No. 23-1229

IN THE

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

CALUMET SHREVEPORT REFINING, L.L.C., et al.,
Respondents.

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

BRIEF FOR STATES OF NEW YORK, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN; THE DISTRICT OF COLUMBIA; HARRIS COUNTY, TEXAS; AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
ELIZABETH A. BRODY
Assistant Solicitor General
MORGAN A. COSTELLO
CLAIBORNE E. WALTHALL
Assistant Attorneys General

28 Liberty Street
New York, New York 10005
(212) 416-8016
barbara.underwood@ag.ny.gov
**Counsel of Record*

(*Counsel listing continues on signature pages.*)

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Cases **Page(s)**

Laws

Session Laws (by year)

Laws **Page(s)**

Administrative Sources

Administrative Sources **Page(s)**

Administrative Sources **Page(s)**

Miscellaneous Authorities

INTERESTS OF AMICI CURIAE

This case concerns the proper interpretation of the Clean Air Act's venue provision, which states that the D.C. Circuit has exclusive jurisdiction to review challenges to "nationally applicable" actions that the U.S. Environmental Protection Agency (EPA) undertakes pursuant to the Act. 42 U.S.C. § 7607(b)(1). The venue provision further provides that the D.C. Circuit also has exclusive jurisdiction to review challenges to "locally or regionally applicable" EPA actions under the Act when they are "based on a determination of nationwide scope or effect," and when EPA "finds and publishes that such action is based on such a determination." *Id.*

Here, the Fifth Circuit declined to transfer to the D.C. Circuit petitions for review that challenged two final EPA actions denying requests by thirty-six small fuel refineries for exemptions under the Act's Renewable Fuel Standards program. Every other regional circuit that received petitions challenging the same EPA denial actions transferred the petitions to the D.C. Circuit after determining that the actions were either nationally applicable or based on a determination of nationwide scope or effect. In rejecting that view, the Fifth Circuit reasoned that the venue provision permitted each small refinery to challenge its own individual denial in its home circuit. Pet. App. 15a.

Amici curiae are the States of New York, Arizona, Colorado, Connecticut, Delaware, Illinois, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin; the District of Columbia; Harris County, Texas; and the City of New York. As States and local governments, Amici work within the Act's cooperative federalism structure to carry out the Act's nation-

wide public health and environmental protection goals. Among the many provisions of the Act that are especially important to Amici are those that address interstate pollution, which causes substantial harms to Amici's residents, industry, and environment. Amici also frequently participate in litigation about EPA actions under the Act, whether as petitioners challenging such actions, intervenors defending such actions, or as amici curiae.

Amici thus have strong interests in ensuring that the Act's venue provision is properly applied to further Congress's clear intent to centralize judicial review of EPA actions concerning national issues in the D.C. Circuit. The Act's direction that adjudication of national issues occur solely in the D.C. Circuit facilitates swift resolution of disputes and promotes the uniform application of the Act. By contrast, as Amici's experience shows, allowing many different regional circuit courts to each address the same national issue under the Act through separate and often duplicative litigation can cause chaos and extensive delay in implementing the Act's requirements, many of which have mandatory, expeditious deadlines for compliance. Congress rejected that approach twice, when it enacted and later amended the venue provision.

The Fifth Circuit's erroneous decision below contravenes Congress's clear intent, evident in the venue provision's text, structure, and history. And the Fifth Circuit's approach needlessly complicates the issue of venue, which should be easily resolvable at the outset of litigation. Otherwise, as Amici's experience demonstrates, the parties and courts will waste time and resources on protracted litigation about the proper venue, or on the merits of a case that turns out to be filed in an improper venue. The Fifth Circuit's decision should be reversed.

STATEMENT

A. Statutory Background

1. The 1970 Clean Air Act

Congress enacted the first version of the Clean Air Act's venue provision in 1970. Congress recognized that many of EPA's actions under the Act—including actions establishing national ambient air quality standards, national emissions standards for hazardous air pollutants, and several other types of standards—would be "national in scope and require even and consistent national application," S. Rep. No. 91-1196, at 41 (1970). Accordingly, Congress specified in the venue provision that challenges to such actions "may be filed only in the United States Court of Appeals for the District of Columbia." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, sec. 12(a), § 307(b), 84 Stat. 1676, 1707-08. Funneling review of national actions directly to a single court of appeals reflected Congress's "significant[] concern[] with expedition" in achieving clean air by the Act's deadlines. *See Kennecott Copper Corp. v. EPA*, 462 F.2d 846, 849 (D.C. Cir. 1972).

At the same time, because the plans that States would craft to meet the national standards ("state implementation plans" or "SIPs") would "run only to one air quality control region," S. Rep. No. 91-1196, *supra*, at 41, Congress directed SIP approvals to be reviewed "in the United States Court of Appeals for the appropriate circuit," Pub. L. No. 91-604, sec. 12(a), § 307(b), 84 Stat. at 1707-08.

As the venue provision was implemented, however, it became clear that "not every question respecting [a state] implementation plan [was] of purely local significance." David P. Currie, *Judicial Review Under Federal*

Pollution Laws, 62 Iowa L. Rev. 1221, 1263 (1977). In 1971, for example, EPA issued primary national air quality standards for several types of transportation-related pollutants. *See* National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8186, 8187 (Apr. 30, 1971). All fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa each submitted implementation plans. *See* Approval and Promulgation of Implementation Plans, 37 Fed. Reg. 10842, 10842 (May 31, 1972). EPA approved each plan and, at the same time, granted uniform, two-year extensions of the deadline for each State and territory to achieve the standards, among other things. *Id.* at 10842, 10845; *see Natural Res. Def. Council, Inc.* (*NRDC*) *v. EPA*, 465 F.2d 492, 493 (1st Cir. 1972).

Challengers sought to obtain judicial review of the uniform, two-year extension and other policy positions that applied nationally and uniformly to the plans. *See NRDC*, 465 F.2d at 493. Because the venue provision at that time required state plan approvals to be challenged in the appropriate regional circuit, challengers filed petitions in all eleven circuits. They then moved to consolidate the scattered challenges in the D.C. Circuit. Five courts of appeals transferred the petitions to the D.C. Circuit, and five stayed proceedings pending the outcome of the D.C. Circuit proceedings. *See* Currie, *supra*, at 1263. In transferring challenges to the D.C. Circuit, the First Circuit explained that "litigation in several circuits, with possible inconsistent and delayed results on the merits, can only serve to frustrate the strong Congressional interest in improving the environment." *NRDC*, 465 F.2d at 495.

2. The 1977 amendments

In 1977, Congress amended the Act's venue provision. Congress amended the first sentence of the provision to specify that, in addition to the seven types of national actions enumerated in the statute, "other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act" are reviewable solely in the D.C. Circuit. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(c)(1), 91 Stat. 685, 776. Congress amended the second sentence to specify that, in addition to state plan approvals, "any other final action of the Administrator under this Act which is locally or regionally applicable" is reviewable in the "appropriate regional circuit." *Id.*, § 305(c)(2), 91 Stat. at 776.

Congress further amended the venue provision to address where challengers must seek review when, as had occurred in *NRDC*, a presumptively local or regional EPA action is based on determinations with nationwide implications. Specifically, Congress added language to the Act that gave the D.C. Circuit exclusive jurisdiction over challenges to a locally or regionally applicable EPA action "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." *Id.*, § 305(c)(4), 91 Stat. at 776.

As part of the congressional hearings leading up to the 1977 amendments' enactment, the Administrative Conference of the United States (ACUS)[1] submitted a

---

[1] ACUS is an independent agency that studies and recommends improvements in federal administrative procedure, among other

(*continues on next page*)

report and recommendation regarding the Act's venue and other judicial-review provisions. *See* ACUS, Recommendation 76-4: Judicial Review Under the Clean Air Act and Federal Water Pollution Control Act (1976), in *Clean Air Act Amendments of 1977: Hr'g on S. 251, S. 252 & S. 253 Before the S. Subcomm. on Env't Pollution of the Comm. on Env't & Pub. Works*, 95th Cong., 1st Sess. pt. 3, at 248-355 (1977). ACUS urged a policy of decentralized review across multiple circuits, recommending that Congress amend the Act to specify that EPA's approvals of state implementation plans are reviewable in regional circuits even when they are based on national determinations. *Id.*

G. William Frick, a member of ACUS and general counsel of EPA, disagreed and appended a separate statement to the report. *See* Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56767, 56768-69 (Dec. 30, 1976). Frick contended that "where 'national issues' are involved" in state implementation plans, "they should be reviewed in the D.C. Circuit." *Id.* at 56768. Frick listed several benefits of centralizing review in the D.C. Circuit, including: promoting national uniformity on important issues; leveraging the D.C. Circuit's "obvious expertise" in administrative law; and capitalizing on the D.C. Circuit's familiarity with the notoriously complex provisions of the Clean Air Act. *Id.* at 56769.

The House committee that conducted the hearings ultimately agreed with Frick's view that national questions should be reviewed in the D.C. Circuit. *See* H.R. Rep. No. 95-294, at 324 (1977) (noting committee's concurrence with "the comments, concerns, and recom-

---

things. *See* 5 U.S.C. § 594(1); Maeve P. Carey, Cong. Rsch. Serv., *The Federal Rulemaking Process: An Overview* 7 n.26 (2013).

mendation" regarding venue in "the separate statement of G. William Frick, which accompanied the Administrative Conference's views"). Thus, the 1977 bill contained the "based on a determination of nationwide scope or effect" language. *Id.* The committee report explained that this language means that when a local or regional action is found by the EPA Administrator "to be based on a determination of nationwide scope or effect (including a determination which has scope or effect *beyond a single judicial circuit*), then exclusive venue for review [would be] in the U.S. Court of Appeals for the District of Columbia." *Id.* (emphasis added). Congress passed the 1977 bill containing that language, and President Richard M. Nixon signed it into law. *See* Pub. L. No. 95-95, § 305(c)(4), 91 Stat. at 776. The venue provision has not been structurally amended since.[2]

B. Procedural Background

In 2022, EPA published two decisions denying the requests of thirty-six small fuel refineries for exemptions under the Clean Air Act's Renewable Fuel Standard (RFS) program. *See* April 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program, 87 Fed. Reg. 24300 (Apr. 25, 2022) ("Apr. Denial"); Notice of June 2022 Denial of Petitions for Small Refinery Exemptions Under the Renewable Fuel Standard Program, 87 Fed. Reg. 34873 (June 8, 2022) ("June Denial"). Asserting "disproportionate

---

[2] In a separate law passed in 1977, Congress added several types of actions to the enumerated lists of "nationally applicable" and "locally or regionally applicable" actions. *See* Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, § 14(a)(79)-(80), 91 Stat. 1393, 1404. In 1990, Congress made a conforming amendment to a statutory cross-reference. *See* Pub. L. No. 101-549, § 302(g), 104 Stat. 2399, 2574 (1990).

economic hardship," the refineries sought an exemption from the Act's requirement to blend certain quantities of ethanol or other renewable fuels into their products. *See, e.g.*, Apr. Denial, 87 Fed. Reg. at 24300; *see also* 42 U.S.C. § 7545(o)(9)(B).

In the published final actions, EPA explained that the April and June Denials were each "nationally applicable" and "based on a determination of nationwide scope or effect." *E.g.*, Apr. Denial, 87 Fed. Reg. at 24301. The actions were "nationally applicable" because they denied exemptions "for over 30 small refineries across the country and applie[d] to small refineries located within 18 states in 7 of the 10 EPA regions and in 8 different Federal judicial circuits." *Id.* In addition, the actions were "based on a determination of nationwide scope or effect" because they were based on two uniform principles. First, the actions were "based on EPA's revised interpretation of the relevant [statutory] provisions," prompted by a recent circuit court decision holding that the plain language of the statute barred EPA from granting economic-hardship exemptions based on circumstances unrelated to compliance with the RFS program. *Id.*; *see Renewable Fuels Ass'n v. EPA*, 948 F.3d 1206 (10th Cir. 2020), *rev'd on other grounds sub nom. HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*, 594 U.S. 382 (2021). Second, the actions were based on the principle that all small refineries pass the cost of program compliance to consumers—a determination that was "applicable to all small refineries no matter the location or market in which they operate." *E.g.*, Apr. Denial, 87 Fed. Reg. at 24301.

Various small refineries located in different States petitioned for review in the Third, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits. Applying the Act's venue provision, 42 U.S.C. § 7607(b)(1), each circuit except the

Fifth Circuit dismissed or transferred the petitions to the D.C. Circuit. *See* Pet. for Writ of Cert. 9-10 & nn.3-4, *EPA v. Calumet Shreveport Refin. Co.*, No. 23-1229 (May 20, 2024) (listing orders).

The Fifth Circuit declined to transfer the petitions filed in that court to the D.C. Circuit, reasoning that the Act's venue provision allows each individual small refinery to challenge its own denial in its home circuit. Pet. App. 15a. The Fifth Circuit concluded that the denial actions were not nationally applicable because, in its view, the phrase "nationally applicable" meant having "legal effect" in every State nationwide. Pet. App. 11a (emphasis omitted). The Fifth Circuit also concluded that the actions were not "based on a determination of nationwide scope or effect" (Pet. App. 13a) because, in its view, the agency's revised legal interpretation and cost passthrough principles were not on their own "a sufficient basis to adjudicate" the exemption petitions (Pet. App. 15a).

Judge Higginbotham dissented, explaining that the denial actions were plainly nationally applicable because they applied across eighteen States in eight judicial circuits. Pet. App. 38a; *see* Pet. App. 35a-43a. The dissent also would have concluded that, even if the actions were locally or regionally applicable, they were based on a determination of nationwide scope and effect and thus reviewable solely in the D.C. Circuit. This Court granted EPA's petition for certiorari.[3]

---

[3] In the same order, this Court also granted certiorari petitions from another case interpreting the same statutory venue provision. *See Oklahoma v. EPA*, No. 23-1067; *PacifiCorp v. EPA*, No. 23-1068.

SUMMARY OF ARGUMENT

I. Congress chose to centralize review of national issues under the Clean Air Act in a single court—the D.C. Circuit. Congress's considered policy judgment ensures uniform interpretations and applications of the Act; avoids conflicting rulings; and furthers the legislative goal of expeditiously achieving clean air across the nation.

A. The venue provision requires the D.C. Circuit to review actions that are "nationally applicable," i.e., spanning more than one judicial circuit. For decades, courts have construed "nationally applicable" in this straightforward, geographical manner—with predictable, consistent results across circuits. Actions involving one State or multiple States within a particular judicial circuit go to the appropriate numbered circuit, whereas actions involving States in more than one circuit go to the D.C. Circuit. The Fifth Circuit's contrary conclusion that a rule is "nationally applicable" only if it has or is likely to have prospective legal effect in all States, drastically departs from this judicial consensus and is untethered to the venue provision's text, structure, and history. Moreover, the Fifth Circuit's rule would require difficult predictive judgments to resolve venue, an issue that should be easily resolvable at the outset of litigation to avoid wasting judicial resources and delaying relief.

B. The venue provision separately provides that the D.C. Circuit has exclusive jurisdiction to review actions that are "based on a determination of nationwide scope or effect," and that the EPA expressly finds are based on such a determination. The plain text of this provision, as well as statutory context, make clear that it requires only a single, but-for determination of nationwide scope

or effect to trigger exclusive venue in the D.C. Circuit. The Fifth Circuit erroneously interpreted this provision to mean that an action is "based on" a determination of nationwide scope or effect only if the nationwide determination is "sufficient," on its own, to support EPA's final decision. But that interpretation contravenes the text and structure of the Act, and presents practical problems because complex administrative actions often have many but-for causes. The Fifth Circuit's approach would force courts to weigh the relative importance of various but-for causes behind complex administrative actions at the outset of litigation, before merits briefing.

II. The recent experience of some Amici vividly demonstrates that departing from Congress's judgment to centralize review of national issues under the Act in the D.C. Circuit, as the Fifth Circuit's rule would do, would sow chaos and delay. Specifically, two recent EPA actions involving interstate pollution each produced parallel litigation in seven regional circuits, about the same core suite of nationwide legal issues. Each circuit litigation involved time-consuming motion practice about venue, only to have many of the courts defer consideration of the venue issue to merits panels or issue unpublished orders on venue that remained reviewable by merits panels. And failure to consolidate these challenges in the D.C. Circuit prompted further confusion upon promulgation of a related rule, with a single entity filing as many as nine separate petitions in five circuits purporting to challenge different pieces of the same rule.

Congress plainly did not intend such chaos. Indeed, the history of the Act shows that Congress amended the venue provision precisely to avoid simultaneous, duplicative review of the same action. And allowing the Fifth Circuit's ruling to stand would likely spawn wasteful litigation, confusion, and undue delay in many other

challenges to EPA actions under the Act. For example, the Fifth Circuit's rule would significantly complicate judicial review of EPA actions that designate geographical areas as in "attainment" or "nonattainment" with national air quality standards because many of these areas span multiple States and multiple judicial circuits. And applying the Fifth Circuit's rule to EPA actions that apportion credits of certain chemicals to Amici States' industries would likely trigger divergent judicial decisions and potentially require serial recalculation and reapportionment of pools of allowances.

ARGUMENT

I. CONGRESS CHOSE TO CENTRALIZE REVIEW OF NATIONAL ISSUES UNDER THE CLEAN AIR ACT IN THE D.C. CIRCUIT.

The Clean Air Act's text, history, and context all confirm that Congress chose to centralize review of national issues under the Act in a single court—the D.C. Circuit. Congress accomplished this goal by expressly providing that the exclusive venue for review of actions spanning more than one circuit is the D.C. Circuit. Congress later reinforced this goal when it amended the Act to expand the D.C. Circuit's exclusive review to include all EPA actions under the Act that are "based on a determination of nationwide scope or effect."

Congress's centralization approach promotes national uniformity in the interpretation and application of the Act and avoids "a patchwork of regional interpretations of nationally applicable rules." *Sierra Club v. EPA*, 955 F.3d 56, 65 (D.C. Cir. 2020) (Wilkins, J., concurring); *see also Texas v. EPA*, 983 F.3d 826, 835 (5th Cir. 2020); *Natural Res. Def. Council, Inc. v. EPA*, 512 F.2d 1351, 1356-57 (D.C. Cir. 1975). And centralization

speeds "effectuation of important national policies underlying the Clean Air Act," by ensuring that judicial review can take place swiftly and authoritatively (of course subject to certiorari review in this Court). *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708 (6th Cir. 1975).

The Fifth Circuit's ruling below is untethered to the venue provision's text, structure, and history, each of which reinforces Congress's clear purpose to centralize review of national issues in the D.C. Circuit. The Fifth Circuit's interpretation also poses difficult practical problems that will likely result in wasted judicial resources and prolonged litigation.

A. Congress Assigned Review of Actions Spanning More Than One Circuit to the D.C. Circuit.

Consistent with Congress's intent to avoid duplication and centralize review under the Act, many courts (including the Fifth Circuit prior to the decision below) have for decades interpreted the phrases "locally or regionally applicable" and "nationally applicable" using a straightforward, geographical approach. *E.g.*, *Texas v. EPA*, No. 10-60961, 2011 WL 710598, at *5 (5th Cir. Feb. 24, 2011). Under this longstanding approach, when the regulated parties or entities are located in a single State, or in multiple States within the same judicial circuit, the action is "locally or regionally" applicable. *See, e.g.*, *Sierra Club v. EPA*, 47 F.4th 738, 740 (D.C. Cir. 2022) (petition seeking review of action involving two areas in Texas was "locally" applicable); *American Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (petition seeking review of California's state plan approval was "locally" applicable); *New York v. EPA*, 133 F.3d 987, 990 (7th Cir. 1998) (petition

seeking review of States abutting Lake Michigan was "regional in a literal sense").

By contrast, when the parties or entities regulated by an EPA action under the Act are located in more than one judicial circuit, the action is instead "nationally applicable," and challenges belong exclusively in the D.C. Circuit. *See, e.g.*, *Southern Ill. Power Coop. v. EPA*, 863 F.3d 666, 671 (7th Cir. 2017) (action involving twenty-four States); *ATK Launch Sys., Inc. v. EPA*, 651 F.3d 1194, 1196 (10th Cir. 2011) (action involving thirty-one areas reaching "from coast to coast"); *Texas*, 2011 WL 710598, at *3 (action involving thirteen States); *see West Virginia Chamber of Com. v. Browner*, 166 F.3d 336, 1998 WL 827315, at *5-6 (4th Cir. 1998) (table case) (action involving twenty-two States and District of Columbia); *see also* S. Rep. No. 91-1196, *supra*, at 41 (contrasting actions that require "national application" with actions that "run only to one air quality control region").

This straightforward geographical approach is easy to administer in practice and avoids "needless uncertainty into the determination of venue, where the need for clear rules is especially acute." *See Southern Ill. Power Coop.*, 863 F.3d at 673. Under the geographical approach, a court assessing the threshold question of venue "need look only to the face of the rulemaking" to discern whether it applies in States located in more than one judicial circuit. *See American Rd. & Transp. Builders Ass'n*, 705 F.3d at 456. And the court need not undertake a time-consuming analysis about whether EPA has in fact announced a policy position in an adjudication, or whether such a policy is likely to have prospective, binding effect on entities not covered by the action.

In reaching a different result here, the Fifth Circuit interpreted the venue provision in a way that undermines these important congressional goals and unnecessarily complicates what should be a straightforward venue determination at the outset of a case. Specifically, rather than decide that an action applying to entities located in eighteen States in eight different circuits was "nationally applicable," the Fifth Circuit held that an action is "nationally applicable" only if it has or is likely to have binding "*legal* effect[s]" in "*all* States." *See* Pet. App. 11a.

As EPA and intervenor-respondents explain, "applicable" does not mean "having legal effect," and "national" can sometimes mean "throughout the country." *See* Br. for Pet'r at 21; Br. for Resp'ts Supporting Pet'r. at 24. Moreover, words must be construed "in their particular statutory context," *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 585 (2010). Here, context confirms that Congress chose to send actions to a single court for review when they did not fit neatly within judicial circuit boundaries. Under the venue provision, all actions are either (i) "nationally applicable" or (ii) "locally or regionally applicable." Locally or regionally applicable actions are reviewable only in "*the* appropriate circuit." 42 U.S.C. § 7607(b)(1) (emphasis added). The "use of the definite article," in turn, indicates that "there is generally only one proper" circuit to which review of local or regional actions could be directed. *See Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004); *see also Corner Post, Inc. v. Board of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 817 (2024) ("the statute's use of the definite article 'the' takes precedence"). But an action covering entities in more than one circuit cannot logically have only "one proper" (i.e., "the appropriate") circuit, geographically, for review. *See Padilla*, 542

U.S. at 434. Accordingly, because all actions must be either "nationally applicable" or "locally or regionally applicable," actions spanning more than one circuit logically must belong to the first group, i.e., the "nationally applicable" group. *See, e.g.*, *Southern Ill. Power Coop.*, 863 F.3d at 671 (action involving twenty-four States "clearly falls in the first basket").

Had Congress intended to condition review in the D.C. Circuit on an action's application to all fifty States, it would have said so. And it would have provided the textual commands required to identify the "one proper" regional circuit in the many other cases where an EPA action involves States across different circuits but not *all* States. But, as described above, Congress did neither of these things.

A similar statute provides a useful example. In the Federal Energy Administration Act of 1974, Congress created a similar, split scheme of centralized and regional review of agency actions. Pub. L. No. 93-275, § 7(i)(2)(A), 88 Stat. 96, 102. That statute provides that actions "of general and national applicability" must be reviewed in the D.C. Circuit, but specifies that actions "of general, *but less than national*, applicability" can be reviewed only in the appropriate regional court of appeals. 15 U.S.C. § 766(c) (emphasis added). The statute then defines the "appropriate circuit" as the "the circuit which contains the area or the *greater part of* the area within which the rule, regulation, or order is to have effect." *Id.* (emphasis added). There is no such language in the Clean Air Act; instead, the statute unambiguously directs such actions to the D.C. Circuit.

B. Congress Assigned Review of Actions Supported by at Least One Nationwide Determination to the D.C. Circuit.

Congress later reaffirmed through a successive amendment its chosen policy of centralized review. In 1977, Congress expanding the types of actions exclusively reviewable in the D.C. Circuit to include locally or regionally applicable actions "based on a determination of nationwide scope or effect." 42 U.S.C. § 7607(b)(1). See *supra* at 5-7 (discussing history). The Fifth Circuit's erroneous interpretation of this prong of the venue provision improperly overrides Congress's clear legislative choice and establishes an overly complicated venue inquiry that will be difficult to administer.

As the Fifth Circuit acknowledged (Pet. App. 12a-14a), EPA expressly found that the actions were based on the agency's nationwide determinations that (i) the RFS statute's economic-hardship exemption does not apply to circumstances unrelated to compliance with the RFS program; and (ii) all small refineries pass the cost of program compliance to consumers. But the Fifth Circuit then concluded that the challenged actions were not "based on" a determination of nationwide scope or effect within the meaning of the venue provision because neither determination, standing alone, provided the agency "with a *sufficient* basis" to completely resolve each refinery's exemption application. Pet. App. 15a (emphasis added). In other words, the Fifth Circuit reasoned that the two uniform determinations were not important enough to satisfy the venue provision's "based on" prong because "there is still a non-zero chance [EPA] will grant small refinery petitions" based on other considerations, such as "data and evidence" about particular refineries' circumstances. *See* Pet. App. 14a-15a.

That interpretation—which assumes that an issue is of nationwide scope or effect only if it is the most pivotal determination in the action—is contrary to the venue provision's plain text. Congress did not use the phrase "based solely on" or "based primarily on." Instead, Congress used the phrase "based on," which means "a relevant part of the analytic framework." *See Hughes v. United States,* 584 U.S. 675, 687 (2018) (quotation marks omitted); *id.* at 686 (collecting dictionary definitions of "base" and "basis"); *In re Sealed Case*, 722 F.3d 361 (D.C. Cir. 2013). "Based on" indicates a "but-for causal relationship" that requires the determination to be (at most) one "necessary condition" of the action. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63 (2007); *cf. Greene v. Doruff*, 660 F.3d 975, 978 (7th Cir. 2011) (Posner, J.) (distinguishing between "necessary" and "sufficient" conditions in formal logic). Put another way, the words "based on" neither "compel the agency to rest its decisions solely on the specified factor nor indicate the extent to which the agency may rely on additional factors." *Catawba Cnty. v. EPA*, 571 F.3d 20, 37 (D.C. Cir. 2009).

Congress's understanding that agency actions are frequently supported by more than one determination is further confirmed by Congress's use of the indefinite article "a" ("*a* determination of nationwide scope or effect"). When used in this manner, the indefinite article "a" means "at least one." *See KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1356 (Fed. Cir. 2000); *see also Niz-Chavez v. Garland*, 593 U.S. 155, 162 (2021) ("Normally, indefinite articles (like 'a' or 'an') precede *countable* nouns."). The statute thus expressly contemplates that an EPA action may be based on one or more "but-for" causal factors, *see Safeco Ins. Co.*, 551 U.S. at 63, and that centralized review is available even if only one such factor is of nationwide scope or effect.

The Fifth Circuit's interpretation is also flatly contrary to the history of the venue provision. Many EPA actions under the Act are based on multiple determinations, some of nationwide scope or effect and some of localized or regional scope or effect. Under the Fifth Circuit's reasoning, essentially all such actions could be challenged in regional circuits so long as the circuit concludes that the determination with nationwide scope or effect is not the most important factor in EPA's decisionmaking. But that result is plainly the opposite of what Congress intended when it amended the venue provision in 1977. Difficulties that arose when ostensibly local or regional actions were *also* based on a determination with national implications drove Congress to amend the venue provision in 1977. At that time, EPA was presented with two approaches for handling challenges to such actions: one approach proposed to centralize review in the D.C. Circuit, and the other proposed to leave review in the regional circuits. See *supra* at 5-7. Congress specifically chose the former and rejected the latter. The Fifth Circuit's decision here would improperly override Congress's legislative policy choice, directing nearly all actions with a localized or regional impact for review in regional circuits even when those actions are plainly based on a determination of a nationwide scope or effect.

The Fifth Circuit's interpretation also needlessly injects complexity into what should be a straightforward venue inquiry that is easily resolvable at the outset of the litigation. Courts are well versed in identifying whether a particular consideration is a "but-for" cause of the agency's action, and can easily conduct this analysis based on the face of the action. By contrast, the Fifth Circuit's approach seemingly requires courts to (i) identify all of the EPA determinations that are but-

for causes of the challenged action; (ii) compare the relative importance of these varied determinations; and (iii) discern whether a determination of nationwide scope or effect is the most important relative to the others. Such an analysis would be particularly difficult at the outset of litigation—when venue issues should be resolved. Indeed, the Fifth Circuit has encountered this problem before in assessing whether a determination of nationwide scope or effect is "core" to the action, and has deferred venue issues to the merits stage where briefing would "provide greater clarity." *See, e.g.*, *Texas v. EPA*, 706 F. App'x 159, 165 (5th Cir. 2017). But a venue rule that requires the court and parties to wait until the merits are adjudicated is essentially no venue rule at all.

II. AMICI'S EXPERIENCE DEMONSTRATES THAT DISREGARDING CONGRESS'S ENACTED POLICY OF CENTRALIZED REVIEW SOWS CHAOS AND CAUSES DELAY.

Amici's experience demonstrates that drastically departing from Congress's clear choice to centralize review of national issues under the Act in the D.C. Circuit, as the Fifth Circuit's rule would do, sows chaos and produces extensive delay in implementing the Act's critically important and time-sensitive protections. That is plainly not what Congress intended.

A. Amici's Recent Experience Illustrates How Improperly Applying the Venue Provision Causes Chaos, Wastes Resources, and Delays Relief.

A recent example from EPA's efforts to control interstate ozone illustrates the chaos and delay that result from improperly applying the Act's venue provision.

In 2023, EPA published a single action disapproving twenty-one States' implementation plans for addressing interstate ozone pollution under the revised 2015 ozone standard. *See* Air Plan Disapprovals; Interstate Transport of Air Pollution for the 2015 8-Hour Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 9336, 9380 (Feb. 13, 2023). In both the proposed and final actions, EPA explained that the actions were based on several determinations of nationwide scope or effect. For example, EPA determined that a State's contribution to interstate ozone problems is significant if it exceeds one percent of the national standard. EPA also determined that participation in an existing emissions-reduction program associated with a prior ozone standard would not satisfy a State's pollution-mitigation obligations under the new standard.

Various industry groups and States lodged dozens of petitions for review challenging the 2023 disapproval action in seven different regional circuit courts. Each purported to challenge the same EPA action as applied only to their respective States, yet each raised essentially the same legal issues. Each circuit received motions to transfer the petitions to the D.C. Circuit—much like what transpired in the *NRDC* litigation that led Congress to amend the Act to give the D.C. Circuit exclusive jurisdiction over local or regional rules that are based on a determination of nationwide scope or effect (see *supra* at 4-5). Each circuit also received motions to stay the (identical) disapproval action as applied only to the States in that circuit.

This initial motion practice took months: indeed, merits briefing in one circuit did not begin until a year after EPA's action was published, in part because that court held a separate oral argument on the venue question. And most orders disposing of the transfer motions

did not definitively resolve the issue. Three circuits issued unpublished orders denying transfer, which did not bind the merits panels and simply required the parties to rebrief the issue in their merits papers and to raise the same points at oral argument. And three circuits issued orders expressly referring the motions to merits panels, which required the parties to brief the merits before knowing whether that circuit considered itself to be the proper venue to decide the merits.

Litigation about the same disapproval rule across seven circuits also imposed a substantial burden on many of the Amici States here, which receive disproportionate amounts of harmful ozone pollution from other States. To protect their interests, these Amici States needed to file multiple amicus briefs, in opposition to stay motions and on the merits. Had all challenges to the same disapproval rule been lodged in the D.C. Circuit, Amici could have filed a single amicus brief at each stage of the litigation, responding to the common suite of legal issues that nearly every petitioner challenging the disapproval rule raised in each circuit. At present, duplicative challenges to the same 2023 disapproval rule continue in six circuits, "utterly defeating the statute's obvious aim of centralizing judicial review of national rules" in the D.C. Circuit. *See Southern Ill. Power Coop.*, 863 F.3d at 673.

The delay and chaos that resulted from the challenges to the 2023 disapproval rule did not end there. Many of the same petitioner States and industry groups followed a similar approach after EPA finalized a related action promulgating replacement federal plans for twenty-three States. *See* Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards, 88 Fed. Reg. 36654 (June 5, 2023). Again, dozens of petitioners filed separate petitions across

seven regional circuits, this time all challenging the same federal-plan rule.

This time, however, the proliferation of challenges to the same action grew worse, as the following examples illustrate. A single petitioner filed nine different petitions—which purported to challenge the same rule as applied to nine different States—across five different circuits. *See* Pets., *Energy Transfer LP v. EPA*, No. 23-60300 (5th Cir. Aug. 7, 2023), ECF Nos. 140, 142, 145; Pet., *Energy Transfer LP v. EPA*, No. 23-3641 (6th Cir. Aug. 3, 2023), ECF No. 1; Pet., *Energy Transfer LP v. EPA*, No. 23-2510 (7th Cir. Aug. 3, 2023), ECF No. 1-1; Pet., *Energy Transfer LP v. EPA*, No. 23-2511 (7th Cir. Aug. 3, 2023), ECF No. 1-1; Pet., *Energy Transfer LP v. EPA*, No. 23-2773 (8th Cir. Aug. 3, 2023), Doc. #5302800; Pet., *Energy Transfer LP v. EPA*, No. 23-2774 (8th Cir. Aug. 3, 2023), Doc. #5302805; Pet., *Energy Transfer LP v. EPA*, No. 23-9569 (10th Cir. July 27, 2023), ECF No. 101. An industry petitioner from Nevada filed its petition for review in the Ninth Circuit, *see* Pet., *Nevada Cement Co. v. EPA*, No. 23-1098 (9th Cir. June 5, 2023), ECF No. 1.1, while the State of Nevada filed its petition for review in the D.C. Circuit, *see* Pet., *Nevada v. EPA*, No. 23-1209 (D.C. Cir. Aug. 4, 2023), Doc. #2011161. These dueling petitions potentially set up an intercircuit conflict over the same rule's application to a single State.

Moreover, a different petitioner filed petitions for review of the same rule in both the Sixth Circuit and the D.C. Circuit. *See* Pet., *Buckeye Power, Inc., et al. v. EPA*, No. 23-3647 (6th Cir. Aug. 4, 2023) (petition including Ohio Valley Electric Corp.); Pet., *Associated Elec. Coop. et al. v. EPA*, No. 23-1195 (D.C. Cir. July 27, 2023), Doc. #2010052 (petition of Ohio Valley Electric Corp. and others). This petitioner moved for a stay in the Sixth

Circuit, *see* Mot. of Buckeye Power, Inc. and Ohio Valley Electric Corp. for a Stay Pending Review, *Buckeye Power*, No. 23-3647 (6th Cir. Aug. 7, 2023), ECF No. 3, and separately advocated for the Sixth Circuit to retain venue over its petition challenging the rule as to Ohio, *see* Pet'rs' Resp. in Opp'n to EPA's Mot. to Dismiss or Transfer for Improper Venue, *Buckeye Power*, No. 23-3647 (6th Cir. Sept. 18, 2023), ECF No. 25. But the same petitioner also urged the D.C. Circuit—and eventually this Court—to stay the same rule as applied to all States, including Ohio. *See* Pet'rs' J. Opposed Mot. to Stay Final Rule, *Utah v. EPA*, No. 23-1157 (D.C. Cir. Aug. 2, 2023), Doc. #2010655 (motion of Ohio Valley Electric Corp. and others).

History and context make abundantly clear that Congress did not intend for the Act's venue provision to produce such chaos. Indeed, the very purpose of enacting the 1977 amendments was to prevent multiple proceedings challenging the same features of state implementation plans (see *supra* at 4-5), and Congress specifically rejected a proposal that endorsed regional circuit review of national issues in statewide plans (see *supra* at 5-7). Affirming the Fifth Circuit's decision here, however, would endorse such an approach and improperly undo these 1977 amendments.

B. Other Examples Show How Such Chaos and Delay Could Spread If the Fifth Circuit's Approach Is Not Rejected.

Two additional examples demonstrate how the Fifth Circuit's rulings, if allowed to stand, could further undermine Congress's judgment and spawn wasteful litigation, confusion, and delay.

First, the Fifth Circuit's rule would be excessively wasteful and complicated to administer in the context of so-called "attainment designation actions." When EPA revises the national ambient air quality standards, as it does periodically, EPA must publish one or more final actions that divide the entire country into geographic units ("areas") for the purpose of assessing compliance with the revised national ambient air quality standards. In these same actions, EPA must also formally designate each area as in "attainment" or "nonattainment" of the standards. Such attainment designation actions are a foundational step for a State in determining how it will plan to achieve (or maintain) compliance with the standards going forward. Notably, EPA often issues these actions in batches, such that no single attainment designation action covers every area across the country. *E.g.*, *Southern Ill. Power Coop.*, 863 F.3d at 671 (sixty-one areas); *ATK Launch Sys.*, 651 F.3d at 1196 (thirty-one areas).

Like the RFS exemption denials at issue in the Fifth Circuit's decision here, each attainment designation action has binding "*legal* effect" (Pet. App. 11a) only on the areas that are the subject of the published action. Nonetheless, the areas that the action designates are numerous, often reach throughout the country, and frequently span more than one State and judicial circuit. Indeed, these actions almost always designate one or

more "multistate attainment areas," which are roughly coextensive with large metropolitan areas experiencing stubborn and severe air pollution. For example, both Montgomery County, Maryland, and Fairfax County, Virginia, are part of the "Washington, DC-MD-VA" nonattainment area for the 2008 and 2015 ozone standards.[4] As the name suggests, this area spans two States and the District of Columbia, and crosses two judicial circuits. Similarly, several counties in Missouri and Illinois are part of the "St. Louis-St. Charles-Farmington, MO-IL" nonattainment area for the 2008 ozone standards and the "St. Louis, MO-IL" nonattainment area for the 2015 ozone standards, both of which span two judicial circuits.[5] And areas of Connecticut, New Jersey, and New York are together part of the "New York-N. New Jersey-Long Island, NY-NJ-CT" nonattainment area for the 2006 particulate matter standards—which spans three States and two circuits.[6]

---

[4] *See* EPA, *Maryland Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (last updated Nov. 30, 2024); EPA, *Virginia Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (last updated Nov. 30, 2024).

[5] *See* EPA, *Illinois Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (last updated Nov. 30, 2024); EPA, *Missouri Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (last updated Nov. 30, 2024).

[6] *See* EPA, *Connecticut Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (last updated Nov. 30, 2024); EPA, *New Jersey Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (last updated Nov. 30, 2024); EPA, *New York Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (last updated Nov. 30, 2024).

Both the geographic boundaries of these areas and EPA's formal designation of these areas as in "attainment" or "nonattainment" are often decided "pursuant to a common, nationwide analytical method." *See, e.g.*, *Southern Ill. Power Coop.*, 863 F.3d at 671. For example, EPA considers common definitions of statutory terms such as "contributes to" and "nearby" to inform the jurisdictional boundaries of a nonattainment area. *See, e.g.*, Air Quality Designations for the 2010 Sulfur Dioxide National Ambient Air Quality Standard, 81 Fed. Reg. 45039, 45042 (July 12, 2016). As another example, EPA may use a particular type of modeling, or a particular iteration of a modeling platform, to inform its determination of whether an area is "in attainment," especially when nearby monitoring sites do not exist. *See, e.g.*, *id.* at 45043-44 (discussing EPA's selection of "dispersion modeling" as appropriate tool).

It would be simply unworkable if, as the Fifth Circuit's erroneous reasoning here would suggest, the geographical and attainment designation of each individual area addressed in a unitary EPA action could be challenged only in its regional circuit. For multistate attainment areas like the ones discussed above, the same area could potentially be subject to judicial review in different regional circuits. The same area would then be subject to different litigation timetables and the possibility of inconsistent decisions about the propriety of EPA's determination.[7]

---

[7] In addition, a single State might be subject to rulings from three different circuits, as some States are home to more than one multistate attainment area. For example, Ohio is home to part of both the "Cincinnati, OH-KY-IN" attainment area for the 2008 ozone standards, which spans the Sixth and Seventh Circuits, as well as the "Steubenville, OH-WV" attainment area for the 2010 sulfur

(*continues on next page*)

Such fracturing of litigation about the same EPA action, and even the same attainment area, would likely delay coordination between States seeking to remedy pollution in their shared areas, or delay the mandatory submission of plans to EPA. Inconsistent decisions could subject one State that is part of a multistate attainment area to the statutory consequences associated with nonattainment—such as submitting detailed demonstration plans for timely future attainment, and executing those plans through increased regulation—while leaving the remaining States that are part of the same attainment area free to continue emitting under the status quo. That result would be fundamentally ineffective at furthering the objectives of the Clean Air Act. Because air pollution does not stay where it is emitted, reducing emissions in only one portion of a nonattainment area would be unlikely, by itself, to fully remedy the underlying air pollution problems, particularly if the adjacent counties continue under a business-as-usual scenario.

Second, the Fifth Circuit's rule would severely complicate compliance planning for private regulated entities in Amici States, such as in the context of so-called "allowance allocation actions." To carry out legislation to phase down the use of certain chemicals, EPA publishes allocations of credits (or "allowances") for those chemicals for each year under nationwide trading programs. *See, e.g.*, Phasedown of Hydrofluorocarbons: Notice of 2025 Allowance Allocations for Production and Consumption of Regulated Substances Under the American Innovation and Manufacturing Act of 2020,

---

dioxide standards, which spans the Sixth and Fourth Circuits. *See* EPA, *Ohio Nonattainment/Maintenance Status for Each County by Year for All Criteria Pollutants* (updated Nov. 30, 2024).

89 Fed. Reg. 84583 (Oct. 23, 2024). The formula and inputs for calculating the total number of allowances, and the percentages by which they must be phased down each year, is fixed by legislation, although EPA establishes the baseline and apportions them. *See id.*

Like the RFS Actions here, allocations to multiple individual entities are published in a single rule, and the action thus has "*legal* effect" (Pet. App. 11a) on only the individual entities to which the allowances are allocated. If each affected entity were entitled to challenge its individual allocation in the regional circuit where it is located, EPA might be required to recalculate and reapportion the statutorily mandated allowances across all affected entities each time that a new circuit decision issued. As a result, the same action still under review in other circuits would be changing, and industry would have no certainty regarding the amount of the chemical that they could consume. Such a result is fundamentally inconsistent with Congress's policy judgment in the Clean Air Act, and with commonsense principles of finality and judicial economy.

CONCLUSION

The Fifth Circuit's judgment should be reversed.

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
JUDITH N. VALE
Deputy Solicitor General
ELIZABETH A. BRODY
Assistant Solicitor General
MORGAN A. COSTELLO
CLAIBORNE E. WALTHALL
Assistant Attorneys General
barbara.underwood@ag.ny.gov

December 2024

* *Counsel of Record*

(*Counsel listing continues on next page.*)

KRIS MAYES
Attorney General
State of Arizona
2005 N. Central Ave
Phoenix, AZ 85004

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
One Ashburton Pl.
Boston, MA 02108

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway, 10th Fl.
Denver, CO 80203

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Ave.
Hartford, CT 06106

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

KATHLEEN JENNINGS
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801

MATTHEW J. PLATKIN
Attorney General
State of New Jersey
25 Market St.
Trenton, NJ 08625

KWAME RAOUL
Attorney General
State of Illinois
115 S. LaSalle St.
Chicago, IL 60603

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. NE
Salem, OR 97301

ANTHONY G. BROWN
Attorney General
State of Maryland
200 Saint Paul Pl.
Baltimore, MD 21202

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania
16th Fl., Strawberry Sq.
Harrisburg, PA 17120

(*Counsel listing continues on next page.*)

PETER F. NERONHA
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

CHARITY R. CLARK
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

JOSHUA L. KAUL
Attorney General
State of Wisconsin
17 W. Main St.
Madison, WI 53703

BRIAN L. SCHWALB
Attorney General
District of Columbia
400 6th St. NW
Washington, D.C. 20001

CHRISTIAN MENEFEE
County Attorney
Harris County, Texas
1019 Congress, 15th Fl.
Houston, TX 77002

MURIEL GOODE-TRUFANT
Corporation Counsel
City of New York
100 Church Street
New York, NY 10007