

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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ENVIRONMENTAL PROTECTION AGENCY,     )  
  Petitioner,     )  
  v.                     ) No. 23-1229  
CALUMET SHREVEPORT REFINING,     )  
L.L.C., ET AL.,                     )  
  Respondents.     )  
- - - - -

Pages: 1 through 112  
Place: Washington, D.C.  
Date: March 25, 2025

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3       ENVIRONMENTAL PROTECTION AGENCY,     )  
4                                   Petitioner,     )  
5                               v.                     ) No. 23-1229  
6       CALUMET SHREVEPORT REFINING,     )  
7       L.L.C., ET AL.,                     )  
8                                   Respondents.     )  
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11                               Washington, D.C.  
12                               Tuesday, March 25, 2025

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14               The above-entitled matter came on for  
15       oral argument before the Supreme Court of the  
16       United States at 10:04 a.m.

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4 of the Petitioner.  
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6 Respondents Growth Energy and Renewable Fuels  
7 Association in support of the Petitioner.  
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10 et al.  
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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 23-1229,  
5 Environmental Protection Agency versus Calumet  
6 Shreveport Refining.

7 Mr. Stewart.

8 ORAL ARGUMENT OF MALCOLM L. STEWART

9 ON BEHALF OF THE PETITIONER

10 MR. STEWART: Mr. Chief Justice, and  
11 may it please the Court:

12 This case provides a paradigmatic  
13 example of the result that the Clean Air Act --  
14 Act's venue provision was intended to avoid.  
15 The April and June 2022 denial actions at issue  
16 here resolved a total of 105 exemption petitions  
17 filed by refineries in eight -- 18 different  
18 states within eight judicial circuits.

19 The agency based those denials on a  
20 new statutory interpretation and economic  
21 analysis it had not previously applied. Under  
22 the approach to venue adopted by the court of  
23 appeals, however, several different regional  
24 circuits would have been required to consider  
25 substantially similar challenges to the agency's

1 approach, wasting judicial resources and  
2 creating a heightened risk of inconsistent  
3 outcomes. Congress amended the venue provision  
4 in 1977 to prevent those results.

5 The judgment of the court of appeals  
6 should be reversed.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: Mr. Stewart, are  
9 there any limits to aggregating different claims  
10 and thereby determining venue in D.C.?

11 MR. STEWART: I don't know that there  
12 are limits to the agency's authority to publish  
13 different decisions in the same Federal Register  
14 notice. We do think that there is some room for  
15 judicial scrutiny of whether -- what the agency  
16 describes as a single action should be regarded  
17 in that way.

18 And so, for example, if the agency in  
19 one Federal Register notice disapproved a SIP  
20 proposed by the State of Ohio and simultaneously  
21 denied an exemption request for a smaller  
22 refinery in Louisiana, you couldn't cogently  
23 regard that as a single action even if it was  
24 published in the same Federal Register notice.

25 JUSTICE THOMAS: Well, in -- let's

1     just take this case with the refineries. What  
2     would be -- a limiting principle if you could  
3     just simply aggregate -- our decisions about  
4     refineries?

5                 MR. STEWART: I -- I think you could.  
6     I think in this case that the agency had  
7     particularly good reasons for publishing them  
8     together because it had issued proposed denials  
9     based on a proposal to change its methodology,  
10    and it didn't want to issue the denials until it  
11    was ready to finalize the methodology. And --  
12    and that's why we wound up with something of  
13    a -- of a backlog.

14                JUSTICE THOMAS: Does it have to be a  
15    change? What about an application of an  
16    existing rule or determination?

17                MR. STEWART: I think the agency's  
18    typical practice has been to do those one at a  
19    time or in small groups when the -- when the  
20    agency is simply applying a principle of federal  
21    law or a rule of federal law that has previously  
22    been established and isn't likely to be  
23    contested on judicial review.

24                JUSTICE THOMAS: But that's  
25    discretionary, isn't it? That's not a real

1 limit?

2 MR. STEWART: I -- I think you're  
3 right that it is up to the -- the agency's  
4 discretion whether to aggregate in those  
5 circumstances.

6 JUSTICE THOMAS: Yeah.

7 JUSTICE GORSUCH: And, Mr. Stewart,  
8 historically, they -- they've taken these one by  
9 one, and -- and SIPs and hardship determinations  
10 have been dealt with at the -- at the regional  
11 circuit level. This is kind of a new  
12 development.

13 MR. STEWART: Well, I think with  
14 respect to ozone transport rules in particular,  
15 that is, review of SIP provisions that purport  
16 to carry out states' good neighbor obligations  
17 to prevent downwind pollution, I think the norm  
18 in that area has been aggregation --

19 JUSTICE GORSUCH: Well, I -- I dealt  
20 with a bunch of SIP approvals on the -- on the  
21 circuit court, and -- and now you've bundled  
22 them and done it differently, but up until now,  
23 these things with refineries and -- and with --  
24 and with SIPs have been done -- done  
25 historically --



1 MR. STEWART: Oh, I think you're  
2 right.

3 JUSTICE GORSUCH: -- at a state level.

4 MR. STEWART: I -- I think you're  
5 right with respect to the refineries, that they  
6 have they have been done seriatim in the past,  
7 but the court --

8 JUSTICE GORSUCH: Yeah. So this is  
9 kind of new. And I guess I'm asking what's  
10 changed other than EPA's decision to bundle them  
11 together?

12 MR. STEWART: I -- I think what  
13 changed was that the agency was changing its  
14 methodology. And the court of appeals, the  
15 Fifth Circuit, noted that EPA in these denial  
16 actions had abandoned or rejected an  
17 adjudicative methodology that it had been  
18 applying for more than a decade.

19 JUSTICE GORSUCH: So it came up with  
20 this pass-through theory. That's the new  
21 development?

22 MR. STEWART: It's partly the  
23 pass-through theory and it's partly the  
24 statutory interpretation.

25 JUSTICE GORSUCH: It's interpretation.

1 MR. STEWART: Yes.

2 JUSTICE GORSUCH: Okay. So, yeah. On  
3 those, I -- I guess I struggle because statutory  
4 interpretation, by gosh, I should hope EPA  
5 applies a consistent statutory interpretation  
6 across the country. And when it comes to  
7 economic theories, same goes. Otherwise, it  
8 would be arbitrary and capricious.

9 So how can it be that that's -- that's  
10 what we should look at?

11 MR. STEWART: Well, I think with --  
12 turning for a second to the third prong of the  
13 statute, the "based on a determination of  
14 nationwide scope or effect," in -- in our view,  
15 the word "determination" has the implication of  
16 resolving a question that was previously  
17 unsettled.

18 JUSTICE GORSUCH: Sure. And every  
19 statutory interpretation and economic theory is  
20 going to -- going to do that, right?

21 MR. STEWART: At -- at some time, but  
22 I think, you know, for instance, if this Court  
23 in 2025 struck down an Act of Congress as  
24 unconstitutional, you wouldn't say that the  
25 Court determined in that decision that it had

1 the -- the authority to review acts of Congress  
2 for constitutionality. That --

3 JUSTICE GORSUCH: Well, I guess I'm  
4 just struggling with, you know, you're trying  
5 to -- a -- a complete sea change in how these  
6 things have been reviewed in the past, and when  
7 I look at a determination, it's an action and a  
8 determination.

9 MR. STEWART: Right.

10 JUSTICE GORSUCH: And I look at, what  
11 is it, 7545, right? And the action is, of  
12 course, here, you're rejecting a hardship  
13 application. And the determination is -- I mean  
14 it's right there in the statute, that the  
15 Secretary has to determine whether there's --  
16 disproportionate economic harm to this  
17 particular refinery.

18 And so when I'm looking for a  
19 determination, why wouldn't I look to the  
20 statute where it uses the very word?

21 MR. STEWART: I mean, that's certainly  
22 one determination, but the agency, in -- in this  
23 context and others, may be making different  
24 subsidiary determinations.

25 JUSTICE GORSUCH: I -- I accept that

1     there are -- that determination of undue  
2     hardship is going to rest upon a statutory  
3     interpretation and an economic theory. But how  
4     far back does somebody have to go in the chain  
5     of reasoning behind the determination that  
6     there's no undue hardship to determine where to  
7     bring their suit? This Court has traditionally  
8     said that venues should be easy and it -- to  
9     figure out at -- outset of a case and shouldn't  
10    in -- involve undue litigation.

11               Now -- now you're asking parties to  
12    not just look at the action, the -- the -- the  
13    rejection of this -- of the application, not  
14    just the determination that there is no undue  
15    hardship, but the analysis behind that, right?  
16    And I -- I think you used the word "core," core  
17    analysis behind it and figure out what's the  
18    core behind a determination of -- and an action.

19               MR. STEWART: I -- I guess I'd say two  
20    things. The first is that EPA, in a case like  
21    this one and typically at the time it takes the  
22    action, will express its own view about where  
23    any challenges should be brought. And so --

24               JUSTICE GORSUCH: Oh, sure. EPA has  
25    its view, but we've got a statute here, friend.

1                   MR. STEWART: It -- it's certainly  
2 true --

3                   JUSTICE GORSUCH: They -- they've got  
4 their view too. I mean --

5                   MR. STEWART: My -- my point is simply  
6 that the -- with respect to that point, is  
7 simply that the -- the litigant is not kind of  
8 starting from square one. The litigant knows  
9 what EPA's view about proper venue is. It knows  
10 whether --

11                  JUSTICE GORSUCH: Yeah, it knows --  
12 the government -- the government would like to  
13 always win, sure, okay. And -- but when it's  
14 supposed to be determining where to bring its  
15 suit, it has to now look not just at the action  
16 and the determination that went into the action  
17 but the reasoning behind it and figure out what  
18 part of its core. How -- how is that consistent  
19 with this -- this Court's repeated admonitions  
20 that venue is supposed to be easy to determine  
21 at the outset of the case?

22                  MR. STEWART: Well, clearly, Congress  
23 wanted there to be a meaningful role for the  
24 D.C. Circuit, not just in reviewing the actions  
25 that are enumerated as nationally applicable.

1 JUSTICE GORSUCH: Sure. And it also  
2 wanted, you know, regional circuits -- I mean,  
3 it's a cooperative federalism system, the Clean  
4 Air Act. It -- it wanted room for both. And  
5 we're now trying to figure out where the line  
6 is. And you're asking us to change historical  
7 practice pretty radically, and I'm just curious  
8 how that fits with our -- our -- our presumption  
9 that venues should be easy to determine at the  
10 outset of a case.

11 MR. STEWART: Well, I think -- that  
12 was part of the debate that went on in the 1970s  
13 after the NRDC cases that we've discussed in our  
14 brief. That is, in 1972 and 1973, there were  
15 numerous challenges to an EPA action that had  
16 simultaneously granted extensions to a number of  
17 different states for filing -- for -- for  
18 meeting a particular type of attainment deadline  
19 and had simultaneously approved SIPs submitted  
20 by the states.

21 And there was controversy over where  
22 those cases should be heard, because although  
23 they pertained to a number of different states,  
24 the legal challenges were all the same. And  
25 both the First Circuit and the D.C. Circuit

1 concluded that venue in that circumstance was  
2 proper in the D.C. Circuit.

3 But the real significance of those  
4 cases is -- is not about whether they were  
5 correct or incorrect in interpreting the statute  
6 as it then existed. The real significance was,  
7 after that happened, there was a debate in the  
8 mid-1970s. And ACUS, the Administrative  
9 Conference of the United States, recommended  
10 that the statute be amended to provide that a  
11 challenge to any EPA action with respect to a --  
12 a state SIP would be heard in the regional  
13 circuit for -- that -- that contained the state  
14 whose plan was involved.

15 And part of the justification for that  
16 approach was, as you say, ease of  
17 administration, that you -- you would know right  
18 off what the right forum was.

19 But the general counsel of EPA said,  
20 in most cases, challenges to SIP decisions will  
21 rest on state-specific circumstances, but  
22 sometimes EPA's SIP decisions will rest on what  
23 he referred to as generic determinations of  
24 nationwide scope or effect. And --

25 JUSTICE JACKSON: And so, Mr. Stewart,

1 I -- I think the answer to Justice Gorsuch's  
2 question is that the statute is focusing  
3 people's attention on what the EPA's reasons  
4 are, at least in that third prong.

5 MR. STEWART: Yes.

6 JUSTICE JACKSON: Then in the --

7 JUSTICE GORSUCH: Where -- where --  
8 where is that? I -- I see -- they have to focus  
9 on the action of the determination. I don't see  
10 that they have to focus on the reasons behind  
11 the determination.

12 MR. STEWART: Well, the -- the -- the  
13 determine -- when we talk about an action based  
14 on determinations, we are talking about the  
15 determinations are the reasons, the action --

16 JUSTICE GORSUCH: Well, I -- the --  
17 the action is denying the application, correct?

18 MR. STEWART: Yes.

19 JUSTICE GORSUCH: And to determine  
20 whether to deny or grant the application, you  
21 have to decide whether there is undue hardship.  
22 That's the statute's language, right?

23 MR. STEWART: That's the statute's  
24 language.

25 JUSTICE GORSUCH: So that's the



1 determination. You've determined that there is  
2 no undue hardship here, right?

3 MR. STEWART: But there can also be  
4 determinations about what does the term "undue  
5 hardship" mean, when the question is --

6 JUSTICE GORSUCH: Oh, sure, you've got  
7 lots of reasons for reaching your determination.

8 MR. STEWART: But I think what  
9 Congress was trying to drive at, and what the --  
10 the EPA -- general counsel had in mind was --

11 JUSTICE GORSUCH: Help --

12 MR. STEWART: -- you -- you are -- you  
13 are correct that in every case the EPA is going  
14 to be applying some kind of general federal rule  
15 or policy or framework to local facts. Or at  
16 least for any locally or regionally applicable  
17 action, you'll have some of both.

18 And the -- the venue provision will  
19 work best if cases are routed to the D.C.  
20 Circuit when the general methodology is likely  
21 to be the subject of the judicial challenge,  
22 because those are the cases where you have the  
23 greatest risk of duplicative judicial resources  
24 and inconsistent outcomes.

25 JUSTICE JACKSON: Can -- can I say it

1     in another way? That -- that the venue  
2     provision appears to be designed to direct  
3     challenges that will turn on local facts and  
4     issues to the local circuits, and challenges  
5     that turn on national facts and issues to the  
6     D.C. Circuit.

7                 Now, I know that's very generalized,  
8     but to the extent that the challenge in this  
9     case and other cases are, for example -- or is,  
10    for example, to the EPA's economic analysis,  
11    which it drew in this case from national market  
12    evaluation and it applied to all of the -- all  
13    of the different refineries, this national  
14    economic analysis, one might think that that's  
15    the kind of determination of national scope or  
16    effect that the third prong, at least, wanted  
17    directed to the D.C. Circuit.

18                MR. STEWART: I -- I think that's  
19    right, but the -- the additional point I would  
20    make is it -- it matters a lot whether EPA's  
21    statutory interpretation and economic analysis  
22    are new or whether this is the way that they --  
23    agency has been doing it for 10 years.

24                JUSTICE JACKSON: Why is that?

25                MR. STEWART: It -- it's -- it's that

1 way because if the agency has been doing it that  
2 way for 10 years, then it's very likely that any  
3 potential challenges to the methodology will  
4 have brought, been resolved, they will be  
5 sort -- they will have been sorted out.

6 And at that point, if EPA has -- is  
7 applying a 10-year-old regulation that was  
8 challenged in the D.C. Circuit but upheld, it's  
9 very unlikely that the new action is going to be  
10 attacked based on the asserted invalidity of the  
11 rule.

12 JUSTICE GORSUCH: How -- how is -- how  
13 is a litigant supposed to figure that out?

14 MR. STEWART: Well, part of --

15 JUSTICE GORSUCH: I mean, I -- so  
16 you're saying, okay, when they're new, theories  
17 of statutory interpretation are new economic  
18 theories of nationwide impact, it goes to the  
19 D.C. Circuit. But if they're old, ah, then --  
20 then I can bring it in my own circuit where I  
21 actually live and operate and work.

22 What -- is it a 10-year cutoff, is  
23 that -- is that the -- is that -- is that what  
24 -- I mean, venue is supposed to be simple. And  
25 I guess I'm trying to figure out what's our

1     simple -- what simple rule would you have us  
2     apply here?

3             MR. STEWART: Well, one of the things  
4     you can look at is, is there some metric by  
5     which you conclude the validity of the rule has  
6     been established? Was it challenged before and  
7     upheld? Has the time for challenging it passed?

8             Another is you can look at the  
9     comments that EPA received on the proposed  
10    action, because not everything, but a lot of  
11    what EPA does, it issues a proposed action and  
12    then it takes comments and it responds to the  
13    comments. And here, it was clear from the  
14    comments that EPA received that any judicial  
15    challenges were likely to be attacks on the  
16    methodology predominantly.

17            JUSTICE KAGAN: I -- I think what  
18    would help me, Mr. Stewart, is if you talked  
19    in -- in a bit more concrete terms about this  
20    case. And again, focusing on the third  
21    sentence, "the action based on a determination  
22    of nationwide scope or effect."

23            What was the determination of  
24    nationwide scope or effect that you are saying  
25    drove all of these decisions?

1                   MR. STEWART: The -- the two  
2     determinations of nationwide scope or effect --  
3     effect that we've emphasized are, first, the  
4     statutory interpretation, the requirement that  
5     the economic hardship come from the blending  
6     requirement itself and not from other economic  
7     circumstances.

8                   And the second was the passthrough  
9     theory, the presumption that generally small  
10    refineries can pass their costs of compliance  
11    along to their customers.

12                  And -- and those --

13                 JUSTICE KAGAN: And how responsible  
14    were those two findings, taken together, for the  
15    actual determinations made?

16                 MR. STEWART: They were -- I mean, all  
17    of the petitions were denied. Now, it's true  
18    that EPA, with respect to the passthrough theory  
19    in particular, gave each refinery an opportunity  
20    to rebut the presumption and show that its own  
21    circumstances were different, that it couldn't  
22    pass through the cost.

23                 But certainly the -- the challenges in  
24    the -- the various litigated proceedings have  
25    focused predominantly on the validity of the

1 nationwide determinations. They haven't  
2 primarily been a --

3 JUSTICE KAGAN: What would a -- what  
4 would -- what -- what would you have to do to  
5 rebut the presumption? I mean, is that a very  
6 high bar? Is that why it's -- wasn't met in any  
7 case?

8 MR. STEWART: I -- I would think it's  
9 a pretty high bar --

10 JUSTICE KAGAN: So your essential  
11 argument here is, like, Look, there's the  
12 statutory interpretation, plus there's this --  
13 what did you call the other one? The --

14 MR. STEWART: The economic analysis.

15 JUSTICE KAGAN: The economic analysis.  
16 That together, was basically determining what  
17 decision was going to be made in all these  
18 cases. There was, you know, a way for you to  
19 come back and say it shouldn't happen here, but  
20 not really.

21 And, you know, given that, like,  
22 everybody would want this to be done in one  
23 court, because one thing was driving all of  
24 these decisions across the country.

25 MR. STEWART: Yes, exactly.

1 JUSTICE BARRETT: But, Mr. Stewart --

2 Oh, sorry. Finish.

3 JUSTICE KAGAN: Go ahead.

4 JUSTICE BARRETT: I -- I -- picking up  
5 on that, what if one of the refineries wanted to  
6 challenge both the EPA's denial of the  
7 presumption in their favor, like, you know, the  
8 non-zero chance, as the Fifth Circuit calls it,  
9 to say, you know what, you should have given me  
10 an exception, because I can show that I uniquely  
11 experienced hardship, as well as the economic  
12 theory and the statutory interpretation.

13 So does it depend on how the refinery  
14 styles the challenge?

15 MR. STEWART: It -- it doesn't depend  
16 on how the refinery challenge -- styles the  
17 court challenge, because the determination -- I  
18 mean, the -- EPA's decision that the third prong  
19 applies has to be made at the type it -- time it  
20 takes the action. And it has to publish that  
21 finding in taking the action.

22 And so it -- it may depend, in part,  
23 on what sort of comments EPA received during the  
24 rule-making, because that -- that may alert it  
25 that it -- it is resolving something that is

1       contested. But the right forum thereafter  
2       doesn't depend on what particular mix of  
3       challenges a particular refinery wants to make.

4               CHIEF JUSTICE ROBERTS: Thank you,  
5       counsel.

6               Justice Thomas?

7               Justice Alito?

8               JUSTICE ALITO: Well, there are a  
9       couple of points about your argument that I  
10      would appreciate some clarification. Some of  
11      them have been touched on, but just to make  
12      them -- present them in simple terms.

13              When do you think an issue is  
14      sufficiently settled so that decisions based on  
15      that no longer involve a determination?

16              MR. STEWART: Well, we've -- we've  
17      referred to the fact that the -- the denials  
18      here were issued roughly contemporaneously with  
19      the -- with the -- the announcement of the --  
20      determination itself.

21              And we've also referred to the fact  
22      that the comments indicated that the nationwide  
23      determinations were likely to be the subject of  
24      challenge.

25              I don't think, frankly, that there is



1 a time limit, and -- but I think what the Court  
2 should be trying to get at is, kind of, what is  
3 the likelihood? Are these determinations  
4 sufficiently new? Are they sufficiently  
5 unestablished that they can be expected to be  
6 the focus of judicial challenge?

7 Because --

8 JUSTICE ALITO: Well, that doesn't  
9 seem to be a very clear rule. Maybe it -- the  
10 application of it here would be clear, but going  
11 forward in other cases, that certainly doesn't  
12 seem to be clear, whether it was sufficiently  
13 established to -- so that anything that happens  
14 later is not a new determination?

15 MR. STEWART: I mean, I think one  
16 thing we would offer is with respect to the  
17 standard of review here, we certainly think the  
18 question of what is the test, what is the basic  
19 standard for applying the third prong, that's a  
20 question of statutory -- determination that the  
21 Court decides de novo. And, so we disagree with  
22 Respondents' interpretation, but the question  
23 whether they're right or wrong -- their -- their  
24 interpretation, but we -- the question whether  
25 they're right or wrong is for the Court to

1     decide.

2                   If the Court accepts our basic  
3     framework that -- the test should be: Were  
4     these determinations sufficiently new that they  
5     are likely to be the subject of judicial  
6     challenge, then I think it would be appropriate  
7     to give some deference to EPA's determination in  
8     that regard, because EPA would know the record,  
9     it would understand to what extent was it  
10    departing from its past methodology, what had  
11    the comments been, and --

12                   JUSTICE ALITO: Okay. Thank you.

13                   What -- why should it matter in making  
14    this determination whether EPA decides what  
15    makes one -- takes one action by itself or  
16    bundles a bunch together?

17                   MR. STEWART: I don't think it  
18    particularly matters for purposes of the third  
19    prong; that is, for purposes of the first prong,  
20    the -- the question is whether the action is  
21    nationally applicable. And that depends on  
22    whether the action that EPA announces as the not  
23    denial of a lot of petitions or the denial of  
24    one.

25                   I think for purposes of the third

1     prong, the analysis would be the same regardless  
2     of whether there's bundling.

3             JUSTICE ALITO:   So you can't -- EPA  
4     can't just say, look, this is -- we're -- we're  
5     deciding cases from five different circuits and,  
6     you know, or -- a number of different states and  
7     they fall into five different circuits, that  
8     shouldn't matter at all?

9             MR. STEWART:   It -- it doesn't matter  
10    for purposes of the third prong, that the  
11    question is, even if you think of the action as  
12    being the denial of a particular refinery's  
13    petition, if it is based on -- if that action is  
14    based on a determination of federal law that's  
15    likely to be challenged in court, that's an  
16    appropriate case for the D.C. Circuit to  
17    exercise review.

18            JUSTICE ALITO:   What do you think  
19    "based on" means?   Since it wasn't exactly clear  
20    from your brief.   At some points, you seem to  
21    say it's but-for causation, and then at another  
22    point, you say it's -- it must lie at the core  
23    of the agency action.   Which one is it?

24            MR. STEWART:   We would say but-for  
25    causation.   That's typically the meaning that

1 the Court ascribes to the -- the term "based  
2 on." But if the Court wanted to have a slightly  
3 more -- stringent test, the -- it's -- it's  
4 really the principle that we care most about,  
5 rather than kind of the exact formulation of the  
6 standard.

7 JUSTICE ALITO: I know the pass- --  
8 the validity of the pass-through theory is not  
9 before us, but just out of curiosity, has  
10 that -- is that being challenged? And what  
11 is -- if so, where -- what is the status of the  
12 challenge?

13 MR. STEWART: Well, it -- it was  
14 challenged in both the D.C. Circuit and the  
15 Fifth Circuit because a lot --

16 JUSTICE ALITO: Right. Okay.

17 MR. STEWART: -- of these cases wound  
18 up in --

19 JUSTICE ALITO: Yeah.

20 MR. STEWART: -- the -- Fifth Circuit.  
21 The -- both of those courts ruled against EPA on  
22 that issue. And in our motion to hold the  
23 briefing schedule in abeyance in this case, we  
24 noted that EPA is reconsidering the methodology  
25 it's using. I -- I don't have any updates on

1     that, but that -- that's what we've represented  
2     to the Court previously.

3                 JUSTICE ALITO:   Thank you.

4                 CHIEF JUSTICE ROBERTS:   Justice  
5     Sotomayor?

6                 JUSTICE SOTOMAYOR:   I am having almost  
7     an impossible time understanding how you  
8     answered Justice Thomas's question to say that  
9     there is a limit that's subject to some form of  
10    judicial review on your decision to bundle  
11    that's not tied directly to the third prong;  
12    meaning, I don't see how you can bundle unless  
13    you meet the third prong, because the first  
14    prong requires an action, and the action,  
15    whether it's a national action or a individual  
16    action, and if it has to be an individual  
17    action, I don't see how you can make it national  
18    without the third prong.

19                MR. STEWART:   Well, I think even if  
20    EPA was simply applying to new circumstances  
21    a -- a previously established general  
22    methodology, EPA would have the authority, if it  
23    wished, to bundle in the sense of announcing in  
24    a single Federal Register notice the results of  
25    its --

1 JUSTICE SOTOMAYOR: I just don't see  
2 how that can be, unless that action is based on  
3 a determination of nationwide scope or effect.  
4 I can't see how you can bundle a New York -- and  
5 you said you can't --

6 MR. STEWART: Right.

7 JUSTICE SOTOMAYOR: -- bundle a New  
8 York and Pennsylvania denial of a SIP and call  
9 it nationwide --

10 MR. STEWART: I -- I think that --

11 JUSTICE SOTOMAYOR: -- absent a  
12 determination of nationwide scope or effect.

13 MR. STEWART: I -- I think the answer  
14 to your question turns on our limiting  
15 construction of the word "determination." That  
16 is, when -- if EPA granted or denied, let's say,  
17 four different refinery proposals in a single  
18 action, if it were simply applying its  
19 preexisting methodology, a methodology that no  
20 one was likely to challenge, but it was applying  
21 that to disparate circumstances around the  
22 country, nothing would prevent it from  
23 announcing those dispositions in a single --  
24 Federal Register notice.

25 The reason we would say those don't

1     turn on a determination of nationwide scope or  
2     effect is that the legal principles would be  
3     preexisting and established. They wouldn't be  
4     kind of new -- new determinations --

5             JUSTICE SOTOMAYOR: I think you're --

6             MR. STEWART: -- resolution of issue.

7             JUSTICE SOTOMAYOR: -- you're --  
8     you're digging yourself into a hole because I  
9     would then say they're individual actions that  
10    you have to take to the local courts.

11            MR. STEWART: And -- and, frankly, EPA  
12    rarely does that kind of bundling in  
13    circumstances where it isn't announcing new  
14    rules or new frameworks. We think it has the  
15    authority to, but I -- I'll say we wouldn't lose  
16    much if the Court said --

17            JUSTICE SOTOMAYOR: All right.

18            MR. STEWART: -- we --

19            JUSTICE SOTOMAYOR: Assume my  
20    assumption --

21            MR. STEWART: Okay.

22            JUSTICE SOTOMAYOR: -- that I don't  
23    take any meaning from your bundling --

24            MR. STEWART: Okay.

25            JUSTICE SOTOMAYOR: -- and that I

1 think it's always a issue of what's a  
2 determination of nationwide scope and effect.  
3 What's the standard of review? I wasn't sure in  
4 the answer you gave to -- you -- you talked  
5 first about de novo and then you talked about  
6 deference. So --

7 MR. STEWART: I -- I would --

8 JUSTICE SOTOMAYOR: -- assume it's --  
9 only the third prong.

10 MR. STEWART: Right.

11 JUSTICE SOTOMAYOR: All right? What's  
12 the standard of review?

13 MR. STEWART: I would say when you are  
14 determining what the basic test should be, the  
15 standard of review is de nobo -- de novo. For  
16 instance, Respondents are -- have argued that  
17 "determination" here is used as a term of art  
18 and it refers only to circumstances where some  
19 other CAA provision instructs EPA to make a  
20 determination or to determine something on a  
21 nationwide basis.

22 Now, we think that interpretation of  
23 the statute is wrong, but the question whether  
24 it is right or wrong is a pure issue of  
25 statutory -- construction. That's something the



1 Court decides de novo.

2           If the Court concludes that we're  
3 right about the basic test, that what we are  
4 looking for is did EPA in this action announce a  
5 new principle of federal law or policy that is  
6 likely to be the subject of judicial challenge,  
7 if that basic test is correct, then we think EPA  
8 should get deference when it announces that it  
9 thinks the test is satisfied with respect to a  
10 particular action.

11           JUSTICE SOTOMAYOR: Thank you.

12           CHIEF JUSTICE ROBERTS: Justice Kagan?

13           JUSTICE KAGAN: I don't know,  
14 Mr. Stewart. You're making this much more  
15 complicated than I came in here thinking it was.

16           You know, the way I thought about it  
17 was if you have a -- a set of individual actions  
18 but they're all based on a common denominator,  
19 such that you know how all the individual  
20 actions are going to come out or almost all or  
21 generally all, you know, such that -- like,  
22 state circumstances are just not playing much of  
23 a role, then you -- then it should be in one  
24 court because that's really all that is going to  
25 be up for judicial review.

1                   So whether it's old, whether it's new,  
2     I mean, you just look and you say did -- did one  
3     nationwide decision, or two nationwide decisions  
4     in this case, drive all of these individual  
5     decisions or almost all or most of them? And if  
6     it did, like, you don't want 11 circuits dealing  
7     with the same question. And if it didn't,  
8     because there are lots of individual  
9     circumstances coming into play and relating  
10    to -- you know, it's -- it's -- it's like both  
11    all mixed together so that the individual  
12    circumstances really are going to count and  
13    different decisions are going to go different  
14    ways, then you do want them done by different  
15    courts.

16                  So, I -- I mean, that might be just a  
17    intuitive way of dealing with it, but it seems  
18    like a lot simpler to me than what you're  
19    pitching.

20                  MR. STEWART: Well, I think part of  
21    the reason that we focused on determination as  
22    we have is the strongest -- to us the strongest  
23    argument on the other side is that whenever EPA  
24    makes a site-specific determination, it is  
25    always applying some nationally applicable rule

1 or framework or policy. If it didn't do that,  
2 the other side appropriately points out, we  
3 wouldn't have any assurance that --

4 JUSTICE KAGAN: Yeah, sure, there is  
5 always some nationwide determination in the mix,  
6 but if it's the kind of thing where that  
7 nationwide determination as applied is going to  
8 come out differently on different decisions,  
9 depending on local conditions, then you don't  
10 want it in the D.C. Circuit.

11 MR. STEWART: Well, you --

12 JUSTICE KAGAN: I mean, I have a  
13 pretty strong intuition -- I won't tell you what  
14 it is -- about both of these cases. And one  
15 goes one way and one goes the other way.  
16 Because, one, everything is being decided by the  
17 nationwide determination; and the other, pretty  
18 much nothing is being decided by the nationwide  
19 determination.

20 MR. STEWART: Well, I think the  
21 nationwide determination, the new principle of  
22 law, can be very important and can arouse great  
23 controversy even if it doesn't, by itself,  
24 preordain what the outcome of any particular  
25 proceeding is going to be.

1           I mean, I'd look at this -- this  
2 Court's practice, for instance. In cases where  
3 the -- this Court determines that the court of  
4 appeals has erred in its analysis, it's not  
5 uncommon for the Court to announce the right  
6 analytic framework and then send it back to the  
7 lower courts to figure out how that framework  
8 applies to particular circumstances.

9           It leaves the last -- it -- it  
10 recognizes that its announcement of the  
11 framework doesn't necessarily foreordain the  
12 outcome. It leaves the last stage for the lower  
13 courts.

14           But what this Court is still doing is  
15 still terribly important, and it's the kind  
16 of -- the task this Court is performing is the  
17 type of task for it's -- which it's important  
18 that there be centralized review, that you not  
19 have a lot of courts making the same  
20 determination of -- of federal law without some  
21 means of bringing harmony to them, even if that  
22 determination doesn't dictate the outcome in a  
23 particular case.

24           JUSTICE KAGAN: Thank you.

25           CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch?

2 JUSTICE GORSUCH: Well, harmony can  
3 also be achieved through appeal, right? I  
4 mean --

5 MR. STEWART: Yes.

6 JUSTICE GORSUCH: I mean, the --  
7 the -- the government's not afraid of litigating  
8 in -- in -- in appropriate forums across the  
9 country, right?

10 MR. STEWART: That -- that's correct,  
11 but --

12 JUSTICE GORSUCH: And if there are  
13 circuit splits over the meaning of the law,  
14 you -- you know how to bring them here?

15 MR. STEWART: Yes.

16 JUSTICE GORSUCH: All right. And so  
17 I -- I -- I just want to explore the two tests  
18 you have offered us: the but-for test and the  
19 core test. Those are the two. And you're happy  
20 with either one?

21 MR. STEWART: Yes.

22 JUSTICE GORSUCH: Yeah. So the  
23 but-for test, I would think, would capture  
24 pretty much any time you have a standard  
25 statutory interpretation or economic theory.

1     Because but for, you wouldn't have reached the  
2     result, right?

3             MR. STEWART: Well, no, I mean, you --  
4     with respect to a particular outcome, you could  
5     have -- you could have EPA issuing rulings in  
6     the alternative, saying: Under our preferred  
7     approach, the small refinery's petition would  
8     be -- should be denied, but even under our old  
9     approach, this particular refinery wouldn't be  
10    entitled to an exemption.

11            JUSTICE GORSUCH: But either of those  
12    statutory interpretations would be a but-for  
13    cause of the -- the -- the -- the -- the  
14    ultimate -- one or the other would have to be at  
15    least a but-for cause?

16            MR. STEWART: Well, no. I think -- I  
17    think if you said under either approach --

18            JUSTICE GORSUCH: Let -- let's make it  
19    easier. I have one standard statutory  
20    interpretation I'm going to apply to all of  
21    these cases. That's a but-for cause?

22            MR. STEWART: It would only be a  
23    but-for cause if -- if there would be a  
24    different outcome under some alternative  
25    interpretation.

1 JUSTICE GORSUCH: Right, okay. Yeah.

2 Exactly.

3 But it was a but-for cause of the  
4 denial in every case.

5 MR. STEWART: Again, only if there  
6 would be a grant of the exemption under some --

7 JUSTICE GORSUCH: Sure. Some court is  
8 going to have to decide whether that is a  
9 correct interpretation and whether there's an  
10 alternative that's preferable, but the  
11 interpretation on which EPA is relying to deny  
12 the application will be the but-for cause in  
13 every case. So it -- it captures everything.  
14 So that's one.

15 And then the core -- what does "core"  
16 mean, and where does it come from?

17 MR. STEWART: I mean, I think we were  
18 trying to get at circumstances where -- we're  
19 trying to weed out circumstances where EPA, in  
20 the course of an action, may announce some  
21 principle of federal law, but it is so  
22 peripheral to the decision it's actually making  
23 that it doesn't appear likely to affect the  
24 outcome, and, consequently, it doesn't appear  
25 likely to be the focus of judicial challenge.

1 JUSTICE GORSUCH: No, I get -- I  
2 get -- I get the impulse. I'm just not sure  
3 where it is in the statute.

4 MR. STEWART: I think the word --  
5 again, I --

6 JUSTICE GORSUCH: "Core" does -- it  
7 doesn't appear anywhere?

8 MR. STEWART: I think if -- if EPA  
9 announced: We -- we think this is the right  
10 statutory interpretation and economic analysis,  
11 this particular small refinery disagrees, and it  
12 thinks we should use an alternative  
13 interpretation and analysis, we note that under  
14 either approach we think this small refinery  
15 would not be entitled to an exemption.

16 I think if you -- EPA said that, then  
17 you couldn't conclude that EPA's preferred  
18 interpretation and analysis were a but-for  
19 cause.

20 JUSTICE GORSUCH: Are we going to have  
21 a jurisprudence on "core"? How core is core?

22 MR. STEWART: Again --

23 JUSTICE GORSUCH: Is that what you're  
24 inviting us to do?

25 MR. STEWART: No. I think if the



1 Court adopted our basic test, then it would be  
2 appropriate to give some deference to EPA's  
3 judgment about how integral to its overall  
4 analysis was a particular principle of law.

5 And, I -- you know --

6 JUSTICE GORSUCH: Thank you. Thank  
7 you.

8 MR. STEWART: You're welcome.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Kavanaugh?

11 JUSTICE KAVANAUGH: On the reason for  
12 all of this in the first place, Congress's  
13 reasons for all of this in the first place,  
14 obviously it wasn't just harmony. I thought it  
15 was also -- but correct me if I'm wrong --  
16 speed.

17 MR. STEWART: Yeah.

18 JUSTICE KAVANAUGH: And therefore,  
19 American businesses, which have to make --  
20 multi-million-dollar decisions on all of this,  
21 have some certainty more quickly about what the  
22 rules are. Because they will say: You know, we  
23 don't care whether the rule's A or B -- I mean,  
24 they do care -- but tell us what the rule is so  
25 we can make our investment decisions and our

1 business decisions.

2 MR. STEWART: Yes. And -- and that's  
3 reflected not just in the provision for  
4 centralization in the D.C. Circuit but in the  
5 short -- the 60-day time limit for seeking  
6 review. It's reflected to an extent in -- in  
7 the fact that you go straight to the court of  
8 appeals in the first place.

9 Part of the reason for kind of  
10 skipping a potential layer of judicial review  
11 was to get things -- these -- these things  
12 resolved quickly. And so if EPA is -- is told  
13 that it's wrong, it can go back to the drawing  
14 board. If EPA's methodology is upheld, then it  
15 can decide what's the next incremental step from  
16 that.

17 JUSTICE KAVANAUGH: The fact that  
18 we're having this argument, though, suggests  
19 that Congress might have missed the mark on  
20 that. But, anyway, that was the idea, right?

21 Then on ease of application, which  
22 Justice Gorsuch rightly raises, I just want to  
23 zero in on the deference point.

24 Your point there is when -- I think --  
25 you know, when EPA makes and publishes and says

1     it's making something based on -- on a  
2     determination of nationwide scope or effect,  
3     that itself will receive deference?

4             MR. STEWART:  -- again, if -- if you  
5     think that EPA is applying basically the right  
6     standard --

7             JUSTICE KAVANAUGH:  Assume that.

8             MR. STEWART:  Yes.

9             JUSTICE KAVANAUGH:  Then it gets  
10    deference in how it applies it in a particular  
11    case, which helps with respect to ease of  
12    application.

13            MR. STEWART:  Yes.

14            JUSTICE KAVANAUGH:  Okay.  And then if  
15    it does go to the D.C. Circuit, and the D.C.  
16    Circuit rules for EPA -- I just want to make  
17    sure you agree with this -- obviously there  
18    won't be a circuit split on anything.  So when  
19    it comes to this Court on cert, we need to be  
20    more attentive to cases like that than we might  
21    be in certain other cases?

22            MR. STEWART:  I -- I agree.  And  
23    it's -- you know, it's kind of like the federal  
24    circuit and patent cases, that with respect to  
25    categories of litigation that can't produce a

1 circuit split, then obviously the Court is going  
2 to -- to take cases even when some of the usual  
3 metrics for what's a cert-worthy case are  
4 absent.

5 JUSTICE KAVANAUGH: Good. Thank you.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Barrett?

8 JUSTICE BARRETT: Just to crystallize  
9 your position, Mr. Stewart, can you point me to  
10 the best textual and contextual evidence that a  
11 determination is this issue of unsettle --  
12 unsettled issue of statutory interpretation,  
13 rather than the decision that the underlying  
14 hardship -- exception doesn't apply?

15 MR. STEWART: I mean, I think that the  
16 basic reason that the two shouldn't be equated  
17 is that the statute refers -- and this is at  
18 the -- kind of the carryover sentence from 31A  
19 and 32A of the appendix to the government's  
20 brief.

21 It says, "Notwithstanding the  
22 preceding sentence, a petition for review of any  
23 action referred to in such sentence," namely, an  
24 action of -- that is locally or regionally  
25 applicable, "may be filed only in the United

1 States Court of Appeals for the District of  
2 Columbia if such action is based on a  
3 determination of nationwide scope" --

4 JUSTICE BARRETT: So the  
5 distinction --

6 MR. STEWART: If the state --

7 JUSTICE BARRETT: -- the use of the  
8 words "action" and "determination," you would  
9 say, is your best evidence?

10 MR. STEWART: Yes. The -- and -- and  
11 the --

12 JUSTICE BARRETT: Okay.

13 MR. STEWART: -- the linkage "based  
14 on" indicates that the two are not the same  
15 thing.

16 JUSTICE BARRETT: Okay. And then,  
17 relatedly, when you've been talking about length  
18 of time and how we decide whether something is  
19 settled or not, I mean, these were denied in two  
20 batches, one April and one June, on the same --  
21 basis of the same, say, determination of the  
22 economic theory and the statutory  
23 interpretation.

24 Why were the ones in June, then, in  
25 the government's view, not based on something

1       that was already settled? Or were they?

2               MR. STEWART: I -- I -- I think they  
3 weren't. I mean, it -- for -- for one thing,  
4 the other metric that -- or criterion that we've  
5 identified for -- for identifying things that  
6 are determinations, things are -- that are the  
7 resolution of a controversy, is did EPA receive  
8 comments on the proposed action that indicated  
9 disagreement with the determination?

10              And that was as true for the  
11 refineries whose petitions were denied in June  
12 as it was for those that were denied in April.  
13 In both instances, EPA was told by the  
14 petitioning refineries that we're not just  
15 disagreeing with the application of your  
16 methodology to our circumstances, we're  
17 disagreeing with the methodology itself.

18              JUSTICE BARRETT: Okay.

19              CHIEF JUSTICE ROBERTS: Justice  
20 Jackson?

21              JUSTICE JACKSON: So I guess I'm just  
22 trying to understand your statutory  
23 interpretation. Are you saying that the action  
24 that was taken here was a nationally applicable  
25 one at prong 1, such that that's why it goes to

1 the D.C. Circuit?

2 MR. STEWART: Yes. We're -- I mean,  
3 we're making two arguments. Our -- our first  
4 argument is because this was the denial of 21  
5 small refinery exemptions, rather than only one,  
6 it was nationally -- and the refineries were  
7 spread out all over the country, it was a  
8 nationally applicable action and it goes to the  
9 D.C. Circuit under prong 1.

10 But then we're also arguing in the  
11 alternative, if instead you view the action as a  
12 matter of law as separate denials of 21  
13 different petitions, we would say each of those  
14 denials falls under prong 3 because each denial  
15 was based on a determination of nationwide scope  
16 or effect.

17 JUSTICE JACKSON: All right. So going  
18 back to the prong 1 issue, help -- help me to  
19 understand your argument. I mean, if the EPA  
20 had issued each of these denials on a separate  
21 piece of paper, would you still say that they  
22 belonged on the D.C. Circuit?

23 MR. STEWART: No. I mean, I think our  
24 argument does depend on the proposition that you  
25 attach a lot of weight to the -- the way that

1 EPA frames its action. And so if on the same  
2 day we had issued 21 separate Federal Register  
3 notices saying we're applying the same  
4 methodology but we're engaging in 21 separate  
5 denial actions, we would say those are --

6 JUSTICE JACKSON: But what about the  
7 statute or Congress's reasons for enacting it or  
8 the way that it works makes you think that  
9 Congress intended for this to turn on the  
10 formal -- the formality of the EPA's  
11 determination in that way?

12 MR. STEWART: Well, it refers to the  
13 action that EPA takes. And I think to a degree,  
14 the -- the application of prong 1 will  
15 necessarily depend at least in part on  
16 formalities. That is, if EPA had first  
17 promulgated a regulation that said here is our  
18 new statutory interpretation, here's our new  
19 economic analysis, in subsequent decisions we  
20 will apply this interpretation and analysis to  
21 different refineries, the regulation itself  
22 would clearly have been nationally applicable.  
23 It would have been a nationwide rule. And it  
24 would have been challengeable only in the D.C.  
25 Circuit.



1 JUSTICE JACKSON: But I thought you  
2 said if they said that and then they had  
3 separate papers saying that, they would be  
4 local?

5 MR. STEWART: No, I -- I -- I was --  
6 perhaps I misunderstood the hypothetical. I was  
7 saying --

8 JUSTICE JACKSON: So here's the  
9 hypothetical. The EPA issues an order that  
10 consists of a single page for each refinery.

11 MR. STEWART: And -- and the --  
12 assuming that the order says: We -- are  
13 applying this methodology and concluding on that  
14 basis that your refinery doesn't meet the  
15 criteria. If it's announcing the methodology in  
16 the same document where it announces the denial,  
17 then that would be a single -- single --  
18 state-specific action.

19 I -- I had in mind a circumstance  
20 where EPA proceeds in two steps, first  
21 promulgating the rule and then issuing separate  
22 actions that apply it to different --  
23 refineries. And our -- and our point is the  
24 fact that in the denial actions here EPA chose  
25 to announce the new methodology in the same

1 document as -- its application shouldn't affect  
2 the nationwide applicability.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 MR. STEWART: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Waxman.

8 ORAL ARGUMENT OF SETH P. WAXMAN  
9 ON BEHALF OF RESPONDENTS GROWTH ENERGY  
10 AND RENEWABLE FUELS ASSOCIATION  
11 IN SUPPORT OF THE PETITIONER

12 MR. WAXMAN: Mr. Chief Justice, and  
13 may it please the Court:

14 The core objective of Section 307(b)  
15 is to avoid inconsistent rules arising from  
16 duplicative litigation in the administration of  
17 the Clean Air Act. Yet, under the ruling below,  
18 eight different courts of appeals will be  
19 passing on the merits of EPA's standards for  
20 eligibility under the small refinery exemption,  
21 producing, as is already evident from the two  
22 circuits that have opined, different substantive  
23 standards, completely the opposite of what  
24 Congress manifestly intended under the national  
25 RFS program.

1           Now, there's been a lot of discussion  
2    about prongs 1 and 3 and maybe some discussion  
3    without identifying it as prong 2, which is the  
4    locally or regionally applicable. As to prong  
5    3, we fully agree with EPA that if the actions  
6    are deemed locally applicable, the disposition  
7    of each -- each refinery's petition was, indeed,  
8    based on a determination of nationwide scope and  
9    effect.

10           I have some different answers to some  
11   of the questions posed, in particular by Justice  
12   Gorsuch and Justice Alito, which I hope I'll get  
13   to, but I want to emphasize at the beginning,  
14   picking up, I think, on what Justin -- Justice  
15   Jackson's questions were alluding to, that we  
16   think that EPA's actions, whether they are  
17   considered individually or together as bundled  
18   by EPA, were nationally applicable under the  
19   first prong for two reasons.

20           The first reason is because they  
21   announced and applied a standard for all  
22   refineries, regardless of location. This was an  
23   avowed statement by EPA in these adjudications.

24           And, second, the second reason relates  
25   to the ubiquity of the RFS program, where every

1 individual exemption determines as a matter of  
2 law the renewable fuel requirement binding all  
3 non-exempt obligated parties and the total  
4 volume of renewable fuel that must be purchased,  
5 such that the legal effect of even an individual  
6 SRE adjudication is nationally applicable  
7 insofar as it necessarily affects the  
8 blending -- blending obligations of not -- of  
9 non-exempt obligated parties and will  
10 necessarily affect the total amount of renewable  
11 fuel that is used in the United States.

12 Now, I guess I should say my time  
13 is -- I welcome the Court's questions. I --  
14 I --

15 JUSTICE THOMAS: Mr. Waxman, one  
16 question.

17 You say that this is a nationally  
18 applicable rule. How many refineries would have  
19 to be involved for it to be nationally  
20 applicable? It is just more than one?

21 MR. WAXMAN: So I think, Justice  
22 Thomas, in -- in this case, since the -- the  
23 standard announced and applied avowedly will  
24 apply to every refiner wherever it is located in  
25 the United States, regardless of location, that

1 is national applicable.

2 I don't think -- nothing in our  
3 submission -- I hope this gets to your  
4 question -- depends on whether you agree with us  
5 and the House report that any legal issue that  
6 can be adjudicated in two different -- in one --  
7 in two different circuits is nationally  
8 applicable under the first prong or you agree  
9 with my friend on the other side that it has to  
10 be all 50 states.

11 The point here is that when EPA  
12 announces and adopts a standard, either in a  
13 regulation or other final action, that it says  
14 will apply to refiner -- to petitioning  
15 refineries regardless of location, that is  
16 national.

17 Now, I don't think, just anticipating  
18 my friend's argument, that the -- that the rule  
19 that in order to -- that -- that it cannot be  
20 that it has to apply to all 50 states in order  
21 to be national. That's completely inconsistent  
22 with the manifest purpose of the 1977  
23 amendments. And it's also manifestly not true  
24 because there are many provisions of the Clean  
25 Air Act that don't apply to all 50 states --

1 JUSTICE THOMAS: But --

2 MR. WAXMAN: -- including the  
3 Renewable Fuel Standard.

4 JUSTICE THOMAS: But I'm -- I'm --  
5 we're -- let's just -- if we -- would just limit  
6 it to the refineries for now and small  
7 refineries, how would you know whether it's  
8 nationally applicable?

9 MR. WAXMAN: Well, I think if EPA --  
10 if EPA adjudicates a -- an individual refiner's  
11 exemption application by announcing and adopting  
12 a new metric that will apply to all refiners, it  
13 is nationally applicable.

14 JUSTICE THOMAS: Wouldn't it be --  
15 wouldn't it be just accepted that if EPA  
16 announced the rule with respect to one refinery  
17 and -- that it would apply the same rule to  
18 future refineries? And would that make it a  
19 national rule?

20 MR. WAXMAN: Yes, I think so.

21 JUSTICE THOMAS: The mere --

22 MR. WAXMAN: That's our --

23 JUSTICE THOMAS: -- fact that they --

24 MR. WAXMAN: That's our position.

25 Now, I -- I recognize that neither of my friends

1 in this case agree with this, but I think, you  
2 know, following on what I -- I took to be the  
3 point of Justice Jackson's questions, I don't  
4 see why it's not true.

5 If EPA -- everybody agrees that if EPA  
6 announced a regulation -- in a regulation that  
7 said from now on all SRE applications are going  
8 to be adjudged under the following metric:  
9 Number one, the small refinery has to prove  
10 causation; that is, it has to prove that the  
11 disproportionate hardship that it is  
12 experiencing is due to the RFS obligation and  
13 not for some other reason.

14 And in evaluating that case, based on  
15 our economic analyses and economic common sense,  
16 we presume that RFS -- that -- that ring costs  
17 can be passed on to consumers. That is a  
18 rebuttable presumption.

19 JUSTICE JACKSON: Mr. --

20 MR. WAXMAN: If that were done in the  
21 context of a regulation, even my friend on the  
22 other side agrees it would be nationally  
23 applicable.

24 JUSTICE JACKSON: Mr. -- Mr. Waxman,  
25 here's -- here's where I need help. If -- if

1     you're right about that, I guess I don't  
2     understand how we ever get to prong 2.

3                 How -- I -- it seems to me that -- I  
4     don't understand the distinction between 1 and  
5     3, meaning it seems like every case would be one  
6     in which you would say that there is a  
7     national -- nationally applicable standard.  
8     Because, as Justice Gorsuch pointed out, we  
9     would hope that the agency would have consistent  
10    metrics for making these determinations.

11                So it's sort of a given that the  
12    agency is going to be applying some standard  
13    and, in our country, a standard that is  
14    consistently applied across every applicant. So  
15    then how do we ever have a local determination  
16    in -- in -- in that scheme?

17                MR. WAXMAN: So I think my -- my  
18    answer to the question is the same that -- it's  
19    the same answer to the question I would give to  
20    Justice Gorsuch's question about prong 3, how is  
21    it -- how can you determine that it is of  
22    national -- what is a determination of  
23    nationwide scope and effect, and Justice Alito's  
24    question about so what's the bright line, what's  
25    the metric under which you can decide that?



1           I think the same applies to prong --  
2   to the -- our -- our first theory for why this  
3   is nationally applicable under prong 1, which is  
4   it is not a -- an action of -- a nationally  
5   applicable action. And it is also, under prong  
6   3, not a determination of nationwide -- scope  
7   and effect if it is simply applying settled law.

8           Now, I fully -- I -- I appreciate the  
9   questions about at what point does law become  
10   settled, and why does that matter for  
11   determination. In our view, law becomes settled  
12   when either there is a court ruling -- and  
13   presumably it would be under prong 3 or prong  
14   1 -- a ruling of the D.C. Circuit saying EPA is  
15   right or EPA is wrong.

16           The application of that national  
17   standard thereafter -- the application of that  
18   standard thereafter would not qualify under  
19   prong 1 or prong 3, in our view.

20           In -- even in the absence of an -- of  
21   a D.C. Circuit adjudication, this statute, this  
22   very unique statute, has a 60-day limit on pose  
23   of challenges to any regulation or final action.  
24   It's a pretty strict time limit that's included  
25   in the same subsection that we're deciding.

1                   And I think an argument can be made  
2     that if there is no -- 60 days goes by and  
3     there's no challenge, or if there is a  
4     challenge -- if there is a challenge, let's let  
5     the D.C. Circuit decide. If there's no  
6     challenge, it's settled.

7                   And thereafter, when the EPA uses that  
8     standard to either grant or deny an exemption  
9     request, that goes to the regional circuit.

10                  The other part of my answer that I --  
11     I don't think -- I'm not sure was fully answered  
12     in response to the questions before is, like,  
13     what -- what is it that -- how are you defining  
14     "determination"? I think this was maybe Justice  
15     Barrett's question.

16                  And I think, you know, we define  
17     "determination" by reference to the accepted  
18     dictionary definition, which we elucidate in our  
19     brief, which is: A determination is either the  
20     resolution of a particular unsettled issue or  
21     the measure of something. That's the dictionary  
22     definition of it.

23                  And we're -- we think that that  
24     dictionary definition comfortably cabins the  
25     scope and extent of -- of the third prong.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 I am very sympathetic to the concern  
4 that venue provisions should be simple. I mean,  
5 it's the first step. It's where you go. It's  
6 not about the merits at all. You don't want to  
7 spend a lot of time litigating that.

8 And you've suggested that your  
9 standard, just recently, is -- is a simple one.  
10 Now, in what respects do you think Mr. Stewart's  
11 proposal is not simple?

12 MR. WAXMAN: Well, I think -- I think  
13 Mr. Proposal's -- Mr. Proposal's --  
14 Mr. Stewart's proposal is simple. And I think  
15 it can be -- prong 3, with which we agree, can  
16 simply be decided by a proper understanding of  
17 the definitional terms of what is and isn't a  
18 determination.

19 As to prong 1, while I agree with him  
20 that the relevant actions in this case are the  
21 two consolidated actions in April and June,  
22 we -- we have proposed in our briefing two other  
23 tests under prong 1 that, if anything, are even  
24 more straightforward and don't depend on  
25 bundling.

1           One is the point that I've been  
2     discussing earlier about if it is an action that  
3     announces and adopts a new standard that will be  
4     applied across the country, it is nationally  
5     applicable.

6           The other, which in some ways is the  
7     simplest, but is a real consequence of the  
8     ubiquity of -- of the RFS standard, which was  
9     adopted long after these 1977 amendments, is  
10    that every adjudication of a small refinery  
11    exemption is nationally applicable as a matter  
12    of law, because it will determine as a matter of  
13    legal consequence the refining obligations, the  
14    blending obligations of non-petitioning  
15    refiners.

16           CHIEF JUSTICE ROBERTS: Thank -- thank  
17    you, counsel.

18           MR. WAXMAN: Thank you.

19           CHIEF JUSTICE ROBERTS: Justice  
20    Thomas, anything further?

21           JUSTICE THOMAS: Just briefly.

22           Mr. Waxman, you -- you -- you  
23    discussed determinations a minute ago, but  
24    what -- what would be your view of "based on"?  
25    I think that's important as to what -- what

1 content you give that.

2 MR. WAXMAN: So we think that "based  
3 on" means essentially two thing. There are two  
4 requirements for an action. The action in these  
5 cases is -- was the denial of the exemption.

6 "Based on" means that it is a but-for  
7 cause or an essential premise of the action and  
8 that it resolves an unsettled issue or that it  
9 establishes a standard. When you have those two  
10 things, the act -- you can say confidently that  
11 the action is based on that determination.

12 I -- I hope that answers your  
13 question. It's the best I got.

14 CHIEF JUSTICE ROBERTS: Justice Alito?  
15 Justice Sotomayor?

16 JUSTICE SOTOMAYOR: There's a number  
17 of lower courts that have said, with respect to  
18 the question of whether a denial is nationally  
19 applicable, that what you have to look at is not  
20 the downstream consequences of the EPA's -- of  
21 the EPA's determination, but what is the effect  
22 of -- on the parties? Is a national effect or  
23 not?

24 Your -- one of your two suggestions  
25 that the -- I see as downstream effects. Yes,

1     there are going to be people from each petition  
2     who might have to do something more later, and  
3     something less if -- if they are denied, but why  
4     isn't that just a pure downstream effect? And  
5     aren't we straying too far when we're  
6     incorporating that into our analysis?

7                 MR. WAXMAN: So I think -- I do  
8     recognize those opinions. And I endorse them,  
9     in the sense that I think, for example, you  
10    know, Justice Kavanaugh -- or then Judge  
11    Kavanaugh had it correctly in -- when he ruled  
12    in the D.C. Circuit that national applicability  
13    has to be determined on the face of the action.  
14    And --

15                JUSTICE SOTOMAYOR: That's the case  
16    I'm talking about.

17                MR. WAXMAN: Yes. And -- and that  
18    practical effect, downstream effects of what is  
19    likely to -- what is more than likely not to  
20    happen is not the crux.

21                All parties in this case -- and I  
22    think all courts -- have agreed that the legal  
23    effects of the regulation or the action is, in  
24    fact, the -- something that is viewable and  
25    consistent with the you have to look on its

1 face.

2 And with respect to the Renewable Fuel  
3 Standard, the legal effect -- not just some  
4 predictable downstream effect, the legal effect  
5 of every SRE determination extends to the  
6 national blending standard and the national  
7 volume requirements by -- as a matter of law.

8 And that's how I would address that --

9 JUSTICE SOTOMAYOR: You know what  
10 bothers me about that position is you're now  
11 saying that every exemption has to go to the  
12 D.C. Circuit --

13 MR. WAXMAN: Our -- our --

14 JUSTICE SOTOMAYOR: -- whether the  
15 methodology -- methodology is new or not.

16 MR. WAXMAN: That --

17 JUSTICE SOTOMAYOR: That's the force  
18 of that argument.

19 MR. WAXMAN: So that's one of the two  
20 arguments that we're making for why this is  
21 nationally applicable. And, yes, it basically  
22 acknowledges that because of the ubiquity, the  
23 way that the RFS program, as opposed to -- most  
24 other Clean Air Act programs, is -- operates, it  
25 is a necessary legal effect of the -- any denial

1     that it will be nationally applicable in the  
2     sense that it has an inexorable legal effect on  
3     other actors and the -- the -- the nation's  
4     ability to meet its national renewable fuel  
5     requirement. But, yes, I do --

6             JUSTICE SOTOMAYOR: That prong.

7             MR. WAXMAN: That's -- that, that  
8     argument is -- is asking for a -- an -- a -- a  
9     rule across the board with respect to all  
10    exemptions.

11            CHIEF JUSTICE ROBERTS: Justice Kagan?  
12            Justice Gorsuch?

13            JUSTICE GORSUCH: Mr. Waxman, do you  
14     agree that the action here is the denial of a  
15     petition --

16            MR. WAXMAN: Yes.

17            JUSTICE GORSUCH: -- to be exempt from  
18     renewable energy mandates?

19            MR. WAXMAN: Well, I -- I think -- I'm  
20     going to be ecumenical about --

21            JUSTICE GORSUCH: Let's not -- no, I'm  
22     not -- I don't want you to be ecumenical today.

23            MR. WAXMAN: Okay.

24            JUSTICE GORSUCH: No, I just want to  
25     know the right answer. That's the action.



1 That's the agency action.

2 MR. WAXMAN: Our view as -- as --

3 JUSTICE GORSUCH: Right, I mean it's  
4 in the Federal Register?

5 MR. WAXMAN: Our view as expressed in  
6 our brief is that the EPA is correct that the  
7 actions that are under review today are the  
8 consolidated April and June decisions, but that  
9 under our understanding of nationally  
10 applicable, it doesn't matter.

11 JUSTICE GORSUCH: I understand that.  
12 I understand the second part. Put that aside.  
13 Put -- put prong 1 aside for now. But the  
14 actions -- all right, you want to use the  
15 plural -- are the denial of the -- of -- of the  
16 exemptions from the renewable energy program,  
17 right?

18 MR. WAXMAN: Yes.

19 JUSTICE GORSUCH: Okay. And to -- to  
20 make that action, EPA had to make a  
21 determination about whether there's a particular  
22 hardship for a particular refinery, correct?

23 MR. WAXMAN: Correct.

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: The third  
3 sentence, the third prong, the third sentence is  
4 just difficult to apply in a coherent way  
5 because it's always going to be -- when you have  
6 some rule that's being applied to a particular  
7 entity in a particular state, it's going -- it's  
8 going to be very difficult.

9 What -- what -- so how should we  
10 handle that?

11 MR. WAXMAN: So, you know, this is our  
12 lot. This is what's --

13 JUSTICE KAVANAUGH: Because --

14 MR. WAXMAN: This is --

15 JUSTICE KAVANAUGH: Because to the  
16 Chief Justice's point and Justice Gorsuch's, I  
17 would like to come out of this case with  
18 something that everyone out there knows, okay,  
19 this is what we need to do.

20 MR. WAXMAN: So I -- we think that the  
21 simplest way to decide this is under the first  
22 sentence, rather than the third, but as to your  
23 question --

24 JUSTICE KAVANAUGH: But if we get to  
25 the third -- yeah.

1                   MR. WAXMAN: If we get to the third, I  
2 would say what the Court should -- what -- the  
3 Court should base its interpretation on the  
4 meaning of the term "determination" and that  
5 under the -- consistent with dictionary  
6 definitions, the determination is either the  
7 resolution of a particular issue and/or the  
8 measurement of something and that what we have  
9 in EPA's two-part test is both.

10                   The first part of the test, the  
11 causation requirement, is certainly the former.  
12 And the -- the presumption based on EPA's  
13 experience with the data is the latter and maybe  
14 also the former. And that so long as that --  
15 the validity of that two-part test is unsettled,  
16 meaning that 60 days have passed under the --  
17 under the very next sentence in the subsection,  
18 and no challenge has been raised, or a challenge  
19 has been raised but the D.C. Circuit has not yet  
20 decided it, it is still a determination as to  
21 which review should be in the D.C. Circuit.

22                   And as to -- to Justice Barrett's  
23 question about, well, June was the second one,  
24 it wasn't the first one, so how do you -- how do  
25 you -- how do you -- how do you deal with that,

1 I think the answer is that I believe -- I -- I'm  
2 not -- I don't have a specific recollection,  
3 but -- fewer than 60 days passed between the  
4 late April determination and the June 3rd  
5 determination.

6 I believe there already had been filed  
7 at least one petition for review, but even if  
8 there hadn't, it was still open for review. And  
9 the consequence of holding that it's only the  
10 first one, whether it's the first single  
11 application as I'm intuiting Justice Gorsuch is  
12 inclined to rule, or the -- the omnibus all --

13 JUSTICE GORSUCH: I wouldn't be so  
14 sure.

15 MR. WAXMAN: Okay.

16 (Laughter.)

17 MR. WAXMAN: Pardon my indiscretion  
18 and my presumption. Whether it's one or the  
19 36th that were decided in April, the notion  
20 that, well, June was not April, and, therefore,  
21 all 67 refineries that were disappointed by the  
22 outcome in June can go to their eight regional  
23 circuits and the D.C. Circuit to get resolution  
24 of the same legal question --

25 CHIEF JUSTICE ROBERTS: Anything

1 further, Justice --

2 MR. WAXMAN: -- is just the opposite  
3 of what --

4 CHIEF JUSTICE ROBERTS: Anything  
5 further, Justice Kavanaugh?

6 JUSTICE KAVANAUGH: No.

7 CHIEF JUSTICE ROBERTS: No?  
8 Justice Barrett?

9 JUSTICE BARRETT: Just one question.  
10 Do you think under your definition of  
11 "determination," which you say is the dictionary  
12 definition of "determination," that it would be  
13 a determination that the hardship exception  
14 didn't apply, kind of to -- Justice Gorsuch's  
15 point? You've got the action, the denial, and  
16 then you have the determination that the undue  
17 hardship exception is inapplicable to that  
18 particular refinery.

19 I understand that the reasoning is --  
20 is what you want to -- is what you're hanging  
21 your hat on, but do you agree that just by the  
22 terms of the definition, it could apply as  
23 Justice Gorsuch suggested -- suggested to the  
24 determination that there was not an undue  
25 hardship?

1                   MR. WAXMAN: I -- I think in the  
2 vernacular sense outside of context, you could  
3 say that that is a determination because it will  
4 always be the case that if a settled legal test  
5 says you get a benefit if you prove this  
6 predicate, a determination that you haven't  
7 proved the predicate means you don't get the  
8 benefit.

9                   But it wouldn't be a determination of  
10 national scope or effect.

11                  JUSTICE BARRETT: Thank you.

12                  CHIEF JUSTICE ROBERTS: Justice  
13 Jackson?

14                  JUSTICE JACKSON: So I understand the  
15 general concern about simplicity, but it appears  
16 that Congress did not share that concern with  
17 respect to this statute because it's very  
18 complicated.

19                  And I'm trying to understand your  
20 interpretation of the difference between  
21 nationally applicable and a determination of  
22 nationwide scope and effect. Are those the same  
23 or different in your view? Do they rise and  
24 fall together? Could we ever have one without  
25 the other?

1                   MR. WAXMAN: They are the same in this  
2 case and will perhaps often be the same, but  
3 they -- they don't -- inexorably -- one doesn't  
4 inexorably require the other. And I'll give you  
5 an example each way.

6                   A regulation or guidance that is  
7 issued by EPA is not a prong 3 issue. It is  
8 nationally applicable. It is not locally or  
9 regionally applicable.

10                  Likewise, SIP denials, that is state  
11 implementation plan denials, are not only  
12 specifically listed under the second prong but  
13 courts have recognized -- and Justice Gorsuch  
14 underscored with his questions today -- they are  
15 the paradigmatic local or regionally applicable  
16 determination because it just asks the question:  
17 Did this state plan satisfy its -- the state's,  
18 requirements under the national air -- national  
19 ambient air quality standards?

20                  But the courts have recognized  
21 repeatedly that if in the course of denying or  
22 granting a SIP application, EPA adopts a new  
23 rule, EPA says, well, there's a new NAAQ  
24 requirement for ozone and you haven't met it,  
25 that -- those cases all go to the D.C. Circuit.

1 And that's the example that General Counsel  
2 Frick was addressing in his comments in 1977.

3 JUSTICE JACKSON: Thank you.

4 MR. WAXMAN: Thank you, Your Honor.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 Mr. Huston.

8 ORAL ARGUMENT OF MICHAEL R. HUSTON  
9 ON BEHALF OF RESPONDENTS CALUMET SHREVEPORT  
10 REFINING, L.L.C., ET AL.

11 MR. HUSTON: Mr. Chief Justice, and  
12 may it please the Court:

13 The Clean Air Act's venue provision  
14 requires a court to look to the text of the  
15 chapter to determine whether an EPA action is  
16 nationally applicable or is instead locally or  
17 regionally applicable and what that action was  
18 based on.

19 When EPA, for example, uses a  
20 rule-making to set requirements for all  
21 regulated parties wherever they're located  
22 throughout the nation, that's a nationally  
23 applicable action. But the relevant text of the  
24 chapter here, Section 7545(o)(9), makes it clear  
25 that EPA's actions on hardship petitions must be



1     locally applicable.  You can find that text on  
2     page 23a of our red brief.

3             Unlike the pre-2011 regime where all  
4     small refineries throughout the nation were  
5     entitled to an exemption, the text now requires  
6     each individual refinery to make its own case  
7     for hardship relief:  "The refinery must  
8     demonstrate that it would be subject to a  
9     disproportionate economic hardship."

10            And the text then reinforces the  
11    requirement of individualized action by keying  
12    EPA's deadline to act to the submission of each  
13    individual petition.  These actions were locally  
14    applicable because each EPA action on a hardship  
15    petition affected only one refinery located in  
16    one place.

17            And the actions were required by the  
18    text to be based on each refinery's economic  
19    circumstances, not any determination affecting  
20    the entire nation.  EPA moved past theory and  
21    produced final agency action only by analyzing  
22    these six small refineries' individualized  
23    evidence of their disproportionate economic  
24    hardship.

25            Now, to be sure, we think EPA's

1     analysis of those economic factors was wrong on  
2     the merits. But the important point for venue  
3     purposes is this: Analyzing the evidence of  
4     local economic conditions facing small  
5     refineries in San Antonio, Texas and Shreveport,  
6     Louisiana is a task that Congress assigned to  
7     the Fifth Circuit, not the D.C. Circuit.

8                 I welcome the Court's questions.

9                 JUSTICE THOMAS: But the argument  
10     would be: If EPA develops a new rule and  
11     applies it to the refineries, that -- that that  
12     is a nationwide rule. That -- that -- at least  
13     that's how I understand their argument.

14                MR. HUSTON: Justice Thomas, I think  
15     EPA is very clear in this case. You can see  
16     this at Pet. App. 330 in the denial decisions.  
17     They say: This is not a rule-making.

18                If EPA wanted to promulgate a new  
19     analytical framework and centralize review of  
20     that framework in the D.C. Circuit --

21                JUSTICE THOMAS: Well, let's say a new  
22     framework for determining whether or not the  
23     exemption applies to the small refineries.

24                MR. HUSTON: Yes, understood. And I  
25     think what I'm saying is if EPA wanted to set

1     that new framework for adjudicating small  
2     refinery hardship petitions, it could use a  
3     rule-making to do so.

4             EPA consciously chose not to use its  
5     rule-making authority here. It expressly  
6     invoked only its adjudication authority. It did  
7     so for a very particular reason.

8             This is April and June of 2022. EPA  
9     is adjudicating hardship petitions from 2018,  
10    '19, and '20. They're retroactively denying  
11    petitions submitted three years earlier. It  
12    would have been illegal under Black Letter  
13    administrative law for EPA to put out a new rule  
14    that retroactively denied old hardship  
15    petitions.

16            But if they want to do that in the --

17            JUSTICE THOMAS: Well -- well, but  
18    they could -- EPA, however, could make a  
19    determination that's national in scope and  
20    effect. Why -- how is that different?

21            MR. HUSTON: So -- EPA -- I -- I think  
22    they could -- they could make a rule that would  
23    say: This is how we interpret the statute.  
24    This is how we're going -- what we want future  
25    small refineries to demonstrate when they are

1 petitioning for hardship relief.

2           And if they use their rule-making  
3 authority, I think that's going to be a  
4 nationally applicable action. But that was not  
5 the final actions here. EPA said these are  
6 adjudications of these hardship petitions.

7           And the -- the right text -- I think  
8 the simple way to answer the third prong, the  
9 third sentence -- there's been a lot of, you  
10 know, talk today about how can we simplify this.  
11 Here is the easy answer to how you determine  
12 what an action was based on: You look at what  
13 the text of the chapter required it to be based  
14 on.

15           And here, the text tells you when EPA  
16 produces this kind of final action, the denial  
17 of a hardship petition, that denial has to be  
18 based on a conclusion about whether the refinery  
19 is experiencing disproportionate economic  
20 hardship.

21           JUSTICE SOTOMAYOR: Counsel, give me  
22 meaning to 3. 3 basically says that something  
23 that would otherwise be looked at as locally or  
24 regularly -- or regionally applicable, it says,  
25 notwithstanding that, that there are -- that

1     there are some -- "if the action is based on,"  
2     seems to me that you have to give that a  
3     difference.

4             Tell me, outside of a announcement of  
5     a regulation or new rule, some action that EPA  
6     could take that's local on its face, regional on  
7     its face, one application, but could still fit  
8     the third exception.

9             MR. HUSTON:  So if I might just -- I  
10    want to answer your question directly,  
11    Justice -- Justice Sotomayor, but before doing  
12    so I just want to observe that neither the --  
13    neither the government nor we have been able to  
14    locate any Clean Air Act case that -- where  
15    venue has been decided solely on the third  
16    prong.

17            So I think this has always been  
18    intended to be --

19            JUSTICE SOTOMAYOR:  Well, the -- yes,  
20    but that doesn't answer the question.

21            MR. HUSTON:  Understood.

22            JUSTICE SOTOMAYOR:  Congress had in  
23    mind something.  When I try to figure out what  
24    Congress has in mind, I look at the -- my --  
25    some of my colleagues don't, but I look at the

1 legislative history to tell me what the examples  
2 were that they were dealing with.

3 MR. HUSTON: Sure.

4 JUSTICE SOTOMAYOR: And they were  
5 dealing with something very similar to this.  
6 And then they created the third sentence. So  
7 you give me another reason for the third  
8 exemption.

9 MR. HUSTON: Justice Sotomayor, so --  
10 I'm -- let's talk directly about what Congress  
11 had in mind. As the government's --

12 JUSTICE SOTOMAYOR: No. Tell me how  
13 you would read it to give it meaning.

14 MR. HUSTON: Sure. I think in a  
15 circumstance for a statutory provision like the  
16 one that then EPA General Counsel Frick brought  
17 to Congress and said this is why we need the  
18 third sentence, that was an instance in which  
19 the statute authorized EPA to grant individual  
20 extensions to individual states, but that was  
21 based on a "determination" about the technology  
22 that was available throughout the nation.

23 So --

24 JUSTICE JACKSON: Why isn't that  
25 indistinguishable from this?

1                   MR. HUSTON: Because, Justice  
2 Jackson --

3                   JUSTICE JACKSON: I mean, the  
4 determination here was based on a national  
5 survey economic understanding of how these  
6 markets work.

7                   MR. HUSTON: Justice Jackson, the EPA  
8 produced an economic hypothesis. That's what  
9 RIN cost passthrough was. According to --

10                  JUSTICE JACKSON: I understand. But  
11 it was nationwide in scope. It seems to me to  
12 be exactly the same thing that you just read, in  
13 terms of the examples that were before Congress  
14 as to the reason why the third sentence was  
15 needed.

16                  So I -- I appreciate your argument  
17 about the first sentence, the first statement.  
18 It's seems quintessentially local. They're  
19 making individualized hardship determinations.  
20 But in making them in this context, when they  
21 are doing the localized analysis, they are  
22 applying an evaluation or an assessment that is  
23 a nationwide economic analysis.

24                  MR. HUSTON: But that was not the  
25 basis for their determination at the end of the

1 day. Their determination was that this  
2 refinery, each of them individually, you and you  
3 and you and you --

4 JUSTICE JACKSON: Right. But then I'm  
5 back to Justice Sotomayor's question. If you're  
6 defining "determination" as just the answer, do  
7 you get it, then you're never going to have a  
8 situation in which you have a localized  
9 assessment that has a nationwide scope or  
10 effect, because you've now eliminated the idea  
11 that the reasons being nation -- nationwide  
12 count.

13 You say it can't be nationwide if the  
14 answer -- the determination is yes, you get it;  
15 no, you don't. And that's going to happen in  
16 every one of these cases.

17 MR. HUSTON: No -- Justice Jackson, I  
18 think it's important to separate what is the  
19 action and what determination is it based on.

20 Here, I -- I think the -- I've taken  
21 my friends to agree, the relevant action is the  
22 denial of the hardship petition that was  
23 submitted by the Calumet Shreveport refinery for  
24 itself. What was that action based on?

25 Here, the statutory text tells you.



1 It was based on EPA's conclusion that -- the  
2 Calumet Shreveport refinery is not experiencing  
3 disproportionate economic --

4 JUSTICE KAVANAUGH: Won't that --

5 MR. HUSTON: -- hardship.

6 JUSTICE KAVANAUGH: -- always be the  
7 case -- and this is not meant as a hostile  
8 question, but won't that always be the case when  
9 a local or regional action is taken affecting  
10 the local or regional entities, even though  
11 there's a nationwide rule it's applying?

12 In other words, it's always going to  
13 be applying a nationwide rule or regulation, as  
14 Justice Gorsuch said, to something local. And  
15 you're saying when it's being applied, it's no  
16 longer based on the -- the nationwide  
17 determination. I think that's what you're  
18 saying.

19 So it will really have no effect. And  
20 maybe that's the answer. And I'm not sure you  
21 should shy away. And you've said it's never  
22 been applied. Maybe the answer is it's -- it's,  
23 you know, inconsistent on its face and it just  
24 really has no impact. Is that where we end up?

25 MR. HUSTON: I think it was --

1 JUSTICE KAVANAUGH: And I'm not saying  
2 that's where we shouldn't end up, just to be  
3 clear.

4 MR. HUSTON: Justice Kavanaugh, I  
5 think it was always intended to be a narrow  
6 exception to the rule for locally applicable  
7 actions, which is they're meant to go to the  
8 regional circuits and get review there.

9 There have not been hardly any -- we  
10 can't find a single example where a court has  
11 adjudicated a Clean Air Act venue dispute and  
12 said: This case is locally applicable, but it  
13 goes to the D.C. Circuit because of the third  
14 sentence.

15 I'm not trying to tell you it's  
16 impossible that there could be. And I think  
17 that the sentence --

18 JUSTICE KAVANAUGH: But you can't  
19 articulate a good example.

20 MR. HUSTON: So --

21 JUSTICE KAVANAUGH: Which maybe it is  
22 impossible.

23 MR. HUSTON: So I -- I will give you  
24 one --

25 JUSTICE KAVANAUGH: Which is fine.

1           MR. HUSTON: I -- I will give you one  
2 more that we have thought of that I think comes  
3 closer to this and that a court has -- has  
4 suggested would get there, which is there was  
5 something called the alternative compliance  
6 demonstration approach. It's discussed in these  
7 papers.

8           It was issued along the -- at the same  
9 time as the April and June 2022 denials. And  
10 what EPA said is although we're denying these  
11 2018 hardship petitions, that was so long ago  
12 that to attempt to ask those refineries to  
13 retire RINs now would really have a  
14 destabilizing effect on the RIN market and the  
15 RIN bank.

16           And on that basis, they created an  
17 alternative path to compliance for those  
18 refineries. That, to me, looks closer to, like,  
19 a -- a -- a locally applicable determination.  
20 They're telling each refinery what they want  
21 them to do, but it's based on a conclusion about  
22 the RIN bank overall.

23           JUSTICE KAVANAUGH: Or -- or --

24           JUSTICE KAGAN: But why isn't this  
25 case that -- the -- the example here? I mean,

1     you have these individual denials. It is you  
2     and you and you and you, but it turns out that  
3     all these you and you and you and you's are  
4     going to come out the exact same way.

5             And the reason that they're going to  
6     come out the exact same way is that  
7     notwithstanding all the differences among the  
8     you, you, you, you, and you's, that there are  
9     local circumstances, there are local conditions,  
10    notwithstanding all of those, EPA has reached  
11    two conclusions that are going to drive the  
12    analysis in every case, or pretty much every  
13    case.

14            And in that circumstance, that seems  
15    like a perfect case for a single court to  
16    adjudicate the question.

17            MR. HUSTON: Justice Kagan, EPA did  
18    not make a determination that drove the  
19    analysis. EPA said it: "Had an economic theory  
20    for how we expect small refineries'  
21    operations" --

22            JUSTICE KAGAN: Well, here's a  
23    determination. I mean, it's a statutory  
24    determination that hardship has to stem from the  
25    Renewable Fuel Program. And it's an economic

1 determination that everybody can recover their  
2 RIN costs. And that's a totally, like, normal  
3 understanding of what the determination -- a  
4 determination means.

5           So you have a statutory determination.  
6 You have an economic determination. And those  
7 determinations, taken together, are going to  
8 produce the exact same outcome in every case, no  
9 matter what the individual local situations and  
10 circumstances are.

11           MR. HUSTON: So, Justice Kagan, I  
12 would love an opportunity to talk about both of  
13 EPA's purported determinations, but let me go  
14 right to the very end of your question. It is  
15 not the case, EPA emphatically denied in the  
16 lower courts and they deny here, that it was  
17 true that those determinations, those -- their  
18 statutory interpretation and their economic  
19 theory were sufficient to decide the hard --  
20 hardship petitions.

21           JUSTICE KAGAN: Well, they gave you an  
22 opportunity. They gave the -- all the different  
23 "you's" an opportunity to rebut what they said.  
24 It's very nice that they gave you that. Nobody  
25 was able to come up with anything to -- rebut

1     what they said.  Maybe in some crazy  
2     circumstance there could have been a rebuttal.

3                 But what you basically know about what  
4     EPA has done here is that it's going to apply  
5     the same way in Ohio and New York and Alabama.  
6     And so in that circumstance, you don't want the  
7     Sixth Circuit and the Second Circuit and the  
8     Eleventh Circuit to be all deciding the same  
9     question.  You want one court to be deciding the  
10    question as to whether the EPA conclusions are  
11    correct.

12                MR. HUSTON:  Your Honor, I would urge  
13    the Court to take a look at the start of page  
14    277 in the Joint Appendix, really moving for the  
15    next 50 pages.  That's 50 pages of analysis that  
16    EPA produced just for the six refineries that  
17    are before you today, to say nothing of the  
18    many, many more refineries that were in this  
19    case.

20                The -- the opportunity to rebut the  
21    presumption was not just like some pro forma  
22    thing that didn't actually mean anything.  
23    There's pages and pages and -- hundreds of --

24                JUSTICE KAGAN:  Was -- was any of  
25    that -- those pages, were they ever

1       successful --

2                   MR. HUSTON:   They --

3                   JUSTICE KAGAN:  -- in rebutting the  
4       presumption?

5                   MR. HUSTON:   No.   EPA did -- EPA  
6       concluded that it -- after looking at every  
7       individual refinery's evidence, that it believed  
8       that these refineries were, in fact, passing --

9                   JUSTICE KAGAN:  I think EPA --

10                  MR. HUSTON:   -- their RIN costs --

11                  JUSTICE KAGAN:  -- gave you every  
12       reason to think that at the start, that this was  
13       going to be a super-high bar to rebutting the  
14       presumption, that once EPA made this statutory  
15       conclusion and this economic conclusion, the  
16       game was pretty well done.

17                  And so who is it that we should want  
18       to address those conclusions that is doing a --  
19       a -- you know, if not all the work, almost all  
20       the work?

21                  MR. HUSTON:   Justice Kagan, again,  
22       I -- I just -- I really respectfully disagree  
23       with the -- your -- your -- your  
24       characterization of the fact that there was not  
25       meaningful study by EPA of the individual

1 economic evidence submitted by the refineries.

2 And I would just say take EPA at their  
3 word on this point. They say, on the face of  
4 the actions, we completed a thorough evaluation  
5 of the data and information provided in the SRE  
6 petitions. They go on and on and on. And,  
7 again, there's hundreds of pages cumulatively of  
8 analysis where EPA looks at the  
9 refinery-specific factors, the San Antonio  
10 refinery and how small it is and the lots that  
11 it can buy RINs, the RIN contracts that Placid  
12 has and, you know, the situation facing Calumet  
13 Shreveport with its competition in the Gulf  
14 Coast.

15 EPA walks through each of this and  
16 they say here's why that doesn't persuade me and  
17 this doesn't persuade me and the like. We -- we  
18 certainly disagree with them, and on the merits  
19 of that --

20 JUSTICE KAGAN: You know what they  
21 said? They said this doesn't persuade me.  
22 Because they had already decided. Subject to  
23 somebody coming up with something super-unusual  
24 that they hadn't thought about, they had already  
25 decided. And that decision was a uniform one



1     that stretched from one end of this country to  
2     the other.

3                 MR. HUSTON:   Your Honor, I think what  
4     they very clearly had was a economic  
5     presumption.  They said we've got a presumption;  
6     we're giving you an opportunity to rebut it.  
7     Why are we doing that?  Because we have to.  The  
8     law compels us to give you this opportunity.  
9     And we took advantage of it.  We submitted  
10    voluminous evidence.

11                JUSTICE KAGAN:  Thank you.

12                MR. HUSTON:  EPA says that it studied  
13    that evidence and --

14                JUSTICE BARRETT:  Counsel --

15                MR. HUSTON:  -- not that it had to be  
16    the basis of this.

17                JUSTICE ALITO:  I mean, somebody --

18                JUSTICE BARRETT:  -- can I ask you a  
19    question?  We've had a lot of talk about how  
20    it's important for venue rules to be clear.  And  
21    given what Justice Kagan just said, you know,  
22    EPA made very clear this was going to apply  
23    nationwide and it was fundamentally shifting the  
24    way that it treated small refineries.

25                Could you have determined or why

1     couldn't you have determined at the outset of  
2     the suit, that the D.C. Circuit was the right  
3     venue? Why wouldn't there be clarity when you  
4     have that kind of national determination?

5                 MR. HUSTON: Well, Your Honor, I mean,  
6     I suppose the clearest possible rule would just  
7     be that whatever EPA says is the right venue is  
8     the right venue. But I don't think that that's  
9     the venue rule that this statute requires.

10                JUSTICE BARRETT: I agree with you. I  
11     agree with you. But given the existence of this  
12     determination on the economic theory and the  
13     statutory interpretation -- and -- and maybe the  
14     answer is, you know, it wouldn't have been clear  
15     to us, but, I mean, given the importance of the  
16     clarity of venue rules, I just want to  
17     understand why it wouldn't have been clear to  
18     you.

19                MR. HUSTON: I think --

20                JUSTICE BARRETT: Or maybe it would  
21     have and you just didn't want to be in the D.C.  
22     Circuit.

23                MR. HUSTON: I think it -- it wouldn't  
24     have been clear because if you are Ergon  
25     Refining, you're a refinery, one of the --

1 Respondents before you located in Vicksburg,  
2 Mississippi, and your argument is we produce  
3 100 percent diesel fuel, and it's because we  
4 only produce diesel that we are economically  
5 burdened, that we face disproportionate economic  
6 hardship from the RFS, that's an argument that  
7 you would naturally think when -- when EPA  
8 rejected my evidence, when EPA said to Ergon  
9 that doesn't persuade us, Ergon, I think quite  
10 rationally, said we want the Fifth Circuit, our  
11 home circuit, to have an opportunity to  
12 address --

13 JUSTICE SOTOMAYOR: Answer the  
14 question.

15 MR. HUSTON: -- the circumstances in  
16 our market.

17 JUSTICE SOTOMAYOR: They refused  
18 because the EPA is saying to you we have a  
19 national rule. Doesn't matter whether you're in  
20 Ergon. The national rule is we presume you can.  
21 We presume that you can pass the cost on, and we  
22 presume that you have to show us hardship that  
23 doesn't have to do with your diesel fuel -- fuel  
24 but has only to do with relying on this -- or  
25 being forced by this regulation to buy the

1 credits you need to.

2 MR. HUSTON: Your Honor, EPA said we  
3 have an economic hypothesis that when we look at  
4 your evidence related to your diesel disparity,  
5 related to if you're Calumet Shreveport, the  
6 intense competition --

7 JUSTICE SOTOMAYOR: Let's go back to  
8 Justice Barrett's question, which is you knew  
9 that they were basing it on two national  
10 presumptions. Why doesn't that tell you where  
11 to go?

12 MR. HUSTON: Because at the -- we  
13 looked to the text of the statute, which said  
14 whether --

15 JUSTICE SOTOMAYOR: The text tells you  
16 the EPA has some form of discretion or  
17 ability -- the EPA has the ability to make a  
18 determination that this has a national effect.  
19 So you got a determination that says the EPA  
20 believes this has a national effect, one prong  
21 of the requirement, and the second is we're  
22 basing it on national presumptions.

23 MR. HUSTON: Your Honor --

24 JUSTICE SOTOMAYOR: So what's hard  
25 about understanding you go to D.C.?

1                   MR. HUSTON: What's hard about it is  
2                   that you're taking refineries that want the  
3                   opportunity to have their local economic  
4                   evidence that is their case --

5                   JUSTICE SOTOMAYOR: You want --

6                   MR. HUSTON: -- for hardship relief.

7                   JUSTICE SOTOMAYOR: That -- that's --  
8                   you're begging the question. I know the EPA  
9                   wants national. The question is what Congress  
10                  wanted, not what you wanted or the EPA wanted.  
11                  The question is what Congress wanted. And I  
12                  kept asking you at the beginning, given the way  
13                  they structured this third exempt -- this third  
14                  category, they are saying that some local  
15                  actions have to go to the D.C. Circuit.

16                  MR. HUSTON: Yes, there is a --

17                  JUSTICE SOTOMAYOR: So why isn't the  
18                  answer that when the EPA makes a determination  
19                  and says we're basing it on two national  
20                  presumptions, that clear enough?

21                  MR. HUSTON: Two -- two points about  
22                  that, Your Honor. The first is that in -- it  
23                  does not suffice, as I think even the government  
24                  agrees, for EPA to just make and find a -- make  
25                  a finding that an action is based on a

1 determination of nationwide scope or effect.

2 The action has to actually be based on  
3 a determination of nationwide scope or effect.  
4 That's written directly into the text of Section  
5 7607.

6 JUSTICE SOTOMAYOR: Those are the  
7 presumptions. Okay.

8 MR. HUSTON: That is --

9 JUSTICE BARRETT: So go ahead --

10 MR. HUSTON: That is their  
11 presumption, but --

12 JUSTICE JACKSON: What do you make of  
13 that, the -- the --

14 JUSTICE BARRETT: What --

15 JUSTICE JACKSON: -- fact that  
16 Congress specifically says that the  
17 administrator has to make that finding? I mean,  
18 doesn't that tell us that Congress really cared  
19 about what the agency thought in this way?

20 MR. HUSTON: I don't think so, Justice  
21 Jackson. What I take that to mean is that EPA  
22 has the opportunity to maintain locally  
23 applicable actions in the D.C. Circuit.

24 I think the Congress probably foresaw  
25 that you get -- once you start talking about

1     what was the basis of the action, was it core or  
2     not, is it, according to my friend, new but  
3     still insufficiently settled, it gets pretty  
4     metaphysical pretty quickly to decide what the  
5     basis was of an EPA action.

6             I think what Congress was thinking  
7     was: In any EPA action, there's going to be a  
8     description by the agency of the interpretation  
9     of its statutory authority, the basic framework  
10    through which it filters the individual facts.  
11    I think Congress wanted to ensure that the  
12    agency has some control to avoid -- to maintain  
13    locally applicable actions in their region --

14            JUSTICE KAVANAUGH: That's why I --

15            MR. HUSTON: -- where they are  
16    supposed to be.

17            JUSTICE KAVANAUGH: -- I think the  
18    deference question is really important. And  
19    Mr. Stewart said that the agency -- and Justice  
20    Sotomayor is just following up on this -- the  
21    agency should get some deference.

22            Should they get any deference, in your  
23    view? Or how does that work?

24            MR. HUSTON: So, I -- recall that the  
25    text has two requirements in order for the third

1 sentence to be activated. First, the action  
2 must be based on a determination of nationwide  
3 scope or effect, and if in taking such action  
4 the administrator finds and publishes that such  
5 action --

6 JUSTICE KAVANAUGH: So if it's --  
7 found and published --

8 MR. HUSTON: That's --

9 JUSTICE KAVANAUGH: -- does the agency  
10 get deference, some deference on the question of  
11 whether it is a determination of nationwide  
12 scope or effect?

13 MR. HUSTON: So -- so I think with  
14 respect to the agency's making of that finding,  
15 I think that's textually committed to the  
16 agency. So I don't think it's generally subject  
17 to -- to -- to judicial review.

18 You can't say the agency didn't  
19 actually make this finding. But on the --

20 JUSTICE KAVANAUGH: No. The -- on the  
21 key part --

22 MR. HUSTON: Yeah, the legal question.  
23 Right. Right.

24 JUSTICE KAVANAUGH: You're -- you're  
25 talking about the part that's not key. Talk



1     about the key part, which is --

2                 MR. HUSTON:  No.  No deference at all.

3                 JUSTICE KAVANAUGH:  No deference at  
4     all?  Okay.

5                 MR. HUSTON:  Absolutely not.  It's a  
6     legal question for the Court.  That set it out  
7     as a separate legal requirement.  It -- that  
8     sentence, that first -- I should -- that first  
9     clause --

10                JUSTICE KAVANAUGH:  But if that  
11     standard -- if we have a set definition of what  
12     what's a determination, ordinary administrative  
13     law would say when you apply that set standard  
14     to a given set of facts, that that gets some  
15     deference.

16                MR. HUSTON:  But not in a situation,  
17     Your Honor, I think where Congress has actually  
18     required the legal find -- excuse me -- the  
19     legal issue to be resolved, and then said, in  
20     addition, the agency has to make a finding with  
21     respect to that.

22                That two --

23                JUSTICE KAVANAUGH:  So you're saying  
24     the ordinary deference that it would get is  
25     taken away by the second sentence -- or the

1 second part of the sentence that requires the  
2 publication and finding?

3 MR. HUSTON: That's correct. I think  
4 the -- the -- the structure of --

5 JUSTICE KAVANAUGH: That's intriguing.  
6 Okay.

7 MR. HUSTON: -- the sentence only  
8 makes sense --

9 JUSTICE KAVANAUGH: Yeah.

10 MR. HUSTON: -- that first clause only  
11 makes sense if that's a legal determination for  
12 the court. In other words, if both the court  
13 and the agency have to agree that the action is  
14 based on a determination of nationwide scope or  
15 effect.

16 Now, that's going to make the third  
17 sentence --

18 JUSTICE ALITO: When a venue --

19 MR. HUSTON: -- smaller --

20 JUSTICE ALITO: -- when a venue issue  
21 arises, it arises because both parties to the  
22 dispute think they would be better off in a  
23 particular forum.

24 And isn't it very odd to say that  
25 one -- that -- that the court, in deciding

1     whether there's venue in one place or the other,  
2     should defer to the view of one of these -- one  
3     of these parties who are contesting the right to  
4     get home court advantage?

5             MR. HUSTON:  I certainly agree with  
6     that, Justice Alito.  And I -- I think just to  
7     put a -- a sharper point on it, if, in fact, it  
8     were the case that Congress wanted there to be  
9     any deference to EPA's venue determination, it  
10    could have just written the third sentence to  
11    say:  The action goes to the D.C. Circuit if EPA  
12    finds and publishes that it's based on a  
13    determination of nationwide scope or effect.

14            JUSTICE ALITO:  But suppose the --  
15    EPA's economic theory is that:  We think that  
16    there will almost always be -- I mean, we think  
17    that the small refineries are always going to --  
18    as far as we're aware, they're always going to  
19    be able to pass through these costs, but, you  
20    know, we're -- we can't say that it's  
21    inconceivable that some small refinery could  
22    come up with some reason that we haven't been  
23    able to think of why they wouldn't be able to do  
24    it.

25            You know, it's like saying we really

1 think that -- that no Martian has ever landed  
2 here, but, you know, we're not going to say  
3 we're going to close our minds to the  
4 possibility that somebody could prove it.

5 If that's the situation, then what  
6 would your answer be?

7 MR. HUSTON: I -- I still think I'm  
8 going to have to end up with the same answer,  
9 which is that even in that situation, EPA --  
10 excuse me -- the statutory text of the chapter  
11 compels EPA to perform an examination of whether  
12 each petitioning small refinery does or does not  
13 experience disproportionate economic hardship.

14 But, notably, the situation that you  
15 describe, Your Honor, is very different from how  
16 EPA acted here.

17 And, again, I just think take EPA at  
18 their word. EPA said: We have an economic  
19 theory for how we expect small refineries'  
20 operations to be affected. We then analyzed the  
21 most current data available to determine whether  
22 finished fuels markets move in the way that  
23 economic theory predicts.

24 JUSTICE GORSUCH: So, for example,  
25 counsel, if -- if EPA had put its economic

1 theory in a rule and promulgated that rule, the  
2 challenge to that would have to be in the D.C.  
3 Circuit.

4 MR. HUSTON: Almost certainly, yes,  
5 Justice Gorsuch.

6 JUSTICE GORSUCH: Yeah. And then its  
7 application in later licensing applications, you  
8 would be kind of foreclosed on that, but you  
9 might have a local challenge otherwise?

10 MR. HUSTON: Yes, I think that's  
11 basically right. I think that's how generally  
12 administrative law works. An agency --

13 JUSTICE GORSUCH: That's how I  
14 remembered it.

15 MR. HUSTON: An agency uses its  
16 rule-making authority to pronounce how it  
17 understands the statutory framework, how its --  
18 and what its adjudicative --

19 JUSTICE SOTOMAYOR: The problem is --

20 JUSTICE GORSUCH: That rule would be  
21 maybe locally applicable, but it would be  
22 nationwide effect. And -- and so the -- the EPA  
23 could sign off on that, and off to the D.C.  
24 Circuit.

25 MR. HUSTON: Yes, Your Honor, but it

1 would be an invocation of the agency's  
2 rule-making authority.

3 JUSTICE SOTOMAYOR: But the problem is  
4 that that's what the third exception says. It  
5 says that it -- the court is giving the -- the  
6 EPA adjudicatory authority to find -- to -- to  
7 find and publish that such an action is based on  
8 a determination of nationwide scope and effect.

9 So Justice Gorsuch is talking about  
10 what the norm is, but they needn't have --  
11 created the exemption 3 at all. They could have  
12 just stayed to 1 and 2.

13 MR. HUSTON: Your Honor, I think that  
14 the purpose of the exception, as we discussed  
15 earlier, is for a certain kind of unusual Clean  
16 Air Act provision where the -- text of the  
17 chapter directs EPA to make a determination  
18 about the whole country.

19 But that's not how this provision of  
20 the chapter works.

21 JUSTICE SOTOMAYOR: That's what it's  
22 done.

23 JUSTICE GORSUCH: Or it could have a  
24 rule, perhaps, that wouldn't be nationwide --  
25 nationally applicable, but would be regionally

1 applicable. And perhaps that might wind up --  
2 that rule might be reviewed in the D.C. Circuit,  
3 or it applies to an industry or whatever.

4 MR. HUSTON: It -- it -- it --  
5 certainly, if it applies to the whole industry,  
6 it says this is how we're going to regulate  
7 stationery sources --

8 JUSTICE GORSUCH: Yeah.

9 MR. HUSTON: -- or power plants,  
10 all -- wherever they are located throughout the  
11 nation --

12 JUSTICE GORSUCH: Even if it isn't all  
13 across the nation. It doesn't have to be the  
14 whole nation.

15 MR. HUSTON: That's -- of course.  
16 That's exactly right. If there is no Rhode --  
17 there's no refineries in Rhode Island, a rule  
18 that regulates all refineries is still clearly  
19 nationally applicable.

20 But consider the sort of absurd  
21 textual consequence of my friend's position.  
22 The Kansas City Metropolitan Air Quality Control  
23 Region, when EPA promulgates a regional air  
24 quality action for that region, my friends say,  
25 well, that's actually a nationally applicable

1     action, it's not a regionally applicable action,  
2     because it just happens to touch more than one  
3     state and more than one circuit.

4             I think that's just brutally hard to  
5     square with the ordinary meanings of the term  
6     "nationally" and "regionally."

7             To come back to the third sentence, I  
8     think the easiest way to understand that third  
9     sentence is, Number 1, to just keep in mind that  
10    the instructions that the Court gives about it  
11    need to maintain it as a narrow exception,  
12    because it's supposed to be an exception to the  
13    general rule for locally applicable actions.

14            And then I think the easiest way to  
15    cut through the metaphysical questions about  
16    what was involved in the process of every EPA  
17    action that it might take is to simply ask:  
18    When you're looking at the text of the  
19    chapter -- when you're looking for what was this  
20    final action under this chapter based on, go  
21    consult the text of the chapter and see what it  
22    directed EPA to base that action on.

23            And here, that leads a very -- that  
24    leads to a very simple answer. Because Congress  
25    directed EPA, when it takes this kind of action,



1 to base that action on its consideration of a  
2 refinery's local economic circumstances.

3 And that's what this refiner -- that's  
4 what EPA did, according to the agency's own  
5 description.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Justice Thomas?

9 Justice Alito?

10 Justice Sotomayor?

11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: On that last  
13 point, which I think is a good point for you, it  
14 does -- I think most cases are going to end up  
15 that way. And so the -- the third sentence ends  
16 up being a null set, or close to a null set, in  
17 your view.

18 And -- and that's fine if that's the  
19 case. I just want -- is that how you see it  
20 playing out? It's been an -- essentially a null  
21 set historically.

22 MR. HUSTON: It has, Your -- it has,  
23 Your Honor. And I would really urge the Court  
24 not to, you know -- to breathe enormous life  
25 into this third sentence, because I think to do

1     so would very significantly disrupt the balance  
2     that has prevailed in the lower courts.

3             Now, obviously we're here because the  
4     lower courts can benefit from some guidance  
5     about the application of this venue provision,  
6     but it is -- it has absolutely been the case  
7     that since 1977 -- this third sentence has been  
8     extraordinarily narrow.

9             The government hasn't been able to  
10    come up with any case. We haven't identified  
11    one. And -- and, you know, we've looked. It's  
12    not for lack of trying. It's hard to come up  
13    with something that fits this. I think that's  
14    okay.

15            JUSTICE KAVANAUGH: It's -- and -- and  
16    just for -- last question. Just to -- so I say  
17    it again, it's because when a local or regional  
18    action is based on a determination of nationwide  
19    scope or effect, the application of that to the  
20    particular local or regional entity will mean  
21    it's -- it's being applied -- it's not based  
22    solely on the nationwide scope -- determination  
23    of nationwide scope or effect? Is that right?

24            MR. HUSTON: I -- I'm not certain I  
25    understand the question, Justice Kavanaugh.

1 JUSTICE KAVANAUGH: Well, any --  
2 you're saying it can't happen that it's based  
3 solely on the determination of nationwide scope  
4 or effect because it's being applied to the  
5 particular entity, right?

6 MR. HUSTON: Yes.

7 JUSTICE KAVANAUGH: Okay.

8 MR. HUSTON: Yes, I think that's  
9 right. It -- it is -- it has to be -- in order  
10 to adjudicate --

11 JUSTICE KAVANAUGH: In other words, to  
12 Justice Gorsuch, it's not like a rule-making --

13 MR. HUSTON: Yes.

14 JUSTICE KAVANAUGH: -- being applied;  
15 it's an adjudication.

16 MR. HUSTON: Correct. In an  
17 adjudicatory posture, it is almost always going  
18 to be the case --

19 JUSTICE KAVANAUGH: Yeah.

20 MR. HUSTON: -- that the action, a  
21 locally applicable action, will be based on the  
22 local facts and circumstances of the individual  
23 petitioner.

24 That actually makes perfect sense  
25 because, remember, the enumerated sections of

1 Section 7607 that Congress assigned as locally  
2 applicable, they all have that form. They're  
3 all adjudications of local factors. They're not  
4 rule-makings unlike the enumerated nationally  
5 applicable actions.

6 JUSTICE KAVANAUGH: Exactly. Okay.  
7 Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

10 Justice Jackson?

11 JUSTICE JACKSON: But, of course, the  
12 rule -- the -- the statute could have said  
13 something about rule-making versus adjudication.  
14 I mean, I -- I appreciate the distinction that  
15 you're making turning a determination of  
16 nationwide scope -- scope or effect into  
17 something akin to a rule-making, but that's not  
18 what it says.

19 MR. HUSTON: I'm not trying to say,  
20 Justice Jackson, that it can only be a  
21 rule-making. What -- what I am saying, though,  
22 is that when you look at the structure of the  
23 overall venue provision, Congress said here are  
24 some things that we are designating as national.  
25 Here are some things that we are designating as

1 local.

2 The national things, they all pretty  
3 much are rule-makings or they look a lot like  
4 rule-makings. The locally designated things  
5 that Congress assigned all are either -- are  
6 individualized adjudications. I think that's a  
7 strong clue about how Congress expected this  
8 provision to work.

9 JUSTICE JACKSON: Right. And then  
10 you're reading the exception to say that if you  
11 are then applying some sort of standard to the  
12 individual case in the context of an  
13 adjudication, then it's being based on the facts  
14 of that case and can never really be considered  
15 to be based on a determination of nationwide  
16 scope or effect?

17 MR. HUSTON: Well, it -- the third  
18 sentence cannot be triggered any time EPA is  
19 basing its individual action on a -- a  
20 nationwide standard.

21 JUSTICE JACKSON: No, I understand.  
22 But you -- you -- you flip all the way to the  
23 other side. You're saying it's never triggered  
24 because you are just applying it to the facts of  
25 the particular case.

1                   MR. HUSTON:  It's -- I'm saying it's  
2                   very rarely triggered.  That's why it's an  
3                   exception to the general rule.

4                   JUSTICE JACKSON:  I understand.

5                   MR. HUSTON:  And -- and what --

6                   JUSTICE JACKSON:  Thank you.

7                   CHIEF JUSTICE ROBERTS:  Thank you,  
8                   counsel.

9                   Rebuttal, Mr. Stewart?

10                  REBUTTAL ARGUMENT OF MALCOLM L. STEWART  
11                  ON BEHALF OF THE PETITIONER

12                  MR. STEWART:  Thank you, Mr. Chief  
13                  Justice.

14                  First, Mr. Huston said that we haven't  
15                  found a case in which a court of appeals has  
16                  upheld an EPA prong 3 finding.  But I think  
17                  there are a fair number of cases in the D.C.  
18                  Circuit in which you have a pattern like this:  
19                  EPA announces a new framework, it applies the  
20                  framework to a number of different states or  
21                  regulated entities, says we regard this as  
22                  nationally applicable, says we find also that  
23                  it's based on a determination of nationwide  
24                  scope or effect, and parties sue in the D.C.  
25                  Circuit and because there's no dispute about

1     venue, the D.C. Circuit decides the case on the  
2     merits without issuing an opinion that addresses  
3     the question. I think that's the explanation  
4     for why you don't have published decisions that  
5     endorse our -- view of prong 3.

6             I think it's equally true to say that  
7     Mr. Huston hasn't identified a case in which EPA  
8     has made a prong 3 finding and a court of  
9     appeals has rejected it. So I think that  
10    adopting his rule would -- significantly change  
11    prevailing D.C. Circuit practice even though it  
12    wouldn't overturn any D.C. Circuit published  
13    opinions.

14            The next thing I'd say is I think  
15    there's an -- an analogy here between prongs 1  
16    and 3 and the types of cases this Court decides  
17    that is sometimes this Court decides cases that  
18    present facial challenges to an act of Congress  
19    or a challenge to the validity of a nationwide  
20    executive branch program, and the bottom line  
21    disposition of the case will have national  
22    impacts. But there are also cases that this  
23    Court reviews that present purely local  
24    disputes, really nobody but the parties cares  
25    who wins and loses on the bottom line, but the

1 case presents a legal issue that has divided the  
2 court of -- courts of appeals and is being  
3 litigated all over the country, and it's  
4 important to have centralization. And that's  
5 the type of thing that prong 3 is for, the local  
6 disputes that present recurring questions of  
7 federal law.

8           There was a colloquy about does it  
9 make is sense to give deference to the view of  
10 an interested party as to where the case should  
11 be heard? Well, we know that the Congress  
12 wanted EPA to have some role in determining  
13 venue because it allowed the EPA to make a prong  
14 3 finding or not.

15           And under our view, the two things  
16 that will be important are did EPA -- regard  
17 what it was doing as the resolution of a  
18 controversy, or was it simply stating an  
19 undisputed proposition of federal law? And,  
20 second, how integral was that proposition to the  
21 ultimate decision? Those are two things that  
22 are right within -- EPA's bailiwick. It makes  
23 perfect sense to give deference to them.

24           Finally, we agree that prong 3 should  
25 be an exception, that most locally or regionally



1 applicable actions should be reviewable in the  
2 regional circuits, but if the exception doesn't  
3 apply here, where nationwide determinations  
4 drove all of the site-specific actions and where  
5 the attack on the nationwide determinations has  
6 been the focus of judicial challenges, you're  
7 basically reading prong 3 out of the statute  
8 altogether.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 The case is submitted.

13 (Whereupon, at 11:48 a.m., the case  
14 was submitted.)

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## Official

<p><b>1</b></p> <p><b>1</b> <sup>[15]</sup> 45:25 46:9,18 47:14 50:2 55:4 56:3,14,19 58: 19,23 64:13 101:12 103:9 110:15 <b>10</b> <sup>[2]</sup> 17:23 18:2 <b>10-year</b> <sup>[1]</sup> 18:22 <b>10-year-old</b> <sup>[1]</sup> 18:7 <b>10:04</b> <sup>[2]</sup> 1:16 4:2 <b>100</b> <sup>[1]</sup> 90:3 <b>105</b> <sup>[1]</sup> 4:16 <b>109</b> <sup>[1]</sup> 3:16 <b>11</b> <sup>[1]</sup> 33:6 <b>11:48</b> <sup>[1]</sup> 112:13 <b>18</b> <sup>[1]</sup> 4:17 <b>19</b> <sup>[1]</sup> 74:10 <b>1970s</b> <sup>[1]</sup> 13:12 <b>1972</b> <sup>[1]</sup> 13:14 <b>1973</b> <sup>[1]</sup> 13:14 <b>1977</b> <sup>[5]</sup> 5:4 52:22 59:9 71: 2 105:7</p> <p><b>2</b></p> <p><b>2</b> <sup>[3]</sup> 50:3 55:2 101:12 <b>20</b> <sup>[1]</sup> 74:10 <b>2018</b> <sup>[2]</sup> 74:9 82:11 <b>2022</b> <sup>[3]</sup> 4:15 74:8 82:9 <b>2025</b> <sup>[2]</sup> 1:12 9:23 <b>21</b> <sup>[4]</sup> 46:4,12 47:2,4 <b>23-1229</b> <sup>[1]</sup> 4:4 <b>23a</b> <sup>[1]</sup> 72:2 <b>25</b> <sup>[1]</sup> 1:12 <b>277</b> 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