No. 23-1230

IN THE

Supreme Court of the United States

GROWTH ENERGY AND THE RENEWABLE FUELS ASSOCIATION,
Petitioners,

v.

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

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Respondents concede that the question presented involves a clear circuit split on a nationally important issue.

Therefore, respondents' merits arguments are no reason to avoid review—indeed, they reinforce the division among the circuits and the need for clarification. They are also wrong.

Nor are there any problems with using this case as a vehicle to resolve the question presented. The merits decision below and the D.C. Circuit's recent counterpart decision differ substantively, but even if they were identical, immediate review would still be warranted. This Court has routinely clarified standards for determining the proper court irrespective of whether doing so would affect the case's ultimate outcome, to avert wasteful litigation over inevitably recurring forum questions.

The risk of wasteful litigation and inconsistent results, and thus the need for immediate clarification, is especially strong here. EPA will issue new decisions on the Renewable Fuel Program ("RFP") exemption petitions remanded by the court below and by the D.C. Circuit in its counterpart case, as well as on other pending and future exemption petitions. These myriad decisions will almost certainly precipitate a stream of new lawsuits, again raising venue questions and creating serious risk of divergent merits decisions. This Court should grant certiorari now to ensure an efficient process for the uniform review of nationally significant RFP exemption actions.

The pending certiorari petitions in *Oklahoma* v. *EPA*, No. 23-1067, and *PacifiCorp* v. *EPA*, No. 23-1068, do not present a better vehicle. This Court recently

recognized the importance of RFP exemptions—which have a huge effect on the transportation-fuel industry—when it granted certiorari in *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382 (2021). And, as respondents acknowledge, granting certiorari both here and in *Oklahoma/PacifiCorp* would yield more complete guidance on venue.

Finally, petitioners' interest in this case is clear, as the court below and the D.C. Circuit in its counterpart case recognized in granting petitioners' opposed intervention motions.

The Court should grant certiorari.

ARGUMENT

I. THE DECISION BELOW IS WRONG

Respondents present new arguments in hopes of rehabilitating a decision whose reasoning they do not defend. Because the question presented undisputedly involves a circuit split, the Court need not dwell on respondents' new merits arguments now. Regardless, those arguments fail.

A. Respondents principally argue that "the relevant administrative action is EPA's denial of each small refinery's *individual* petition for hardship relief." Opp.17, 20-21 (cleaned up). Their argument confirms the need for certiorari. As the petition explained (at 16-21), the circuit courts—across various Clean Air Act contexts—are broadly divided over whether an integrated decision resolving multiple individual parties' interests is the relevant "action" for venue purposes.

Also, respondents are wrong in this case. EPA defined the "actions" as the two integrated decisions denying multiple exemption petitions: "In this action, [EPA]

is denying 69 petitions …. This final action … is a single action, but it is comprised of the adjudication of 69 [exemption] petitions." Pet.App.45a; *see* Pet.10, 30. Respondents' contrary statutory arguments beg the question by assuming that the "action" can only be the decision on an individual exemption petition. *See* Opp.18-19.

Respondents' argument is also beside the point, in two ways.

First, *every* individual RFP exemption adjudication is "nationally applicable" and would qualify for a published EPA finding that it is "based on a determination of nationwide scope or effect," 42 U.S.C. §7607(b)(1), because, as petitioners explained (at 9, 30-31), every RFP exemption necessarily either creates a national renewable-fuel shortfall or increases the RFP obligations of all non-exempt obligated parties around the country. Respondents ignore this point.

Second, each individual *2022* exemption adjudication is "nationally applicable" and "based on a determination of nationwide scope or effect" because each adopted and applied a common standard governing all small refineries wherever they are located: a causation requirement and a presumption based on a general cost-recoupment finding. Pet.9-11, 29-30. Indeed, those general, national determinations are the target of respondents' litigation. *See* Pet.30. Therefore, given that each 2022 exemption adjudication "involve[s] generic determinations" and "issues," "centralize[d] review" in the D.C. Circuit is necessary to achieve the "even and consistent national application" that Congress desired in establishing the venue provision. 41 Fed. Reg. 56,767, 56,768:3-56,769:1 (Dec. 30, 1976) (cleaned up); S. Rep. No. 91-1196, at 41 (1970); *see* Pet.27-30.

Respondents counter (at 21-23) that small refineries "typically" base their RFP exemption petitions on claims that they "face unique burdens related to their local circumstances and market conditions," and that EPA "could not have complied with the CAA without" "bas[ing] its ultimate [2022] denial actions on determinations about local facts and data." Maybe so, but the Act's venue provision recognizes the reality that *EPA's decisions* may be based on multiple determinations and venue may be laid in the D.C. Circuit if any of those determinations has nationwide scope or effect, as is the case for the 2022 exemption actions. Pet.32-33.[1]

B. Respondents argue (at 24-26) that the "uniform-standard rationale … proves too much": the D.C. Circuit would have exclusive venue over every EPA action "because every action is traceable to a uniform statutory standard." It is respondents who overstate their case.

The 2022 exemption actions differ from many Clean Air Act actions and did not merely "appl[y a] new interpretation of the hardship standard and [a] new economic" finding. Opp.24. Those uniform elements were *adopted* through the actions, Pet.App.181a; and they are the *target* of respondents' challenge, *see* Pet.30.

Moreover, even if, as respondents contend, the "uniform-standard rationale" meant that virtually all EPA actions were "based on a determination of nationwide scope or effect," it would not follow that the D.C. Circuit

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[1] Contrary to respondents' call (at 22) for "de novo" review, EPA's finding that the 2022 exemption actions are based on determinations of nationwide scope or effect must be reviewed deferentially. 5 U.S.C. §706(2)(A); *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244, 2247, 2261 (2024); *see also* 42 U.S.C. §7607(d)(9)(A). But that finding is so obviously correct that the standard of review is irrelevant.

would always be the exclusive venue for review. EPA would also have to publish the requisite finding for each action. This qualification is salutary; it allows EPA—which will be more familiar than courts with the precise scope and consequences of its actions—to centralize review in the D.C. Circuit when EPA recognizes that there is a national issue requiring uniform resolution, and otherwise to allow more localized disputes to proceed in local circuits.

C. Finally, respondents fret (at 21) that "joint briefing" in the D.C. Circuit "alongside dozens of other refineries" will make it "difficult … to draw attention to their particular local circumstances." That fear cannot override Congress's interest in ensuring efficient and uniform resolution of nationally significant issues. It also is misplaced, as shown by the fact that nearly 30 refinery-petitioners in the D.C. Circuit's counterpart case adequately briefed their individual circumstances. *See* Pet'rs.' Final Joint Opening Br.81-88, ECF #2035080, *Sinclair Wyoming Refining Co.* v. *EPA*, No. 22-1073 (D.C. Cir. Jan. 9, 2024).

II. THIS CASE REMAINS AN IDEAL VEHICLE

None of respondents' supposed vehicle problems would hinder effective review.

A. Respondents contend (at 26-27) that this case is no longer "important enough to warrant" review because the D.C. Circuit, in its counterpart case, has now vacated 2022 exemption actions like the court below did, and therefore the outcome is the same in either circuit. *See Sinclair Wyoming Refining Co.* v. *EPA*, No. 22-1073, 2024 WL 3801747, at *6-13 (D.C. Cir. July 26, 2024). That decision—which is the subject of a pending rehearing petition—does not diminish the need for certiorari.

To start, respondents disregard the significant differences between the Fifth and D.C. Circuits' merits decisions. Although both courts vacated the exemption actions, they did not "adopt[] the same reasoning" in all respects, Opp.27, leaving EPA ample room to reach different results on remand from the two courts. The court below held that EPA impermissibly acted retroactively when it ceased relying on the Department of Energy's 2011 Study and "scoring matrix." Pet.App.16a-22a. In contrast, the D.C. Circuit declined to reach the retroactivity issues. *Sinclair Wyoming*, 2024 WL 3801747, at *13 n.12. Therefore, EPA must adhere to that old methodology when re-adjudicating the exemption petitions remanded by the Fifth Circuit but not when re-adjudicating the ones remanded by the D.C. Circuit. Additionally, the court below and the D.C. Circuit found different flaws in EPA's RIN-passthrough analysis. *Compare* Pet.App.29a-32a *with Sinclair Wyoming*, 2024 WL 3801747, at *10-13.

But more fundamentally, the worthiness of this certiorari petition has nothing to do with whether the Fifth and D.C. Circuits have agreed on the merits of the 2022 exemption actions. This Court has routinely granted certiorari to resolve questions about the proper forum regardless of whether doing so would affect the case's ultimate outcome, *see* Pet.21-23 (cases collected)—and even when resolving the forum question would probably *not* affect the ultimate outcome, *see* Opp.15, *Elgin* v. *Department of Treasury*, No. 11-45 (U.S. Sept. 9, 2011) ("Resolution of the question presented would not be outcome-determinative in this case …."); Opp.33-34, *TC Heartland LLC* v. *Kraft Foods Group Brands LLC*, No. 16-341 (U.S. Nov. 16, 2016) ("a ruling on the venue question is unlikely to affect the actual dispute between these parties"). The Court has done so in recognition that "[i]t

is of first importance to have a [rule] … that will not invite extensive threshold litigation" over the proper court because such inevitably recurring "litigation … is essentially a waste of time and resources." *Navarro Savings Ass'n* v. *Lee*, 446 U.S. 458, 464 n.13 (1980) (cleaned up).

That concern is acute here. Even if the Fifth and D.C. Circuits' merits decisions were identical, immediate review of the question presented would still be imperative because litigation over RFP exemption decisions—and thus over the venue for reviewing them—will continue in this case and in future cases. EPA's re-adjudications on remand will spur a new round of litigation. EPA's *2023* exemption action has *already* prompted litigation in the D.C. Circuit and seven local circuits. Pet.24. And refineries presumably will continue filing exemption petitions annually, prompting more rounds of litigation (currently, 48 exemption petitions await adjudication). *Id.*; EPA, *RFS Small Refinery Exemptions* at tbl. SRE-2.[2]

These new rounds of lawsuits will surely raise the venue issue again, at least outside the Fifth and Eleventh Circuits. And as long as the circuit split remains—and especially if it expands—the potential for divergent outcomes on the merits will persist. Denying certiorari now and waiting for the issue to return would needlessly guarantee more wasted resources on threshold litigation and needlessly increase the likelihood of inconsistent substantive RFP rules, contrary to Congress's desire for the Act's venue provision to ensure uniformity on significant national issues. *See* Pet.27-29.

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[2] https://www.epa.gov/fuels-registration-reporting-and-compliance-help/rfs-small-refinery-exemptions (updated Aug. 15, 2024).

Respondents object (at 26) that the "parties and the circuit courts have already expended enormous time and resources to thoroughly evaluate EPA's Denials." That reflects the sunk-cost fallacy. *See Cuff* v. *Trans States Holdings, Inc.*, 768 F.3d 605, 610 (7th Cir. 2014). The pertinent question is how best to avoid future costs. The answer is to grant certiorari now and take advantage of the parties' and the courts' existing investment in the venue issue, rather than force them to make the investment all over again just to arrive at the same place.

B. Respondents speculate (at 27-28) that this case will not "conclusively determine venue for future RFS cases" because it presents a "one-off" situation: "simultaneously announc[ing and applying] a new regulatory approach" in a "bundle" of adjudications made possible by EPA's failure to adjudicate each petition by the statutory deadline.

This case is not unique. As explained, every RFP exemption adjudication is inherently nationally significant because each one necessarily either creates a national renewable-fuel shortfall or increases the RFP obligations of all non-exempt obligated parties. *See supra* p.3. Additionally, as also explained, EPA's use of new uniform standards triggers D.C. Circuit venue even without "bundling." *See supra* p.3. And little imagination is needed to see the potential for similar situations to arise. EPA may well continue to "bundle" adjudications because of common issues or administrative efficiency. Or it might announce and apply another change in its approach during future exemption adjudications, whether bundled or not.

C. Finally, respondents argue (at 27, 29-31) that *Oklahoma/PacifiCorp* offers a "much more suitable vehicle[]" to address the Act's venue provision. Their

points are meritless—and tellingly, they eventually concede that the best course is to grant certiorari in both cases.

Respondents cast (at 17, 27) RFP exemption as "a relatively obscure CAA provision," compared to "the rejection of a SIP," the "commonly recurring type of EPA action" present in *Oklahoma/PacifiCorp*. That assertion does not hold up. EPA annually receives dozens of RFP exemption petitions covering billions of gallons of renewable fuel—more than 10% of the total RFP requirement. Like the RFP itself, exemptions potentially affect every level of the supply chain, from fuel producers all the way to consumers. Pet.25. And litigation invariably ensues from EPA's adjudication of exemption petitions. *See supra* pp.6-7. Indeed, this Court granted certiorari to resolve a unique issue regarding the RFP exemption provision—despite the absence of a circuit split—based on the refinery-petitioners' claim that the functioning of the "exemption program" was "exceptional[ly] important." Pet.11, *HollyFrontier*, No. 20-472 (U.S. Sept. 4, 2020); *see* 594 U.S. 382.

Moreover, as the petition explained (at 33-34), there are real differences between the EPA actions at issue here and in *Oklahoma/PacifiCorp*. Respondents rightly admit (at 31 n.7) that such difference favors granting certiorari in both cases so the Court can "assess the venue issues in light of a broader range of circumstances and provide more complete guidance for EPA, private litigants, and the circuit courts."

III. PETITIONERS HAVE A STRONG INTEREST IN THIS CASE

Respondents are wrong to assert that petitioners have no "plausible interest in this case." Opp.31. Petitioners are associations representing the producers of the ethanol used to meet about two-thirds of the annual

"conventional" RFP requirements and about half of the annual "total" RFP requirements. The court below and the D.C. Circuit in its counterpart case recognized petitioners' interest in granting petitioners' opposed motions to intervene. *See* C.A.ECF #303 (Mar. 16, 2023); Order, ECF #1987065, *Sinclair Wyoming*, No. 22-1073 (D.C. Cir. Feb. 22, 2023); Fed. R. Civ. P. 24(a)(2).

A. The RFP mandates the percentage of the national transportation-fuel supply that must be renewable; thus it determines the national renewable-fuel demand and precludes petroleum producers from competing with renewable-fuel producers for that portion of the transportation-fuel supply. Pet.5-6; *see also Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 696-697, 710 (D.C. Cir. 2017). If granted, the exemption petitions covered by the 2022 exemption actions would injure petitioners' members because the exemptions would in effect reduce the national RFP requirements, thereby diminishing national demand for the members' renewable fuel and expanding the portion of the market in which the members would face competition from petroleum producers. Pet.8-9; *see, e.g.*, *Alon Refining Krotz Springs, Inc.* v. *EPA*, 936 F.3d 628, 665 (D.C. Cir. 2019); *Renewable Fuels Ass'n* v. *EPA*, 948 F.3d 1206, 1233-1236 (10th Cir. 2020), *vacated on other grounds sub nom. HollyFrontier*, 594 U.S. 382; *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

This is true even though the 2022 exemption actions involve "*past* compliance years." Opp.31. As EPA found, requiring compliance from the refineries covered by the actions would "increase demand for renewable fuels in the future." EPA, *April 2022 Alternative Compliance Demonstrative Approach for Certain Small*

Refineries 17 ("*Alternative Compliance*")[3]; EPA, *RFS Annual Rules, Regulatory Impact Analysis* 7 (June 2022).[4] To comply with the obligations that were reinstated by the exemption denials, obligated parties would have to either use additional renewable fuel immediately or draw down the RIN bank. *Alternative Compliance* at 12-14; Pet.7. A bank drawdown would make those used RINs unavailable to meet a future year's obligations, forcing obligated parties to use more renewable fuel in the future to meet that future year's obligations. *See* 87 Fed. Reg. 39,600, 39,613:1 n.75 (July 1, 2022).

In holding that petitioner Growth Energy lacked standing to challenge a different RFP action in a different case, *Sinclair Wyoming*, 2024 WL 3801747, at *19-21, the D.C. Circuit misapprehended these basic RFP mechanics, contradicted precedents of this Court and the Circuit on standing, and contravened the Tenth Circuit's ruling that the identically situated Renewable Fuels Association (also a petitioner here) had standing to challenge three exemptions for other past years, *see Renewable Fuels*, 948 F.3d at 1236. Consequently, Growth Energy has sought rehearing of the D.C. Circuit's standing ruling. In any event, as intervenors now seeking the same relief as EPA here, petitioners' standing in this case is irrelevant to the certworthiness of their petition. *Little Sisters of the Poor Saints Peter & Paul Home* v. *Pennsylvania*, 591 U.S. 657, 674 n.6 (2020).

B. Petitioners also have a strong "stake in the *venue* issue." Opp.32. As regular participants in lawsuits involving RFP exemption actions around the

[3] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P1014EK3.pdf.

[4] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P10155TQ.pdf.

country, petitioners strongly prefer centralized review of RFP exemption actions in the D.C. Circuit to avoid expensive duplicative litigation and inconsistent exemption standards—both for any EPA actions on remand regarding the exemption petitions at issue here and for any other future RFP exemption actions. Uniformity engenders "the market certainty so critical to the [RFP's] long term success" by, among other things, enabling the renewable-fuels industry to plan for future demand more reliably. *Americans for Clean Energy*, 864 F.3d at 715 (cleaned up).

Nor does the government "adequately represent[]" petitioners. Opp.32. Courts "look skeptically on government entities serving as adequate advocates for private parties." *Crossroads Grassroots Policy Strategies* v. *FEC*, 788 F.3d 312, 321 (D.C. Cir. 2015). And petitioners have presented some arguments that are different from the government's to ensure that all RFP exemption adjudications are reviewable in the D.C. Circuit.

CONCLUSION

The Court should grant certiorari here, regardless of whether it does so in *Oklahoma/PacifiCorp*.

Respectfully submitted.

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