No. 23-1229

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

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

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

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

In a pair of final actions, the United States Environmental Protection Agency (EPA) denied 105 petitions filed by small oil refineries seeking exemptions from the requirements of the Clean Air Act's Renewable Fuel Standard program. Six of those refineries petitioned for review of EPA's decisions in the Fifth Circuit, which denied the government's motion to transfer the petitions to the D.C. Circuit. The question presented is as follows:

Whether venue for the refineries' challenges lies exclusively in the D.C. Circuit because the denial actions are "nationally applicable" or, alternatively, are "based on a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-43a) is reported at 86 F.4th 1121.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 2023. Petitions for rehearing were denied on January 22, 2024 (Pet. App. 331a-333a). On April 11, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including May 21, 2024. The petition for a writ of certiorari was filed on May 20, 2024, and was granted on October 21, 2024. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix. App., *infra*, 1a-32a.

STATEMENT

A. Legal Background

1. When a petitioner seeks review of a "final action" taken by the Environmental Protection Agency (EPA) under the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, Section 7607(b)(1) of Title 42 provides for direct court of appeals review of the petitioner's challenge. To determine which circuit has exclusive venue over the challenge, Section 7607(b)(1) separates EPA's final actions into three categories. First, challenges to certain specified actions or to "any other nationally applicable regulations promulgated, or final action taken," must be filed "only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. 7607(b)(1). Second, challenges to actions that are "locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit." *Ibid.* Third, "[n]otwithstanding" the sentence directing review of locally or regionally applicable actions to "the appropriate circuit," challenges to such locally or regionally applicable actions "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." *Ibid.*

Congress adopted this three-prong structure in 1977. See Clean Air Act Amendments of 1977, Pub. L. No. 95, 91 Stat. 776. The predecessor to Section 7607(b)(1) had provided for direct court of appeals review only of certain specifically enumerated EPA actions. 42 U.S.C. 1857h-5(b)(1) (1970). EPA actions involving "national primary or secondary ambient air quality standard[s]," "emission standard[s]," or other

specified standards or controls were reviewable only in the D.C. Circuit, while EPA's actions "in approving or promulgating" a state or federal "implementation plan" were reviewable only in "the appropriate circuit." *Ibid.* That division reflected Congress's view that EPA actions that are "national in scope" should receive "even and consistent national application," which would be accomplished through centralized D.C. Circuit review. S. Rep. No. 1196, 91st Cong., 2d Sess. 41 (1970) (1970 Senate Report). By contrast, Congress viewed EPA actions approving or promulgating "implementation plans which run only to one air quality control region" as appropriately reviewed "in the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located." *Ibid.* At that time, the venue provision did not include a catchall for other nationally or locally or regionally applicable actions, nor did the provision specifically reference EPA actions that are based on a determination of nationwide scope or effect. Rather, final actions that the CAA venue provision did not specifically address were reviewable only by a district court exercising federal-question jurisdiction. See *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 584 (1980).

In 1977, Congress amended the statute to authorize direct court of appeals review of all EPA "final actions" under the CAA. Congress achieved that result by adding the catchall categories for the first two subsets of final actions, and by adding the third category of locally or regionally applicable actions that are based on a determination of nationwide scope or effect. The House Report accompanying the amendment explained that the revision would "provide[] for essentially locally, statewide, or regionally applicable rules or orders to be

reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located." H.R. Rep. No. 294, 95th Cong., 1st Sess. 323 (1977) (1977 House Report). "On the other hand," the report explained, venue would lie only in the D.C. Circuit "if an action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect beyond a single judicial circuit)." *Id.* at 324.

2. The EPA actions at issue in this case involve the Renewable Fuel Standard (RFS) program, a CAA program that generally requires transportation fuel sold or introduced into commerce in the United States to contain specified volumes of renewable fuel. See 42 U.S.C. 7545(*o*)(2)(A)(i) and (B)(i). To implement the program, EPA expresses renewable-fuel targets as a percentage of the gasoline and diesel fuel that is projected to be sold in the upcoming year, and the agency adopts regulations to ensure compliance. See 42 U.S.C. 7545(*o*)(2)(A)(i); see also 42 U.S.C. 7545(*o*)(3). Obligated parties "use that annual-percentage standard to determine their volume obligations" for the year. Pet. App. 3a. Each obligated party's renewable-fuel-volume obligation is proportional to its annual production or importation of gasoline and diesel fuel.

EPA's implementing regulations identify refineries and importers of gasoline and diesel as obligated parties subject to RFS requirements. 40 C.F.R. 80.2, 80.1406. To track whether an obligated party has satisfied RFS program requirements, EPA uses a credit system that offers parties flexibility in achieving compliance. See 42 U.S.C. 7545(*o*)(5). Producers and importers of renewable fuels generate credits—called Renewable Identification Numbers (RINs)—for each gallon of renewable

fuel they produce or import for use in the United States. 40 C.F.R. 80.1426(a). The producers and importers assign a RIN to each batch of renewable fuel. 40 C.F.R. 80.1426(e). A RIN may be used after it is "separated" from its batch by an obligated party or by an entity that blends the renewable fuel into gasoline or diesel. 40 C.F.R. 80.1429(b). Once separated, RINs may be kept for compliance or sold. 40 C.F.R. 80.1425-80.1429. Each year, a refinery may generate its own credits by blending renewable fuel into transportation fuel, or it may purchase the requisite number of credits. See Pet. App. 206a-207a; see also 42 U.S.C. 7545(*o*)(5)(B) and (E); 40 C.F.R. 80.1428(b), 80.1429(b).

Obligated parties meet their renewable-fuel-volume obligations by "retir[ing]" RINs in an annual compliance demonstration. 40 C.F.R. 80.1427(a)(1). A refinery may use a particular RIN only during the calendar year in which it was generated or in the following calendar year. 40 C.F.R. 80.1427(a)(6), 80.1428(c). An obligated party who fails to demonstrate full compliance in one year may carry forward a compliance deficit to the following year. 42 U.S.C. 7545(*o*)(5)(D).

Congress created a three-tiered scheme through which obligated parties that qualify as "[s]mall refineries" may obtain exemptions from RFS program requirements. 42 U.S.C. 7545(*o*)(9) (emphasis omitted); see 42 U.S.C. 7545(*o*)(1)(k) (defining "small refinery").

First, Congress granted all small refineries a blanket exemption until 2011. 42 U.S.C. 7545(*o*)(9)(A)(i).

Second, Congress directed the U.S. Department of Energy (DOE) to study "whether compliance with the requirements of [the RFS program] would impose a disproportionate economic hardship on small refineries." 42 U.S.C. 7545(*o*)(9)(A)(ii)(I). For any small refinery

that DOE determined "would be subject to a disproportionate economic hardship if required to comply," Congress directed EPA to extend the exemption for at least two years. 42 U.S.C. 7545(*o*)(9)(A)(ii)(II).

Third, Congress established a mechanism through which a small refinery "may at any time petition [EPA] for an extension of the exemption under subparagraph (A) for the reason of disproportionate economic hardship." 42 U.S.C. 7545(*o*)(9)(B)(i). In evaluating a petition for such an exemption, EPA, "in consultation with" DOE, "shall consider the findings of [DOE's study] and other economic factors." 42 U.S.C. 7545(*o*)(9)(B)(ii).

B. Facts And Proceedings Below

1. In August 2019, EPA issued a single decision acting on 36 exemption petitions filed by small refineries for the 2018 compliance year, granting 31 petitions and denying five. See C.A. App. 2928. Multiple parties petitioned for review of the action in the D.C. Circuit. See *Sinclair Wyoming Ref. Co.* v. *EPA*, No. 19-1196; *Big West Oil, LLC* v. *EPA*, No. 19-1197; *Renewable Fuels Ass'n* v. *EPA*, No. 19-1220; *Kern Oil & Ref. Co.* v. *EPA*, No. 19-1216; *Wynnewood Ref. Co.* v. *EPA*, No. 20-1099.

While those challenges were pending, the Tenth Circuit issued a decision vacating and remanding three EPA orders granting three exemption petitions for the 2016 and 2017 compliance years. *Renewable Fuels Ass'n* v. *EPA*, 948 F.3d 1206, 1258 (2020). The court held that a small refinery is eligible for an extension of an exemption only if it has maintained a continuous, uninterrupted exemption, *id.* at 1245-1249; that "renewable fuels compliance must be the cause of any disproportionate hardship" in order for an exemption to be available, *id.* at 1253; and that EPA had "'failed to consider an important aspect of the problem'" when it did not ad-

dress whether refiners could "pass RIN costs on to customers," *id.* at 1257 (citation omitted). This Court granted a petition for a writ of certiorari limited to the first of those Tenth Circuit holdings. *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 974 (2021). Pending this Court's resolution of *HollyFrontier*, the D.C. Circuit granted EPA's motion to hold in abeyance the petitions for review that had been filed in that court. See *Sinclair Wyoming Ref. Co.* v. *EPA*, No. 19-1196, Doc. 1883334 (Feb. 2, 2021); p. 6, *supra*.

This Court reversed the Tenth Circuit decision in *HollyFrontier*, holding that a small refinery may be eligible for an exemption renewal even if the refinery had allowed a prior exemption to lapse. *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382, 390 (2021). In the pending D.C. Circuit proceedings, EPA then moved for a voluntary remand without vacatur to allow the agency to reconsider its action on the 2018 exemption petitions in light of this Court's decision in *HollyFrontier*, and in light of the Tenth Circuit's analysis in *Renewable Fuels Association* of additional issues this Court had not reached. See *Sinclair Wyoming Ref. Co.*, No. 19-1196, Doc. 1911606 (Aug. 25, 2021). The D.C. Circuit granted that motion and instructed EPA to act on the petitions within 120 days. *Sinclair Wyoming Ref. Co.*, No. 19-1196, Doc. 1925942 (Dec. 8, 2021).

2. In December 2021, EPA proposed to deny all pending small refinery exemption petitions. 86 Fed. Reg. 70,999 (Dec. 14, 2021); see C.A. App. 520-585. Seeking to create a nationally uniform program, EPA proposed to adopt the Tenth Circuit's reasoning in *Renewable Fuels Association* on the issues this Court had

not considered. Under that approach, EPA proposed to interpret the pertinent statutory provisions as requiring small refineries seeking exemptions to show that RFS compliance itself caused a disproportionate economic hardship. C.A. App. 545-548. In accordance with the Tenth Circuit's analysis, EPA also analyzed whether refineries were able to pass on the costs of RFS compliance to consumers. The agency concluded that the evidence supported a rebuttable presumption that such costs "are fully passed through to consumers," so that small refineries ordinarily would not suffer disproportionate economic hardship as a result of RFS compliance. *Id.* at 549; see *id.* at 548-584. In light of those conclusions, EPA proposed to deny all the pending exemption petitions and sought comment on that proposed decision.

After the comment period ended, EPA took two actions. In April 2022—the deadline set by the D.C. Circuit to resolve the remanded petitions—EPA denied 36 exemption petitions filed by small refineries for the 2018 compliance year. Pet. App. 193a; see *April 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program*, 87 Fed. Reg. 24,300 (Apr. 25, 2022) (*April Notice*). In June 2022, EPA denied an additional 69 petitions for the 2016-2021 compliance years. Pet. App. 48a; see *Notice of June 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program*, 87 Fed. Reg. 34,873, 34,874 (June 8, 2022) (*June Notice*). The two denial actions reflect the same reasoning and are based on two principal rationales, one statutory and one economic.[1] The denial actions contain ex-

[1] For ease of reference, this brief cites only the April 2022 denial when discussing reasoning common to both actions.

plicit agency findings that the actions are nationally applicable or, in the alternative, that they are based on determinations of nationwide scope or effect.

Statutory interpretation. In the April and June 2022 denial actions, EPA concluded that an extension of the small refinery exemption under the relevant provisions may be granted only if disproportionate economic hardship was "caused by RFS compliance." Pet. App. 242a. For relevant context, the agency turned to paragraph (A) of 42 U.S.C. 7545(*o*)(9), which established the initial blanket exemption for small refineries and the two-year extension based on the DOE study. See 42 U.S.C. 7545(*o*)(9)(A) and (B). The agency observed that paragraph (A) focuses on "whether compliance with the requirements of [the RFS program] would impose a [disproportionate economic hardship] on small refineries." Pet. App. 243a (quoting 42 U.S.C. 7545(*o*)(9)(A)(ii)(I)). Because paragraph (B) provides for an extension of the exemption provided by paragraph (A), EPA construed paragraph (B) to require a similar causal connection between RFS compliance and any resulting economic hardship. *Id.* at 245a. The agency found it "hard to imagine that Congress intended" to permit exemptions for hardships resulting from "a broad array of circumstances unrelated to the RFS program." *Id.* at 247a.

Economic analysis. In implementing the RFS program, EPA has made "longstanding and consistent findings" that obligated parties can pass the costs of RFS compliance on to purchasers, a phenomenon called RIN cost passthrough. Pet. App. 248a; see, *e.g.*, *Alon Ref. Krotz Springs, Inc.* v. *EPA*, 936 F.3d 628, 649-650 (D.C. Cir. 2019) (per curiam) (discussing earlier studies reaching this conclusion), cert. denied, 140 S. Ct. 2792 (2020). In the April and June 2022 denial actions, EPA

reassessed and reaffirmed those prior findings. Pet. App. 248a-303a; see *id.* at 240a-241a (explaining related concept of "RIN discount"). After reviewing extensive market data, the agency determined that "all obligated parties recover the cost of acquiring RINs by selling the gasoline and diesel fuel they produce at the market price, which reflects these RIN costs." *Id.* at 249a. EPA further concluded that "RINs are generally widely available in an open and liquid market," and that the "cost of acquiring RINs is the same for all parties." *Ibid.*

Given that all refineries bear the same costs of RFS compliance and can recover those costs by selling at market price, EPA found that such costs presumptively do not cause disproportionate economic hardship to any small refinery. Pet. App. 248a-250a. EPA determined that none of the petitioning small refineries had rebutted that presumption through evidence about their specific circumstances. *Id.* at 251a-252a; see *id.* at 305a-310a.

Venue. EPA determined that the denial actions are subject to review exclusively in the D.C. Circuit because they are "'nationally applicable'" or, in the alternative, because they are "based on a determination of 'nationwide scope or effect.'" Pet. App. 328a; *id.* at 187a (same for June 2022 denial action); see *April Notice*, 87 Fed. Reg. at 24,300-24,301; *June Notice*, 87 Fed. Reg. at 34,874. The agency explained that the April 2022 denial action encompasses petitions from more than 30 small refineries located within 18 States in seven of the ten EPA regions and in eight different federal judicial circuits. Pet. App. 329a; see *id.* at 187a (similar for June denial). The agency further observed that the denial actions are "based on EPA's revised interpretation of

the relevant CAA provisions and the * * * RIN cost passthrough principles that are applicable to all small refineries no matter the location or market in which they operate." *Id.* at 329a; see *id.* at 187a-188a.

3. Six small refineries filed petitions for review in the Fifth Circuit, collectively challenging both denial actions. Pet. App. 2a, 6a. Various renewable-fuel trade associations were granted leave to intervene as respondents. See 22-60266 C.A. Doc. 303-1 (Mar. 16, 2023). The court granted the petitions for review, vacated the denial actions as to the six petitioners, and remanded to EPA for further proceedings. Pet. App. 1a-34a.

a. The court of appeals denied EPA's motion to transfer the petitions to the D.C. Circuit. Pet. App. 9a-15a. The court held that the denial actions are "locally or regionally applicable" rather than "nationally applicable," 42 U.S.C. 7607(b)(1), because the actions' "legal effect" is limited to the petitioning refineries, and the actions do not "bind[] EPA in any future adjudication," Pet. App. 11a-12a (emphases omitted).

The court of appeals further held that neither denial action is "based on a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1). The court acknowledged, but disagreed with, EPA's express finding that the denial actions were based on such determinations. Pet. App. 12a-14a. The court noted that, under EPA's interpretation of the relevant provisions, the agency will review refinery-specific information to determine whether there is any basis to depart from EPA's general conclusions about market conditions and RIN passthrough. *Id.* at 15a. The court of appeals concluded that, because "there is still a non-zero chance [EPA] will grant small refinery petitions" based on "data and evidence" about particular refineries' circumstances, "the

Denial Actions rely on refinery-specific determinations and are not based on a determination of nationwide scope or effect." *Ibid.*

On the merits, the Fifth Circuit held the denial actions unlawful on three grounds. Pet. App. 16a-33a. First, the court found that small refineries have a protectable property interest in being exempt from RFS program obligations, and that EPA had impermissibly applied its new analysis retroactively to deprive the refineries here of that interest. *Id.* at 16a. Second, the court rejected the agency's interpretation of the governing statutory language. The court characterized the agency's position as requiring that "compliance costs must be *the sole cause* of" hardship, *id.* at 23a, and it disagreed on the ground that hardship may have "myriad causes," *id.* at 25a. Third, the court concluded that the agency had acted arbitrarily and capriciously. *Id.* at 29a-33a. Without questioning the agency's RIN cost passthrough analysis as a general matter, *id.* at 31a n.44, the court found that the analysis was undermined as to the petitioning refineries by data concerning the particular local markets in which they operate, *id.* at 31a-33a.

b. Judge Higginbotham dissented as to venue. Pet. App. 35a-43a. He would have held that the denial actions are "nationally applicable" because they "apply one consistent statutory interpretation and economic analysis to thirty-six small refineries, located in eighteen different states, in the geographical boundaries of eight different circuit courts." *Id.* at 38a. In the alternative, he concluded that the denial actions are "'based on a determination of nationwide scope or effect'" because the "two determinations at the[ir] core"—the agency's statutory interpretation and economic analysis—"are ap-

plicable to all small refineries no matter the location or market in which they operate." *Id.* at 40a-42a.

4. Other small refineries petitioned for review of the April and June 2022 denial actions in the Third, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits. Each of the other regional circuits either dismissed the petitions without prejudice based on improper venue[2] or transferred them to the D.C. Circuit.[3]

The D.C. Circuit consolidated the various petitions that were before it, and on July 26, 2024, the court vacated and remanded the denial actions. *Sinclair Wyoming Ref. Co.* v. *EPA*, 114 F.4th 693 (per curiam). The court held that EPA had imposed an "overly strict causation requirement" in concluding that only disproportionate compliance costs could justify granting an exemption and in failing to consider certain RIN purchases as a source of disproportionate economic hardship. *Id.* at 707; see *id.* at 707-711. The court also held

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[2] See *Hunt Ref. Co.* v. *EPA*, 90 F.4th 1107 (11th Cir. 2024); *Calumet Mont. Ref., LLC* v. *EPA*, No. 22-70124, Doc. 16 (9th Cir. Oct. 25, 2022); *Par Haw. Ref., LLC* v. *EPA*, No. 22-70125, Doc. 16 (9th Cir. Oct. 25, 2022); *San Joaquin Ref. Co.* v. *EPA*, No. 22-70126, Doc. 16 (9th Cir. Oct. 25, 2022); *Kern Oil & Ref. Co.* v. *EPA*, No. 22-70128, Doc. 13 (9th Cir. Oct. 25, 2022); *Calumet Mont. Ref., LLC* v. *EPA*, No. 22-70166, Doc. 14 (9th Cir. Oct. 25, 2022); *Par Haw. Ref., LLC* v. *EPA*, No. 22-70168, Doc. 13 (9th Cir. Oct. 25, 2022); *San Joaquin Ref. Co.* v. *EPA*, No. 22-70170, Doc. 12 (9th Cir. Oct. 25, 2022); *Kern Oil & Ref. Co.* v. *EPA*, No. 22-70172, Doc. 14 (9th Cir. Oct. 25, 2022).

[3] See *American Ref. Grp., Inc.* v. *EPA*, No. 22-1991, Doc. 23 (3d Cir. Aug. 9, 2022); *American Ref. Grp.* v. *EPA*, No. 22-2435, Doc. 20 (3d Cir. Sept. 23, 2022); *Countrymark Ref. & Logistics, LLC* v. *EPA*, No. 22-1878, Doc. 13 (7th Cir. July 20, 2022); *Countrymark Ref. & Logistics, LLC* v. *EPA*, No. 22-2368, Doc. 9 (7th Cir. Sept. 8, 2022); *Wyoming Ref. Co.* v. *EPA*, No. 22-9538, Doc. 010110728295 (10th Cir. Aug. 23, 2022); *Wyoming Ref. Co.* v. *EPA*, No. 22-9553, Doc. 010110737506 (10th Cir. Sept. 12, 2022).

that the denial actions were arbitrary and capricious because EPA had not sufficiently justified its conclusion that small refineries can purchase RINs on a regular basis and recoup that cost in the sales price of their fuel. *Id.* at 711-714. Unlike the Fifth Circuit, however, the D.C. Circuit declined to address whether EPA's approach was impermissibly retroactive. *Id.* at 714 n.12.

SUMMARY OF ARGUMENT

Under the plain terms of Section 7607(b)(1), the denial actions here are reviewable only in the D.C. Circuit. The Fifth Circuit's contrary decision imposes atextual requirements and fails to give effect to the provision Congress enacted.

A. Under Section 7607(b)(1), "nationally applicable" EPA final actions are subject to judicial review only in the D.C. Circuit. 42 U.S.C. 7607(b)(1). To apply that statutory requirement, courts consider the final action on its face and determine whether it applies to entities located throughout the country rather than in a single region. The denial actions here qualify as "nationally applicable" on that basis: They resolve exemption petitions from small refineries located in 18 States and eight federal judicial circuits across the country.

Statutory context confirms that result. Section 7607(b)(1) distinguishes between "nationally applicable" EPA actions, which are subject to review in the D.C. Circuit, and "locally or regionally applicable" actions, which are subject to review in "*the* appropriate circuit." 42 U.S.C. 7607(b)(1) (emphasis added). Congress's use of the definite article indicates that there is only one "appropriate circuit" for review of any particular "locally or regionally applicable" action. When an EPA action applies to entities in multiple circuits, no single regional circuit can be identified as "the" appro-

priate venue, so the action is properly viewed as "nationally applicable" rather than "locally or regionally applicable."

Section 7607(b)(1)'s legislative history reinforces that conclusion. That history reflects Congress's understanding that any "locally or regionally applicable" action could be reviewed in the regional court of appeals where the affected entity was located. Where affected entities are spread across multiple circuits, however, Congress viewed the D.C. Circuit as the proper venue.

In endorsing the contrary conclusion, both the court of appeals and respondents go beyond the statutory text to impose additional restrictions on the availability of D.C. Circuit review. The court of appeals required that the final action have a prospective effect on future agency decisions. But the court did not ground that requirement in the statutory text, and respondents do not defend it. Respondents instead argue that, for venue purposes, the Court should treat the denial of each refinery's exemption petition as a separate "final action." But that requirement likewise is untethered to the statutory text, and this Court has long recognized that agencies have discretion to devise their own procedures, including by aggregating common issues for joint resolution. EPA acted reasonably in taking that approach here. And in determining the proper venue for challenges to the agency's denial actions, the Court should focus on the actions that EPA actually took, rather than on a hypothetical array of 105 separate, refinery-specific disapprovals.

B. Even if this Court finds the denial actions here to be "locally or regionally applicable," those actions are still subject to review only in the D.C. Circuit because they are "based on a determination of nationwide scope

or effect," and EPA published its findings to that effect in accordance with Section 7607(b)(1)'s requirements. 42 U.S.C. 7607(b)(1).

In requiring a "determination of nationwide scope or effect," the statutory text focuses on the underlying reasons for EPA's final action. 42 U.S.C. 7607(b)(1). The final action must be "based on" the relevant determinations, indicating that the determinations must be a but-for cause of the agency's final action—forming the core of the agency's analysis. And to be nationwide in scope or effect, the core justifications for EPA's final action must be intended to govern the agency's decisionmaking in actions throughout the country, or have legal consequences for entities beyond a single judicial circuit.

The denial actions here meet those requirements. EPA found that the denial actions were based on two interrelated determinations of nationwide scope: (1) EPA's statutory interpretation that a small refinery's disproportionate economic hardship will support an exemption only if it is caused by compliance with the RFS program; and (2) EPA's economic analysis of the national market for RINs, which found that the cost to acquire RINs is the same for refineries everywhere and is passed through to consumers in the price of fuels. Those determinations apply to all small refinery exemption requests under the RFS program as a whole, and they were the core rationales for EPA's denials of the exemption requests.

Statutory history confirms Congress's intent that EPA actions like the denial actions here would be reviewable in the D.C. Circuit. The original 1970 version of the venue provision did not specifically authorize D.C. Circuit review of final actions that are based on a

determination of nationwide scope or effect. That statutory gap led to litigation over which circuit qualified as "the appropriate circuit" when EPA issued an action that established a legal framework for implementation plans that spanned multiple States in multiple judicial circuits. In amending the statute to its current form, Congress adopted the view expressed by EPA's then-General Counsel, who urged that challenges to such actions should be channeled to the D.C. Circuit to "centralize review" and "tak[e] advantage of [the D.C. Circuit's] administrative law expertise," thereby "facilitating an orderly development of the basic law" that EPA would apply nationwide. 41 Fed. Reg. 56,767, 56,769 (Dec. 30, 1976).

The court of appeals and respondents have not disputed that the EPA actions at issue here rested in part on interpretive and economic determinations having nationwide scope or effect. They have observed, however, that EPA *also* considered refinery-specific facts in ruling on the exemption requests. But the statute does not require that the final action be based *solely* on determinations of nationwide scope or effect. Nor would such a limitation make sense. The third prong of Section 7607(b)(1) comes into play only when the challenged EPA action is "locally or regionally applicable," and such actions almost always will rest at least in part on consideration of local or regional circumstances. 42 U.S.C. 7607(b)(1).

Respondents are also incorrect in asserting that EPA's interpretation would allow for D.C. Circuit venue for challenges to every locally or regionally applicable action. The statute imposes meaningful limits on EPA's authority to find that a particular action is "based on a determination of nationwide scope or effect." Courts

should enforce those limits without adding more of their own making.

ARGUMENT

THE D.C. CIRCUIT IS THE APPROPRIATE VENUE FOR REVIEW OF THE DENIAL ACTIONS AT ISSUE HERE

The CAA's venue provision reflects a clear congressional preference for "uniform judicial review of regulatory issues of national importance." *National Environmental Development Ass'n Clean Air Project* v. *EPA*, 891 F.3d 1041, 1054 (D.C. Cir. 2018) (Silberman, J., concurring). Section 7607(b)(1) specifies two distinct circumstances in which review of nationally significant EPA actions will be channeled to the D.C. Circuit. First, any "nationally applicable" final action is subject to review exclusively in the D.C. Circuit. 42 U.S.C. 7607(b)(1). Second, even if a challenged final action is "locally or regionally applicable," venue lies exclusively in the D.C. Circuit if that 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." *Ibid.*

Because the denial actions at issue here resolve the exemption petitions of small refineries across the country, those actions are "nationally applicable" within the meaning of Section 7607(b)(1). In the alternative, if the Court views the denial actions as "locally or regionally applicable," those EPA actions are based on determinations of nationwide scope because they are grounded in EPA's statutory interpretation and analysis of marketplace conditions, both of which apply to all small refinery exemption requests under the RFS program as a whole. Section 7607(b)(1) thus requires that challenges to the denial actions be brought in the D.C. Circuit.

Indeed, the Fifth Circuit's decision in this case provides a paradigmatic example of the outcome that Section 7607(b)(1) was intended to prevent. The two EPA denial actions at issue here collectively covered 105 exemption petitions from 39 small refineries located in eight different judicial circuits. The actions were premised on a statutory interpretation and an economic analysis that the agency had not previously announced, and that constituted "determination[s] of nationwide scope or effect" under any reasonable understanding of that phrase. 42 U.S.C. 7607(b)(1). The ensuing briefing in the court of appeals focused primarily on those nationwide determinations, not on refinery-specific circumstances. The denial actions thus are precisely the types of EPA actions that Congress regarded as appropriate for centralized D.C. Circuit review.

Under the Fifth Circuit's venue analysis, however, the 25 covered refineries that challenged EPA's denial actions in court could have obtained judicial review only through individual challenges filed in seven different regional circuits. That extreme fragmentation was avoided here only because some refineries initially petitioned for review in the D.C. Circuit, and five other regional circuits either dismissed petitions for lack of venue or transferred petitions to that court. But if this Court endorses the Fifth Circuit's venue analysis, future challenges to similar EPA actions can be expected to consume far greater judicial resources, with consequent heightened risks of inconsistent outcomes. Congress crafted Section 7607(b)(1) to avoid that result, and this Court should vacate the court of appeals' judgment.

A. The Denial Actions Are Nationally Applicable

Each of the two denial actions resolved the exemption petitions of more than 30 small refineries located in

multiple judicial circuits across the country. It therefore is apparent on the face of the final actions that they are "nationally applicable" and subject to review in the D.C. Circuit. 42 U.S.C. 7607(b)(1). The contrary arguments advanced by the court of appeals and respondents do not contest the reach of the two denial actions EPA issued, but instead advocate additional limitations that the statutory text does not impose.

1. The text, context, and history of Section 7607(b)(1) make clear that the denial actions are nationally applicable

Section 7607(b)(1) instructs that a challenge to a "final action" that is "nationally applicable" must be heard in the D.C. Circuit. 42 U.S.C. 7607(b)(1). That language encompasses the denial actions at issue here because those actions apply to small refineries in multiple judicial circuits throughout the country. The statutory context and history confirm Congress's intent that the D.C. Circuit would review challenges to such actions.

a. Under the text of Section 7607(b)(1), the proper venue for challenges to EPA's implementation of the CAA depends on the "final action" that is being challenged. The term "action" in Section 7607(b)(1) "is meant to cover comprehensively every manner in which an agency may exercise its power." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478 (2001). And as numerous courts of appeals have recognized, the statutory text makes clear that venue turns on the nature of the pertinent EPA action rather than on the basis for a particular petitioner's challenge. See, *e.g.*, *Hunt Ref. Co.* v. *EPA*, 90 F.4th 1107, 1110 (11th Cir. 2024); *Southern Ill. Power Coop.* v. *EPA*, 863 F.3d 666, 671 (7th Cir. 2017); *American Road & Transp. Builders Ass'n* v. *EPA*, 705 F.3d 453, 455 (D.C. Cir. 2013), cert. denied,

571 U.S. 1125 (2014); *ATK Launch Sys., Inc.* v. *EPA*, 651 F.3d 1194, 1197 (10th Cir. 2011). Courts thus must look to the face of the action and determine whether it applies to—or includes "within its scope," *Black's Law Dictionary* 91 (5th ed. 1979) (*Black's*) (defining "apply")—entities "throughout [the] nation," *Webster's Third New International Dictionary of the English Language* 1505 (1976) (*Webster's*) (defining "nationally").

Statutory context sheds further light on what geographic scope an action must have to be "nationally applicable." Under Section 7607(b)(1), each EPA action is *either* "nationally applicable" *or* "locally or regionally applicable." 42 U.S.C. 7607(b)(1). In distinguishing between those two types of actions, "[t]he text of the statute leaves no room for an intermediate case." *Southern Ill. Power Coop.*, 863 F.3d at 673. If the challenged action is "nationally applicable," the D.C. Circuit is the exclusive forum for judicial review. And unless a "locally or regionally applicable" action is "based on a determination of nationwide scope or effect," it may be challenged "only in the United States Court of Appeals for the appropriate circuit." 42 U.S.C. 7607(b)(1). The statute's use of the definite article—"*the* appropriate circuit," *ibid.* (emphasis added)—indicates that, for any given locally or regionally applicable EPA action, there is only one appropriate regional court of appeals in which to seek review. Cf. *Rumsfeld* v. *Padilla*, 542 U.S. 426, 434 (2004) (explaining that the "use of the definite article" in the federal habeas statute "indicates that

there is generally only one proper respondent to a given prisoner's habeas petition").[4]

The existence of a single appropriate court of appeals for this category of EPA actions in turn conveys that a particular action is "locally or regionally applicable" only if it applies to entities that are confined to a single judicial circuit. 42 U.S.C. 7607(b)(1). After all, for an action that applies equally to entities in more than one judicial circuit, no particular court of appeals can be identified as "*the* appropriate circuit" for review. *Ibid.* (emphasis added). Thus, any action that spans more than one judicial circuit is properly viewed as "nationally applicable" and subject to review only in the D.C. Circuit. *Ibid.*

b. The history of Section 7607(b)(1) reflects the same understanding. As originally enacted in 1970, the CAA venue provision stated that any action "promulgating any national primary or secondary ambient air quality standard," "emission standard," "standard of performance," or other specified standards or controls, would be reviewable only in the D.C. Circuit. 42 U.S.C. 1857h-5(b)(1) (1970). The provision further specified that any action "approving or promulgating any implementation plan" could be reviewed only in "the appropriate circuit." *Ibid.* Because that venue provision did not specify the proper court for review of the many EPA actions that did not fall within any of the enumerated categories, such actions were reviewable only by dis-

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[4] Section 7607(b)(1)'s reference to "*the* appropriate circuit," 42 U.S.C. 7607(b)(1) (emphasis added), contrasts with the preceding subsection, where Congress contemplated the prospect of multiple permissible forums by authorizing "the district court * * * for *any* district in which such person is found or resides or transacts business" to issue certain orders, 42 U.S.C. 7607(a) (emphasis added).

trict courts exercising federal-question jurisdiction. See p. 3, *supra*.

The actions that Congress specified for D.C. Circuit review in the 1970 statute were all "national in scope," and Congress sought to ensure that they received "even and consistent national application" through centralized review. 1970 Senate Report 41. By contrast, Congress viewed EPA actions approving or promulgating "implementation plans which run only to one air quality control region" as amenable to review "in the U.S. Court of Appeals for the Circuit in which the affected air quality control region, or portion thereof, is located," *ibid.*, which the statute referred to as "the appropriate circuit," 42 U.S.C. 1857h-5(b)(1) (1970).

When Congress amended the statute in 1977 to expand the scope of direct court of appeals review, it adopted the same understanding of the limited geographic scope of actions that would be subject to review in "the appropriate circuit." The 1977 House Report explained that the revision would "provide[] for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located." 1977 House Report 323. And the House Report contrasted such local actions with nationally relevant actions that extend "beyond a single judicial circuit" and therefore should be subject to centralized D.C. Circuit review. *Id.* at 324. That history reinforces the conclusion that, under the venue provision in its current form, final EPA actions that apply to entities in multiple judicial circuits are reviewable only in the D.C. Circuit.

c. Applying that understanding here, the denial actions are nationally applicable. EPA "exercise[d] its power" through two final denial actions, each of which

applies to multiple entities located throughout the country in multiple federal judicial circuits. *Whitman*, 531 U.S. at 478. The April 2022 denial action covers "36 * * * petitions for exemptions from the RFS program for over 30 small refineries across the country and applies to small refineries located within 18 states in 7 of the 10 EPA regions and in 8 different federal judicial circuits." Pet. App. 329a. The June 2022 denial action covers "69 petitions for exemptions from the RFS program for over 30 small refineries across the country and applies to small refineries located within 15 states in 7 of the 10 EPA regions and in 8 different Federal judicial circuits." *Id.* at 187a. On a plain-text understanding, each of the two denial actions is therefore "nationally applicable," and respondents' challenges to those actions can proceed only in the D.C. Circuit. 42 U.S.C. 7607(b)(1); see *Hunt Ref. Co.*, 90 F.4th at 1110.

2. The court of appeals' and respondents' contrary reasoning is inconsistent with the statutory text

Neither the court of appeals nor respondents have disputed that the denial actions at issue here apply to small refineries in multiple judicial circuits across the country. Nor have they disputed the general proposition that, when an EPA final action applies to entities in multiple judicial circuits, that action is "nationally applicable" within the meaning of Section 7607(b)(1). The court of appeals nevertheless held that the denial actions are not "nationally applicable" because those actions apply only to the specific refineries whose exemption petitions EPA adjudicated, and those adjudications will not bind the agency in any future proceeding. Respondents have not endorsed that rationale, but have argued instead that the denial actions should be viewed for venue purposes as 105 separate denials of 105 ex-

emption petitions, each of which is confined to a single judicial circuit. Those arguments lack merit.

a. The court of appeals found it significant that the denial actions apply only to the petitioning refineries and do not "bind[] EPA in any future adjudication." Pet. App. 12a. But the court did not attempt to tether that observation to the statutory text. And nothing in Section 7607(b)(1) suggests that a final action must bind EPA prospectively in order to be considered "nationally applicable." The court of appeals erred by effectively "add[ing] words * * * to the statute Congress enacted" and "impos[ing] a new requirement" that atextually limits the category of actions encompassed within Section 7607(b)(1)'s first category. *Muldrow* v. *City of St. Louis*, 601 U.S. 346, 355 (2024).

Indeed, under the court of appeals' approach, virtually no adjudicatory actions would be deemed "nationally applicable" because agency adjudications typically "lack 'legal effect' beyond the parties involved." Pet. App. 39a (Higginbotham, J., dissenting). But the venue provision at issue here refers broadly to "any other nationally applicable regulations promulgated, *or final action taken*." 42 U.S.C. 7607(b)(1) (emphasis added). Such "expansive language" is not amenable to the kind of "limiting construction" the court of appeals' analysis would impose. *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 589 (1980); see *Whitman*, 531 U.S. at 478. Elsewhere in Section 7607(b)(1), Congress distinguished among particular agency actions by referring specifically to a "regulation[]" or "order." 42 U.S.C 7607(b)(1). In contrast, Congress's reference to "any other nationally applicable * * * final action" should be given its natural meaning rather than subjected to artificial constraints. *Ibid.*; cf. *Nielsen* v. *Preap*, 586 U.S. 392, 414

(2019) (presuming that "every word and every provision" in a statute "is to be given effect") (citation omitted).

b. Respondents do not defend the court of appeals' reliance on the adjudicative character of the denial actions. Instead, respondents contend (Br. in Opp. 17-21) that, for purposes of the venue provision, the relevant "final action[s]" are not the two denial actions issued in April and June of 2022, but rather 105 separate denials of the various petitioning refineries' exemption requests. That is incorrect.

Respondents argue that here, "[t]he final EPA action 'under' the CAA is EPA's adjudication of *individual* hardship petitions." Br. in Opp. 18. Respondents highlight the fact that Section 7545(*o*)(9)(B) allows "*a* small refinery" to petition for an exemption and requires EPA to "evaluat[e] *a* petition." 42 U.S.C. 7545(*o*)(9)(B) (emphases added). But neither that CAA provision nor any other restricts EPA's ability to consider petitions together and resolve common issues in a single action. The court of appeals recognized that "[w]ithout more," the use of "an indefinite article immediately followed with a singular noun" does not "show that the relevant statutory provisions require EPA to consider exemption petitions individually." Pet. App. 29a.

The Dictionary Act, ch. 71, 16 Stat. 431, instructs that, "unless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things." 1 U.S.C. 1. Here, the context provides no reason to doubt that EPA may evaluate multiple petitions in a single action. Indeed, this Court has long recognized that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting

them to discharge their multitudinous duties." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940); see *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 524 (1978) ("[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."). That discretion includes the ability to determine "whether applications should be heard contemporaneously or successively." *Pottsville*, 309 U.S. at 138. Section 7545(*o*)(9)(B)'s use of an indefinite article is an insufficient basis for inferring any constraint on EPA's discretion to aggregate similar petitions for joint resolution.

There is nothing unusual or problematic about EPA's decision to group the various exemption petitions to decide the common issues that affect refineries across the country. That approach aligns with Section 7607(b)(1)'s aim to promote national uniformity and with EPA's longstanding practice of resolving similar issues in a single action to ensure consistent treatment. See *ATK Launch Sys.*, 651 F.3d at 1197 (single EPA action promulgating air quality designations for 31 areas across 18 States); *RMS of Ga., LLC* v. *EPA,* 64 F.4th 1368, 1371 (11th Cir. 2023) (single EPA action adjudicating allowance requests and issuing allowances to 32 entities to consume hydrofluorocarbons); *West Virginia Chamber of Commerce* v. *Browner*, 166 F.3d 336 (4th Cir. 1998) (Tbl.) (per curiam) (single EPA action declaring that 22 States' implementation plans were inadequate and required revisions). Indeed, such aggregation generally is encouraged as a means of efficiently adjudicating common issues. See Committee on Adjudication, Ad-

ministrative Conference of the United States, *Aggregation of Similar Claims in Agency Adjudication* (June 13, 2016), https://perma.cc/2UQS-TJ6F.

EPA's approach was particularly sensible here. EPA was considering the exemption petitions in light of this Court's decision in *HollyFrontier*, and in light of the Tenth Circuit's reasoning in *Renewable Fuels Association* on issues this Court had not addressed. See pp. 6-7, *supra*. EPA grouped the petitions together for resolution in order to "apply one consistent statutory interpretation and economic analysis to thirty-six small refineries, located in eighteen different states, in the geographical boundaries of eight different circuit courts." Pet. App. 38a (Higginbotham, J., dissenting); see also pp. 7-8, *supra*.

In making prior exemption decisions, EPA has sometimes declined to group multiple petitions for resolution in a single action because the agency concluded that the circumstances did not call for such treatment. When EPA has issued decisions on petitions from individual small refineries, EPA has recognized that the actions are locally or regionally applicable. See, *e.g.*, *Producers of Renewables United for Integrity Truth & Transparency* v. *EPA*, No. 18-1202, Doc. 1775897 (D.C. Cir. Mar. 4, 2019). But whichever course EPA chooses in a particular instance, it is the face of the final action that determines the proper venue.

Respondents' position would require the court where a petition for review is filed to look behind EPA's characterization of its own agency action and potentially substitute a judicial determination of the relevant unit of analysis. But respondents provide little guidance on how courts would make that determination. Lower courts confronted with such arguments have generally

rejected requests to second-guess EPA's own framing and have focused solely on the face of the final agency action. See, *e.g.*, *Chevron U.S.A. Inc.* v. *EPA*, 45 F.4th 380, 387 (D.C. Cir. 2022) (rejecting petitioner's argument that EPA's construction and application to a specific context of "nationally applicable provisions of the Clean Air Act" rendered the agency action itself nationally applicable); *Sierra Club* v. *EPA*, 47 F.4th 738, 744 (D.C. Cir. 2022) (rejecting petitioner's argument that EPA's approvals of Texas's state implementation plans were nationally applicable because EPA had announced a new understanding that would apply in other locations, thereby "effectively amend[ing] the agency's national implementation regulations"); *Southern Ill. Power Coop.*, 863 F.3d at 671 (rejecting petitioner's argument that EPA's designations of nonattainment areas were an "amalgamation of many different locally or regionally applicable actions"); *RMS of Ga.*, 64 F.4th at 1374 (rejecting petitioner's argument that an allocation of allowances among entities should be considered a "document detailing many smaller individual actions").

Focusing on the face of the EPA action has allowed courts and litigants to quickly and efficiently determine where venue lies, preventing wasteful expenditure of resources resolving threshold issues, and furthering Section 7607(b)(1)'s purpose of "prioritiz[ing] efficiency." *National Ass'n of Mfrs.* v. *Department of Defense*, 583 U.S. 109, 130 (2018). Respondents' approach, by contrast, would "introduce[] needless uncertainty into the determination of venue, where the need for clear rules is especially acute." *Southern Ill. Power Coop.*, 863 F.3d at 673.

B. The Denial Actions At Issue Here Are Based On Determinations Of Nationwide Scope Or Effect

Even if the Court concludes that EPA's denial actions here are "locally or regionally applicable," those actions still are reviewable exclusively in the D.C. Circuit. Those actions are "based on a determination of nationwide scope or effect," and EPA published findings to that effect. 42 U.S.C. 7607(b)(1).

1. The denial actions at issue here were based on determinations of nationwide scope

Under Section 7607(b)(1), a final action that is "locally or regionally applicable" is nonetheless reviewable in the D.C. Circuit if it 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." 42 U.S.C. 7607(b)(1). There is no dispute that EPA published the requisite findings. See Pet. App. 12a-13a; see also *April Notice*, 87 Fed. Reg. at 24,301; *June Notice*, 87 Fed. Reg. at 34,874. Those findings were correct.

a. A "determination" is a "decision arrived at or promulgated; a determinate sentence, conclusion, or opinion." 4 *The Oxford English Dictionary* 548 (2d ed. 1989) (*OED*); see *Webster's* 616 ("the settling and ending of a controversy esp. by judicial decision"; "the resolving of a question by argument or reasoning"). The text of Section 7607(b)(1) distinguishes between the agency's "final action" and the relevant underlying "determination." 42 U.S.C. 7607(b)(1). A particular EPA action may reflect multiple agency determinations, but by referring to "*a* determination of nationwide scope or effect," Section 7607(b)(1) authorizes D.C. Circuit venue (if EPA publishes the requisite finding) so long as any

single determination of that kind forms the basis of the action. 42 U.S.C. 7607(b)(1) (emphasis added).

Requiring that the action be "'based on'" the relevant determination ordinarily "indicates a but-for causal relationship and thus a necessary logical condition." *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 63 (2007). EPA's actions may be—and frequently are—based on multiple determinations, and courts have long accepted such independent causes as adequate. See *Bostock* v. *Clayton County*, 590 U.S. 644, 656 (2020) (noting that "[o]ften, events have multiple but-for causes" that can be sufficient to trigger liability). Under "the traditional but-for causation standard," causation cannot be defeated "just by citing some *other* factor that contributed to [the] challenged * * * decision." *Ibid.* "So long as" the relevant determination "was one but-for cause of th[e] decision, that is enough to trigger the law." *Ibid.* Thus, under Section 7607(b)(1), the relevant determinations must "lie at the core of the agency action" and cannot be "[m]erely peripheral or extraneous." *Texas* v. *EPA*, 829 F.3d 405, 419 (5th Cir. 2016).

Section 7607(b)(1) further provides that venue may be appropriate in the D.C. Circuit when the relevant determination has "nationwide scope *or* effect." 42 U.S.C. 7607(b)(1) (emphasis added). "Scope" means "the general range or extent of cognizance, consideration, activity, or influence." *Webster's* 2035; see 14 *OED* 672 ("[R]ange of application or of subjects embraced."). "Effect" generally means "something that is produced by an agent or cause." *Webster's* 724; see 5 *OED* 79 ("To bring about"; "to accomplish"). When used with respect to a statute, "effect" refers to "[t]he result * * * which a statute will produce upon the existing law." *Black's* 462. Applying that definition in the context of agency

action, the "effect" of an agency determination refers to the legal consequences that determination produces. Thus, Section 7607(b)(1) allows for D.C. Circuit review when EPA's final action sets out as a core justification a principle or conclusion that is intended to govern the agency's decisionmaking in actions throughout the country, or when a central rationale for EPA's final action has legal consequences for entities beyond a single judicial circuit.

Under the third prong of Section 7607(b)(1), a locally or regionally applicable action is reviewable in the D.C. Circuit only if (a) the action "is based on a determination of nationwide scope or effect" *and* (b) EPA "finds and publishes that such action is based on such a determination." 42 U.S.C. 7607(b)(1). When EPA publishes the specified finding, a person who seeks review of the pertinent EPA action may argue that the finding is incorrect and that venue therefore lies in a regional circuit. In such cases, any disputes about the meaning of the phrase "determination of nationwide scope or effect" will present questions of statutory interpretation that courts must decide de novo. See *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244, 2266 (2024). But EPA's finding that the statutory standard is satisfied with respect to a particular final action ordinarily will be governed by the arbitrary-and-capricious standard. See 5 U.S.C. 706(2)(A) (requiring application of arbitrary-and-capricious standard to "agency action, findings, and conclusions"); cf. 42 U.S.C. 7607(d)(9) (requiring application of arbitrary-and-capricious standard to particular EPA actions). That deferential standard of review accounts for the fact that EPA has obvious knowledge and expertise with respect to the centrality of the relevant "determination" to the agency's own decisionmaking

process. See *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 376-377 (1989) (applying arbitrary-and-capricious review to a "factual dispute" as to whether "new information undermines conclusions" the agency reached because such a question "implicates substantial agency expertise").

By contrast, nothing in the statute *requires* EPA to "find[] and publish[] that [an] action is based on * * * a determination" of nationwide scope or effect, 42 U.S.C. 7607(b)(1), even when the facts and law would support such a finding. Rather, when EPA declines to publish such a finding, that decision "is committed to the agency's discretion and thus is unreviewable," *Sierra Club*, 47 F.4th at 745, and it effectively precludes D.C. Circuit venue under Section 7607(b)(1)'s third prong. Thus, for any locally or regionally applicable action that is based on a determination of nationwide scope or effect, Congress "entrusted EPA with discretion to determine the proper venue as the agency sees fit." *Id.* at 746; accord *Texas* v. *EPA*, 983 F.3d 826, 834-835 (5th Cir. 2020). If EPA concludes that a regional circuit is "best equipped to evaluate" a particular agency action based on "local market conditions," Br. in Opp. 21, EPA may decline to publish the relevant finding, thereby ensuring that the regional circuit will have venue over any challenge to the action.

b. As EPA correctly found, the denial actions at issue here were "based on" two interrelated "determination[s] of nationwide scope." See *April Notice*, 87 Fed. Reg. at 24,301; *June Notice*, 87 Fed. Reg. at 34,874. First, the agency adopted a new interpretation of 42 U.S.C. 7545(*o*)(9)(B), construing that provision to require that any qualifying hardship "must be caused by compliance with the RFS program" rather than by

some unrelated circumstance. Pet. App. 242a (capitalization and emphasis altered). Second, EPA determined, as a matter of economic reality, that every refinery recovers the cost of the RIN at the time it sells a gallon of fuel. See *id.* at 249a. And because the "refining and fuel blending markets are highly competitive," EPA found that "RINs are generally widely available in an open and liquid market," and that "[t]he cost of acquiring RINs is the same for all parties"—features that "facilitate the RIN cost passthrough." *Ibid.* In light of those two determinations, EPA concluded that, absent unusual circumstances, compliance with the RFS program cannot cause disproportionate economic hardship to small refineries.

As an interpretation of the statute and an analysis of the national fuels and RIN markets that govern all small refineries throughout the country seeking exemptions from the RFS program, EPA's determinations are "nationwide" in scope. Pet. App. 327a-328a. That EPA adopted and applied those determinations uniformly to small refineries across the country is evidence of that fact. Those core determinations played a decisive role in EPA's denial actions, leading EPA to presume that the petitioning small refineries across the country had not experienced disproportionate economic hardship—a presumption that EPA concluded no individual refineries had succeeded in rebutting. See *id.* at 15a. And those determinations were essential to the validity of the challenged denial actions, such that judicial rejection of either determination would provide a sufficient basis for reversing the actions.[5]

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[5] Under the RFS program, EPA establishes percentage standards each year that all obligated parties must use to satisfy their

Indeed, the Fifth Circuit's ultimate merits disposition of the petitions for review here confirms that the challenged denial actions were "based on" the statutory interpretation and economic analysis described above. In this case the Fifth Circuit, having concluded that EPA's statutory interpretation was inconsistent with the CAA's text (Pet. App. 23a-27a) and that "EPA's RIN-passthrough theory [was] contrary to the evidence" (*id.* at 30a; see *id.* at 29a-33a), granted the petitions for review and vacated the denial actions. See *id.* at 34a. If judicial invalidation of the relevant determination would provide a sufficient basis for finding the final action itself to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 42 U.S.C. 7607(d)(9)(A); 5 U.S.C. 706(2), then the determination is properly viewed as "a necessary logical condition" of the action, *Safeco*, 551 U.S. at 63, and the requisite causal relationship exists.

c. The statutory history confirms that Congress intended for final actions like those at issue here to be subject to review in the D.C. Circuit.

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portion of the nationwide target volumes, see p. 4, *supra*. When EPA anticipates granting an exemption petition at the time it establishes the percentage standard, it accounts for that exemption by shifting the pro rata burden to other obligated parties. See Pet. App. 248a & n.139. If EPA later grants an exemption it did not anticipate, the result is that the national target volumes will not be reached for that year. See *id.* at 246a & n.135. EPA's exemption decisions thus implicate the legal obligations of all non-exempt refineries across the country. That reality further underscores the need for nationwide uniformity, and thus the appropriateness of D.C. Circuit review, which ensures that uniform standards will apply and that no refinery will receive a competitive advantage based on the happenstance of the circuit in which it is located.

Before Congress amended the venue provision to authorize D.C. Circuit review of locally or regionally applicable actions with nationwide scope or effect, the 1970 statute made the approval or promulgation of state or federal plans reviewable in "the appropriate circuit." 42 U.S.C. 1857h-5(b)(1) (1970). Disputes concerning that language spawned protracted litigation. See David P. Currie, *Judicial Review Under Federal Pollution Laws*, 62 Iowa L. Rev. 1221, 1262-1269 (1977) (Currie). Parties faced a lack of clarity as to which circuit was "the appropriate circuit" when a petitioner challenged a final action pertaining to state implementation plans submitted by multiple states spanning multiple judicial circuits. *Id.* at 1264.

In light of that uncertainty, one petitioner filed identical petitions in ten regional circuits, with an eleventh in the D.C. Circuit, and then asked each of the regional circuits to transfer the case to the D.C. Circuit for resolution. Currie 1263. Five courts of appeals agreed to do so, while the other five stayed proceedings pending the disposition of the D.C. Circuit case. *Ibid.* Each of the petitions challenged an EPA action that had approved numerous state implementation plans based on the agency's determination that the attainment deadlines for certain pollutants should be extended because necessary control measures would not be available in the time otherwise prescribed. See *Natural Resources Defense Council* v. *EPA*, 475 F.2d 968, 969-970 (D.C. Cir. 1973) (per curiam).

In an opinion approving a transfer and finding the D.C. Circuit to be "the appropriate circuit," the First Circuit explained that "[t]he legal issues raised by petitioners in the" various pending cases "seem[ed] to be identical," and that "litigation in several circuits, with

possible delayed results on the merits, can only serve to frustrate the strong Congressional interest in improving the environment." *Natural Resources Defense Council* v. *EPA*, 465 F.2d 492, 494 (1st Cir. 1972) (per curiam). The D.C. Circuit agreed, explaining that "[n]one of the[] issues" raised by the petitions "involve facts or laws peculiar to any one jurisdiction; rather, all concern uniform determinations of nationwide effect made by the Administrator." *Natural Resources Defense Council*, 475 F.2d at 970.

In 1976, the Administrative Conference of the United States (ACUS) drafted recommendations for amending and clarifying the CAA venue provision. 41 Fed. Reg. at 56,767. ACUS urged Congress to "clarify[] that the appropriate circuit is the one containing the state whose plan is challenged." *Ibid.* EPA General Counsel G. William Frick provided additional views, however, and counseled that "where 'national issues' are involved they should be reviewed in the D.C. Circuit." *Id.* at 56,768. Frick noted that, although EPA actions involving state implementation plans "usually involve issues peculiar to the affected States, such actions sometimes involve generic determinations of nationwide scope or effect." *Id.* at 56,768-56,769. In Frick's view, "Congress intended review in the D.C. Circuit of 'matters on which national uniformity is desirable'" because of "the D.C. Circuit's obvious expertise in administrative law matters" and its familiarity with the CAA's "complex" text and history. *Id.* at 56,769. Citing the *Natural Resources Defense Council* cases as illustrative, Frick explained that it "makes sense to centralize review of 'national' [state implementation plan] issues in the D.C. Circuit, taking advantage of its administrative law expertise and facilitating an orderly development of the

basic law under the Act, rather than to have such issues decided separately by a number of courts." *Ibid.*

By authorizing D.C. Circuit review of final EPA actions that are based on "determination[s] of nationwide scope or effect," the 1977 amendments incorporated Frick's own language. 42 U.S.C. 7607(b)(1); see 41 Fed. Reg. at 56,768-56,769. The House Report that accompanied the 1977 amendments "concur[red]" with Frick's "comments, concerns, and recommendation." 1977 House Report 324. That history reflects Congress's awareness that, even when a particular EPA action specifically addresses a single State, region, or entity, judicial review of the action may implicate national concerns. After considering the competing viewpoints expressed by ACUS and Frick as to the proper means of resolving those national issues, Congress opted to authorize uniform resolution by providing a mechanism for exclusive D.C. Circuit review.

2. The court of appeals' and respondents' contrary reasoning would render the "nationwide scope or effect" prong of Section 7607(b)(1) practically insignificant

The court of appeals and respondents have largely ignored the determinations of nationwide scope or effect that EPA identified. The court and respondents have focused instead on the refinery-specific circumstances that EPA *also* considered in the course of determining whether individual refineries could rebut the presumption the agency had established. That myopic approach is inconsistent with the statutory text and would severely undercut the intended reach of the third prong of Section 7607(b)(1). Under the correct interpretation of the statute, that prong has both meaningful reach and meaningful limits, each designed to further Congress's purpose of channeling to the D.C. Circuit

those challenges that are likely to raise issues of national importance.

a. The Fifth Circuit erred in rejecting EPA's finding that the denial actions are based on determinations of nationwide scope or effect. The court stated that EPA's statutory interpretation and economic analysis—"without more"—"fail to provide the agency with a sufficient basis to adjudicate exemption petitions." Pet. App. 15a. The court observed that, in ruling on a specific exemption request, EPA must examine "refinery-specific" facts to ensure that local circumstances do not warrant a departure from the agency's general economic analysis. *Ibid.* Respondents likewise emphasize (Br. in Opp. 23) that EPA considered "local facts and data" in determining that the refineries' exemption requests should be denied.

In treating that aspect of EPA's methodology as decisive, the court and respondents would effectively limit D.C. Circuit venue under Section 7607(b)(1)'s third prong to review of EPA actions that are based *solely* on determinations of nationwide scope or effect. Nothing in the statutory text supports that approach. Where Congress intended to require such a limitation, it said so explicitly. See, *e.g.*, 42 U.S.C. 7607(b)(1) (providing an exception to the statute's 60-day filing window where the "petition is based *solely* on grounds arising after" that time period expires) (emphasis added); cf. *Bostock*, 590 U.S. at 656 ("As it has in other statutes, [Congress] could have added 'solely' to indicate that actions taken 'because of' the confluence of multiple factors do not violate the law."). And this approach would effectively preclude application of Section 7607(b)(1)'s third prong to adjudications, which by their nature involve discrete

parties and virtually always implicate at least some party-specific facts and judgments. Cf. p. 25, *supra*.

More fundamentally, the Fifth Circuit's approach would largely drain the "nationwide scope or effect" prong of any practical significance. 42 U.S.C. 7607(b)(1). By its terms, Section 7607(b)(1)'s third prong applies only to actions that are "locally or regionally applicable." *Ibid.* Nearly all such actions can be expected to rest at least in part on consideration of local or regional circumstances. Yet on the Fifth Circuit's view, EPA's consideration of such circumstances as one aspect of its analysis suffices to preclude application of Section 7607(b)(1)'s third prong.

As explained above (see pp. 37-38, *supra*), Congress enacted Section 7607(b)(1) in its current form after EPA's then-General Counsel highlighted the fact that EPA's approval and promulgation of implementation plans for individual States, which will necessarily rest at least in part on State-specific circumstances, can also raise issues of national significance for which D.C. Circuit review is appropriate. See 41 Fed. Reg. at 56,769. The Fifth Circuit's decision thus contravenes Congress's purpose of centralizing review of national issues in the D.C. Circuit and prioritizing the efficient resolution of those issues, even when the actions also address local or regional concerns. See Pet. App. 43a (Higginbotham, J., dissenting).

b. Respondents also contend that, because "EPA in every action [must] apply a uniform approach to similarly affected parties," adopting the government's interpretation would allow D.C. Circuit venue for challenges to *every* locally or regionally applicable EPA action. Br. in Opp. 25-26. That is incorrect. The statutory

text includes significant limitations that would prevent that result.

i. As an initial matter, the relevant language in Section 7607(b)(1) imposes a causation requirement, authorizing D.C. Circuit venue only when the challenged agency action is "*based on* a determination of nationwide scope or effect." 42 U.S.C. 7607(b)(1) (emphasis added). See pp. 30-31, *supra*. EPA's finding that such a standard is satisfied is subject to arbitrary-and-capricious review. See p. 32, *supra*. That causation requirement ensures that D.C. Circuit review will be available only if the relevant determinations are at the core of EPA's action. For the reasons already explained, *ibid*., that causation requirement is satisfied here—but it will not be satisfied for *every* EPA action.

ii. The word "determination" suggests a resolution of an unsettled issue. See *Webster's* 616 ("the settling and ending of a controversy esp. by judicial decision"). On that understanding, EPA does not make a "*determination* of nationwide scope" when it merely applies a previously established agency rule, policy, or interpretation to new "locally or regionally applicable" circumstances, even if EPA has previously expressed its intent that the relevant agency rule or policy will apply nationwide. In deciding whether an EPA rule or policy constitutes a "determination" when the agency applies it in taking a new action, the court may consider whether EPA announced the rule or policy at roughly the same time as the challenged agency action itself. The court may also consider whether the participants in any notice-and-comment period or comparable agency proceeding leading up to the challenged action contested the validity of the rule or policy.

That approach reflects a textually reasonable understanding of the statutory term "determination," and it would further the congressional policy judgments reflected in the second and third prongs of Section 7607(b)(1). The vast majority of "locally or regionally applicable" EPA actions reflect the application of some nationwide agency rule, policy, or interpretation to a factual setting that is confined to a single judicial circuit. When the circumstances suggest that the rule, policy, or interpretation itself is likely to be called into question in any judicial challenge to the EPA action, routing such challenges to the D.C. Circuit serves important interests in judicial efficiency and nationwide uniformity. That is particularly so if the relevant EPA determination is intended to govern future agency actions. But where the validity of the general rule or policy appears to be settled, such that any judicial challenges to the action are likely to focus on the application of the general pronouncement to discrete local facts, those interests are inapposite.

Here, EPA's new statutory interpretation and economic analysis were announced at roughly the same time as, and were intended to guide, the denial actions themselves. Comments on the proposed denial actions disputed the validity of the interpretation and analysis. See C.A. App. 96-144, 242-290 (summarizing and responding to comments). The interpretation and analysis therefore are properly viewed as EPA "determination[s]" within the meaning of Section 7607(b)(1), rather than as the application of settled nationwide principles to new factual settings.[6]

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[6] Respondents have contended (Br. in Opp. 29) that EPA's April and June 2022 denial actions raise distinct venue issues because the

iii. As explained above, a locally or regionally applicable EPA action is reviewable in the D.C. Circuit only if (a) the action "is based on a determination of nationwide scope or effect" *and* (b) EPA "finds and publishes that such action is based on such a determination." 42 U.S.C. 7607(b)(1). Even when the facts and law would support the specified finding, EPA has plenary discretion to decide whether to publish that finding, and the agency "may weigh any number of considerations" in making that decision. *Sierra Club*, 47 F.4th at 746; see p. 33, *supra*. For example, EPA may consider whether any petitions for review of a particular action would likely contest EPA determinations of national concern, or instead would likely dispute EPA's understanding of local or regional circumstances. For EPA actions in the latter category, the agency may decline to publish the relevant finding, thereby ensuring that the regional circuit will have venue over any challenge to the action.

c. The limitations described above meaningfully constrain the number of locally or regionally applicable actions that will be subject to D.C. Circuit review, while furthering the congressional purpose embodied in Section 7607(b)(1) to promote efficient and uniform resolu-

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April denial action announced a *new* approach to small-refinery exemptions, while the June denial action simply applied that approach to additional refineries. That contention is overstated. Both denial actions here stemmed from a single proposed denial that first announced EPA's new approach to exemptions. Pet. App. 48a, 193a; see 86 Fed. Reg. at 70,999 (proposing to "deny all pending [exemption] petitions" based on the agency's determinations regarding the meaning of disproportionate economic hardship and the market realities of refinery operations). The fact that a short time passed between the finalization of the two actions—without any court considering the validity of EPA's new determinations—is an insufficient basis to distinguish between the actions for purposes of venue.

tion of disputed issues of national significance. By contrast, respondents' interpretation would limit D.C. Circuit review of locally or regionally applicable EPA actions to a vanishingly small category. Embracing that interpretation would lead to the very problems Congress sought to avoid in amending the CAA's venue provision to include the nationwide-scope-or-effect language.

This case is illustrative. As a result of the Fifth Circuit's refusal to transfer this case, EPA now faces two merits decisions from two different circuit courts that addressed substantially similar challenges to the same denial actions. The petitioners in both circuits focused their attacks on the statutory interpretation and economic analysis that EPA had adopted and applied nationwide, not on any refinery-specific EPA findings. And EPA avoided further fragmentation of judicial review only because five other regional courts of appeals dismissed similar challenges for improper venue or transferred challenges to the D.C. Circuit.

Although both the Fifth and D.C. Circuits ultimately vacated EPA's denial actions, the differences in reasoning between the two circuits may lead to different results on remand.[7] That would create a bifurcated RFS

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[7] Most notably, the Fifth Circuit found that refineries had reasonably relied on EPA's prior approach to adjudicating exemption petitions, such that the agency's consideration of updated economic information regarding RFS compliance costs—relating to the "RIN cost passthrough principle"—created an impermissible retroactive effect. Pet. App. 14a; see *id.* at 16a-23a. The D.C. Circuit declined to reach that issue. See *Sinclair Wyoming Ref. Co.* v. *EPA*, 114 F.4th 693, 714 n.12 (2024) (per curiam). Under the Fifth Circuit's retroactivity analysis, EPA would be required to evaluate the remanded petitions under its prior approach, without considering up-

program consisting of one program for remanded petitions for most of the nation, and a separate, more favorable program for exemption claimants in the Fifth Circuit. That result is contrary to Congress's direction to ensure a uniform, nationwide framework for increasing renewable fuel use, see *e.g.*, 42 U.S.C. 7545(*o*)(2)(A)(i) and (*o*)(2)(B)(ii)(III), and with Section 7607(b)(1)'s evident purpose of ensuring efficient, uniform resolution of issues with national significance. And if this Court endorses the Fifth Circuit's venue analysis, future EPA actions similar to the denial actions here can be expected to spawn litigation in *several* courts of appeals, with a consequent increased waste of judicial resources and a heightened risk of inconsistent outcomes. Nothing in the statutory text requires that result, and the Court should reject it.

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dated economic analysis of a small refinery's compliance costs beyond those contemplated by the DOE study and corresponding scoring matrix. That aspect of the Fifth Circuit's opinion focuses not on any refinery-specific circumstance, but on the economic analysis EPA used in assessing exemption petitions from refineries nationwide. Under the D.C. Circuit's analysis, by contrast, EPA may consider any updated economic information about a small refinery's compliance costs that is relevant to assessing whether the refinery actually suffers disproportionate economic hardship.

CONCLUSION

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

Respectfully submitted.

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APPENDIX

TABLE OF CONTENTS

APPENDIX

1. 42 U.S.C. 7545(*o*) provides:

Regulation 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 com-

ment, 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

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

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.

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

(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 en-

sure 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
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 coordina-

tion 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 in-

troduced 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 consideration, 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 ex-

cessive 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

(iii) 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 Administrator, 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 dispropor-

tionate 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.

2. 42 U.S.C. 7607(b) provides:

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

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

requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[3] 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 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

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[1] See References in Text note below.

[3] So in original.

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 person may challenge the deferral pursuant to paragraph (1).