

No. 23-1229

In The
Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

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

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

**BRIEF OF NATSO, SIGMA, AND NACS AS
AMICI CURIAE IN SUPPORT OF
PETITIONER**

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TABLE OF CONTENTS

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------|----|
| INTEREST OF <i>AMICI CURIAE</i> | 1 |
| INTRODUCTION AND SUMMARY OF ARGUMENT | 2 |
| ARGUMENT | 4 |
| I. Compliance Costs For The Renewable Fuel Standard Program Are Set By, And Passed Through In, A Nationwide Market, Without Regional Variation..... | 4 |
| A. The Renewable Fuels Credit Market Operates Within a Competitive National Fuel Market. 5 | |
| B. A National Market Is Best Served by National Rules. | 11 |
| C. The Question Whether Small Refineries Are Equally Able to Pass Through RIN Costs Is Not Presented..... | 14 |
| II. The Fifth Circuit’s Rejection Of RIN Passthrough Was Wrong. | 16 |
| CONCLUSION | 20 |

TABLE OF AUTHORITIES

CASES

| | |
|----------------------------------------------------------------------------------------------------|--------|
| <i>Alon Refin. Krotz Springs, Inc. v. EPA</i> , 936 F.3d 628 (D.C. Cir. 2019) | 10 |
| <i>HollyFrontier Cheyenne Refin., LLC v. Renewable Fuels Ass’n</i> , 594 U.S. 382 (2021) | 9 |
| <i>Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.</i> , 510 U.S. 27 (1993) | 14 |
| <i>Macquarie Infrastructure Corp. v. Moab Partners, L.P.</i> , 601 U.S. 257 (2024) | 16 |
| <i>S. Ill. Power Coop. v. EPA</i> , 863 F.3d 666 (7th Cir. 2017) | 12, 13 |
| <i>Sinclair Wyo. Refin. Co. v. EPA</i> , 114 F.4th 693 (D.C. Cir. 2024) | 12, 17 |
| <i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992) | 14 |

STATUTES

| | |
|------------------------------|-------|
| 42 U.S.C. § 7607(b)(1) | 1, 11 |
|------------------------------|-------|

REGULATIONS

| | |
|------------------------------------------|----|
| 40 C.F.R. § 80.1415(a)-(b) | 9 |
| 40 C.F.R. § 80.1425(g) | 10 |
| 85 Fed. Reg. 7016 (Feb. 6, 2020) | 12 |
| 89 Fed. Reg. 14760 (Feb. 29, 2024) | 8 |

OTHER AUTHORITIES

| | |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| <i>Advanced Biofuels Under the Renewable Fuel Standard: Current Status and Future Prospects: Hearing Before the H. Subcomm. on Env't, 115th Cong. (2018) (statement of Robin Puthusseril on behalf of NATSO)</i> | 6 |
| <i>Gasoline explained, U.S. Energy Info. Admin.</i> | 5 |
| <i>Gasoline explained: Regional gasoline price differences, U.S. Energy Info. Admin.</i> | 7 |
| Kristi Moriarty, Nat'l Renewable Energy Lab'y, <i>High Octane Fuel: Terminal Backgrounder (2016)</i> | 5, 6 |
| <i>Pricing 101: Spot Fuel Markets Made Simple, OPIS (Mar. 10, 2023)</i> | 7 |
| <i>Rack Pricing Coverage by City, OPIS</i> | 8 |
| <i>Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56767 (Dec. 30, 1976) (statement of G. William Frick)</i> | 12 |
| <i>RIN Trades and Price Information, EPA</i> | 10 |
| <i>RINs and Carbon Credit Pricing, OPIS</i> | 10 |

INTEREST OF *AMICI CURIAE*¹

Amici NATSO (formerly the National Association of Truck Stop Operators), SIGMA: America’s Leading Fuel Marketers (formerly the Society of Independent Gasoline Marketers of America), and NACS (the National Association of Convenience Stores) are the leading trade associations representing distributors and retailers of motor fuel. Together, they represent more than 90 percent of retail motor fuel sales in the United States, as well as terminal operators, wholesalers, and distributors.

Amici organizations and their members have significant experience with EPA’s Renewable Fuel Standard (RFS) program, as well as direct insight into all segments of the motor fuel value chain. That experience makes them uniquely well-positioned to weigh in on what is ultimately a very narrow question presented here—whether EPA’s across-the-board denial of RFS program exemptions to small refineries was “nationally applicable” or “based on a determination of nationwide scope or effect.” 42 U.S.C. § 7607(b)(1).

Whatever the scope of the Clean Air Act’s venue provision in the abstract—a question on which *amici* take no view—the precise venue question here can be answered by recognizing that there is no regional variation in the essential market dynamics for RFS

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the brief’s preparation or submission.

compliance costs. *Amici's* experience as market participants aligns with EPA's judgment that the question of whether small refineries qualify for RFS program exemptions can and should be answered on a nationwide basis, as EPA did here.

INTRODUCTION AND SUMMARY OF ARGUMENT

As daily participants in wholesale and retail fuel markets, *amici's* members are deeply familiar with pricing dynamics in those markets, as well as the effects of the RFS program. With respect to what matters here—the cost of renewable fuel credits (called Renewable Identification Numbers or RINs) and the ability of refineries to pass those costs on to customers—market dynamics do not vary across the country. Fuel prices in general, and RIN prices in particular, are set in the context of a national market. Reflecting this national-market reality, EPA's denial actions here are both nationally applicable and based on a determination of nationwide scope and effect.

Judge-made variation across regional circuits would necessarily be premised on a misunderstanding of how the RIN market operates and interacts with the nationwide motor fuel distribution system. Regional circuit review risks geographically disparate exemption standards. And because exempt refineries' RFS compliance obligations can be re-allocated to other refineries, such disparate standards could cause regionally lopsided shifts in RFS compliance obligations. This would introduce inefficiency-generating incoherency into what has thus far been a well-functioning national market.

The lack of regional variation in how the RIN market operates—including the degree to which refineries can pass on their RIN costs—confirms that D.C. Circuit venue is appropriate. That is so regardless of whether the Court agrees with EPA that all refineries can, in fact, pass along their RIN costs. The question whether small and large refineries are equally able to pass on their RIN costs is not presented here. The Court need not—and therefore should not—address whether EPA’s technical answer on that merits question was correct. It need only decide the cleanly presented procedural question of whether EPA answered that question on a nationwide basis. *Amici* therefore urge the Court to steer clear of endorsing any attempt to smuggle the Fifth Circuit’s flawed merits analysis into the venue question presented.

Though the Court should not reach it, highlighting but one point of error—among many where the Fifth Circuit went astray—shows why carefully separating the straightforward venue question from the merits analysis matters. Here, the Fifth Circuit reasoned, based on nonpublic data, that small refineries cannot pass through their RFS compliance costs in “micro-markets” because prices in those markets are lower. But *amici*’s experience (consistent with basic economic principles) shows the opposite: prices in small, local markets generally are *higher* than prices in large, central markets. Regardless, even if small refiners cannot pass on some *non-RIN* costs, there is no evidence they cannot pass on *RIN costs*, and the record evidence is otherwise.

But the relevant point here—for the venue question presented—is even if (counterfactually) smaller refineries faced different RIN costs than larger ones, those costs would still be demonstrably tethered to national market dynamics and principles that do not vary geographically. This national market should not be subject to eleven conflicting rulesets about when EPA can grant RFS program exemptions to small refineries. Only a nationally applicable rule, subject to review in the D.C. Circuit alone, can properly supervise this aspect of the RFS program as Congress intended.

ARGUMENT

I. Compliance Costs For The Renewable Fuel Standard Program Are Set By, And Passed Through In, A Nationwide Market, Without Regional Variation.

Local U.S. fuel markets do not function in isolation. Rather, they are connected by extensive transportation networks, and buyers and sellers in one place inevitably influence prices elsewhere. The EPA rule here hinged on a determination that the same national market forces shape fuel prices across the country, including refineries' ability to pass on RIN costs as part of those fuel prices.

Amici's real-world experience amply supports EPA's assessment that small-refinery exemptions should be, and were, decided in a nationally applicable action based on an economic analysis that was national in scope. Regardless of whether EPA was correct about whether small refineries are equally

able to pass on their RIN costs as large refineries—a merits question the Court need not address—the lack of regional variation in how RIN passthrough works confirms that venue is proper in the D.C. Circuit.

A. The Renewable Fuels Credit Market Operates Within a Competitive National Fuel Market.

1. The U.S. motor fuel market is extremely competitive throughout the distribution chain. Generally, the market has three levels. At the refining level, crude oil is refined into “blendstocks,” which require blending with other liquids to make the finished motor fuel that American motorists buy at filling stations across the country. *See Gasoline explained*, U.S. Energy Info. Admin. <https://tinyurl.com/4mtxsjd2>. There are about 130 refineries in the United States, and they compete with one another, as well as with refineries outside the United States and importers. All these actors vie to deliver blendstocks to fuel terminals around the country, often via pipelines and other low-cost transportation methods. Pet. App. 115a.

Fuel terminals—more than 1,300 of them across the United States—represent the next stage in the distribution chain: the wholesale stage where blendstocks are stored, blended into finished motor fuels, and loaded onto trucks. Pet. App. 114a. At this stage, ethanol or other renewable fuels are typically blended into finished motor fuels. *See id.* at 120a; Kristi Moriarty, Nat’l Renewable Energy Lab’y, *High Octane Fuel: Terminal Backgrounder* 1-2 (2016), <https://tinyurl.com/twc94d77>. You can think of a fuel

terminal as having several distinct tanks holding different components of finished fuel—*e.g.*, different gasoline blendstocks, diesel, ethanol, and additives. When a truck arrives at the terminal and selects a particular blend, “products are pulled from various tanks to dispense a finished transportation fuel into the truck.” Moriarty, *supra*, at 1.

The truck then delivers that finished fuel to the final retail stage, where it is sold to consumers. At the retail level, there are about 145,000 retail fueling stations in the United States. Pet. App. 114a. At those stations, operated by *amici*’s members, retail prices are highly transparent and competitive. *Id.* at 115a. Price signs are visible from consumers’ vehicles, and consumers often can see multiple signs for the same fungible commodity from a single vantage point. Consumers also can compare prices through mobile applications that list prices from retail fueling stations anywhere in the country.

These competitive dynamics, fueled by price transparency, are particularly pronounced in retail diesel markets. Truck drivers and trucking fleets, which make the lion’s share of diesel purchases, are price sensitive and often compare prices over long distances, with fleet managers directing truck drivers to specific retail locations for the lowest prices. *Advanced Biofuels Under the Renewable Fuel Standard: Current Status and Future Prospects: Hearing Before the H. Subcomm. on Env’t, 115th Cong. 34 (2018)* (statement of Robin Puthusseril on behalf of NATSO).

2. Blendstocks, as key inputs for this highly competitive market, can move long distances

relatively quickly and cheaply. This means that prices for the same product tend to converge, differing only by transportation costs. Pet. App. 116a-17a. In fact, many fuel supply contracts set prices by indexing the price to the price of fuel in a major market, plus or minus transportation costs to or from the local market (depending on the direction the fuel is flowing). *Id.* at 116a.² This efficient and transparent pricing is facilitated by an information provider that gathers price data from the major markets and then factors in transportation costs (truck, rail, or pipeline tariffs, terminal fees, product shrinkage in transit, etc.) to arrive at a “Spot Replacement Index” or “spot” price for hundreds of smaller markets. *Id.* at 150a.

These pricing fundamentals do not vary by region, even if retail prices sometimes do. A consumer taking a road trip from New York to Florida may experience regional variation in retail gas prices for a variety of reasons: differing state taxes, different gasoline formulations, or varying distances from sources of supply. See *Gasoline explained: Regional gasoline price differences*, U.S. Energy Info. Admin., <https://tinyurl.com/dyy9dn6s>. For example, some parts of the United States must “use special, reformulated gasoline that includes additives to help reduce carbon monoxide, smog, and toxic air pollutants.” *Id.* California’s reformulation requirements are uniquely stringent, *id.*, and EPA

² There are seven major markets in the U.S.: New York Harbor, Houston/Gulf Coast, Chicago, Pacific Northwest, San Francisco, Los Angeles, and Group 3 (Midwest). *Pricing 101: Spot Fuel Markets Made Simple*, OPIS (Mar. 10, 2023), <https://tinyurl.com/2jvkntvf>.

recently authorized several Midwestern states to impose more stringent blendstock requirements in the summer, 89 Fed. Reg. 14760 (Feb. 29, 2024).

But these regional variations have nothing to do with market pricing fundamentals, which are nationally uniform in operation, given the overall efficiency and transparency of the market. Transportation costs may be lower or higher, depending on where a terminal is located and how blendstocks are transported to it (*e.g.*, by pipeline or not), but whether you are in New York City or Shreveport, Louisiana, wholesale “rack” prices for a particular product at a particular fuel terminal are set by the same market forces for all market participants, Pet. App. 117a, and in many cases are published, *Rack Pricing Coverage by City*, OPIS, <https://tinyurl.com/3c8c56af>.

That there are aspects of the national fuel market that do vary by region, such as required gasoline formulations, only underscores the narrowness of the question presented here. In *amici*’s experience, some aspects of the fuel market and fuel operations do vary across the country, such that governing rules are or should be locally or regionally applicable, rather than nationally applicable. But not so for the uniform market fundamentals regarding RIN prices and RIN cost passthrough, where regionally fragmented rules would only introduce artificial uncertainty and inefficiency.

3. As renewable fuels are just one component among many that must be priced into the cost of finished motor fuel, it is unsurprising that RFS compliance costs operate in a national market, too.

As the Court explained in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass’n*, 594 U.S. 382 (2021), the RFS program requires certain volumes of renewable fuels to be blended into transportation fuel each year, with the applicable volumes now set annually by EPA. *Id.* at 385-86. The annual volume is apportioned among refineries (and importers) in proportion to each refiner’s volume of motor fuel production (or importation). *Id.* at 386; Pet. App. 60a-61a. EPA “polices these mandates with a system of credits,” with each “credit represent[ing] the blending of a certain quantity of renewable fuel” into finished motor fuel. *HollyFrontier*, 594 U.S. at 386. The credits—called RINs—are tradable nationwide, so that a refinery can “comply with the law thanks to its own blending efforts, the purchase of credits from someone else, or a combination of both.” *Id.*

RINs are generated by a renewable fuel producer (e.g., an ethanol producer) and assigned to a batch of renewable fuel. Pet. App. 62a.³ When, at the wholesale stage, the renewable fuel is blended into gasoline or diesel, the RIN is “separated” from the fuel. *Id.* at 62a-63a. It may thereafter be sold or used by the blender to satisfy its own RFS program compliance obligations (if the blender is a refiner, as some are, *id.* at 119a-20a). *Id.* at 63a.⁴

³ Each RIN generally represents a gallon of ethanol or its energy equivalent. See 40 C.F.R. § 80.1415(a)-(b).

⁴ Many of *amici*’s members are blenders that sell the separated RINs to market participants with RFS obligations. Pet. App. 122a. But such blenders cannot keep the receipts from

RINs are traded in a *national* market that is “open, competitive, liquid, and functioning as intended.” *Id.* at 96a. Like fuel prices, RIN prices are reported and transparent. *See RINs and Carbon Credit Pricing*, OPIS, <https://tinyurl.com/muhejs46>. For example, the average nationwide price for a “D6” RIN during the last week of October 2024 was 62 cents. *RIN Trades and Price Information*, EPA, <https://tinyurl.com/bdceptsh> (last updated Nov. 10, 2024).⁵

Because both RINs and fuel are sold in competitive markets, in the denial actions at issue EPA identified key market fundamentals that govern RFS compliance costs across the country. First, every refiner or importer incurs a cost to acquire RINs, whether they buy RINs directly or buy renewable fuels with RINs attached, blend those fuels into finished fuels, and keep the separated RINs to satisfy their own RFS obligations. *See* Pet. App. 119a-22a; *Alon Refin. Krotz Springs, Inc. v. EPA*, 936 F.3d 628, 650 (D.C. Cir. 2019) (“In a competitive market there’s no such thing as a free lunch, and blenders and integrated refiners pay their [RIN] tab just as others do; they just do so indirectly.”).

RIN sales. *Id.* at 125a. Because of competitive market dynamics, the amount received from RIN sales must be used to cover an equivalent discount in the price of the blender’s finished fuel, such that the finished fuel price reflects only one RIN cost (the RIN cost passed through from the refiner in the price of the petroleum blendstocks). *Id.* at 122a, 125a.

⁵ “D” codes identify the type of renewable fuel that the RIN represents. 40 C.F.R. § 80.1425(g).

Second, those RIN costs are passed on in the price of finished fuel to wholesale purchasers like *amici*'s members—and ultimately to retail consumers at the pump. *See* Pet. App. 114a-30a. This principle, called “RIN cost passthrough,” has been consistently recognized and applied by EPA for a decade. *Id.* at 110a-14a. Much like a nationwide tax, the market price of gasoline and diesel increases and decreases in concert with RIN cost increases and decreases. *Id.* at 67a, 122a. Of fundamental importance here, this relationship does not vary by geography or region; EPA has examined pricing data from markets across the country and confirmed the RIN passthrough result time and again. *See id.* at 143a-49a, 168a.

Amici can attest to the accuracy of EPA's conclusion that location is immaterial to RIN cost passthrough. *Amici*'s members account for over 90% of retail fuel sales nationwide. If there were a region or market in the country subject to the nationwide RFS program where finished fuel nonetheless could be purchased without passthrough of RIN costs, they would quickly take advantage of that difference and skew fuel purchasing accordingly. There is no such market, because RIN cost passthrough is a fundamental principle of the national fuel market, affecting refineries—and the purchasers of their products—in structurally similar ways, no matter where they are located.

B. A National Market Is Best Served by National Rules.

In enacting Section 7607(b)(1), “Congress intended review in the D.C. Circuit of ‘matters on

which national uniformity is desirable.” *Recommendations of the Administrative Conference of the United States*, 41 Fed. Reg. 56767, 56769 (Dec. 30, 1976) (statement of G. William Frick).

National uniformity is desirable here, where the RIN national market operates in the same manner across the country. Condoning venue in the regional circuits would only generate “[o]verlapping, piecemeal, multicircuit review,” *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 674 (7th Cir. 2017), that has already resulted in rulings that subject EPA to conflicting guidance on remand. *Compare* Pet. App. 16a-23a (retroactivity holding restricting EPA to evaluating exemptions under a pre-2021 analytical approach), *with Sinclair Wyo. Refin. Co. v. EPA*, 114 F.4th 693, 714 n.12 (D.C. Cir. 2024) (declining to reach retroactivity issue). Multi-circuit review thus risks creating regional market variation where none now exists, substituting unpredictable litigation-driven RFS program inconsistency for the current coherent, consistent market fundamentals.

On a forward-looking basis, when small-refinery exemptions are anticipated, that refiner’s share of the total renewable fuel volume will be re-allocated to other refiners. 85 Fed. Reg. 7016, 7050-51 (Feb. 6, 2020). This re-allocation reinforces the inherently national scope of small-refinery exemption decisions. When EPA grants or projects it will grant a small-refinery exemption such that re-allocation takes place, that action affects refiners nationwide by increasing their RFS obligations. *See* Br. for Resp’ts Supporting Pet’r 36-37.

Re-allocation also heightens the potential negative impacts of inter-circuit conflicts. As a practical matter, if regional circuits can set different standards for small-refinery exemptions, this could shift RFS obligations to circuits with proportionately fewer small refiners and circuits with relatively stringent exemption standards. Such a shift could be large, because exemption-eligible small refiners are responsible for about 10% of the nation's refining capacity (and thus also for about 10% of the annual RFS obligations). U.S. Cert. Reply 9.

Because RFS compliance costs are passed through in fuel prices, this could artificially raise fuel prices across the board if exempt refiners, despite being exempt from RIN costs, sell fuel at prevailing prices that reflect the now-higher RIN costs experienced by refiners with higher (re-allocated) RFS obligations. Some refineries could be afforded a substantial competitive advantage, *see* Pet. App. 167a, based largely on the happenstance of being located in a circuit that applies more lenient exemption rules.

However the market reacts, the inability to obtain a "coherent and consistent interpretation and application" of RFS standards is "potentially destabilizing." *S. Ill. Power Coop.*, 863 F.3d at 674. The RFS program and RIN market have functioned well under uniform national standards for small-refinery exemptions. It falls in the heartland of the desired uniformity in implementation that Congress was trying to protect through the Clean Air Act's venue provision.

C. The Question Whether Small Refineries Are Equally Able to Pass Through RIN Costs Is Not Presented.

The lack of regional variation in how the RIN market and RIN passthrough operate confirms that EPA was right to set nationally applicable standards for small-refinery exemptions based on nationwide determinations. That should end the Court’s inquiry on the venue question presented. Whether RIN passthrough works the same for small and large refineries is a distinct merits question that the Court need not—and should not—reach.

The procedural question presented—about which court should review EPA’s actions—does not include the substantive question of whether EPA’s actions were valid. *See* U.S. Pet. i, 8 n.2. Nor is validity “fairly included” within the question presented. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 (1993). A question “which is merely ‘complementary’ or ‘related’ to the question presented” is not “fairly included.” *Id.* (quoting *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992)). And, as the Fifth Circuit’s opinion makes clear, the venue question and the merits of the EPA’s denial actions are analytically distinct. Nonetheless, in their Brief in Opposition, Respondents leaned on the Fifth Circuit’s merits holding about purported “local market conditions” to support their contention that regional circuit court review is necessary. Br. in Opp’n 21. The Court should reject any attempt to smuggle the dense and technically complicated merits question into the straightforward venue question presented here.

To explain, among its merits holdings, the Fifth Circuit rejected EPA's conclusion that RIN cost passthrough applies equally to small and large refineries. Pet. App. 30a. That holding is wrong, but it is also not at issue here. Whether or not EPA got it right about RIN passthrough being the same for small and large refineries, EPA correctly gave that question a national answer, applicable to every petitioning small refinery in 18 states within 8 different circuits. Pet. App. 187a. EPA did so based on its analysis of market "principles that are applicable to all small refineries no matter the location or market in which they operate." Pet. App. 187a-88a. The Fifth Circuit's venue decision did not turn on its rejection of EPA's analysis of those market principles. It did not once mention its critique of "RIN-passthrough theory" or the substance of EPA's economic analysis when rejecting D.C. Circuit venue. *Id.* at 9a-15a.

Rather, for venue purposes, the Fifth Circuit wrongly held that EPA based its exemption denials on local or regional determinations—despite EPA's undisputably national-in-scope statutory interpretation and its analysis of national market principles like RIN passthrough. The Fifth Circuit concluded that EPA's denials were based on local determinations simply because EPA acknowledged the relevance of considering each refinery's individual information and contemplated a "non-zero chance" of granting a future exemption. *Id.* at 14a-15a.

That reasoning is faulty for several reasons, not least because the refinery-specific data only *confirmed* that the relevant national market principles operate the same everywhere. *See* Pet. App. 113a, 168a. But it

also means the Court has no reason to delve into the *correctness* of the EPA’s national economic analysis regarding RIN cost passthrough. To decide the venue question presented, the Court need only decide whether EPA’s action was, in fact, based on nationwide analysis.

There is, therefore, no reason for this Court to delve into the details of whether and how small refineries can pass on their RIN costs like large refineries can. And there is every reason not to. The “Court does not opine on issues that are ... tangential to the question presented,” *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257, 266 n.2 (2024), with good reason. Given the lack of complete briefing, the Court should avoid inadvertent endorsement of the Fifth Circuit’s questionable economic analysis. The need for caution is especially strong here, because EPA must chart a course on small-refinery exemptions on remand from the D.C. Circuit. *See* U.S. Br. 44 & n.7. Any merits comment in the Court’s opinion—especially on unbriefed issues where the Fifth and D.C. Circuits differ—could inadvertently alter not just that remand, but the overall trajectory of the program.

II. The Fifth Circuit’s Rejection Of RIN Passthrough Was Wrong.

Although irrelevant to the venue question presented, if the Court nonetheless opts to consider the Fifth Circuit’s economic analysis, it should reject it. Among other errors, the gravamen of the Fifth Circuit’s reasoning was that in their “micro-markets,” Respondents had to sell their fuel at lower prices than

they would command in “efficient” markets, and therefore they were unable to pass on their RIN costs. Pet. App. 31a-33a. That analysis is wrong from top to bottom.⁶

First, the premise: Smaller markets have higher wholesale prices, not lower ones, contrary to the Fifth Circuit’s conclusion. As EPA explained, “[i]f a small refinery is facing competition in its local market from a larger remote market, the local price will typically be higher than the price in the major market, reflecting the cost of shipping the fuel to the local market from the larger remote market.” Pet. App. 116a.

Amici agree. *Amici*’s members purchase billions of gallons of fuel annually—including from Respondents. *Amici*’s retailers are located nationwide, and they purchase and sell fuel in large

⁶ This was far from the only error, and the fact that the errors also diverged from the D.C. Circuit’s reasoning only underscores how the Fifth Circuit’s wrong turn on venue risks conflicting guidance. For example, the Fifth Circuit wrongly concluded that small refineries cannot purchase RINs “at the same time they sell fuel”—which is known as “ratable purchasing”—because they need RINs in small quantities, and RINs are only sold in larger “clips.” Pet. App. 33a. But that is not the case. *Amici*’s members work with RIN brokers all the time; many of them are blenders that sell RINs. The D.C. Circuit did not find any similar quantity obstacle to ratable purchasing (though it questioned EPA’s ratable-purchasing analysis on other grounds). See *Sinclair Wyo. Refin. Co.*, 114 F.4th at 712-14. *Amici*’s experience confirms EPA’s judgment: RIN brokers offer ratable purchasing contracts to small refineries with at most a *de minimis* premium that does not affect refiners’ ability to pass through RIN costs when they purchase RINs on a regular, systemic basis. Pet. App. 153a-54a.

urban markets, small rural markets, and everything in between. Generally, the price of refined petroleum in a small market equals the price in the large market plus the transportation cost from the large market to the small one. As discussed above, sales contracts often make this connection explicit by indexing small-market prices to large markets.

Although *amici* cannot respond directly to Respondents' nonpublic data, they are unaware of any pockets of the country where refiners have no choice but to sell their fuel at prices *below* the cost of transporting fuel from the nearest major market (where prices are undisputedly set efficiently and include RIN cost passthrough, as even the Fifth Circuit did not question, Pet. App. 32a). Such a market would be nonsensically inefficient in the context of a highly competitive national fuel market and interlocking transportation system.

The Fifth Circuit's conclusion does not follow from its premise in any event. Even if "micro-market" prices somehow were lower than the efficient level, those lower prices do not result from any inability to pass through RIN costs. Where prices in two markets sustainably differ, it reflects a different balance of supply and demand in those two locations. It has nothing to do with RIN costs, which are the same whether a refiner sells its fuel in a "micro-market" or not. Pet. App. 124a.

Small refineries may have higher *non-RIN* costs than their larger competitors, like higher transportation costs, fewer economies of scale, or more restricted access to crude oil. *See* Pet. App. 166a-67a. Those higher costs may compress small refineries'

margins. But such variations in costs between smaller and larger refineries do not stem from the national economic operation of the RFS program (much less whether they are participating in the program in New York or New Mexico). The Fifth Circuit thus wrongly sidestepped a much more complex analysis in assuming that anytime a small refinery cannot cover its full cost of production (assuming this ever occurs), it is the RIN costs—which are the same everywhere—that it is unable to passthrough, rather than its non-RIN costs—which undisputedly differ across different refineries.

In short, even if some small refineries do have to sell their fuel at lower-than-prevailing prices, it is due to market forces that are separate from the nationwide RFS program. If the Court is going to pass judgment on whether small refineries are able to pass on RIN costs, it should not take the Fifth Circuit's flawed economic judgments at face value, and instead await a case in which that question is actually presented.

* * * * *

Ultimately, this case presents a straightforward and narrow procedural question. EPA based its decision on a nationwide economic analysis in furtherance of a uniform national rule for a national RIN market. That makes D.C. Circuit venue appropriate. But no matter how the Court resolves that venue question, it need not—and should not—endorse any attempt to muddy those procedural issues with technical and complex questions about the substance of EPA's national economic analysis, on which the Fifth Circuit's conclusion runs counter to

economic common sense and *amici*'s nationwide real-world experience.

CONCLUSION

The judgment should be reversed.

Respectfully submitted.

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