No. 23-

IN THE

Supreme Court of the United States

GROWTH ENERGY AND THE
RENEWABLE FUELS ASSOCIATION,
Petitioners,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an action by the Environmental Protection Agency is "nationally applicable" or "based on a determination of nationwide scope or effect" for purposes of laying venue under 42 U.S.C. §7607(b)(1) when the action uses a common legal requirement and a general factual finding to resolve all pending "small refinery" petitions for exemption from annual obligations under the Renewable Fuel Program irrespective of the petitioning refineries' location.

PARTIES TO THE PROCEEDING

Petitioners, intervenors below, are Growth Energy and the Renewable Fuels Association.

Respondents, petitioners below, are Calumet Shreveport Refining, L.L.C.; Ergon Refining, Incorporated; Ergon-West Virginia, Inc.; Placid Refining Company, L.L.C.; The San Antonio Refinery, L.L.C; Wynnewood Refining Company, L.L.C.

Respondent below was the U.S. Environmental Protection Agency.

Other intervenors below were American Coalition for Ethanol, National Corn Growers Association, and National Farmers Union.

CORPORATE DISCLOSURE STATEMENT

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

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

RELATED PROCEEDINGS

In addition to the proceeding below, small-refinery petitioners also sought review of EPA's April 2022 and June 2022 exemption actions in the following proceedings:

American Refining Group v. *EPA*, No. 22-1991 (3d Cir.)

American Refining Group v. *EPA*, No. 22-2435 (3d Cir.)

Countrymark Refining and Logistics, LLC v. *EPA*, No. 22-1878 (7th Cir.)

Countrymark Refining and Logistics, LLC v. *EPA*, No. 22-2368 (7th Cir.)

Calumet Montana Refining, LLC v. *EPA*, No. 22-70124 (9th Cir.)

Calumet Montana Refining, LLC v. *EPA*, No. 22-70166 (9th Cir.)

Kern Oil & Refining Co. v. *EPA*, No. 22-70128 (9th Cir.)

Kern Oil & Refining Co. v. *EPA*, No. 22-70172 (9th Cir.)

Par Hawaii Refining, LLC v. *EPA*, No. 22-70125 (9th Cir.)

Par Hawaii Refining, LLC v. *EPA*, No. 22-70168 (9th Cir.)

San Joaquin Refining Co., Inc. v. *EPA*, No. 22-70126, (9th Cir.)

San Joaquin Refining Co., Inc. v. *EPA*, No. 22-70170 (9th Cir.)

Wyoming Refining Co. v. *EPA*, No. 22-9538 (10th Cir.)

Wyoming Refining Co. v. *EPA*, No. 22-9553 (10th Cir.)

Hunt Refining Co. v. *EPA*, No. 22-11617 (consol.) (11th Cir.)

Sinclair Wyoming Refining Co. v. *EPA*, No. 22-1073 (consol.) (D.C. Cir.)

In July 2023, EPA issued a separate final action denying 26 additional small-refinery exemption petitions for compliance years 2016-2018 and 2021-2023. Petitions for review of the July 2023 action were filed in the following proceedings:

American Refining Group v. *EPA*, No. 23-2664 (3d Cir.)

Ergon Refining, Inc., et al. v. *EPA*, No. 23-60492 (5th Cir.)

The San Antonio Refinery and Calumet Shreveport Refining, LLC v. *EPA*, No. 23-60399 (5th Cir.)

Wynnewood Refining Company, LLC v. *EPA*, No. 23-60427 (5th Cir.)

Countrymark Refining and Logistics, LLC v. *EPA*, No. 23-2766 (7th Cir.)

Cross Oil Refining and Marketing v. *EPA*, No. 23-3101 (8th Cir.)

Calumet Montana Refining, LLC v. *EPA*, No. 23-2183 (9th Cir.)

Par Hawaii Refining, LLC v. *EPA*, No. 23-2185 (9th Cir.)

San Joaquin Refining Co., Inc. v. *EPA*, No. 23-2186 (9th Cir.)

Wyoming Refining Co. v. *EPA*, No. 23-9582 (10th Cir.)

Hunt Refining Co. v. *EPA*, No. 23-12347 (11th Cir.)

Calumet Montana Refining LLC v. *EPA*, No. 23-1194 (consol.) (D.C. Cir.)

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INTRODUCTION

The Clean Air Act establishes numerous important environmental programs, which routinely call upon the Environmental Protection Agency ("EPA") to take actions of varied geographic reach. The proper venue for judicial review of such actions is specified by 42 U.S.C. §7607(b)(1). A petition for review "may be filed only in" the D.C. Circuit "if" either (a) the EPA action is "nationally applicable" or (b) the EPA 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." Otherwise, the petition for review "may be filed only in the United States Court of Appeals for the appropriate circuit."

The Renewable Fuel Program ("RFP") is a Clean Air Act program that mandates the amount of renewable fuel to be blended annually into the nation's supply of gasoline and diesel fuel. In 2022, EPA issued two actions that together denied 105 requests by 36 "small refineries" to be exempted from their RFP obligations for certain compliance years. In the actions, EPA adopted and applied a single legal requirement and a general factual finding to all the refineries—which were located in 18 States in eight federal judicial circuits.

Disappointed refineries filed petitions for review of EPA's two exemption actions in the Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. In the decision below, a divided Fifth Circuit panel held that it is a proper venue under §7607(b)(1) because the exemption actions are "neither nationally applicable nor based on a determination of nationwide scope or effect." App.15a.

The Fifth Circuit's decision contradicted prior rulings of the Third, Seventh, Ninth, and Tenth Circuits, all of which had terminated their cases in favor of the D.C. Circuit. And the Fifth Circuit's analysis was later expressly rejected by the Eleventh Circuit, which concluded that the D.C. Circuit is the exclusive venue to review the 2022 exemption actions because they are both "nationally applicable" and "based on a determination of nationwide scope or effect." *Hunt Refining Co.* v. *EPA*, 90 F.4th 1107, 1111-1113 (11th Cir. 2024).

As a result of this split, two circuits will opine on the same challenges to the same EPA actions—actions that adopted and used a common legal requirement and a general factual finding to resolve requests from refineries around the country for exemption from a nationwide mandate. That alone warrants this Court's review.

Moreover, as this Court has recognized, a circuit split over the application of §7607(b)(1) warrants "certiorari … because of the importance of determining the locus of judicial review of the actions of EPA." *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 586 (1980). "It is of first importance to have a [rule] … that will not invite extensive threshold litigation" over the proper court to hear a case, *Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 n.13 (1980) (cleaned up), but that is precisely what the current confusion over the meaning of §7607(b)(1) causes.

Certiorari is also needed because the decision below is wrong and will have serious deleterious consequences for the administration of the RFP and other federal environmental programs. Section 7607(b)(1)'s text, structure, purpose, and history show that Congress intended §7607(b)(1) to provide a comprehensive scheme for centralizing review in the D.C. Circuit of any Clean Air Act action that is nationally significant. Local review of such actions will produce duplicative efforts and potentially inconsistent results, undermining Congress's substantive objectives, whipsawing EPA, and leaving regulated entities subject to different rules solely because of the circuit in which they happen to be located.

Finally, the need for certiorari is amplified by the circuit split's wider scope and repercussions. The split concerning the 2022 RFP exemption actions is one manifestation of a broader circuit split regarding how to apply §7607(b)(1) to a single EPA action that resolves multiple matters relating to entities located in many States and in multiple circuits. Indeed, the Tenth Circuit's disagreement with the Fourth, Fifth, Sixth, and Eighth Circuits over this question in the context of another EPA action is the subject of two pending certiorari petitions. *See Oklahoma* v. *EPA*, No. 23-1067 (filed Mar. 28, 2024); *PacifiCorp* v. *EPA*, No. 23-1068 (filed Mar. 28, 2024).

The Court should grant the petition regardless of how it disposes of *Oklahoma/PacifiCorp* because this case presents distinct issues that would not necessarily be resolved by a decision in *Oklahoma/PacifiCorp*. If the Court grants this petition and the petitions in *Oklahoma/PacifiCorp*, it should hear the cases in tandem.

OPINION BELOW

The court of appeals' opinion (App.1a-41a) is reported at 86 F.4th 1121.

JURISDICTION

The court of appeals entered judgment on November 22, 2023. Growth Energy's and the Renewable Fuels Association's timely rehearing petitions were denied on January 22, 2024. App.185a. On March 15, 2024, their deadline to petition for certiorari was extended until May 21, 2024. *See* No. 23A841. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix (App.187a-227a).

STATEMENT OF THE CASE

A. The Clean Air Act's Venue Provision

Section 7607(b)(1) of title 42 of the U.S. Code establishes rules for determining "the proper venue as between the District of Columbia Circuit and the other Federal Circuits" to review EPA actions under the Clean Air Act. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 590 (1980). Section 7607(b)(1) also applies to EPA actions under the American Innovation and Manufacturing Act. 42 U.S.C. §7675(k)(1)(C).

The venue provision begins by distinguishing between "nationally applicable" actions and "locally or regionally applicable" ones. Petitions for review of "any … nationally applicable regulations promulgated, or final action taken, by the Administrator under [the Act] may be filed only in" the D.C. Circuit. §7607(b)(1). Petitions for review of "any other final action of the Administrator under [the Act] … which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit"—unless 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," in which case, again, the petition for review "may be filed only in" the D.C. Circuit. *Id.*

B. The Renewable Fuel Program

1. Annual national volume requirements

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

Under the program, there are four annual national volume requirements, one for each of four "nested"

categories of renewable-fuel types. *Americans for Clean Energy*, 864 F.3d at 697-698, 701. EPA "translat[es] the annual volume requirements into 'percentage standards,'" which "represent the percentage of transportation fuel introduced into commerce that must consist of renewable fuel." *Id.* at 699; *see* §7545(*o*)(3)(B)(i)-(ii); 40 C.F.R. §80.1405(c). That is, the percentages roughly equal the national mandated renewable-fuel volumes divided by the total national volume of gasoline and diesel fuel projected to be used. EPA is charged with establishing the percentage standards before the relevant year begins. §7545(*o*)(2)(B)(ii), (3)(B)(i).

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

EPA "polices these mandates with a system of credits." *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 386 (2021); *see* §7545(*o*)(5). "Each credit"—called a Renewable

Identification Number ("RIN")—"represents the blending of [an ethanol-equivalent gallon] of renewable fuel" into gasoline or diesel fuel. *HollyFrontier*, 594 U.S. at 386; *see* 40 C.F.R. §80.1415. "A refinery that blends renewables may either 'retire' the credits it has earned (i.e., use them) to satisfy its own RFP volume obligation—or sell those credits to a different [obligated party] that needs them." *HollyFrontier*, 594 U.S. at 386; *see* 40 C.F.R. §§80.1428-80.1429. Unused RINs remain valid for compliance with the next year's RFP obligations, 40 C.F.R. §80.1427, and the aggregate amount of the prior year's still-valid excess RINs is called the "carryover RIN bank," *Renewable Fuel Standard (RFS) Program: RFS Annual Rules*, 87 Fed. Reg. 39,600, 39,613:1 & n.75 (July 1, 2022) [hereinafter "*2020-2022 RFS Rule*"]; *Americans for Clean Energy*, 864 F.3d at 714-716.

To illustrate: If the required national renewable-fuel volume for 2024 is 10 billion gallons and the total projected transportation-fuel use for 2024 is 100 billion gallons, EPA would set the 2024 percentage standard at 10%. Then, if an obligated party introduced 5 million gallons of transportation fuel into commerce during 2024, its RFP obligation would be 500,000 gallons of renewable fuel, which it would satisfy by blending that amount of renewable fuel into its gasoline and diesel, buying that number of RINs in the market, or doing a combination thereof. Generally, it could use RINs generated in 2024 or 2023 (*i.e.*, carryover RINs) to show compliance.

2. Small-refinery exemptions

Congress allowed "small refineries"—refineries whose "throughput" is below a specified level, §7545(*o*)(1)(K)—to be exempted from their RFP obligations under limited circumstances. Relevant here, individual small refineries may "petition" EPA for

exemption (technically, extension of exemption) by showing that they "would be subject to a disproportionate economic hardship if required to comply with" their RFP obligations. §7545(*o*)(9)(A)(ii), (B)(i). These are called "small refinery exemptions" ("SREs").

Although small-refinery exemptions are granted for individual small refineries, they have significant effects on national compliance with RFP requirements. Since the 2020 compliance year, EPA's formula for determining the percentage standards has required EPA to account for all projected exemptions for that year. *See Renewable Fuel Standard Program: Standards for 2020 and Biomass-Based Diesel Volume for 2021 and Other Changes*, 85 Fed. Reg. 7,016, 7,050:3 (Feb. 6, 2020) [hereinafter "*2020 RFS Rule*"]. EPA does so by subtracting from the projected total amount of transportation fuel—*i.e.*, from the denominator in the percentage standard—"[t]he total amount of gasoline [and diesel fuel] projected to be exempt in [the relevant] year." 40 C.F.R. §80.1405(c). Reducing the denominator "increas[es] the [percentage] standards on [all] non-exempt obligated parties" nationally. *2020-2022 RFS Rule* at 39,632:2.

"[S]hould EPA grant SREs without accounting for them in the percentage formula, those exemptions would effectively reduce the volumes of renewable fuel required by the RFS program," *2020 RFS Rule* at 7,050:3, in turn creating a "renewable-fuel shortfall," *American Fuel & Petrochemical Manufacturers* v. *EPA*, 937 F.3d 559, 571 (D.C. Cir. 2019); *see also Sinclair Wyoming Refining Co.* v. *EPA*, 2024 WL 2141564, at *5, *13-14 (D.C. Cir. May 14, 2024) (upholding EPA's formula for accounting for projected exemptions).

In short, unaccounted-for exemptions create a national renewable-fuel shortfall relative to the nationally

required amount, while accounted-for exemptions increase the RFP obligations of all non-exempt obligated parties nationally.

C. EPA's 2022 Exemption Actions

In December 2021, EPA publicly noticed and solicited comment on its proposal "to deny all pending SRE petitions," *Notice of Opportunity to Comment on Proposed Denial of Petitions for Small Refinery Exemptions*, 86 Fed. Reg. 70,999 (Dec. 14, 2021), based on a "revis[ed]" approach, App.181a. In January 2022, EPA announced that it was expanding its proposed denial to include 36 more exemption petitions, which had been remanded to EPA by the D.C. Circuit. App.45a n.1.

After receiving comments from the petitioning refineries and other interested parties, EPA finalized its proposal in two parts. In April 2022, EPA published a final action titled "April 2022 Denial of Petitions for RFS Small Refinery Exemptions," which covered the 36 remanded exemption petitions added to the proceeding in January 2022. C.A.J.A.0001; C.A.J.A.0003, 0006. In June 2022, EPA published a second final action, titled "June 2022 Denial of Petitions for RFS Small Refinery Exemptions," which covered the other 69 pending exemption petitions. C.A.J.A.0146; App.43a, 45a.

The two actions together denied all pending exemption petitions based on the revised approach proposed in December 2021. *See, e.g.*, App.53a-54a. First, EPA clarified its interpretation of the statute's exemption provision: henceforth, a petitioning "small refinery must demonstrate a direct causal relationship between its RFS compliance costs and the [disproportionate economic hardship] it alleges"; unlike in some recent years, "financial difficulties" that are "unrelated" to compliance "will not satisfy" the exemption standard. App.76a; *see*

also App.52a, 95a-101a. Second, EPA determined, based on studies of the national RIN market and of various fuel markets, that all small refineries, irrespective of their location, "have the ability … to pass through their RIN costs." App.149a; *see also* App.48a-52a, 63a-64a, 78a, 101a-105a, 162a, 177a; C.A.J.A.0227. Accordingly, EPA found that, as a general matter, RFP compliance "cannot cause" small refineries to incur any net compliance costs, let alone the requisite disproportionate economic hardship. App.64a; *see also* App.79a-80a.

However, EPA invited the small refineries to rebut its general presumption that they incur no net compliance costs, by submitting refinery-specific evidence showing that in fact they are unable to recoup their RIN costs or that they otherwise do incur net compliance costs (and in turn those costs inflict disproportionate economic hardship). App.51a-54a. After reviewing all the evidence submitted by the refineries, EPA concluded that none met that burden. App.52a, 78a, 102a-105a, 156a; C.A.J.A.0227.

In EPA's published notices of the final exemption actions, EPA stated that the actions are "nationally applicable" and found that they are "based on a determination of 'nationwide scope or effect.'" C.A.J.A.0001:3-0002:1 (quoting §7607(b)(1)); C.A.J.A.0147:2. The notice for the April denial explained that it "denies petitions for exemptions … for over 30 small refineries across the country and applies to small refineries located within 18 states in 7 of the 10 EPA regions and in 8 different Federal judicial circuits." C.A.J.A.0002:1. The notice for the June denial included the same statement, except that it applied to small refineries located in fifteen States. C.A.J.A.0147:2; *see* App.181a. The notices added that the exemption actions are "based on EPA's revised interpretation of the relevant [statutory] provisions

[requiring causation] and the RIN discount and RIN cost passthrough principles that are applicable to all small refineries no matter the location or market in which they operate," C.A.J.A.0002:1; C.A.J.A.0147:2-3, i.e., that "all refineries" can "recover their RIN costs through the market price of the fuel they produce" because those prices "increase[] to reflect the cost of the RIN," C.A.J.A.0001:3; C.A.J.A.0147:1; *see* App.179a-182a. Therefore, under §7607(b)(1), "judicial review of th[ese] action[s] must be filed in" the D.C. Circuit. C.A.J.A.0002:1; C.A.J.A.0147:3.

D. Litigation Challenging The 2022 Exemption Actions

1. Numerous small refineries challenged the 2022 exemption actions in the Third, Fifth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. *See supra* pp.iii-v. Many of the petitions filed outside the D.C. Circuit were duplicative of ones filed there. *See id.* In all the cases outside the D.C. Circuit, EPA moved under §7607(b)(1) to dismiss or transfer to the D.C. Circuit.

Motions panels in the Third, Seventh, Ninth, and Tenth Circuits concluded that the D.C. Circuit was the only proper venue for reviewing the 2022 exemption actions and therefore granted EPA's motions.[1] Motions

[1] *See* Order, *American Refining Group* v. *EPA*, No. 22-1991, ECF #23 (3d Cir. Aug. 9, 2022); Order, *American Refining Group* v. *EPA*, No. 22-2435, ECF #20 (3d Cir. Sept. 23, 2022); Order, *Countrymark Refining and Logistics, LLC* v. *EPA*, No. 22-1878, ECF #13 (7th Cir. July 20, 2022); Order, *Countrymark Refining and Logistics, LLC* v. *EPA*, No. 22-2368, ECF #9 (7th Cir. Sept. 8, 2022); Order, *Calumet Montana Refining, LLC* v. *EPA*, No. 22-70124, ECF #16 (9th Cir. Oct. 25, 2022); Order, *Par Hawaii Refining, LLC* v. *EPA*, No. 22-70125, ECF #16 (9th Cir. Oct. 25, 2022); Order, *San Joaquin Refining Co., Inc.* v. *EPA*, No. 22-70126, ECF #16 (9th Cir.

panels in the Fifth and Eleventh Circuits deferred the venue issue to merits panels.

2. In the published decision below, a divided Fifth Circuit merits panel disagreed with the Third, Seventh, Ninth, and Tenth Circuits, holding that the D.C. Circuit is not the exclusive venue for reviewing the 2022 exemption actions because the actions are "neither nationally applicable nor based on a determination of nationwide scope or effect." App.15a.

The Fifth Circuit majority first determined that the 2022 exemption actions are not nationally applicable. The majority declared that "the *legal* effect—… not the practical effect—of an agency action … determines whether that action is 'nationally applicable." App.11a-12a. The 2022 actions' legal effect is not national, the majority reasoned, because the actions' general "approach" does not govern "*all*" small refineries since it does not "bind[] EPA in *any* future adjudication" of exemption petitions. App.12a.

Next, the majority concluded that the 2022 actions are not based on a determination of nationwide scope or effect. Giving "no deference" to EPA's published finding that the actions are based on a determination of nationwide scope or effect, the majority determined that the

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Oct. 25, 2022); Order, *Kern Oil & Refining Co.* v. *EPA*, No. 22-70128, ECF #13 (9th Cir. Oct. 25, 2022); Order, *Calumet Montana Refining, LLC* v. *EPA*, No. 22-70166, ECF #14 (9th Cir. Oct. 25, 2022); Order, *Par Hawaii Refining, LLC* v. *EPA*, No. 22-70168, ECF #13 (9th Cir. Oct. 25, 2022); Order, *San Joaquin Refining Co., Inc.* v. *EPA*, No. 22-70170, ECF #12 (9th Cir. Oct. 25, 2022); Order, *Kern Oil & Refining Co.* v. *EPA*, No. 22-70172, ECF #14 (9th Cir. Oct. 25, 2022); Order, *Wyoming Refining Co.* v. *EPA*, No. 22-9538, ECF #10935421 (10th Cir. Aug. 23, 2022); Order, *Wyoming Refining Co.* v. *EPA*, No. 22-9553, ECF #10939881 (10th Cir. Sept. 12, 2022).

finding was not "accura[te]." App.13a, 15a. The majority acknowledged that the actions are *partially* "based on factors and facts common to each petition"—*i.e.*, EPA's causation requirement and general cost-recoupment finding, but emphasized that those common factors were not alone "a sufficient basis to adjudicate [the] exemption petitions." App.15a. To deny each petition, EPA had to determine whether each individual refinery had rebutted the general presumption that they incur no net compliance cost based on "refinery-specific" evidence. *Id.*

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

Dissenting, Judge Higginbotham concluded that the D.C. Circuit is the only proper venue. Starting with §7607(b)(1)'s principal venue test, he explained that the question is not one of "legal effect" but of "national applicability," which should be "measure[d] … by looking to the location of the persons or enterprises that the action regulates." App.36a (cleaned up). The 2022 exemption actions "inescapably" satisfy this standard because "they apply one consistent statutory interpretation and economic analysis to thirty-six small refineries, located in eighteen different states, in the geographical boundaries of eight different circuit courts." App.36a-37a.

Alternatively, Judge Higginbotham would have held, the actions are based on a determination of nationwide scope or effect. He acknowledged that the actions are partially based on refinery-specific determinations, but he explained that, while "there can be multiple determinations that influence an agency's actions," "what matters" is whether some "core determinations" have nationwide scope or effect. App.40a-41a. "[T]he two

determinations at the core of the Denial Actions"—again, EPA's causation requirement and its general cost-recoupment finding—have nationwide scope and effect because they "appl[y] to all small refineries no matter the location or market in which they operate." App.40a.

3. Subsequently, in a published decision, the Eleventh Circuit aligned with the Third, Seventh, Ninth, and Tenth Circuits and held that the D.C. Circuit is the only proper venue for reviewing the 2022 exemption actions. *See Hunt Refining Co.* v. *EPA*, 90 F.4th 1107, 1113 (11th Cir. 2024). The Eleventh Circuit expressly rejected the Fifth Circuit's analysis, instead finding "Judge Higginbotham's dissent … more persuasive." *Id.* at 1112.

Having been apprised of the Eleventh Circuit's contrary decision, *see* Letter of Supplemental Authority, C.A. ECF #432 (5th Cir. Jan. 12, 2024), the Fifth Circuit nonetheless denied petitions for rehearing on the venue issue. App.185a. The Eleventh Circuit likewise denied a rehearing petition.

4. Finally, the merits of the 2022 exemption actions have been fully briefed and argued in the D.C. Circuit, and that case has been submitted for judgment. Courtroom Minutes of Oral Argument, *Sinclair Wyoming Refining Co.* v. *EPA*, No. 22-1073, ECF #2049836 (D.C. Cir. Apr. 16, 2024). The refinery petitioners and EPA appear to agree that there is no "live venue question" there because all the remaining petitioners in that case have consented to venue. Petitioners' Final Joint Reply Brief 4, *Sinclair*, No. 22-1073, ECF #2035081 (D.C. Cir. Jan. 9, 2024).

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE SHARPLY DIVIDED

The circuits are directly and firmly divided over whether the very same EPA actions—the 2022 exemption actions—must be reviewed in the D.C. Circuit. The Third, Seventh, Ninth, Tenth, and Eleventh Circuits have held that the D.C. Circuit is the only proper venue under §7607(b)(1). The Fifth Circuit, in this case, is the only circuit to disagree, holding that the appropriate regional circuit is the proper venue.

This division is but one front in a broader split over how to apply §7607(b)(1) to a single EPA action that resolves multiple individual matters relating to entities in many States and in multiple federal judicial circuits. Addressing other EPA actions, the Fourth, Fifth, Sixth, and Eighth Circuits have held—over vigorous dissents—that "the appropriate" regional circuit is the proper venue when the petitioner challenges the action's resolution of the petitioner's individual matter and that resolution turned on petitioner-specific analysis. Contrary to that approach—and expressly criticizing it as improperly petition-based—the Seventh, Tenth, and Eleventh Circuits have instead looked at the nature and reach of the overarching EPA action and accordingly held that the D.C. Circuit is the proper venue for review.

A. The Circuits Are Intractably Split On The Proper Venue For Reviewing The 2022 Exemption Denials

Initially, seven panels in four circuits—the Third, Seventh, Ninth, and Tenth Circuits—uniformly concluded (in unpublished orders) that, under §7607(b)(1), the D.C. Circuit is the only proper venue to review EPA's 2022 exemption actions. *See supra* p.11 n.1. The

Fifth Circuit disagreed with all those panels. It concluded that *it*, not the D.C. Circuit, is the proper venue to hear the challenges before it. App.15a-16a. The Eleventh Circuit thereafter expressly rejected the Fifth Circuit's position and aligned with the Third, Seventh, Ninth, and Tenth Circuits. *Hunt*, 90 F.4th at 1112. Finally, the Fifth and Eleventh Circuits each denied rehearing petitions notwithstanding the other's decision. *Supra* p.14. Thus, the circuit split on where to review the 2022 exemption actions could not be more direct, entrenched, or consequential.

This split reflects the circuits' very different approaches to applying §7607(b)(1)'s venue provision. In the decision below, the Fifth Circuit began with the proposition that "the *legal* effect … of an agency action … determines whether that action is 'nationally applicable.'" App.11a-12a. It then concluded that the 2022 actions are not nationally applicable because they do not govern "*all*" small refineries since even the general "approach" under which they were adjudicated does not "bind[] EPA in *any* future adjudication" of exemption petitions. App.12a. The court also found that the actions are not based on a determination of nationwide scope or effect because, although they are "based on factors and facts common to each petition"—namely, EPA's causation "interpretation and RIN passthrough theory"—they also necessarily "rel[ied] on refinery-specific determinations" that "each of the petitions … did not … present facts contrary to" EPA's general cost-recoupment finding. App.15a.

The Eleventh Circuit, however, found Judge Higginbotham's dissent "more persuasive" and concluded that the D.C. Circuit is the proper venue to review the 2022 exemption actions because they are "nationally applicable" and, alternatively, "based on a determination of

nationwide scope or effect." *Hunt*, 90 F.4th at 1112. The court stated: "When deciding whether a final action is 'nationally applicable,' we begin by analyzing the nature of the EPA's action, not the specifics of the petitioner's grievance." *Id.* at 1110 (cleaned up). The court criticized the Fifth Circuit's focus on the action's "*legal* effect" as contradicting the "plain meaning" of "nationally applicable," which accounts for "the location of the persons or enterprises that the action regulates." *Id.* at 1112 (cleaned up). In the Eleventh Circuit's view, the fact that the two exemption actions together "denied 105 petitions from refineries across the country[] is a strong indicator of their national applicability." *Id.* at 1110 (cleaned up). "[M]ore importantly," the court said, the exemption actions are "inescapabl[y]" "nationally applicable" because they used a "statutory interpretation and analytical framework that is applicable to all small refineries no matter their location or market." *Id.* at 1111-1112 (cleaned up). Similarly, and in the alternative, the court concluded that the exemption actions are "based on a determination of nationwide scope or effect because they announced a new, universally applicable approach to evaluating hardship petitions." *Id.* at 1112; *see id.* at 1113.

Like the Eleventh Circuit, the Third Circuit concluded that the June 2022 denial is "nationally applicable" "because, on its face, it denies exemptions sought by 30 small refineries across the county and applies to small refineries located within 15 states in 7 of the 10 EPA regions." Order 2, *American Refining Group*, No. 22-2435, ECF #20. "Alternatively," the court said, the denial was "based on a determination of nationwide scope or effect." *Id.* The Seventh and Tenth Circuits reached the same conclusion but did not supply their rationale—presumably because, as explained presently, that result was

dictated by their precedents applying §7607(b)(1) in other contexts.

B. The Circuits Are More Broadly Split On How To Apply §7607(b)(1)'s Venue Provision

The division among the circuits regarding the proper venue for reviewing the 2022 exemption actions implicates a broader division among the circuits regarding how to apply §7607(b)(1) to a single EPA action that resolves multiple individual matters for entities in multiple States and in multiple judicial circuits.

For example, several circuits have disagreed about the proper venue to review EPA's 2023 rule that disapproved 21 States' proposed state implementation plans ("SIPs") for meeting National Ambient Air Quality Standards ("NAAQS") because they failed to satisfy the Clean Air Act's "Good Neighbor" requirement. The Fourth Circuit held that it, not the D.C. Circuit, was the proper venue to hear West Virginia's challenge to the 2023 SIP action. To start, the court declared that the "focus must be on the *geographical reach* of the agency's final action and the determination on which it is based—not the standard that the agency applied." *West Virginia* v. *EPA*, 90 F.4th 323, 328 (4th Cir. 2024). The court then found that "the relevant agency action for our review … is the EPA's disapproval of West Virginia's SIP." *Id.* at 330. Although "national standards … were indeed applied to reject West Virginia's SIP" and EPA "disapproved of the SIPs of 21 States in a consolidated, single agency action," *id.* at 329-330, the court determined that the SIP action was neither "nationally applicable" nor "based on a determination of nationwide scope or effect" because "the circumstances addressed by the EPA were those particular and unique to West Virginia," *id.* at 328-329; *see also id.* at 330. In dissent,

Judge Thacker concluded that the 2023 SIP action was "nationally applicable on its face—it disapproves SIPs from 21 states across the country because those states all failed to comply with the Good Neighbor provision." *Id.* at 334. In her view, the majority incorrectly "look[ed] to the nature of West Virginia's challenge," *i.e.*, to "the individual SIP[] before" the court. *Id.* at 334-335.

For largely the same reasons, the Fifth and Sixth Circuits reached the same conclusion with respect to the petitions for review before them. *See Texas* v. *EPA*, 2023 WL 7204840, at *4-5 (5th Cir. May 1, 2023) ("relevant unit of administrative action here is the EPA's [three] individual SIP denials" because "EPA *separately considered and disapproved*" each State's SIP and each was "plainly based on a number of intensely factual determinations unique to each State"); Order 4-6, *Kentucky* v. *EPA*, No. 23-3216, ECF #39-2 (6th Cir. July 25, 2023). And the Eighth Circuit reached the same result without explanation. *See, e.g.*, *Arkansas* v. *EPA*, No. 23-1320, ECF #5269098 (8th Cir. Apr. 25, 2023). Dissenting in the Fifth Circuit, Judge Douglas warned: "If this circuit were to determine that the underlying standard utilized by the EPA was wrong, this would impact the EPA's determinations in other states and would gut the underlying policy of the venue provision: uniformity in standards that have national effect and centralization of SIP review." 2023 WL 7204840, at *13.

Disagreeing with the Fourth, Fifth, Sixth, and Eighth Circuits, the Tenth Circuit held that the D.C. Circuit is the only proper venue for reviewing EPA's 2023 SIP action. *Oklahoma* v. *EPA*, 93 F.4th 1262 (10th Cir. 2024). The court began: "[W]hether a petition for review belongs in the D.C. Circuit turns exclusively on the nature of the challenged agency action." *Id.* at 1266. To make that assessment, courts must "look only to the

face of the action, not its practical effects or the scope of the petitioner's challenge." *Id.* Repeatedly citing the Eleventh Circuit's decision in *Hunt*, *id.* at 1267-1268, the court concluded that the "action being challenged" is "nationally applicable": it is a "rule disapproving SIPs from 21 states across the country—spanning eight EPA regions and ten federal judicial circuits—because those states all failed to comply with the good-neighbor provision," and "EPA applied a uniform statutory interpretation and common analytical methods," *id.* at 1266; *see also id.* at 1268.

Turning to the Fourth, Fifth, and Sixth Circuits' decisions, the Tenth Circuit explained that by finding the "relevant unit of administrative action" to be "each individual SIP disapproval," "all three courts strayed from §7607(b)(1)'s text and instead applied a petition-focused approach that we and other circuits have rejected." 93 F.4th at 1268. Their "misdirected approach may well result in ten regional circuit courts ruling on issues arising from the same nationwide EPA rule, thereby defeating the statute's purpose to centralize judicial review of nationally applicable actions in the D.C. Circuit." *Id.* at 1269. This disagreement among the circuits regarding the proper venue for reviewing EPA's 2023 SIP action is the subject of two pending certiorari petitions to the Tenth Circuit. *See Oklahoma* v. *EPA*, No. 23-1067 (filed Mar. 28, 2024); *PacifiCorp* v. *EPA*, No. 23-1068 (filed Mar. 28, 2024).

Still other EPA actions have raised similar questions. In a case involving an action that made "air quality attainment designations covering 61 geographic areas across 24 states—from New York to Hawaii—… pursuant to a common, nationwide analytical method," the Seventh Circuit reached the same conclusion as the Tenth Circuit for similar reasons. *Southern Illinois*

Power Cooperative v. *EPA*, 863 F.3d 666, 671 (7th Cir. 2017). The petitioner argued that the action was "just an amalgamation of many different locally or regionally applicable agency actions and … that its petition challenges only one," but the court rejected that "petition-focused approach," explaining that what matters is "the nature of the *agency action* in question, *not* the nature or scope of the petition for review." *Id.* In another case involving NAAQS attainment designations, the Tenth Circuit reached the same conclusion with respect to two counties' challenges to EPA's 2009 action "explaining the methodology for determining designations and enumerating [attainment] designations for areas across the country." *ATK Launch Systems, Inc.* v. *EPA*, 651 F.3d 1194, 1196-1197 (10th Cir. 2011).

And the Eleventh Circuit concluded that the D.C. Circuit was the proper venue under §7607(b)(1) for reviewing an EPA action that "allocat[ed] … permits [to several companies] to consume hydrofluorocarbons." *RMS of Georgia, LLC* v. *EPA*, 64 F.4th 1368, 1369, 1372-1373 (11th Cir. 2023).

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

A. The venue rules in §7607(b)(1) are highly consequential for EPA's administration of myriad environmental programs under the Clean Air Act (and the American Innovation and Manufacturing Act), for all those who are affected by actions under those programs, and for the courts that review those actions. Thus, as this Court previously recognized when granting certiorari to clarify the meaning of "any other final action" in §7607(b)(1), "certiorari" is warranted "because of the importance of determining the locus of judicial review of

the actions of EPA" under §7607(b)(1). *Harrison*, 446 U.S. at 581, 586.

"It is of first importance to have a [rule] … that will not invite extensive threshold litigation" over the proper court to hear a case. *Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 n.13 (1980) (cleaned up). "[L]itigation over whether the case is in the right court is essentially a waste of time and resources." *Id.* (cleaned up); *accord Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Unclear venue rules also "encourage gamesmanship," while undermining the "predictability" that "benefits plaintiffs deciding [where] to file suit." *Hertz*, 559 U.S. at 94-95. Thus, division and confusion over the Clean Air Act's venue provision hurts both the parties in any given case and the judicial system itself. *See Elgin* v. *Department of Treasury*, 567 U.S. 1, 15 (2012) (rejecting test because it would "deprive the aggrieved employee, the [agency], and the district court of clear guidance about the proper forum for the employee's claims at the outset of the case").

Consequently, the Court has routinely stepped in to resolve questions about the proper court for particular classes of disputes. *Harrison*, *Navarro Savings*, *Hertz*, and *Elgin* are just the tip of the iceberg. *See also, e.g.*, *Atlantic Richfield Co.* v. *Christian*, 140 S. Ct. 1335, 1349 n.3 (2020) ("find[ing] it both necessary and prudent to decide … issue" so as not to "leave the parties in a state of uncertainty as to whether the litigation is proceeding in the proper forum" (cleaned up)); *National Ass'n of Manufacturers* v. *Department of Defense*, 583 U.S. 109, 114, 119-120 (2018) (granting certiorari to decide "in which federal court" challenges to "Waters of the United States" rule "must be filed"); *Perry* v. *Merit Systems Protection Board*, 582 U.S. 420, 422, 429 (2017) (despite lack of circuit split, granting certiorari to decide "the

proper forum for judicial review" of certain claims under Civil Service Reform Act); *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, 581 U.S. 258, 261 (2017) (granting certiorari to decide "where proper venue lies for a patent infringement lawsuit").

B. All these problems and more are on display in the litigation over the 2022 exemption actions. Small refineries filed duplicative petitions for review in the D.C. Circuit and six other circuits; the parties had to brief the venue issue in the six other circuits; and the parties had to fully brief and argue the merits of the exemption actions in three circuits: the Fifth, Eleventh, and D.C. In the Eleventh Circuit the parties' briefing and oral argument on the merits was entirely wasted because that court eventually dismissed for improper venue.

Worse, because of the circuits' disagreement on the venue issue, two different circuits—the Fifth and the D.C.—will decide the validity of the same EPA actions based on the same arguments. *See infra* p.30. Under §7607(b)(1), the D.C. Circuit's decision on the merits should be controlling nationally (unless, of course, this Court reviews that decision), but the Fifth Circuit's assertion of authority will leave refineries, intervenors, and EPA unsure whose decision governs exemption decisions within the Fifth Circuit's borders. If the Fifth Circuit's decision governs there and the D.C. Circuit's decision differs in any material respect, then identically situated small refineries will be treated differently under a national program depending on where they happen to be located.

Given the annual nature of RFP volume obligations and, correspondingly, of adjudications of petitions for small-refinery exemption, these harms will recur absent clarification from this Court. In 2023, EPA issued

another action denying a new round of exemption petitions. *Notice of July 2023 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program*, 88 Fed. Reg. 46,795 (July 20, 2023). Small refineries have filed (again, sometimes duplicative) petitions to review that action in the D.C. Circuit and seven other circuits: the Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh. *See* Joint Unopposed Motion to Stay All Deadlines and Hold Case in Abeyance 5-6 & n.4, *Hunt Refining Co.* v. *EPA*, No. 23-12347, ECF #34 (11th Cir. Nov. 6, 2023) (collecting cases). Although most of those cases have been stayed pending resolution of the challenges to the 2022 exemption actions, the parties will eventually need to litigate venue in at least some of those cases and might need to also litigate the merits unnecessarily if a circuit decides that venue is improper at the merits stage.[2]

And even that round might not be the end of it. EPA will continue to adjudicate petitions for small-refinery exemption in the future. Currently, there are ten pending exemption petitions for 2023, three for 2024, and 38 total, with more anticipated for 2024, 2025, and beyond. *See* EPA, *RFS Small Refinery Exemptions*.[3] EPA's decisions on those exemption petitions will prompt new rounds of litigation and thus new disputes about venue. Small refineries whose exemption petitions are denied might try to shop for a more favorable forum by stretching the statute's concept of "the appropriate circuit." Indeed, one refinery has already done that, challenging

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[2] *San Antonio*, No. 23-60399 (5th Cir.), and *Ergon Refining*, No. 23-60492 (5th Cir.), which are consolidated, are proceeding.

[3] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (data updated May 16, 2024).

EPA's 2022 and 2023 exemption actions in the Fifth Circuit even though its facility is within the Fourth Circuit, it operates entirely outside the Fifth Circuit, and it previously challenged a different exemption denial in the Fourth Circuit. *Compare Ergon-West Virginia, Inc.* v. *EPA*, No. 22-60433 (5th Cir.), *and Ergon-West Virginia, Inc.* v. *EPA*, No. 23-60492 (5th Cir.), *with* C.A.J.A.3389-3390, *and Ergon-West Virginia, Inc.* v. *EPA*, 896 F.3d 600, 601 (4th Cir. 2018).

The potential for such uncertainty and inconsistency is intolerable for the RFP. The program has an enormous impact on the country. It governs the nation's supply of transportation fuel and affects every level of the supply chain, from producers of petroleum-based and renewable fuels, to transportation-fuel distributors, retailers, and consumers. *See Americans for Clean Energy*, 864 F.3d at 697. And small refineries are responsible for more than 10%—several billion gallons—of the renewable fuel to be introduced annually. *Compare* EPA, *RFS Small Refinery Exemptions*,[4] *with* EPA, *Renewable Fuel Annual Standards*.[5]

C. The need to clarify the application of §7607(b)(1)'s venue provision extends beyond small-refinery exemptions under the RFP. As discussed above, similar questions and confusion have arisen in the context of other programs—including approvals of SIPs, designations of attainment areas, and allocations of

[4] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (data updated May 16, 2024).

[5] https://www.epa.gov/renewable-fuel-standard-program/renewable-fuel-annual-standards (updated June 21, 2023).

permits—and are likely to continue to do so absent the Court's intervention. *Supra* pp.18-21.

III. THE DECISION BELOW IS WRONG

Under §7607(b)(1), the D.C. Circuit is the proper venue for reviewing EPA's 2022 exemption actions because they are "nationally applicable" and, alternatively, they are "based on a determination of nationwide scope or effect" (a finding EPA undisputedly made and published). The Fifth Circuit's decision contradicts §7607(b)(1)'s intended meaning and misunderstands the nature of EPA's 2022 exemption actions.

A. Congress Intended For Review Of All Matters Whose Significance Extends Beyond One Judicial Circuit To Be Centralized In The D.C. Circuit

Section 7607(b)(1) embodies a congressional policy of respecting regional circuits' local expertise and interest in reviewing actions that are "essentially" local, while protecting national interests and preventing inefficiency and inconsistency by creating a comprehensive regime to funnel review of all nationally significant EPA actions to the D.C. Circuit. *Harrison*, 446 U.S. at 590-591 (quoting H.R. Rep. No. 95-294, at 323 (1977)). The statute sends to the D.C. Circuit all actions that govern nationally: petitions to review "any … nationally applicable regulations promulgated, or final action taken, by the Administrator under [the Clean Air Act] may be filed only in the United States Court of Appeals for the District of Columbia." §7607(b)(1). But because that venue rule might not catch every nationally significant action, the statute also sends to the D.C. Circuit—or more precisely, authorizes EPA to select the D.C. Circuit to review—any EPA action that has a significant national ingredient or consequence: petitions to review "any

action" by EPA "may be filed only in" the D.C. Circuit if the action "is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination." §7607(b)(1). Thus, unless EPA declines to make and publish the requisite finding, only petitions to review truly local and regional actions must be heard in "the appropriate circuit," *id.*, *i.e.*, "the circuit in which [the aggrieved entity] is located," *Harrison*, 446 U.S. at 591 (quoting H.R. Rep. No. 95-294, at 323).

These rules reflect the fact that "Congress intended review in the D.C. Circuit of matters on which national uniformity is desirable." 41 Fed. Reg. 56,767, 56,769:1 (Dec. 30, 1976) (statement of EPA general counsel G. William Frick on behalf of EPA, item No. 1); *see* S. Rep. No. 91-1196, at 41 (1970) (explaining venue provision was adopted because "many" Clean Air Act actions "require even and consistent national application"). Thus, Congress sought to "centralize review" in the D.C. Circuit not only of actions that have national force but also of actions that "involve generic determinations" and "issues" because they too concern all actors irrespective of location and in turn require uniformity. 41 Fed. Reg. at 56,768:3-56,769:1 (cleaned up). Local review of any such actions could produce duplicative litigation—since there are likely to be aggrieved actors in multiple circuits—leading to wasted resources and inconsistent results on issues that need consistency. And local review could allow "the validity" of nationally significant actions to "turn on the particulars of [their] impacts within a given Circuit" or on the views of a circuit that "would probably lack frequent exposure to the [Clean Air] Act." *Id.* at 56,769:1. By contrast, centralized review of such actions in the D.C. Circuit "tak[es] advantage of [that court's]

administrative law expertise and facilitat[es] an orderly development of the basic law under the Act." *Id.*[6]

By using the terms "nationally" and "nationwide," Congress obviously intended §7607(b)(1) to funnel into the D.C. Circuit review of any action that applies or has scope or effect throughout the country or irrespective of affected actors' location.

But Congress more specifically intended "nationally" and "nationwide" to mean actions with application, scope, or effect in more than one federal judicial circuit. This is evident from §7607(b)(1)'s text, which states that review of an action whose application, scope, and effect are "local[] or regional[]" must be filed "only in the United States Court of appeals for *the* appropriate circuit" (emphasis added). Congress's use of the definite article shows that for local and regional actions, there is *only one* appropriate circuit. And that can be the case only if the action's application, scope, and effect are confined to a single circuit; otherwise, *each* affected circuit would be equally "appropriate."

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[6] In 1977, Congress revised §7607(b)(1) to its current form "to clarify some questions relating to venue," by broadening the scope of covered actions and adding the fallback provision for actions based on determinations of nationwide scope or effect. H.R. Rep. No. 95-294, at 323. In connection with that amendment, the statement of Mr. Frick was included with the formal recommendations of the Administrative Conference of the United States. The portion of Mr. Frick's statement quoted above was expressly endorsed in the report of the House Interstate and Foreign Commerce Committee that accompanied the enacted House bill: "The committee's view … concurs … with the comments, concerns, and recommendation contained in item No. 1 of the separate statement of G. William Frick, which accompanied the Administrative Conference's views." *Id.* at 324; *see* Pub. L. No. 95-95, §305(c)(1), 91 Stat. 685 (1977) (enacting H.R. 6161); H.R. Conf. Rep. No. 95-564, at 140 (1977) (stating that Congress adopted the House version of the venue provision).

Congress certainly knows how to indicate when there are multiple appropriate jurisdictions—indeed, it did so in the preceding subsection, where it stated that "the district court … for *any* district in which such person is found or resides … shall have jurisdiction" to issue certain orders. §7607(a). But it did not do so in §7607(b)(1). On the contrary, the legislative history expressly states that Congress wanted the D.C. Circuit to be the "exclusive venue for review" of "any action" based on "a determination which has scope or effect *beyond a single judicial circuit*." H.R. Rep. No. 95-294, at 324 (emphasis added).

This specific understanding also follows from the statute's structure and purpose. It would make no sense to construe "nationally" and "nationwide" so narrowly that one regional circuit must decide cases in which another regional circuit has an equal interest. Whether two or all regional circuits are implicated, the undesirable consequences of local review of actions with national significance are the same: duplicative efforts and potentially inconsistent results, undermining Congress's substantive objectives, whipsawing the agency, and leaving regulated entities subject to different rules depending solely on their location.

B. The 2022 Exemption Actions Must Be Reviewed In The D.C. Circuit Because They Are Nationally Significant

For several reasons, §7607(b)(1) mandates that the refineries' challenges to EPA's 2022 exemption actions be heard in the D.C. Circuit because the actions are both nationally applicable and based on determinations of nationwide scope or effect.

First, the 2022 exemption actions adopt and apply EPA's clarified causation requirement and its general cost-recoupment finding—based on its studies of the

national RIN market and various fuel markets—"to all small refineries no matter the location or market in which they operate." App.181a. EPA required *every* small-refinery petitioner, regardless of its location, to rebut the general cost-recoupment finding and then show that the causation requirement was satisfied. *Supra* pp.9-11. Indeed, the 2022 actions' general, national character is reflected in the fact that, in the three exemption cases in which the merits have been briefed, the refineries have almost exclusively attacked EPA's general requirements (and the actions' supposed "retroactive" effect) and have done so using arguments that are independent of individual refineries' specific circumstances. *See* C.A. ECF #270-3, at 34-65, 72-73; Petitioner's Opening Br. 28-55, *Hunt Refining Co.* v. *EPA*, No. 22-11617, ECF #51 (11th Cir. Feb. 9, 2023); Petitioners' Final Joint Opening Br. 34-85, 87-97, 98-103, *Sinclair*, No. 22-1073, ECF #2035080 (D.C. Cir. Jan. 9, 2024).

Second, the 2022 exemption actions adjudicate petitions filed by 36 small refineries in fifteen or eighteen States in eight federal judicial circuits. *Supra* pp.9-10. Thus, they span a large proportion of the States and multiple regional circuits—indeed, two-thirds of them.

And third, because of the nature of the RFP and small-refinery exemptions, *every* exemption adjudication—whether for one refinery or 36 of them—is inherently national. The RFP establishes national renewable-fuel volume requirements. By complying with its RFP obligations, each obligated party contributes proportionally to the achievement of those required volumes. A decision to exempt an obligated party is necessarily a decision either to create a national renewable-fuel shortfall relative to the nationally required volume or to increase the RFP obligations of all non-exempt obligated parties nationally, wherever they may be (depending on

whether EPA accounted for the exemptions in its percentage standards). *See supra* pp.8-9.

C. The Fifth Circuit's Analysis Is Thoroughly Flawed

1. The majority below concluded that the 2022 exemption actions are not "nationally applicable" because they do not govern "*all*" small refineries since even their general "approach" does not "bind[] EPA in *any* future adjudication" of exemption petitions. App.12a. That is mistaken for several reasons.

First, the exemption actions in fact adopt and apply general requirements to *all* refineries wherever located: every refinery must rebut the general finding of cost recoupment and show that its compliance would cause it to suffer disproportionate economic hardship. In any event, an action need not apply to all actors in the country to be "nationally applicable"; it need only to apply to those in a large swath of the country or more than one judicial circuit, as the exemption actions do.

Second, the majority ignored the fact that EPA expressly made its approach applicable to, and actually applied it to, all *pending* exemption petitions, and the statute does not distinguish between present and future applicability. App.38a (dissent).

Third, as the dissent observed, the majority's reasoning "effectively removes all 'adjudications' from the ambit of §7607(b)(1)," contrary to the statutory text. App.38a. The Act's venue provision expressly applies not only to "regulations," but also to "any … action," §7607(b)(1). That phrase "must be construed to mean exactly what it says," *Harrison*, 446 U.S. at 589, and Congress said it includes adjudications, 5 U.S.C. §551(7), (13); *see Harrison*, 446 U.S. at 592-593 (holding that "any

… action" is not limited to review of "formal adjudication [and] informal rulemaking").

And fourth, "[a]djudication … has future … legal consequences, since the principles announced in an adjudication cannot be departed from in future adjudications without reason." *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 216-217 (1988) (Scalia, J., concurring). All the more so here given that EPA adopted and applied its common requirements through the same notice-and-comment process it would use for a rulemaking and stated in the exemption actions that it would use this framework "going forward." App.95a-98a.

2. The majority's analysis under the statute's alternative venue test fares no better. The majority gave "no deference" to EPA's published finding that the exemption actions are based on determinations of nationwide scope or effect. App.13a, 15a. But EPA's finding was at least entitled to review under the arbitrary-and-capricious standard. *See* §7607(d)(9)(A).

Further, the majority emphasized that, despite the exemption actions' reliance on a common causation requirement and the general finding of cost recoupment, they also necessarily "rel[ied] on refinery-specific determinations" because EPA considered whether each refinery rebutted EPA's general cost-recoupment finding. App.15a. But the statute does not send to the D.C. Circuit only those cases that are based *purely* on determinations of nationwide scope or effect. App.40a-41a (dissent). Rather, the statute asks only whether the action is based on "a" nationwide determination. §7607(b)(1). That makes good sense: as long as there is at least one nationally significant dimension to the action, EPA should have the ability to centralize review in the D.C.

Circuit for all the reasons why Congress enacted the venue provision. *Supra* pp.27-28.

IV. THIS CASE IS AN IDEAL VEHICLE

This case is an ideal vehicle to resolve the question presented. The panel below issued a published decision analyzing the 2022 exemption actions under both of §7607(b)(1)'s venue tests. The Eleventh Circuit did the same, and then both the Fifth and Eleventh Circuits denied rehearing notwithstanding the other's contrary decision. The D.C. Circuit is unlikely to address venue, *see supra* p.14, and in any event the D.C. Circuit could not override the Fifth or Eleventh Circuit's venue ruling.

Also, this case will not necessarily be resolved by a decision in *Oklahoma/PacifiCorp* because this case presents distinct issues. First, unlike the decision below, the Tenth Circuit's decision in *Oklahoma* did not "address" whether EPA's 2023 SIP action was "based on a determination of nationwide scope or effect." *Oklahoma*, 93 F.4th at 1269 n.8. Second, unlike SIP disapprovals, which relate only to individual States' compliance, RFP exemptions necessarily affect the achievement of a unified national standard by either creating a national shortfall or increasing all non-exempt parties' obligations nationwide. Third, unlike RFP exemptions, SIP approval decisions potentially raise federalism concerns because SIPs are proposed by States and §7607(b)(1) expressly calls SIP "approv[als]" "locally or regionally applicable." And fourth, whereas each disapproval in the 2023 SIP action apparently "was based entirely on [each State's] particular circumstances and [EPA's] analysis of those circumstances," *West Virginia*, 90 F.4th at 329, the 2022 exemption actions adopted and relied on a common statutory interpretation and a general factual finding to adjudicate each exemption petition, *cf. id.* at 330 (distinguishing case

where "the reason for rejecting all state SIPs was based on circumstances *common to all States*").

CONCLUSION

The Court should grant the petition. It should do so even if it grants the petitions in *Oklahoma/PacifiCorp* because this case presents distinct issues that would not necessarily be resolved by decision in *Oklahoma/PacifiCorp*. If the Court grants both this petition and the petitions in *Oklahoma/PacifiCorp*, it should hear the cases in tandem.

Respectfully submitted.

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APPENDIX

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