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 THE SMALL REFINERY RESPONDENTS

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QUESTION PRESENTED

The Clean Air Act requires the Environmental Protection Agency ("EPA") to grant an exemption from the Act's Renewable Fuel Standard ("RFS") to a small refinery when compliance with the RFS would cause the refinery disproportionate economic hardship in a given year. 42 U.S.C. § 7545(o)(9)(B)(i). The six small refinery respondents here separately petitioned EPA for hardship exemptions for particular compliance years. EPA concluded, after "consider[ing] each [respondent's] individual refinery information," that each of the respondents was not entitled to hardship relief and denied the petitions. Pet.App.14a-15a. Respondents then petitioned for judicial review as permitted by the Clean Air Act, 42 U.S.C. § 7607(b)(1). The question presented is:

Whether an EPA decision denying a small refinery's RFS hardship petition is a "locally or regionally applicable" action, such that a court challenge to that action is properly venued in a regional circuit court, or is instead a "nationally applicable" action or an action "based on a determination of nationwide scope or effect" that must be challenged only in the U.S. Court of Appeals for the D.C. Circuit. 42 U.S.C. § 7607(b)(1).

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STATUTORY PROVISION INVOLVED

The Clean Air Act provides at 42 U.S.C. § 7607(b), in relevant part, that:

Administrative proceedings and judicial review

(b) Judicial review

(1) A petition for review of action of the Administrator [of the Environmental Protection Agency] in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,[] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under

section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia 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.

*

This and other pertinent statutory provisions are reprinted in the appendix to this brief. App.1a-31a, *infra*.

INTRODUCTION

The Clean Air Act ("CAA" or "Act") assigns the venue for a petition for judicial review of final agency action by asking whether the challenged action is "nationally applicable" (reviewed by the D.C. Circuit) or "locally or regionally applicable" (reviewed by the regional circuit courts). 42 U.S.C. § 7607(b)(1).[1] Determining venue thus requires focusing with precision on the "action" that the Environmental Protection Agency ("EPA") was authorized by the CAA to take: the "final action taken … under this chapter." *Ibid.* ("[T]his chapter" is the CAA.)

Once the final action is properly identified, the venue provision is straightforward. Most EPA actions under the Act are rulemakings or similar actions that apply throughout the entire nation, or else are adjudications or similar decisions involving individual States or regulated entities. The former go to the D.C. Circuit, the latter to the regional circuit courts—save only in the exceptional circumstance where the CAA's text directs EPA to base a local action on a "determination" about the whole nation.

Applying those statutory instructions here shows why the Fifth Circuit below got the venue question right. This case concerns a type of statutory forbearance from the CAA's Renewable Fuel Standard ("RFS") that affects only small refineries. Small refineries like respondents may petition EPA for an exemption from the RFS obligation by showing that they will face disproportionate economic hardship from compliance with the RFS in a given year. § 7545(o)(9)(A)-(B). Until a presidential administration change in 2021, EPA had repeatedly acknowledged that its decisions on small refineries' hardship petitions

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[1] All statutory citations are to Title 42 of the United States Code.

are quintessential locally applicable actions that Section 7607(b)(1) refers to the regional circuits. That's because each EPA "final action" on a hardship-exemption petition adjudicates the rights of only one small refinery located in one place, and the "chapter" (the CAA) requires those actions to be based on consideration of each small refinery's *own* economic hardship. § 7607(b)(1); see § 7545(o)(9)(B).

EPA changed its position on venue and started deliberately attempting to re-direct judicial challenges to its preferred court, the D.C. Circuit, only after it suffered a string of defeats in regional circuit courts that found EPA had wrongly decided hardship petitions. EPA now argues that, because it published its decisions on multiple small refineries' pending hardship petitions bundled together in two explanation documents (denying every pending petition), it was able to convert what it has long agreed were locally applicable final actions into just two nationally applicable actions. EPA was transparent about its goal of making the D.C. Circuit the only court allowed to review its latest denial decisions.

EPA's new venue position is contrary to the CAA's text, and the Fifth Circuit correctly rejected it. EPA was able to produce the bundled decisions only by ignoring the statutory command to decide hardship petitions individually as they come in. More fundamentally, the two explanation documents were bundles of *individual* final actions under the CAA. EPA's choice about how to publish its decisions cannot change the nature of the "final action taken … under this chapter," which is what matters for venue. § 7607(b)(1). It is the statutory text—"th[e] chapter"—that establishes what actions EPA is permitted to take. And here, every relevant provision of the chapter confirms that EPA was required to produce individualized

final actions based on individual petitioning refineries' economic circumstances.

In fact, that is just what EPA did. EPA itself has stated that it denied all of the small-refinery respondents' RFS hardship petitions because it "determin[ed]," after "consider[ing] each [refinery's] individual refinery information," that each respondent was not experiencing disproportionate economic hardship. Pet.App.14a-15a. EPA concluded, after examining each respondent's evidence, that each ostensibly passes on 100% of its RFS compliance costs in the price of the fuel it sells. *Those* were the conclusions on which EPA based its decisions to deny hardship relief to these small-refinery respondents, each of which received an individualized explanation from EPA analyzing its own economic evidence.

Multiple courts of appeals (including the D.C. Circuit) have since held that EPA's merits reasoning about the small refineries' ability to pass through their RFS compliance costs was arbitrary and capricious and unsupported by the record evidence. But the venue issue before this Court is simpler. To borrow Judge Silberman's description of the venue provision that EPA endorses (U.S. Br. 18): EPA's answer to whether a petitioning small refinery like Calumet Shreveport located in Shreveport, Louisiana, does or does not successfully pass through its RFS compliance costs in its fuel sales hardly qualifies as a "regulatory issue[] of national importance" that belongs in the D.C. Circuit. *National Env't Dev. Ass'ns Clean Air Project* v. *EPA*, 891 F.3d. 1041, 1054 (D.C. Cir. 2018) (Silberman, J., concurring).

The Fifth Circuit's judgment should be affirmed.

STATEMENT

A. Statutory and regulatory background

1. Venue for petitions for review under the Clean Air Act

Section 7607(b)(1) governs "[j]udicial review" of "petitions for review" of EPA's "final action[s] under this chapter," *i.e.*, under the Clean Air Act. See *Kentucky* v. *EPA*, 123 F.4th 447, 458, 461 (6th Cir. 2024); 42 U.S.C. Ch. 85, Codification Note ("this chapter" is the CAA). As relevant here, Section 7607(b)(1)'s venue instructions consist of three "lengthy" sentences. *Kentucky*, 123 F.4th at 458.

a. The first sentence describes the proper venue for challenging EPA final actions that apply to the nation as a whole. That sentence begins by enumerating several CAA provisions authorizing EPA to take national actions. For example, when EPA promulgates a *national* primary or secondary air quality standard under Section 7412, or sets a standard of performance for *all* new stationary sources of emissions under Section 7411, challenges to those national actions "may be filed only in" the D.C. Circuit. § 7607(b)(1). In 1977, Congress amended the venue provision to add a catchall phrase to that sentence: In addition to the enumerated national actions, "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter" are reviewable only in the D.C. Circuit. *Ibid.*; see Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (Aug. 7, 1977).[2]

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[2] For ease of reference, the 1970 and 1982 versions of the venue provision (the latter including the 1977 amendments) are provided at App., *infra*, 29a and 30a, respectively.

b. The second sentence follows the same basic structure but for non-national final agency actions. It first enumerates CAA provisions authorizing EPA to take actions that apply to less than the whole country, and it makes those actions reviewable only in regional circuit courts. For example, when EPA approves or promulgates a state implementation plan under Sections 7410 or 7411(d), a challenge to that action "may be filed only in the United States Court of Appeals for the appropriate circuit." § 7607(b)(1). The second sentence of Section 7607(b)(1), like the first, also includes a catchall phrase added by the same 1977 amendment: "any other final action of the Administrator under this chapter … which is locally or regionally applicable" is reviewable only in "the appropriate circuit" court. *Ibid.*

Identifying which circuit court is "appropriate" for reviewing local or regional final action is usually easy. That's because for these EPA actions, the relevant substantive CAA provision makes it clear that the action affects particular regulated facilities or States, each of which is governed by a regional circuit court. When EPA promulgates a regional action that happens to touch more than one federal circuit—for example, approving or rejecting an implementation plan for the Metropolitan Kansas City air-quality-control region—there may be more than one appropriate circuit.

c. The courts of appeals and EPA agree that, to assess the national vs. local applicability of an EPA action for purposes of Section 7607(b)(1), courts look only "to the face" of the action as that action is authorized by the CAA—not to the challenger's arguments in the petition for review, and not to the effects of the action or the reasoning within it. *American Rd. & Transp. Builders Ass'n* v. *EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (Kavanaugh,

J.); see also, *e.g.*, *ATK Launch Sys., Inc.* v. *EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011); U.S. Br. 20 (invoking "the face of" the actions). That focus on what action EPA took follows from the statutory instruction to look to the "final action … under this chapter" to resolve venue. § 7607(b)(1).

The textual structure of Section 7607(b)(1)'s first two sentences—enumerated lists of CAA actions followed by catchall phrases—indicates that courts should apply the catchall phrases by reasoning by analogy to the enumerated provisions. The catchall phrases use a "collective term"—any other final action—"at the end of a list of specific items," so the collective term is "controlled and defined by reference to the specific classes that precede it." *Fischer* v. *United States*, 603 U.S. 480, 487 (2024) (*ejusdem generis* canon) (cleaned up); see *Kentucky*, 123 F.4th at 460 (using *ejusdem generis* to interpret Section 7607(b)(1)). Thus, an EPA final action pursuant to an unenumerated CAA provision is "nationally applicable" if it applies to the whole nation like the enumerated actions in the first sentence of Section 7607(b)(1) do. And a final action is "locally or regionally applicable" if it applies to less than the whole nation, as the enumerated CAA actions in the second sentence do. *Ibid.*

d. The third sentence contemplates a narrow exception for certain rare EPA actions that, though locally or regionally applicable, are "based on a determination of nationwide scope or effect." § 7607(b)(1). That sentence was added by the same 1977 amendment referenced above, prompted by a recommendation from the Administrative Conference of the United States that included a statement from EPA General Counsel William Frick. See 41 Fed. Reg. 56,767 (Dec. 30, 1976).

Frick had identified a circumstance where the third-sentence exception was needed. 41 Fed. Reg. at 56,768-

56,769. Under a particular CAA provision at the time (since repealed), EPA could grant extensions of a State's attainment date for certain national ambient air quality standards—actions that were locally applicable—only "if after review ... the Administrator *determine*[*d*] *that*," among other things, regulated emission sources were "unable to comply with the [applicable] requirements … because *the necessary technology or other alternatives are not available or will not be available* soon enough to permit compliance." 42 U.S.C. § 1857c-5(e) (1973) (emphasis added); see *NRDC* v. *EPA*, 475 F.2d 968 (D.C. Cir. 1973) (explaining the available-technology determination and corresponding extension action).

Frick's statement, which the government agrees (U.S. Br. 37) was the genesis of the third sentence in Section 7607(b)(1), illustrates how that exception works: If the statutory text *requires* a particular EPA action to be based on a statutory "determination" about a circumstance *equally affecting the whole nation*, then a challenge to that action should go to the D.C. Circuit. Congress provided that "if" a locally applicable action "is based on a determination of nationwide scope or effect and if in taking such action [EPA] finds and publishes that such action is based on such a determination," then the proper venue is the D.C. Circuit. § 7607(b)(1).

The third sentence thus establishes two independent requirements for this exception: the action must actually be based on a determination of nationwide scope or effect, *and* EPA must publish a finding that it is so based. Accord U.S. Br. 30. Whether EPA publishes that finding is the only part of Section 7607(b)(1) that contemplates any discretion for the agency. The text is thus "clear" that "[t]he court—not EPA—determines both the scope of an action's applicability and whether it was based on a deter-

mination of nationwide scope or effect." *Texas* v. *EPA* ("*Texas 2020*"), 983 F.3d 826, 833 (5th Cir. 2020); accord *Sierra Club* v. *EPA*, 47 F.4th 738, 746 (D.C. Cir. 2022).

e. In sum, the CAA allocates venue for regulatory challenges depending on the nature of the "final action" under review: If EPA's "final action … under this chapter" is "nationally applicable," then the proper venue is the D.C. Circuit. § 7607(b)(1). If EPA's "final action … under this chapter" is "locally or regionally applicable," then the proper venue is presumptively a regional circuit court. *Ibid.*; see *Texas* v. *EPA* (*"Texas 2016"*), 829 F.3d 405, 419, 424 (5th Cir. 2016). If EPA can demonstrate *both* that a locally applicable action is "based on a determination of nationwide scope or effect"—that is, a textually called for determination reaching all the nation's regulated parties equally—"and" that EPA "f[ound] and publishe[d] that such action is based on such a determination," then venue is proper in the D.C. Circuit. § 7607(b)(1).

The first question for venue, then, is: What is the "final action … under this chapter" that EPA was authorized to take? To answer that question, courts "look primarily to the text of the statute," specifically to the relevant CAA provision that is "the legal source of [EPA's] authority to take the challenged action[]." *Texas* v. *EPA* ("*Texas 2023*"), No. 23-60069, 2023 WL 7204840, at *4 (5th Cir. May 1, 2023); see *Kentucky*, 123 F.4th at 460-462; *West Virginia* v. *EPA*, 90 F.4th 323, 329 (4th Cir. 2024).

2. Small-refinery hardship petitions under the Act's RFS Program

a. The CAA's RFS program requires that increasing amounts of renewable fuels be blended into the transportation fuel (gasoline and diesel) sold in the United States. § 7545(o)(2)(A)(i), (B)(i)(I)-(IV); see *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382,

385-387 (2021). EPA first sets annual renewable fuel percentage standards across the industry. § 7545(o)(3). Obligated parties—refiners and importers of transportation fuel—use those standards to learn their own annual volume obligations for each renewable-fuel category. See 40 C.F.R. § 80.1406.

Obligated parties comply with their annual RFS obligations by "retiring" credits called renewable identification numbers ("RINs"). 40 C.F.R. § 80.1427. A RIN is generated when renewable fuel (ethanol, for example) is manufactured. *Id.* § 80.1426. The RIN remains attached to the volume of renewable fuel until it is blended into transportation fuel, at which point the RIN is "separated." *Id.* §§ 80.1428, 80.1429. RINs have a limited life; they can be used for compliance only in the year they are generated or the next compliance year. § 7545(o)(5)(C). Obligated parties demonstrate RFS compliance by securing sufficient separated RINs, either by generating RINs through blending renewable fuels or by purchasing RINs from others that blend. § 7545(o)(5)(B).

b. "The RFS program reflects a carefully crafted legislative bargain to promote renewable fuels, but also to provide an exemption mechanism for small refineries." *Sinclair Wyoming Refin. Co. LLC* v. *EPA*, 114 F.4th 693, 711 (D.C. Cir. 2024). A "small refinery" has an average aggregate daily crude oil throughput for a calendar year of 75,000 barrels or less. § 7545(o)(1)(K). Congress recognized that "escalating [RFS] obligations could work special burdens on small refineries," many of which "lack the inherent scale advantages of large refineries" and are limited in their ability to blend renewable fuels—or are unable to blend at all. *HollyFrontier*, 594 U.S. at 386 (cleaned up). Congress also understood that small refineries are

essential to the nation's energy supply and often "a major source of jobs in rural communities." *Id.* at 386-387.

EPA has acknowledged that "[m]any" small refineries "do not have access to renewable fuels or the ability to blend them, and so must use credits to comply" with the RFS. 72 Fed. Reg. 23,900, 23,904 (May 1, 2007). Small refineries that cannot separate enough RINs through blending are forced to buy RINs on an unregulated secondary market where prices can fluctuate wildly. See 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010) (explaining RIN spot markets); *HollyFrontier*, 594 U.S. at 398 (noting one year where RIN prices "shot up by as much as 100%").

Congress initially exempted all small refineries from the RFS until 2011, and it directed the U.S. Department of Energy ("DOE") to study whether RFS compliance would impose disproportionate economic hardship on small refineries. § 7545(o)(9)(A). DOE completed that study in 2011, finding that small refineries "have particular obstacles that would make compliance more costly than those of large integrated companies." DOE, Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship 3, 32, 37 (March 2011) ("2011 DOE Study").[3] DOE also recognized that small refineries' hardship would grow increasingly acute as renewable-fuel blending mandates increased. *Id.* at 17-18.

To avoid damaging small refineries, Congress created a permanent safety valve that allows a small refinery to petition EPA for an exemption from its annual RFS obligation "for the reason of disproportionate economic hardship." § 7545(o)(9)(B)(i). The Act provides that "[*a*] *small refinery* may at any time petition the Administrator" for

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[3] https://www.epa.gov/sites/default/files/2016-12/documents/small-refinery-exempt-study.pdf.

an exemption—and thus requires each small refinery to petition separately for hardship relief. *Ibid.* (emphasis added). Each granted petition frees only one small refinery from its RFS obligation for the year(s) involved in the petition, based on that refinery's economic circumstances. § 7545(o)(9)(B)(i)-(ii); 40 C.F.R. § 80.1441(e)(2). EPA must decide each small-refinery hardship petition in "consultation" with DOE after "consider[ing] the findings" of DOE's 2011 small-refinery study along with "other economic factors." § 7545(o)(9)(A)-(B).

Congress required EPA to decide any hardship petition submitted by a small refinery "not later than 90 days after" receipt, because a small refinery cannot plan adequately for RFS compliance until it knows whether it has an obligation. § 7545(o)(9)(B)(iii). But EPA has failed to meet that deadline for almost 90 percent of hardship petitions submitted since 2013, causing significant uncertainty for small refineries. See U.S. Government Accountability Office, Renewable Fuel Standard: Actions Needed to Improve Decision-Making in the Small Refinery Exemption Program 20, GAO23104273 (Nov. 2022).[4]

c. When EPA has denied small-refinery hardship petitions, the petitioners sometimes sought judicial review. Regarding venue for those challenges, EPA repeatedly acknowledged that RFS hardship-exemption decisions are "quintessentially local action[s]" that must be reviewed in the regional circuit courts. *E.g.*, EPA Motion to Dismiss 18, *Advanced Biofuels Ass'n* v. *EPA,* No. 18-1115, Dkt. 1740614 (D.C. Cir. July 13, 2018).

On the merits of those challenges, EPA suffered a streak of losses where circuit courts vacated its hardship decisions. See *Sinclair Wyoming Refin. Co.* v. *EPA*, 887

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[4] https://www.gao.gov/products/gao-23-104273.

F.3d 986 (10th Cir. 2017); *Ergon-West Virginia, Inc.* v. *EPA*, 896 F.3d 600 (4th Cir. 2018); *Renewable Fuels Ass'n* v. *EPA*, 948 F.3d 1206 (10th Cir. 2020); *Ergon-West Virginia, Inc.* v. *EPA*, 980 F.3d 403 (4th Cir. 2020). Frustrated by its repeated defeats in the regional circuits, and after a 2021 change in presidential administration, EPA began attempting to eliminate small-refinery hardship relief altogether. EPA first abandoned defense of its own prior decisions granting hardship relief and began newly insisting that a small refinery cannot receive relief unless it had received an exemption in every prior compliance year. This Court rejected that new position in *HollyFrontier*. 594 U.S. at 396-397.

When that effort failed, EPA went back to the drawing board intent on rejecting hardship relief and avoiding judicial review anywhere other than the D.C. Circuit.

B. The present controversy

1. The small-refinery respondents here have repeatedly received RFS hardship relief from EPA in the past, because each of them faces structural disadvantages that make RFS compliance disproportionately burdensome. The respondents petitioned EPA again for hardship relief for some or all of the compliance years 2017 through 2021. Pet.App.19a nn.26-27. EPA initially granted Wynnewood's hardship petition for 2017, and it granted Calumet Shreveport's, Ergon Refining's, Placid's, and Wynnewood's petitions for 2018. See EPA, Decision on 2018 Small Refinery Exemption Petitions (Aug. 9, 2019).[5]

In December 2021, however, EPA reversed itself and issued a proposal to deny every pending small-refinery hardship petition, including by *retroactively* denying pre-

[5] https://www.regulations.gov/comment/EPA-HQ-OAR-2021-0566-0077#collapseAttachmentMetadata-ember186 (Tab I).

viously granted petitions. 86 Fed. Reg. 70,999 (Dec. 14, 2021). EPA proposed to do so by applying multiple seachanges to the agency's longstanding approach to hardship petitions. See Proposed Denials.[6] EPA also proposed, however, to continue its existing practice of deciding hardship petitions through agency adjudication, because applying a new rulemaking process to hardship petitions from prior years would have been unlawfully retroactive. See *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208-209 (1988).

EPA's proposed denials included a new statutory interpretation and a new "economic theory" hypothesizing that "the RFS program cannot cause [disproportionate economic hardship]" because RIN costs are supposedly the same for all obligated parties regardless of their size, bargaining power, location, or blending capability, and because obligated parties supposedly universally pass through 100% of their RIN costs in the price of the fuel they sell. Proposed Denials 11-12 & n.37. Small refineries commented on the proposal, explaining why EPA's new statutory position was textually unsupportable and why their individual economic evidence refuted EPA's hypothesis that small refineries universally pass on RIN costs. *E.g.*, JA 131-275.

In April 2022, in the first set of administrative actions challenged here, EPA followed through on its proposal and simultaneously denied 36 previously decided hardship petitions (31 of which EPA had previously granted), including petitions submitted by these respondents. Pet.App.189a-330a (the "April Denials"). EPA announced it was satisfied that each of the petitioning small refineries

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[6] EPA, Proposed RFS Small Refinery Exemption Decision (Dec. 2021), https://www.epa.gov/renewable-fuel-standard-program/proposal-deny-petitions-small-refinery-exemptions.

was able to fully pass through its RIN costs in the price of its fuel. *Id.* at 209a-212a. EPA issued each small refinery a "confidential, refinery-specific appendi[x]" to the April Denials' explanation document, giving individualized reasons for its conclusion that each refinery could pass through 100% of its RFS costs. *Id.* at 199a.

In June 2022, EPA largely copied and pasted its April reasoning to announce the denial of another 69 hardship petitions, including these small-refinery respondents' petitions for some or all of the 2017 and 2019-2021 years. Pet.App.44a-188a (the "June Denials"). The June Denials' explanation document stated "that none of the 69 pending [small-refinery hardship] petitions for the 2016-2021 compliance years ha[s] demonstrated [disproportionate economic hardship] caused by the cost of compliance with the requirements of the RFS program." Pet.App.185a. EPA again provided separate "confidential, refinery-specific appendices" explaining its findings on each small refinery's RIN-cost passthrough. Pet.App.55a.

The refinery-specific appendices accompanying the April and June Denials detailed EPA's individualized assessments of each small refinery's economic condition. For example, EPA considered whether one respondent refinery could blend enough biodiesel given that it operates in a market that does not accept biodiesel blends, and whether that refinery faced higher ethanol costs than other large refiners and blenders in its area. JA 285-287. EPA considered whether another respondent faced higher transportation costs for shipping from terminals along the Gulf Coast. JA 293-295. And EPA considered the price impacts to another respondent from the fact that, in its tri-State region, the small refinery faced diminished demand for kerosene-based jet fuel and more-stringent specifications for ultra-low-sulfur diesel fuel. JA

312-313. It was based on individualized, refinery-specific considerations like those—how each refinery fits in its own local market—that EPA concluded that each of the petitioning small refineries "is recovering its [RFS compliance] costs," and for that reason is not experiencing disproportionate economic hardship. *E.g.*, JA 280, 286, 298.

EPA accomplished its bundled denial decisions only by ignoring the statutory deadline to decide the hardship petitions; it held dozens beyond the 90-day deadline so that it could deny them together and create the appearance of promulgating just two actions.

2. The small-refinery respondents filed petitions for judicial review of EPA's denials of their RFS hardship petitions. Because the refineries each are headquartered, incorporated, or operate within the Fifth Circuit, they sought review there. Two groups representing the interests of the biofuel industry—the respondents in support of petitioner here ("Biofuel respondents")—intervened to support EPA's denials of hardship relief.

EPA moved to dismiss the petitions or transfer them to the D.C. Circuit, asserting that because it had bundled together its hardship-petition denial decisions, they were "nationally applicable" or else "based on a determination of nationwide scope or effect." § 7607(b)(1).

The Fifth Circuit denied EPA's motions. Pet.App.9a-15a. EPA's actions denying the small refineries' hardship petitions were "locally … applicable," not "nationally applicable," because they affected only the individual petitioning small refineries. *Id.* at 11a-12a. Nor were EPA's actions based on any nationwide determination. *Id.* at 12a-13a. EPA conceded that it had "considered each petition on the merits and individual refinery information." *Id.* at 14a (cleaned up). And EPA's explanation documents confirm that the agency's *final actions*—its

ultimate denials of the hardship-exemption petitions—"re[lied] on refinery-specific determinations" about each refinery's own "economic hardship" factors. *Id.* at 15a.

On the merits of the small refineries' challenges, the Fifth Circuit explained at length why EPA's hardship-denial actions were "(1) impermissibly retroactive; (2) contrary to law; and (3) counter to the record evidence." Pet.App.3a; see *id.* at 16a-33a.

The Biofuel respondents filed petitions for rehearing and rehearing en banc. Those were denied. Pet.App.332a-333a.

3. Some other small refineries whose RFS hardship petitions were denied as part of EPA's April and June Denials chose to petition for judicial review only in the D.C. Circuit. And still other small refineries filed petitions for review in the regional circuits but had their petitions transferred to the D.C. Circuit—most without a substantive explanation or opinion. See U.S. Br. 13 & nn.2-3.

In July 2024, the D.C. Circuit unanimously agreed with the Fifth Circuit's "analysis and conclusion" on the merits that EPA's April and June Denials were "contrary to law" and must be vacated. *Sinclair Wyoming*, 114 F.4th at 706-707 & n.5. The D.C. Circuit also held that the denials were arbitrary and capricious because "reality undercuts EPA's" economic "theory" that small refineries can universally pass on their RIN costs. *Id.* at 713.

SUMMARY OF ARGUMENT

A. The Fifth Circuit correctly held that EPA's final actions challenged here were locally applicable rather than nationally applicable, and were based on respondents' local economic circumstances rather than any determination of nationwide scope or effect.

1. Section 7607(b)(1)'s reference to the agency's "final action … under this chapter" indicates that it is the substantive CAA text that determines what final actions the agency was authorized to take. Whether and how EPA chooses to bundle its final actions is irrelevant to venue. Here, every part of the relevant provision under the "chapter"—especially the singular, definite articles and the deadline for deciding hardship petitions indexed to each petition's submission date—indicates that Congress directed EPA to produce individualized final actions on individually submitted hardship petitions.

2. EPA's individual denials of hardship relief were obviously locally appliable rather than nationally applicable. The government does not argue otherwise. Those decisions on individually submitted petitions affecting only one refinery look nothing like the enumerated nationwide actions in Section 7607(b)(1)'s first sentence, but they closely resemble the enumerated locally applicable actions in the second sentence.

3. "Determination" is a term of art in the CAA. An EPA action is based on a determination of nationwide scope or effect in the rare instance where the CAA's *text* directs EPA to make a "determination" about the *entire nation* or industry, without the need to consider individual circumstances. But here, the CAA required EPA to base its hardship decisions on each petitioning small refinery's individual economic hardship factors. And EPA's own documents confirm that the agency did just that.

B. The government's arguments seeking D.C. Circuit review fail.

1. The government goes astray because it gets the relevant "action" wrong. EPA contends that its denials of 105 individually submitted hardship petitions were really just two actions, asserting that a court may not contest EPA's "characterization" of its actions. But it is the text of "th[e] chapter," not EPA, that determines what final actions the agency is authorized to take.

2. EPA's argument for national applicability depends on the Court accepting the agency's view of the relevant unit of administrative action. Even if EPA were correct that the bundled decision announcements were the relevant actions, those still were not nationally applicable because they applied only to those refineries that chose to petition for hardship relief, not to the whole nation. EPA asserts that *any* agency action that touches more than one judicial circuit is nationally applicable. But that argument produces the absurd result that an expressly *regional* action for a metropolitan region that happens to encompass two States (and two circuits) would be "nationally applicable" and reviewable only by the D.C. Circuit.

3. Contrary to EPA's assertion, the hardship denial actions were not based on any determination of nationwide scope or effect.

The relevant text of the "chapter" here, unlike other closely related provisions, does not call for any "determination" on a small-refinery hardship petition. EPA's argument depends on treating "determination" not as a term of art but as an amorphous concept of anything that contributed significantly to an EPA action.

In any event, neither EPA's new interpretation of the Act, nor its new RIN-cost-passthrough economic hypothesis, were "nationwide determinations" that formed the

"bas[is]" for EPA's hardship denial decisions. *Every* EPA action necessarily rests to some degree on the agency's understanding of its statutory authority. And EPA is *required* to apply a "uniform" statutory interpretation to similarly situated small-refinery petitioners—anything else would have been arbitrary. Moreover, EPA's new statutory reading could not be the basis for *final* actions on respondents' hardship petitions; EPA expressly did not use a rulemaking here. EPA achieved final actions only by applying its statutory interpretation to respondents' individual economic facts.

For the same reason, even if EPA's economic theory could qualify as a "determination" under the CAA, the final actions denying respondents' hardship petitions were not "based on" it. Moving beyond hypothesis to final actions required EPA to test its prediction against respondents' economic evidence. And EPA acknowledges on the face of the denial decisions that it did so.

EPA's decisions here do not resemble the unusual CAA provision that was the genesis for the nationwide-determination exception sentence in Section 7607(b)(1).

EPA's appeals to policy cannot overcome the statutory text. And in any event, EPA's attempt to force dozens of small refineries to litigate their RFS hardship-denial decisions together in the D.C. Circuit has served only to obscure judicial consideration of the individual economic factors that the CAA makes the core basis for hardship relief.

Argument

Section 7607(b)(1) sets the venue for a petition for review principally by asking whether the EPA "final action" being challenged is nationally applicable or locally/regionally applicable. Courts identify the relevant "final action" by examining the substantive text of "th[e] chapter"—the CAA. Here the chapter designates the final actions as EPA's denials of small refineries' *individually submitted* RFS hardship petitions. The statutory text calls for individualized consideration of each petitioning small refinery's "disproportionate economic hardship." § 7545(o)(9)(B).

Once EPA's individual denial decisions are properly identified as the "final action[s]" under challenge, their national vs. local applicability is obvious: Those individual denials are, as EPA has always said, "quintessentially local action[s]" for Section 7607(b)(1) because they "adjudicate[ ] legal rights as to a single refinery in a single location." EPA Motion 18, *Advanced Biofuels*, No. 18-1115, *supra*. The face of the actions here confirms that EPA reached final decisions only by examining refinery-specific evidence and reaching refinery-specific conclusions that none of these respondents experiences disproportionate economic hardship from the RFS. Indeed, the statutory text *compelled* EPA to deny hardship relief based on the petitioning small refineries' own economic circumstances—not any nationwide determination. So the Fifth Circuit correctly held that it was the proper venue rather than the D.C. Circuit.

The government contends (U.S. Br. 28-29) that these hardship-petition denial actions are nationally applicable—unlike all prior hardship decisions—because EPA has "characteriz[ed]" them differently. EPA conceives of its decisions denying 105 separately submitted hardship

petitions as just two national actions because it chose to announce those denials together. But EPA does not decide what the relevant "final action" is under the CAA—the statute does. The substantive CAA provision at issue designates each individual hardship decision as the relevant unit of administrative action, none of which applies in more than one circuit. EPA's suggestions that any action happening to touch more than one circuit is "nationally applicable," and that it can manufacture nationally applicable actions by bundling individual decisions together, are inconsistent with the CAA's text, context, and history, as well as common sense.

Alternatively, EPA claims that these hardship decisions are locally applicable but based on a new statutory interpretation and economic theory that have nationwide scope or effect. Wrong, both times. EPA's musings about its statutory instructions, and its generalized economic *hypothesis* about small refineries' RIN costs, were merely steps along the way of EPA's individual-refinery decisionmaking process. Neither was a "determination"—a term of art in the CAA—called for by the text. And neither produced any *final* agency action. EPA's final actions were instead expressly based on its conclusions about each petitioning small refinery's economic circumstances. EPA itself says it denied respondents' hardship petitions based on its (erroneous) view that each refinery "*is* recovering its [RFS compliance] costs." *E.g.*, JA 280, 286, 298 (emphasis added).

Under the venue instructions in Section 7607(b)(1), review of these hardship-petition actions belongs in the regional circuit courts—exactly where prior actions on similar petitions have long been reviewed. The Fifth Circuit's judgment should be affirmed.

A. The Fifth Circuit's decision was correct.

Identifying the proper venue for judicial review under Section 7607(b)(1) involves three questions: (1) What "final action" did EPA take "under" the CAA? (2) Was that final action locally or regionally applicable, as opposed to nationally applicable? (3) If so, was the action nevertheless "based on a determination of nationwide scope or effect"? The Fifth Circuit answered each of those questions correctly.

1. The "final action[s]" are EPA's denials of each small-refinery's hardship petition.

a. The parties and the courts of appeals agree that "Section 7607(b)(1) categorizes petitions for [judicial] review according to the nature of the [EPA] action" being challenged. *Texas 2016*, 829 F.3d at 419; accord U.S. Br. 20 (citing additional cases). But a court cannot assess an action's nature until it identifies "*what* 'final action' [it is] dealing with." *Kentucky* v. *EPA*, Nos. 23-3216/23-3225, 2023 WL 11871967, at *2 (6th Cir. July 25, 2023).

The statute helpfully describes how to answer that question: refer to the "final action of [EPA] *under this chapter*." § 7607(b)(1) (emphasis added). "[T]his chapter" is the CAA. See p. 6, *supra*. Section 7607(b)(1)'s phrase "final action … under this chapter" points the reader to the substantive CAA provision that provides "the legal source of the agency's … authority to take the challenged actions." *Texas 2023*, 2023 WL 7204840, at *4; see p. 10, *supra* (additional cases making the same point).

Section 7607(b)(1)'s overall structure makes this even more clear. By enumerating specific CAA sections authorizing national or local/regional actions in the first two sentences, and then adding a catchall clause to each sentence for "any other" nationally or locally/regionally applicable action, the venue provision repeatedly requires cross ref-

erencing the CAA provision that authorized the EPA action under challenge. See *Kentucky*, 123 F.4th at 461 (Section 7607(b)(1) "focuses on the statute … to distinguish" national vs. local/regional actions).

b. The "final action" that the CAA authorized here is for EPA to "act on" a small refinery's individually submitted RFS hardship petition. § 7545(o)(9)(B); see Pet.App. 185a (EPA invoking § 7545(o)(9)(B) as its source of authority). So that is the "relevant unit of administrative action" for venue purposes. *Texas 2023*, 2023 WL 7204840, at *4.

Everything about that substantive text demonstrates that EPA's final actions on hardship petitions are to be individualized. Every reference in that subsection to the "petition" or the petitioning "refinery" is in the singular: "A small refinery may at any time petition" EPA for a hardship exemption, based on the "reason of disproportionate economic hardship" if required to comply with the RFS. § 7545(o)(9)(B)(i) (emphasis added). EPA must "evaluat[e] a petition," considering the findings of the 2011 DOE small-refinery study and other economic factors. § 7545(o)(9)(B)(ii) (emphasis added). Whether a particular petitioning small refinery is experiencing disproportionate economic hardship from the RFS in a given year is necessarily an individualized inquiry focused on that refinery's own economic circumstances.

Congress also provided that the statutory deadline for EPA to "act on any [small-refinery hardship] petition" is indexed to each petition: "not later than 90 days after the date of receipt of the petition." § 7545(o)(9)(B)(iii). That provision forcefully confirms that Congress directed EPA to produce individualized actions on hardship petitions; the rolling, refinery-specific deadlines would make no sense otherwise. Cf. *Kentucky*, 123 F.4th at 461 (EPA's obligation "to 'act' on each State's 'submission' on a plan-

by-plan basis within a specified time" indicates those actions are locally rather than nationally applicable) (citation omitted). And as mentioned above (p. 17, *supra*), EPA was able to produce bundled hardship decisions only by deliberately ignoring the CAA's decision deadline.

The broader statutory context also shows that Congress did not intend its "singular" definite and indefinite articles in this subsection to "include and apply to several persons, parties, or things." Contra U.S. Br. 26 (quoting 1 U.S.C. § 1). Congress initially granted a blanket exemption from the RFS through 2011 to all "small refineries"—plural. § 7545(o)(9)(A)(i). Congress then directed EPA to extend that exemption for another two years on an *individualized* basis to only "a" small refinery that DOE determined would face disproportionate economic hardship from the RFS. § 7545(o)(9)(A)(ii)(II). After that, Congress transitioned to the current petition-based approach. § 7545(o)(9)(B). The statute now puts the onus on each small refinery to request hardship relief based on its own "disproportionate economic hardship." § 7545(o)(9)(B)(i). Congress knew how to authorize blanket or multiple exemption actions, but it did not do so here. Congress instead directed EPA to "act on" "*the* petition" "submitted by *a* small refinery." § 7545(o)(9)(B)(iii) (emphases added).

c. Federal courts' practice also reflects the reality that EPA's individual hardship-exemption decisions are the final actions for venue purposes. When the Fifth Circuit below held that EPA's denial decisions were unlawful, it did not vacate all 105 EPA denial decisions, despite the government's urging that it had produced just two national actions. Instead, the Fifth Circuit properly vacated only the denial decisions for the small refineries before it. Pet.App.34a.

In another recent case involving subsequent small-refinery hardship decisions that EPA bundled together, the government moved the D.C. Circuit to act separately on the denial decisions for particular refineries—to vacate some final actions in EPA's bundle but not others. See *Calumet Montana Refin., LLC* v. *EPA*, No. 23-1194, Dkt. 2081226 (Oct. 21, 2024); see *id.*, Dkt. 2091139 (Dec. 23, 2024) (D.C. Circuit granting limited vacatur in accord with EPA's request). That motion confirms EPA's agreement that, even when it bundles small-refinery hardship decisions together, courts review the *individual* final actions that apply to each refinery. And EPA would surely take the position that each denied refinery must file a petition for review to obtain judicial review at all.

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The relevant "final action[s]" for venue purposes are thus EPA's decisions on each small refinery's hardship petition, regardless of EPA's choice to bundle its petition decisions. Accord *Kentucky*, 123 F.4th at 460-463 (rejecting EPA's argument that its consolidated disapprovals of 21 state implementation plans constituted a single action). Once the action is properly identified, it "makes this case easy." *Id.* at 461. EPA's individual denial decisions are obviously locally/regionally applicable—the government doesn't try to argue otherwise. And those decisions did not involve any nationwide "determination" called for by the CAA. Rather, each was based (as they must be per the Act) on EPA's refinery-specific evaluations of each petitioning small refinery's own economic hardship factors—things like local-market acceptance of renewable fuel, percentage of diesel production, access to capital, etc. See, *e.g.*, JA 280, 285-287, 293-298.

2. EPA's denials of the hardship petitions are "locally or regionally applicable" actions.

a. The venue provision's "applicability" inquiry—nationally vs. locally/regionally applicable—asks about "the location of the persons or enterprises that the action regulates." *Texas* v. *EPA*, No. 10-60961, 2011 WL 710598, at *3 (5th Cir. Feb. 24, 2011) (quoting *New York* v. *EPA*, 133 F.3d 987, 990 (7th Cir. 1998)). Multiple courts of appeals have agreed, at the government's urging, that what matters is "the face of" the action, *American Road*, 705 F.3d at 456 (Kavanaugh, J.), not the action's reasoning or practical "effects," *ATK Launch*, 651 F.3d at 1197. Accord U.S. Br. 20-21 (citing additional cases).[7]

The "'ordinary meaning'" of the "key words" in Section 7607(b)(1)'s first sentence—"'nationally applicable regulations promulgated, or final action taken' by the EPA"—"convey[s] that the challenged regulations or action must apply to the *entire country*." *Kentucky*, 123 F.4th at 459 (emphasis added; citations omitted). The Sixth Circuit's *Kentucky* opinion gives the relevant dictionary definitions, see *ibid.*, though it's "doubt[ful] that we need dictionaries for this point," *ibid.* The word "nationally" refers to an EPA action affecting the "nation as a whole." *Ibid.* (citation omitted).

Two different canons of construction confirm that interpretation. The first is *ejusdem generis*. See *Kentucky*, 123 F.4th at 460. Because the phrase "nationally applicable" comes in a catchall clause following an enumerated list of national CAA actions, courts determine

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[7] Biofuel respondents' alternative theory (Br. 21)—that the key to venue is what arguments might be raised in a petition for review challenging the agency action—has been repeatedly rejected. It is contrary to the textual instruction to look to the "final action … under this chapter." § 7607(b)(1).

the meaning of "nationally applicable" by reference to the enumerated actions. *Ibid.* (citing *Bissonnette* v. *LePage Bakeries Park St., LLC*, 601 U.S. 246, 252 (2024)). And the first sentence's enumerated CAA actions all "have nationwide applicability," *ibid.*: They regulate across the whole nation without individualized consideration, and they apply irrespective of whether any party requested agency action or not. By contrast, the enumerated locally applicable actions in Section 7607(b)(1) involve individual regulated entities or States. Finding a "nationally applicable" action for purposes of the catchall clause thus requires identifying an EPA final action that similarly affects the entire nation, irrespective of a party's local circumstances.

Second, "courts presume that Congress means to adopt 'clear boundaries' in 'jurisdictional statutes' to avoid wasteful litigation over the proper forum." *Kentucky*, 123 F.4th at 460 (quoting *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 11 (2015), and citing other cases). The courts of appeals have agreed that Section 7607(b)(1) is a venue provision rather than a jurisdictional one.[8] But the basic point is the same: No one's interests are served by complex disputes over venue. Clear boundaries are set by giving "nationally applicable" its ordinary meaning: An EPA final action is "nationally applicable" for purposes of Section 7607(b)(1) when it governs *the entire nation*, as opposed to when it governs some lesser subset of regulated parties, States, or regions.

b. In the context of the RFS program, the CAA authorizes EPA to take some national actions and some local actions. For example: When EPA publishes annual

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[8] See *Texas 2016*, 829 F.3d at 418; *Dalton Trucking, Inc.* v. *EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015); *Clean Water Action Council of Ne. Wis., Inc.* v. *EPA*, 765 F.3d 749, 751 (7th Cir. 2014).

renewable-fuel blending-volume obligations for the industry, *that* is a nationally applicable action, and any challenge to it goes to the D.C. Circuit. See, *e.g.*, *Americans for Clean Energy* v. *EPA*, 864 F.3d 691 (D.C. Cir. 2017). That's because EPA's volumes rule affects every RFS-obligated party in the nation.

But when EPA decides a small refinery's RFS hardship petition, that is a "quintessentially local action," as EPA itself has previously (correctly) put it. EPA Motion 18, *Advanced Biofuels*, No. 18-1115, *supra.* Hardship decisions look nothing like the national actions enumerated in Section 7607(b)(1)'s first sentence, but they closely resemble the individualized decisions enumerated in the second sentence. Hardship decisions do not regulate the whole nation or industry; they "involve only the regulation of" individual facilities' requests for relief and "have legal consequences only for [those] facilities." *Texas 2023*, 2023 WL 7204840, at *5; see *West Virginia Chamber of Commerce* v. *Browner*, 166 F.3d 336 (4th Cir. 1998) (finding it "clearly regionally applicable" "when the EPA … makes a determination with respect to a particular facility").

As EPA has previously explained: Each of the small-refinery respondents' hardship petitions "only requested relief for one refinery." EPA Reply in Support of Motion to Dismiss 2, *Lion Oil Co.* v. *EPA*, No. 14-3405, Dkt. 4227218 (8th Cir. Dec. 17, 2014). And each denial action was a "decision with respect to a particular small refinery's request" that "adjudicates legal rights as to that single refinery in its single location." U.S. Br. 15, *Producers of Renewables United for Integrity Truth and Transparency* v. *EPA* ("*PRUITT*"), No. 18-1202, Dkt. 1775897 (D.C. Cir. Mar. 4, 2019).

That is why EPA has repeatedly argued that RFS hardship decisions are locally applicable for Section

7607(b)(1), before EPA began attempting to manufacture venue in the D.C. Circuit by bundling decisions together. *E.g.*, *PRUITT*, No. 18-1202, *supra*; EPA Response 2, *Renewable Fuels Ass'n* v. *EPA*, No. 18-9533, Dkt. 35 (10th Cir. July 12, 2018) ("venue is proper in this Court"); U.S. Br. 2-3, *Ergon-West Virginia, Inc.* v. *EPA*, Nos. 19-2128, 19-2148, 19-2152 (consol.), Dkt. 64 (4th Cir. May 28, 2020) (challenge to denied hardship petition "properly venued" in Fourth Circuit "because the action is locally or regionally applicable").

3. EPA's actions were based on local economic facts, not any nationwide statutory determination.

a. Because EPA's denials of respondents' RFS hardship petitions are "locally or regionally applicable action[s]," the text of Section 7607(b)(1)'s third sentence presumptively "requires review in th[e] [regional] circuit." *Texas 2016*, 829 F.3d at 424; see *Kentucky*, 2023 WL 11871967, at *3. EPA can overcome that presumption only by demonstrating that its denials were "based on a determination of nationwide scope or effect." § 7607(b)(1); see pp. 8-10, *supra*.

The courts of appeals broadly agree that the scope and effect of EPA's determinations are reviewed "*de novo*" and without deference to the agency. *Texas 2016*, 829 F.3d at 421 (5th Cir.); see *Sierra Club*, 47 F.4th at 746 (D.C. Cir.); *Dalton Trucking, Inc.* v. *EPA*, 808 F.3d 875, 881 (D.C. Cir. 2015). The third-sentence exception applies only "*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." § 7607(b)(1) (emphases added). It does not suffice for EPA to find and publish a nationwide-effect conclusion; the action must actually *be* based on a determination of nationwide scope or effect *and* EPA

must publish that finding. The first of those independent "two conditions" (unlike the second) makes no reference to what EPA finds or publishes, so it is a legal question for the courts. *Texas 2016*, 829 F.3d at 421; see *Sierra Club*, 47 F.4th at 746; see also *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024).

Both the text and history of Section 7607(b)(1)'s third sentence show that, to trigger the exception, the relevant substantive CAA provision must *textually* direct EPA to make a "determination" for the *entire nation—i.e.*, the kind of determination that does not depend on individual circumstances. See pp. 8-9, *supra*. That was the kind of statutory determination identified by EPA General Counsel Frick that the government agrees (U.S. Br. 18) prompted Congress to add the third sentence to Section 7607(b)(1). And the government further agrees (U.S. Br. 31) that Section 7607(b)(1)'s "based on" formulation means the relevant EPA determination cannot be "peripheral or extraneous" but must "lie at the core of the agency action." *Texas 2016*, 829 F.3d at 419.

The CAA is littered with provisions requiring "determinations" as the basis for final actions. In fact, more than half of the CAA's sections call for at least one determination before EPA can act. See generally 42 U.S.C. Ch. 85. Congress's repeated use of the term "determination" or its derivatives throughout the Act indicates it is a term of art with the same meaning in Section 7607(b)(1). See *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 456 (2012). So courts do not apply Section 7607(b)(1)'s third sentence by asking *generally* about the inputs or processes for an EPA action; they look to whether the *statutory text* called for taking that action on the basis of a specific kind of determination. See *Kentucky*, 123 F.4th at 463-464 ("When used to describe a ruling from an 'administrative agency,'

'determination' has a more precise 'legal meaning'" that does "not" refer to "each *preliminary* step on the road to [the agency's] decision.") (citation omitted).

b. EPA's denials of the small-refinery respondents' hardship petitions were not based on any statutory determinations of nationwide scope or effect.

i. That is so, first, because the relevant CAA provision here (§ 7545(o)(9)(B)) does not call for any determination at all. Unlike the immediately preceding subsection and other subsections within the same section, subsection 7545(o)(9)(B) does not use the phrase "determination" or "determines." It instead invites a small refinery to petition for relief "for the reason of disproportionate economic hardship," and it says that EPA should "evaluat[e]" that hardship petition in consultation with DOE after considering DOE's 2011 study and "other economic factors." There are no *statutory* "determination[s]" in that process.

To the extent Section 7545(o)(9)(B) contemplates any statutory determination at all, it calls for a determination that has a local scope and effect. After the blanket RFS exemption for small refineries ended in 2011, Congress directed EPA to extend an exemption for at least two more years "[*i*]*n the case of* a small refinery that the Secretary of Energy *determines* … would be subject to a disproportionate economic hardship if required to comply with" the RFS. § 7545(o)(9)(A)(ii)(II) (emphases added). No longer did all small refineries nationwide get the exemption; only those specific small refineries that were determined to face disproportionate economic hardship. That provision required EPA to grant exemptions *based on* DOE's local *determination* that a particular small refinery would face hardship.

Congress then provided in the very next subsection—the one at issue here—that "[a] small refinery may at any time petition [EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." § 7545(o)(9)(B)(i). The reference back to "subparagraph (A)" indicates that, when EPA considers a small refinery's hardship petition, it must make the same individualized hardship determinations that drove the earlier regime.

The plain text of "th[e] chapter" thus compels EPA's hardship decisions to be "based on" an economic analysis for "a" petitioning small refinery that is local in scope and effect. § 7607(b)(1); § 7545(o)(9)(B)(i). EPA has said the same thing: the Act "give[s] EPA the authority to grant [a hardship] petition only when a small refinery demonstrates it is experiencing [hardship] caused by compliance with the RFS program." Pet.App.185a. *That* must be the core basis for any final action on a hardship petition.

ii. Moreover, the record here shows that EPA in fact based its final actions denying hardship relief on just such individualized conclusions. EPA explained that it had "completed a thorough evaluation of the data and information provided in the [hardship] petitions, supplemental submissions, and comments to determine if any of the petitioners have demonstrated that the cost of compliance with the RFS is the cause of their alleged [hardship]." Pet.App.94a-95a. EPA then found "that none of the" pending petitions had "demonstrated [hardship] caused by the cost of compliance with the requirements of the RFS program." Pet.App.185a; accord U.S. Br. 10 ("EPA determined that none of the petitioning small refineries had rebutted [the RIN-cost-passthrough] presumption through evidence about their specific circumstances.").

To be sure, EPA had hypothesized in the proposed denials, *before* its final actions, that no small refinery would suffer hardship from the RFS because each could fully pass through its RIN costs. But that was merely a hypothesis. EPA called it then an "economic theory," Pet.App.212a n.42, 251a; and calls it now (U.S. Br. 8) a "rebuttable presumption." Whatever it's called, for EPA to test its hypothesis—to move beyond theory and produce *final agency action* on the hardship petitions—EPA concedes that it needed to, and did, "carefully review[] data, [fuel-sales] contracts, and other information from small refineries." Pet.App.98a-99a. It was only then that EPA concluded (erroneously) that each small refinery actually "is recovering its [RFS compliance] costs," *e.g.*, JA 280, 286, 298, and for that reason does not face economic hardship, Pet.App.100a.

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Both the statutory text and record confirm that EPA took these final actions "based on" conclusions that none of the small-refinery respondents would experience disproportionate economic hardship from the RFS. § 7607(b)(1). Even if those conclusions could qualify as "determinations" at all, they were local determinations based on an analysis of each refinery's local evidence, not any "determination of nationwide scope or effect." *Ibid.*

B. EPA's arguments seeking D.C. Circuit review fail.

Despite EPA's longtime position that its final actions on hardship petitions are reviewable only in the regional circuit courts, EPA now argues that these denial decisions were nationally applicable, or else were based on a determination of nationwide scope or effect. EPA is wrong on both points.

1. EPA gets the "action" wrong.

EPA does not attempt to argue that its individual hardship-petition decisions—as opposed to its bundled *explanations* in the April and June Denials of its reasons for denying those petitions—were nationally applicable. EPA's argument thus hangs on this Court being willing to credit its assertion that it produced just two final actions. But the statute shows EPA is wrong about that. It is the chapter's text, not EPA, that establishes what qualifies as the relevant "action" "under" the CAA. *Texas 2023*, 2023 WL 7204840, at *4.

a. EPA's brief offers no real attempt to analyze the first critical phrase in Section 7607(b)(1): "final action … under this chapter." The government says (U.S. Br. 28-29) all that matters is "EPA's characterization of its own agency action" and that courts may not "second-guess EPA's own framing." But all agree it is the *nature* of the administrative action that matters for venue. See pp. 22-23, *supra*. And nothing in the statute gives EPA the power to alter the nature of administrative actions just by choosing how to publish those actions (grouped together vs. individual announcements). EPA's argument calls back to an era before this Court held squarely that "courts, not agencies," determine "the meaning of statutory provisions." *Loper Bright*, 603 U.S. at 392, 394.

The Sixth Circuit recently explained why it rejected the same argument advanced by the government here: that EPA's choice of framing, rather than the statutory text, controls what counts as the final action. See *Kentucky*, 123 F.4th at 460-463. "The 'structure' of the judicial-review provision … focuses on the statute"—not on how EPA chose to report its decisions—"to distinguish the EPA actions that parties must challenge in the D.C. Circuit from those they must challenge in regional circuits."

Id. at 461 (quoting *Engine Mfrs. Ass'n* v. *South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004)). Congress's own designation in Section 7607(b)(1)'s first two sentences of enumerated actions as either nationally applicable or locally applicable, combined with catchall phrases for each sentence, indicates it is the Act, not EPA, that gives an action its nature. See *ibid.*

EPA's invocation (U.S. Br. 28) of "the face of the final action" does not advance the analysis. "Th[at] argument conflates the [*explanation*] issued" for EPA's hardship-denial decisions "with the 'final action' that the EPA takes." *Kentucky*, 123 F.4th at 462 (quoting § 7607(b)(1)). Small-refinery respondents' position does not depend on the contents of any petitioner's court challenge to the EPA action or on downstream effects. Venue depends, instead, on whether the text of the chapter shows the challenged action on its face to be more like Section 7607(b)(1)'s enumerated nationally applicable actions (governing the *whole nation*) or more like the enumerated locally applicable actions that resolve individual parties' rights or obligations.

b. None of that calls into question EPA's "free[dom] to fashion [its] own rules of procedure," including "'whether applications should be heard contemporaneously or successively.'" U.S. Br. 26-27 (quoting *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)). That freedom includes the "process" for taking action; for example, the freedom (where the law permits) to choose between "rulemaking, individual adjudication, or a combination of the two." *NAACP* v. *Federal Power Comm'n*, 425 U.S. 662, 668 (1976). EPA could have conducted a rulemaking to establish a new interpretation of Section 7545(o)(9)(B) and new adjudicatory framework, and such a rule would likely have been nationally applicable. But a new rule like

that would have needed to be prospective only, see p. 15, *supra*, which did not meet EPA's goal here to issue long-overdue decisions denying previously submitted small-refinery hardship petitions from prior years.

Respondents' position thus does not disturb EPA's choice whether to proceed by rulemaking versus adjudication. EPA will retain flexibility in running its future hardship decisionmaking processes, so long as it examines each small refinery's evidence and adheres to the statutory decision deadline for final action on each petition. What EPA may *not* do is what it attempted here: disregard whether the CAA's text calls for local rather than national action. Contrary to EPA's assertion (U.S. Br. 26-27), respondents' textual analysis does not rely merely on "an indefinite article." As described above (pp. 24-27, *supra*), every relevant part of the text and structure of Section 7545(o)(9) confirms that Congress wanted RFS hardship decisions to be individualized. Cf. *Kentucky*, 123 F.4th at 461 ("the disapproval of each state plan qualifies as a distinct 'action'").

2. EPA fails to establish that the hardship decisions are nationally applicable.

With EPA's misidentification of the relevant final action corrected, the errors in its remaining arguments become clear. EPA's April and June 2022 explanation documents asserted that the agency had taken nationally applicable actions for two reasons. First, EPA announced together the denial of hardship petitions submitted by refineries located in different circuits. Pet.App.185a-188a (June 2022 announcement: "This final action denies 69 petitions … for over 30 small refineries across the country[.]"); Pet.App.327a-330a (similar for April 2022 announcement). Second, EPA applied its new statutory interpretation and new economic passthrough hypothesis

to all hardship petitions that the agency adjudicated. *E.g.*, Pet.App.187a-188a ("EPA's revised interpretation of the relevant CAA provisions and the RIN discount and RIN cost passthrough principles … are applicable to all small refineries.").

a. Although EPA defended the second venue argument in its certiorari petition, U.S. Pet. 10 (arguing that the Denials "are 'nationally applicable' because they apply a uniform methodology to small refineries"), it has now abandoned it, making only the geographic argument here. U.S. Br. 19-24. Rightly so. Looking to the legal standard or reasoning applied would contradict EPA's long-held position—accepted by multiple courts of appeals—that only "the face" of the challenged action matters for venue, not the action's reasoning or effects. See p. 28, *supra*.[9]

b. EPA's argument that the actions here were nationally applicable because of geography rests on two erroneous premises. First, as discussed just above in Part B.1, it wrongly assumes the relevant "actions" are the two documents explaining EPA's reasons for denying 105 individually submitted hardship petitions. "[T]hrow[ing] a blanket labeled 'national' over [105] individual decisions" does not "convert" them "into … national one[s]." *West Virginia*, 90 F.4th at 330. That is especially so when EPA

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[9] Biofuel respondents' argument (at Br. 36) that "small-refinery exemption decisions" are "inherently nationally applicable" because they affect "the amount of renewable fuel that obligated parties must inject into the nation's transportation-fuel supply" fails for the same reason. The "applicability" inquiry is unconcerned with the "practical effects" of the EPA action. *American Road*, 705 F.3d at 456 (Kavanaugh, J.). Especially a downstream issue like whether EPA chooses to adjust volume obligations for other parties based on outcomes of small refineries' hardship petitions.

was able to get all of these individual decisions under its purportedly "national" blanket only by refusing to follow the CAA's 90-day deadline for answering the hardship petitions. § 7545(o)(9)(B)(iii). Courts generally "will not suffer a party to profit by his own wrongdoing." *United States* v. *Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996). And the government "should turn square corners in dealing with the people." *Department of Homeland Sec.* v. *Regents of the Univ. of California*, 591 U.S. 1, 24 (2020) (internal quotation marks and citation omitted).

Second, EPA now reads the statutory phrase "*the* appropriate circuit" to mean that "any action that spans more than one judicial circuit is properly viewed as 'nationally applicable' and subject to review only in the D.C. Circuit." U.S. Br. 21-22 (quoting § 7607(b)(1)). According to the government (U.S. Br. 21), "[t]he statute's use of the definite article … indicates that, for any given locally or regionally applicable EPA action, there is only one appropriate regional court of appeals in which to seek review." That reading is incorrect.

Nothing in Section 7607(b)(1) indicates that the phrase "the appropriate circuit" informs the meaning of "nationally applicable," and the plain meaning of "nationally applicable" contradicts EPA's reading. "Nationally" means "with regard to the nation as a whole." *Nationally*, THE OXFORD ENGLISH DICTIONARY (1971); see *Kentucky*, 123 F.4th at 459 (same). Yet on EPA's reading, an action applying to far less than the whole nation—say, one applying only to Mississippi and Alabama—would be "nationally applicable." That is a stretch, to say the least.

Even accepting arguendo EPA's view of the relevant final action, the April and June 2022 Denials were not "nationally applicable" because they did not cover the whole nation like the enumerated actions in Section 7607(b)(1)'s

first sentence do. They applied to (and bound) only those small refineries that petitioned for an exemption. See Pet.App.11a-12a.

The ordinary meaning of "regionally applicable" also rebuts EPA's proffered reading, because that term contemplates agency actions applying in multiple places within a region: "of or pertaining to, or connected with, a particular region." *Regional*, THE OXFORD ENGLISH DICTIONARY (1971). Indeed, EPA's attempt to put so much weight on a single definite article produces textually absurd results. Consider EPA's 250 air quality control regions, some of which cover large metropolitan areas that happen to cross State (and circuit) lines.[10] "Metropolitan St. Louis" (Region 70) and "Metropolitan Kansas City" (Region 90) are two examples. Can there be any doubt that an EPA disapproval of a regional implementation plan for only Region 90 (Metropolitan Kansas City) is a "regionally applicable" action for purposes of Section 7607(b)(1), even though that action touches both the Eighth and Tenth Circuits?

Congress did not think so. The 1970 Senate Report invoked by the government (U.S. Br. 23) said that "implementation plans which run only to one air quality control region" should be reviewed in the circuit court "in which the affected air quality control region, *or portion thereof*, is located." S. Rep. No. 1196, 91st Cong., 2d Sess. 41 (1970) (emphasis added). Yet according to the government (U.S. Br. 22), the circuit courts governing the States affected by a Kansas City regional action are powerless because "any action that spans more than one judicial circuit" must go exclusively to the D.C. Circuit.

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[10] See https://aqs.epa.gov/aqsweb/documents/codetables/aqcrs.html.

The Senate Report supports what ordinary usage suggests about the meaning of "*the* appropriate circuit." § 7607(b)(1) (emphasis added). The use of "the appropriate circuit" rather than "the appropriate circuit(s)" reflects merely that Congress often doesn't legislate with laser-like precision. *E.g.*, *United States* v. *Bass*, 404 U.S. 336, 344 (1971) ("we cannot pretend that all statutes are model statutes"). For most EPA final actions (properly identified), it will be readily apparent whether the action applies to the whole nation or to some subset—and in the latter instance, which circuit court is "appropriate." That is certainly true for EPA's RFS hardship decisions, which affect only individual small refineries.

c. Taken together, EPA's arguments reveal the agency's conscious desire for the power to choose where its actions are reviewed. EPA says (U.S. Br. 28-29) that "action … under this chapter" means its own "characterization" of an action, which courts cannot "second-guess." And EPA further says (U.S. Br. 22) that any time an action affects states or parties in more than one circuit, it is automatically entitled to D.C. Circuit review. If EPA were right about both, then the agency could nearly always manufacture venue in the D.C. Circuit. EPA could simply mush together two small refineries' RFS hardship decisions, or decisions on two States' implementation plans—even two decisions that have nothing to do with each other—and thereby deny the regulated parties the opportunity for review by a regional circuit court.

The text of Section 7607(b)(1) does not allow that manipulation. "[V]enue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." *Travis* v. *United States*, 364 U.S. 631, 634 (1961) (citation omitted).

3. The hardship decisions were not based on a determination of nationwide scope or effect.

EPA asserts (U.S. Br. 33-35) that its individual denial decisions were based on two determinations of nationwide scope or effect: "EPA's revised interpretation of the relevant CAA provisions and the RIN discount and RIN cost passthrough principles." Pet.App.187a-188a. That mischaracterizes both the statutory text and the final actions.

a. As an initial matter, neither EPA's statutory interpretation nor its economic hypothesis was a statutory "determination" as the CAA uses that term of art. See pp. 32-34, *supra*. Neither describes any issue that the CAA's *text* directed EPA to "determine" before acting on a small refinery's RFS hardship petition. See § 7545(o)(9).

In the immediately preceding subsection, Congress instructed EPA to extend two-year hardship exemptions based on DOE's "determin[ation]" about a small refinery's hardship. § 7545(o)(9)(A)(ii)(II). And elsewhere in the same Section, Congress authorized EPA to grant certain waivers, following consultation with DOE, "based on a determination by the Administrator … that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States." § 7545(o)(7)(A)(i).

Congress thus knows how to make actions "based on a determination" when it wants to. It did not do that for small-refinery hardship petitions in Section 7545(o)(9)(B). EPA's position wrongly depends on treating "determination" in Section 7607(b)(1) not as a statutory term of art but rather as some amorphous concept of anything that contributed significantly to a final action.

b. Even if Section 7607(b)(1) used "determination" in the colloquial sense, EPA would still be wrong about the basis for these hardship-petition denial actions.

i. EPA's first suggestion—that a statutory interpretation can qualify as a "determination of nationwide scope or effect"—is nothing less than an argument that *every* EPA action must go to the D.C. Circuit. EPA is a "creature[] of statute," so "it possess[es] only the authority that Congress has provided." *National Fed'n of Indep. Bus.* v. *Dep't of Lab., Occupational Safety & Health Admin.*, 595 U.S. 109, 117, (2022). Every EPA action is necessarily "based on" the agency's understanding of its statutory authority.

It similarly cannot be the case (contra U.S. Br. 34) that EPA's denial actions here were based on a nationwide determination because EPA applied a statutory interpretation "uniformly" to them. If EPA had *not* done that—if it had applied a different statutory reading to similarly situated small-refinery petitioners—that would be the height of arbitrariness. So "if application of a national standard … were the controlling factor, there never could be a local or regional action" because every EPA action "purportedly applies a national standard created by the national statute and its national regulations." *West Virginia*, 90 F.4th at 329-330. This Court should not read the narrow nationwide-scope-or-effect exception to "swallow the" local-or-regionally-applicable rule. *Cuomo* v. *Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 530 (2009).

The most obvious examples of locally applicable actions involve EPA applying a uniform statutory standard to individual regulated parties' factual circumstances. Accord U.S. Br. 42. Acknowledging that reality, EPA ultimately abandons any argument based on application of a "uniform" standard, conceding (U.S. Br. 41) that EPA "does not" make a nationwide-scope determination "when it merely applies a previously established agency … interpretation to new 'locally or regionally applicable' circum-

stances." That describes what EPA did in the final actions challenged here: It applied its statutory interpretation to each petitioning small refinery's evidence about its local economic circumstances. See pp. 34-35, *supra*.

Insofar as EPA contends (U.S. Br. 33, 41) that what matters here is that it promulgated its "new interpretation" at "roughly the same time" it denied the hardship petitions, that argument does not rebut the Fifth Circuit's venue conclusion. For one thing, that argument would not extend to the June 2022 Denial decisions, which merely applied the statutory interpretation that EPA had announced months earlier in April. Pet.App.80a.[11]

In any event, EPA's choice to offer a new statutory analysis cannot alter what determination the statute required as the basis for every small-refinery hardship decision. The text does not ask whether the agency *made* some determination of nationwide scope or effect in connection with the action. It asks whether EPA "based" its final action on such a determination. § 7607(b)(1). Here, as explained above, the basis for these final actions must by law be findings about the individual petitioning small

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[11] Despite EPA repeatedly referring to the April and June Denials as two separate actions, EPA simultaneously argues that those explanation documents should be treated as one for purposes of establishing its new adjudication approach to hardship petitions. U.S. Br. 42-43 n.6. EPA urges this Court (*ibid.*) to disregard the "time that passed between the[ir] finalization" because "[b]oth denial actions here stemmed from a single propos[al]." But obviously one proposal can lead ultimately to multiple final actions. And according to the face of the June explanation document, it was only the April explanation document that broke new ground: "In this action, EPA is *applying* the approach proposed on December 7, 2021, and *adopted* in the April 2022 [RFS] Denial." Pet.App.80a (emphases added).

refineries' economic circumstances. And EPA has admitted that these hardship decisions were based on just that. See p. 34, *supra*.

Moreover, EPA's new statutory interpretation was not sufficient to produce *final* agency action in this context. Recall that EPA could not, and did not, use a rulemaking for its new interpretation—because to do so here would plainly have been illegally retroactive. If EPA had wanted judicial review to focus on its new statutory interpretation (U.S. Br. 42), it could have run a (lawful) rulemaking process. But EPA expressly chose to proceed only by adjudication. See Pet.App.188 ("This action is not a rulemaking"). That choice meant that EPA could produce "final action … under this chapter" *not* by analyzing the statute but rather only by evaluating the petitioning small refineries' economic evidence. § 7607(b)(1).

It is also no answer for EPA to contend (U.S. Br. 35, 42) that a case must go to the D.C. Circuit when "circumstances suggest" that EPA's statutory interpretation is "likely to be called into question" in the litigation. That flies in the face of the courts' consistent holding (and EPA's consistent position) that what matters is EPA's "final action," not the petitioner's arguments challenging it. See pp. 7-8, *supra*. It will not always be apparent at the outset of litigation, when venue is typically (and most efficiently) resolved, what aspects of an EPA action will be called into question.

The better answer is the simpler one that also gives the statutory terms their ordinary meaning: An EPA action is based on a determination of nationwide scope or effect in the rare instance when the CAA's text directs EPA to make a factual "determination" about the entire nation or industry, without the need to consider individual circumstances.

ii. For many of the same reasons, EPA's RIN-cost-passthrough hypothesis did not make these hardship denial actions based on a determination of nationwide scope or effect. Even if EPA's passthrough hypothesis could qualify as a "determination" under the statute when the text does not describe it that way, see pp. 33-34, *supra*, the actions denying the hardship petitions were not "based on" it, § 7607(b)(1). EPA had merely a *hypothesis*—an "analysis of how" EPA "expected" individual fuels markets to respond, Pet.App.163a-165a—that EPA needed to test, and did test, against each hardship petition's evidence. See pp. 34-35, *supra*. Only that analysis of each refinery's individual evidence could be the "bas[is]" for "*final* action[s]" denying respondents' hardship petitions. § 7607(b)(1) (emphasis added).

EPA's actions were not "based on" any supposedly nationwide RIN-cost-passthrough determination for the additional reason that, with or without any nationwide assessment, EPA's denial actions here would have been exactly the same. The government agrees (U.S. Br. 41) that the textual "causation requirement" in Section 7607(b)(1) means that "the relevant determinations" must be "at the core of EPA's action." But here, EPA did not need any *nationwide* finding about any other refineries to conclude, as it wrongly did in the denial actions, that each of the small-refinery respondents were "able to pass along RFS compliance costs," were "recovering [their] costs," and so were suffering "no economic harm." Pet.App.99a-100a, 165a; JA 280.

In short, the conclusion that drove each denial decision was not that *all* obligated parties recover their RFS costs; it was that each of these respondents (purportedly) does. As EPA itself explains (U.S. Br. 10): It denied respondents' hardship petitions because it "determined that none

of the petitioning small refineries had rebutted [the RIN-cost-passthrough] presumption through evidence about their specific circumstances." Those were conclusions about specific refineries, not nationwide determinations.[12]

c. EPA invokes the history (U.S. Br. 35-38) of the third-sentence exception in Section 7607(b)(1), but that history actually undermines EPA's position. As recounted above, the exception was prompted by General Counsel Frick's description of an atypical CAA provision that, though calling for a local action (an extension for specific States), *textually required* EPA's action to be based on a determination about technology available *throughout the industry*. See pp. 8-9, *supra*. That extension action did not require or even contemplate any consideration of individualized State circumstances; EPA was tasked instead with making a finding about the technology available throughout the nation.

EPA's actions on small-refinery hardship petitions look nothing like that. The text of Section 7545(o)(9)(B), unlike the unusual provision that Frick described, does not ask EPA to make any "determination" about the entire nation or industry as a basis for granting hardship relief. It does not call for any determination at all. To the extent it does, it calls for a determination about the individual petitioning small refinery's economic circumstances. See pp. 33-34, *supra*.

EPA responds by catastrophizing (U.S. Br. 38) that if the denials here do not qualify as based on nationwide

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[12] EPA's footnoted discussion (U.S. Br. 34 n.5) of how it chooses to respond to granted hardship petitions is irrelevant to Section 7607(b)(1), because those downstream choices by the agency say nothing about what was the "bas[is]" for the final denial actions here.

determinations, then the third-sentence exception to Section 7607(b)(1) will be "practically insignificant." But the third sentence was always meant to state an *exception* to the general rule for locally applicable actions. General Counsel Frick urged the exception's adoption to address a CAA provision that has since been repealed. That is likely why, before the cases involving EPA's denial decisions here, no court had ever found a locally applicable EPA action that was based on a determination of nationwide scope or effect. The exception is properly narrow.

d. EPA concludes by resorting to a policy argument: It asks this Court to read "based on a determination of nationwide scope or effect" broadly, on the theory that judicial review will be more efficient if the D.C. Circuit alone considers issues like EPA's statutory analysis and methodological framework.

Appeals to policy cannot supersede the ordinary meaning of the terms in Section 7607(b)(1) or the confirmation of their meaning in the statutory context and history. *Niz-Chavez* v. *Garland*, 593 U.S. 155, 171 (2021) ("no amount of policy-talk can overcome a plain statutory command"). And in any event, EPA's policy argument falls flat. If EPA wants to propound a new statutory interpretation and have it reviewed by only the D.C. Circuit, then the agency need only adopt that interpretation through a lawful rulemaking process.

Experience has proven EPA wrong in suggesting that consolidated D.C. Circuit review of CAA actions is always or usually best. The litigation here is a perfect example. Because EPA persuaded several regional circuit courts to transfer small refineries' challenges to their hardship-denial decisions, the D.C. Circuit ended up hearing one massive case consolidating dozens of small refineries' petitions for review. See p. 18, *supra*. That consolidation

made the D.C. Circuit litigation take much longer than other small refineries' regional-circuit challenges to EPA's denials of their hardship petitions.

Even more important, consolidation in the D.C. Circuit made it very difficult for the individual small refineries to get judicial attention on what ultimately matters most: their specific economic circumstances that give rise to their disproportionate economic hardship from the RFS. To take just one example: In the mass D.C. Circuit challenge alongside dozens of co-petitioners, there was no easy way for a small refinery affiliated with one respondent here, Calumet Montana, to ask the court to focus on the idiosyncrasies of producing blended diesel fuel in a cold climate in winter. Yet that is exactly the sort of condition that causes Calumet Montana to face disproportionate economic hardship from the RFS.

EPA's preference for near-universal D.C. Circuit review would obscure the judiciary's consideration of individual regulated entities' circumstances, contrary to the essential logic of Congress's plan for a national vs. local divide in Section 7607(b)(1).

Conclusion

The judgment of the court of appeals should be affirmed.

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Statutory Appendix

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42 U.S.C. § 7545
Regulations of fuels

…

(o) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

The term "additional renewable fuel" means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in home heating oil or jet fuel.

(B) Advanced biofuel

(i) In general

The term "advanced biofuel" means renewable fuel, other than ethanol derived from corn starch, that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than baseline lifecycle greenhouse gas emissions.

(ii) Inclusions

The types of fuels eligible for consideration as "advanced biofuel" may include any of the following:

(I) Ethanol derived from cellulose, hemicellulose, or lignin.

(II) Ethanol derived from sugar or starch (other than corn starch).

(III) Ethanol derived from waste material, including crop residue, other vegetative waste material, animal waste, and food waste and yard waste.

(IV) Biomass-based diesel.

(V) Biogas (including landfill gas and sewage waste treatment gas) produced through the conversion of organic matter from renewable biomass.

(VI) Butanol or other alcohols produced through the conversion of organic matter from renewable biomass.

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

The term "baseline lifecycle greenhouse gas emissions" means the average lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, for gasoline or diesel (whichever is being replaced by the renewable fuel) sold or distributed as transportation fuel in 2005.

(D) Biomass-based diesel

The term "biomass-based diesel" means renewable fuel that is biodiesel as defined in section 13220(f) of this title and that has lifecycle greenhouse gas emissions, as determined by the Administrator, after notice and opportunity for comment, that are at least 50 percent less than the baseline lifecycle greenhouse gas emissions. Notwithstanding the preceding sentence, renewable fuel derived from co-processing biomass with a petroleum feedstock shall be advanced biofuel if it meets the requirements of subparagraph (B), but is not biomass-based diesel.

(E) Cellulosic biofuel

The term "cellulosic biofuel" means renewable fuel derived from any cellulose, hemicellulose, or lignin that is derived from renewable biomass and that has lifecycle greenhouse gas emissions, as determined by the Administrator, that are at least 60 percent less than the baseline lifecycle greenhouse gas emissions.

(F) Conventional biofuel

The term "conventional biofuel" means renewable fuel that is ethanol derived from corn starch.

(G) Greenhouse gas

The term "greenhouse gas" means carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons,[9] sulfur hexafluoride. The Administrator may include any other anthropogenically-emitted gas that is determined by the Administrator, after notice and comment, to contribute to global warming.

(H) Lifecycle greenhouse gas emissions

The term "lifecycle greenhouse gas emissions" means the aggregate quantity of greenhouse gas emissions (including direct emissions and significant indirect emissions such as significant emissions from land use changes), as determined by the Administrator, related to the full fuel lifecycle, including all stages of fuel and feedstock production and distribution, from feedstock generation or extraction through the distribution and delivery and use of the finished fuel to the ultimate consumer, where the mass values for all greenhouse gases are adjusted to account for their relative global warming potential.

(I) Renewable biomass

The term "renewable biomass" means each of the following:

(i) Planted crops and crop residue harvested from agricultural land cleared or cultivated at any time prior to December 19, 2007, that is either actively managed or fallow, and nonforested.

(ii) Planted trees and tree residue from actively managed tree plantations on non-federal[10] land cleared at any time prior to December 19, 2007,

including land belonging to an Indian tribe or an Indian individual, that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.

(iii) Animal waste material and animal byproducts.

(iv) Slash and pre-commercial thinnings that are from non-federal [10] forestlands, including forestlands belonging to an Indian tribe or an Indian individual, that are held in trust by the United States or subject to a restriction against alienation imposed by the United States, but not forests or forestlands that are ecological communities with a global or State ranking of critically imperiled, imperiled, or rare pursuant to a State Natural Heritage Program, old growth forest, or late successional forest.

(v) Biomass obtained from the immediate vicinity of buildings and other areas regularly occupied by people, or of public infrastructure, at risk from wildfire.

(vi) Algae.

(vii) Separated yard waste or food waste, including recycled cooking and trap grease.

(J) Renewable fuel

The term "renewable fuel" means fuel that is produced from renewable biomass and that is used to replace or reduce the quantity of fossil fuel present in a transportation fuel.

(K) Small refinery

The term "small refinery" means a refinery for which the average aggregate daily crude oil throughput for a calendar year (as determined by dividing the aggregate throughput for the calendar year by the number of days in the calendar year) does not exceed 75,000 barrels.

(L) Transportation fuel

The term "transportation fuel" means fuel for use in motor vehicles, motor vehicle engines, nonroad vehicles, or nonroad engines (except for ocean-going vessels).

(2) Renewable fuel program

(A) Regulations

(i) In general

Not later than 1 year after August 8, 2005, the Administrator shall promulgate regulations to ensure that gasoline sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains the applicable volume of renewable fuel determined in accordance with subparagraph (B). Not later than 1 year after December 19, 2007, the Administrator shall revise the regulations under this paragraph to ensure that transportation fuel sold or introduced into commerce in the United States (except in noncontiguous States or territories), on an annual average basis, contains at least the applicable volume of renewable fuel, advanced biofuel, cellulosic biofuel, and biomass-based diesel, determined in accordance with subparagraph (B) and, in the case of any such renewable fuel produced from new facilities that commence construction after December 19, 2007, achieves at least a 20 percent reduction in lifecycle greenhouse gas emissions compared to baseline lifecycle greenhouse gas emissions.

(ii) Noncontiguous State opt-in

(I) In general

On the petition of a noncontiguous State or territory, the Administrator may allow the renewable fuel program established under this subsection to apply in the

noncontiguous State or territory at the same time or any time after the Administrator promulgates regulations under this subparagraph.

(II) Other actions

In carrying out this clause, the Administrator may—

(aa) issue or revise regulations under this paragraph;

(bb) establish applicable percentages under paragraph (3);

(cc) provide for the generation of credits under paragraph (5); and

(dd) take such other actions as are necessary to allow for the application of the renewable fuels program in a noncontiguous State or territory.

(iii) Provisions of regulations

Regardless of the date of promulgation, the regulations promulgated under clause (i)—

(I) shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met; but

(II) shall not—

(aa) restrict geographic areas in which renewable fuel may be used; or

(bb) impose any per-gallon obligation for the use of renewable fuel.

(iv) Requirement in case of failure to promulgate regulations

If the Administrator does not promulgate regulations under clause (i), the percentage of renewable fuel in gasoline sold or dispensed to consumers in the United States, on a volume basis, shall be 2.78 percent for calendar year 2006.

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

For the purpose of subparagraph (A), the applicable volume of renewable fuel for the calendar years 2006 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of renewable fuel (in billions of gallons):
2006	4.0
2007	4.7
2008	9.0
2009	11.1
2010	12.95
2011	13.95
2012	15.2
2013	16.55
2014	18.15
2015	20.5
2016	22.25
2017	24.0
2018	26.0
2019	28.0
2020	30.0
2021	33.0
2022	36.0

(II) Advanced biofuel

For the purpose of subparagraph (A), of the volume of renewable fuel required under subclause (I), the

applicable volume of advanced biofuel for the calendar years 2009 through 2022 shall be determined in accordance with the following table:

Calendar Year:	Applicable volume of advanced biofuel (in billions of gallons):
2009	0.6
2010	0.95
2011	1.35
2012	2.0
2013	2.75
2014	3.75
2015	5.5
2016	7.25
2017	9.0
2018	11.0
2019	13.0
2020	15.0
2021	18.0
2022	21.0

(III) Cellulosic biofuel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of cellulosic biofuel for the calendar years 2010 through 2022 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2010	0.1
2011	0.25

Calendar year:	Applicable volume of cellulosic biofuel (in billions of gallons):
2012	0.5
2013	1.0
2014	1.75
2015	3.0
2016	4.25
2017	5.5
2018	7.0
2019	8.5
2020	10.5
2021	13.5
2022	16.0

(IV) Biomass-based diesel

For the purpose of subparagraph (A), of the volume of advanced biofuel required under subclause (II), the applicable volume of biomass-based diesel for the calendar years 2009 through 2012 shall be determined in accordance with the following table:

Calendar year:	Applicable volume of biomass-based diesel (in billions of gallons):
2009	0.5
2010	0.65
2011	0.80
2012	1.0

(ii) Other calendar years

For the purposes of subparagraph (A), the applicable volumes of each fuel specified in the tables in clause (i)

for calendar years after the calendar years specified in the tables shall be determined by the Administrator, in coordination with the Secretary of Energy and the Secretary of Agriculture, based on a review of the implementation of the program during calendar years specified in the tables, and an analysis of—

(I) the impact of the production and use of renewable fuels on the environment, including on air quality, climate change, conversion of wetlands, ecosystems, wildlife habitat, water quality, and water supply;

(II) the impact of renewable fuels on the energy security of the United States;

(III) the expected annual rate of future commercial production of renewable fuels, including advanced biofuels in each category (cellulosic biofuel and biomass-based diesel);

(IV) the impact of renewable fuels on the infrastructure of the United States, including deliverability of materials, goods, and products other than renewable fuel, and the sufficiency of infrastructure to deliver and use renewable fuel;

(V) the impact of the use of renewable fuels on the cost to consumers of transportation fuel and on the cost to transport goods; and

(VI) the impact of the use of renewable fuels on other factors, including job creation, the price and supply of agricultural commodities, rural economic development, and food prices.

The Administrator shall promulgate rules establishing the applicable volumes under this clause no later than 14 months before the first year for which such applicable volume will apply.

(iii) Applicable volume of advanced biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of advanced biofuel shall be at least the same percentage of the applicable volume of renewable fuel as in calendar year 2022.

(iv) Applicable volume of cellulosic biofuel

For the purpose of making the determinations in clause (ii), for each calendar year, the applicable volume of cellulosic biofuel established by the Administrator shall be based on the assumption that the Administrator will not need to issue a waiver for such years under paragraph (7)(D).

(v) Minimum applicable volume of biomass-based diesel

For the purpose of making the determinations in clause (ii), the applicable volume of biomass-based diesel shall not be less than the applicable volume listed in clause (i)(IV) for calendar year 2012.

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

Not later than October 31 of each of calendar years 2005 through 2021, the Administrator of the Energy Information Administration shall provide to the Administrator of the Environmental Protection Agency an estimate, with respect to the following calendar year, of the volumes of transportation fuel, biomass-based diesel, and cellulosic biofuel projected to be sold or introduced into commerce in the United States.

(B) Determination of applicable percentages

(i) In general

Not later than November 30 of each of calendar years 2005 through 2021, based on the estimate provided under subparagraph (A), the Administrator of the Environmental Protection Agency shall determine and publish in the Federal Register, with respect to the following calendar year, the renewable fuel obligation that ensures that the requirements of paragraph (2) are met.

(ii) Required elements

The renewable fuel obligation determined for a calendar year under clause (i) shall—

(I) be applicable to refineries, blenders, and importers, as appropriate;

(II) be expressed in terms of a volume percentage of transportation fuel sold or introduced into commerce in the United States; and

(III) subject to subparagraph (C)(i), consist of a single applicable percentage that applies to all categories of persons specified in subclause (I).

(C) Adjustments

In determining the applicable percentage for a calendar year, the Administrator shall make adjustments—

(i) to prevent the imposition of redundant obligations on any person specified in subparagraph (B)(ii)(I); and

(ii) to account for the use of renewable fuel during the previous calendar year by small refineries that are exempt under paragraph (9).

(4) Modification of greenhouse gas reduction percentages

(A) In general

The Administrator may, in the regulations under the last sentence of paragraph (2)(A)(i), adjust the 20 percent, 50 percent, and 60 percent reductions in lifecycle greenhouse gas emissions specified in paragraphs (2)(A)(i) (relating to renewable fuel), (1)(D) (relating to biomass-based diesel), (1)(B)(i) (relating to advanced biofuel), and (1)(E) (relating to cellulosic biofuel) to a lower percentage. For the 50 and 60 percent reductions, the Administrator may make such an adjustment only if he determines that generally such reduction is not commercially feasible for fuels made using a variety of feedstocks, technologies, and processes to meet the applicable reduction.

(B) Amount of adjustment

In promulgating regulations under this paragraph, the specified 50 percent reduction in greenhouse gas emissions from advanced biofuel and in biomass-based diesel may not be reduced below 40 percent. The specified 20 percent reduction in greenhouse gas emissions from renewable fuel may not be reduced below 10 percent, and the specified 60 percent reduction in greenhouse gas emissions from cellulosic biofuel may not be reduced below 50 percent.

(C) Adjusted reduction levels

An adjustment under this paragraph to a percent less than the specified 20 percent greenhouse gas reduction for renewable fuel shall be the minimum possible adjustment, and the adjusted greenhouse gas reduction shall be established by the Administrator at the maximum achievable level, taking cost in consider-

ation, for natural gas fired corn-based ethanol plants, allowing for the use of a variety of technologies and processes. An adjustment in the 50 or 60 percent greenhouse gas levels shall be the minimum possible adjustment for the fuel or fuels concerned, and the adjusted greenhouse gas reduction shall be established at the maximum achievable level, taking cost in consideration, allowing for the use of a variety of feedstocks, technologies, and processes.

(D) 5-year review

Whenever the Administrator makes any adjustment under this paragraph, not later than 5 years thereafter he shall review and revise (based upon the same criteria and standards as required for the initial adjustment) the regulations establishing the adjusted level.

(E) Subsequent adjustments

After the Administrator has promulgated a final rule under the last sentence of paragraph (2)(A)(i) with respect to the method of determining lifecycle greenhouse gas emissions, except as provided in subparagraph (D), the Administrator may not adjust the percent greenhouse gas reduction levels unless he determines that there has been a significant change in the analytical methodology used for determining the lifecycle greenhouse gas emissions. If he makes such determination, he may adjust the 20, 50, or 60 percent reduction levels through rulemaking using the criteria and standards set forth in this paragraph.

(F) Limit on upward adjustments

If, under subparagraph (D) or (E), the Administrator revises a percent level adjusted as provided in subparagraphs (A), (B), and (C) to a higher percent, such higher percent may not exceed the applicable percent

specified in paragraph (2)(A)(i), (1)(D), (1)(B)(i), or (1)(E).

(G) Applicability of adjustments

If the Administrator adjusts, or revises, a percent level referred to in this paragraph or makes a change in the analytical methodology used for determining the lifecycle greenhouse gas emissions, such adjustment, revision, or change (or any combination thereof) shall only apply to renewable fuel from new facilities that commence construction after the effective date of such adjustment, revision, or change.

(5) Credit program

(A) In general

The regulations promulgated under paragraph (2)(A) shall provide—

(i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports gasoline that contains a quantity of renewable fuel that is greater than the quantity required under paragraph (2);

(ii) for the generation of an appropriate amount of credits for biodiesel; and

(iii) for the generation of credits by small refineries in accordance with paragraph (9)(C).

(B) Use of credits

A person that generates credits under subparagraph (A) may use the credits, or transfer all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(C) Duration of credits

A credit generated under this paragraph shall be valid to show compliance for the 12 months as of the date of generation.

(D) Inability to generate or purchase sufficient credits

The regulations promulgated under paragraph (2)(A) shall include provisions allowing any person that is unable to generate or purchase sufficient credits to meet the requirements of paragraph (2) to carry forward a renewable fuel deficit on condition that the person, in the calendar year following the year in which the renewable fuel deficit is created—

(i) achieves compliance with the renewable fuel requirement under paragraph (2); and

(ii) generates or purchases additional renewable fuel credits to offset the renewable fuel deficit of the previous year.

(E) Credits for additional renewable fuel

The Administrator may issue regulations providing: (i) for the generation of an appropriate amount of credits by any person that refines, blends, or imports additional renewable fuels specified by the Administrator; and (ii) for the use of such credits by the generator, or the transfer of all or a portion of the credits to another person, for the purpose of complying with paragraph (2).

(6) Seasonal variations in renewable fuel use

(A) Study

For each of calendar years 2006 through 2012, the Administrator of the Energy Information Administration shall conduct a study of renewable fuel blending to

determine whether there are excessive seasonal variations in the use of renewable fuel.

(B) Regulation of excessive seasonal variations

If, for any calendar year, the Administrator of the Energy Information Administration, based on the study under subparagraph (A), makes the determinations specified in subparagraph (C), the Administrator of the Environmental Protection Agency shall promulgate regulations to ensure that 25 percent or more of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) is used during each of the 2 periods specified in subparagraph (D) of each subsequent calendar year.

(C) Determinations

The determinations referred to in subparagraph (B) are that—

(i) less than 25 percent of the quantity of renewable fuel necessary to meet the requirements of paragraph (2) has been used during 1 of the 2 periods specified in subparagraph (D) of the calendar year;

(ii) a pattern of excessive seasonal variation described in clause (i) will continue in subsequent calendar years; and promulgating regulations or other requirements to impose a 25 percent or more seasonal use of renewable fuels will not prevent or interfere with the attainment of national ambient air quality standards or significantly increase the price of motor fuels to the consumer.

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

Renewable fuel blended or consumed in calendar year 2006 in a State that has received a waiver under section 7543(b) of this title shall not be included in the study under subparagraph (A).

(F) State exemption from seasonality requirements

Notwithstanding any other provision of law, the seasonality requirement relating to renewable fuel use established by this paragraph shall not apply to any State that has received a waiver under section 7543(b) of this title or any State dependent on refineries in such State for gasoline supplies.

(7) Waivers

(A) In general

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, may waive the requirements of paragraph (2) in whole or in part on petition by one or more States, by any person subject to the requirements of this subsection, or by the Administrator on his own motion by reducing the national quantity of renewable fuel required under paragraph (2)—

(i) based on a determination by the Administrator, after public notice and opportunity for comment, that implementation of the requirement would severely harm the economy or environment of a State, a region, or the United States; or

(ii) based on a determination by the Administrator, after public notice and opportunity for comment, that there is an inadequate domestic supply.

(B) Petitions for waivers

The Administrator, in consultation with the Secretary of Agriculture and the Secretary of Energy, shall approve or disapprove a petition for a waiver of the requirements of paragraph (2) within 90 days after the date on which the petition is received by the Administrator.

(C) Termination of waivers

A waiver granted under subparagraph (A) shall terminate after 1 year, but may be renewed by the Administrator after consultation with the Secretary of Agriculture and the Secretary of Energy.

(D) Cellulosic biofuel

(i) For any calendar year for which the projected volume of cellulosic biofuel production is less than the minimum applicable volume established under paragraph (2)(B), as determined by the Administrator based on the estimate provided under paragraph (3)(A), not later than November 30 of the preceding calendar year, the Administrator shall reduce the applicable volume of cellulosic biofuel required under paragraph (2)(B) to the projected volume available during that calendar year. For any calendar year in which the Administrator makes such a reduction, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(ii) Whenever the Administrator reduces the minimum cellulosic biofuel volume under this subparagraph, the Administrator shall make available for sale cellulosic biofuel credits at the higher of $0.25 per gallon or the amount by which $3.00 per gallon exceeds the average wholesale price of a gallon of gasoline in

the United States. Such amounts shall be adjusted for inflation by the Administrator for years after 2008.

(iii) Eighteen months after December 19, 2007, the Administrator shall promulgate regulations to govern the issuance of credits under this subparagraph. The regulations shall set forth the method for determining the exact price of credits in the event of a waiver. The price of such credits shall not be changed more frequently than once each quarter. These regulations shall include such provisions, including limiting the credits' uses and useful life, as the Administrator deems appropriate to assist market liquidity and transparency, to provide appropriate certainty for regulated entities and renewable fuel producers, and to limit any potential misuse of cellulosic biofuel credits to reduce the use of other renewable fuels, and for such other purposes as the Administrator determines will help achieve the goals of this subsection. The regulations shall limit the number of cellulosic biofuel credits for any calendar year to the minimum applicable volume (as reduced under this subparagraph) of cellulosic biofuel for that year.

(E) Biomass-based diesel

(i) Market evaluation

The Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall periodically evaluate the impact of the biomass-based diesel requirements established under this paragraph on the price of diesel fuel.

(ii) Waiver

If the Administrator determines that there is a significant renewable feedstock disruption or other market circumstances that would make the price of biomass-based diesel fuel increase significantly, the Admin-

istrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, shall issue an order to reduce, for up to a 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed 15 percent of the applicable annual requirement for biomass-based diesel. For any calendar year in which the Administrator makes a reduction under this subparagraph, the Administrator may also reduce the applicable volume of renewable fuel and advanced biofuels requirement established under paragraph (2)(B) by the same or a lesser volume.

(iii) Extensions

If the Administrator determines that the feedstock disruption or circumstances described in clause (ii) is continuing beyond the 60-day period described in clause (ii) or this clause, the Administrator, in consultation with the Secretary of Energy and the Secretary of Agriculture, may issue an order to reduce, for up to an additional 60-day period, the quantity of biomass-based diesel required under subparagraph (A) by an appropriate quantity that does not exceed an additional 15 percent of the applicable annual requirement for biomass-based diesel.

(F) Modification of applicable volumes

For any of the tables in paragraph (2)(B), if the Administrator waives—

(i) at least 20 percent of the applicable volume requirement set forth in any such table for 2 consecutive years; or

(ii) at least 50 percent of such volume requirement for a single year, the Administrator shall promulgate a rule (within 1 year after issuing such waiver) that modifies the applicable volumes set forth in the table

concerned for all years following the final year to which the waiver applies, except that no such modification in applicable volumes shall be made for any year before 2016. In promulgating such a rule, the Administrator shall comply with the processes, criteria, and standards set forth in paragraph (2)(B)(ii).

(8) Study and waiver for initial year of program

(A) In general

Not later than 180 days after August 8, 2005, the Secretary of Energy shall conduct for the Administrator a study assessing whether the renewable fuel requirement under paragraph (2) will likely result in significant adverse impacts on consumers in 2006, on a national, regional, or State basis.

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

Based on the results of the study, the Secretary of Energy shall make specific recommendations to the Administrator concerning waiver of the requirements of paragraph (2), in whole or in part, to prevent any adverse impacts described in subparagraph (A).

(D) Waiver

(i) In general

Not later than 270 days after August 8, 2005, the Administrator shall, if and to the extent recommended by the Secretary of Energy under subparagraph (C), waive, in whole or in part, the renewable fuel requirement under paragraph (2) by reducing the national

quantity of renewable fuel required under paragraph (2) in calendar year 2006.

(ii) No effect on waiver authority

Clause (i) does not limit the authority of the Administrator to waive the requirements of paragraph (2) in whole, or in part, under paragraph (7).

(9) Small refineries

(A) Temporary exemption

(i) In general

The requirements of paragraph (2) shall not apply to small refineries until calendar year 2011.

(ii) Extension of exemption

(I) Study by Secretary of Energy

Not later than December 31, 2008, the Secretary of Energy shall conduct for the Administrator a study to determine whether compliance with the requirements of paragraph (2) would impose a disproportionate economic hardship on small refineries.

(II) Extension of exemption

In the case of a small refinery that the Secretary of Energy determines under subclause (I) would be subject to a disproportionate economic hardship if required to comply with paragraph (2), the Administrator shall extend the exemption under clause (i) for the small refinery for a period of not less than 2 additional years.

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

A small refinery may at any time petition the Administrator for an extension of the exemption under

subparagraph (A) for the reason of disproportionate economic hardship.

(ii) Evaluation of petitions

In evaluating a petition under clause (i), the Administrator, in consultation with the Secretary of Energy, shall consider the findings of the study under subparagraph (A)(ii) and other economic factors.

(iii) Deadline for action on petitions

The Administrator shall act on any petition submitted by a small refinery for a hardship exemption not later than 90 days after the date of receipt of the petition.

(C) Credit program

If a small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A), the regulations promulgated under paragraph (2)(A) shall provide for the generation of credits by the small refinery under paragraph (5) beginning in the calendar year following the date of notification.

(D) Opt-in for small refineries

A small refinery shall be subject to the requirements of paragraph (2) if the small refinery notifies the Administrator that the small refinery waives the exemption under subparagraph (A).

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

Not later than 180 days after August 8, 2005, and annually thereafter, the Federal Trade Commission shall perform a market concentration analysis of the ethanol production industry using the Herfindahl-Hirschman Index to determine whether there is

sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.

(ii) Scoring

For the purpose of scoring under clause (i) using the Herfindahl-Hirschman Index, all marketing arrangements among industry participants shall be considered.

(B) Report

Not later than December 1, 2005, and annually thereafter, the Federal Trade Commission shall submit to Congress and the Administrator a report on the results of the market concentration analysis performed under subparagraph (A)(i).

(11) Periodic reviews

To allow for the appropriate adjustment of the requirements described in subparagraph (B) of paragraph (2), the Administrator shall conduct periodic reviews of—

(A) existing technologies;

(B) the feasibility of achieving compliance with the requirements; and

(C) the impacts of the requirements described in subsection (a)(2) [11] on each individual and entity described in paragraph (2).

(12) Effect on other provisions

Nothing in this subsection, or regulations issued pursuant to this subsection, shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions (including section 7475) of this chapter. The previous

sentence shall not affect implementation and enforcement of this subsection.

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[9] So in original. The word "and" probably should appear.

[10] So in original. Probably should be "non-Federal".

[11] So in original. Subsection (a) does not contain a par. (2).

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42 U.S.C. § 7607
Administrative proceedings and judicial review

…

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,[1] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)1 of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I) which is locally or

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[1] So in original.

regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia 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. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any per-son may challenge the deferral pursuant to paragraph (1).

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42 U.S.C. § 1857h-5 (1970)
Administrative proceedings and judicial review

…

(b) (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard under section 1857c-7 of this title, any standard of performance under section 1857c-6 of this title, any standard under section 1857f-1 of this title (other than a standard required to be prescribed under section 1857f-l(b)(1) of this title), any determination under section 1857f-1(b)(5) of this title, any control or prohibition under section 1857f-6c of this title or any standard under section 1857f-9 of this title may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title or section 1857c-6(d) of this title, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation or approval, or after such date if such petition is based solely on grounds arising after such 30th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

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42 U.S.C. § 7607 (1982)
Administrative proceedings and judicial review

…

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(l) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 74ll(d) of this title, any order under section 74ll(j) of this title, under section 7412(c) of this title, under section 7413(d) of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the

preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia 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. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

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