No. 23-1229

# In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

*v.*

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

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

**REPLY BRIEF FOR THE PETITIONER**

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## REPLY BRIEF FOR THE PETITIONER

At this juncture, the Environmental Protection Agency (EPA) is reassessing the basis for and soundness of the denial actions at issue here. Nonetheless, the petitions challenging those actions remain pending, and the D.C. Circuit is where they should be reviewed. Section 7607(b)(1) of Title 42 supports D.C. Circuit review here for two independent reasons. First, Section 7607(b)(1) mandates D.C. Circuit review of "nationally applicable" EPA actions. 42 U.S.C. 7607(b)(1). Here, EPA's denial actions are nationally applicable because they resolve the exemption petitions of small refineries located in multiple judicial circuits.

Second, Section 7607(b)(1) requires D.C. Circuit review of "locally or regionally applicable" actions that are "based on a determination of nationwide scope or effect" if EPA "finds and publishes that such action is based on such a determination." 42 U.S.C. 7607(b)(1). The at-issue denial actions are based on determinations

of nationwide scope or effect because they are grounded in EPA's statutory interpretation and economic analysis of marketplace conditions, which together establish EPA's general framework for adjudicating all small refinery exemption requests under the Renewable Fuel Standard (RFS) program. Petitions challenging the denial actions should therefore be subject to D.C. Circuit review.

Contrary to respondents'[1] assertions (Br. 3-4, 14), this is not the first time EPA has aggregated common issues for resolution in a single action and asserted that review is proper in the D.C. Circuit, either in the RFS context or otherwise. In 2019 EPA aggregated small refinery exemption petitions for resolution in a single action, and argued that venue was proper in the D.C. Circuit. See Gov't Br. 6. And in other contexts, EPA has engaged for decades in similar aggregation of common issues. See *id.* at 27, 36; see also 37 Fed. Reg. 10,842 (May 31, 1972).

Nothing about EPA's interpretation of Section 7607(b)(1) gives the agency carte blanche to strategically opt into the D.C. Circuit. EPA may not aggregate unrelated issues into a single action to manipulate venue. And locally or regionally applicable actions are subject to review in the D.C. Circuit only if there is a but-for causal link between the challenged action and the determination of nationwide scope or effect; the determination resolves an unsettled issue; and EPA then exercises its discretion to publish a finding that the action is based on the relevant determination. Those are meaningful guardrails.

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[1] This brief refers to the small refinery respondents as "respondents" throughout.

Respondents' contrary interpretations are unpersuasive and risk creating constant piecemeal litigation instead of the consolidation that Congress deemed appropriate for issues of national import. With respect to Section 7607(b)(1)'s first prong, respondents' approach of treating EPA's April and June 2022 denial actions as 105 refinery-specific actions would allow a reviewing court to disregard EPA's decision to aggregate common issues for resolution in a single adjudication. And respondents' view that an EPA action must govern all 50 States to be "nationally applicable" ignores contrary indications in the statutory text and history and would generate unpredictability for actions involving dozens of States, but not all 50.

Respondents read the word "determination" in Section 7607(b)(1)'s third prong as a term of art that refers only to statutorily required nationwide determinations. No court has adopted that interpretation, which is inconsistent with Section 7607(b)(1)'s history and with this Court's recognition that everyday terms should be given their everyday meaning. Respondents further contend that the denial actions were not based on determinations of nationwide scope or effect because EPA *also* considered refinery-specific circumstances in making exemption decisions. That contention would effectively negate Section 7607(b)(1)'s third prong.

Respondents suggest (Br. 4, 17, 26, 40, 42) that EPA attempted to manipulate venue by delaying agency action, aggregating petitions for consideration, and publishing nationwide determinations rather than adjudicating individual exemption requests seriatim. But EPA has long aggregated common issues for decision. These actions are no different. This Court should va-

cate the judgment below and remand the case with instructions to transfer the petitions to the D.C. Circuit.

### A. The Denial Actions Are Nationally Applicable

On their face, the denial actions are nationally applicable because they collectively apply to 39 small refineries located in eight different judicial circuits across the country. The court below held that an EPA action can be considered "nationally applicable" only if it binds EPA prospectively. Pet. App. 12a. Respondents do not defend that atextual analysis, but their own arguments suffer from similar flaws.

#### *1. Respondents do not accurately define the EPA "actions" they seek to challenge*

Respondents contend (Br. 24-27, 36-38) that, rather than looking to the face of the two denial actions, the Court should treat the petitions for review as challenging 105 separate denials of 105 exemption petitions. Nothing in the text, structure, or context of the relevant statutes suggests that a court in determining venue under Section 7607(b)(1) should disregard EPA's decision to aggregate common issues in a single, nationally applicable action.

a. Section 7607(b)(1) directs a reviewing court to look to the "final action taken[] by the Administrator under [the Clean Air Act (CAA)]." 42 U.S.C. 7607(b)(1). This Court previously construed the word "action" in Section 7607(b)(1) to "cover comprehensively every manner in which an agency may exercise its power." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478 (2001). Here, EPA "exercise[d] its power," *ibid.*, by aggregating the various exemption petitions into two groups in light of the common issues they presented, and by deciding those petitions based on common rea-

soning. EPA's decision to consolidate the petitions should be treated as controlling when a court identifies the "final action" that is subject to the court's review. 42 U.S.C. 7607(b)(1). Section 7607(b)(1) refers to the action actually "taken[] by the Administrator"—not to a hypothetical action (such as the isolated denial of a single refinery's exemption petition) that EPA could have taken. *Ibid.*[2]

Respondents assert (Br. 24-25) that Section 7607(b)(1)'s reference to an action "under" the CAA, combined with the singular nouns in the provisions of 42 U.S.C. 7545*(o)* that address small refinery exemptions, requires that each relevant "final action" must involve a single small refinery petition. The statutory text does not support that result.

Section 7607(b)(1)'s reference to an action "under" the CAA indicates that the statute regulates venue only for actions EPA takes "'by reason of the authority of'" that Act. *Caraco Pharmaceutical Laboratories, Ltd.* v. *Novo Nordisk A/S*, 566 U.S. 399, 418 (2012) (citation omitted). Section 7607(b)(1) does not govern venue for challenges to EPA actions exercising other statutory authorities. But no one disputes that EPA exercised its authority "under" the CAA when it issued the denial actions.

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[2] Regulated parties have at times effectively aggregated their own petitions by seeking waivers of other RFS program requirements via a trade association representing obligated parties nationwide. See, *e.g.*, Office of Transport & Air Quality, EPA, *Denial of AFPM Petition for Partial Waiver of 2023 Cellulosic Biofuel Standard* (Mar. 2024), https://www.epa.gov/system/files/documents/2024-03/afpm-part-waiver-denial-cellulosic-biofuel-stndrd-2024-03.pdf. A final action resolving such a petition is likewise nationally applicable. *Id.* at 10.

The singular nouns in Section 7545(*o*) likewise will not bear the weight that respondents place on them. Of course "[a] small refinery" will file an individual "petition" for an exemption, and of course EPA must "evaluat[e] a petition" and "act on any petition" it receives. 42 U.S.C. 7545(*o*)(9)(B). But that statutory language does not limit the discretion that agencies have traditionally possessed to structure their actions, including by aggregating common issues for joint resolution. See *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); see also Gov't Br. 26-27.

b. The statutory structure and context that respondents invoke (Br. 24-27) do not suggest otherwise. Respondents point out (Br. 26) that Congress initially granted small refineries a blanket exemption from RFS compliance before transitioning to an individualized approach to exemptions. See 42 U.S.C. 7545(*o*)(9)(A) and (B). But the fact that a small refinery now must petition for an exemption does not affect either EPA's power to act on the petitions collectively or the legal consequences of its decision to do so.

The same is true of the CAA provision that requires EPA to act on an exemption petition within 90 days of receipt. See 42 U.S.C. 7545(*o*)(9)(B)(iii); Resp. Br. 25-26. That deadline does not affect EPA's authority to issue a single decision if it receives numerous petitions at approximately the same time. Even where, as here, the deadline has passed due to litigation surrounding earlier exemption petitions, that lapse does not alter EPA's authority.[3] Congress provided a remedy for breaches of

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[3] Contrary to respondents' suggestion (Br. 17), EPA's delay in resolving the petitions at issue here simply reflected delays arising from the then-pending litigation that led to this Court's decision in

the statutory deadline by allowing refineries to file suits "where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary." 42 U.S.C. 7604(a)(2). It would be particularly anomalous to treat a statutory deadline as precluding aggregation, since grouping common issues for joint resolution may increase an agency's efficiency and thus reduce the likelihood of untimely agency actions.

Respondents point out (Br. 26-27) that as a remedy, courts of appeals have invalidated the denial decisions only as to individual refineries that have successfully challenged the denial actions. That remedial choice merely reflects the longstanding equitable principle that relief should extend only as far as is necessary to redress the plaintiffs' own harms. See, *e.g.*, *Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979). Indeed, even in consolidated D.C. Circuit litigation, the court may grant relief to only some petitioners if it identifies salient differences among them. See, *e.g.*, *Sinclair Wyoming Ref. Co.* v. *EPA*, 114 F.4th 693, 700-701, 714-721, 726-727 (D.C. Cir. 2024) (per curiam). The court in *Sinclair* held that, because two of the petitioning refineries "were ineligible for exemptions on other grounds unaffected by vacatur of the Denial Actions," *id.* at 700, those refineries' petitions for review would be denied, *id.* at 726.

c. Respondents acknowledge (Br. 37) that "EPA could have conducted a rulemaking to establish a new interpretation of Section 7545(*o*)(9)(B) and new adjudi-

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*HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382 (2021). See Gov't Cert. Reply Br. 3 n.1; Gov't C.A. Br. 11-17. In resolving the exemption petitions for other years, EPA sought to consider the implications of the decision in *HollyFrontier*, and respondents accordingly did not press EPA to act on their petitions during the 90-day window.

catory framework, and such a rule would likely have been nationally applicable." Respondents suggest (Br. 38), however, that if EPA elects to use adjudication instead, "the CAA's text calls for local rather than national action." The logical implication of respondents' reasoning—like that of the court of appeals' decision—is that adjudications cannot be nationally applicable. See Gov't Br. 25-26. That view disregards Section 7607(b)(1)'s expansive reference to "any * * * nationally applicable * * * final action taken[] by the Administrator under [the CAA]." 42 U.S.C. 7607(b)(1).

Respondents recognize that, if EPA had proceeded in two steps—first promulgating a rule to establish the general framework that would govern small refineries' exemption requests nationwide, and then applying that framework in adjudicating particular exemption petitions—the rule would have been reviewable only in the D.C. Circuit. Respondents contend, however, that because EPA chose to announce the general framework in the same adjudicative decisions that applied the framework to individual refineries, the nationwide framework itself was reviewable in multiple regional circuits. The Court has long held, however, that agencies are "not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion." *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); see *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). Respondents' approach would skew that choice by making centralized review available in one scenario but not the other.

Respondents also contend (Br. 42) that, under EPA's interpretation of Section 7607(b)(1), the agency could "manufacture venue in the D.C. Circuit" by combining

unrelated agency actions that affect entities in multiple circuits. Respondents do not and could not plausibly claim that EPA engaged in any such arbitrary aggregation here. Nor do they identify any instance in which EPA has attempted to manipulate venue by grouping otherwise unrelated local actions for decision and then arguing for D.C. Circuit review. If the agency ever did so, the principle we advocate here—*i.e.*, that reviewing courts in determining venue should ordinarily accept EPA's framing of its own actions—would allow a court to reject a particular grouping. Cf. *In re Samsung Electronics Co.*, 2 F.4th 1371, 1377 (Fed. Cir. 2021) (noting that courts "have repeatedly assessed the propriety of venue by disregarding manipulative activities of the parties"), cert. denied, 142 S. Ct. 1445 (2022).

***2. Respondents misinterpret Section 7607(b)(1)'s references to "nationally applicable" and "locally or regionally applicable" EPA actions***

In respondents' view, an EPA action is "nationally applicable" within the meaning of Section 7607(b)(1) only if it applies to all 50 States. That reading logically implies that any EPA action with less than 50-State geographic coverage is "locally or regionally applicable." See Gov't Br. 21 (explaining that Section 7607(b)(1) does not contemplate any intermediate category between "nationally" and "locally or regionally" applicable actions). Respondents' view of those statutory terms does not withstand scrutiny.

a. Respondents contend (Br. 28-29, 40) that, to be "nationally applicable" under Section 7607(b)(1)'s first prong, an action must apply within every State. That understanding is inconsistent with respondents' identification (Br. 29-30) of a rule regarding annual renewable fuel volume obligations for the industry as an example

of a nationally applicable rule. Although "EPA's volumes rule affects every RFS-obligated party in the nation," Resp. Br. 30, the RFS program does not apply in Alaska. 42 U.S.C. 7545(*o*)(2)(A)(i).

Respondents' reliance on the *ejusdem generis* canon is flawed for similar reasons. Some of the enumerated actions referenced in Section 7607(b)(1)'s first prong can and regularly do apply to fewer than 50 States. For example, Section 7607(b)(1)'s first prong refers to "any control or prohibition" of fuels under Section 7545, even though certain controls or prohibitions apply only in nonattainment areas, which are not present in every State. 42 U.S.C. 7607(b)(1); see 42 U.S.C. 7545(h)(1), (h)(6), and (k)(1)(A); see also 42 U.S.C. 7545(k)(10)(D).

Courts accordingly have determined that various EPA actions governing fewer than all 50 States, including nonattainment designations and calls for state implementation plans, were reviewable only in the D.C. Circuit. See, *e.g.*, *ATK Launch Systems, Inc.* v. *EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011) (transferring challenge to single EPA action evaluating States' recommended nonattainment designations and promulgating final designations for 31 areas in 18 States across the country); *West Virginia Chamber of Commerce* v. *Browner*, 166 F.3d 336, 1998 WL 827315, at *2 (4th Cir. 1998) (Tbl.) (per curiam) (transferring challenge to single EPA action evaluating 22 state plans and declaring them inadequate, requiring revisions); *Texas* v. *EPA*, No. 10-60961, 2011 WL 710598, at *2 (5th Cir. Feb. 24, 2011) (same as to 13 States). There is no sound basis for reading the catchall language in Section 7607(b)(1)'s first prong—which refers to "any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter," 42 U.S.C.

7607(b)(1)—to require greater geographic coverage than the enumerated actions reflect.

b. Respondents also contend (Br. 40-42) that an EPA action may be "locally or regionally applicable" even if it extends beyond a single judicial circuit. But respondents never explain how a court would identify "the appropriate circuit" to review an action that spans more than one circuit. 42 U.S.C. 7607(b)(1). While respondents suggest (Br. 42) that in most cases the "appropriate circuit" "will be readily apparent," that is hardly self-evident, particularly under respondents' view that an action covering 49 States is "locally or regionally applicable." For example, when EPA issued a cross-state air pollution transport rule that curbed emissions in 27 upwind States, the D.C. Circuit heard challenges to that rule. See *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489, 500-504 (2014). Yet it is unclear where venue would lie under respondents' view.

Respondents invoke (Br. 41) the Senate Report that accompanied the predecessor to Section 7607(b)(1). See S. Rep. No. 1196, 91st Cong. 2d Sess. (1970) (1970 Senate Report). That predecessor venue provision, enacted in 1970, specified that any action "approving or promulgating any implementation plan" could be reviewed only in "the appropriate circuit," but lacked any catchall for locally or regionally applicable actions. 42 U.S.C. 1857h-5(b)(1) (1970). The Senate Report described EPA actions approving or promulgating "implementation plans which run only to one air quality control region" as reviewable "in the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located." 1970 Senate Report 41. Respondents view that report as cutting against EPA's interpretation of current Section 7607(b)(1) because a single

EPA air quality control region may span multiple circuits, suggesting that there may be more than one "appropriate circuit" for review. That Report does not support respondents' position here.

First, insofar as the 1970 Senate Report is relevant to the proper interpretation of current Section 7607(b)(1), that Report does not support regional-circuit venue in this case. The Report suggested that regional-circuit review would be appropriate for "implementation plans which run only to one air quality control region." 1970 Senate Report 41. But in addition to spanning multiple federal judicial circuits, each of the two denial actions at issue here spanned multiple States and air quality control regions.[4] And nothing in the 1970 Senate Report suggested that D.C. Circuit venue should be limited to EPA actions that applied in every State.

Second, in 1977 Congress replaced the CAA's predecessor venue provision with Section 7607(b)(1) *because* the prior law had produced confusion as to the appropriate circuit for reviewing various types of EPA action. *Inter alia*, Congress added the catchall language covering unenumerated "nationally" and "locally or regionally" applicable actions. The House Report accompanying *that* legislation described the nationally relevant actions that should be reviewed in the D.C. Circuit as those that extend "beyond a single judicial circuit." H.R. Rep. No. 294, 95th Cong., 1st Sess. 324 (1977).

c. Respondents assert (Br. 29) that their interpretation of the terms "nationally applicable" and "locally or

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[4] See EPA, *RFS Small Refinery Exemptions* Tbl. 3, https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (updated Jan. 16, 2025) (listing locations of petitioning small refineries); 40 C.F.R. 81.12-81.276 (listing 265 air quality control regions).

regionally applicable" is preferable because it can be applied more easily and predictably to particular cases. But as explained above (see pp. 9-10, *supra*), there are strong reasons to reject respondents' view that an action must apply to all 50 States in order to be nationally applicable. Other than their extreme 50-State requirement, respondents offer no administrable test for determining how large a geographic area an EPA action must cover to trigger Section 7607(b)(1)'s first prong. Moreover, respondents' contention that courts must look behind EPA's characterization of its own actions (here, by treating EPA's April and June 2022 denial actions as 105 separate denials) would create its own indeterminacy, as judges would be tasked with determining the correct unit of analysis. See Gov't Br. 28-29. The clearest rule—and the one consistent with the text, context, and history of the statute—is that an action that applies in multiple judicial circuits is nationally applicable.

**B. Regardless, The Denial Actions Must Be Reviewed In The D.C. Circuit Under Section 7607(b)(1)'s Third Prong**

Even if the Court concludes that EPA's denial actions are "locally or regionally applicable," those actions still are reviewable exclusively in the D.C. Circuit. The denial actions were "based on" EPA's interpretation of Section 7545(*o*)(9)(B) as requiring that any qualifying economic hardship "must be caused by compliance with the RFS program," Pet. App. 242a (capitalization and emphasis altered), and on EPA's economic assessment that refineries presumptively recover the cost of the [fuel credits] when they sell a gallon of fuel, *id.* at 249a. Both conclusions were "determination[s] of nationwide scope or effect" under Section 7607(b)(1)'s third prong, and EPA found and published that the denial actions were based on those determinations. 42 U.S.C. 7607(b)(1).

Respondents offer no persuasive defense of the court of appeals' contrary holding.

***1. This Court should reject respondents' term-of-art interpretation of the word "determination" in Section 7607(b)(1)'s third prong***

In arguing that the denial actions fall outside Section 7607(b)(1)'s third prong, respondents primarily contend (Br. 32) that the word "determination" in that prong is a term of art that applies only when a substantive CAA provision "*textually* direct[s] EPA to make a 'determination' for the *entire nation*." No court has adopted that reading of the statutory language, which lacks support in text, precedent, and history.[5]

a. Section 7607(b)(1)'s third prong refers to an action that is "based on a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1). Unlike the first and second prongs, each of which contains a list of enumerated actions followed by a catchall, the third prong does not cross-reference other statutory provisions as exemplars of the kind of actions that may be based on such determinations. If (as respondents contend, Br. 8-9, 32) Congress had in mind only those determinations that specific CAA provisions require EPA to make on a

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[5] Respondents cite (Br. 32-33) the Sixth Circuit's decision in *Kentucky* v. *EPA*, 123 F.4th 447 (2024), which addressed the appropriate venue for challenges to an EPA action disapproving various state implementation plans. The court in *Kentucky* did not adopt respondents' proposed interpretation of "determination" in Section 7607(b)(1)'s third prong. Rather, the court held that the word "determination" in this provision "refers to the agency's *ultimate* decision—not to each *preliminary* step on the road to that decision." *Id.* at 464. Respondents do not embrace that reasoning, which conflates the final "action" to which Section 7607(b)(1) refers and the "determination" on which that action is based. 42 U.S.C. 7607(b)(1); see Gov't Br. at 41-44, *Oklahoma* v. *EPA*, No. 23-1067 (Jan. 17, 2025).

nationwide basis, Congress could have cross-referenced such statutes, as it did for the first and second prongs.

Respondents contend (Br. 32) that Congress's "repeated use of the term 'determination' or its derivatives throughout the [CAA] indicates that it is a term of art with the same meaning in Section 7607(b)(1)." In support, respondents cite *Mohamad* v. *Palestinian Authority*, 566 U.S. 449, 456 (2012). That decision makes the uncontroversial point that when a given term appears in multiple places within the same statute, the term generally retains the same meaning throughout. *Ibid.* Rather than suggesting that repeated use of a common word transforms that word into a term of art, the Court in *Mohamad* held that the term "individual" should have the same meaning it has "in everyday parlance." *Id.* at 454.

The statutory term ("determination") at issue here is likewise used in everyday parlance and should be given its ordinary meaning. It is "too common" a word to "bear so loaded a meaning" as respondents would ascribe to it. *Yellen* v. *Confederated Tribes of the Chehalis Reservation*, 594 U.S. 338, 353 (2021) (referring to statutory term "[r]ecognized"); cf. *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 235 (2011) (refusing to read "[u]navoidable" as a term of art in part because "'[u]navoidable' is hardly a rarely used word"). Moreover, if the third prong of Section 7607(b)(1) referred only to actions that are statutorily required to be based on nationwide "determination[s]," it would make little sense to require EPA to "find[] and publish[]" that a particular action is based on such a determination. That fact would be apparent from the statute under which EPA acted.

b. The history of Section 7607(b)(1) does not support respondents' term-of-art reading. In 1976, commenting

on the Administrative Conference of the United States' recommendations for amending the CAA venue provision, EPA General Counsel G. William Frick discussed a then-recent EPA action that had granted numerous States two-year extensions of the attainment deadlines for certain national ambient air quality standards (NAAQS). See Gov't Br. 37-38. EPA had taken that action pursuant to a since-repealed CAA provision that authorized such extensions if "the Administrator determine[d] that" specified conditions were satisfied. 42 U.S.C. 1857c-5(e) (1970); see Resp. Br. 9; pp. 16-17, *infra*. Frick identified that EPA decision as an "[e]xample[]" of an action that had involved "generic determinations of nationwide scope or effect." 41 Fed. Reg. 56,767, 56,768-56,769 (Dec. 30, 1976). But Frick never suggested that D.C. Circuit review would be appropriate only for actions taken pursuant to provisions that specifically call for nationwide "determinations." Instead, he referred broadly to allowing for D.C. Circuit review of "matters on which national uniformity is desirable." *Id*. at 56,769.

Moreover, contrary to respondents' suggestion (Br. 9), the CAA provision that governed the extensions in Frick's example did *not* require EPA to make any nationwide determination. Under that provision, the "Governor of a State" could apply for an extension of the NAAQS compliance deadline. 42 U.S.C. 1857c-5(e)(1) (1970). EPA could grant such an extension "if the Administrator determine[d] that" (A) at least one emission source was "unable to comply" with the state-plan requirements "because the necessary technology or other alternatives [we]re not available" and (B) "[t]he State ha[d] considered and applied as part of its plan reasonably available alternative means" of attaining the NAAQS "and ha[d] justifiably concluded that attainment of [the

NAAQS] within the [deadline] cannot be achieved." 42 U.S.C. 1857c-5(e)(1)(A) and (B) (1970).

The statute thus required EPA to make specified determinations about circumstances *in a particular State*. EPA concluded, however, that substantially the same circumstances (in particular, the unavailability of necessary control technology) existed in numerous States, and that the compliance deadlines for those States therefore should be extended. See 37 Fed. Reg. at 10,845; Gov't Br. 36. That nationwide determination (in the ordinary-meaning sense) was an appropriate exercise of agency discretion, but it was not mandated by any CAA provision.

In this case, respondents argue (Br. 23) that EPA's new statutory interpretation and economic analysis "were merely steps along the way of EPA's individual-refinery decisionmaking process." But in the example that Frick cited, EPA's nationwide determination regarding the availability of particular control technology likewise was a "step[] along the way" to the agency's grant of extensions to individual States. Respondents acknowledge (Br. 46) that EPA could have adopted its approach to small refinery exemption applications through a nationally applicable rule. But while the choice between rulemaking and adjudication may have other legal consequences (see *ibid.*), it does not alter the nationwide character of the agency's interpretive and economic determinations.

***2. Respondents' remaining arguments are unsound***

Respondents' remaining contentions largely repeat the errors of the court of appeals.

a. Respondents emphasize (Br. 47) that EPA was required to consider local circumstances in determining whether particular small refineries were entitled to ex-

emptions. But treating EPA's consideration of local circumstances as precluding D.C. Circuit review would effectively limit Section 7607(b)(1)'s third prong to agency actions that are based *solely* on determinations of nationwide scope or effect. The statute does not impose that limitation, which would restrict the third prong to a vanishingly small set of EPA actions. See Gov't Br. 39-40.

Contrary to respondents' suggestion (Br. 46), Section 7607(b)(1)'s third prong does not require that the nationwide determinations be "sufficient" to produce the agency action at issue. An EPA action is "based on" a nationwide determination under Section 7607(b)(1) only if the determination is a "but-for" cause of the action. See Gov't Br. 31. A but-for cause must be necessary to the final action, but it need not be sufficient to produce the end result. Respondents therefore are wrong in contending (Br. 33-35) that the third prong is inapplicable here because Section 7545(*o*)(9) requires EPA to consider each refinery's individual circumstances and EPA in fact did so.

When EPA considered the various exemption requests, the agency's interpretive and economic determinations established a rebuttable presumption that no small refinery would face disproportionate economic hardship. Because none of the petitioning small refineries provided sufficient evidence to rebut the presumption, the presumption itself was a but-for cause of the denials. The decisions of the Fifth and D.C. Circuits demonstrate as much: Because those courts disagreed with EPA's nationwide determinations, they concluded that the denials could not stand. See Pet. App. 23a-29a; *Sinclair*, 114 F.4th at 706-714, 726-727; Gov't Br. 35.

b. Respondents assert (Br. 47) that the denial actions were not "based on" EPA's economic analysis because (1) even under that analysis, EPA might have granted particular exemption requests if it had reached different conclusions about the circumstances of individual refineries; and (2) without making any nationwide cost-passthrough determination, EPA might have denied the various exemption petitions through refinery-by-refinery determinations that each petitioning refinery could recoup its own RFS compliance costs. Those arguments are unsound.

"[L]ocally or regionally applicable" EPA actions characteristically involve the application of some nationwide agency rule, policy, or interpretation to a discrete factual setting. Gov't Br. 42. When EPA takes such actions, the nationwide rule, etc., typically will be capable of producing different results in different cases depending on the local circumstances. If that were not so, consideration of the local circumstances would be superfluous. Respondents' contention that this possibility precludes D.C. Circuit review reprises the mistaken argument that Section 7607(b)(1)'s third prong is limited to EPA actions that are based *solely* on nationwide determinations. See p. 18, *supra*.

It likewise is true that, whenever EPA makes a nationwide determination and then applies it to diverse local settings, the agency *might have* reached the same outcomes by repeatedly considering the matter afresh and ultimately adopting the same determination in making each local decision. In making the extension decisions that General Counsel Frick remarked upon (see pp. 16-17, *supra*), for example, EPA might have separately determined for each State that the requisite technology was not available. By making and announcing a

nationwide determination to that effect, however, EPA expedited both its own disposition of the various States' extension requests and the process of judicial review. If a nationwide determination is central to EPA's *actual* rationale for taking a particular "locally or regionally applicable" action, the action is naturally described as being "based on" the nationwide determination, even if the agency *could have* reached the same conclusion through a different analytic route.

c. Respondents contend (Br. 44-46) that EPA's understanding of Section 7607(b)(1)'s third prong would permit D.C. Circuit review of every locally or regionally applicable action. But D.C. Circuit venue under the third prong is subject to meaningful limits, including that the nationwide determination is the but-for cause of the underlying action, that the determination resolves an unsettled issue, and that EPA exercises its discretion to publish its finding that the action was based on the requisite determination. See Gov't Br. 40-43.

Respondents contend (Br. 45) that EPA's June 2022 denial action exceeds those limits because that denial action "merely applied the statutory interpretation that EPA had announced months earlier in April" and therefore did not itself resolve an unsettled issue. But both denial actions stemmed from the same proposal, in which EPA had proposed a new—and contested—statutory interpretation and economic analysis. See Gov't Br. 42-43 n.6. The weeks-long delay between the two denial actions was due to a deadline imposed by a court order remanding an action addressing certain petitions. Pet. App. 48a, 193a. And the validity of EPA's new statutory interpretation and economic analysis was scarcely settled when EPA issued the June 2022 denial action.

D.C. Circuit review of the denial actions at issue here would further Section 7607(b)(1)'s purposes of conserving judicial resources and achieving uniform resolution of issues of national relevance. Respondents argue that the question whether a particular refinery will receive an exemption is not a "regulatory issue[] of national importance." Br. 5 (quoting *National Environmental Development Ass'ns Clean Air Project* v. *EPA*, 891 F.3d 1041, 1054 (D.C. Cir. 2018) (Silberman, J., concurring)) (brackets in original). But the denial actions do not simply resolve particular exemption claims; they set forth EPA's nationally relevant determinations regarding the general framework that governs all small refineries' requests for exemptions from the RFS program. Even where EPA's determinations are "applied first to a single set of facilities," they may "constitute[] an interpretation of 'nationwide scope and effect'" to which Section 7607(b)(1)'s third prong applies. *National Environmental Development Ass'ns*, 891 F.3d at 1053 (Silberman, J., concurring).

Respondents misconstrue (Br. 46) the government's observation (Gov't Br. 42) that, when challenges to novel resolutions of nationally relevant questions are brought, D.C. Circuit review promotes efficiency and uniformity. Respondents are correct that, in deciding which prong of Section 7607(b)(1) covers a particular EPA action, a court "look[s] only 'to the face' of the action," rather than "to the challenger's arguments in the petition for review." Resp. Br. 7 (citation omitted); see Gov't Br. 20. But when a "locally or regionally applicable" EPA action is "based on a determination of nationwide scope or effect," and therefore falls within Section 7607(b)(1)'s third prong, *EPA* may properly consider what challenges are likely to be brought in court when

the agency decides whether to "find[] and publish[] that such action is based on such a determination." 42 U.S.C. 7607(b)(1); see Gov't Br. 33, 43. In particular, when comments on a proposed "locally or regionally applicable" action indicate that EPA's predicate nationwide determinations are likely to be the focus of judicial challenges, that fact may lead EPA to publish the specified finding. Gov't Br. 43; see Resp. Br. 15 (explaining that small refineries' comments on the proposed denial actions challenged EPA's new statutory interpretation and economic analysis).

Under respondents' reading of the relevant statutory language, Section 7607(b)(1)'s third prong would authorize D.C. Circuit review of only a practically insignificant set of EPA actions. Apart from the extension for NAAQS compliance in the EPA actions highlighted by General Counsel Frick, respondents do not identify a single action that they view as falling within the third prong. And as explained (see pp. 16-17, *supra*), the CAA provision that formerly governed such extensions did not actually require EPA to make any nationwide determinations.

Respondents suggest (Br. 49) that giving Section 7607(b)(1)'s third prong a narrow scope is unproblematic because that prong establishes an exception to the general rule that "locally or regionally applicable" EPA actions are reviewed in the regional circuits. But "this Court has made clear that statutory exceptions are to be read fairly, not narrowly, for they 'are no less part of Congress's work than its rules and standards—and all are worthy of a court's respect.'" *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 396 (2021) (citation omitted). Here, Section 7607(b)(1)'s text and history indicate that Congress viewed the pro-

vision's third prong as playing an important role in allocating review between the D.C. Circuit and regional circuits.

Respondents complain (Br. 49-50) that D.C. Circuit review in consolidated cases leads to delay and makes it difficult to draw attention to individualized issues. But if delay is a concern, parties may move for expedited briefing. See, *e.g.*, 22-11617 C.A. Doc. 37-1 (11th Cir. Dec. 6, 2022) (granting motion to expedite briefing and oral argument). And the D.C. Circuit's briefing format may be adapted to allow individual entities to highlight their particular issues. For example, the small refineries in *Sinclair* reserved their rights to "present common issues in a single brief and issues specific to individual refineries or groups o[f] refineries in a limited number of briefs." 22-1073 C.A. Doc. 1971464, at 4 (D.C. Cir. Oct. 31, 2022). In any event, in the recent litigation involving the denial actions here, the challenges have overwhelmingly focused on EPA determinations that were common to all petitioning refineries. See Pet. App. 16a-34a; *Sinclair*, 114 F.4th at 706-714. The denial actions are thus precisely the types of EPA actions that are appropriate for centralized D.C. Circuit review.

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This Court should vacate the judgment of the court of appeals and remand with instructions to transfer the case to the D.C. Circuit.

Respectfully submitted.

SARAH M. HARRIS
*Acting Solicitor General*

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