

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

v.

CALUMET SHREVEPORT REFINING, LLC, ET AL.,

Respondents

**SMALL REFINERY RESPONDENTS' CONDITIONAL
OPPOSITION TO PETITIONER'S MOTION TO HOLD
THE BRIEFING SCHEDULE IN ABEYANCE**

Pursuant to this Court's Rule 21.4, the small-refinery respondents respectfully submit this conditional opposition to the motion of petitioner the United States Environmental Protection Agency (EPA) to hold the briefing schedule in abeyance. EPA has filed a materially identical abeyance motion in *Oklahoma v. EPA*, No. 23-1067 (consolidated with *PacificCorp v. EPA*, No. 23-1068), which concerns a question presented similar to the question presented by this case, regarding the same venue provision in the Clean Air Act, 42 U.S.C. § 7606(b)(1). The petitioners in Nos. 23-1067 and 23-1068 have opposed the government's abeyance motion. If this Court denies EPA's abeyance request in *Oklahoma*, then the Court should similarly deny EPA's request for an abeyance here.

1. The Clean Air Act (CAA) assigns the venue for a petition for 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). The venue provision also contains a narrow exception to the

general rule of regional-circuit review for a “locally or regionally applicable” EPA action if that action is “based on a determination of nationwide scope or effect.” *Ibid.* The questions presented in this case and *Oklahoma* concern the meaning of that venue provision.

2. This case arises from the statutory small-refinery hardship exemption under 42 U.S.C. § 7545(o)(9)(B)—a type of statutory forbearance from the CAA’s Renewable Fuel Standard (RFS). A small refinery may petition EPA for an exemption from the RFS by showing that it will face “disproportionate economic hardship” from compliance with the RFS in a given year. *Ibid.* Prior to the final EPA actions at issue in this case, EPA had repeatedly acknowledged that its decisions on small refineries’ hardship petitions are quintessentially local actions that the CAA’s venue provision refers to the regional circuits. But in April and June 2022, EPA simultaneously denied 105 individually submitted small-refinery hardship petitions by bundling those denials together in two explanation documents, which EPA contended are just two nationally applicable actions that can be reviewed only in the D.C. Circuit. Pet.App.189a–330a (April Denials); Pet.App.44a–188a (June Denials).

3. Six small refineries petitioned for judicial review of EPA’s denial actions in their regional circuit court: the Fifth Circuit. The court of appeals granted the petitions for review, vacated the April and June decisions denying hardship relief to those six small refineries, and remanded to the agency for further proceedings. Pet.App. 1a-34a. On the venue issue, the court denied EPA’s motion to transfer the petitions for review to the D.C. Circuit. *Id.* at 9a-15a. The court held that 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. The court further held that EPA’s denials were not based on any nationwide determination because EPA conceded that it had “considered each petition on the merits ... and individual refinery information,” and had “re[lied] on refinery-specific determinations” about each refinery’s own “economic hardship” factors. *Id.* at 14a-15a. EPA filed a petition for a writ of certiorari solely on the venue question, and this Court granted EPA’s petition.

4. In *Oklahoma*, state and industry petitioners filed petitions for judicial review in the Tenth Circuit of EPA’s disapproval under the CAA of multiple States’ implementation plans for reducing ozone pollution. See Motion of Respondents to Hold Briefing Schedule in Abeyance ¶ 1, No. 23-1067 (Jan. 24, 2025). On the venue issue, the court of appeals granted EPA’s motion and transferred the petitions for review to the D.C. Circuit. *Ibid.* The court concluded that EPA’s disapprovals of the implementation plans were “nationally applicable” under 42 U.S.C. § 7607(b)(1) because EPA had rejected multiple plans from States across the country. *Ibid.* The state and industry petitioners filed separate petitions for a writ of certiorari on the venue question, and this Court granted both petitions and consolidated the cases. *Ibid.* Justice Alito took no part in the consideration or decision of those petitions.

5. On January 24, 2025, EPA filed materially identical abeyance motions in *Oklahoma* and this case, “to allow for EPA to reassess the basis for and soundness of the” EPA actions in both cases. Motion of Respondents to Hold Briefing Schedule in Abeyance ¶ 2, No. 23-1229 (Jan. 24, 2025). The petitioners in *Oklahoma* oppose the government’s abeyance motion. See Opposition to EPA’s Motion to Hold Briefing Schedule in Abeyance, No. 23-1067 (Jan. 27, 2025).

6. Small-refinery respondents welcome EPA reassessing the underlying RFS hardship denial decisions at issue here, and hope EPA will promptly agree with respondents that the denials previously issued by EPA were unsound. If EPA no longer wants briefing and a decision from this Court in this case, then it can simply voluntarily dismiss its petition for a writ of certiorari. But EPA has not done so. EPA also has not yet committed to altering its decisions on the small-refinery respondents’ hardship petitions, nor has it indicated when it would complete a “reassess[ment].” EPA is already several years late in resolving these small-refinery hardship petitions, and a lengthy abeyance period would be prejudicial to respondents. Other federal court actions in the court of appeals are currently on hold pending this Court’s decision on the venue question in this case, and a

significant delay by EPA during an abeyance period would further delay the lower court's consideration of those cases. See *San Antonio Refinery v. EPA*, No. 23-60399 (consolidated with Nos. 23-60427, 23-60492) (5th Cir. Dec. 3, 2024), Doc. No. 117.

7. Because the *Oklahoma* petitioners oppose the government's abeyance motion, it is possible that EPA's motion in that case will be denied, and that *Oklahoma* will proceed to a decision this Term. See, e.g., Order, *Nat'l Assoc. of Mfrs. v. Dep't of Defense*, No. 16-299 (Apr. 3, 2017) (denying federal respondents' motion to hold briefing schedule in abeyance). In the event this Court denies the government's abeyance request in *Oklahoma*, then the Court's decision in *Oklahoma* concerning the same CAA venue provision at issue in this case could be of great import to the small-refinery respondents here. Indeed, in that instance, this Court's decision in *Oklahoma* may well affect the small-refinery respondents' rights, and the small-refinery respondents should be heard by this Court in this case to resolve the circuit split that prompted EPA's certiorari petition here. Moreover, this case—unlike *Oklahoma*—provides an opportunity for the full Court to interpret the CAA's venue provision. For all of those reasons, if this Court denies EPA's abeyance motion in *Oklahoma*, then the Court should similarly deny EPA's motion here.

January 27, 2025

Respectfully submitted,

s/ Michael R. Huston

Michael R. Huston

Counsel of Record

PERKINS COIE LLP

2525 E. Camelback Road

Suite 500

Phoenix, AZ 85016-4227

602.351.8000

MHuston@perkinscoie.com

Counsel for Small-Refinery Respondents