No. 23-1229

IN THE

Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

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

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

REPLY BRIEF FOR RESPONDENTS SUPPORTING PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Growth Energy has no parent company and no publicly held company has a 10% or greater ownership interest in Growth Energy.

The Renewable Fuels Association has no parent company and no publicly held company has a 10% or greater ownership interest in the Renewable Fuels Association.

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REPLY FOR RESPONDENTS SUPPORTING PETITIONER

INTRODUCTION

Under §307(b)(1) of the Clean Air Act, the D.C. Circuit was the exclusive venue to review the 2022 exemption actions, for three separate reasons: (1) they are "nationally applicable" because, by operation of law, they automatically affected the RFP requirements for all non-exempt regulated entities around the country; (2) they are "nationally applicable" because they prescribed a general standard for adjudicating all pending and future small-refinery exemption petitions, irrespective of the refinery's location; and (3) they are "based on … determination[s] of nationwide scope or effect," namely, EPA's determinations that the Act requires petitioning refineries to show that their alleged hardship would be

caused by their RFP compliance and that small refineries presumptively can recoup their compliance costs.

Largely ignoring biofuels respondents' arguments, the refineries principally rely on two contentions. First, they contend the relevant EPA "action" is each individual exemption adjudication, not the collective actions through which EPA adjudicated all the pending exemption petitions. That is irrelevant because all three grounds for triggering D.C. Circuit venue hold even under the refineries' definition of the "action." Second, they contend the statutory provision under which EPA acted does not expressly direct EPA to make a nationwide "determination." That magic-words test contradicts §307(b)(1)'s ordinary meaning, nullifies other statutory text, undermines §307(b)(1)'s purpose, and creates absurdities.

ARGUMENT

I. THE REFINERIES' DEFINITION OF THE "ACTION" IS IRRELEVANT AND INCORRECT

The refineries contend (Br.24) the relevant EPA "action" is the individual "denial[] of each small-refinery's hardship petition." As previously explained, that contention is both irrelevant and incorrect.

A. The definition of the action is irrelevant because even the individual exemption denials are "nationally applicable" and "based on a determination of nationwide scope or effect," for three independent reasons.

First, every individual adjudication of a small-refinery exemption petition is nationally applicable because each one determines the level of the national RFP requirements that bind all non-exempt obligated parties around the country and sets the total national volume of

renewable fuel that must be purchased. *See* Biofuels Br.36-37; *infra* pt.II.A.

Second, every individual 2022 exemption denial is nationally applicable because each one announced a new general standard for adjudicating all exemption petitions, regardless of the refinery's location. *See* Biofuels Br.38-39; *infra* pt.II.B.

And third, every individual 2022 exemption denial is based on two determinations of nationwide scope or effect: (1) the Act requires petitioning refineries to show that their RFP compliance would cause the requisite hardship; and (2) small refineries presumptively can recover their RFP compliance costs, and therefore presumptively do not satisfy the causation requirement. *See* Biofuels Br.43-44; *infra* pt.III.B-C.

B. The refineries' definition of the action is also incorrect. Their argument has two steps. First: "Section 7607(b)(1)'s phrase 'final action … under this chapter' points the reader to the substantive CAA provision that provides the legal source of the agency's … authority to take the challenged actions." Br.24 (some quotation marks omitted). Second: the relevant substantive provision calls for "an individualized inquiry focused on [the petitioning] refinery's own economic circumstances" because it is written "in the singular." Br.25-26.

That argument assumes its conclusion. *See* Biofuels Br.35-36. The integrated 2022 exemption actions are undeniably (1) "final actions" (2) taken "under" the Act, i.e., pursuant to the substantive provisions governing small-refinery exemptions. Ordinarily, "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof." 5 U.S.C. §551(13). "The technical form of the order is irrelevant" to whether it is an "action"; it is an

"action" if it "decid[es] the merits." *City of Chicago* v. *United States*, 396 U.S. 162, 166 (1969). And it is "final action" if it "mark[s] the consummation of the agency's decisionmaking process" and has "legal consequences." *Bennett* v. *Spear*, 520 U.S. 154, 178 (1997) (quotation cleaned). The 2022 exemption actions fit the bill, and nothing in §307(b)(1) purports to give "final action" a different meaning or bars EPA from adjudicating exemption petitions *en masse* on (or partially on) common grounds.

C. Finally, the refineries repeatedly accuse EPA of having improper motives for adjudicating the exemption petitions through a collective action. Although irrelevant to the question presented, the accusations should not go unremarked.

The refineries claim "EPA was able to produce bundled hardship decisions only by deliberately ignoring the CAA's decision deadline." Br.26. According to the refineries, EPA did this because it was "[f]rustrated by its repeated defeats in the regional circuits" and wanted to "avoid[] judicial review anywhere other than the D.C. Circuit." Br.14; *see also* Br.17, 38, 40.

The refineries' story is incorrect. EPA did not invent the practice of resolving multiple RFP exemption petitions through an integrated action in 2022. In 2019, EPA used an integrated action to *grant* 31 RFP exemption petitions for 2018. *See* C.A.J.A.2928-2929. Nor did the fact that the 2022 exemption actions were issued after the statutory deadlines enable EPA to act through an integrated action; EPA could have issued late but separate decisions, and in the future, EPA could issue a timely but consolidated exemption action covering any pending petitions whose deadline has not yet arrived.

Most importantly, EPA's timing and integrated process for disposition of the exemption petitions were driven by EPA's conscientious desire to conduct an orderly, deliberate, transparent process through which to overhaul its standard in light of intervening judicial decisions on the subject. *See* EPA Br.28. Recall that in 2020, the Tenth Circuit rejected the approach under which EPA had initially granted some of the 2016-2017 exemption petitions later covered by the 2022 exemption actions, and that the 2018 exemption petitions covered by the 2022 exemption actions were initially granted and challenged in the D.C. Circuit while the Tenth Circuit case was pending. *See* Biofuels Br.9. This Court granted certiorari to review a portion of the Tenth Circuit's decision, *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 594 U.S. 382 (2021), rightly prompting the D.C. Circuit to hold its case in abeyance, *Renewable Fuels Ass'n* v. *EPA*, No. 19-1220, ECF #1885774 (Feb. 17, 2021), and EPA to refrain from adjudicating other pending exemption petitions until the judicial dust settled. This Court decided *HollyFrontier* on June 25, 2021. Three months later, EPA asked the D.C. Circuit to remand the 2018 exemptions so that EPA could "reconsider" them "in light of" the Tenth Circuit's and this Court's intervening decisions. Pet.App.78a.

On December 7, 2021, EPA publicly proposed to deny all pending exemption petitions, including those remanded by the Tenth Circuit, under a new standard that corrected the remaining errors identified by the Tenth Circuit, invited all petitioning refineries to update their submissions in response to the proposed standard, and invited public comment on its proposal. Pet.App.78a. The next day, the D.C. Circuit remanded the 2018 exemptions, giving EPA until April 7, 2022, to render its new decisions on those petitions. *Ibid.* In January 2022,

EPA announced that it was "expanding" its proposed denial "to include" the exemption petitions remanded by the D.C. Circuit. Pet.App.48a n.1. After digesting the voluminous materials submitted by petitioning refineries and others, EPA adopted the proposed standard and denied the pending exemption petitions under that standard in April and June 2022. *See* Biofuels Br.10-12.

This methodical rulemaking-like process differed from EPA's prior process, under which EPA did not publicly propose, seek public comment on, or publicly release exemption decisions. As the D.C. Circuit observed, EPA's prior process "paint[ed] a troubling picture of intentionally shrouded and hidden agency law that could have left those [who did not petition for an exemption but were] aggrieved by the agency's actions without a viable avenue for judicial review." *Advanced Biofuels Ass'n* v. *EPA*, 792 F. App'x 1, 5 (D.C. Cir. 2019).

II. THE REFINERIES HAVE NO ANSWER FOR THE WAYS IN WHICH THE 2022 EXEMPTION ACTIONS ARE "NATIONALLY APPLICABLE"

The refineries contend that an EPA action is "nationally applicable" only if "the persons or enterprises that the action regulates" are "locat[ed]" in "the entire country." Br.28 (quotation cleaned); *see also* Br.29. To assess an action's applicability, they say, courts must "look only to the face of the action as that action is authorized by the CAA." Br.7 (quotation cleaned); *see also* Br.28, 37, 39. In the refineries' view, the 2022 exemption actions fail this test because, taken individually, they "involve only the regulated individual facilities' requests for relief and have legal consequences only for those facilities." Br.30 (quotation cleaned).

The refineries' interpretation of the phrase "nationally applicable" is too narrow, but even their unduly

narrow test is satisfied by the 2022 exemption actions, in two different ways.

A. As previously explained, every adjudication of a small-refinery exemption petition—whether viewed individually or collectively—is "nationally applicable" because every such adjudication determines the level of the national RFP requirements binding all non-exempt obligated parties around the country and the total volume of renewable fuel that must be purchased. *See* Biofuels Br.36-37.

The refineries say this argument impermissibly relies on the actions' "practical effects": "[W]hether EPA chooses to adjust volume obligations for other parties based on outcomes of small refineries' hardship petitions" is a "downstream issue," not on "the face of the challenged action[s]." Br.39 & n.9 (quotation cleaned); *see also* Br.48 n.12. That mischaracterizes how the RFP works. EPA may choose whether an RFP exemption raises the RFP obligations for all non-exempt obligated parties throughout the nation or reduces the nationally required volume of renewable fuel that must be purchased, but one or the other will necessarily happen as a matter of law. Further, the actors necessarily affected under *either* path are regulated entities: the formally designated non-exempt obligated parties and renewable-fuel producers, who are also "directly regulated" by the RFP requirements. Biofuels Br.37 n.12. And those regulated entities are affected irrespective of their location around the country. Therefore, regardless of EPA's "choice," the *facial legal effect* of an RFP-exemption adjudication is national. *See* Biofuels Br.7-8.

B. As also previously explained, there is a separate reason why the 2022 exemption actions are "nationally

applicable" (again, individually or collectively): they "adopt[ed]" a new standard that "will" "appl[y] to all small refineries no matter the location or market in which they operate," both then-pending and "going forward." *See, e.g.*, Pet.App.55a, 85a, 101a, 104a, 106a, 187-188, 329a; Biofuels Br.37-38. In other words, the actions adopted a *rule*—a "statement of general … applicability and future effect," 5 U.S.C. §551(4)—and therefore are, as Mr. Frick put it, "virtually identical to promulgation of" a regulation. *Miscellaneous Amendments*, 41 Fed. Reg. 56,767, 56,769:1 (Dec. 30, 1976); *see* Biofuels Br.37-39.

The refineries counter that the 2022 exemption actions cannot be "nationally applicable" because they are adjudications and only "rulemakings or similar actions … go to the D.C. Circuit." Br.3, 30. Although the distinction between regulation and adjudication might be a useful rule of thumb for determining whether an EPA action is "nationally applicable," it cannot be dispositive; as previously explained, categorically excluding adjudications from the scope of "action" for purposes of assessing "national applicability" contradicts the Act's plain text and this Court's precedent. Biofuels Br.40; *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578, 592-593 (1980). The refineries have no answer.

Moreover, even if "EPA could have conducted a rulemaking to establish a new interpretation of Section 7545(*o*)(9)(B) and new adjudicatory framework, and such a rule would likely have been nationally applicable," Refineries Br.37-38, 46, EPA was "not precluded from announcing new principles in an adjudicative proceeding and … the choice between rulemaking and adjudication [lay] in the first instance within the [EPA's] discretion," *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). Indeed, the difference between adjudication and

rulemaking is especially thin here given that the 2022 exemption actions were the product of a notice-and-comment rulemaking-like process. Pet.App.55a; *see* Biofuels Br.XX.[1]

Moreover, categorically excluding adjudications from the scope of the "actions" that can be "nationally applicable would disserve §307(b)(1)'s fundamental purpose of avoiding inconsistent substantive rules for the agency and regulated actors. *See* Biofuels Br.20-31. The 2022 exemption actions are case-in-point. From the moment EPA issued the actions, it was clear that each disappointed small refinery could challenge the same new general standard and therefore clear that fragmented review in home circuits could lead to different conclusions about the standard—an intolerable outcome for a national program regulating the nation's entire transportation-fuel supply. The refineries mistakenly dismiss this point as looking to "the challenger's arguments in the petition for review" rather than "the face" of the action. Br.7, 28 n.7; *see also* Br.46. That the 2022 exemption actions raise general issues is self-evident from their facial announcement of the new standard.

C. Regardless, the refineries' test is flawed in multiple ways.

1. The refineries' view that "applicable" considers only the location of entities regulated by the action on its

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[1] The refineries are wrong that "a new rule … would have needed to be prospective only." Br.38. Applying the new standard to the remanded and pending exemption petitions resolved through the 2022 exemption actions did not disrupt legitimate settled expectations or impose new obligations or penalties for past conduct. *See* C.A.ECF #314, at 9-25; C.A.ECF #429, at 13-16; Br. of Intervenors 21-37, *Sinclair Wyoming Refining Co.* v. *EPA*, No. 22-1073, ECF #2024930 (D.C. Cir. Nov. 1, 2023).

face, not its practical effects, disregards §307(b)(1)'s text and purpose. As biofuels respondents showed (Br.21-22), "applicable" ordinarily means capable of or suitable for being put into operation or effect or having relevance. That plainly encompasses practical effects. The refineries offer no response.

2. The refineries' view that "nationally" means "the entire country" fails to account for *all* of §307(b)(1) and for §307(b)(1)'s authoritative legislative history, both of which make clear that "nationally" means "in more than one judicial circuit."

As shown, Congress wrote §307(b)(1) to ensure that judicial review could be centralized whenever needed to avoid inconsistent substantive rules from duplicative litigation. Biofuels Br.26-31. Initially, Congress selected specific actions for centralization because it believed those actions would be the ones "requir[ing] even and consistent national application." S. Rep. No. 91-1196, at 41 (1970). Congress subsequently added the "nationally applicable" catchall because experience had shown that other types of actions also carried a risk of problematic inconsistency if review was left to local circuits. *See* Biofuels Br.27-31.

This congressional intent is evident in the Act's directive that actions that are *not* "nationally applicable" are (presumptively) reviewed in "the" appropriate circuit. §307(b)(1). If an action applies in multiple circuits, no circuit can be "the" appropriate circuit because no circuit would have a unique interest in or ability to review the action. *See* Biofuels Br.24. Section 307(a) shows, in contrast, that when Congress intended to allow multiple courts to have venue, it said so: "the district court … for *any* district in which such person is found or resides or

transacts business … shall have jurisdiction" to issue certain orders. 42 U.S.C. §7607(a); *see* Biofuels Br.24-25.

The refineries insist, "Nothing in Section 7607(b)(1) indicates that the phrase 'the appropriate circuit' informs the meaning of 'nationally applicable.'" Br.40. Of course it does. The "words [of §307(b)(1)] must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia* v. *EPA*, 597 U.S. 697, 721 (2022) (quotation cleaned). And the phrase "the appropriate circuit" obviously bears on the meaning of "nationally applicable" because it is the other half of the dichotomy Congress created: "the appropriate circuit" specifies the venue for reviewing any action that is *not* "nationally applicable." §307(b)(1).

The refineries say "put[ting] so much weight on a single definite article produces textually absurd results." Br.41. Noting that "some" "air quality control regions … cover large metropolitan areas that happen to cross … circuit[] lines," they ask rhetorically, "Can there be any doubt that an EPA disapproval of a regional implementation plan for" such an "air quality control region" is "a 'regionally applicable' action for purposes of Section 7607(b)(1), even though that action touches both" circuits? Br. 41. Yes, there is good reason for doubt: the fact that fragmented review of such an action in home circuits could lead to inconsistent substantive rules for a single metropolitan area. Far from absurd, centralizing review of such an action is eminently sensible.

Underlying the refineries' argument is a mistaken assumption about the meaning of "locally" and "regionally" in §307(b)(1). The refineries incorrectly equate those terms with "one State" and "a cluster of States," respectively. Ordinarily, "local" refers to "subdivisions

of the State," e.g., a municipality, *Lindke* v. *Freed*, 601 U.S. 187, 195 n.1 (2024), and that is how the Act uses the term, *see, e.g.*, 42 U.S.C. §7628 ("local governments (such as municipalities and counties"). Although "regional" can sometimes refer to a cluster of States, *e.g.*, "the Southeast Region," "regional" commonly refers to an area surrounding a "local" area, *see, e.g.*, *Tarrant Regional Water District* v. *Herrmann*, 569 U.S. 614, 618 (2013) ("Tarrant Regional Water District (Tarrant), a Texas agency"). The Clean Air Act reflects the latter meaning, using "regional" to refer to an area around a local area, irrespective of state lines; the Act uses "interstate" to refer to an action or program that spans multiple States. *See, e.g.*, 42 U.S.C. §7407(c) ("designate as an air quality control region any interstate area or major intrastate area"); 42 U.S.C. §7410(a)(1) ("in each air quality control region (or portion thereof) within such State"); 42 U.S.C. §7406 ("any interstate air quality control region"); 42 U.S.C. §7602(c) ("'interstate air pollution control agency' means … agency established by two or more States"); 42 U.S.C. §7504(a) ("local governments, regional agencies, or the State"). Accordingly, the vast majority of air quality control regions are limited to a single State, but some span multiple States and a small percentage of them span States in different judicial circuits. *See* EPA, *AQCRs (Air Quality Control Regions)* (Feb. 19, 2025).[2]

Because "regions" under the Act are usually cabined within a single State or, if they are interstate, span States within a single circuit, there usually is a single appropriate circuit to review actions related to a region, and therefore "regional" actions are typically "regionally applicable." But when a region happens to span multiple

[2] https://aqs.epa.gov/aqsweb/documents/codetables/aqcrs.html.

circuits, the associated action is "nationally applicable." Only this more pragmatic interpretation applies Congress's express desire that centralized review be available whenever necessary to avoid duplicative litigation and potentially inconsistent results, and accords with Congress's use of the definite article in the phrase "the appropriate circuit." In contrast, the refineries offer no reason why Congress would have wanted review to be centralized only if the action affected every State in the Union.

The refineries quote legislative history stating that §307(b)(1) "places jurisdiction in … the Circuit in which the affected air quality control region, or portion thereof, is located." S. Rep. No. 91-1196, at 41, *quoted in* Br.41. Emphasizing the phrase "or portion thereof," the refineries claim this shows Congress intended all interstate actions to be (presumptively) reviewed in "the appropriate circuit." Br.41. But the quoted remark accompanied the 1970 legislation, which only identified specific actions for review in either the D.C. Circuit or "the appropriate circuit." It was not until 1977 that Congress added the catchall phrase "nationally applicable" specifically to more broadly centralize review in the D.C. Circuit of actions raising "generic" issues reaching "beyond a single judicial circuit." 41 Fed. Reg. at 56,768:3-56,769:1; H.R. Rep. No. 95-294, at 324 (1977); *see* Biofuels Br.29-31. Thus, the quoted 1970 language does not support the refineries' interpretation.

Finally, interpreting "nationally" to mean "in more than one circuit" provides the "clear boundaries" the refineries acknowledge are needed "to avoid wasteful litigation over the proper forum." Br.29 (quotation cleaned); *see* Biofuels Br.19-20. It is the *refineries'* position that introduces vagueness and absurdity. What "region" is implicated by the 2022 exemption actions, which

denied petitions filed by refineries in 8 judicial circuits around the country? *See* Biofuels Br.12. Or consider the many actions that allow individual States to opt out or that apply only to the continental United States. *See, e.g.*, 42 U.S.C. §7545(h)(5)(A). The refineries' position implies that such actions are "regionally applicable," but their trade association sensibly recognized that such actions are "nationally applicable" when it petitioned the D.C. Circuit to review an EPA action applicable to "the 48 contiguous States and the District of Columbia," §7545(h)(6). *See American Fuel & Petrochemical Manufacturers* v. *EPA*, 3 F.4th 373 (D.C. Cir. 2021). The refineries' simplistic notion of "nationally," Br.28, creates incoherence and invites metaphysical litigation over how much of the nation must be included to be the "whole nation."

III. THE REFINERIES' CLAIM THAT THE 2022 EXEMPTION ACTIONS WERE NOT "BASED ON A DETERMINATION OF NATIONWIDE SCOPE OR EFFECT" CONTRADICTS THE ACT'S PLAIN TEXT, UNDERMINES CONGRESS'S PURPOSE, AND YIELDS ABSURD RESULTS

As previously shown, the 2022 exemption actions must be reviewed in the D.C. Circuit for yet a third independent reason: the actions (again, individually or collectively) are based on determinations of nationwide scope or effect: EPA's 2022 interpretation of the Act to require direct causation and the presumption that small refineries can recoup their RFP compliance costs. Biofuels Br.40-48. Each step in the refineries' response is meritless.

A. The refineries begin with the proposition that "the scope and effect of EPA's determinations are reviewed *de novo* and without deference to the agency." Br.31 (quotation cleaned). They read the Act to

establish two distinct requirements: "the action must actually *be* based on a determination of nationwide scope or effect *and* EPA must publish that finding." Br.31-32. Biofuels respondents already refuted that reading, Biofuels Br.40-43, and the refineries have no response other than the mistaken assertion that the "courts of appeals broadly agree" with their position. Br.31.

Only the Fifth Circuit has agreed with the refineries. *See* Pet.App.13a; *see* Biofuels Br.41. Contrary to the refineries' assertion, the D.C. Circuit rejected their position. In *Alcoa, Inc.* v. *EPA*, the D.C. Circuit deemed EPA's finding conclusive: that court had venue under §307(b)(1) simply because EPA had "unambiguously determined that the final action … has nationwide scope and effect." No. 04-1189, 2004 WL 2713116, at *1 (D.C. Cir. Nov. 24, 2004). Then in *Dalton Trucking, Inc.* v. *EPA*, the D.C. Circuit quoted *Alcoa*'s holding approvingly and merely rejected EPA's attempt to use its "invalid 'national applicability' finding [a]s, per se, a finding of 'nationwide scope or effect.'" 808 F.3d 875, 881-882 (D.C. Cir. 2015). Subsequently, Judge Silberman forcefully argued for deference without suggesting that *Dalton* stood in the way, even though he discussed *Dalton*. *National Environmental Development Ass'n's Clean Air Project* v. *EPA*, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring); *see* Biofuels Br.42-43. The Eleventh Circuit has also rejected the refineries' position. *Sierra Club* v. *Leavitt*, 368 F.3d 1300, 1306, 1308 n.12 (11th Cir 2004) ("EPA, not this Court, … judge[s] whether EPA has made a determination of nationwide scope.").

Regardless, deference is unnecessary here because the 2022 exemption actions plainly are based on determinations of nationwide scope or effect.

B. The refineries' principal claim is that the 2022 exemption actions were not "based on a determination of nationwide scope or effect" because that phrase requires that the Act "[1] *textually* direct EPA to make a 'determination' [2] for the *entire* nation—*i.e.*, the kind of determination that does not depend on individual circumstances." Br.32; *see also, e.g.*, Br.10, 46, 48. Here, the refineries say, "[n]either" EPA's causation interpretation nor its presumption of cost recoupment "describes any issue that the CAA's *text* directed EPA to 'determine' before acting on a small refinery's RFS hardship petition." Br.43; *see also* Br.33. Both elements of the refineries' interpretation are wrong.

1. As with the refineries' "entire country" interpretation of "nationally," their "entire nation" interpretation of "nationwide" contravenes §307(b)(1)'s text, purpose, and history. *See supra* pt.II.C.2. Indeed, the legislative history shows unequivocally that Congress used "nationwide" to mean "beyond a single judicial circuit." H.R. Rep. No. 95-294, at 324. This meaning reflects Congress's fundamental goal of avoiding duplicative litigation and inconsistent rules by centralizing review of actions raising general issues that could be challenged in multiple circuits. *See* Biofuels Br.29-31.

Regardless, as explained, two determinations on which the 2022 exemption actions (individually or collectively) were expressly based—the causation requirement and the presumption of cost recovery—satisfy the refineries' notion of "nationwide" because they "appl[ied] to all small refineries no matter the location or market in which they operate." Pet.App.187a-188a, 329a; *see* Biofuels Br.43-44; *supra* pp.7-8.

2. The refineries' magic-words interpretation—that the "based on a determination" test is satisfied *only*

if the Act expressly told EPA to make a nationwide "determination"— contradicts §307(b)(1)'s ordinary meaning, nullifies other statutory text, undermines §307(b)(1)'s purpose, and creates other absurdities. Tellingly, no litigant or judge espoused this interpretation below or, apparently, in any other case involving §307(b)(1)'s "based on a determination" test.

a. Section 307(b)(1) certainly does not say that the substantive provision underlying the action must call for a nationwide "determination." Rather, the refineries' premise is that "Congress's repeated use of the term 'determination' or its derivatives throughout the Act indicates it is a term of art with the same meaning in Section 7607(b)(1)." Br.32. By that logic, "the," "and," "or" and myriad other words are also "terms of art" in the Act. Like those words, "determine" is an ordinary word with a straightforward meaning—to resolve an issue or to measure, Biofuels Br.32—that is useful in the administrative context because agencies routinely resolve issues or measure things.

Accordingly, courts, including this one, routinely use "determine" to describe EPA's resolution of an issue under the Act, even if the statute did not describe the resolution as a "determination." *See, e.g.*, *West Virginia* v. *EPA*, 597 U.S. 697, 709 (2022) (describing statutory directive to "include a category of sources in such list if in [Administrator's] judgment it causes, or contributes significantly to, air pollution" as requiring EPA to "list 'categories of stationary sources' that it determines 'cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare'" (citing 42 U.S.C. §7411(b)(1)(A))); *Harrison*, 446 U.S. at 581 (same); *Massachusetts* v. *EPA*, 549 U.S. 497, 533 (2007) (saying, "Under the clear terms of" 42 U.S.C. §7521, "EPA can avoid taking further action only

if it determines that greenhouse gases do not contribute to climate change …," where statute directs EPA to "prescribe … standards applicable to the emission of any air pollutant from any class … of new motor vehicles … which in [its] judgment cause … air pollution").

Thus, a statutory directive to "determine" something merely expresses Congress's intent that EPA resolve a particular issue or measure something; it does not imply that no other agency resolutions or measurements are "determinations." Indeed, the RFP-exemption provision itself uses "determin[ation]" and "finding" interchangeably. *See* §7545(*o*)(9)(A)(ii)(I) & (B)(ii). Accordingly, §307(b)(1)'s use of "determination" encompasses any resolution or measurement on which the action is "based," not just the ones that are statutorily prescribed using the magic word "determine."

b. The refineries' position would nullify the portion of §307(b)(1) conditioning exclusive D.C. Circuit venue on EPA's "find[ing] … that such action is based on … a determination" "of nationwide scope or effect." Under the refineries' position, the necessary statutory directive to make a nationwide "determination" as a condition of the action would fully and conclusively resolve the action's basis, leaving no room for EPA to judge the basis. At most, EPA's "finding" could operate as an election of D.C. Circuit venue, but as explained previously, if that was all Congress intended, Congress would have told EPA to say so directly instead of requiring EPA to go to the trouble of making a substantive finding about the action's basis that is already statutorily specified. Biofuels Br.42.

c. The refineries' magic-words test would yield other absurdities. For example, the Act directs the Department of Energy to conduct "a study to *determine*

whether compliance with the [RFP] would impose a disproportionate economic hardship on small refineries," §7545(*o*)(9)(A)(ii)(I) (emphasis added), and then directs EPA to "consider the findings of th[at] study" when "evaluating a petition" for a small-refinery exemption, §7545(*o*)(9)(B)(ii). So, under the refineries' test, if EPA relies on DOE's findings, the "based on a determination" test would be satisfied. But EPA is not required to rely on DOE's findings, *e.g.*, *United Refining Co.* v. *EPA*, 64 F.4th 448, 460 (3d Cir. 2023), and if it declined to do so, then the "based on a determination" test would *not* be satisfied. Thus, the refineries' test implies that whether an exemption decision is reviewable in the DC Circuit depends on whether EPA followed DOE's recommendation.

Additionally, the Act allows a party to supplement the administrative record "[i]n any judicial proceeding in which review is sought of a *determination* under this chapter required to be made on the record after notice and opportunity for hearing." §7607(c) (emphasis added). Under the refineries' view, a party could *not* supplement the administrative record in an identically postured case if the challenged EPA action was not described by the Act as a "determination."

Likewise, under the refineries' test, EPA's approval or disapproval of a state implementation plan ("SIP") could not be "based on a determination" for purposes of §307(b)(1) because the relevant statutory provision does not expressly call for a "determination," §7410(k)(3), but EPA's "correction[]" of such a decision could be, because the relevant statutory provision does expressly call for a "determination," §7410(k)(6).

d. There is no rational reason why Congress would have wanted the refineries' magic-words test or these

absurd consequences. On the contrary, that test would undermine Congress's stated purpose of avoiding inconsistent substantive rules through centralized review of actions raising general issues. Aggrieved actors may ordinarily challenge any necessary ingredient of an agency action, whether that ingredient be labeled a determination, basis, finding, ground, or otherwise. *See FEC* v. *Akins*, 524 U.S. 11, 25 (1998) ("those adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground"); *cf. National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 659 (2007) (upholding agency action because objectionable "stray statement" by agency in published notice of action "could have had no effect on the underlying agency action being challenged"). Naturally, some of those necessary ingredients will be general, *i.e.*, common to similar actions involving other actors or not limited to the specific actor covered by the action, but many of those general ingredients will not be expressly called a "determination" by the Act. Therefore, under the refineries' reading, inconsistent adjudication of such general ingredients would be rampant—as illustrated by the litigation over the 2022 exemption actions. *See* Biofuels Br.44-45.

The refineries claim support from Mr. Frick's statement that supplied the basis for Congress's adoption of the "based on a determination" test. Br.8-9, 32, 48. But the fact that he discussed cases involving issues relating to statutorily express "determinations" was entirely incidental to his advocacy. Indeed, the refineries' test would have subverted his main objective, just as it would subvert Congress's: to make the Act clear that EPA actions "involv[ing] generic issues that apply to EPA's actions nationwide" should be "reviewed in the D.C. Circuit." 41 Fed. Reg. at 56,768:3-56,769:1.

C. The refineries also advance several meritless arguments that even without their magic-words interpretation, the 2022 exemption actions do not satisfy the "based on a determination" test.

1. The refineries argue that if the provision for small-refinery exemptions—§7545(*o*)(9)(B)—"contemplates any statutory determination at all, it calls for a determination that has a local scope and effect," namely, an "individualized hardship determination[]." Br.33-34; *see also*, *e.g.*, Br.45-46, 48.

The refineries' argument equates the "determination" with the "action" itself, contrary to the statutory text. Indeed, the refineries' argument that §7545(*o*)(9)(B) calls for an individualized *determination* is identical to its argument that §7545(*o*)(9)(B) calls for an individualized *action*. *See* Br.25-26; *see supra* pt.I.B. In a passage quoted by the refineries (Br.32-33), the Sixth Circuit adopted the same view, declaring that "'determination' has a more precise legal meaning that refers to the agency's *ultimate* decision—not each *preliminary* step on the road to that decision." *Kentucky* v. *EPA*, 123 F.4th 447, 464 (6th Cir. 2024). That is wrong. Although the Act sometimes uses "determination" to refer to the ultimate decision, the Act also uses "determination" to refer to a premise of the ultimate decision, *see, e.g.*, §7545(c)(4)(C)(ii) (EPA may "waive a control … if [it] determines that …"). Section 307(b)(1) clearly uses "determination" in the latter sense, expressly differentiating between the "action" and the "determination[s]" on which the "action" is "based." An action cannot be *based on* the "ultimate decision"; the action *is* the ultimate decision. In effect, the refineries and the Sixth Circuit erase "based on" from §307(b)(1).

2. The refineries argue that "appl[ying] a statutory interpretation uniformly" cannot be a "nationwide determination" because then "*every* EPA action must go to the D.C. Circuit." Br.44. As biofuels respondents previously explained (Br.32-34, 43), that is not necessarily true and specifically untrue here: the 2022 exemption actions did not apply a settled interpretation but rather resolved and applied the interpretation; and even then review would go to the D.C. Circuit only because EPA made and published the requisite finding. The refineries have no response.

3. The refineries contend that EPA's presumption of cost recoupment is merely a "hypothesis" made in EPA's "proposed denials," not a "determination" in the final action. Br.35. That contention does not touch the other determination on which the actions were based: the causation requirement. That contention is also wrong. The presumption, which was thoroughly supported by both economic theory and extensive empirical evidence collected over many years, was an essential component of EPA's final decisions: EPA concluded that the refineries had not satisfied the statutory standard for exemption because they had not rebutted the presumption. *See* Biofuels Br.11-12 (collecting citations). If the presumption were nothing more than a proposed prediction, surely the refineries would not have attacked it so vigorously in their lawsuits. *See* Biofuels Br.44-45 (collecting citations).[3]

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[3] The refineries also assert that the "based on a determination" test is not satisfied by "processes for an EPA action." Br.32. The "process" label perhaps applies to the "four-step framework" EPA followed in rendering the actions at issue in *Oklahoma* v. *EPA*, *see* Br. for the Federal Respondents at 5, No. 23-1067, but it does not apply here: the causation interpretation establishes the *legal*

4. The refineries argue that to satisfy the "based on a determination" test, the determination "must lie at the core of the agency action." Br.32 (quotation cleaned). That contravenes the plain meaning of "based on," which merely requires that the determination be a necessary ingredient, *i.e.*, a but-for component. *See* Biofuels Br.23, 47-48. By excluding some essential general ingredients of agency actions, the refineries' "core" interpretation again generates a risk of inconsistent outcomes through fragmented litigation because litigants can challenge any but-for component of an agency action. *See supra* p.20. Further, if "core" means anything more than "essential," it is a vague concept where clarity is vital. *Supra* p.13.

Regardless, both the causation requirement and the presumption of cost recoupment are "core" under any fair understanding of the term: they were the centerpiece of EPA's reconsideration of its approach to RFP exemptions, *see, e.g.*, Pet.App.80a-84a, 100a-101a, 106a-107a; Pet.App.224a-228a, 242a-243a, 248a-249a; they were the first points in EPA's "summary" of its actions, *see, e.g.*, Pet.App.55a-57a; Pet.App.199a-201a; and they comprised the bulk of EPA's explanation of its exemption actions, *see, e.g.*, Pet.App.79a-85a, 100a-184a; Pet.App.223a-228a, 242a-326a.

CONCLUSION

The Court should reverse the decision below.

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requirement that must be met and the presumption of cost recoupment is a substantive finding that establishes that the causation requirement is not met unless the presumption is rebutted factually.

Respectfully submitted.

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