Nos. 23-1229 & 23-1230

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

CALUMET SHREVEPORT REFINING, LLC, ET AL.,
Respondents

GROWTH ENERGY, ET AL.,
Petitioners,

v.

CALUMET SHREVEPORT REFINING, LLC, ET AL.,
Respondents

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

BRIEF FOR THE SMALL REFINERY RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Clean Air Act requires the Environmental Protection Agency ("EPA") to grant a small petroleum refinery an exemption from the Act's Renewable Fuel Standard ("RFS") where compliance with the RFS would cause the refinery to experience disproportionate economic hardship in a given year. 42 U.S.C. § 7545(o)(9)(B)(i). Six small refineries separately petitioned EPA for hardship exemptions for some or all of the compliance years 2017 through 2021. EPA "determin[ed]," after "consider[ing] each [refinery's] individual refinery information," that each of the petitioning small refineries was not entitled to hardship relief and denied their petitions. EPA.App.14a–15a. Each small refinery then petitioned for judicial review under the Clean Air Act, 42 U.S.C. § 7607(b)(1). The question presented is:

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

CORPORATE DISCLOSURE STATEMENT

Calumet Shreveport Refining, LLC, is a Delaware limited liability company. It is 100% owned by Calumet, Inc., a manufacturer of specialty products and a publicly traded company under the symbol "CLMT." There are no other known parent corporations or publicly held corporations that own 10% or more of Calumet, Inc.'s stock.

Ergon Refining, Inc., is a Mississippi corporation. It is a refiner of petroleum products and is wholly owned by Ergon, Inc. No publicly held company has a 10% or greater ownership interest in it.

Ergon-West Virginia, Inc., is a Mississippi corporation. It is a refiner of petroleum products and is wholly owned by parent company Ergon, Inc. No publicly held company has a 10% or greater ownership interest in it.

Placid Refining Company LLC is a Delaware limited liability company. It is a refiner of petroleum products and is 100% owned by its parent companies Placid Holding Company and RR Refining, Inc. No publicly held company has a 10% or greater ownership interest in it.

The San Antonio Refinery LLC ("TSAR") is a Delaware limited liability company (formerly known as Calumet San Antonio Refining, LLC). TSAR is a refiner of petroleum products. TSAR is 100% owned by Allegiance Refining, LLC. Allegiance Refining, LLC, is a Texas limited liability company. It is a refining operations company and operator of TSAR. Allegiance Refining, LLC, is not publicly traded, and no publicly held company has a 10% or greater ownership interest in it.

Wynnewood Refining Company, LLC, is a wholly owned subsidiary of CVR Refining, LLC, a Delaware limited liability company. CVR Refining, LLC, is a wholly owned subsidiary of CVR Refining, LP, which is an indi-

rect wholly owned subsidiary of CVR Energy, Inc., a Delaware corporation that is publicly traded on the NYSE under the symbol "CVI." Icahn Enterprises, L.P., and its affiliates ("IEP") hold a 10% or greater ownership interest in CVR Energy, Inc. IEP is a publicly traded partnership under the symbol "IEP."

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STATUTORY PROVISIONS INVOLVED

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

Administrative proceedings and judicial review

(b) Judicial review

(1) A petition for review of action of the Administrator [of the Environmental Protection Agency] [under various enumerated provisions], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's [various enumerated actions], or any other final action of the Administrator under this chapter … which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination.

*

This and other pertinent statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a–33a.

INTRODUCTION

The Clean Air Act ("CAA") determines the venue for a petition for judicial review of administrative action by asking whether the challenged agency action is "nationally applicable" (reviewed by the D.C. Circuit) or "locally or regionally applicable" (reviewed by the regional circuit courts). 42 U.S.C. § 7607(b)(1).[1] The U.S. Environmental Protection Agency ("EPA") believes that, when it issues a series of individualized administrative decisions—each of which applies to only a single regulated entity—it can convert those locally applicable decisions into one nationally applicable action, and thereby gain access to its preferred forum, simply by packaging together its announcement of the individual adjudications. That is not how the CAA's venue provision works for the EPA actions at issue here, as the court of appeals correctly determined.

This case concerns a type of statutory forbearance under the CAA that affects only small petroleum refineries. Congress provided that a small refinery is entitled to an exemption from the CAA's Renewable Fuel Standard ("RFS") requirements where it can demonstrate that the RFS would cause it "disproportionate economic hardship" in a given compliance year. In the past, EPA acknowledged that its decisions on small-refinery hardship petitions are "quintessentially local action[s]" for purposes of venue under Section 7606(b)(1), because they "adjudicate[] legal rights as to a single refinery in a single location." EPA Motion to Dismiss 18, *Advanced Biofuels Ass'n* v. *EPA*, No. 18-1115, Dkt. No. 1740614 (D.C. Cir. July 13, 2018). As a result, judicial challenges to EPA decisions on RFS hardship petitions have typically been litigated in the regional circuit courts.

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

EPA lost a number of those challenges, including in this Court in *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382 (2021). And after a change in presidential administrations, EPA announced its plan to never grant small-refinery hardship relief again. In two decision announcements in April and June 2022, EPA announced that it was denying 105 individual small-refinery hardship petitions. And EPA was transparent about its goal to make the D.C. Circuit the only court capable of reviewing its denial decisions: it asserted that it had transformed those 105 quintessentially local actions into just two *national* actions by publishing them together at the same time and deciding them under the same legal rationale.

The six small-refinery respondents here were among those whose hardship petitions EPA denied. EPA's decisions did not comply with the CAA and the Administrative Procedure Act, so the small refineries petitioned for judicial review in their home circuit: the Fifth Circuit. The court of appeals rejected EPA's attempt to manufacture venue in the D.C. Circuit, explaining that the relevant administrative "actions" under the Clean Air Act are the adjudications of the individual hardship petitions, regardless of how EPA chooses to publish those decisions. And EPA conceded that it took those actions—as the text of the CAA *requires*—by "evaluat[ing] … the data and information provided in" the individual hardship petitions. EPA.App.14a (quoting EPA's decision document). On the merits, the court of appeals agreed with the small refineries that EPA's denial decisions were unlawful for multiple independent reasons.

The Fifth Circuit was right. EPA's choice to publish multiple decisions together does not affect the localized nature of the administrative "action" taken, which is what

matters for venue under Section 7607(b)(1). And administrative agencies are *always* required to treat like parties alike, so the mere fact that EPA applied the same legal standard to all RFS hardship petitions does not make the actions based on any "nationwide" "determination."

This case, moreover, would be a wholly unsuitable vehicle for this Court to review the Clean Air Act's venue provision. The D.C. Circuit recently agreed with the Fifth Circuit that EPA's RFS denial decisions were unlawful, so EPA's venue objection here is inconsequential. This consolidated case also involves two separate sets of adjudications, issued at different times, the second of which merely incorporated the first by reference. That unusual sequence could complicate this Court's review of the venue question. And this case involves a relatively obscure provision of the Clean Air Act that—though critical to the small refineries for whom Congress designed it—is hardly the standard fare of Section 7607(b)(1). Granting review here could mire the larger question of venue for the entire Clean Air Act in the technicalities of small refineries.

If this Court is interested in considering venue under the Clean Air Act, then other pending petitions for a writ of certiorari concern the same venue provision but offer much more suitable vehicles. The petitions in *Oklahoma* v. *EPA*, No. 23-1067, and *Pacificorp* v. *EPA*, No. 23-1068, involve a commonly recurring fact pattern under the Clean Air Act—the rejection of a State Implementation Plan ("SIP")—that would offer a much better opportunity for this Court to provide a definitive interpretation of Section 7607(b)'s venue provision in all its applications.

In all events, whether this Court chooses to review *Oklahoma* and *Pacificorp* or not, the venue question is no longer important to this case. So the Court should deny the petitions for a writ of certiorari here.

STATEMENT

A. Statutory and regulatory background

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

Section 7607(b)(1) governs "[j]udicial review" of "petitions for review" of EPA "action[s]" "under this chapter," *i.e.*, under the Clean Air Act. That subsection allocates venue for regulatory challenges depending on the character of the administrative "action" under review: If EPA's "action … under this chapter" is "nationally applicable," then the proper venue is the D.C. Circuit. § 7607(b)(1). If EPA's "action … under this chapter" is "locally or regionally applicable," then venue is "in the United States Court of Appeals for the appropriate circuit." *Ibid.*

When the administrative action being challenged is locally or regionally applicable, the CAA creates a "default presumption" that venue is proper in the regional circuit court. *Texas* v. *EPA*, 829 F.3d 405, 419, 424 (5th Cir. 2016) ("*Texas 2016*"). That presumption has a narrow exception which has "two conditions." *Id.* at 421. If EPA can demonstrate *both* that its locally applicable action is "based on a determination of nationwide scope or effect," "and" that EPA "f[ound] and publishe[d] that such action is based on such a determination," then venue is proper in the D.C. Circuit. § 7607(b)(1).

The CAA's text makes it "clear" that "[t]he court—not EPA—determines both the scope of an action's applicability and whether it was based on a determination of nationwide scope or effect." *Texas* v. *EPA* ("*Texas 2020*"), 983 F.3d 826, 833 (5th Cir. 2020); see *Sierra Club* v. *EPA*, 47 F.4th 738, 746 (D.C. Cir. 2022) (same); *Hunt Refin. Co.* v. *EPA*, 90 F.4th 1107, 1113–1114 (11th Cir. 2024) (Lagoa, J., concurring) ("courts surely must form their own judgment on the matter" of venue). The court answers those

questions by looking "to the face of" the administrative action that is the subject of the petition for review. *American Rd. & Transp. Builders Ass'n* v. *EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (Kavanaugh, J.); see *ATK Launch Sys., Inc.* v. *EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011).

Thus, the relevant question for determining venue in a CAA case is: What is the "action … under this chapter" that EPA was authorized to take? § 7607(b)(1). To answer that question, courts "look primarily to the text of the statute," specifically to the relevant CAA provision that is "the legal source of [EPA's] authority to take the challenged action[]." *Texas* v. *EPA* ("*Texas 2023*"), No. 23-60069, 2023 WL 7204840, at *4 (5th Cir. May 1, 2023).

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

a. The CAA's RFS program requires that increasing amounts of renewable fuels be blended each year into the gasoline and diesel fuel sold in the United States. § 7545(o)(2)(B)(i)(I)–(IV). EPA sets annual renewable fuel percentage standards based on the amount of renewable fuel that must be blended into transportation fuel to meet the volume requirements in § 7545(o)(2), and then establishes an RFS compliance process, § 7545(o)(3), (7). Obligated parties—including refiners and importers of transportation fuel—use the annual renewable fuel percentage standard to determine their own volume obligations for four categories of renewable fuel. See 40 C.F.R. § 80.1406. Those individual volume obligations must be met by the annual RFS compliance deadline set by EPA. *Id.* § 80.1451(f)(1)(i)(A).

Obligated parties comply with their annual RFS obligation by securing credits called renewable identification numbers ("RINs"). 40 C.F.R. § 80.1427. A RIN is generated when a renewable fuel (like ethanol) is manufactured.

Id. § 80.1426. The RIN remains attached to the physical volume of renewable fuel until it is blended into transportation fuel, at which point the RIN is "separated." *Id.* §§ 80.1428, 80.1429. RINs have a limited shelf life; they can be used only for compliance for the year in which they are generated or the next year. 42 U.S.C. § 7545(o)(5)(C). Obligated parties must secure the necessary credits (*i.e.*, separated RINs) to demonstrate RFS compliance by either acquiring RINs through blending renewable fuels or else by purchasing RINs from other parties that blend. § 7545(o)(5)(B).

b. "The RFS program reflects a carefully crafted legislative bargain to promote renewable fuels, but also to provide an exemption mechanism for small refineries." *Sinclair Wyoming Refin. Co. LLC* v. *EPA*, __ F.4th __, No. 22-1073, 2024 WL 3801747, at *10 (D.C. Cir. Aug. 14, 2024). Congress recognized that "escalating [RFS] obligations could work special burdens on small refineries," many of which "lack the inherent scale advantages of large refineries" and are limited in their ability to blend renewable fuels—or unable to blend at all. *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 386 (2021) (cleaned up). Small refineries that cannot separate enough RINs through their own blending are forced to buy RINs from others on an unregulated secondary market. See 72 Fed. Reg. 23,900, 23,904 (May 1, 2007) ("Many obligated parties do not have access to renewable fuels or the ability to blend them, and so must use credits to comply."); 75 Fed. Reg. 14,670, 14,722 (Mar. 26, 2010) (explaining how RINs are traded on a spot market or bought and sold through private contracts).

Congress accordingly created a "safety valve," *HollyFrontier*, 594 U.S. at 387, that allows any small refinery to petition EPA for relief from the annual RFS compli-

ance obligation by showing that compliance would cause "disproportionate economic hardship." § 7545(o)(9)(B)(i). The Act requires each small refinery to petition separately for hardship relief. *Ibid.* Each granted petition frees only one small refinery from its RFS obligation for the applicable year, based on its own economic circumstances. § 7545(o)(9)(B)(i)–(ii); 40 C.F.R. § 80.1441(e)(2).

EPA must decide each small-refinery hardship petition on an individual, case-by-case basis in "consultation" with the U.S. Department of Energy ("DOE"), and by "consider[ing] the findings" of a 2011 DOE study on small refineries' economic hardship, along with "other economic factors." § 7545(o)(9)(A)(ii)(I), (B)(i)–(ii). In that study, DOE: (1) found that small refineries "have particular obstacles that would make compliance more costly than those of large integrated companies"; (2) developed a scoring matrix "to evaluate the full impact of [the] disproportionate economic hardship"; and (3) concluded that many small refineries should be exempt. DOE, Small Refinery Exemption Study: An Investigation into Disproportionate Economic Hardship 3, 32, 37 (March 2011) ("2011 DOE Study").[2] DOE also recognized that the hardship on small refineries would continue to grow as the renewable-fuel blending mandates escalated. *Id.* at 17–18.

Congress also required EPA to decide every hardship petition "not later than 90 days after" receipt, because hardship petitions are important to small refineries' ability to plan for RFS compliance. § 7545(o)(9)(B)(iii). But EPA has failed to meet that deadline on almost 90% of hardship petitions submitted since 2013, causing significant detrimental uncertainty for petitioning small refineries and the industry as a whole. See U.S. Government

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

Accountability Office, Renewable Fuel Standard: Actions Needed to Improve Decision-Making in the Small Refinery Exemption Program, GAO23104273 (Nov. 2022).[3]

c. For more than a decade after the 2011 DOE Study—until 2022—EPA consistently "relied on DOE's findings" of small refineries' disproportionate economic hardship and evaluated petitions for RFS hardship relief by applying DOE's "scoring matrix." EPA.App.95a; see *id.* at 8a.

The small-refinery respondents here were among the small refineries that petitioned for hardship relief for some or all compliance years, because each of them faces structural disadvantages that make RFS compliance disproportionately burdensome. Back when EPA was considering each hardship petition using the scoring matrix, EPA granted these small refineries' hardship petitions for several years.

For some hardship petitions submitted by other small refineries, EPA denied relief. In some of those cases, the denied small refineries sought judicial review. When they did, EPA repeatedly acknowledged that its decisions granting or denying small-refinery hardship petitions are "quintessentially local action[s]" that must be reviewed in the regional circuit courts. EPA Motion to Dismiss 2, 18, *Advanced Biofuels,* No. 18-1115, *supra* (asking the D.C. Circuit to dismiss the petition for review because review of "individual decisions on RFS hardship petitions is in the appropriate local circuit").

On the merits of those challenges, EPA suffered multiple losses where it had wrongfully denied small-refinery hardship relief. See, *e.g.*, *Ergon-West Virginia, Inc.* v. *EPA*, 980 F.3d 403 (4th Cir. 2020); *Sinclair Wyoming*

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

Refin. Co. v. *EPA*, 887 F.3d 986 (10th Cir. 2017). Frustrated by defeat in the regional circuit courts, and after a change in presidential administrations, EPA began searching for a way to eliminate small-refinery hardship relief altogether. It first changed its long-standing statutory interpretation to assert that a small refinery would not be eligible for hardship relief unless the refinery had received relief in every prior compliance year. This Court rejected that new position in *HollyFrontier* as inconsistent with the statutory text. See 594 U.S. at 396–397.

When that effort failed, EPA went back to the drawing board with the goals of eliminating hardship relief and avoiding judicial review anywhere other than the D.C. Circuit.

B. The present controversy

1. The small-refinery respondents here each petitioned EPA for RFS hardship relief for some or all of the compliance years 2017 through 2021. EPA.App.19a nn. 26–27. EPA initially granted Wynnewood's hardship petition for the 2017 compliance year, and it granted Calumet Shreveport's, Ergon Refining's, Placid's and Wynnewood's hardship petitions for 2018. See EPA, Decision on 2018 Small Refinery Exemption Petitions (Aug. 9, 2019).[4]

After EPA's change in approach, though, the agency reversed itself. In April 2022, EPA in one fell swoop *retroactively* denied 36 hardship petitions that it had previously granted, including petitions submitted by these small-refinery respondents. EPA.App.189a–330a (the "April Denials"). EPA announced those denials in a single decision document, applying multiple sea-changes to the agency's longstanding approach to hardship petitions. In

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

the April Denials, EPA: (a) applied a new and materially different interpretation of several CAA terms; (b) abandoned the scoring matrix and DOE recommendations that had been the cornerstone of all of EPA's small-refinery hardship decisions for more than a decade; and (c) replaced them with a new "economic theory" that small refineries *never* experience disproportionate economic hardship from the RFS, notwithstanding Congress's statutory provision for small-refinery hardship relief. EPA. App.237a–238a, 251a.

EPA's new "economic theory" hypothesized that "the RFS program cannot cause [disproportionate economic hardship]" because RIN costs are supposedly equal for all obligated parties regardless of their size, bargaining power, location, or blending capability, and because obligated parties supposedly universally pass through 100% of their RIN costs to customers in the price of their fuel. EPA.App.212a. As appendices to the April 2022 decision announcement, EPA sent each petitioning small refinery a "confidential, refinery-specific appendi[x]" giving a refinery-specific explanation for its conclusion that the refinery could pass on its RFS costs. EPA.App.199a.

Less than two months after the April Denials, EPA in June 2022 largely copied and pasted its new reasoning from April into a materially identical decision document announcing the denial of another 69 RFS hardship petitions for 33 distinct small refineries, including these small refinery respondents' pending hardship petitions for some or all of 2017 and 2019–2021. EPA.App.44a–188a (the "June Denials"). EPA accomplished that bundled decision only by again ignoring the statutory deadline to decide the individual hardship petitions; it held dozens beyond the 90-day deadline so that it could deny them all at once.

The June Denials concluded "that none of the 69 pending [small-refinery hardship] petitions for the 2016–2021 compliance years have demonstrated [disproportionate economic hardship] caused by the cost of compliance with the requirements of the RFS program." EPA.App.185a. EPA again sent each of the small refineries separate "confidential, refinery-specific appendices" explaining its conclusions on RIN-cost passthrough. EPA.App.55a.

2. The small refinery respondents filed petitions for judicial review under the CAA challenging EPA's April and June Denials of their RFS hardship petitions. Because the refineries are each headquartered, incorporated, or operate within the Fifth Circuit, they sought review there. Two groups representing the interests of renewable fuel producers—the petitioners in No. 23-1230 in this Court—intervened to support EPA's denials of hardship relief (the "Renewable Intervenors").[5]

EPA moved to dismiss the petitions for review or else transfer them to the D.C. Circuit, asserting that because it had bundled together its denials of the refineries' individual RFS hardship petitions, those denials were actu-

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[5] Renewable Intervenors now accuse respondent Ergon-West Virginia of "shop[ping] for a more favorable forum" by seeking review in the Fifth Circuit instead of the Fourth Circuit. Renewable Pet. 25–26. That charge is baseless. Neither EPA nor the Renewable Intervenors ever argued that Ergon-West Virginia's case should be transferred to the Fourth Circuit. Perhaps that is because they knew the Fourth Circuit was hardly an adverse forum for Ergon-West Virginia, which has won multiple challenges there to prior EPA actions denying RFS hardship relief. *E.g.*, *Ergon-West Virginia, Inc.* v. *EPA*, 896 F.3d 600 (4th Cir. 2018); *Ergon-West Virginia, Inc.* v. *EPA*, 980 F.3d 403 (4th Cir. 2020). More importantly, any transfer motion would have been meritless because Ergon-West Virginia is incorporated in Mississippi, within the Fifth Circuit. See Certificate of Interested Persons, *Ergon Refin., Inc.* v. *EPA*, No. 22-60433 (consolidated with No. 22-60266), Dkt. No. 1 (5th Cir. Aug. 8, 2022).

ally a "nationally applicable" action that was also "based on a determination of nationwide scope or effect." Motion to Dismiss, C.A. Dkt. No. 31 in No. 22-60266 (June 22, 2022), C.A. Dkt. No. 53 in No. 22-60425 (Sept. 8, 2022). The small refinery respondents opposed EPA's motions, explaining that venue is proper in the regional circuit because hardship denial decisions are locally or regionally applicable. Each hardship petition sought relief for only a single refinery, and EPA's actions on those petitions were based on determining each refinery's *individual* economic circumstances.

The Fifth Circuit denied EPA's motion and explained why venue is proper in that court. EPA.App.9a–15a. EPA's denial actions were "locally … applicable," not "nationally applicable," because they affected only the individual petitioning small refineries. *Id.* at 11a–12a. And while EPA *asserted* that its actions were "based on a determination of nationwide scope or effect," that assertion was wrong as a matter of law. *Id.* at 12a–13a. EPA conceded that it had "considered each petition on the merits and individual refinery information." *Id.* at 14a (cleaned up). And EPA's decision documents confirm that the agency's Denial actions "re[lied] on refinery-specific determinations" about each individual refinery's "economic hardship" criteria. *Id.* at 15a.

On the merits of the small refineries' challenges, the Fifth Circuit determined that EPA's hardship-denial actions issued in April and June 2022 were unlawful for multiple independent reasons. EPA.App.16a–33a. The Fifth Circuit explained at length why the denials were: "(1) impermissibly retroactive; (2) contrary to law; and (3) counter to the record evidence." EPA.App.3a. EPA's Denial actions, among several other problems, had "glosse[d] over [the refineries'] refinery-specific data

proving they operate in inefficient local markets that do not allow for RIN cost pass-through." EPA.App.32a.

The Renewable Intervenors filed petitions for rehearing and rehearing en banc. C.A. Dkt. Nos. 427–430, No. 22-60266 (Jan. 8, 2024). No judge requested a vote on the rehearing petitions. EPA.App.332a–333a.

3. Some other small refineries whose RFS hardship petitions were denied by EPA in the April and June Denials petitioned for judicial review in the D.C. Circuit. And still other small refineries filed petitions for review in the regional circuits but had their petitions transferred to the D.C. Circuit—typically (though not always) without a substantive explanation or opinion. See, *e.g.*, *Wyoming Refin. Co.* v. *EPA*, No. 22-9553, Dkt. No. 10939881 (10th Cir. Sept. 12, 2022) (transferring to the D.C. Circuit without explanation); *Hunt Refining*, 90 F.4th at 1113 (concluding venue was proper in the D.C. Circuit in a reasoned opinion). As a result, the D.C. Circuit considered most of the same legal arguments challenging EPA's denials as the Fifth Circuit had.

On July 26, 2024, the D.C. Circuit agreed with the Fifth Circuit that EPA's April and June Denials are unlawful and must be vacated. *Sinclair Wyoming*, 2024 WL 3801747. Like the Fifth Circuit, the D.C. Circuit panel unanimously held that EPA's denials of hardship relief were both "contrary to law and arbitrary and capricious." *Id.* at *1. The D.C. Circuit expressly agreed with the Fifth Circuit's "analysis and conclusion that the Denial Actions are contrary to law." *Id.* at *7 n.5.

REASONS FOR DENYING THE PETITION

The petitions for a writ of certiorari should be denied because the court of appeals' decision is correct, and because the issues presented by these particular petitions are inconsequential and idiosyncratic.

The Fifth Circuit properly applied Section 7607(b)(1)'s venue provision to the small-refinery actions at issue here. EPA has long acknowledged that the denial of a small-refinery hardship petition is a locally applicable action that must be reviewed in the petitioning refinery's regional circuit. That's because EPA's actions on RFS hardship petitions are—and under the Clean Air Act, must be—based on each petitioning refinery's individual, *local* economic circumstances. Each action on an RFS hardship petition applies to only a single refinery in one location.

EPA observes that the circuit courts have disagreed about how to determine venue under Section 7607(b)(1). But this case would be a poor vehicle for addressing that issue for multiple reasons. First, EPA's venue objection in these cases is no longer important: even if the refineries' challenges to EPA's denial actions were transferred to the D.C. Circuit as EPA wishes, the D.C. Circuit's recent decision in *Sinclair Wyoming* proves beyond doubt that EPA would lose those challenges on the merits for largely the same reasons given by the Fifth Circuit.

Second, denials of RFS hardship petitions are hardly prototypical administrative actions governed by Section 7607(b)(1). If this Court were inclined to examine the venue provision for the entire Clean Air Act, then it should do so in a case that presents a standard form of CAA challenge—which this case does not.

Third, even if this Court wanted to review the specific issue of venue for judicial challenges to the denial of RFS hardship petitions, this case would still be a bad vehicle

because it concerns not one but *two* EPA decision announcements, and the differences between them may affect the outcome of the venue question under Section 7607(b)(1).

Other petitions pending before this Court present similar venue questions in a more suitable posture. See *Oklahoma*, No. 23-1067; *Pacificorp*, No. 23h-1068. Unlike in this case, those petitions present a commonly recurring type of EPA action under the Clean Air Act—rejection of a SIP—and would allow this Court to give a definitive interpretation of Section 7607(b)(1)'s venue provision. This Court should deny certiorari in this case and allow EPA to get on with its work of re-deciding the small refineries' RFS hardship petitions in a lawful manner.

A. The decision below is correct.

Section 7607(b)(1) determines the venue for a petition for review under the CAA based on the nature—national or local—of the "action" that the statute authorized EPA to take. And courts determine what the relevant "action" is by examining the statutory text. Here, the CAA is clear that the relevant administrative action is EPA's denial of each small refinery's *individual* petition for hardship relief. The small refineries were required to submit those petitions only for themselves based on their own "disproportionate economic hardship[s]." § 7545(o)(9)(B)(i)–(ii). And EPA was required to, and did, decide those petitions by evaluating each of the small refineries' locally applicable circumstances.

Once EPA's individual denials are properly identified as the relevant "action" for assessing venue, their nature is obvious: Those individual denials are, as EPA has previously put it, "quintessentially local action[s]" because they "adjudicate[ ] legal rights as to a single refinery in a single location." EPA Motion to Dismiss 18, *Advanced*

Biofuels, No. 18-1115, *supra*. And those locally applicable, refinery-specific adjudications are based on refinery-specific determinations. EPA denied relief to each of the small refineries here based on whether they individually faced economic hardship. So the decision below correctly determined that venue was proper in the regional circuits rather than the D.C. Circuit.

1. The relevant administrative "actions" are the individual denials of small-refinery hardship petitions.

Courts determine venue under Section 7607(b)(1) by "analyz[ing] the nature of the EPA's action" challenged in the petition for review. *RMS of Georgia* v. *EPA*, 64 F.4th 1368, 1372–1373 (11th Cir. 2023); accord EPA Pet. 12. Specifically, courts determine whether the challenged "action" is "nationally applicable" or "locally or regionally applicable." § 7607(b)(1).

But a court cannot analyze an action's nature until it identifies "*what* 'final action' [it is] dealing with." *Kentucky* v. *EPA*, 2023 WL 11871967, at *2 (6th Cir. 2023). Helpfully, the statute describes where to look: the "final action of [EPA] *under this chapter*." § 7607(b)(1) (emphasis added). "[T]his chapter" is the Clean Air Act. 42 U.S.C. Ch. 85, Codification Note. So Section 7607(b)(1)'s textual reference to EPA action *under this chapter* instructs courts to focus on the CAA provision that provides "the legal source of the agency's … authority to take the challenged actions." *Texas 2023*, 2023 WL 7204840, at *4.

The final EPA action "under" the CAA here is EPA's adjudication of *individual* hardship petitions. That is the "relevant unit of administrative action" for Section 7607(b)(1). *Texas 2023*, 2023 WL 7204840, at *4. The CAA authorizes EPA to take that action as the culmination of a process: It first instructs EPA to set all refineries' annual

renewable fuel-blending obligation. § 7545(o)(2)(B), (3)(B). A small refinery may then petition for an "exemption" from its individual RFS "compliance … requirements" by demonstrating that compliance would cause it "disproportionate economic hardship." § 7545(o)(9)(A)(ii), (B)(i). EPA must "evaluat[e]" that petition and then grant or deny it. § 7545(o)(9)(B)(ii)-(iii).

Under the CAA's text, EPA must separately consider and decide each petition it receives: "A small refinery may at any time petition" for an exemption, § 7545(o)(9)(B)(i) (emphasis added), which is available "[i]n the case of a small refinery"—singular—"that … would be subject to a disproportionate economic hardship if required to comply with the" RFS, § 7545(o)(9)(A)(ii)(II) (emphasis added). The CAA instructs EPA to "evalut[e] a petition," one at a time, to determine whether the refinery has shown "disproportionate economic hardship" after considering DOE's 2011 Study "and other economic factors." § 7545(o)(9)(B)(i)-(ii) (emphasis added). The deadline for EPA to "act on any petition" (again, singular) is indexed to each individual petition: "not later than 90 days after the date of receipt of *the* petition." § 7545(o)(9)(B)(iii) (emphasis added).

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

Whether EPA's denials of the small refinery respondents' hardship petitions were "nationally applicable" or "locally or regionally applicable," § 7607(b)(1), "turns on the legal impact of the action as a whole," *Texas 2016*, 829 F.3d at 419, "not" on the action's ancillary "effects," *ATK Launch*, 651 F.3d at 1197; see also *American Road*, 705 F.3d at 456 (Kavanaugh, J.) (declining to consider an action's "practical effects"). For example, the D.C. Circuit concluded that "EPA's approval of a 2011 California SIP

revision" was a "'locally or regionally applicable' action" because it regulated only entities in California. *American Road*, 705 F.3d at 455; see also *Dalton Trucking, Inc.* v. *EPA*, 808 F.3d 875, 880 (D.C. Cir. 2015) (California-only preemption waiver was "not nationally applicable"). The Fifth Circuit reached the same conclusion for three jointly published SIP denials because, though announced together, each denial "involve[d] only the regulation of Texas, Louisiana, and Mississippi emission sources and ha[d] legal consequences only for … facilities" in those states. *Texas 2023*, 2023 WL 7204840, at *5.

When EPA publishes annual renewable-fuel blending obligations for the entire industry, *that* is a nationally applicable action and any challenge to it goes to the D.C. Circuit. See, *e.g.*, *Americans for Clean Energy* v. *EPA*, 864 F.3d 691 (D.C. Cir. 2017). But when EPA grants or denies a small refinery's hardship petition, that is a "quintessentially local action," as EPA repeatedly acknowledged before it started attempting to manufacture venue in the D.C. Circuit. *E.g.*, EPA Motion to Dismiss 10, *Advanced Biofuels*, No. 18-1115, *supra*; EPA Brief 15, *Producers of Renewables United for Integrity Truth and Transparency* v. *EPA* ("*PRUITT*"), No. 18-1202, Dkt. No. 1775897 (D.C. Cir. Mar. 4, 2019) (same); EPA Brief 2–3, EPA Reply in Support of Motion to Dismiss 2, *Lion Oil Co.* v. *EPA*, No. 14-3405, Dkt. No. 4227218 (8th Cir. Dec. 17, 2014) ("denial of [a] small refinery exemption petition is locally applicable" because the "petition only requested relief for one refinery").

Each of the small-refinery respondents' hardship petitions "only requested relief for one refinery." EPA Reply 2, *Lion Oil*, No. 14-3405, *supra*. And EPA's denials of those petitions are each a "decision with respect to a particular small refinery's request," that "adjudicates

legal rights as to that single small refinery in its single location." EPA Brief 15, *PRUITT*, No. 18-1202, *supra*. EPA's decisions on the small refineries' hardship petitions "involve only the regulation of" their individual refineries and "have legal consequences only for [those] facilities." *Texas 2023*, 2023 WL 7204840, at *5. Those are locally applicable actions reviewable only in the regional circuits.

Congress's decision in Section 7607(b)(1) to channel judicial review of EPA's hardship decisions to the appropriate regional circuit courts is important to the sound administration of the CAA. Small refineries typically claim disproportionate hardship by demonstrating that they face unique burdens related to their local circumstances and market conditions. For example, some small refineries have limited opportunities to blend renewable fuel; their fuel goes into pipelines that prohibit blended fuel. Appellant's Brief 17, No. 22-60266, C.A. Dkt. No. 270 (Mar. 7, 2023). And while many refineries operate in fuels markets indexed to the national market, Calumet Shreveport operates in a "micro-market" that "operates differently than national markets." *Id.* at 69. Regional circuit courts are best equipped to evaluate whether EPA adequately considered those sort of local market conditions. See, *e.g.*, EPA.App.31a (explaining why EPA's decision was arbitrary and capricious for failing to engage with a small refinery's evidence about local fuels markets).

EPA's position, by contrast would force all refineries nationwide to bring their court challenges exclusively to the D.C. Circuit to be considered alongside dozens of other refineries, as in *Sinclair Wyoming*. Being forced to litigate in that way has made it difficult for refineries in joint briefing to draw attention to their particular local circumstances that make hardship relief appropriate.

3. EPA cannot overcome the presumption of regional-circuit review.

Because EPA's denials of the small refinery respondents' petitions are "locally or regionally applicable action[s], Section 7607(b)(1)'s default presumption "requires review in th[e] [regional] circuit." *Texas 2016*, 829 F.3d at 424; *Kentucky*, 2023 WL 11871967, at *3. EPA could overcome that presumption only by convincing this Court that its denials were "based on a determination of nationwide scope or effect." § 7607(b)(1); see p. 6, *supra*. Contrary to EPA's implication (Pet. 12–13) that it may choose its preferred venue, courts assess the issue "*de novo*" and without deference to the agency. *Texas 2016*, 829 F.3d at 421; see *Dalton Trucking*, 808 F.3d at 881; *Sierra Club*, 47 F.4th at 746.

EPA cannot make that showing for two independent but related reasons. First, the CAA *requires* hardship-petition decisions to be based on the "determin[ation]" whether each small refinery individually "would be subject to disproportionate economic hardship if required to comply with the" RFS. § 7545(o)(9)(A)(ii)(II), (B)(i). EPA cannot legally determine whether a small refinery is disproportionately economically impacted without basing that determination on refinery-specific economic factors that are local in scope and effect.

Second, the record shows that EPA in fact based its denial of the small refineries' hardship petitions on individualized determinations about each refinery's specific facts and data: EPA explained that it had "completed a thorough evaluation of the data and information provided in the [hardship] petitions, supplemental submissions, and comments to determine if any of the petitioners have demonstrated that the cost of compliance with the RFS is the cause of their alleged [hardship]." EPA.App.94a–95a.

To be sure, EPA hypothesized that *every* small refinery would suffer no burden from the RFS because it could pass on its RIN costs. See *Sinclair Wyoming*, 2024 WL 3801747 at *6 (correctly describing "EPA's passthrough *theory*") (emphasis added). But for EPA to test that hypothesis and complete the hardship adjudications, EPA had to "carefully review[ ] data, contracts, and other information from small refineries" before it could assert "that [its new economic theories] applie[d]." EPA.App.98a–99a. Even then, EPA's conclusions were petition-specific: "we find ... that [hardship] is not demonstrated *in the 69* [*hardship*] *petitions* EPA has evaluated." EPA.App.100a (emphasis added).

In short, EPA based its ultimate denial actions on determinations about local facts and data. It could not have complied with the CAA without doing so. EPA did not and cannot rebut the presumption that these locally applicable actions should be reviewed in a regional circuit.

4. EPA's arguments for D.C. Circuit review fail.

EPA offers various reasons for its new, flip-flopped position that only the D.C. Circuit can review hardship actions. None is persuasive.

a. First, EPA contends that the April and June Denials are "nationally applicable" because they announced decisions together on several hardship petitions submitted by several refineries located in different places. EPA.App.185a–188a ("This final action denies 69 petitions … for over 30 small refineries."); EPA.App.327a–330a (same for 36 petitions). It's notable that EPA accomplished that bundling only by breaking the law and refusing to decide each hardship petition within 90 days of submission, as the CAA requires. § 7545(o)(9)(B)(iii).

Even more important, EPA's observation about the various administrative actions bundled together in the

April and June Denials is irrelevant to venue. EPA's argument simply assumes that the relevant administrative "action" for purposes of Section 7607(b)(1) was the decision documents themselves. It was not. For all the reasons explained above, the agency actions authorized "under this chapter" were adjudications of individual hardship petitions submitted by a single refinery for itself.

EPA asserts (Pet. 13) that the April and June decision documents are "two agency actions" for venue purposes, but EPA does not support that assertion with any legal argument. In fact, the government entirely skips over the statute's foundational threshold question: What is the agency action under review? The statutory text looks to the "action under this chapter" that EPA was authorized to take—not whether EPA chooses to announce its actions separately or bundle multiple actions together and announce them in a single decision document.

b. EPA next asserts that these were "national" actions because it applied its new interpretation of the hardship standard and its new economic hypothesis to all of the petitioning small refineries. See EPA Pet 10 (arguing that the denials "are 'nationally applicable' because they apply a uniform methodology to small refineries across the country."); EPA.App.187a–188a ("EPA's revised interpretation of the relevant CAA provisions and the RIN discount and RIN cost passthrough principles … are applicable to all small refineries"). That is nothing less than an argument that *every* EPA action is nationally applicable—because every action is traceable to a uniform statutory standard, if nothing else. As the Fourth Circuit has recognized in rejecting a very similar argument from EPA: "if application of a national standard … were the controlling factor, there never could be a local or regional action" because every EPA action "purportedly applies a

national standard created by the national statute and its national regulations." *West Virginia* v. *EPA*, 90 F.4th 323. 329–330 (4th Cir. 2024); see also *Chevron U.S.A. Inc.* v. *EPA*, 45 F.4th 380, 387 (D.C. Cir. 2022) (recognizing that even "locally or regionally applicable actions may require interpretation of the Clean Air Act's statutory terms").

Indeed, if EPA had failed to apply a uniform methodology—if it had failed to treat like cases alike by applying the same statutory interpretation and analytical framework to all petitioning parties—then it would violate the Administrative Procedure Act. See *Encino Motorcars, LLC* v. *Navarro*, 579 U.S. 211, 212 (2016) (an agency's "unexplained inconsistency" is "arbitrary and capricious"). Simply applying a uniform standard (statutory or regulatory) to individual fact patterns "does not transform a locally applicable action into a nationally applicable one." *Chevron*, 45 F.4th at 387.

c. EPA also attempts to argue that, even if the April and June Denials were locally or regionally applicable, they were "based on a determination of nationwide scope or effect" for the same reasons discussed above. But those arguments are wrong for the reasons already explained. Here again, EPA simply assumes (wrongly) that the decision documents are the relevant "action" under Section 7607(b). Moreover, EPA's primary rationale—that the April and June Denials denied multiple petitions from refineries in various places—was not a "determination" at all. EPA doesn't argue (and couldn't plausibly argue) that it relied on the number of hardship petitions submitted or the refineries' disparate locales to decide whether to grant hardship relief.

EPA's uniform-standard rationale once again proves too much. As just noted, the Administrative Procedure Act *compelled* EPA in every action to apply a uniform

approach to similarly situated regulated parties. So EPA's application of a uniform approach tells this Court nothing about whether the decisions were based on local or national determinations.

B. This case is not a suitable vehicle for answering the venue question presented, especially compared to other pending petitions raising similar issues.

The petitions for a writ of certiorari should be denied for the additional reason that this case has multiple vehicle problems that could burden this Court's ability to effectively analyze the venue question. If the Court were inclined to review the circuit courts' disagreement about the application of Section 7607(b)(1), then it should do so in the *Oklahoma* or *Pacificorp* cases that present similar issues in a cleaner posture.

1. The first and most significant problem with the petitions here is that, after *Sinclair Wyoming*, petitioners can no longer claim that their question presented—which court should review of the April and June 2022 Denials—is important enough to warrant this Court's review. The D.C. Circuit's recent decision expressly agreeing with the Fifth Circuit's reasoning on the merits means that EPA's venue objection is now inconsequential. The D.C. Circuit, like the Fifth Circuit, concluded that EPA's individual denials of the petitioning small refineries' hardship petitions were "contrary to law and arbitrary and capricious." *Sinclair Wyoming*, 2024 WL 3801747.

The parties and the circuit courts have already expended enormous time and resources to thoroughly evaluate EPA's Denials. Granting the government's petition would likely prompt EPA to further delay its work redeciding the hardship petitions on remand, and it would risk throwing out the Fifth Circuit's efforts on this case with no possible benefit to either party. EPA has nothing

to gain in this Court even if it persuaded the Court that the D.C. Circuit was the proper venue; the only result of transfer would be another loss for the government on the merits, with the D.C. Circuit adopting the same reasoning as the Fifth Circuit here. Those merits are not even arguably before the Court in this case because both the government's and the Renewable Intervenors' certiorari petitions are limited exclusively to the venue question. And venue "is a separate and independent matter." *Mercantile Nat. Bank at Dallas* v. *Langdeau*, 371 U.S. 555, 558 (1963).

Second, this case is a wholly unsuitable vehicle for reviewing Section 7607(b)(1)—the venue provision that governs legal challenges for the entire Clean Air Act—because it involves a relatively obscure CAA provision. To be sure, RFS hardship relief is incredibly important to the small refineries for which Congress created it. But the exemption provision implicates only the Nation's smallest refineries, and only in certain years when they experience disproportionate economic hardship. If this Court is going to address Section 7607(b)(1), then it should do so in a case that implicates a common and frequently recurring type of CAA challenge. The petitions in *Oklahoma* and *Pacificorp*, concerning challenges to SIP denials, provide that opportunity. This case does not.

Third, if the Court took up this case, it is not clear that the Court could definitively resolve the circuits' disagreements over Section 7607(b)(1) or even conclusively determine venue for future RFS cases. EPA's approach here is a historical aberration. Until April 2022, "the regional circuits, not th[e D.C. Circuit]" "reviewed EPA actions on small refinery exemption requests, except where" a petitioning small refinery chose to litigate in the D.C. Circuit and EPA acquiesced. EPA Brief 15–16, *PRUITT*, No.

18-1202, *supra*. EPA's approach in the April and June Denials—to bundle together several locally applicable adjudications, *and* to simultaneously announce a new regulatory approach and then apply it in the same adjudication decision in April 2022—was a novel method of proceeding born from EPA's violations of the CAA, which requires individualized decisionmaking on a 90-day timeframe. § 7545(o)(9)(B)(iii).

EPA's novel approach resulted in the Eleventh Circuit providing what is essentially a one-off answer to the venue question, tied heavily to the particular circumstances of EPA's decisions here. That court accepted EPA's assertion that the April and June decision documents were the relevant administrative "actions" for Section 7607(b)(1) only because EPA bundled together multiple hardship denials and "announced a new, universally applicable approach to evaluating hardship petitions." *Hunt Refining*, 90 F.4th at 1112. At oral argument, the panel suggested that neither bundling nor announcing a new standard would be warranted for the next round of hardship decisions, because EPA would already "have a standard" (RIN-cost passthrough) that it would simply apply to each individual future petition. See Oral Argument Audio 30:35–31:20, Dkt. No. 111, *Hunt Refining*, Nos. 22-11617 & 22-12535 (11th Cir. July 27, 2023). In other words, the Eleventh Circuit appeared to give EPA a one-time-only ticket to the D.C. Circuit because of the specific configuration of EPA's decisions here.

EPA's aberrational approach limits the impact of any venue guidance that this Court might provide here. This Court's review of the venue issue in this case would necessarily be tied to the exceptional factual scenario where EPA disregarded the 90-day statutory deadline for hardship petitions so that it could apply a brand-new approach

to adjudicating those hardship petitions. It is decidedly unclear whether that circumstance will ever arise again.

Moreover, EPA's exceptional (and unlawfully late) "bundling" of hardship decisions in this case would needlessly complicate this Court's review of the question presented. If, as EPA contends, what makes D.C. Circuit review appropriate here is the combination of devising a new methodology and bundling otherwise local actions together, then at most half of this case would belong in the D.C. Circuit. Only the decision document announcing the *April* 2022 Denials could possibly be characterized as EPA applying a *new* adjudicatory approach. The June Denials were merely "consistent with the April 2022 [hardship] Denial[s]." EPA.App.79a. EPA did nothing more than reassert and apply the reasoning from the April Denials; the June Denials were not based on anything new. The June Denials as thus akin to EPA applying an existing published regulation to a regulated party's individualized facts in an individual adjudication—classic locally applicable action.

Even on EPA's venue theory, then, the Fifth Circuit's venue ruling was still correct for the small refineries' challenge to the June 2022 Denials. But no party to this case—and no court—has addressed what should happen if the April and June Denials belong in different venues. This Court should not be the first. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 719 n.7 (2005).

2. If this Court is inclined to review the circuit courts' disagreement over venue under Section 7607(b)(1), then the pending petitions in *Oklahoma* and *Pacificorp* present that issue without the same vehicle defects. Those petitions seek review of the deeper split over the meaning of "action" in Section 7607(b)(1) and the effect of EPA's bundling. *Oklahoma* Pet. i, 10–11, 16–18, 27–35, No.

23-1067; *Pacificorp* Pet. i, 2, 23–26, 35–36, No. 23-1068; see also EPA.Pet.20–22 (discussing those petitions and the deeper circuit split). And those petitions would provide a better, cleaner opportunity to address venue.

The government insists that this case provides a "suitable vehicle" because the court of appeals "below squarely addressed both statutory bases for transfer to the D.C. Circuit." EPA Pet. 23. True, the Fifth Circuit did reject both of EPA's venue arguments: that the Denials were "nationally applicable" or alternatively "based on a determination of nationwide scope or effect." But the court did so where EPA made only the flimsiest assertion that its individual refinery adjudications were actually based on a nationwide determination about every refinery's economic condition. And while the Tenth Circuit did not have occasion to reach the nationwide-scope-or-effect question in *Oklahoma* and *Pacificorp*, this Court has the benefit of the Fourth, Fifth, and Sixth Circuits' opinions, all of which reached that issue in the context of SIP denials. See *Oklahoma* Cert. Reply 6, No. 23-1067.

The government next contends that this case is "a better vehicle for the Court to clarify the proper application of Section 7607(b)(1)" because the Fifth Circuit "issued a final judgment disposing of the case" on the merits. EPA Brief in Opp. 20, *Oklahoma*, No. 23-1067, *Pacificorp*, No. 23-1068. But because the issue here is *venue*, the government has it backward. A full merits adjudication should give the Court pause when it is asked to review only a venue question. As this Court has explained, venue "is a separate and independent matter, anterior to the merits and not enmeshed" in them. *Langdeau*, 371 U.S. at 558. As an "anterior" matter, courts should resolve venue *prior to* the merits where possible. This Court did just that in *National Association of Manufacturers* v. *Depart-*

ment of Defense, 583 U.S. 109 (2018), when it resolved a split before either case was decided on the merits.[6]

The petitions in *Oklahoma* and *Pacificorp* provide an opportunity for this Court to address *all* of the relevant venue issues without sacrificing the substantial party and judicial resources that have already been spent here.[7]

C. The Renewable Intervenors' petition should be denied in any event.

No matter what this Court might do with the government's petition for a writ of certiorari in this case, the Renewable Intervenors' petition should be denied.

The Renewable Intervenors never had any plausible interest in this case to begin with. They are not obligated parties for the RFS, and EPA's decisions in 2022 denying hardship relief to some of the Nation's smallest refineries for *past* compliance years (2019–2021) will have no impact on demand for the renewable fuels that Intervenors produce. That is why the D.C. Circuit recently held that some of these same renewable-fuel groups lack standing to advocate in favor of RFS hardship denials. See *Sinclair Wyoming*, 2024 WL 3801747 at *19–21. That court unani-

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[6] EPA has occasionally argued that Section 7607(b)(1)'s venue instructions are jurisdictional, but it does not do so here. And every court of appeals to address the issue has concluded that Section 7607(b)(1) is "not jurisdictional." *Clean Water Action Council of Ne. Wisc., Inc.* v. *EPA*, 765 F.3d 749, 751 (7th Cir. 2014); see *Texas 2016*, 829 F.3d at 418; *Dalton Trucking*, 808 F.3d at 879.

[7] If this Court ultimately decides to grant the government's petition in this case, then it should also grant the *Oklahoma* and *Pacificorp* petitions. As the government notes, "[q]uestions concerning Section 7607(b)(1) have arisen repeatedly in connection with a variety of EPA actions." EPA Brief in Opp. 20, *Oklahoma*, No. 23-1067, *Pacificorp*, No. 23-1068. If the Court is going to answer those venue questions, it should do so with the benefit of the ability to consider a variety of the EPA actions in which the question arises.

mously determined that the renewable intervenors in that case had not offered any plausible showing that EPA's decisions on small-refinery hardship relief would affect their interests. *Ibid.*

What's more, the Renewable Intervenors certainly have no stake in the *venue* issue that is the only question presented to this Court. Renewable Intervenors themselves have said that their interest in this case is limited to "EPA's implementation of the RFS program," ostensibly to "ensur[e] that the renewable fuel standards are not unlawfully reduced by [small refinery exemptions]." Motion to Intervene 6, C.A. Dkt. No. 214, No. 22-60266 (Feb. 17, 2023). The Renewable Intervenors' interest is thus confined to the *merits* of EPA's Denial decisions—not where those Denial decision are reviewed. But neither the Renewable Intervenors nor EPA has asked this Court to review those merits in this case. And like EPA, the Renewable Intervenors cannot claim after *Sinclair Wyoming* that the merits of this case will be affected by which court hears it.

Even if the Renewable Intervenors had some vague interest in the venue for challenges to future RFS hardship denial decisions, the government more than adequately represents that interest in this Court. It is *the government* that wants to litigate future challenges to *its* RFS actions exclusively in the D.C. Circuit, for reasons of its own convenience. And no party has more experience litigating federal statutory questions before this Court. The Renewable Intervenors' petition makes clear that they do not offer any unique or useful insight into the interpretation or operation of this federal venue statute. Their petition does not materially add to EPA's, so granting it would only needlessly complicate briefing and argument in this Court.

Given the Renewable Intervenors' lack of any discernible interest in the venue question and the D.C. Circuit's doubts about their standing, this Court has ample reason to deny the Renewable Intervenors' petition regardless of its decision on EPA's petition.

Conclusion

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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Statutory Appendix

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Regulations of fuels

(o) Renewable fuel program

(1) Definitions

In this section:

(A) Additional renewable fuel

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

(B) Advanced biofuel

(i) In general

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

(ii) Inclusions

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

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

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

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

(IV) Biomass-based diesel.

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

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

(VII) Other fuel derived from cellulosic biomass.

(C) Baseline lifecycle greenhouse gas emissions

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

(D) Biomass-based diesel

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

(E) Cellulosic biofuel

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

(F) Conventional biofuel

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

(G) Greenhouse gas

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

(H) Lifecycle greenhouse gas emissions

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

(I) Renewable biomass

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

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

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

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

(iii) Animal waste material and animal byproducts.

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

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

(vi) Algae.

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

(J) Renewable fuel

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

(K) Small refinery

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

(L) Transportation fuel

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

(2) Renewable fuel program

(A) Regulations

(i) In general

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

(ii) Noncontiguous State opt-in

(I) In general

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

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

(II) Other actions

In carrying out this clause, the Administrator may—

(aa) issue or revise regulations under this paragraph;

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

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

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

(iii) Provisions of regulations

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

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

(II) shall not—

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

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

(iv) Requirement in case of failure to promulgate regulations

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

(B) Applicable volumes

(i) Calendar years after 2005

(I) Renewable fuel

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

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

(II) Advanced biofuel

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

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

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

(III) Cellulosic biofuel

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

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

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

(IV) Biomass-based diesel

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

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

(ii) Other calendar years

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

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

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

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

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

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

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

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

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

(iii) Applicable volume of advanced biofuel

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

(iv) Applicable volume of cellulosic biofuel

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

(v) Minimum applicable volume of biomass-based diesel

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

(3) Applicable percentages

(A) Provision of estimate of volumes of gasoline sales

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

(B) Determination of applicable percentages

(i) In general

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

(ii) Required elements

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

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

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

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

(C) Adjustments

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

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

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

(4) Modification of greenhouse gas reduction percentages

(A) In general

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

(B) Amount of adjustment

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

(C) Adjusted reduction levels

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

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

(D) 5-year review

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

(E) Subsequent adjustments

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

(F) Limit on upward adjustments

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

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

(G) Applicability of adjustments

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

(5) Credit program

(A) In general

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

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

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

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

(B) Use of credits

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

(C) Duration of credits

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

(D) Inability to generate or purchase sufficient credits

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

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

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

(E) Credits for additional renewable fuel

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

(6) Seasonal variations in renewable fuel use

(A) Study

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

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

(B) Regulation of excessive seasonal variations

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

(C) Determinations

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

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

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

(D) Periods

The 2 periods referred to in this paragraph are—

(i) April through September; and

(ii) January through March and October through December.

(E) Exclusion

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

(F) State exemption from seasonality requirements

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

(7) Waivers

(A) In general

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

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

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

(B) Petitions for waivers

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

(C) Termination of waivers

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

(D) Cellulosic biofuel

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

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

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

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

(E) Biomass-based diesel

(i) Market evaluation

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

(ii) Waiver

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

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

(iii) Extensions

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

(F) Modification of applicable volumes

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

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

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

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

(8) Study and waiver for initial year of program

(A) In general

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

(B) Required evaluations

The study shall evaluate renewable fuel—

(i) supplies and prices;

(ii) blendstock supplies; and

(iii) supply and distribution system capabilities.

(C) Recommendations by the Secretary

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

(D) Waiver

(i) In general

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

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

(ii) No effect on waiver authority

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

(9) Small refineries

(A) Temporary exemption

(i) In general

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

(ii) Extension of exemption

(I) Study by Secretary of Energy

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

(II) Extension of exemption

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

(B) Petitions based on disproportionate economic hardship

(i) Extension of exemption

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

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

(ii) Evaluation of petitions

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

(iii) Deadline for action on petitions

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

(C) Credit program

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

(D) Opt-in for small refineries

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

(10) Ethanol market concentration analysis

(A) Analysis

(i) In general

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

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

(ii) Scoring

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

(B) Report

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

(11) Periodic reviews

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

(A) existing technologies;

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

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

(12) Effect on other provisions

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

sentence shall not affect implementation and enforcement of this subsection.

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

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

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

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

(b) Judicial review

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

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[1] So in original.

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

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

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