SUPREME COURT
OF THE UNITED STATES

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        IN THE SUPREME COURT OF THE UNITED STATES
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OKLAHOMA, ET AL.,                        )

            Petitioners,          )

            v.                    ) No. 23-1067

ENVIRONMENTAL PROTECTION AGENCY,    )

ET AL.,                                  )

            Respondents.          )

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PACIFICORP, ET AL.,                      )

            Petitioners,          )

            v.                    )  No. 23-1068

ENVIRONMENTAL PROTECTION AGENCY,    )

ET AL.,                                  )

            Respondents.          )

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Pages:  1 through 55

Place:  Washington, D.C.

Date:   March 25, 2025
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 6   ENVIRONMENTAL PROTECTION AGENCY,    )
 7   ET AL.,                             )
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14   ET AL.,                             )
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16   - - - - - - - - - - - - - - - - - - -
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18                 Washington, D.C.
19              Tuesday, March 25, 2025
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21        The above-entitled matter came on for
22   oral argument before the Supreme Court of the
23   United States at 11:50 a.m.
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 1    APPEARANCES:

 2    MITHUN MANSINGHANI, Oklahoma City, Oklahoma; on behalf

 3         of the Petitioners in Case 23-1067.

 4    MISHA TSEYTLIN, Chicago, Illinois; on behalf of the

 5         Petitioners in Case 23-1068.

 6    MALCOLM L. STEWART, Deputy Solicitor General,

 7         Department of Justice, Washington, D.C.; on behalf

 8         of the Respondents.

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1   P R O C E E D I N G S

2   (11:50 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument next in Case 23-1067, Oklahoma versus

5   the Environmental Protection Agency.

6   Mr. Mansinghani.

7   ORAL ARGUMENT OF MITHUN MANSINGHANI

8   ON BEHALF OF THE PETITIONERS IN CASE 23-1067

9   MR. MANSINGHANI: Thank you, Mr. Chief

10   Justice, and may it please the Court:

11   EPA actions to approve or disapprove

12   state implementation plans are the prototypical

13   action reviewed in the regional circuit. As I

14   believe Mr. Stewart confirmed in the previous

15   argument, all parties agree at this point that

16   if EPA had disapproved Oklahoma's and Utah's

17   plans in separate Federal Register notices,

18   those would be locally applicable actions.

19   So when it comes to applicability, the

20   only disputed question is whether the

21   disapprovals of these state plans are

22   transformed into a single national action

23   because EPA chose to process and publish them

24   together with the disapprovals of 19 other

25   states.

1   But the text of the Act's venue

2   provision directs the courts to look at the

3   statutory authority under which EPA took its

4   action, not the form of publication. Here

5   Section 7410 authorizes EPA to take local

6   action, approval or disapproval of state

7   implementation plans. EPA's position that the

8   form of publication dictates the action's

9   applicability for venue purposes has no basis in

10   the text of the statute and, indeed, is at war

11   with it.

12   That leaves EPA's backup, that the

13   Oklahoma and Utah disapproval actions must be

14   reviewed in the D.C. Circuit because they are

15   based on a determination of nationwide scope or

16   effect. That exception, however, only applies

17   to actions where EPA arrives at a generic

18   conclusion that applies uniformly to all states

19   and that forms a dispositive reason for the

20   agency's action, irrespective of local factors.

21   As Justice Gorsuch's and Kavanaugh's

22   questions earlier today indicate, EPA's reading

23   applying that exception any time EPA articulates

24   a rubric or a standard and then applies it to a

25   local circumstance would mean essentially every

1 local EPA action is one that is based on a

2 nationwide determination.

3   The Court should reverse the decision

4 below and send this case back to the Tenth

5 Circuit.

6   I welcome the Court's questions.

7   JUSTICE THOMAS: You heard the last

8 argument. How does -- factually, how does your

9 case differ from the refinery case?

10   MR. MANSINGHANI: So one major

11 difference is that state plan approvals and

12 disapprovals are explicitly listed in the

13 locally and regionally applicable part of the

14 statute, in the second sentence of the statute.

15 That's not true of -- of Renewable Fuel Standard

16 exemptions, so that makes this a really easy

17 case for -- for us to say this is locally or

18 regionally applicable.

19   JUSTICE SOTOMAYOR: Is the nature of

20 the presumption here different? Meaning there

21 were two, arguably in the first case, nationwide

22 rules, one having to do with focusing just on

23 compliance with legal requirement and the

24 second, the presumption that you couldn't have

25 hardship.

1   Here it -- it -- it's been strange in

2   my mind because you don't actually have to

3   follow the EPA's formula, correct?

4   MR. MANSINGHANI: That's correct. We

5   don't have to follow their modeling. We don't

6   have to follow their framework. And EPA was

7   very clear about that. So I --

8   JUSTICE SOTOMAYOR: Right. So

9   whatever their framework is, since you don't

10   have to follow it, it's hard to see how it has a

11   nationwide effect, isn't it?

12   MR. MANSINGHANI: That's correct. It

13   -- it's not even meets their definition of a

14   determination, which is the conclusive ending of

15   a controversy. If we didn't have to follow

16   their framework, it's hard to see how it's even

17   --

18   JUSTICE SOTOMAYOR: The only --

19   MR. MANSINGHANI: -- a determination.

20   JUSTICE SOTOMAYOR: -- argument that I

21   see that might be different is that 1 percent

22   rule that they have. And there's at least a

23   bunch of amici who say that, in absolutely every

24   challenge to a SIP, that the 1 percent rule is

25   being fought about.

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1   So could one say that that's

2   determinative in the way that's nationwide?

3   MR. MANSINGHANI: So EPA was also

4   clear that with respect to the 1 percent rule,

5   it has, quote, "not imposed a requirement that

6   states use a 1 percent threshold." That's at

7   page 9373 of the final Federal Register notice.

8   The other problem is that EPA didn't

9   identify that as one of the nationwide

10   determinations when they say -- when they were

11   invoking the venue exception. So you have a

12   Chenery problem there, and you also have a

13   problem that the statute requires EPA to make a

14   publication.

15   And, of course, this is also a

16   long-standing thing that they've used. In -- in

17   page 47 of their brief, they -- they acknowledge

18   they've used the 1 percent rule in prior

19   transport orders and -- and in EME Homer. So it

20   doesn't -- it also doesn't meet their test for

21   that reason because, you know, I guess EPA would

22   -- would consider it settled.

23   When Utah tried to use an alternative

24   as a 1 parts per billion threshold instead of a

25   1 percent threshold, it gave very Utah-specific

1   reasons for why it thought that a 1 part per

2   billion threshold was more appropriate. And EPA

3   gave very Utah-specific reasons for why it was

4   rejecting Utah's Utah-specific reasons.

5   JUSTICE GORSUCH: Counsel, if I might

6   just push back a little bit. I would have

7   thought that, if anything, the intuitive appeal

8   of the idea that -- that your case involves

9   nationwide determinations would be the stronger

10   one in some ways for EPA, given that we're

11   talking here about clean air obligations of

12   states and the downwind impact of any state on

13   others. Its good neighbor obligations as the

14   statute calls it.

15   I mean, gosh, if anything's -- if

16   anything is nationwide in impact, it's got to be

17   air pollution because it travels.

18   MR. MANSINGHANI: Well, the whole

19   statute's about air pollution. But with respect

20   to the good neighbor provision, EPA made clear

21   that interstate ozone transport is a "regional

22   scale pollution problem." You can see that at

23   page 9801 of Oklahoma's proposed disapproval.

24   JUSTICE GORSUCH: Yeah, but it crosses

25   the country in ways that don't respect our

1   jurisdictional boundaries between circuits.

2   MR. MANSINGHANI: Sure. And I think,

3   at most, that makes it something that has

4   regional effects. It's not of regional

5   applicability when EPA disapproves this

6   individual state's plan. So, for example,

7   Oklahoma's plan was disapproved because it was

8   polluting -- allegedly significantly

9   contributing to Texas non-attainment --

10   JUSTICE GORSUCH: Well, you --

11   MR. MANSINGHANI: -- and Utah --

12   JUSTICE GORSUCH: -- got two circuits

13   right there.

14   MR. MANSINGHANI: And -- and for the

15   reasons Mr. Huston gave in the prior case, I

16   don't think their two-circuit rule really is --

17   is something that --

18   JUSTICE GORSUCH: Why not? We're

19   going to have different interpretations of the

20   statute with different -- different circuits and

21   all these terrible splits and -- and, gosh, we

22   won't have the immediate resolution of the D.C.

23   Circuit that we could have.

24   MR. MANSINGHANI: Well, respectfully,

25   I don't think splits are all that terrible.

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 1                    JUSTICE GORSUCH:  Oh.  Oh.  Oh.

 2                    (Laughter.)

 3                    MR. MANSINGHANI:  This Court's --

 4                    JUSTICE GORSUCH:  Really?  We deal

 5       with them?

 6                    MR. MANSINGHANI:  This Court's

 7       landmark Clean Air Act cases, state

 8       implementation plan cases, Train and Union

 9       Electric, both arose from circuit splits where

10       different circuits were adjudicating different

11       state plans but it touched on cross-cutting

12       issues such as whether variances could be

13       allowed in a state plan or whether EPA had to

14       consider costs or feasibility, technical

15       feasibility, in approving or disapproving a

16       state plan.

17                    And there's no indication that those

18       circuit splits that led to the -- this Court's

19       landmark decisions in Train and Union Electric

20       were the things that Congress was trying to do

21       away with --

22                    JUSTICE JACKSON:  And, Counsel, I --

23                    MR. MANSINGHANI:  -- when it enacted

24       the --

25                    JUSTICE JACKSON:  -- I mean, I thought
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1   your original point was that the statute itself

2   when -- in section -- sentence 2 talks about

3   what counts as locally or regionally applicable

4   and that should go in the appropriate circuit

5   includes approval of SIPs.

6   MR. MANSINGHANI: That's correct.

7   JUSTICE JACKSON: I mean specifically.

8   MR. MANSINGHANI: Specifically if --

9   JUSTICE JACKSON: So, regardless of us

10   thinking that air pollution seems national,

11   Congress was putting it in the local or regional

12   bucket.

13   MR. MANSINGHANI: That's -- that's

14   absolutely correct.

15   JUSTICE GORSUCH: So are you making

16   the argument, then, that -- that the third

17   provision has no application to SIPs? Could

18   never be applied to SIPs?

19   MR. MANSINGHANI: No, Justice Gorsuch,

20   I'm not making that argument.

21   JUSTICE GORSUCH: Ah.

22   JUSTICE JACKSON: You're making the

23   argument that the first doesn't, because we're

24   in the second, locally or regional. And then we

25   go to the exception, and we have to decide

1   whether or not it's in the D.C. Circuit, but on

2   the basis of the third prong, not the first one?

3   MR. MANSINGHANI: That's correct,

4   Justice Jackson. So the examples historically

5   that arose prior to the enactment of the

6   exception are both things that relate to SIPs.

7   They weren't SIP approvals or disapprovals

8   necessarily.

9   But the NRDC case -- cases from the

10   First and D.C. Circuits that Mr. Stewart

11   mentioned, the -- the First Circuit said it

12   involved an automatic application of standard

13   nationwide guidelines to all plans that

14   simultaneously preordained wholesale extensions

15   of the -- of the attainment deadline.

16   The Dayton Power case from the Sixth

17   Circuit was the other case that -- that led

18   to -- at least according to the legislation

19   history, the enactment of this exception. And

20   there, the Sixth Circuit said what was at issue

21   was a uniform rule that had the effect of

22   amending every state's implementation plan in

23   precisely the same way.

24   JUSTICE GORSUCH: Were these rules?

25   MR. MANSINGHANI: Say that again,

1   Justice?

2   JUSTICE GORSUCH: Were these rules?

3   MR. MANSINGHANI: They -- it's hard to

4   say that the amendment of a state plan is a

5   rule-making, but it was published in the Federal

6   Register as -- as a rule-making, in -- in

7   perhaps what I would say is a single order.

8   And -- and it's those types of things

9   where you have a -- a conclusion that applies

10   uniformly to all states, and that forms the

11   dispositive reason for the agency's action that

12   are covered by the exception.

13   It's not the types of things that led

14   to this -- this Court's cases in Train and Union

15   Electric, where you have an intense mix of very

16   local issues and perhaps some cross-cutting

17   issues that may be true across different states.

18   Not every state was the 1 percent

19   threshold an issue. Not every state was the

20   modeling that made the difference between

21   approval or disapproval.

22   And here, of course, EPA had issued

23   approvals of state plans individually or

24   sometimes in groups. And there's no indication

25   that I have seen from EPA that there was a

1   reason why its approvals were issued

2   individually, would go to the regional circuit,

3   and its disapprovals would go to -- to the D.C.

4   Circuit.

5   JUSTICE JACKSON: Can I ask you about

6   the remedy? So if we agree with you that the

7   court of appeals here was wrong to hold that

8   this was nationally applicable under prong 1,

9   would you say that we should remand it to the

10   Tenth Circuit to apply steps 2 and potentially

11   3?

12   MR. MANSINGHANI: That would certainly

13   be an option, but not our first preference. So

14   I think this Court has fully in front of it the

15   issue, and it's fairly encompassed within the

16   question presented as to whether the exception

17   applies.

18   And I think in elucidating how the

19   exception applies in our case and the Calumet

20   case, it will provide greater guidance to lower

21   courts by -- by showing how it applies in two

22   very different factual scenarios.

23   JUSTICE GORSUCH: What weight should

24   we give the EPA's determination? I mean,

25   that -- that's -- that's a thing, right? I

1   mean, EPA, you know, wrote the determination.

2   Does that -- is it -- is that owed deference?

3   MR. MANSINGHANI: It is not owed

4   deference to the -- on the question of whether

5   the action's, in fact, based on a nationwide

6   determination of scope and effect.

7   And remember, this is a venue

8   provision that we're interpreting. And it's

9   very unusual for this Court to defer to one

10   party or another's choice of venue. Instead,

11   this Court applies the law de novo.

12   And so here, the statute, as -- as my

13   friend Mr. Huston says, has two elements. One,

14   that it is based on a determination of

15   nationwide scope and effect. That's reviewed de

16   novo. And, second, that EPA publish a finding

17   along those lines.

18   And I think that could be reviewed for

19   arbitrary and capriciousness if EPA chose or

20   didn't choose to publish a finding in any given

21   circumstance, but the first thing is viewed --

22   is reviewed de novo.

23   JUSTICE KAGAN: Suppose that, you

24   know, of these four determinations -- let's just

25   focus -- suppose that with -- just this one,

     1   which dealt with the contribution threshold.

     2   And suppose that the contribution threshold that

     3   EPA picked was super low. Like, so instead of

     4   1 percent, it was .01 percent or something like

     5   that. So low that you knew that every SIP was

     6   going to get rejected, every state plan.

     7   What would the answer be then?

     8   MR. MANSINGHANI: I think there would

     9   -- that would present a closer case. And I

    10   think that would get closest to what would be a

    11   determination of nationwide effect.

    12   So it wouldn't have nationwide scope

    13   because, you know, in theory a state could,

    14   possibly, be under that super low threshold, but

    15   it might still, nonetheless, be something that's

    16   of nationwide effect.

    17   JUSTICE KAGAN: I mean, it's a

    18   nationwide -- you know, presumably they know

    19   what effect this is going to have in every

    20   state, in -- in my hypothetical. So it's -- it

    21   seems actually unusual not to say it would be of

    22   nationwide scope.

    23   And I'm not suggesting that my

    24   hypothetical is at all the same as your case. I

    25   mean, actually, it seems to me that these four

1   nation -- nationwide determinations, that the

2   nature of them is the -- you still -- the agency

3   still has to do a lot of work before deciding

4   whether to issue -- whether to approve any state

5   SIP.

6   But in my hypothetical, that's not

7   right. Basically, the nationwide determination

8   is doing all the work.

9   MR. MANSINGHANI: So I'll push back on

10   one thing, Justice Kagan, which is to say that

11   if the screening threshold operates in the same

12   way in your hypothetical as it does in our rule,

13   then, yes, there still has to be a lot of work

14   done.

15   Because a screening threshold is just

16   that, it screens out what are de minimis

17   contributions and what are contributions that

18   have to be further evaluated to determine

19   whether they are significant.

20   So even a really low screening

21   threshold would still require a lot of further

22   analysis to determine whether any given state's

23   contributions to another state are --

24   JUSTICE KAGAN: I take that point. So

25   I guess I was hypothesizing a more simple-minded

1   inquiry --

2   MR. MANSINGHANI: Right.

3   JUSTICE KAGAN: -- where basically

4   this threshold was going to make the difference

5   between approval and not. And it was set at so

6   low a level that it was clear that no state

7   could meet it.

8   And then to me, that says: Okay, that

9   should be in the D.C. Circuit. Like, you don't

10   want 11 circuits deciding whether that's a

11   preposterously low level or not.

12   MR. MANSINGHANI: Yeah. So if it was

13   an automatic generic conclusion that applied to

14   all states uniformly, you didn't have to really

15   consider whether the state's circumstances,

16   yeah, I think that would get, you know, very

17   close to meeting the exception.

18   Now, to be very clear, we would think

19   that is very illegal, and the state -- the EPA

20   doesn't have --

21   JUSTICE KAGAN: Yeah, yeah, yeah.

22   MR. MANSINGHANI: -- the ability to

23   set a screening threshold that low and to -- to

24   cabin and state discretion that much. But yes,

25   a very legal thing could be adjudicated by the

1   D.C. Circuit as very illegal.

2   JUSTICE KAVANAUGH: Do you agree or --

3   do you disagree with anything Mr. Huston said in

4   the prior argument in terms of the scope of the

5   third sentence or how much effect the third

6   sentence might have in practice?

7   MR. MANSINGHANI: So I think the only

8   gap in our position is that Mr. Huston's

9   position is that the statute alone dictates what

10   the relevant determination is. And I think my

11   test is a little bit more flexible.

12   That said, you know, if Mr. Huston's

13   position is correct, I think we still also

14   prevail. Because in order to disapprove our

15   state plans, EPA would have to conclude that

16   Oklahoma was significantly contributing to

17   another state. That is the relevant

18   determination.

19   JUSTICE KAVANAUGH: Right. It has to

20   look at the state-specific --

21   MR. MANSINGHANI: That's precisely

22   correct, Justice --

23   JUSTICE JACKSON: I perceive

24   Mr. Huston's argument to be substantially

25   different than yours, so maybe I'm not

1   understanding.

2   I -- I thought you were taking -- you

3   were willing to accept the idea that the third

4   prong allows for a generic conclusion by the EPA

5   that applies uniformly irrespective of factual

6   differences, and that that could be enough.

7   And I took Mr. Huston to be saying

8   something different than that.

9   MR. MANSINGHANI: So I take Mr. Huston

10   to be saying that that generic conclusion has to

11   be mandated by statute. I don't -- I don't

12   quite go that far.

13   JUSTICE JACKSON: I see.

14   MR. MANSINGHANI: But I think,

15   otherwise, our tests are very similar.

16   JUSTICE JACKSON: Thank you.

17   CHIEF JUSTICE ROBERTS: Thank you,

18   counsel.

19   Anything further?

20   Anything further?

21   Thank you.

22   MR. MANSINGHANI: Thank you, Your

23   Honor.

24   CHIEF JUSTICE ROBERTS: Mr. Tseytlin.

25

1   ORAL ARGUMENT OF MISHA TSEYTLIN.

2   ON BEHALF OF THE PETITIONERS IN CASE 23-1068

3   MR. TSEYTLIN: Mr. Chief Justice and

4   may it please the Court:

5   The Clean Air Act's venue provision

6   challenge -- channels challenges to national EPA

7   actions to the D.C. Circuit, while channeling

8   challenges to local or regional EPA actions,

9   such as SIP approvals and disapprovals, to the

10   regional circuits.

11   As you heard this morning, EPA

12   attempts to change this neutral venue rule,

13   which respects cooperative federalism and the

14   expertise of regional circuits, into something

15   very different. There are three fundamental

16   problems with EPA's approach:

17   First, it is at war with the statutory

18   text, including because it requires, for it to

19   not devolve into everything being in the D.C.

20   Circuit, the creation of multiple non-statutory

21   tests. Like whether the bundling of multiple

22   actions is a sham, like whether a determination

23   made somewhere in a Federal Register preamble is

24   novel.

25   Second, it leads to unadministrable,

        1   wasteful litigation about where actions should

        2   be brought. We saw this with my -- with some of

        3   my friends' answers today about how you have to

        4   look at all the comments that were submitted,

        5   and I was thinking, for these 21 states, how

        6   tall the comment letters would be piling up next

        7   to me, that I'd have to read all of them to

        8   determine which court that I would need to sue

        9   in.

        10   And, finally -- and we haven't heard

        11   that much about it today -- it leaves more of an

        12   opportunity of significant venue manipulation by

        13   EPA that Congress certainly did not envision.

        14   I welcome the Court's questions.

        15   JUSTICE THOMAS: Just as a matter of

        16   curiosity, what is the difference between an

        17   action that is nationally applicable and one

        18   that is nationwide in effect or scope?

        19   MR. TSEYTLIN: Right. So whether an

        20   action is nationally applicable is based on the

        21   statutory authority under which Congress was

        22   acting. So it's approvals or disapprovals under

        23   110(k) that has to be done state by state.

        24   However, hypothetically, there could

        25   be a SIP disapproval or SIP approval that

1   hypothetically could have a nationwide effect.

2   The -- the example that we talked about -- it's

3   a completely hypothetical example that we talked

4   about in our reply brief -- is if the state's

5   pollution problem is so significant that it

6   pollutes across the entire nation -- let's say

7   it has that much NOx emissions and it goes all

8   across the nation -- theoretically, that locally

9   applicable action would have nationwide effect.

10   And so that would be an example where the

11   exception would have a real meaning.

12   Now, I want to cover this issue of

13   venue manipulation, and it hasn't gotten -- even

14   though we've been here for, like, two hours,

15   that hasn't gotten a lot of airing, and I think

16   it's a very problematic aspect of both EPA's

17   arguments on -- on the first two sentences and

18   on its exception.

19   EPA essentially says that if it

20   packages separate actions in a single -- in a

21   single Federal Register notice, subject to an

22   ill-defined sham exception, it can always get

23   into the D.C. Circuit.

24   Further, EPA says that under the

25   exception, if that's not good enough to get them

1   to the D.C. Circuit every time, they can say,

2   well, we can point to any general reasoning,

3   which as Justice Gorsuch pointed out is just

4   non-arbitrary/capricious rule-making under the

5   APA, and say that that sends us to the D.C.

6   Circuit under -- under the -- the third prong.

7   It -- it is that amount of power for

8   EPA to essentially take local and regionally

9   applicable actions and send them to D.C., send

10   them here, is at war with the Clean Air Act's

11   cooperative federalism regime.

12   And with regard to SIPs, which are a

13   big part of that, in particular, the whole

14   notion of SIPs, including with transport SIPs,

15   is that those are state-specific. Those are

16   decisions made by the states, how to control

17   pollution coming from sources in the state. The

18   venue provision here is just part and parcel of

19   that, that when you have those state-specific

20   decisions, you don't have to go to D.C. to

21   litigate the legality of that. You get to stay

22   in your own backyard.

23   And the cases here, the ones that are

24   pending in the lower courts are -- are a stark

25   example of what would happen if you allowed EPA

1   to essentially subvert this regime. We --

2   JUSTICE JACKSON: Can I ask you about

3   your --

4   MR. TSEYTLIN: Yes.

5   JUSTICE JACKSON: Can I ask you about

6   your view of remand? Would you object if we

7   reversed the decision on the nationally

8   applicable prong and sent it back to the Tenth

9   Circuit for a determination of whether or not

10   there is -- the exception applies here?

11   MR. TSEYTLIN: Certainly, I never want

12   to turn down a -- a win, but I would say that

13   one of the arguments made by EPA in opposition

14   to our -- on to our cert petition was that they

15   -- was that that the Tenth Circuit hadn't

16   decided that question. And our answer in our

17   reply brief wasn't, like, give us a round trip.

18   It was that the issue had been fully briefed, it

19   had been decided in other circuits, and this

20   Court would be fully able to answer it.

21   We've now been here for -- we've had a

22   lot of pages of briefing, had a lot of oral

23   arguments. I think that this Court is now in a

24   good position to decide the meaning of that pro

25   -- the meaning of that third sentence and to

1   apply it both in the -- in the Calumet case and

2   in our case here.

3   And -- and -- and so just to finish --

4   just to finish my thought, when thinking about

5   what would be the -- the consequence of allowing

6   EPA to -- to jam all these cases into the D.C.

7   Circuit, we took a look at how many pages in the

8   Sixth Circuit, in the six circuits that are

9   currently taking briefing in these -- in these

10   cases; focused on these specific issues. And we

11   counted up 300 to pages of just merits briefing

12   that were focusing just on the specific issues,

13   not to say on the background section.

14   To say that all of this could be

15   jammed into the D.C. Circuit and that these

16   local, intensely local issues, quintessentially

17   local issues would be able to practically get a

18   -- a fair airing is I think -- don't think not

19   realistic and not what Congress envisioned.

20   And I will say that we do have a

21   different wrinkle in the way we approach the

22   third sentence, which I --

23   JUSTICE KAVANAUGH: I thought your

24   point on the venue --

25   MR. TSEYTLIN: Yes?

1   JUSTICE KAVANAUGH: -- was just

2   convenience, not -- or is there more to it than

3   that?

4   MR. TSEYTLIN: Sorry.

5   JUSTICE KAVANAUGH: In other words,

6   you want to be able to litigate in your home.

7   You know, it's more convenient to litigate in

8   the -- in the circuit in the -- in the home --

9   MR. TSEYTLIN: It -- it's more

10   convenient and it's also --

11   JUSTICE KAVANAUGH: Is there anything

12   else to it that your -- is behind -- any other

13   premise behind your comment there?

14   MR. TSEYTLIN: Yeah, well, it's --

15   it's -- I guess it depends how you define the

16   word "convenient." I mean, the -- you get to

17   litigate your issues without being jammed in

18   with folks that want to submit 270 pages of

19   briefing on issues in different parts of the

20   country.

21   SIPs are quintessentially --

22   decisional SIPs -- quintessentially local. You

23   know, we had -- you know, there was -- there

24   was, you know, again, the comment, the --

25   JUSTICE KAVANAUGH: Well, the premise

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 1    there --
 2              MR. TSEYTLIN:  Yeah.
 3              JUSTICE KAVANAUGH:  -- I'm not going
 4    to dispute it too much, but --
 5              MR. TSEYTLIN:  Yes.
 6              JUSTICE KAVANAUGH:  -- you know, they
 7    -- they get fair attention in both courts.
 8              MR. TSEYTLIN:  It is true that the --
 9    you know, the judges of -- of the D.C. Circuit
10    are excellent judges and work very hard.
11              (Laughter.)
12              MR. TSEYTLIN:  But --
13              JUSTICE KAVANAUGH:  And they're not
14    afraid to rule against EPA pretty routinely
15    either.
16              MR. TSYETLIN:  Yeah.
17              JUSTICE KAVANAUGH:  When justified.
18              MR. TSEYTLIN:  When -- when justified.
19              (Laughter.)
20              MR. TSEYTLIN:  But -- but -- but I
21    would also say that, as a practical matter, when
22    you get -- when you get consolidated in the D.C.
23    Circuit, the fight for word count and page count
24    to raise intensively, that is -- I mean, I don't
25    -- those of you who have -- it is fierce to get
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1   a couple of pages on these local-specific

2   issues. You know, these 300 pages, you know,

3   they're -- there are, you know, when I thought

4   our case is being transferred to D.C., thinking

5   about how things that I had 15 pages to say I

6   would now have 2 pages to say or 3 pages to say,

7   that was a daunting thought and certainly not

8   what Congress envisioned when it specifically

9   listed in the second sentence the SIP approvals

10   and disapprovals go to the regional circuits.

11   JUSTICE KAGAN: Mr. Tseytlin, explain

12   to me how, notwithstanding the four

13   determinations, how a SIP approval would vary

14   among states? Like, what -- what -- what would

15   the variations be, notwithstanding that the EPA

16   has made these four nationwide determinations?

17   MR. TSEYTLIN: Well, if you're talking

18   about the third sentence, our approach to the --

19   our --

20   JUSTICE KAGAN: I'm talking about the

21   third sentence.

22   MR. TSEYTLIN: Our approach to the

23   third sentence is -- is somewhat different,

24   while it does ultimately lead to the same result

25   as -- as my friends on the states have --

1   JUSTICE KAGAN: But mostly, I'm not

2   talking about any sentence. I'm actually just

3   talking about, like, your sense of the

4   practicalities of the situation. You come in

5   with a SIP. EPA has to approve it. It has to

6   disapprove it. They've said these four things

7   which apply uniformly to all their

8   approval/disapproval decisions. But I'm taking

9   it that you're saying, notwithstanding that

10   they've said those four things, the supposed

11   common denominator actually pales in

12   significance relative to the state-specific

13   circumstances and situations and arguments and

14   so on.

15   And I think I want a little bit more

16   meat on the bones as to what that would -- what

17   that means.

18   MR. TSEYTLIN: Yeah, so, I mean, I

19   will say that those kinds of observations are

20   not really relevant to either one of our --

21   aspects of our test. You know, our first test

22   for applicable -- applicability is just --

23   JUSTICE KAGAN: I just want --

24   MR. TSEYTLIN: Yeah.

25   JUSTICE KAGAN: -- like, your sense

1   of, like, what happens.

2   MR. TSEYTLIN: Okay. Well, what

3   happens is, for example, on the 1 -- the 1 --

4   the 1 percent threshold, you know, Utah's and,

5   you know, PacifiCorp was my client there, our

6   submission was that, you know, with regard to

7   states in the west, the -- the 1 percent doesn't

8   make sense. And we used an example --

9   JUSTICE KAGAN: Not what I'm saying.

10   MR. TSEYTLIN: Okay.

11   JUSTICE KAGAN: Suppose we take these

12   four nationwide determinations --

13   MR. TSEYTLIN: Mm-hmm.

14   JUSTICE KAGAN: -- and we just assume

15   that the EPA is going to apply them uniformly.

16   Is there still work to be done as to any SIP

17   approval/disapproval decision?

18   MR. TSEYTLIN: Yes, of course. So --

19   JUSTICE KAGAN: So what is -- what is

20   the non-common denominator work that remains to

21   be done?

22   MR. TSEYTLIN: The state specific

23   arguments, for example, in Utah. We made the

24   argument that we are like Arizona, and Arizona a

25   couple years before, EPA had declined to -- to

1   apply the -- the 1 percent threshold,

2   essentially because the down-state pollution

3   there was to California and the mountains were

4   essentially trapping most of the -- most of the

5   pollution there, and so the 1 -- there was so

6   much -- so little import to the contribution

7   that Arizona was making to California that it

8   wouldn't make any sense to apply the 1 percent

9   threshold. We said we, in Utah, we're -- we're

10   told that we're triggering monitors in the

11   Denver area. We said look, there's mountains

12   around Denver. It's trapping it over there.

13   And so treat us like Arizona.

14   Now, that is a very specific

15   regional-specific thing that, you know, I

16   wouldn't get to argue -- you know, it would get

17   lost in -- in the D.C. Circuit and also it is

18   not one of the four determinations. It's

19   something very particular.

20   CHIEF JUSTICE ROBERTS: Thank you,

21   counsel.

22   Justice Thomas? Anything further?

23   JUSTICE KAVANAUGH: It doesn't get

24   lost. I'll just say that.

25   CHIEF JUSTICE ROBERTS: I'm sorry,

1   Justice Gorsuch? Anything?

2   JUSTICE GORSUCH: Yeah. But there are

3   four things, right? I mean, the EPA says they

4   are uncommon to all and wouldn't it be efficient

5   to have those determined in one venue with

6   excellent judges who pay close attention to

7   them.

8   (Laughter.)

9   JUSTICE GORSUCH: And then any other

10   regional matters to resolve regionally.

11   MR. TSEYTLIN: Well --

12   JUSTICE GORSUCH: I mean, that would

13   be a good system too, right?

14   MR. TSEYTLIN: Certainly that would be

15   a system that Congress could enact.

16   JUSTICE GORSUCH: Yeah.

17   MR. TSEYTLIN: Further --

18   JUSTICE GORSUCH: Okay, thanks.

19   MR. TSEYTLIN: -- further the way that

20   -- you know -- that -- you know --

21   CHIEF JUSTICE ROBERTS: Justice

22   Kavanaugh.

23   JUSTICE KAVANAUGH: Just to make sure

24   on deference, are you saying no deference to

25   EPA's determination that it's nationwide scope

1   and effect?

2   MR. TSEYTLIN: Yeah, my position is

3   the same as Mr. Huston, but I will have one

4   addition -- sorry.

5   JUSTICE KAVANAUGH: Yeah. Go ahead.

6   MR. TSEYTLIN: My additional wrinkle

7   is that regardless of whether the Court believes

8   that deference is warranted to -- when EPA

9   applies the proper framework, here there's no

10   deference to the fact that their -- the finding

11   that they made was on the wrong thing.

12   So if you take a look at the Federal

13   Register notice, the only thing that they're

14   finding as a nationwide determination of a scope

15   and effect is based on the fundamental flaw that

16   applies to the first and second sentence, which

17   is that they think that the -- the action is all

18   21. So the fact that they identified the wrong

19   -- the wrong action wouldn't be entitled to

20   deference no matter what.

21   JUSTICE KAVANAUGH: I understand that

22   point.

23   MR. TSEYTLIN: Yeah.

24   JUSTICE KAVANAUGH: Okay. Thank you.

25   CHIEF JUSTICE ROBERTS: Justice

 1   Barrett?

 2   Justice Jackson?

 3   JUSTICE JACKSON: Yeah, you said a

 4   couple of times that your approach to the third

 5   sentence differed, but you never quite got out

 6   how so.

 7   MR. TSEYTLIN: Yeah. So the sentence,

 8   the -- the key sentences, if such an action is

 9   based on a determination of scope -- of

10   nationwide scope and effect, we think that the

11   word "of" is ambiguous. We take the states and

12   maybe EPA to -- to read "of" as, if such an

13   action is based on a determination that has a

14   nationwide scope and effect.

15   We read that "of" to be, if such an

16   action is based on a determination of that

17   action's nationwide scope and effect. And I --

18   I think if -- you know, as this opinion writes,

19   I think if you take a look at that, that is the

20   most administrable rule that can be made for the

21   third sentence. And it gives it real import,

22   even though it's in a limited number of cases.

23   JUSTICE JACKSON: Thank you.

24   CHIEF JUSTICE ROBERTS: Thank you,

25   counsel.

1   Mr. Stewart. Welcome back.

2   ORAL ARGUMENT OF MALCOLM L. STEWART

3   ON BEHALF OF THE RESPONDENTS

4   MR. STEWART: Thank you, Mr. Chief

5   Justice and may it please the Court:

6   Let me just make two or three

7   observations and -- and then take questions.

8   The first is that there's been

9   colloquy in both of these cases about the

10   propriety of EPA getting deference on a question

11   about what forum the case will be heard in.

12   Under the statute, EPA has some influence on the

13   question of whether the case, all challenges to

14   a particular action will be heard in a

15   centralized forum or whether, instead, they can

16   be brought all throughout the country.

17   And if EPA chooses the former course,

18   the fact that the cases go to the D.C. Circuit,

19   the fact that the D.C. Circuit is the

20   centralized forum, that's the choice of

21   Congress. That's not the choice of EPA. And so

22   it's not the case that EPA can direct challenges

23   to whatever court it wishes.

24   The second thing I would say, and this

25   goes back to the NRDC cases that I mentioned

1   earlier, that when Congress was studying the

2   venue provision in preparation for the 1977

3   amendments, it had in mind the SIP approval

4   actions that had taken place and been challenged

5   in many -- in NRDC cases.

6   And when it chose the path that EPA's

7   general counsel recommended, rather than the

8   path that ACUS recommended, it wanted to ensure

9   that there was some mechanism available for

10   review of national issues, even when they

11   pertained to the approval or disapproval of

12   SIPs.

13   And, finally, Justice Kagan, you said

14   something to the effect that under EPA's

15   framework here, as opposed to the framework in

16   the case before, even once you got past the

17   1 percent threshold, the 1 -- the questions

18   about the propriety of the 1 percent de minimis

19   threshold, there was still a lot of work to be

20   done.

21   And I think the analysis is

22   complicated, but at the end of the day, EPA

23   disapproved 21 plans. It approved, I think, 23.

24   I believe that all 23 plans that were

25   approved were approved on the ground that the

1   state fell under the 1 percent de minimis

2   threshold. So as a practical matter, the

3   determination of whether a particular state

4   exceeded the 1 percent threshold had great

5   predictive effect in terms of whether the plan

6   would be approved or disapproved.

7   I welcome the Court's questions.

8   JUSTICE THOMAS: But once you got past

9   the 1 percent thresh -- threshold, which they

10   have in common, the rest of it seems quite

11   particularized. And how would you deal with

12   that as opposed to the refineries, where we were

13   only talking about a couple of factors?

14   MR. STEWART: Well, I would say they

15   do require analysis of particular state

16   circumstances, but they -- they are still

17   national in scope and they still were contested;

18   that is, EPA received comments indicating that

19   challenges to even the subsequent steps of the

20   analysis were not simply going to be we accept

21   these factors, but we think we satisfy them.

22   They were going to be challenges to

23   the factors themselves.

24   CHIEF JUSTICE ROBERTS: There's been

25   talk about the benefit of having a simple and

1   straightforward standard, and I think that's

2   true.

3   I also think the point Mr. Tseytlin

4   makes is a significant one too, that if you're

5   -- however you want to put it -- more at home in

6   your local circuit and less likely to get lost

7   in the shuffle here in Washington. And I

8   wondered if you had a response to his concern in

9   that respect.

10   MR. STEWART: I -- I mean, I think

11   that just depends -- I mean, part of the

12   awkwardness of the case is, the extent of the

13   statute is the extent to which that is so

14   depends on the extent to which your challenges

15   are to the national criteria that EPA has

16   promulgated or whether they are to the way in

17   which those criteria are applied to your own

18   state-specific circumstances.

19   And the more that the latter is the

20   case, the more it makes sense to be in the

21   regional circuit. The reason I say it's an

22   awkwardness of the statute is the statute

23   requires that the venue determination be made as

24   of -- at the time that the action is taken, and

25   it doesn't take into account what set of

1   challenges do particular petitions for review

2   choose to make.

3   And so the best we can do is have a

4   test that tries to use proxies for actions that

5   are -- as to which the national determinations

6   are likely to be the focus of judicial review.

7   JUSTICE JACKSON: So the statute does

8   look at the action at the time it's taken. And

9   sentence 2 very clearly puts these kinds of

10   actions, the SIPs, in the local or regional

11   bucket. So I guess I'm -- I'm confused as to

12   why the government is even taking the position

13   that the first bucket is applicable here.

14   MR. STEWART: I -- I mean, we see the

15   specification of SIP decisions in prong 2 as

16   referring to decisions regarding an -- an

17   individual SIP. And to the extent that we

18   publish approvals or disapprovals of particular

19   state SIPs on a one -- one-to-one basis, we

20   would agree that those are regionally --

21   JUSTICE JACKSON: So you think the

22   statute was really meant to distinguish between

23   1 and 2 on the basis of the EPA's publishing

24   determinations?

25   MR. STEWART: Well, I would say that

1   the statute was meant to distinguish between 1

2   and 2 on the basis of the action that EPA took.

3   And if -- if you regard the -- what EPA did here

4   as simply a publishing decision, then we would

5   say no, you should probably disregard it.

6   We -- we think of it as more than that

7   in -- in the same way --

8   JUSTICE JACKSON: Are they materially

9   different? If what the EPA did here was

10   separate out -- I mean, I understand. I see one

11   -- one publication that lists each state

12   separately and has the analysis for each state

13   separately.

14   If EPA put a page break between each

15   one of the states and published them

16   differently, would you say that's a sentence 2

17   scenario?

18   MR. STEWART: I -- I don't think a

19   page break would be enough, but if EPA issued

20   different -- you know, 21 different Federal

21   Register notices on 21 consecutive days all

22   applying the --

23   JUSTICE JACKSON: With the same

24   content --

25   MR. STEWART: With -- with --

1   JUSTICE JACKSON: -- exactly the same

2   content.

3   MR. STEWART: With the same kind of

4   content as to the nationwide part of it, and

5   then each one with a different analysis, how

6   does this content, the nationwide content apply

7   to the particular state involved, then we would

8   say that's a series of discrete state-specific

9   actions.

10   And in -- in a way the most

11   straightforward way for us to prevail in this

12   case ultimately is on prong 3, because the

13   analysis under prong 3 doesn't depend on what if

14   any weight the court gives to EPA's decision to

15   issue these, all of these in one Federal

16   Register notice.

17   JUSTICE JACKSON: So on the thought,

18   the prong 3 determination, what -- what is your

19   view as to why this is still driven? I

20   understand that you have four factors and you're

21   applying the four factors. And we would hope

22   that that would be the case, that you would be

23   assessing each state consistently using a set of

24   criteria.

25   But I take your point that that's

1   enough to make it a -- a determination of

2   national scope or application?

3   MR. STEWART: Well, I mean, it is

4   partly that they were the four criteria we were

5   going to use. It was partly that they at least

6   to a degree were new and contested. We

7   anticipated from comments we received on the

8   proposed disapprovals that the states would

9   contest the methodology, not just its

10   application.

11   The other thing I would say is all of

12   the states whose plans were disapproved had

13   proposed to take no further ameliorative action

14   with respect to ozone transport beyond what they

15   were already doing. So it would have been a

16   much more complicated analysis if various states

17   had been planning to improve their plans in --

18   in different ways and EPA was required to make

19   state-by-state determinations as to is this good

20   enough.

21   In -- instead, we had -- we approved a

22   lot of plans that -- for states that fell below

23   the 1 percent threshold, disapproved a lot of

24   plans for states that in our view fell above it

25   and that didn't propose to do anything

1   additional.

2   JUSTICE GORSUCH: So they -- the --

3   you knew the challenges were going to be to the

4   four factors --

5   MR. STEWART: Right.

6   JUSTICE GORSUCH: -- because the plans

7   in all the states was to do nothing. And so it

8   had to challenge the -- the factors that you

9   were using?

10   MR. STEWART: We -- we anticipated

11   that, and we had confirmation of that from the

12   fact that we had proposed -- had -- had

13   published proposed disapprovals for each of the

14   states and had received comments on --

15   JUSTICE GORSUCH: Saying as much.

16   MR. STEWART: Yes.

17   JUSTICE GORSUCH: Exactly. And so,

18   again, as I take it, you -- you're consistent

19   between the two cases in this respect. You're

20   saying: There are new criteria. That's what's

21   going to get challenged. That should go to the

22   D.C. Circuit. And maybe 10 years later when the

23   criteria are settled, and it really does turn on

24   local factors, then -- then the regional

25   circuits can take over again?

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1              MR. STEWART:  Yes, exactly.
2              JUSTICE GORSUCH:  Yeah.
3              JUSTICE JACKSON:  But isn't it here
4    how those factors are actually working and the
5    differences in the modeling in each state that
6    is driving the determination?
7              I mean, I think this goes back to
8    Justice Kagan's points earlier that, yes, there
9    -- the factors are new, they are going to be
10   contested, and if those factors had necessarily
11   come out the same way because we didn't really
12   care about the facts of each case in the
13   application, then perhaps it would make sense to
14   have the D.C. Circuit doing it, but if you're
15   applying new factors and it matters that you are
16   Denver versus, you know, Arizona or whatever in
17   terms of how the modeling works, I guess I don't
18   see how this is necessarily the same as the
19   refining -- the refinery determination.
20             MR. STEWART:  I -- I mean, there's an
21   obvious difference in outcomes in the sense that
22   with the refineries, we ultimately denied all of
23   105 of the exemption applications; whereas with
24   the various state plans that EPA got, we
25   disapproved 21 of them and approved I -- 23 or
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1   plus -- plus or minus one or two of that. So we

2   were approving a little over half the plan

3   submissions. In that case, it -- it looks as

4   though there's more -- and there is -- more

5   state-specific variation in outcome.

6   The two things I would say are a -- a

7   determination can be -- a -- a nationwide

8   determination can be central to the analysis and

9   be the focus of judicial scrutiny and be the

10   sort of thing that -- for which centralized

11   review is important, even if it doesn't kind of

12   preordain the outcome of a particular matter.

13   And then the second thing I would say

14   is, with respect to the state-by-state

15   variations here, the big predictor was did you

16   fall above or below the 1 percent threshold.

17   JUSTICE JACKSON: I know, but we're in

18   the exception. I mean, the thing that -- the

19   thing that troubles me about your first point,

20   at least --

21   MR. STEWART: Right.

22   JUSTICE JACKSON: -- is that we've

23   already determined in the structure of the

24   statute that these are local because we're in

25   prong 3. And the exception, I would think,

1   would just be identifying the particular

2   circumstances in which, even though we know we

3   have state-specific variation that matters,

4   that's why we're local, we're still going to say

5   no, this is really being driven in a significant

6   way by the -- the national determination.

7   And so I guess I just don't -- it's --

8   it's hard to for me to square that understanding

9   of the structure of the statute and the fact

10   that we're in an exception with an argument that

11   says yes, but there's a national standard doing

12   some work here.

13   MR. STEWART: Well, I mean, obviously

14   the only -- the only people who -- who are going

15   to seek judicial review are people who didn't

16   get the result that they want from the agency.

17   And so in -- in the case of SIP disapprovals,

18   the -- the disappointed parties would

19   predominantly be states, to some extent

20   industry.

21   And so you -- you would have to -- you

22   would have to ask -- if you were trying to route

23   to the D.C. Circuit the recurring national

24   issues, while leaving local issues to the

25   regional circuits, you -- you'd want to be

1   anticipating as best you can are the people who

2   are disappointed by this decision likely, in the

3   main, to challenge it on the ground that the

4   national framework was no good or, in the main,

5   will they argue that even accepting the national

6   framework, the outcome should have been

7   different in my case?

8   Again, based on the -- both the kind

9   of the nature of the inquiry and the comments we

10   had received on the proposed disapprovals, EPA

11   anticipated that, in the main, the challenges

12   would be to the nationwide aspects.

13   And although it's not directly

14   relevant to the venue question, that's been

15   borne out in practice. The people who have

16   challenged these -- the SIP disapprovals in the

17   regional circuits have primarily focused on the

18   nationwide framework, rather than on the

19   site-specific application.

20   JUSTICE KAVANAUGH: In your rebuttal

21   in the earlier case, where you said some cases

22   have ended up in the D.C. Circuit without being

23   challenged, the venue being challenged --

24   MR. STEWART: Right.

25   JUSTICE KAVANAUGH: -- and I think

1   that's right, were you referring, though, to the

2   prong 1 cases or prong 3 cases?

3   MR. STEWART: I -- I mean, I think in

4   most of these cases, it would -- EPA would

5   identify both in the rule-making as bases for

6   D.C. Circuit venue. And so as -- as happened in

7   this Federal -- these Federal Register notices

8   --

9   JUSTICE KAVANAUGH: So they're both

10   prong 1 and 3.

11   MR. STEWART: Both prong 1 and 3. And

12   because the people sued in the D.C. Circuit and

13   nobody contested venue, it -- it wasn't --

14   JUSTICE KAVANAUGH: But the point -- I

15   think the point would be -- is different if it

16   were an exclusively prong 3 situation.

17   MR. STEWART: I -- I -- I think that's

18   right although --

19   JUSTICE KAVANAUGH: Anyway, that --

20   MR. STEWART: I guess my only --

21   JUSTICE KAVANAUGH: You get -- you get

22   my point.

23   MR. STEWART: Yeah. And my -- my

24   response to Mr. Huston was just to the effect

25   that the -- the fact that we can't point to

1   published court of appeals opinions that have

2   upheld prong 3 findings by EPA is more a

3   function of those findings not being challenged

4   in prior litigation than it is of we make

5   findings, prong 3 findings, and sometimes

6   they're struck down and -- but they're never

7   upheld. That -- that hasn't been the case.

8   We're not aware of any case in which EPA has

9   made a prong 3 finding and a court has

10   disapproved it.

11   I guess the last thing I wanted to say

12   is I'm be -- I've always bemused in these papers

13   by references to the D.C. Circuit as a hometown

14   court for EPA because if location in D.C. meant

15   that the D.C. Circuit is a hometown court, then

16   this Court would be a hometown court for EPA,

17   and I've never had that perception.

18   (Laughter.)

19   MR. STEWART: Thank you, Mr. Chief

20   Justice.

21   CHIEF JUSTICE ROBERTS: Anything

22   further?

23   MR. STEWART: Or do --

24   CHIEF JUSTICE ROBERTS: Yeah.

25   Anything further?

1   Thank you, counsel.

2   MR. STEWART: Thank you.

3   CHIEF JUSTICE ROBERTS: Mr.

4   Mansinghani.

5   REBUTTAL ARGUMENT OF MITHUN MANSINGHANI

6   ON BEHALF OF THE PETITIONERS IN CASE 23-1067

7   MR. MANSINGHANI: Thank you, Mr. Chief

8   Justice. Two quick points.

9   To Justice Kagan's question about

10   whether the four determinations were sort of the

11   be all/end all here, and it seems like

12   Mr. Stewart seemed to think so with the

13   1 percent threshold, if you look at Oklahoma's

14   plan, Oklahoma said, look, even -- even though

15   we're above the screening threshold, here's why

16   our contributions are not significantly going to

17   contribute to non-attainment down-wind. Look at

18   the trends in Oklahoma's emissions due to the

19   specific structure of the Southern Power Pool

20   and to how Oklahoma operates its electric

21   generating fleet. And look at the dropping

22   ozone levels in down-wind states like Texas,

23   because of mobile source changes.

24   EPA rejected those rationales, but

25   nonetheless those were state-specific things

1   that ended up controlling the decision.

2   Similarly with Utah, Utah said based

3   on a weight -- weight-of-the-evidence analysis,

4   we don't think we're significantly contributing

5   because in the west, as EPA had prior determined

6   with states like Arizona and California, the --

7   the relative contributions are relatively low.

8   Around 6 to 7 percent are coming from other

9   states, very different from what's happening in

10   the east.

11   So these were all very state-specific

12   things that EPA had to -- to adjudicate, even

13   after it got past all of those four

14   determinations.

15   The second thing I wanted to talk

16   about was where we are with the text of the

17   exception. You know, Mr. Stewart's test has a

18   lot of atextual things to it. Well, it has to

19   be a determination but a new one, not a -- not

20   an old one. We have to try to figure out where

21   -- what -- what part of the action litigants are

22   likely to challenge. Are they likely to

23   challenge the local aspects or the national

24   aspects? That -- that seems like a very

25   hard-to-adjudicate venue test. And it's also

1   something that doesn't come from anywhere in the

2   statute.

3   I think our test comes from the words

4   "based on," which in this Court's Foreign

5   Sovereign Immunities Act decision in Sachs, I

6   think takes a similar approach as we do. It has

7   to be the gravamen -- gravamen or foundation of

8   the action and not just an element. And in that

9   case, this Court declined to apply the

10   commercial activities exception in a unanimous

11   decision, even though plaintiffs had alleged

12   commercial activities, because the Court said

13   that alleging all of those things alone still

14   entitled plaintiffs to nothing.

15   But then you also couple that with the

16   fact that I think the third sentence has to be

17   read in conjunction with the first two. It has

18   to be things like are in the first sentence,

19   like the setting of a national uniform air

20   quality standard or a national uniform standard

21   of performance for sources.

22   Couple that with the types of cases

23   that we talked about like the NRDC cases and

24   Dayton Power cases and the fact that this is a

25   venue clause, so it shouldn't be manipulable,

1   and the fact that it's an exception, so it

2   shouldn't be read to swallow the rule. I think

3   all of that leads to -- to our test.

4   CHIEF JUSTICE ROBERTS: Thank you,

5   counsel. The case is submitted.

6   (Whereupon, at 12:39 p.m., the case

7   was submitted.)

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