 (3d Cir. Sept. 23, 2022); Order, *Countrymark Refining and Logistics, LLC* v. *EPA*, No. 22-1878, ECF #13 (7th Cir. July 20, 2022); Order, *Countrymark Refining and Logistics, LLC* v. *EPA*, No. 22-2368, ECF #9 (7th Cir. Sept. 8, 2022); Order, *Calumet Montana Refining, LLC* v. *EPA*, No. 22-70124, ECF #16 (9th Cir. Oct. 25, 2022); Order, *Par Hawaii Refining, LLC* v. *EPA*, No. 22-70125, ECF #16 (9th Cir. Oct. 25, 2022); Order, *San Joaquin Refining Co., Inc.* v. *EPA*, No. 22-70126, ECF #16 (9th Cir. Oct. 25, 2022); Order, *Kern Oil & Refining Co.* v. *EPA*, No. 22-70128, ECF #13 (9th Cir. Oct. 25, 2022); Order, *Calumet Montana Refining, LLC* v. *EPA*, No. 22-70166, ECF #14 (9th Cir. Oct. 25, 2022); Order, *Par Hawaii Refining, LLC* v. *EPA*, No. 22-70168, ECF #13 (9th Cir. Oct. 25, 2022); Order, *San Joaquin Refining Co., Inc.* v. *EPA*, No. 22-70170, ECF #12 (9th Cir. Oct. 25, 2022); Order, *Kern Oil & Refining Co.* v. *EPA*, No. 22-70172, ECF #14 (9th Cir. Oct. 25, 2022); Order, *Wyoming Refining Co.* v. *EPA*, No. 22-9538, ECF #10935421 (10th Cir. Aug. 23, 2022); Order, *Wyoming Refining Co.* v. *EPA*, No. 22-9553, ECF #10939881 (10th Cir. Sept. 12, 2022).

2. In the decision below, a divided Fifth Circuit disagreed with the Third, Seventh, Ninth, and Tenth Circuits, holding that the D.C. Circuit is not the exclusive venue for reviewing the 2022 exemption actions because the actions are "neither nationally applicable nor based on a determination of nationwide scope or effect." Pet.App.17a.

The Fifth Circuit majority first determined that the 2022 exemption actions are not nationally applicable. The majority declared that "the *legal* effect—… not the practical effect—of an agency action … determines whether that action is 'nationally applicable." Pet.App.11a. The majority considered the 2022 actions' legal effect not to be national because the actions' "new approach" does not govern "*all*" small refineries since (the court said) that approach does not "bind[] EPA in *any* future adjudication" of exemption petitions. Pet.App.12a.

The majority also concluded that the 2022 actions are not based on a determination of nationwide scope or effect. Giving EPA "no deference," the majority determined that EPA's finding to the contrary was not "accura[te]." Pet.App.13a (emphasis omitted), 15a. The majority acknowledged that the actions are *partially* "based on factors and facts common to each petition"—*i.e.*, EPA's causation requirement and general cost-recoupment presumption—but emphasized that those common factors were not alone "a sufficient basis to adjudicate [the] exemption petitions." Pet.App.15a. To deny each petition, EPA had to determine whether each individual refinery had rebutted the general presumption that they can avoid net compliance cost based on "refinery-specific" evidence. *Id.*

Proceeding to the merits, the majority granted the petitions for review, vacated the 2022 exemption actions, and remanded to EPA. Pet.App.3a.

Dissenting, Judge Higginbotham concluded that the D.C. Circuit is the only proper venue. First, he explained that the question of "national applicability" should be "measure[d] … by looking to the location of the persons or enterprises that the action regulates." Pet.App.37a (quotation cleaned). The 2022 exemption actions "inescapably" satisfy this standard because "they apply one consistent statutory interpretation and economic analysis to thirty-six small refineries, located in eighteen different states, in the geographical boundaries of eight different circuit courts." Pet.App.37a-38a.

Alternatively, Judge Higginbotham would have held, the actions are based on a determination of nationwide scope or effect. He acknowledged that the actions are partially based on refinery-specific determinations, but he explained that, while "there can be multiple determinations that influence an agency's actions," "what matters" is whether some "core determinations" have nationwide scope or effect. Pet.App.42a. "[T]he two determinations at the core of the Denial Actions"—again, EPA's causation requirement and its general cost-recoupment finding—have nationwide scope and effect because they "appl[y] to all small refineries no matter the location or market in which they operate." Pet.App.41a-42a.

3. Subsequently, the Eleventh Circuit aligned with the Third, Seventh, Ninth, and Tenth Circuits and held that the D.C. Circuit is the only proper venue for reviewing the 2022 exemption actions. *See Hunt Refining Co.* v. *EPA*, 90 F.4th 1107, 1113 (11th Cir. 2024). The Eleventh Circuit expressly rejected the Fifth Circuit's

analysis, instead finding "Judge Higginbotham's dissent … more persuasive." *Id.* at 1112.

SUMMARY OF ARGUMENT

I. Congress enacted §307(b)(1) to avoid duplicative litigation and inconsistent rules for EPA and regulated actors. Accordingly, §307(b)(1) provides a comprehensive system to ensure that all Clean Air Act actions defining general standards or otherwise raising general issues are reviewable in the D.C. Circuit.

A. Section 307(b)(1) provides that a petition for review "may be filed only in" the D.C. Circuit "if" either (a) the action is "nationally applicable" or (b) the action "is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." 42 U.S.C. §7607(b)(1). That text makes evident the core objective of avoiding duplicative litigation and inconsistent rules, and it achieves that by comprehensively centralizing in the D.C. Circuit review of all actions defining general standards or otherwise raising general issues. This broad, simple venue rule also minimizes wasteful threshold litigation.

The ordinary meaning of "applicable" broadly covers the legal and practical reach of an action. The ordinary meaning of "scope or effect" is similarly broad. The principal difference between the two tests is this: whereas the "nationally applicable" test turns on the reach of the standard or decision that the action establishes, the "based on a determination" test turns on the reach of the action's essential premises. Thus, as venue rules that centralize review of certain cases, the two tests must be understood as complementary ways to identify actions subject to challenge, or whose elements are subject to

challenge, in multiple circuits because, without centralized review, such actions could generate duplicative litigation and inconsistent outcomes. Accordingly, "nationally" and "nationwide" mean "general," "irrespective of location," or "across circuits."

This interpretation is confirmed by other aspects of §307(b)(1). For example, the Act contemplates decentralized review of an action only in "*the* appropriate circuit," indicating that there would be a single appropriate local circuit—which cannot be the case for actions raising general issues.

B. This interpretation is also compelled by the legislative history. Congress's aim was to send to the D.C. Circuit those actions that were "national in scope" and therefore "require[d] even and consistent national application," while allowing local review of actions that "r[a]n only to *one* air quality control region." S. Rep. No. 91-1196, at 41 (1970). Congress explained that actions "involv[ing] generic issues that apply to EPA's actions nationwide" are "virtually identical to [the] promulgation of 'national standards,'" and all such actions can be "reviewed in the D.C. Circuit" under the "based on a determination" test. *Miscellaneous Amendments*, 41 Fed. Reg. 56,767, 56,768:3-56,789:1 (Dec. 30, 1976) (quotation cleaned). Congress added that a determination is "nationwide" if it "has scope or effect beyond a single judicial circuit." H.R. Rep. No. 95-294, at 324 (1977).

C. Still, this interpretation of §307(b)(1) recognize that there are various circumstances in which an action applying a general standard will not be reviewed in the D.C. Circuit.

II. For several independent reasons, the 2022 exemption actions must be reviewed in the D.C. Circuit.

A. The relevant unit of administrative action is the integrated exemption action as EPA issued it, not EPA's denial of each individual exemption petition. However, D.C. Circuit review was required here regardless of how the action is defined.

B. The exemption actions are "nationally applicable" for two separate reasons. First, every decision on a small-refinery exemption petition is inherently nationally applicable because every such decision inherently affects, by operation of law, the level of the national RFP requirements and further affects renewable-fuel purchases and RIN purchases around the country.

Second, the exemption actions are nationally applicable because they—whether defined collectively or individually—expressly "adopt[ed]" a new general standard for adjudicating all pending and future exemption petitions. Pet.App.55a.

C. Alternatively, the exemption actions are also "based on a determination of nationwide scope or effect."

1. The APA "mandate[s] that judicial review of" EPA's finding to that effect "be deferential," *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244, 2261 (2024), and nothing in the Clean Air Act displaces that "default standard," *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461, 496 (2004).

2. Even if the finding is reviewed de novo, however, it is correct. The exemption actions—whether defined collectively or individually—expressly rested on determinations of nationwide scope or effect: EPA's general standard for adjudicating small-refinery exemptions, including both the causation requirement and the presumption of cost recoupment. This conclusion is also proved by

the fact that the actions precipitated lawsuits in numerous circuits all challenging that general standard.

ARGUMENT

I. SECTION 307(b)(1) MAKES ALL CLEAN AIR ACT ACTIONS RAISING GENERAL ISSUES REVIEWABLE IN THE D.C. CIRCUIT

Congress enacted §307(b)(1) to ensure consistent national rules for EPA and affected actors and to take advantage of the D.C. Circuit's administrative-law expertise, by centralizing in the D.C. Circuit review of all actions that define general standards or otherwise raise general issues that could be challenged by actors across judicial circuits. Section 307(b)(1) creates a comprehensive system to ensure that such actions do not slip through the cracks. This broad, simple venue rule both avoids duplicative litigation and inconsistent results, and also minimizes wasteful threshold litigation over the proper forum.

A. Section 307(b)(1) Must Be Interpreted To Provide Clear And Simple Venue Rules

"It is of first importance to have a [rule] … that will not invite extensive threshold litigation" over the proper court to hear a case. *Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 n.13 (1980) (quotation cleaned); *see, e.g.*, *Direct Marketing Ass'n* v. *Brohl*, 575 U.S. 1, 11 (2015) (noting "our rule favoring clear boundaries in the interpretation of jurisdictional statutes"); *Mississippi ex rel. Hood* v. *AU Optronics Corp.*, 571 U.S. 161, 172-173 (2014). "[L]itigation over whether the case is in the right court is essentially a waste of time and resources." *Navarro Savings*, 446 U.S. at 464 n.13 (quotation cleaned). Unclear venue rules also "encourage gamesmanship," while undermining the "predictability" that "benefits

plaintiffs deciding [where] to file suit." *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94-95 (2010). In short, unclear venue rules hurt both the parties in any given case and the judicial system itself. *See Elgin* v. *Department of Treasury*, 567 U.S. 1, 15 (2012) (rejecting proposed test because it would "deprive the aggrieved employee, the [agency], and the district court of clear guidance about the proper forum for the employee's claims at the outset of the case").

Therefore, the Court should interpret §307(b)(1) to provide simple rules yielding clear answers in as many situations as possible. An interpretation that relies on vague tests or creates technical gaps will unnecessarily invite confusion and controversy, leading to the kind of wasteful litigation the Court has warned against.

B. Section 307(b)(1)'s Text Comprehensively Centralizes In The D.C. Circuit Review Of All Actions Raising General Issues

1. Section 307(b)(1) declares that the D.C. Circuit is the exclusive forum for reviewing "any" action taken by EPA under the Clean Air Act if (i) the action is "nationally applicable" or (ii) the action is "based on a determination of nationwide scope or effect" and EPA makes and publishes a finding that the action is based on such a determination. §7607(b)(1). Section 307(b)(1) declares that "the appropriate circuit" is the forum only for EPA actions that does not satisfy either of those tests. *Id.*

"Viewing [§307(b)(1)] as a whole, it is evident" that §307(b)(1)'s "core objective[]," *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), is to avoid duplicative litigation and inconsistent rules for EPA and regulated actors. To achieve this objective, an action must be reviewable in the D.C. Circuit whenever

it invites challenge by parties regardless of their location or in multiple circuits.

Thus, §307(b)(1) sets out two broad, complementary tests for D.C. Circuit review. The "nationally applicable" test sends to the D.C. Circuit every action that establishes, revises, or reaffirms a general standard, because that action could be challenged by affected actors regardless of their location. The "based on a nationwide determination or effect" test sends to the D.C. Circuit every action that rests on a general premise where the validity or terms of that premise could be raised by actors around the country (provided that EPA makes and publishes a finding that the action has such a basis). In either of these circumstances, local review would invite duplicative litigation and inconsistent rules for EPA and regulated actors. Only actions that raise no general issues for which EPA desires uniformity must be reviewed in the relevant local circuit.

2. This simple, broad interpretation is supported by careful examination of the text of §307(b)(1), whose "words … must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022) (quotation cleaned)

First, consider the "nationally applicable" test. "Applicable" means "capable of or suitable for being applied,"[3] and "apply" in turn means "to put into operation or effect" (transitive) and "to have relevance or a valid connection" (intransitive).[4] Thus, an action is "nationally

[3] "Applicable," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/applicable/.

[4] "Apply," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/apply/.

applicable" if the standard or decision it announces regulates actors nationally. The court below understood this to refer to the action's "legal effect," *i.e.*, the action's effect on "legal rights, duties, or obligations." Pet.App.11a-12a. That interpretation is incomplete in two respects. First, the court limited the assessment of legal effect to the parties that had challenged the action, failing to fully account for the action's legal effect on other actors. Second, as just noted, the ordinary meaning of "applicable" also encompasses "relevance" and "connection," and therefore an action is also "nationally applicable" if its rule or decision is significant for, or affects the interests of, parties that could challenge the action nationally.

Next, consider the "based on a determination of nationwide scope or effect" test. "Scope" means "extent of treatment, activity, or influence" and "range of operation,"[5] and "effect" means "something that inevitably follows an antecedent," "the quality or state of being operative," "power to bring about a result," and "a goal or purpose."[6] One might say that "scope" focuses on the actor or conduct that is the target of the determination, whereas "effect" focuses on the determination's consequences for that actor or conduct. But that understanding would shortchange the breadth of the ordinary meaning of both "scope" and "effect." In context, "scope or effect" is properly understood as comprehensively covering all aspects of a determination, legal or practical.

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[5] "Scope," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/scope/.

[6] "Effect," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/effect/.

It is clear, therefore, that both "applicable" and "scope or effect" are capacious and similar. The principal difference between the two tests stems from the second test's use of the phrase "based on a determination of": under the first test, the action itself must be national, whereas under the second test, what must be national is the determination on which the action is based. In context, the phrase "based on a determination of" identifies something that is a "*sine qua non*" of the action, *Fry* v. *Napoleon Community School*, 580 U.S. 154, 167 (2017), *i.e.*, "something absolutely indispensable or essential" to the action.[7] *See also Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47, 63 (2007) ("in common talk, the phrase 'based on' indicates a but-for causal relationship" (quotation cleaned)). Consequently, the "based on a determination" test turns on the geographic scope or effect of the action's essential premises.

All these interpretations must be understood more concretely in the broader context of §307(b)(1)'s role as a rule prescribing the appropriate venue for litigating the validity of agency actions. The tests are ways to identify the potential for challenge or potential issues a challenger could raise in the lawsuit, such as the validity of a national standard or the validity of a statutory interpretation or national policy on which a specific action is premised. And because the tests prescribe a *central* venue for litigating certain cases, they must further be understood as identifying situations where fragmented review in local circuits could lead to duplicative litigation and inconsistent rules for affected actors and for EPA.

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[7] "Sine qua non," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/sine%20qua%20non/.

This understanding of §307(b)(1) informs the meaning of "nationally" and "nationwide." The definition of "national" is "of or relating to a nation,"[8] and similarly the definition of "nationwide" is "extending throughout a nation."[9] In context, they mean "general," *i.e.*, "irrespective of location" or "across circuits," reflecting the circumstances in which local review of an action could generate duplicative litigation and inconsistent results regarding an issue.

In short, the two tests for D.C. Circuit review together comprehensively identify actions that define general standards or otherwise raise general issues for review, rather than actions that raise issues limited to a single actor or location.

This interpretation is confirmed by §307(b)(1)'s directive that a "locally or regionally applicable" action is presumptively reviewable "only in the United States Court of Appeals for *the* appropriate circuit." §7607(b)(1) (emphasis added). Congress's use of the definite article ("the") indicates that actions must be reviewed in a local circuit only if there is *only one* appropriate local circuit. And there can be a single appropriate local circuit *only* if the action raises issues limited to a single actor or a single circuit. If the action raises a general issue that could be raised by aggrieved parties in multiple circuits, then local review in multiple "appropriate" circuits could result in duplicative litigation and inconsistent rules. Had Congress wanted to tolerate

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[8] "National," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/national.

[9] "Nationwide," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/nationwide.

fragmented review of common, general issues in multiple circuits, it could easily have said that. Indeed, Congress did so in the preceding subsection of §307, where it stated that "the district court … for *any* district in which such person is found or resides … shall have jurisdiction" to issue certain orders. §7607(a).

Section 307(b)(1)'s express categorization of specific actions as "nationally" or "locally or regionally" applicable also reinforces this interpretation. *See Fischer* v. *United States*, 603 U.S. 480, 487 (2024) ("under the … canon of *ejusdem generis*, a general or collective term at the end of a list of specific items is typically controlled and defined by reference to the specific classes … that precede it" (quotation cleaned)). The Act identifies as "nationally applicable" those actions that "promulgat[e]" a "standard," "rule," "control or prohibition"—all actions that establish a standard or decision affecting parties generally, irrespective of their specific location. §7607(b)(1). For example, the Act deems "nationally applicable" the "national … ambient air quality standard[s]" ("NAAQS"), §7607(b)(1), which establish minimum air quality requirements that must be met in every State. *See* 40 C.F.R. §§50.2(d), 50.4; 42 U.S.C. §§7401, 7410(a). The Act also deems "nationally applicable" limits on greenhouse-gas emissions for all manufacturers of light-duty vehicles, *see* 42 U.S.C. §7521; *Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards*, 86 Fed. Reg. 74,434, 74,434, 74,438, 74,439 (Dec. 30, 2021), even though the regulated vehicle manufacturers are based in and produce vehicles in a small minority of States.[10]

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[10] *See* "List of automotive assembly plants in the United States," *Wikipedia* (identifying about 17 automakers with

In contrast, the Act identifies as "locally or regionally applicable" actions that "approv[e] or promulgat[e]" a state implementation plan ("SIP") for a NAAQS, actions that grant or deny particular types of waivers, and actions that impose certain penalties. §307(b)(1). Each of these actions prescribes a standard or rule for a single actor or location, namely, the State that proposed the plan or the "person" who requested the waiver for an emissions "source" or whose "source" violated applicable emissions limits, *see* 42 U.S.C. §§7411(j), 7420(a)(2)(A). Thus, comparison of this list of "locally or regionally applicable" actions to the list of "nationally applicable" actions illustrates that centralized review in the D.C. Circuit is warranted where the action is general, whereas review in the local circuit is warranted where the action is tied uniquely to a particular actor or location.

C. Section 307(b)(1)'s Legislative History Confirms That Congress Specifically Intended That All Actions Raising General Issues Would Be Reviewable In The D.C. Circuit

If §307(b)(1)'s text were ambiguous in any relevant way, its legislative history would "clear [that] up." *Milner* v. *Department of Navy*, 562 U.S. 562, 572 (2011); *accord Bostock* v. *Clayton County*, 590 U.S. 644, 674 (2020); *id.* at 721 (Alito, J., dissenting). Consistent with the textual interpretation just described, the history shows that Congress designed §307(b)(1) to ensure that any action defining a standard or otherwise raising an issue affecting actors regardless of their location would be reviewable in the D.C. Circuit to avoid duplicative litigation and inconsistent rules under the Act and to take

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headquarters in 7 States and assembly plants in 17 States), https://en.wikipedia.org/wiki/List_of_automotive_assembly_plants_in_the_United_States.

advantage of the D.C. Circuit's administrative-law expertise.

1. As initially enacted in 1970, §307(b)(1) lacked the terms "nationally applicable," "locally or regionally applicable," and "based on a determination of nationwide scope or effect." Instead, the provision specified the venue for each type of action. Section 307(b)(1) required that the D.C. Circuit review any "action … promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 2931." Clean Air Act Amendments of 1970 (hereinafter "1970 Amendments"), Pub. L. No. 91-604, §12(a), 84 Stat. 1676, 1708 (1970). And §307(b)(1) provided that "the appropriate circuit" would review any "action in approving or promulgating any implementation plan under section 110 or section 111(d)." *Id.*

The statute's structure reflected Congress' expectations about which actions would raise general issues and thus require uniform disposition. The types of actions designated for exclusive D.C. Circuit review were "national in scope" and therefore "require[d] even and consistent national application." S. Rep. No. 91-1196, at 41 (1970). Actions to be reviewed in "the appropriate circuit," in contrast, "r[a]n only to *one* air quality control region." *Id.* (emphasis added).

Questions soon emerged regarding how to accomplish Congress' goal of centralized review given the statute's limited language. In 1972, various environmental groups challenged an EPA action approving and

promulgating numerous States' proposed SIPs together. *See Natural Resources Defense Council, Inc.* v. *EPA*, 465 F.2d 492, 493 (1st Cir. 1972) (addressing *Approval and Promulgation of Implementation Plans*, 37 Fed. Reg. 10,842 (May 31, 1972)). The approvals undisputedly had to be challenged in "the appropriate circuit" under §307(b)(1) as it stood then. *Id.* at 493-494. Accordingly, the petitioners sued in every regional circuit. *Id.* at 493. But because they challenged "administrative policy positions which were applied nationally and uniformly" to render the approvals, they argued that the D.C. Circuit was "the appropriate" circuit. *Id.*

The First Circuit agreed, holding that the D.C. Circuit was the appropriate circuit because the lawsuit involved "the automatic application of standard, nationwide guidelines to all plans simultaneously [that] preordains wholesale approvals or extensions," rather than "particularistic attention … given to each plan devised for one air quality control region." *Id.* at 494. The court emphasized: "The legal issues raised by petitioners in the First Circuit seem to be identical with those raised in every other circuit. The parties are the same. There do not appear to be factual questions unique to each circuit." *Id.* at 495. Therefore, localized adjudication would create "possible inconsistent and delayed results on the merits." *Id.*

The D.C. Circuit then reached the same conclusion because the contrary conclusion "would produce some anomalous results" for two reasons. *Natural Resources Defense Council* v. *EPA*, 475 F.2d 968, 969 (D.C. Cir. 1973). First, some of the challenged "implementation plans … cover[ed] jurisdictions falling within several circuits." *Id.* Second, "all of these cases raise[d] identical legal issues. None of these issues involve[d] facts or laws peculiar to any one jurisdiction; rather, all concern[ed]

uniform determinations of nationwide effect made by the Administrator." *Id.* at 970. Therefore, centralized review in the D.C. Circuit served the "strong congressional concern for coordinated decision-making." *Id.* at 969-970.

Two years later, the Sixth Circuit agreed with the First and D.C. Circuits and accordingly applied "a similar analysis" to an action that "amended state implementation plans" and therefore "plainly" had to be reviewed in "the appropriate circuit" under §307(b)(1). *Dayton Power & Light Co.* v. *EPA*, 520 F.2d 703, 706, 708 (6th Cir. 1975) (addressing *Prevention of Significant Air Quality Deterioration*, 39 Fed. Reg. 42,510 (Dec. 5, 1974)). Because the challenged action was "the product of a unitary rule-making proceeding" and had "the effect of amending every state's air quality implementation plan in precisely the same way"—and thus was "national in scope and appl[ied] uniformly throughout the country"—the court recognized that review in each "local circuit" would create "a substantial risk of seriously inconsistent results and an inevitable delay." *Id.* at 707-708. Therefore, the court held that the D.C. Circuit was the appropriate circuit. *Id.* at 708.

2. In 1977, Congress "clarif[ied]" §307(b)(1)'s language to provide a more direct path to the result reached by the First, Sixth, and D.C. Circuits in the *Natural Resources* and *Dayton Power* cases, namely, centralized review in the D.C. Circuit of actions raising general issues. H.R. Rep. No. 95-294, at 323 (1977).

Congress's 1977 amendments gave §307(b)(1) its current form. First, Congress expanded the range of actions for which review in the D.C. Circuit is mandatory by adding "any other nationally applicable regulations promulgated, or final action taken, by" EPA. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §304(c)(1),

91 Stat. 685, 776 (1977). Second, Congress correspondingly expanded the range of actions for which review in "the appropriate circuit" is presumptively mandatory by adding "any other final action … which is locally or regionally applicable." *Id.* §304(c)(2). Finally, Congress added the third venue test, under which the second test's presumption would be rebutted in favor of the D.C. Circuit "if [the] action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." *Id.* §304(c)(4).

The House Committee on Interstate and Foreign Commerce, which prepared the amendments, *see* Pub. L. No. 95-95, §305(c)(1), 91 Stat. 685 (1977) (enacting H.R. 6161); H.R. Conf. Rep. No. 95-564, at 140 (1977) (conference committee adopted House version), explained that a determination is "nationwide" if it "has scope or effect *beyond a single judicial circuit.*" H.R. Rep. No. 95-294, at 324 (emphasis added). That understanding reflects §307(b)(1)'s fundamental purpose of avoiding duplicative litigation and inconsistent rules. Because an underlying determination whose scope or effect spans multiple circuits could aggrieve parties in those multiple circuits, the revised statute ensures that review of such determinations can be centralized.

The Committee also stated that "[i]n adopting" these amendments, it "concur[red] … with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick"—then EPA's general counsel—that "accompanied the Administrative Conference's views." H.R. Rep. No. 95-294, at 324. Mr. Frick recommended that §307(b)(1) be amended to make clear that "where national issues are involved they should be reviewed in the D.C. Circuit." *Miscellaneous Amendments*, 41 Fed. Reg. 56,767,

56,768:3 (Dec. 30, 1976) (quotation cleaned). He observed that although "[c]ases involving" actions like "permits" and SIP "approval[s] … usually involve issues peculiar to the affected States," they "sometimes involve generic issues that apply to EPA's actions nationwide," *i.e.*, "generic determinations of nationwide scope or effect." *Id.* at 56,768:3-56,769:1. "[S]uch actions [are] virtually identical to promulgation of 'national standards,'" which should be "reviewed in the D.C. Circuit." *Id.* at 56,769:1; *see id.* 56,768:1 (discussing "national standards").

As examples of actions involving generic issues or actions otherwise virtually identical to national standards, which should be reviewable in the D.C. Circuit, Mr. Frick cited the action approving numerous States' SIPs at issue in the *Natural Resources* cases, through which EPA had applied a policy nationally and uniformly to concurrently resolve multiple States' status. 41 Fed. Reg. at 56,769:1 & n.1. He noted that "it is possible to argue that the D.C. Circuit is the 'appropriate circuit' for review of 'national' SIP issues," as the D.C., First, and Sixth Circuits had already held under §307(b)(1)'s original language. *Id.* at 56,769:1 & n.3. But the new "based on a determination of nationwide scope or effect" test, he explained, would reinforce Congress' original "inten[t]" that "review … of matters on which national uniformity is desirable" would take place in the D.C. Circuit. *Id.* at 56,769:1 (quotation cleaned). And, he said, "it ma[de] sense to centralize review of 'national' … issues in the D.C. Circuit[to] tak[e] advantage of [that court's] administrative law expertise and facilitat[e] an orderly development of the basic law under the Act." *Id.* at 56,769:1.

D. Interpreting §307(b)(1) To Make All Actions Applying A General Standard Reviewable In The D.C. Circuit Does Not Mean All Actions Will Be Reviewed In The D.C. Circuit

In their brief in opposition, respondents argued (at 25-26) that "apply[ing] a uniform standard to similarly situated regulated parties" cannot suffice to require D.C. Circuit review under §307(b)(1) because the Administrative Procedure Act ("APA") "*compel[s]* EPA" to do that "in every action," and therefore every EPA action would have to be reviewed in the D.C. Circuit. That argument is substantially overstated.

First, as explained above, the "nationally applicable" test does not depend on what standard the action rests on, but rather depends on what standard the action *establishes* (or revises or reaffirms). Merely "constru[ing] and appl[ying] nationally applicable provisions … does not transform a locally applicable action into a nationally applicable one." *Chevron U.S.A. Inc.* v. *EPA*, 45 F.4th 380, 387 (D.C. Cir. 2022); *see also Sierra Club* v. *EPA*, 926 F.3d 844, 849-850 (D.C. Cir. 2019).

Second, *applying* a uniform standard can but will not always satisfy the "based on a determination" test. A "determination" is "the resolving of a question by argument or reasoning" or "the act, process, or result of an accurate measurement."[11] EPA sometimes applies a mandatory or settled general standard, *e.g.*, a standard directly imposed by the Act, a standard conclusively adopted by the courts as the best reading of the statute, or a standard for which the Act's 60-day time bar has

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[11] "Determination," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/determination.

expired, *see* §7607(b)(1). In such cases, the action would be based not on a *determination of* the general standard—the selection of the standard would not be up for debate or judicial review—but rather only on the standard's rote application.

Third, some EPA actions do not turn on a general determination at all. For example, EPA has denied proposed SIPs for purely factual reasons specific to the proposing State. *See, e.g.*, *West Virginia* v. *EPA*, 90 F.4th 323, 328-329 (4th Cir. 2024) ("[T]he circumstances addressed by the EPA were those particular and unique to West Virginia …. These discussions all focused on the data particular to West Virginia and the analyses that West Virginia conducted with respect to those state-specific data."); *Kentucky* v. *EPA*, __ F.4th __, No. 23-3216, 2024 WL 5001991, at *12 (6th Cir. Dec. 6, 2024) ("[T]he agency decided that Kentucky's plan did not satisfy the Good Neighbor Provision due to circumstances … unique to that plan," and EPA "would have denied Kentucky's plan even if it had allowed Kentucky to use the 2011 modeling and 1 ppb threshold" (quotation cleaned)). Such grounds would be sufficient to deny a proposed SIP, and therefore a SIP denial premised only on such grounds would not be based on a determination of nationwide scope or effect.

And fourth, even where an action is based on a general determination, the D.C. Circuit is the exclusive venue to review it only if EPA expressly makes and publishes a finding to that effect. §7607(b)(1). EPA has discretion not to make such a finding and sometimes exercises that prerogative. *See, e.g.*, *Sierra Club*, 926 F.3d at 849-850. For example, EPA might elect not to make the requisite finding if it recognizes that the general standard applied is unlikely to be challenged—and thus the risk of duplicative litigation and inconsistent rules is

low—or if it believes that duplicative litigation or inconsistent rules are tolerable or even desirable in the particular context. *Compare, e.g.*, Pet.App.187a n.259 ("In deciding whether to invoke the exception by making and publishing a finding that this final action is based on a determination of nationwide scope or effect, the Administrator has also taken into account a number of policy considerations, including his judgment balancing the benefit of obtaining the D.C. Circuit's authoritative centralized review versus allowing development of the issue in other contexts and the best use of Agency resources."), *with, e.g.*, *Approval and Promulgation of Implementation Plans*, 81 Fed. Reg. 296, 326 (Jan. 5, 2016) ("some variation" allowed for SIP actions "across EPA regions" (quotation cleaned)).

II. THE 2022 EXEMPTION ACTIONS MUST BE REVIEWED IN THE D.C. CIRCUIT

For several independent reasons, §307(b)(1) mandates that the 2022 exemption actions be reviewed exclusively in the D.C. Circuit. First, the actions are nationally applicable because every small-refinery exemption adjudication affects national RFP obligations as a matter of law, and in turn has consequences for non-exempt obligated parties and renewable-fuel producers around the country. Second, the actions are nationally applicable because they announced general standards for adjudicating all RFP exemption petitions, wherever the petitioning refinery might be. And third, the actions are based on determinations of nationwide scope or effect (and EPA properly published a finding saying so) because EPA's new general standard—both its causation requirement and its presumption of cost recoupment—was an essential premise of all the exemption denials. All these reasons hold true regardless of whether the relevant administrative actions are the 105

individual exemption denials or the integrated actions through which those denials were issued.

For all these reasons, the D.C. Circuit is the appropriate circuit for review of these actions just as much as it was for review of the SIP-related actions in the *Natural Resources* and *Dayton Power* cases, whose results Congress endorsed when it revised §307(b)(1) in 1977.

A. The Integrated 2022 Exemption Actions Are The Relevant Actions, But The Unit Of Action Is Irrelevant Here Anyway

In opposing certiorari, respondents argued that "the relevant administrative action is EPA's denial of each small refinery's individual petition for hardship relief"—105 supposed actions in all—not the integrated exemption actions issued in April and June 2022. Opp.17, 20-21 (quotation cleaned). As the analysis below shows, the question of how to define the unit of action is irrelevant here; either way, the D.C. Circuit was the only venue in which the petitions for review could be filed under §307(b)(1). *See infra* pt. II.B-C.

In any event, respondents' definition of the relevant unit of action is incorrect. EPA defined the "actions" as the integrated decisions issued in April and June 2022 collectively denying multiple exemption petitions: "In this action, [EPA] is denying 69 petitions …. This final action … is a single action, but it is comprised of the adjudication of 69 [exemption] petitions." Pet.App.48a; Pet.App.193a. Respondents' contrary statutory arguments beg the question. They noted (at 18) that §307(b)(1)'s venue provisions refer to "action … under this chapter" and that "chapter" refers to the Clean Air Act. However, EPA's integrated exemption actions were issued *under* the Clean Air Act just as much as an action denying a single exemption petition alone.

Respondents also noted (at 19) that the Act's provisions authorizing small-refinery exemptions consistently use the singular to refer to the exemption petition and EPA's adjudication thereof: "*A* small refinery" may petition "for *an* extension of the exemption," §7545(*o*)(9)(B)(i) (emphasis added); "In evaluating *a* petition," §7545(*o*)(9)(B)(ii) (emphasis added); "The Administrator shall act on *any* petition … not later than 90 days after the date of receipt of *the* petition," §7545(*o*)(9)(B)(iii) (emphasis added). That language does not, however, preclude EPA from resolving multiple individual petitions jointly under a single, common standard, as EPA did here.

B. The 2022 Exemption Actions Are "Nationally Applicable"

1. The 2022 Exemption Actions are "nationally applicable," for two independent reasons.

First, unlike other types of individual adjudications, such as a typical SIP approval, *see* §7607(b)(1), small-refinery exemption decisions have a distinctive feature that makes each such adjudication inherently nationally applicable.

The RFP establishes general standards specifying the amount of renewable fuel that obligated parties must inject into the nation's transportation-fuel supply, irrespective of their location. Because of the RFP's legal structure, a decision on a petition for a small-refinery exemption is necessarily a decision that defines the level of those national RFP requirements. Granting an exemption automatically either (a) raises the percentage standards for all non-exempt obligated parties (if EPA adjusts the percentage standards to account for the exemption, as required by EPA's regulations under certain circumstances), or (b) reduces the nationally required volume

of renewable-fuel use (if EPA does not make that adjustment). Therefore, any litigation over an exemption decision (regardless of whether the decision granted or denied the exemption) is about the level of the general RFP standards. Moreover, these legal effects have corresponding practical effects on renewable-fuel purchases and RIN purchases around the country. *See supra* pp.7-8, 21-23.[12]

Second, even if the foregoing were not true, the 2022 exemption actions would be nationally applicable because they announced a new general standard for adjudicating all exemption petitions. In the actions, EPA "adopt[ed]" its interpretation that the Act requires that a petitioning refinery "demonstrate a direct causal relationship between its RF[P] compliance costs and the [disproportionate economic hardship] it alleges," Pet.App.55a, 57a, 80a, 104a, 106a; Pet.App.199a, 224a, 228a, 246a, 248a, and EPA established a presumption that RFP compliance does not cause small refineries such hardship because they can recoup their compliance costs by passing the costs through the supply chain, Pet.App.68a, 83a-84a, 107a-108a, 168a; Pet.App.212a, 227a-228a, 249a-250a, 310a. In both actions, EPA stated that this standard "*appl[ies]* to all small refineries no matter the location or market in which they operate."

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[12] Although renewable-fuel producers are not "obligated parties," they are a direct object of exemption decisions because RFS "annual standards" "directly regulate biofuel producers" by mandating the amount of renewable fuel that must be supplied and used, *American Fuel*, 937 F.3d at 595, and, as just explained, exemption decisions affect the level of those standards. *See Energy Future Coalition* v. *EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.) (although "regulation [prohibiting use of certain biofuel in vehicles] is technically directed at vehicle manufacturers," biofuel producers were also "an object of the action").

Pet.App.187a-188a, 329a (emphasis added). And in both actions, EPA stated that it "will" apply this standard both to all exemption petitions then pending and "going forward." Pet.App.101a; *see also* Pet.App.104a (EPA "is therefore adopting this interpretation going forward."); Pet.App.242a-243a, 246a. Thus, the actions "promulgate[d]" a general "standard" or "rule," just like the regulations and rules that §307(b)(1) expressly identifies as nationally applicable and subject to mandatory exclusive D.C. Circuit review. §7607(b)(1).

That the actions promulgated a general standard is so even if each individual exemption denial is deemed the relevant administrative action, because each such action made the same announcement concurrently through the April and June 2022 exemption actions. As the citations in the preceding paragraph show, EPA expressly announced its general standard in both actions. Indeed, in the June action EPA explained and defended the general standard anew, *e.g.*, Pet.App.84a-85a ("For the reasons described herein, EPA believes that this approach is the best interpretation of—and the most reasonable way to implement—the statutory SRE provisions."), and in as much detail as it had in the April 2022 exemption action, *compare* Pet.App.223a-228a, 242a-326a *with* Pet.App.79a-85a, 100a-184a.

In any event, the temporal separation between the April and June 2022 exemption actions is artificial and should be disregarded for venue purposes. Both actions were the product of the unitary administrative proceeding commenced in December 2021. *See supra* p.10. EPA merely adjudicated the petitions in two tranches for administrative convenience based on their procedural posture: the April adjudications covered the exemption petitions for 2018, which the D.C. Circuit had remanded and which the D.C. Circuit had directed EPA to

adjudicate by April 7, 2022, whereas the June adjudications covered all the other pending exemption petitions, which were not subject to a court-ordered deadline. *Supra* pp.9-12. Thus, the two actions genuinely reflect a single resolution of a single, comprehensive administrative proceeding.

2. The court below considered the 2022 exemption actions not "nationally applicable" because their general "approach" does not "bind[] EPA in *any* future adjudication" of exemption petitions. Pet.App.12a. That is incorrect for several independent reasons.

First, the court below did not account for the inherently national nature of every small-refinery exemption decision.

Second, the 2022 exemption actions' general standard controlled at least with respect to all *pending* exemption petitions, and that is enough. Section 307(b)(1) does not specify whether the action's "applicability" must be in the present or future.

And third, the exemption action's general standard indeed bound EPA in the future as much as a regulation would. Not only did the actions state that EPA "will" apply the new standard "going forward," *supra* p.38, but also "[a]djudication … has future … legal consequences, since the principles announced in an adjudication"—just like a regulation—"cannot be departed from in future adjudications without reason." *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 216-217 (1988) (Scalia, J., concurring); *see, e.g.*, *Kaufman* v. *Nielsen*, 896 F.3d 475, 484 (D.C. Cir. 2018) ("An agency interpretation in

an informal adjudication may … have general applicability and the force of law.").[13]

The lower court's reasoning "effectively removes all 'adjudications' from the ambit of §7607(b)(1)," contrary to the statutory text. Pet.App.39a. Section 307(b)(1)'s "nationally applicable" test expressly applies not only to "any … regulations," but also to "any … action." §7607(b)(1). Congress has expressly defined administrative "action" to include informal adjudication. 5 U.S.C. §551(7), (13). Thus, "action" in this context must include the adjudication of small-refinery exemption petitions, particularly given the Act's juxtaposition of "action" and "regulations"; otherwise, "action" would be superfluous. *See also Harrison*, 446 U.S. at 583, 592-593 (phrase "any other final action" in §307(b)(1) encompasses not only "formal adjudication [and] informal rulemaking," but also informal adjudication). "[T]hat kind of superfluity, in and of itself, refutes [the court of appeals'] reading." *Pulsifer* v. *United States*, 601 U.S. 124, 143 (2024).

C. Alternatively, EPA Published Its (Sound) Finding That The 2022 Exemption Actions Are "Based On A Determination Of Nationwide Scope Or Effect"

1. Courts must defer to EPA's finding that an action is based on a determination of nationwide scope or effect

EPA's finding that an action is "based on a determination of nationwide scope or effect" should be reviewed deferentially. The APA "mandate[s] that judicial review

[13] This remains true for an agency's statutory interpretation until the courts conclusively determine the "best reading" of the statute. *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244, 2266 (2024).

of agency policymaking and factfinding be deferential" under the arbitrary-and-capricious and substantial-evidence standards. *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244, 2261 (2024) (citing 5 U.S.C. §706(2)(A), (E)).

The court below, however, concluded that it had to "independently assess" whether the exemption actions are based on a determination of nationwide scope or effect. Pet.App.13a (quotation cleaned). According to Fifth Circuit precedent, §307(b)(1)'s "based on a determination" test has "two conditions": "First the action must be based on such a determination and second the agency must so find and publish." *Texas* v. *EPA*, 829 F.3d 405, 421 (5th Cir. 2016). Therefore, the Fifth Circuit reasoned, courts "must make an independent assessment of the scope of the determinations" "[b]ecause the answer to the first condition controls the role of the court." *Id.* The intuition behind the Fifth Circuit's position seems to be that deferring to EPA's finding "effectively collapse[s] both conditions into the second condition, thereby rendering the first condition superfluous." *Hunt Refining Co.* v. *EPA*, 90 F.4th 1107, 1114 (11th Cir. 2024) (Lagoa, J., concurring). That is not the case.

To be sure, there cannot be both deferential review of EPA's finding and de novo review on the same question; it must be one or the other. But the lower court's analysis is incorrect. Deferential review does not render the first "condition" superfluous because §307(b)(1) does not actually require both the court and EPA to make the same finding. Rather, the best reading of §307(b)(1) is that it establishes a substantive condition and a procedural condition, both for EPA: it spells out the finding that EPA must make and then spells out the process by which EPA must make it in order to trigger D.C. Circuit

venue, namely, EPA must make the finding expressly, in a published notice.

Section 307(b)(1) should be read this way for several reasons.

First, it is the Fifth Circuit's view that renders part of §307(b)(1) superfluous. If Congress intended courts to determine the basis of an action independently, there would have been no need for Congress to also direct EPA to formally make the same finding; EPA's substantive assessment would be irrelevant. One might say that EPA's publication of the finding would still serve the role of expressing its desire for D.C. Circuit review should the *court* make the requisite finding. But Congress could have easily achieved that more directly by directing EPA to merely state that preference, without the trouble of making a substantive finding.

Second, the APA's "default standard" of deferential review applies unless another statute "specif[ies] a standard for judicial review," *Alaska Department of Environmental Conservation* v. *EPA*, 540 U.S. 461, 496 (2004), and §307(b)(1) does not specify a standard for review for EPA findings that an action is based on a determination of nationwide scope or effect. Congress certainly knew how to do that because, elsewhere in the Clean Air Act, Congress prescribed the standard for reviewing certain regulations promulgated via rulemaking. *See* §7607(d)(1), (9).

Third, deferential review is especially appropriate here because "[i]t is clear that Congress, by empowering the EPA Administrator to publish a finding that an action is 'based on a determination of nationwide scope or effect,' delegated unusual authority to control the venue of judicial review." *National Environmental Development Ass'n's Clean Air Project* v. *EPA*, 891 F.3d 1041,

1053 (D.C. Cir. 2018) (Silberman, J., concurring). And "the Administrator, as the national regulator, is in a much better position than a regional circuit court to evaluate the nationwide impact of [the Administrator's own] action." *Id.*

And fourth, deferential review serves the two overarching imperatives: avoiding wasteful litigation over venue and avoiding duplicative litigation and inconsistent rules under the Act. The more deferential the review of EPA's finding, the less likely the finding is to spur litigation over venue and the more likely EPA is to successfully ensure centralized review when it deems centralization warranted.

2. EPA's finding that the 2022 exemption actions are based on determinations of nationwide scope or effect is correct

a. However EPA's finding that the 2022 exemption actions are based on determinations of nationwide scope or effect is reviewed, it is correct. This is plain from the fact that the exemption actions—individually or collectively—could have precipitated, and did in fact precipitate, duplicative litigation of the same general issues, with inconsistent results and thus inconsistent rules going forward.

In the 2022 exemption actions, EPA "determined that any small refinery seeking an exemption … must" satisfy the new two-part standard: the interpretation of the Act to require direct causation and the empirical presumption that small refineries can recoup their RFP compliance costs. Pet.App.55a; Pet.App.199a-200a. These are "determinations" under §307(b)(1) because they reflect EPA's reasoned resolution of a question and a measurement (of small refineries' ability to recoup their RIN cost). These determinations have nationwide

scope or effect because they operate on and have consequences for all small refineries, irrespective of their location, across multiple judicial circuits. In other words, they are *general* determinations, not limited to any individual refinery. *See* supra p.32, pp.22-23.

Further, the 2022 exemption actions—and each individual exemption adjudication rendered through the 2022 exemption actions—were *based on* these determinations. These determinations were essential premises of each exemption adjudication: EPA denied each exemption petition because it concluded that each small refinery had failed to rebut EPA's empirical presumption of cost recoupment and therefore had not shown that RFP compliance caused the refinery to suffer the alleged disproportionate economic hardship. *See supra* pp.11-12. But for its general standard, EPA may well have granted the exemption petitions instead. Indeed, that is the result EPA routinely reached under its prior approach, which did not require causation or account for refineries' ability to recoup their RFP compliance costs. *See supra* pp.9-10.

Thus, the exemption denials involve general issues, and those issues are appropriately subject to centralized review. Local review would create a risk of duplicative litigation and inconsistent rules for small-refinery exemptions—which is especially problematic for a program that establishes *national* standards to ensure that certain volumes of renewable fuel are used *nationally*, *see supra* pp.5-7.

Of course, this is exactly what happened. Refineries whose exemption petitions were denied in April or June 2022 sought review in circuits around the country. *See supra* p.13. They principally challenged the general elements of EPA's general standard on grounds that were

independent of the individual refineries' specific circumstances, including asserting that EPA's causation requirement contradicted the Act's plain text and that EPA's presumption of cost recoupment contradicted the empirical record. *See, e.g.*, C.A.ECF #270-3, at 42-65, 72-73; Petitioners' Final Joint Opening Br. 34-85, 98-103, *Sinclair Wyoming Refining Co.* v. *EPA*, No. 22-1073, ECF #2035080 (D.C. Cir. Jan. 9, 2024); Petitioner's Opening Br. 35-52, *Hunt Refining Co.* v. *EPA*, No. 22-11617, ECF #51 (11th Cir. Feb. 9, 2023).

Predictably, the two circuits to decide the merits of the refineries' arguments—the Fifth Circuit in this case and the D.C. Circuit—reached different conclusions on some of those issues. For example, the court below held that EPA impermissibly acted retroactively in departing from certain aspects of its prior approach—its reliance on the Department of Energy's "scoring matrix"—because DOE had not accounted for refineries' ability to recoup their RIN costs. Pet.App.19a-23a. In contrast, the D.C. Circuit declined to reach the retroactivity issue. *Sinclair Wyoming Refining Co.* v. *EPA*, 114 F.4th 693, 714 n.12 (D.C. Cir. 2024). Therefore, EPA may have to revert to DOE's framework when re-adjudicating the exemption petitions remanded by the Fifth Circuit but not when re-adjudicating the ones remanded by the D.C. Circuit. Additionally, the D.C. Circuit and the court below identified different flaws in EPA's RIN-passthrough analysis. *Compare id.* at 711-714 *with* Pet.App.30a-33a.[14]

[14] Both circuits interpreted the Act to mean that small refineries must show that their RFP compliance is a "but-for" cause of their disproportionate economic hardship, but need not show that compliance is the "sole cause" of that hardship. *Sinclair Wyoming*,

Certainly, fragmented review of the 2022 exemption actions created the potential for even wider divergence between the circuits. And fragmented review of generic determinations on which future small-refinery exemption actions are based could again create a serious risk of duplicative litigation and inconsistent rules.

Inconsistent exemption rules pose a serious problem for the RFP, which governs the entire nation's supply of transportation fuel and affects every level of the supply chain, from farmers growing renewable-fuel feedstocks, to producers of renewable and petroleum-based fuels, to distributors, retailers, and consumers of transportation fuel. Small refineries have been responsible for more than 10%—several billion gallons—of the RFP's annual renewable-fuel mandate. *Compare* EPA, *RFS Small Refinery Exemptions*, *with* EPA,[15] *Renewable Fuel Annual Standards*.[16] Allowing an ever-fragmenting patchwork of small-refinery exemption standards around the country undermines the "market certainty so critical to the [RFP's] long term success." *Americans for Clean Energy*, 864 F.3d at 715 (quotation cleaned).

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114 F.4th at 708-709; Pet.App.23-27a. But the lower courts' rejection of the "sole cause" test was based on a misconception of EPA's position: EPA never required that RFP compliance be the *sole* cause, only that it be the *proximate* cause, *i.e.*, that there be "a direct causal relationship between its RF[P] compliance costs and" the hardship. Pet.App.80a; Pet.App.224a. The lower courts never addressed whether the Act requires proximate cause, and this case presents no occasion for this Court to do so, either.

[15] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (data updated Nov. 21, 2024).

[16] https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-annual-standards (updated June 4, 2024).

b. The lower court's contrary conclusion is wrong.

Although the court acknowledged that EPA's general standard had nationwide scope or effect and that the exemption denials were based on that standard, the court instead focused on the fact that the denials *also* necessarily "rel[ied] on refinery-specific determinations" that "each of the petitions … did not … present facts contrary to" EPA's general cost-recoupment finding. Pet.App.15a.

That analysis contravenes the statute. Section 307(b)(1) does not send to the D.C. Circuit only those cases that are based *exclusively* on determinations of nationwide scope or effect. Section 307(b)(1) uses the indefinite article, providing for D.C. Circuit review if the action is based on "a" determination of nationwide scope or effect. §7607(b)(1). The Dictionary Act declares that, "unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. §1. And as an indefinite article, the word "a" often indicates "one or more." The dictionary defines "a" to mean "any," which in turn means "one or some indiscriminately of whatever kind," "one, some, or all indiscriminately of whatever quantity," and "unmeasured or unlimited in amount, number, or extent."[17]

In this context, "a" *must* mean "one or more." Actions by EPA under the Act can be and routinely are based on multiple determinations, *i.e.*, they have multiple essential premises. *See Paroline* v. *United States*,

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[17] "A," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/a/; "any," *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/any/.

572 U.S. 434, 444-445 (2014) ("Every event has many [but-for] causes …."). There would be no basis to single out one among them as *the* determination that matters for whether the "based on a determination" test is met. Rather, as long as the action rests on at least one general determination and thereby raises at least one general issue for judicial review, the action must be reviewable in the D.C. Circuit because fragmented adjudication of that general issue could spur the duplicative litigation and inconsistent rules that Congress enacted §307(b)(1) to avoid.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

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