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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.)

Washington, D.C.
Tuesday, March 25, 2025

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

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4 of the Petitioner.
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7 Association in support of the Petitioner.
8 MICHAEL R. HUSTON, Phoenix, Arizona; on behalf of
9 Respondents Calumet Shreveport Refining, L.L.C.,
10 et al.
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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Stewart.

ORAL ARGUMENT OF MALCOLM L. STEWART
ON BEHALF OF THE PETITIONER

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

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

The agency based those denials on a new statutory interpretation and economic analysis it had not previously applied. Under the approach to venue adopted by the court of appeals, however, several different regional circuits would have been required to consider 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 just
3 simply aggregate decisions about refineries?

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

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

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

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

25 MR. STEWART: I -- I think you're

1 right that it is up to the -- the agency's
2 discretion whether to aggregate in those
3 circumstances.

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

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

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

23 MR. STEWART: Oh, I think you're
24 right.

25 JUSTICE GORSUCH: -- at a state level.

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

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

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

16 JUSTICE GORSUCH: So it came up with
17 this pass-through theory. That's the new
18 development?

19 MR. STEWART: It's partly the
20 pass-through theory and it's partly the
21 statutory interpretation.

22 JUSTICE GORSUCH: It's interpretation.
23 Okay. So, yeah. On those, I guess I struggle
24 because statutory interpretation, by gosh, I
25 should hope EPA applies a consistent statutory

1 interpretation across the country. And when it
2 comes to economic theories, same goes.
3 Otherwise, it would be arbitrary and capricious.

4 So how can it be that that's -- that's
5 what we should look at?

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

13 JUSTICE GORSUCH: Sure. And every
14 statutory interpretation and economic theory is
15 going to -- going to do that, right?

16 MR. STEWART: At some time, but I
17 think, you know, for instance, if this Court in
18 2025 struck down an Act of Congress as
19 unconstitutional, you wouldn't say that the
20 Court determined in that decision that it had
21 the -- the authority to review acts of Congress
22 for constitutionality. That --

23 JUSTICE GORSUCH: Well, I guess I'm
24 just struggling with, you know, you're trying to
25 -- a -- a complete sea change in how these

1 things have been reviewed in the past, and when
2 I look at a determination, it's an action and a
3 determination. And I look at the, what is it,
4 7545, right? And the action is, of course,
5 here, you're rejecting a hardship application.
6 And the determination is -- I mean it's right
7 there in the statute, that the Secretary has to
8 determine whether there's a disproportionate
9 economic harm to this particular refinery.

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

13 MR. STEWART: I mean, that's certainly
14 one determination, but the agency, in -- in this
15 context and others, may be making different
16 subsidiary determinations.

17 JUSTICE GORSUCH: I -- I accept that
18 there are -- that that determination of undue
19 hardship is going to rest upon a statutory
20 interpretation and an economic theory. But how
21 far back does somebody have to go in the chain
22 of reasoning behind the determination that
23 there's no undue hardship to determine where to
24 bring their suit? This Court has traditionally
25 said that venues should be easy and it -- to

1 figure out at the outset of a case and shouldn't
2 in -- involve undue litigation.

3 Now -- now you're asking parties to
4 not just look at the action, the -- the
5 rejection of this -- of the application, not
6 just the determination that there is no undue
7 hardship, but the analysis behind that, right?
8 And I -- I think you used the word "core," core
9 analysis behind it and figure out what's the
10 core behind a determination and an action.

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

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

18 MR. STEWART: It -- it's certainly
19 true --

20 JUSTICE GORSUCH: They've got their
21 view too. I mean --

22 MR. STEWART: My point is simply that
23 the -- with respect to that point, is simply
24 that the -- the litigant is not kind of starting
25 from square one. The litigant knows what EPA's

1 view about proper venue is. It knows whether --

2 JUSTICE GORSUCH: Yeah, it knows --
3 the government -- the government would like to
4 always win, sure, okay. But when it's supposed
5 to be determining where to bring its suit, it
6 has to now look not just at the action and the
7 determination that went into the action but the
8 reasoning behind it and figure out what part of
9 its core. How -- how is that consistent with
10 this -- this Court's repeated admonitions that
11 venue is supposed to be easy to determine at the
12 outset of the case?

13 MR. STEWART: Well, clearly, Congress
14 wanted there to be a meaningful role for the
15 D.C. Circuit, not just in reviewing the actions
16 that are enumerated as nationally applicable.

17 JUSTICE GORSUCH: Sure. And it also
18 wanted, you know, regional circuits -- I mean,
19 it's a cooperative federalism system, the Clean
20 Air Act. It -- it wanted room for both. And
21 we're now trying to figure out where the line
22 is. And you're asking us to change historical
23 practice pretty radically, and I'm just curious
24 how that fits with our -- our -- our presumption
25 that venues should be easy to determine at the

1 outset of a case.

2 MR. STEWART: Well, I think -- that
3 was part of the debate that went on in the 1970s
4 after the NRDC cases that we've discussed in our
5 brief. That is, in 1972 and 1973, there were
6 numerous challenges to an EPA action that had
7 simultaneously granted extensions to a number of
8 different states for filing -- for -- for
9 meeting a particular type of attainment deadline
10 and had simultaneously approved SIPs submitted
11 by the states.

12 And there was controversy over where
13 those cases should be heard, because although
14 they pertained to a number of different states,
15 the legal challenges were all the same. And
16 both the First Circuit and the D.C. Circuit
17 concluded that venue in that circumstance was
18 proper in the D.C. Circuit.

19 But the real significance of those
20 cases is -- is not about whether they were
21 correct or incorrect in interpreting the statute
22 as it then existed. The real significance was,
23 after that happened, there was a debate in the
24 mid-1970s. And ACUS, the Administrative
25 Conference of the United States, recommended

1 that the statute be amended to provide that a
2 challenge to any EPA action with respect to a
3 state SIP would be heard in the regional circuit
4 for -- that -- that contained the state whose
5 plan was involved.

6 And part of the justification for that
7 approach was, as you say, ease of
8 administration, that you -- you would know right
9 off what the right forum was.

10 But the general counsel of EPA said,
11 in most cases, challenges to SIP decisions will
12 rest on state-specific circumstances, but
13 sometimes EPA's SIP decisions will rest on what
14 he referred to as generic determinations of
15 nationwide scope or effect. And --

16 JUSTICE JACKSON: And so, Mr. Stewart,
17 I -- I think the answer to Justice Gorsuch's
18 question is that the statute is focusing
19 people's attention on what the EPA's reasons
20 are, at least in that third prong.

21 MR. STEWART: Yes.

22 JUSTICE JACKSON: Then in the --

23 JUSTICE GORSUCH: Where -- where is
24 that? I -- I see -- they have to focus on the
25 action of the determination. I don't see that

1 they have to focus on the reasons behind the
2 determination.

3 MR. STEWART: Well, the -- the
4 determine -- when we talk about an action based
5 on determinations, we are talking about the
6 determinations are the reasons, the action --

7 JUSTICE GORSUCH: I -- the -- the
8 action is denying the application, correct?

9 MR. STEWART: Yes.

10 JUSTICE GORSUCH: And to determine
11 whether to deny or grant the application, you
12 have to decide whether there is undue hardship.
13 That's the statute's language, right?

14 MR. STEWART: That's the statute's
15 language.

16 JUSTICE GORSUCH: So that's the
17 determination. You've determined that there is
18 no undue hardship here, right?

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

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

24 MR. STEWART: But I think what
25 Congress was trying to drive at, and what the --

1 the EPA's general counsel had in mind was,
2 you -- you -- you are correct that in every case
3 the EPA is going to be applying some kind of
4 general federal rule or policy or framework to
5 local facts. Or at least for any locally or
6 regionally applicable action, you'll have some
7 of both.

8 And the -- the venue provision will
9 work best if cases are routed to the D.C.
10 Circuit when the general methodology is likely
11 to be the subject of the judicial challenge,
12 because those are the cases where you have the
13 greatest risk of duplicative judicial resources
14 and inconsistent outcomes.

15 JUSTICE JACKSON: Can -- can I say it
16 in another way? That -- that the venue
17 provision appears to be designed to direct
18 challenges that will turn on local facts and
19 issues to the local circuits, and challenges
20 that turn on national facts and issues to the
21 D.C. Circuit.

22 Now, I know that's very generalized,
23 but to the extent that the challenge in this
24 case and other cases are, for example -- or is,
25 for example, to the EPA's economic analysis,

1 which it drew in this case from national market
2 evaluation and it applied to all of the -- all
3 of the different refineries, this national
4 economic analysis, one might think that that's
5 the kind of determination of national scope or
6 effect that the third prong, at least, wanted
7 directed to the D.C. Circuit.

8 MR. STEWART: I -- I think that's
9 right, but the -- the additional point I would
10 make is it -- it matters a lot whether EPA's
11 statutory interpretation and economic analysis
12 are new or whether this is the way that the
13 agency has been doing it for 10 years.

14 JUSTICE JACKSON: Why is that?

15 MR. STEWART: It's -- it's that way
16 because if the agency has been doing it that way
17 for 10 years, then it's very likely that any
18 potential challenges to the methodology will
19 have brought, been resolved, they will be --
20 they will have been sorted out.

21 And at that point, if EPA has -- is
22 applying a 10-year-old regulation that was
23 challenged in the D.C. Circuit but upheld, it's
24 very unlikely that the new action is going to be
25 attacked based on the asserted invalidity of the

1 rule.

2 JUSTICE GORSUCH: How -- how is -- how
3 is a litigant supposed to figure that out?

4 MR. STEWART: Well, part of --

5 JUSTICE GORSUCH: I mean, so you're
6 saying, okay, when they're new, theories of
7 statutory interpretation are new economic
8 theories of nationwide impact, it goes to the
9 D.C. Circuit. But if they're old, ah, then --
10 then I can bring it in my own circuit where I
11 actually live and operate and work.

12 What -- is it a 10-year cutoff, is
13 that -- is that the -- is that -- is that what
14 -- I mean, venue is supposed to be simple. And
15 I guess I'm trying to figure out what's our
16 simple -- what simple rule would you have us
17 apply here?

18 MR. STEWART: Well, one of the things
19 you can look at is, is there some metric by
20 which you conclude the validity of the rule has
21 been established? Was it challenged before and
22 upheld? Has the time for challenging it passed?

23 Another is you can look at the
24 comments that EPA received on the proposed
25 action, because not everything, but a lot of

1 what EPA does, it issues a proposed action and
2 then it takes comments and it responds to the
3 comments. And here, it was clear from the
4 comments that EPA received that any judicial
5 challenges were likely to be attacks on the
6 methodology predominantly.

7 JUSTICE KAGAN: I -- I think what
8 would help me, Mr. Stewart, is if you talked in
9 -- in a bit more concrete terms about this case.
10 And again, focusing on the third sentence, "the
11 action based on a determination of nationwide
12 scope or effect."

13 What was the determination of
14 nationwide scope or effect that you are saying
15 drove all of these decisions?

16 MR. STEWART: The -- the two
17 determinations of nationwide scope or effect --
18 effect that we've emphasized are, first, the
19 statutory interpretation, the requirement that
20 the economic hardship come from the blending
21 requirement itself and not from other economic
22 circumstances.

23 And the second was the passthrough
24 theory, the presumption that generally small
25 refineries can pass their costs of compliance

1 along to their customers.

2 And -- and those --

3 JUSTICE KAGAN: And how responsible
4 were those two findings, taken together, for the
5 actual determinations made?

6 MR. STEWART: They were -- I mean, all
7 of the petitions were denied. Now, it's true
8 that EPA, with respect to the passthrough theory
9 in particular, gave each refinery an opportunity
10 to rebut the presumption and show that its own
11 circumstances were different, that it couldn't
12 pass through the cost.

13 But certainly the -- the challenges in
14 the -- the various litigated proceedings have
15 focused predominantly on the validity of the
16 nationwide determinations. They haven't
17 primarily been a --

18 JUSTICE KAGAN: What would a -- what
19 would -- what would you have to do to rebut the
20 presumption? I mean, is that a very high bar?
21 Is that why it's -- wasn't met in any case?

22 MR. STEWART: I would think it's a
23 pretty high bar.

24 JUSTICE KAGAN: So your essential
25 argument here is, like, Look, there's the

1 statutory interpretation, plus there's this --
2 what did you call the other one? The --

3 MR. STEWART: The economic analysis.

4 JUSTICE KAGAN: The economic analysis.
5 That together, was basically determining what
6 decision was going to be made in all these
7 cases. There was, you know, a way for you to
8 come back and say it shouldn't happen here, but
9 not really.

10 And, you know, given that, like,
11 everybody would want this to be done in one
12 court, because one thing was driving all of
13 these decisions across the country.

14 MR. STEWART: Yes, exactly.

15 JUSTICE BARRETT: But, Mr. Stewart --
16 Oh, sorry. Finish.

17 JUSTICE KAGAN: Go ahead.

18 JUSTICE BARRETT: I -- I -- picking up
19 on that, what if one of the refineries wanted to
20 challenge both the EPA's denial of the
21 presumption in their favor, like, you know, the
22 non-zero chance, as the Fifth Circuit calls it,
23 to say, you know what, you should have given me
24 an exception, because I can show that I uniquely
25 experienced hardship, as well as the economic

1 theory and the statutory interpretation.

2 So does it depend on how the refinery
3 styles the challenge?

4 MR. STEWART: It doesn't depend on how
5 the refinery challenges -- styles the court
6 challenge, because the determination -- whether
7 -- I mean, EPA's decision that the third prong
8 applies has to be made at the type it -- time it
9 takes the action. And it has to publish that
10 finding in taking the action.

11 And so it -- it may depend, in part,
12 on what sort of comments EPA received during the
13 rule-making, because that -- that may alert it
14 that it is resolving something that is
15 contested. But the right forum thereafter
16 doesn't depend on what particular mix of
17 challenges a particular refinery wants to make.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Thomas?

21 Justice Alito?

22 JUSTICE ALITO: Well, there are a
23 couple of points about your argument that I
24 would appreciate some clarification. Some of
25 them have been touched on, but just to make

1 them -- present them in simple terms.

2 When do you think an issue is
3 sufficiently settled so that decisions based on
4 that no longer involve a determination?

5 MR. STEWART: Well, we -- we've
6 referred to the fact that the -- the denials
7 here were issued roughly contemporaneously with
8 the -- with the determine -- the announcement of
9 the determination itself.

10 And we've also referred to the fact
11 that the comments indicated that the nationwide
12 determinations were likely to be the subject of
13 challenge.

14 I don't think, frankly, that there is
15 a time limit, and -- but I think what the Court
16 should be trying to get at is, kind of, what is
17 the likelihood? Are these determinations
18 sufficiently new? Are they sufficiently
19 unestablished that they can be expected to be
20 the focus of judicial challenge?

21 Because --

22 JUSTICE ALITO: Well, that doesn't
23 seem to be a very clear rule. Maybe the
24 application of it here would be clear, but going
25 forward in other cases, that certainly doesn't

1 seem to be clear, whether it was sufficiently
2 established to -- so that anything that happens
3 later is not a new determination?

4 MR. STEWART: I mean, I think one
5 thing we would offer is with respect to the
6 standard of review here, we certainly think the
7 question of what is the test, what is the basic
8 standard for applying the third prong, that's a
9 question of statutory determination that the
10 Court decides de novo. So we disagree with
11 Respondents' interpretation, but the question
12 whether they're right or wrong -- their -- their
13 interpretation, but we -- but the question
14 whether they're right or wrong is for the Court
15 to decide.

16 If the Court accepts our basic
17 framework that the test should be: Were these
18 determinations sufficiently new that they are
19 likely to be the subject of judicial challenge,
20 then I think it would be appropriate to give
21 some deference to EPA's determination in that
22 regard, because EPA would know the record, it
23 would understand to what extent was it departing
24 from its past methodology, what had the comments
25 been, and --

1 JUSTICE ALITO: Okay. Thank you.

2 What -- why should it matter in making
3 this determination whether EPA decides one --
4 makes one -- takes one action by itself or
5 bundles a bunch together?

6 MR. STEWART: I don't think it
7 particularly matters for purposes of the third
8 prong; that is, for purposes of the first prong,
9 the -- the question is whether the action is
10 nationally applicable. And that depends on
11 whether the action that EPA announces as the not
12 denial of a lot of petitions or the denial of
13 one.

14 I think for purposes of the third
15 prong, the analysis would be the same regardless
16 of whether there's bundling.

17 JUSTICE ALITO: So you can't just --
18 EPA can't just say, look, this is -- we're --
19 we're deciding cases from five different
20 circuits and, you know, or a number of different
21 states and they fall into five different
22 circuits, that shouldn't matter at all?

23 MR. STEWART: It -- it doesn't matter
24 for purposes of the third prong, that the
25 question is, even if you think of the action as

1 being the denial of a particular refinery's
2 petition, if it is based on -- if that action is
3 based on a determination of federal law that's
4 likely to be challenged in court, that's an
5 appropriate case for the D.C. Circuit to
6 exercise review.

7 JUSTICE ALITO: What do you think
8 "based on" means? And -- since it wasn't
9 exactly clear from your brief. At some points,
10 you seem to say it's but-for causation, and then
11 at another point, you say it's -- it must lie at
12 the core of the agency action. Which one is it?

13 MR. STEWART: We would say but-for
14 causation. That's typically the meaning that
15 the Court ascribes to the -- the term "based
16 on." But if the Court wanted to have a slightly
17 more stringent -- stringent test, it's -- it's
18 really the principle that we care most about,
19 rather than kind of the exact formulation of the
20 standard.

21 JUSTICE ALITO: I know the pass- --
22 the validity of the pass-through theory is not
23 before us, but just out of curiosity, has that
24 -- is that being challenged? And what is -- if
25 so, where -- what is the status of the

1 challenge?

2 MR. STEWART: Well, it -- it was
3 challenged in both the D.C. Circuit and the
4 Fifth Circuit because a lot --

5 JUSTICE ALITO: Right.

6 MR. STEWART: -- of these cases wound
7 up in --

8 JUSTICE ALITO: Yeah.

9 MR. STEWART: -- the Fifth Circuit.
10 The -- both of those courts ruled against the
11 EPA on that issue. And in our motion to hold
12 the briefing schedule in abeyance in this case,
13 we noted that EPA is reconsidering the
14 methodology it's using. I -- I don't have any
15 updates on that, but that -- that's what we've
16 represented to the Court previously.

17 JUSTICE ALITO: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Sotomayor?

20 JUSTICE SOTOMAYOR: I am having almost
21 an impossible time understanding how you
22 answered Justice Thomas's question to say that
23 there is a limit that's subject to some form of
24 judicial review on your decision to bundle
25 that's not tied directly to the third prong;

1 meaning, I don't see how you can bundle unless
2 you meet the third prong, because the first
3 prong requires an action, and the action,
4 whether it's a national action or a individual
5 action, and if it has to be an individual
6 action, I don't see how you can make it national
7 without the third prong.

8 MR. STEWART: Well, I think even if
9 EPA was simply applying to new circumstances a
10 -- a previously established general methodology,
11 EPA would have the authority, if it wished, to
12 bundle in the sense of announcing in a single
13 Federal Register notice the results of its --

14 JUSTICE SOTOMAYOR: I just don't see
15 how that can be, unless that action is based on
16 a determination of nationwide scope or effect.
17 I can't see how you can bundle a New York -- and
18 you said you can't --

19 MR. STEWART: Right.

20 JUSTICE SOTOMAYOR: -- bundle a New
21 York and Pennsylvania denial of a SIP and call
22 it nationwide --

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

24 JUSTICE SOTOMAYOR: -- absent a
25 determination of nationwide scope or effect.

1 MR. STEWART: I -- I think the answer
2 to your question turns on our limiting
3 construction of the word "determination." That
4 is, when -- if EPA granted or denied, let's say,
5 four different refinery proposals in a single
6 action, if it were simply applying its
7 preexisting methodology, a methodology that no
8 one was likely to challenge, but it was applying
9 that to disparate circumstances around the
10 country, nothing would prevent it from
11 announcing those dispositions in a single
12 Federal Register notice.

13 The reason we would say those don't
14 turn on a determination of nationwide scope or
15 effect is that the legal principles would be
16 preexisting and established. They wouldn't be
17 kind of new -- new determinations --

18 JUSTICE SOTOMAYOR: I think you're --

19 MR. STEWART: -- resolution of an
20 issue.

21 JUSTICE SOTOMAYOR: -- you're --
22 you're digging yourself into a hole because I
23 would then say they're individual actions that
24 you have to take to the local courts.

25 MR. STEWART: And -- and, frankly, EPA

1 rarely does that kind of bundling in
2 circumstances where it isn't announcing new
3 rules or new frameworks. We think it has the
4 authority to, but I'd -- I'll say we wouldn't
5 lose much if the Court said --

6 JUSTICE SOTOMAYOR: All right.

7 MR. STEWART: -- we --

8 JUSTICE SOTOMAYOR: Assume my
9 assumption --

10 MR. STEWART: Okay.

11 JUSTICE SOTOMAYOR: -- that I don't
12 take any meaning from your bundling --

13 MR. STEWART: Okay.

14 JUSTICE SOTOMAYOR: -- and that I
15 think it's always a issue of what's a
16 determination of nationwide scope and effect.
17 What's the standard of review? I wasn't sure in
18 the answer you gave to -- you -- you talked
19 first about de novo and then you talked about
20 deference. So --

21 MR. STEWART: I -- I would --

22 JUSTICE SOTOMAYOR: -- assume it's
23 only the third prong.

24 MR. STEWART: Right.

25 JUSTICE SOTOMAYOR: All right? What's

1 the standard of review?

2 MR. STEWART: I would say when you are
3 determining what the basic test should be, the
4 standard of review is de novo -- de novo. For
5 instance, Respondents are arguing -- have argued
6 that "determination" here is used as a term of
7 art and it refers only to circumstances where
8 some other CAA provision instructs EPA to make a
9 determination or to determine something on a
10 nationwide basis.

11 Now, we think that interpretation of
12 the statute is wrong, but the question whether
13 it is right or wrong is a pure issue of
14 statutory construction. That's something the
15 court decides de novo.

16 If the Court concludes that we're
17 right about the basic test, that what we are
18 looking for is did EPA in this action announce a
19 new principle of federal law or policy that is
20 likely to be the subject of judicial challenge,
21 if that basic test is correct, then we think EPA
22 should get deference when it announces that it
23 thinks the test is satisfied with respect to a
24 particular action.

25 JUSTICE SOTOMAYOR: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

5 You know, the way I thought about it
6 was if you have a set of individual actions but
7 they're all based on a common denominator, such
8 that you know how all the individual actions are
9 going to come out or almost all or generally
10 all, you know, such that individual -- like,
11 state circumstances are just not playing much of
12 a role, then you -- then it should be in one
13 court because that's really all that is going to
14 be up for judicial review.

15 So whether it's old, whether it's new,
16 I mean, you just look and you say did -- did one
17 nationwide decision, or two nationwide decisions
18 in this case, drive all of these individual
19 decisions or almost all or most of them? And if
20 it did, like, you don't want 11 circuits dealing
21 with the same question. And if it didn't,
22 because there are lots of individual
23 circumstances coming into play and relating
24 to -- you know, it's -- it's -- it's like both
25 all mixed together so that the individual

1 circumstances really are going to count and
2 different decisions are going to go different
3 ways, then you do want them done by different
4 courts.

5 So, I mean, that might be just an
6 intuitive way of dealing with it, but it seems
7 like a lot simpler to me than what you're
8 pitching.

9 MR. STEWART: Well, I think part of
10 the reason that we focused on determination as
11 we have is the strongest -- to us the strongest
12 argument on the other side is that whenever EPA
13 makes a site-specific determination, it is
14 always applying some nationally applicable rule
15 or framework or policy. If it didn't do that,
16 the other side appropriately points out, we
17 wouldn't have any assurance that --

18 JUSTICE KAGAN: Yeah, sure, there is
19 always some nationwide determination in the mix,
20 but if it's the kind of thing where that
21 nationwide determination as applied is going to
22 come out differently on different decisions,
23 depending on local conditions, then you don't
24 want it in the D.C. Circuit.

25 MR. STEWART: Well, you --

1 JUSTICE KAGAN: I mean, I have a
2 pretty strong intuition -- I won't tell you what
3 it is -- about both of these cases. And one
4 goes one way and one goes the other way.
5 Because, one, everything is being decided by the
6 nationwide determination; and the other, pretty
7 much nothing is being decided by the nationwide
8 determination.

9 MR. STEWART: Well, I think the
10 nationwide determination, the new principle of
11 law, can be very important and can arouse great
12 controversy even if it doesn't, by itself,
13 preordain what the outcome of any particular
14 proceeding is going to be.

15 I mean, I'd look at this -- this
16 Court's practice, for instance. In cases where
17 the -- this Court determines that the court of
18 appeals has erred in its analysis, it's not
19 uncommon for the Court to announce the right
20 analytic framework and then send it back to the
21 lower courts to figure out how that framework
22 applies to particular circumstances.

23 It leaves the last -- it -- it
24 recognizes that its announcement of the
25 framework doesn't necessarily foreordain the

1 outcome. It leaves the last stage for the lower
2 courts.

3 But what this Court is still doing is
4 still terribly important, and it's the kind
5 of -- the task this Court is performing is the
6 type of task for which it's important that there
7 be centralized review, that you not have a lot
8 of courts making the same determination of -- of
9 federal law without some means of bringing
10 harmony to them, even if that determination
11 doesn't dictate the outcome in a particular
12 case.

13 JUSTICE KAGAN: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

16 JUSTICE GORSUCH: Well, harmony can
17 also be achieved through appeal, right? I
18 mean --

19 MR. STEWART: Yes.

20 JUSTICE GORSUCH: I mean, the -- the
21 government's not afraid of litigating in -- in
22 -- in appropriate forums across the country,
23 right?

24 MR. STEWART: That -- that's correct,
25 but --

1 JUSTICE GORSUCH: And if there are
2 circuit splits over the meaning of the law,
3 you -- you know how to bring them here, right?

4 MR. STEWART: Yes.

5 JUSTICE GORSUCH: All right. And so
6 I -- I -- I just want to explore the two tests
7 you have offered us: the but-for test and the
8 core test. Those are the two. And you're happy
9 with either one?

10 MR. STEWART: Yes.

11 JUSTICE GORSUCH: Yeah. So the
12 but-for test, I would think, would capture
13 pretty much any time you have a standard
14 statutory interpretation or economic theory.
15 Because but for, you wouldn't have reached the
16 result, right?

17 MR. STEWART: Well, no, I mean, you --
18 with respect to a particular outcome, you could
19 have -- you could have EPA issuing rulings in
20 the alternative, saying: Under our preferred
21 approach, the small refinery's petition would
22 be -- should be denied, but even under our old
23 approach, this particular refinery wouldn't be
24 entitled to an exemption.

25 JUSTICE GORSUCH: But either of those

1 statutory interpretations would be a but-for
2 cause of the -- the -- the -- the ultimate --
3 one or the other would have to be at least a
4 but-for cause?

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

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

11 MR. STEWART: It would only be a
12 but-for cause if -- if there would be a
13 different outcome under some alternative
14 interpretation.

15 JUSTICE GORSUCH: Right, okay. Yeah.
16 Exactly.

17 But it was a but-for cause of the
18 denial in every case.

19 MR. STEWART: Again, only if there
20 would be a grant of the exemption under some
21 alternative --

22 JUSTICE GORSUCH: Sure. Some court is
23 going to have to decide whether that is a
24 correct interpretation and whether there's an
25 alternative that's preferable, but the

1 interpretation on which EPA is relying to deny
2 the application will be the but-for cause in
3 every case. So it -- it captures everything.
4 So that's one.

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

7 MR. STEWART: I mean, I think we were
8 trying to get at circumstances where -- we're
9 trying to weed out circumstances where EPA, in
10 the course of an action, may announce some
11 principle of federal law, but it is so
12 peripheral to the decision it's actually making
13 that it doesn't appear likely to affect the
14 outcome, and, consequently, it doesn't appear
15 likely to be the focus of judicial challenge.

16 JUSTICE GORSUCH: No, I get -- I
17 get -- I get the impulse. I'm just not sure
18 where it is in the statute.

19 MR. STEWART: I think the word --
20 again, I --

21 JUSTICE GORSUCH: "Core" does -- it
22 doesn't appear anywhere?

23 MR. STEWART: I think if -- if EPA
24 announced: We -- we think this is the right
25 statutory interpretation and economic analysis,

1 this particular small refinery disagrees, and it
2 thinks we should use an alternative
3 interpretation and analysis, we note that under
4 either approach we think this small refinery
5 would not be entitled to an exemption.

6 I think if you -- if EPA said that,
7 then you couldn't conclude that EPA's preferred
8 interpretation and analysis were a but-for
9 cause.

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

12 MR. STEWART: Again --

13 JUSTICE GORSUCH: Is that what you're
14 inviting us to do?

15 MR. STEWART: No. I think if the
16 Court adopted our basic test, then it would be
17 appropriate to give some deference to EPA's
18 judgment about how integral to its overall
19 analysis was a particular principle of law.

20 And, I -- you know --

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh?

24 JUSTICE KAVANAUGH: On the reason for
25 all of this in the first place, Congress's

1 reasons for all of this in the first place,
2 obviously it wasn't just harmony. I thought it
3 was also -- but correct me if I'm wrong --
4 speed.

5 MR. STEWART: Yeah.

6 JUSTICE KAVANAUGH: And therefore,
7 American businesses, which have to make
8 millions -- multi-million-dollar decisions on
9 all of this, have some certainty more quickly
10 about what the rules are. Because they will
11 say: You know, we don't care whether the rule's
12 A or B -- I mean, they do care -- but tell us
13 what the rule is so we can make our investment
14 decisions and our business decisions.

15 MR. STEWART: Yes. And -- and that's
16 reflected not just in the provision for
17 centralization in the D.C. Circuit but in the
18 short -- the 60-day time limit for seeking
19 review. It's reflected to an extent in -- in
20 the fact that you go straight to the court of
21 appeals in the first place.

22 Part of the reason for kind of
23 skipping a potential layer of judicial review
24 was to get things -- these things resolved
25 quickly. And so if EPA is -- is told that it's

1 wrong, it can go back to the drawing board. If
2 EPA's methodology is upheld, then it can decide
3 what's the next incremental step from that.

4 JUSTICE KAVANAUGH: The fact that
5 we're having this argument, though, suggests
6 that Congress might have missed the mark on
7 that. But, anyway, that was the idea, right?

8 Then on ease of application, which
9 Justice Gorsuch rightly raises, I just want to
10 zero in on the deference point.

11 Your point there is when -- I think --
12 you know, when EPA makes and publishes and says
13 it's making something based on -- on a
14 determination of nationwide scope or effect,
15 that itself will receive deference?

16 MR. STEWART: Again, if -- if you
17 think that EPA is applying basically the right
18 standard --

19 JUSTICE KAVANAUGH: Assume that.

20 MR. STEWART: Yes.

21 JUSTICE KAVANAUGH: Then it gets
22 deference in how it applies it in a particular
23 case, which helps with respect to ease of
24 application.

25 MR. STEWART: Yes.

1 JUSTICE KAVANAUGH: Okay. And then if
2 it does go to the D.C. Circuit, and the D.C.
3 Circuit rules for EPA -- I just want to make
4 sure you agree with this -- obviously there
5 won't be a circuit split on anything. So when
6 it comes to this Court on cert, we need to be
7 more attentive to cases like that than we might
8 be in certain other cases?

9 MR. STEWART: I -- I agree. And
10 it's -- you know, it's kind of like the federal
11 circuit and patent cases, that with respect to
12 categories of litigation that can't produce a
13 circuit split, then obviously the Court is going
14 to -- to take cases even when some of the usual
15 metrics for what's a cert-worthy case are
16 absent.

17 JUSTICE KAVANAUGH: Good. Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Barrett?

20 JUSTICE BARRETT: Just to crystallize
21 your position, Mr. Stewart, can you point me to
22 the best textual and contextual evidence that a
23 determination is this issue of unsettled --
24 unsettled issue of statutory interpretation,
25 rather than the decision that the underlying

1 hardship appli- -- exception doesn't apply?

2 MR. STEWART: I mean, I think that the
3 basic reason that the two shouldn't be equated
4 is that the statute refers -- and this is at
5 the -- kind of the carryover sentence from 31A
6 and 32A of the appendix to the government's
7 brief.

8 It says, "Notwithstanding the
9 preceding sentence, a petition for review of any
10 action referred to in such sentence," namely, an
11 action of -- that is locally or regionally
12 applicable, "may be filed only in the United
13 States Court of Appeals for the District of
14 Columbia if such action is based on a
15 determination of nationwide scope" --

16 JUSTICE BARRETT: So the
17 distinction --

18 MR. STEWART: If the state --

19 JUSTICE BARRETT: The use of the words
20 "action" and "determination," you would say, is
21 your best evidence?

22 MR. STEWART: Yes. The -- and the --

23 JUSTICE BARRETT: Okay.

24 MR. STEWART: -- the linkage "based
25 on" indicates that the two are not the same

1 thing.

2 JUSTICE BARRETT: Okay. And then,
3 relatedly, when you've been talking about length
4 of time and how we decide whether something is
5 settled or not, I mean, these were denied in two
6 batches, one April and one June, on the same --
7 basis of the same, say, determination of the
8 economic theory and the statutory
9 interpretation.

10 Why were the ones in June, then, in
11 the government's view, not based on something
12 that was already settled? Or were they?

13 MR. STEWART: I -- I -- I think they
14 weren't. I mean, for -- for one thing, the
15 other metric that -- or criterion that we've
16 identified for determine -- for identifying
17 things that are determinations, things are --
18 that are the resolution of a controversy, is did
19 EPA receive comments on the proposed action that
20 indicated disagreement with the determination?

21 And that was as true for the
22 refineries whose petitions were denied in June
23 as it was for those that were denied in April.
24 In both instances, EPA was told by the
25 petitioning refineries that we're not just

1 disagreeing with the application of your
2 methodology to our circumstances, we're
3 disagreeing with the methodology itself.

4 JUSTICE BARRETT: Okay.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So I guess I'm just
8 trying to understand your statutory
9 interpretation. Are you saying that the action
10 that was taken here was a nationally applicable
11 one at prong 1, such that that's why it goes to
12 the D.C. Circuit?

13 MR. STEWART: Yes. I mean, we're
14 making two arguments. Our -- our first argument
15 is because this was the denial of 21 small
16 refinery exemptions, rather than only one, it
17 was nationally -- and the refineries were spread
18 out all over the country, it was a nationally
19 applicable action and it goes to the D.C.
20 Circuit under prong 1.

21 But then we're also arguing in the
22 alternative, if instead you view the action as a
23 matter of law as separate denials of 21
24 different petitions, we would say each of those
25 denials falls under prong 3 because each denial

1 was based on a determination of nationwide scope
2 or effect.

3 JUSTICE JACKSON: All right. So going
4 back to the prong 1 issue, help -- help me to
5 understand your argument. I mean, if the EPA
6 had issued each of these denials on a separate
7 piece of paper, would you still say that they
8 belonged on the D.C. Circuit?

9 MR. STEWART: No. I mean, I think our
10 argument does depend on the proposition that you
11 attach a lot of weight to the -- the way EPA
12 frames its action. And so if on the same day we
13 had issued 21 separate Federal Register notices
14 saying we're applying the same methodology but
15 we're engaging in 21 separate denial actions, we
16 would say those are --

17 JUSTICE JACKSON: But what about the
18 statute or Congress's reasons for enacting it or
19 the way that it works makes you think that
20 Congress intended for this to turn on the formal
21 -- the formality of the EPA's determination in
22 that way?

23 MR. STEWART: Well, it refers to the
24 action that EPA takes. And I think to a degree,
25 the -- the application of prong 1 will

1 necessarily depend at least in part on
2 formalities. That is, if EPA had first
3 promulgated a regulation that said here is our
4 new statutory interpretation, here's our new
5 economic analysis, in subsequent decisions we
6 will apply this interpretation and analysis to
7 different refineries, the regulation itself
8 would clearly have been nationally applicable.
9 It would have been a nationwide rule. And it
10 would have been challengeable only in the D.C.
11 Circuit.

12 JUSTICE JACKSON: But I thought you
13 said if they said that and then they had
14 separate papers saying that, they would be
15 local?

16 MR. STEWART: No, I -- I was --
17 perhaps I misunderstood the hypothetical. I was
18 saying --

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

22 MR. STEWART: And the -- assuming that
23 the order says: We are applying this
24 methodology and concluding on that basis that
25 your refinery doesn't meet the criteria. If

1 it's announcing the methodology in the same
2 document where it announces the denial, then
3 that would be a single -- a single state --
4 state-specific action.

5 I -- I had in mind a circumstance
6 where EPA proceeds in two steps, first
7 promulgating the rule and then issuing separate
8 actions that apply it to different refineries.
9 And our -- and our point is the fact that in the
10 denial actions here EPA chose to announce the
11 new methodology in the same document as its
12 application shouldn't affect the nationwide
13 applicability.

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 MR. STEWART: Thank you.

18 CHIEF JUSTICE ROBERTS: Mr. Waxman.

19 ORAL ARGUMENT OF SETH P. WAXMAN
20 ON BEHALF OF RESPONDENTS GROWTH ENERGY
21 AND RENEWABLE FUELS ASSOCIATION
22 IN SUPPORT OF THE PETITIONER

23 MR. WAXMAN: Mr. Chief Justice, and
24 may it please the Court:

25 The core objective of Section 307(b)

1 is to avoid inconsistent rules arising from
2 duplicative litigation in the administration of
3 the Clean Air Act. Yet, under the ruling below,
4 eight different courts of appeals will be
5 passing on the merits of EPA's standards for
6 eligibility under the small refinery exemption,
7 producing, as is already evident from the two
8 circuits that have opined, different substantive
9 standards, completely the opposite of what
10 Congress manifestly intended under the national
11 RFS program.

12 Now, there's been a lot of discussion
13 about prongs 1 and 3 and maybe some discussion
14 without identifying it as prong 2, which is the
15 locally or regionally applicable. As to prong
16 3, we fully agree with EPA that if the actions
17 are deemed locally applicable, the disposition
18 of each -- each refinery's petition was, indeed,
19 based on a determination of nationwide scope and
20 effect.

21 I have some different answers to some
22 of the questions posed, in particular by Justice
23 Gorsuch and Justice Alito, which I hope I'll get
24 to, but I want to emphasize at the beginning,
25 picking up, I think, on what Justin -- Justice

1 Jackson's questions were alluding to, that we
2 think that EPA's actions, whether they are
3 considered individually or together as bundled
4 by EPA, were nationally applicable under the
5 first prong for two reasons.

6 The first reason is because they
7 announced and applied a standard for all
8 refineries, regardless of location. This was an
9 avowed statement by EPA in these adjudications.

10 And, second, the second reason relates
11 to the ubiquity of the RFS program, where every
12 individual exemption determines as a matter of
13 law the renewable fuel requirement binding all
14 non-exempt obligated parties and the total
15 volume of renewable fuel that must be purchased,
16 such that the legal effect of even an individual
17 SRE adjudication is nationally applicable
18 insofar as it necessarily affects the blending
19 requirement -- blending obligations of -- of
20 non-exempt obligated parties and will
21 necessarily affect the total amount of renewable
22 fuel that is used in the United States.

23 Now, I guess I should say my time is
24 -- I welcome the Court's questions. I -- I --

25 JUSTICE THOMAS: Mr. Waxman, one

1 question.

2 You say that this is a nationally
3 applicable rule. How many refineries would have
4 to be involved for it to be nationally
5 applicable? Is it just more than one?

6 MR. WAXMAN: So I think, Justice
7 Thomas, in -- in this case, since the -- the
8 standard announced and applied avowedly will
9 apply to every refinery wherever it is located
10 in the United States, regardless of location,
11 that is national applicable.

12 I don't think -- nothing in our
13 submission -- I hope this gets to your question
14 -- depends on whether you agree with us and the
15 House report that any legal issue that can be
16 adjudicated in two different -- in one -- in two
17 different circuits is nationally applicable
18 under the first prong or you agree with my
19 friend on the other side that it has to be all
20 50 states.

21 The point here is that when EPA
22 announces and adopts a standard, either in a
23 regulation or other final action, that it says
24 will apply to refinery -- to petitioning
25 refineries regardless of location, that is

1 national.

2 Now, I don't think, just anticipating
3 my friend's argument, that the -- that the rule
4 that in order to -- that it cannot be that it
5 has to apply to all 50 states in order to be
6 national. That's completely inconsistent with
7 the manifest purpose of the 1977 amendments.
8 And it's also manifestly not true because there
9 are many provisions of the Clean Air Act that
10 don't apply to all 50 states --

11 JUSTICE THOMAS: But --

12 MR. WAXMAN: -- including the
13 Renewable Fuel Standard.

14 JUSTICE THOMAS: But I'm -- I'm --
15 let's just -- if we -- if we would just limit it
16 to the refineries for now and small refineries,
17 how would you know whether it's nationally
18 applicable?

19 MR. WAXMAN: Well, I think if EPA --
20 if EPA adjudicates a refinery -- an individual
21 refiner's exemption application by announcing
22 and adopting a new metric that will apply to all
23 refiners, it is nationally applicable.

24 JUSTICE THOMAS: Wouldn't it be --
25 wouldn't it be just accepted that if EPA

1 announced the rule with respect to one refinery
2 and -- that it would apply the same rule to
3 future refineries? And would that make it a
4 national rule?

5 MR. WAXMAN: Yes, I think so.

6 JUSTICE THOMAS: The mere --

7 MR. WAXMAN: That's our --

8 JUSTICE THOMAS: -- fact that --

9 MR. WAXMAN: That's our position.

10 Now, I -- I recognize that neither of my friends
11 in this case agree with this, but I think, you
12 know, following on what I -- I took to be the
13 point of Justice Jackson's questions, I don't
14 see why it's not true.

15 If EPA -- everybody agrees that if EPA
16 announced a regulation -- in a regulation that
17 said from now on all SRE applications are going
18 to be adjudged under the following metric:
19 Number one, the small refinery has to prove
20 causation; that is, it has to prove that the
21 disproportionate hardship that it is
22 experiencing is due to the RFS obligation and
23 not for some other reason.

24 And in evaluating that case, based on
25 our economic analyses and economic common sense,

1 we presume that RFS -- that -- that ring costs
2 can be passed on to consumers. That is a
3 rebuttable presumption.

4 JUSTICE JACKSON: Mr. --

5 MR. WAXMAN: If that were done in the
6 context of a regulation, even my friend on the
7 other side agrees it would be nationally
8 applicable.

9 JUSTICE JACKSON: Mr. -- Mr. Waxman,
10 here's where I need help. If -- if you're right
11 about that, I guess I don't understand how we
12 ever get to prong 2.

13 How -- it seems to me that -- I don't
14 understand the distinction between 1 and 3,
15 meaning it seems like every case would be one in
16 which you would say that there is a national --
17 nationally applicable standard. Because, as
18 Justice Gorsuch pointed out, we would hope that
19 the agency would have consistent metrics for
20 making these determinations.

21 So it's sort of a given that the
22 agency is going to be applying some standard
23 and, in our country, a standard that is
24 consistently applied across every applicant. So
25 then how do we ever have a local determination

1 in -- in -- in that scheme?

2 MR. WAXMAN: So I think my -- my
3 answer to the question is the same -- it's the
4 same answer to the question I would give to
5 Justice Gorsuch's question about prong 3, how is
6 it -- how can you determine that it is of
7 national -- what is a determination of
8 nationwide scope and effect, and Justice Alito's
9 question about so what's the bright line, what's
10 the metric under which you can decide that?

11 I think the same applies to prong --
12 to the -- our -- our first theory for why this
13 is nationally applicable under prong 1, which is
14 it is not a -- an action of -- a nationally
15 applicable action. And it is also, under prong
16 3, not a determination of nationwide significant
17 -- scope and effect if it is simply applying
18 settled law.

19 Now, I fully -- I -- I appreciate the
20 questions about at what point does law become
21 settled, and why does that matter for
22 determination. In our view, law becomes settled
23 when either there is a court ruling -- and
24 presumably it would be under prong 3 or prong
25 1 -- a ruling of the D.C. Circuit saying EPA is

1 right or EPA is wrong.

2 The application of that national
3 standard thereafter -- the application of that
4 standard thereafter would not qualify under
5 prong 1 or prong 3, in our view.

6 In -- even in the absence of a -- of a
7 D.C. Circuit adjudication, this statute, this
8 very unique statute, has a 60-day limit on pose
9 of challenges to any regulation or final action.
10 It's a pretty strict time limit that's included
11 in the same subsection that we're deciding.

12 And I think an argument can be made
13 that if there is no -- 60 days goes by and
14 there's no challenge, or if there is a
15 challenge -- if there is a challenge, let's let
16 the D.C. Circuit decide. If there's no
17 challenge, it's settled.

18 And thereafter, when the EPA uses that
19 standard to either grant or deny an exemption
20 request, that goes to the regional circuit.

21 The other part of my answer that I --
22 I don't think -- I'm not sure was fully answered
23 in response to the questions before is, like,
24 what -- what is it that -- how are you defining
25 "determination"? I think this was maybe Justice

1 Barrett's question.

2 And I think, you know, we define
3 "determination" by reference to the accepted
4 dictionary definition, which we elucidate in our
5 brief, which is: A determination is either the
6 resolution of a particular unsettled issue or
7 the measure of something. That's the dictionary
8 definition of it.

9 And we're -- we think that that
10 dictionary definition comfortably cabins the
11 scope and extent of -- of the third prong.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

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

19 And you've suggested that your
20 standard, just recently, is -- is a simple one.
21 Now, in what respects do you think Mr. Stewart's
22 proposal is not simple?

23 MR. WAXMAN: Well, I think -- I think
24 Mr. Proposal's -- Mr. Proposal's --
25 Mr. Stewart's proposal is simple. And I think

1 it can be -- prong 3, with which we agree, can
2 simply be decided by a proper understanding of
3 the definitional terms of what is and isn't a
4 determination.

5 As to prong 1, while I agree with him
6 that the relevant actions in this case are the
7 two consolidated actions in April and June, we
8 have -- we have proposed in our briefing two
9 other tests under prong 1 that, if anything, are
10 even more straightforward and don't depend on
11 bundling.

12 One is the point that I've been
13 discussing earlier about if it is an action that
14 announces and adopts a new standard that will be
15 applied across the country, it is nationally
16 applicable.

17 The other, which in some ways is the
18 simplest, but is a real consequence of the
19 ubiquity of -- of the RFS standard, which was
20 adopted long after these 1977 amendments, is
21 that every adjudication of a small refinery
22 exemption is nationally applicable as a matter
23 of law, because it will determine as a matter of
24 legal consequence the refining obligations, the
25 blending obligations of non-petitioning

1 refiners.

2 CHIEF JUSTICE ROBERTS: Thank -- thank
3 you, counsel.

4 MR. WAXMAN: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Thomas, anything further?

7 JUSTICE THOMAS: Just briefly.

8 Mr. Waxman, you -- you -- you
9 discussed determinations a minute ago, but what
10 -- what would be your view of "based on"? I
11 think that's important as to what -- what
12 content you give that.

13 MR. WAXMAN: So we think that "based
14 on" means essentially two things. There are two
15 requirements for an action. The action in these
16 cases is -- was the denial of the exemption.

17 "Based on" means that it is a but-for
18 cause or an essential premise of the action and
19 that it resolves an unsettled issue or that it
20 establishes a standard. When you have those two
21 things, the act -- you can say confidently that
22 the action is based on that determination.

23 I -- I hope that answers your
24 question. It's the best I got.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: There's a number
3 of lower courts that have said, with respect to
4 the question of whether a denial is nationally
5 applicable, that what you have to look at is not
6 the downstream consequences of the EPA's -- of
7 the EPA's determination, but what is the effect
8 of -- on the parties? Is it a national effect
9 or not?

10 Your -- one of your two suggestions
11 that the -- I see as downstream effects. Yes,
12 there are going to be people from each petition
13 who might have to do something more later, and
14 something less if -- if they are denied, but why
15 isn't that just a pure downstream effect? And
16 aren't we straying too far when we're
17 incorporating that into our analysis?

18 MR. WAXMAN: So I think -- I do
19 recognize those opinions. And I endorse them,
20 in the sense that I think, for example, you
21 know, Justice Kavanaugh -- or then Judge
22 Kavanaugh had it correctly in -- when he ruled
23 in the D.C. Circuit that national applicability
24 has to be determined on the face of the action.
25 And --

1 JUSTICE SOTOMAYOR: That's the case
2 I'm talking about.

3 MR. WAXMAN: Yes. And -- and that
4 practical effect, downstream effects of what is
5 likely to -- what is more than likely not to
6 happen is not the crux.

7 All parties in this case -- and I
8 think all courts -- have agreed that the legal
9 effects of the regulation or the action is, in
10 fact, the -- something that is viewable and
11 consistent with the you have to look on its
12 face.

13 And with respect to the Renewable Fuel
14 Standard, the legal effect -- not just some
15 predictable downstream effect, the legal effect
16 of every SRE determination extends to the
17 national blending standard and the national
18 volume requirements by -- as a matter of law.

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

20 JUSTICE SOTOMAYOR: You know what
21 bothers me about that position is you're now
22 saying that every exemption has to go to the
23 D.C. Circuit --

24 MR. WAXMAN: Our -- our --

25 JUSTICE SOTOMAYOR: -- whether the

1 methodology -- methodology is new or not.

2 That's the force of that argument.

3 MR. WAXMAN: So that's one of the two
4 arguments that we're making for why this is
5 nationally applicable. And, yes, it basically
6 acknowledges that because of the ubiquity, the
7 way that the RFS program, as opposed to many --
8 most other Clean Air Act programs, is --
9 operates, it is a necessary legal effect of the
10 -- any denial that it will be nationally
11 applicable in the sense that it has an
12 inexorable legal effect on other actors and the
13 -- the -- the -- the nation's ability to meet
14 its national renewable fuel requirement. But,
15 yes, I do --

16 JUSTICE SOTOMAYOR: That prong.

17 MR. WAXMAN: That's -- that, that
18 argument is -- is asking for a -- an
19 acknowledgment -- a rule across the board with
20 respect to all exemptions.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?
22 Justice Gorsuch?

23 JUSTICE GORSUCH: Mr. Waxman, do you
24 agree that the action here is the denial of a --
25 a petition --

1 MR. WAXMAN: Yes.

2 JUSTICE GORSUCH: -- to be exempt from
3 renewable energy mandates?

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

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

8 MR. WAXMAN: Okay.

9 JUSTICE GORSUCH: No, I just want to
10 know the right answer. That's the action.
11 That's the agency action.

12 MR. WAXMAN: Our view as expressed --

13 JUSTICE GORSUCH: Right, but it's in
14 the Federal Register?

15 MR. WAXMAN: Our view as expressed in
16 our brief is that the EPA is correct that the
17 actions that are under review today are the
18 consolidated April and June decisions, but that
19 under our understanding of nationally
20 applicable, it doesn't matter.

21 JUSTICE GORSUCH: I understand that.
22 I understand the second part. Put that aside.
23 Put prong 1 aside for now. But the actions --
24 all right, you want to use the plural -- are the
25 denial of the -- of -- of the exemptions from

1 the renewable energy program, right?

2 MR. WAXMAN: Yes.

3 JUSTICE GORSUCH: Okay. And to -- to
4 make that action, EPA had to make a
5 determination about whether there's a particular
6 hardship for a particular refinery, correct?

7 MR. WAXMAN: Correct.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

11 JUSTICE KAVANAUGH: The third
12 sentence, the third prong, the third sentence is
13 just difficult to apply in a coherent way
14 because it's always going to be -- when you have
15 some rule that's being applied to a particular
16 entity in a particular state, it's going -- it's
17 going to be very difficult.

18 What -- what -- so how should we
19 handle that?

20 MR. WAXMAN: So, you know, this is our
21 lot. This is our --

22 JUSTICE KAVANAUGH: Because --

23 MR. WAXMAN: This is --

24 JUSTICE KAVANAUGH: Because to the
25 Chief Justice's point and Justice Gorsuch's, I

1 would like to come out of this case with
2 something that everyone out there knows, okay,
3 this is what we need to do.

4 MR. WAXMAN: So I -- we think that the
5 simplest way to decide this is under the first
6 sentence, rather than the third, but as to your
7 question --

8 JUSTICE KAVANAUGH: But if we get to
9 the third -- yeah.

10 MR. WAXMAN: If we get to the third, I
11 would say what the Court should -- what -- the
12 Court should base its interpretation on the
13 meaning of the term "determination" and that
14 under the -- consistent with dictionary
15 definitions, the determination is either the
16 resolution of a particular issue and/or the
17 measurement of something and that what we have
18 in EPA's two-part test is both.

19 The first part of the test, the
20 causation requirement, is certainly the former.
21 And the -- the presumption based on EPA's
22 experience with the data is the latter and maybe
23 also the former. And that so long as that --
24 the validity of that two-part test is unsettled,
25 meaning that 60 days have passed under the sub-

1 -- under the very next sentence in the
2 subsection, and no challenge has been raised, or
3 a challenge has been raised but the D.C. Circuit
4 has not yet decided it, it is still a
5 determination as to which review should be in
6 the D.C. Circuit.

7 And as to -- to Justice Barrett's
8 question about, well, June was the second one,
9 it wasn't the first one, so how do you -- how do
10 you -- how do you -- how do you deal with that,
11 I think the answer is that I believe -- I -- I'm
12 not -- I don't have a specific recollection, but
13 fewer than 60 days passed between the late April
14 determination and the June 3rd determination.

15 I believe there already had been filed
16 at least one petition for review, but even if
17 there hadn't, it was still open for review. And
18 the consequence of holding that it's only the
19 first one, whether it's the first single
20 application as I'm intuiting Justice Gorsuch is
21 inclined to rule, or the -- the omnibus all --

22 JUSTICE GORSUCH: I wouldn't be so
23 sure.

24 (Laughter.)

25 MR. WAXMAN: Pardon my indiscretion

1 and my presumption. Whether it's one or the
2 36th that were decided in April, the notion
3 that, well, June was not April, and, therefore,
4 all 67 refineries that were disappointed by the
5 outcome in June can go to their eight regional
6 circuits and the D.C. Circuit to get resolution
7 of the same legal question --

8 CHIEF JUSTICE ROBERTS: Anything
9 further --

10 MR. WAXMAN: -- is just the opposite
11 --

12 CHIEF JUSTICE ROBERTS: Anything
13 further, Justice Kavanaugh?

14 JUSTICE KAVANAUGH: No.

15 CHIEF JUSTICE ROBERTS: No?
16 Justice Barrett?

17 JUSTICE BARRETT: Just one question.
18 Do you think under your definition of
19 "determination," which you say is the dictionary
20 definition of "determination," that it would be
21 a determination that the hardship exception
22 didn't apply, kind of to Justice Gorsuch's
23 point? You've got the action, the denial, and
24 then you have the determination that the undue
25 hardship exception is inapplicable to that

1 particular refinery.

2 I understand that the reasoning is --
3 is what you want to -- is what you're hanging
4 your hat on, but do you agree that just by the
5 terms of the definition, it could apply as
6 Justice Gorsuch suggested -- suggested to the
7 determination that there was not an undue
8 hardship?

9 MR. WAXMAN: I -- I think in the
10 vernacular sense outside of context, you could
11 say that that is a determination because it will
12 always be the case that if a settled legal test
13 says you get a benefit if you prove this
14 predicate, a determination that you haven't
15 proved the predicate means you don't get the
16 benefit.

17 But it wouldn't be a determination of
18 national scope or effect.

19 JUSTICE BARRETT: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Jackson?

22 JUSTICE JACKSON: So I understand the
23 general concern about simplicity, but it appears
24 that Congress did not share that concern with
25 respect to this statute because it's very

1 complicated.

2 And I'm trying to understand your
3 interpretation of the difference between
4 nationally applicable and a determination of
5 nationwide scope and effect. Are those the same
6 or different in your view? Do they rise and
7 fall together? Could we ever have one without
8 the other?

9 MR. WAXMAN: They are the same in this
10 case and will perhaps often be the same, but
11 they -- they don't inexorably -- one doesn't
12 inexorably require the other. And I'll give you
13 an example each way.

14 A regulation or guidance that is
15 issued by EPA is not a prong 3 issue. It is
16 nationally applicable. It is not locally or
17 regionally applicable.

18 Likewise, SIP denials, that is state
19 implementation plan denials, are not only
20 specifically listed under the second prong but
21 courts have recognized -- and Justice Gorsuch
22 underscored with his questions today -- they are
23 the paradigmatic local or regionally applicable
24 determination because it just asks the question:
25 Did this state plan satisfy its -- the state's,

1 requirements under the national air quality --
2 national ambient air quality standards?

3 But the courts have recognized
4 repeatedly that if in the course of denying or
5 granting a SIP application, EPA adopts a new
6 rule, EPA says, well, there's a new NAAQ
7 requirement for ozone and you haven't met it,
8 that -- those cases all go to the D.C. Circuit.
9 And that's the example that General Counsel
10 Frick was addressing in his comments in 1977.

11 JUSTICE JACKSON: Thank you.

12 MR. WAXMAN: Thank you, Your Honor.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Mr. Huston.

16 ORAL ARGUMENT OF MICHAEL R. HUSTON
17 ON BEHALF OF RESPONDENTS CALUMET SHREVEPORT
18 REFINING, L.L.C., ET AL.

19 MR. HUSTON: Mr. Chief Justice, and
20 may it please the Court:

21 The Clean Air Act's venue provision
22 requires a court to look to the text of the
23 chapter to determine whether an EPA action is
24 nationally applicable or is instead locally or
25 regionally applicable and what that action was

1 based on.

2 When EPA, for example, uses a
3 rule-making to set requirements for all
4 regulated parties wherever they're located
5 throughout the nation, that's a nationally
6 applicable action. But the relevant text of the
7 chapter here, Section 7545(o)(9), makes it clear
8 that EPA's actions on hardship petitions must be
9 locally applicable. You can find that text on
10 page 23a of your our red brief.

11 Unlike the pre-2011 regime where all
12 small refineries throughout the nation were
13 entitled to an exemption, the text now requires
14 each individual refinery to make its own case
15 for hardship relief. Quote, "the refinery must
16 demonstrate that it would be subject to a
17 disproportionate economic hardship."

18 And the text then reinforces the
19 requirement of individualized action by keying
20 EPA's deadline to act to the submission of each
21 individual petition. These actions were locally
22 applicable because each EPA action on a hardship
23 petition affected only one refinery located in
24 one place.

25 And the actions were required by the

1 text to be based on each refinery's economic
2 circumstances, not any determination affecting
3 the entire nation. EPA moved past theory and
4 produced final agency action only by analyzing
5 these six small refineries' individualized
6 evidence of their disproportionate economic
7 hardship.

8 Now, to be sure, we think EPA's
9 analysis of those economic factors was wrong on
10 the merits. But the important point for venue
11 purposes is this: Analyzing the evidence of
12 local economic conditions facing small
13 refineries in San Antonio, Texas and Shreveport,
14 Louisiana is a task that Congress assigned to
15 the Fifth Circuit, not the D.C. Circuit.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: But the argument
18 would be: If EPA develops a new rule and
19 applies it to the refineries, that -- that that
20 is a nationwide rule. That -- at least that's
21 how I understand their argument.

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

1 If EPA wanted to promulgate a new
2 analytical framework and centralize review of
3 that framework in the D.C. Circuit --

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

7 MR. HUSTON: Yes, understood. And I
8 think what I'm saying is if EPA wanted to set
9 that new framework for adjudicating small
10 refinery hardship additions, it could use a
11 rule-making to do so.

12 EPA consciously chose not to use its
13 rule-making authority here. It expressly
14 invoked only its adjudication authority. It did
15 so for a very particular reason.

16 This is April and June of 2022. EPA
17 is adjudicating hardship petitions from 2018,
18 '19, and '20. They're retroactively denying
19 petitions submitted three years earlier. It
20 would have been illegal under Black Letter
21 administrative law for EPA to put out a new rule
22 that retroactively denied old hardship
23 petitions.

24 But if they want to do that --

25 JUSTICE THOMAS: Well, they could --

1 EPA, however, could make a determination that's
2 national in scope and effect. Why -- how is
3 that different?

4 MR. HUSTON: So EPA -- I -- I think
5 they could theoretic -- they could make a rule
6 that would say: This is how we interpret the
7 statute. This is how we're going -- what we
8 want future small refineries to demonstrate when
9 they are petitioning for hardship relief.

10 And if they use their rule-making
11 authority, I think that's going to be a
12 nationally applicable action. But that was not
13 the final actions here. EPA said these are
14 adjudications of these hardship petitions.

15 And the -- the right text -- I think
16 the simple way to answer the third prong, the
17 third sentence -- there's been a lot of, you
18 know, talk today about how can we simplify this.
19 Here is the easy answer to how you determine
20 what an action was based on: You look at what
21 the text of the chapter required it to be based
22 on.

23 And here, the text tells you when EPA
24 produces this kind of final action, the denial
25 of a hardship petition, that denial has to be

1 based on a conclusion about whether the refinery
2 is experiencing disproportionate economic
3 hardship.

4 JUSTICE SOTOMAYOR: Counsel, give me
5 meaning to 3. 3 basically says that something
6 that would otherwise be looked at as locally or
7 regularly -- or regionally applicable, it says,
8 notwithstanding that, that there are -- that
9 there are some -- "if the action is based on,"
10 seems to me that you have to give that a
11 difference.

12 Tell me, outside of an announcement of
13 a regulation or a new rule, some action that EPA
14 could take that's local on its face, regional on
15 its face, one application, but could still fit
16 the third exception.

17 MR. HUSTON: So if I might just -- I
18 want to answer your question directly,
19 Justice -- Justice Sotomayor, but before doing
20 so I just want to observe that neither the
21 government -- neither the government nor we have
22 been able to locate any Clean Air Act case
23 that -- where venue has been decided solely on
24 the third prong.

25 So I think this has always been

1 intended to be --

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

4 MR. HUSTON: Understood.

5 JUSTICE SOTOMAYOR: Congress had in
6 mind something. When I try to figure out what
7 Congress has in mind, I look at the -- my --
8 some of my colleagues don't, but I look at the
9 legislative history to tell me what the examples
10 were that they were dealing with.

11 MR. HUSTON: Sure.

12 JUSTICE SOTOMAYOR: And they were
13 dealing with something very similar to this.
14 And then they created the third sentence. So
15 you give me another reason for the third
16 exemption.

17 MR. HUSTON: Justice Sotomayor, so
18 I'm happy -- let's talk directly about what
19 Congress had in mind. As the government --

20 JUSTICE SOTOMAYOR: No. Tell me how
21 you would read it to give it meaning.

22 MR. HUSTON: Sure. I think in a
23 circumstance for a statutory provision like the
24 one that then EPA General Counsel Frick brought
25 to Congress and said this is why we need the

1 third sentence, that was an instance in which
2 the statute authorized EPA to grant individual
3 extensions to individual states, but that was
4 based on a "determination" about the technology
5 that was available throughout the nation.

6 So --

7 JUSTICE JACKSON: Why isn't that
8 indistinguishable from this?

9 MR. HUSTON: Because, Justice
10 Jackson --

11 JUSTICE JACKSON: I mean, the
12 determination here was based on a national
13 survey economic understanding of how these
14 markets work.

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

18 JUSTICE JACKSON: I understand. But
19 it was nationwide in scope. It seems to me to
20 be exactly the same thing that you just read, in
21 terms of the examples that were before Congress
22 as to the reason why the third sentence was
23 needed.

24 So I appreciate your argument about
25 the first sentence, the first statement. It

1 seems quintessentially local. They're making
2 individualized hardship determinations. But in
3 making them in this context, when they are doing
4 the localized analysis, they are applying an
5 evaluation or an assessment that is a nationwide
6 economic analysis.

7 MR. HUSTON: But that was not the
8 basis for their determination at the end of the
9 day. Their determination was that this
10 refinery, each of them individually, you and you
11 and you and you --

12 JUSTICE JACKSON: Right. But then I'm
13 back to Justice Sotomayor's question. If you're
14 defining "determination" as just the answer, do
15 you get it, then you're never going to have a
16 situation in which you have a localized
17 assessment that has a nationwide scope or
18 effect, because you've now eliminated the idea
19 that the reasons being nation -- nationwide
20 count.

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

25 MR. HUSTON: No, Justice -- Justice

1 Jackson, I think it's important to separate what
2 is the action and what determination is it based
3 on.

4 Here, I -- I think the -- I've taken
5 my friends to agree, the relevant action is the
6 denial of the hardship petition that was
7 submitted by the Calumet Shreveport refinery for
8 itself. What was that action based on?

9 Here, the statutory text tells you.
10 It was based on EPA's conclusion that the
11 Calumet Shreveport refinery is not experiencing
12 disproportionate economic --

13 JUSTICE KAVANAUGH: Wouldn't that --

14 MR. HUSTON: -- hardship.

15 JUSTICE KAVANAUGH: -- always be the
16 case -- and this is not meant as a hostile
17 question, but won't that always be the case when
18 a local or regional action is taken affecting
19 the local or regional entities, even though
20 there's a nationwide rule it's applying?

21 In other words, it's always going to
22 be applying a nationwide rule or regulation, as
23 Justice Gorsuch said, to something local. And
24 you're saying when it's being applied, it's no
25 longer based on the -- the nationwide

1 determination. I think that's what you're
2 saying.

3 So it will really have no effect. And
4 maybe that's the answer. And I -- I'm not sure
5 you should shy away. And you've said it's never
6 been applied. Maybe the answer is it's -- it's,
7 you know, inconsistent on its face and it just
8 really has no impact. Is that where we end up?

9 MR. HUSTON: I think it was --

10 JUSTICE KAVANAUGH: And I'm not saying
11 that's where we shouldn't end up, just to be
12 clear.

13 MR. HUSTON: Justice Kavanaugh, I
14 think it was always intended to be a narrow
15 exception to the rule for locally applicable
16 actions, which is they're meant to go to the
17 regional circuits and get review there.

18 There have not been hardly any -- we
19 can't find a single example where a court has
20 adjudicated a Clean Air Act venue dispute and
21 said: This case is locally applicable, but it
22 goes to the D.C. Circuit because of the third
23 sentence.

24 I'm not trying to tell you it's
25 impossible that there could be. And I think

1 that the sentence --

2 JUSTICE KAVANAUGH: But you can't
3 articulate a good example.

4 MR. HUSTON: So --

5 JUSTICE KAVANAUGH: Which maybe it is
6 impossible.

7 MR. HUSTON: So I will give you --

8 JUSTICE KAVANAUGH: Which is fine.

9 MR. HUSTON: I will give you one more
10 that we have thought of that I think comes
11 closer to this and that a court has -- has
12 suggested would get there, which is there was
13 something called the alternative compliance
14 demonstration approach. It's discussed in these
15 papers.

16 It was issued along the -- at the same
17 time as the April and June 2022 denials. And
18 what EPA said is although we're denying these
19 2018 hardship petitions, that was so long ago
20 that to attempt to ask those refineries to
21 retire RINs now would really have a
22 destabilizing effect on the RIN market and the
23 RIN bank.

24 And on that basis, they created an
25 alternative path to compliance for those

1 refineries. That, to me, looks closer to, like,
2 a locally applicable determination. They're
3 telling each refinery what they want them to do,
4 but it's based on a conclusion about the RIN
5 bank overall.

6 JUSTICE KAVANAUGH: Or --

7 JUSTICE KAGAN: But why isn't this
8 case the example here? I mean, you have these
9 individual denials. It is you and you and you
10 and you, but it turns out that all these you and
11 you and you and you's are going to come out the
12 exact same way.

13 And the reason that they're going to
14 come out the exact same way is that
15 notwithstanding all the differences among the
16 you, you, you, and you's, that there are local
17 circumstances, there are local conditions,
18 notwithstanding all of those, EPA has reached
19 two conclusions that are going to drive the
20 analysis in every case, or pretty much every
21 case.

22 And in that circumstance, that seems
23 like a perfect case for a single court to
24 adjudicate the question.

25 MR. HUSTON: Justice Kagan, EPA did

1 not make a determination that drove the
2 analysis. EPA said it, quote, "had an economic
3 theory for how we expect small refineries'
4 operations" --

5 JUSTICE KAGAN: Well, here's a
6 determination. I mean, it's a statutory
7 determination that hardship has to stem from the
8 Renewable Fuel Program. And it's an economic
9 determination that everybody can recover their
10 RIN costs. And that's a totally, like, normal
11 understanding of what the determination -- a
12 determination means.

13 So you have a statutory determination.
14 You have an economic determination. And those
15 determinations, taken together, are going to
16 produce the exact same outcome in every case, no
17 matter what the individual local situations and
18 circumstances are.

19 MR. HUSTON: So, Justice Kagan, I
20 would love an opportunity to talk about both of
21 EPA's purported determinations, but let me go
22 right to the very end of your question. It is
23 not the case, EPA emphatically denied in the
24 lower courts and they deny here, that it was
25 true that those determinations, those -- their

1 statutory interpretation and their economic
2 theory were sufficient to decide the hard --
3 hard -- the hardship petitions.

4 JUSTICE KAGAN: Well, they gave you an
5 opportunity. They gave the -- all the different
6 "you's" an opportunity to rebut what they said.
7 It's very nice that they gave you that. Nobody
8 was able to come up with anything to rebut what
9 they said. Maybe in some crazy circumstance
10 there could have been a rebuttal.

11 But what you basically know about what
12 EPA has done here is that it's going to apply
13 the same way in Ohio and New York and Alabama.
14 And so in that circumstance, you don't want the
15 Sixth Circuit and the Second Circuit and the
16 Eleventh Circuit to be all deciding the same
17 question. You want one court to be deciding the
18 question as to whether the EPA conclusions are
19 correct.

20 MR. HUSTON: Your Honor, I would urge
21 the Court to take a look at the start of page
22 277 in the Joint Appendix, really moving for the
23 next 50 pages. That's 50 pages of analysis that
24 EPA produced just for the six refineries that
25 are before you today, to say nothing of the

1 many, many more refineries that were in this
2 case.

3 The -- the opportunity to rebut the
4 presumption was not just like some pro forma
5 thing that didn't actually mean anything.
6 There's pages and pages and pages -- hundreds of
7 --

8 JUSTICE KAGAN: Was any of that --
9 those pages, were they ever successful --

10 MR. HUSTON: They --

11 JUSTICE KAGAN: -- in rebutting the
12 presumption?

13 MR. HUSTON: No. EPA did -- EPA
14 concluded that it -- after looking at every
15 individual refinery's evidence, that it believed
16 that these refineries were, in fact, passing --

17 JUSTICE KAGAN: I think EPA --

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

19 JUSTICE KAGAN: -- gave you every
20 reason to think that at the start, that this was
21 going to be a super-high bar to rebutting the
22 presumption, that once EPA made this statutory
23 conclusion and this economic conclusion, the
24 game was pretty well done.

25 And so who is it that we should want

1 to address those conclusions that is doing a --
2 a -- you know, if not all the work, almost all
3 the work?

4 MR. HUSTON: Justice Kagan, again, I
5 just -- I really respectfully disagree with the
6 -- your -- your characterization of the fact
7 that there was not meaningful study by EPA of
8 the individual economic evidence submitted by
9 the refineries.

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

23 EPA walks through each of this and
24 they say here's why that doesn't persuade me and
25 this doesn't persuade me and the like. We -- we

1 certainly disagree with them, and on the merits
2 of that --

3 JUSTICE KAGAN: You know what they
4 said? They said this doesn't persuade me.
5 Because they had already decided. Subject to
6 somebody coming up with something super-unusual
7 that they hadn't thought about, they had already
8 decided. And that decision was a uniform one
9 that stretched from one end of this country to
10 the other.

11 MR. HUSTON: Your Honor, I think what
12 they very clearly had was a economic
13 presumption. They said we've got a presumption;
14 we're giving you an opportunity to rebut it.
15 Why are we doing that? Because we have to. The
16 law compels us to give you this opportunity.
17 And we took advantage of it. We submitted
18 voluminous evidence.

19 JUSTICE KAGAN: Thank you.

20 MR. HUSTON: EPA says that it studied
21 that evidence and --

22 JUSTICE BARRETT: Counsel --

23 MR. HUSTON: -- not that it had to be
24 the basis of this.

25 JUSTICE ALITO: I mean, somebody --

1 JUSTICE BARRETT: -- can I ask you a
2 question? We've had a lot of talk about
3 important about how it's important for venue
4 rules to be clear. And given what Justice Kagan
5 just said, you know, EPA made very clear this
6 was going to be apply nationwide and it was
7 fundamentally shifting the way that it treated
8 small refineries.

9 Could you have determined or why
10 couldn't you have determined at the outset of
11 the suit, that the D.C. Circuit was the right
12 venue? Why wouldn't there be clarity when you
13 have that kind of national determination?

14 MR. HUSTON: Well, Your Honor, I mean,
15 I suppose the clearest possible rule would just
16 be that whatever EPA says is the right venue is
17 the right venue. But I don't think that that's
18 the venue rule that this statute requires.

19 JUSTICE BARRETT: I agree with you. I
20 agree with you. But given the existence of this
21 determination on the economic theory and the
22 statutory interpretation -- and -- and maybe the
23 answer is, you know, it wouldn't have been clear
24 to us, but, I mean, given the importance of the
25 clarity of venue rules, I just want to

1 understand why it wouldn't have been clear to
2 you.

3 MR. HUSTON: I think --

4 JUSTICE BARRETT: Maybe it would have
5 and you just didn't want to be in the D.C.
6 Circuit.

7 MR. HUSTON: I think it -- it wouldn't
8 have been clear because if you are Ergon
9 Refining, you're a refinery, one of the
10 Respondents before you located in Vicksburg,
11 Mississippi, and your argument is we produce
12 100 percent diesel fuel, and it's because we
13 only produce diesel that we are economically
14 burdened, that we face disproportionate economic
15 hardship from the RFS, that's an argument that
16 you would naturally think when -- when EPA
17 rejected my evidence, when EPA said to Ergon
18 that doesn't persuade us, Ergon, I think quite
19 rationally, said we want the Fifth Circuit, our
20 home circuit, to have an opportunity to address
21 --

22 JUSTICE SOTOMAYOR: Answer the
23 question.

24 MR. HUSTON: -- the circumstances in
25 our market.

1 JUSTICE SOTOMAYOR: They refused
2 because the EPA is saying to you we have a
3 national rule. It doesn't matter whether you're
4 in Ergon. The national rule is we presume you
5 can. We presume that you can pass the cost on,
6 and we presume that you have to show us hardship
7 that doesn't have to do with your diesel fuel --
8 fuel but has only to do with relying on this reg
9 -- or being forced by this regulation to buy the
10 credits you need to.

11 MR. HUSTON: Your Honor, EPA said we
12 have an economic hypothesis that when we look at
13 your evidence related to your diesel disparity,
14 related if you're Calumet Shreveport, the
15 intense competition --

16 JUSTICE SOTOMAYOR: Let's go back to
17 Justice Barrett's question, which is you knew
18 that they were basing it on two national
19 presumptions. Why doesn't that tell you where
20 to go?

21 MR. HUSTON: Because at the -- we
22 looked to the text of the statute, which said
23 whether --

24 JUSTICE SOTOMAYOR: The text tells you
25 the EPA has some form of discretion or ability

1 -- the EPA has the ability to make a
2 determination that this has a national effect.
3 So you've got a determination that says the EPA
4 believes this has a national effect, one prong
5 of the requirement, and the second is we're
6 basing it on national presumptions.

7 MR. HUSTON: Your Honor --

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

10 MR. HUSTON: What's hard about it is
11 that you're taking refineries that want the
12 opportunity to have their local economic
13 evidence that is their case --

14 JUSTICE SOTOMAYOR: You want --

15 MR. HUSTON: -- for hardship relief.

16 JUSTICE SOTOMAYOR: That -- that's --
17 you're begging the question. I know the EPA
18 wants national. The question is what Congress
19 wanted, not what you wanted or the EPA wanted.
20 The question is what Congress wanted. And I
21 kept asking you at the beginning, given the way
22 they structured this third exempt -- this third
23 category, they are saying that some local
24 actions have to go to the D.C. Circuit.

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

1 JUSTICE SOTOMAYOR: So why isn't the
2 answer that when the EPA makes a determination
3 and says we're basing it on two national
4 presumptions, that clear enough?

5 MR. HUSTON: Two -- two points about
6 that, Your Honor. The first is that it -- it
7 does not suffice, as I think even the government
8 agrees, for EPA to just make and find -- make a
9 finding that an action is based on a
10 determination of nationwide scope or effect.

11 The action has to actually be based on
12 a determination of nationwide scope or effect.
13 That's written directly into the text of Section
14 7607.

15 JUSTICE SOTOMAYOR: Those are the
16 presumptions. Okay.

17 MR. HUSTON: That is --

18 JUSTICE SOTOMAYOR: But what is --

19 MR. HUSTON: That is their
20 presumption --

21 JUSTICE JACKSON: What do you make of
22 that, the fact that Congress specifically says
23 that the administrator has to make that finding?
24 I mean, doesn't that tell us that Congress
25 really cared about what the agency thought in

1 this way?

2 MR. HUSTON: I don't think so, Justice
3 Jackson. What I take that to mean is that EPA
4 has the opportunity to maintain locally
5 applicable actions in the D.C. Circuit.

6 I think the Congress probably foresaw
7 that you get -- once you start talking about
8 what was the basis of the action, was it core or
9 not, is it, according to my friend, new but
10 still insufficiently settled, it gets pretty
11 metaphysical pretty quickly to decide what the
12 basis was of an EPA action.

13 I think what Congress was thinking
14 was: In any EPA action, there's going to be a
15 description by the agency of the interpretation
16 of its statutory authority, the basic framework
17 through which it filters the individual facts.
18 And I think Congress wanted to ensure that the
19 agency has some control to avoid -- to maintain
20 locally applicable actions in their region --

21 JUSTICE KAVANAUGH: That's why I think
22 the --

23 MR. HUSTON: -- where they are
24 supposed to be.

25 JUSTICE KAVANAUGH: That's why I think

1 the deference question is really important. And
2 Mr. Stewart said that the agency -- and Justice
3 Sotomayor is just following up on this -- the
4 agency should get some deference.

5 Should they get any deference, in your
6 view? Or how does that work?

7 MR. HUSTON: So, I -- recall that the
8 text has two requirements in order for the third
9 sentence to be activated. First, the action
10 must be based on a determination of nationwide
11 scope or effect, and if in taking such action
12 the administrator finds and publishes that such
13 action --

14 JUSTICE KAVANAUGH: So if it's found
15 and published --

16 MR. HUSTON: That's --

17 JUSTICE KAVANAUGH: -- does the agency
18 get deference, some deference on the question of
19 whether it is a determination of nationwide
20 scope or effect?

21 MR. HUSTON: So -- so I think with
22 respect to the agency's making of that finding,
23 I think that's textually committed to the
24 agency. So I don't think it's generally subject
25 to -- to -- to judicial review.

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

3 JUSTICE KAVANAUGH: Yeah. On -- on
4 the key part --

5 MR. HUSTON: Yeah, the legal question.
6 Right. Right.

7 JUSTICE KAVANAUGH: You're -- you're
8 talking about the part that's not key. Talk
9 about the key part, which is --

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

11 JUSTICE KAVANAUGH: No deference at
12 all?

13 MR. HUSTON: Absolutely not. It's a
14 legal question for the Court. That set it out
15 as a separate legal requirement. It -- that
16 sentence, that first -- I should -- that first
17 clause --

18 JUSTICE KAVANAUGH: But if that
19 standard -- if we have a set definition of what
20 what's a determination, ordinary administrative
21 law would say when you apply that set standard
22 to a given set of facts, that that gets some
23 deference.

24 MR. HUSTON: But not in a situation,
25 Your Honor, I think where Congress has actually

1 required the legal finding -- excuse me -- the
2 legal issue to be resolved, and then said, in
3 addition, the agency has to make a finding with
4 respect to that.

5 That two --

6 JUSTICE KAVANAUGH: So you're saying
7 the ordinary deference that it would get is
8 taken away by the second sentence -- or the
9 second part of the sentence that requires the
10 publication and finding?

11 MR. HUSTON: That's correct. I think
12 the -- the -- the structure of --

13 JUSTICE KAVANAUGH: That's intriguing.

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

21 Now, that's going to make the third
22 sentence --

23 JUSTICE ALITO: When a venue --

24 MR. HUSTON: -- smaller --

25 JUSTICE ALITO: -- when a venue issue

1 arises, it arises because both parties to the
2 dispute think they would be better off in a
3 particular forum.

4 And isn't it very odd to say that
5 one -- that the court, in deciding whether
6 there's venue in one place or the other, should
7 defer to the view of one of these -- one of
8 these parties who are contesting the right to
9 get home court advantage?

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

19 JUSTICE ALITO: But suppose the EPA's
20 economic theory is that: We think that there
21 will almost always be -- I mean, we think that
22 the small refineries are always going to -- as
23 far as we're aware, they're always going to be
24 able to pass through these costs, but, you know,
25 we're -- we can't say that it's inconceivable

1 that some small refinery could come up with some
2 reason that we haven't been able to think of why
3 they wouldn't be able to do it.

4 You know, it's like saying we really
5 think that -- that no Martian has ever landed
6 here, but, you know, we're not going to say
7 we're going to close our minds to the
8 possibility that somebody could prove it.

9 If that's the situation, then what
10 would your answer be?

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

19 But, notably, the situation that you
20 describe, Your Honor, is very different from how
21 EPA acted here.

22 And, again, I just think take EPA at
23 their word. EPA said: We have an economic
24 theory for how we expect small refineries'
25 operations to be affected. We then analyzed the

1 most current data available to determine whether
2 finished fuels markets move in the way that
3 economic theory predicts.

4 JUSTICE GORSUCH: So, for example,
5 counsel, if -- if EPA had put its economic
6 theory in a rule and promulgated that rule, the
7 challenge to that would have to be in the D.C.
8 Circuit.

9 MR. HUSTON: Almost certainly, yes,
10 Justice Gorsuch.

11 JUSTICE GORSUCH: Yeah. And then its
12 application in later licensing applications, you
13 would be kind of foreclosed on that, but you
14 might have a local challenge otherwise?

15 MR. HUSTON: Yes, I think that's
16 basically right. I think that's how generally
17 administrative law works. An agency --

18 JUSTICE GORSUCH: That's how I
19 remembered it.

20 MR. HUSTON: An agency uses its
21 rule-making authority to pronounce how it
22 understands the statutory framework, how its --
23 and what its adjudicative --

24 JUSTICE SOTOMAYOR: The problem is --

25 JUSTICE GORSUCH: That rule would be

1 maybe locally applicable, but it would be
2 nationwide effect. And -- and so the -- the EPA
3 could sign off on that, and off to the D.C.
4 Circuit.

5 MR. HUSTON: Yes, Your Honor, but it
6 would be an invocation of the agency's
7 rule-making authority.

8 JUSTICE SOTOMAYOR: But the problem is
9 that that's what the third exception says. It
10 says that the -- the court is giving the -- the
11 EPA adjudicatory authority to find -- to -- to
12 find and publish that such an action is based on
13 a determination of nationwide scope and effect.

14 So Justice Gorsuch is talking about
15 what the norm is, but they needn't have created
16 the exemption 3 at all. They could have just
17 stayed to 1 and 2.

18 MR. HUSTON: Your Honor, I think that
19 the purpose of the exception, as we discussed
20 earlier, is for a certain kind of unusual Clean
21 Air Act provision where the text of the chapter
22 directs EPA to make a determination about the
23 whole country.

24 But that's not how this provision of
25 the chapter works.

1 JUSTICE SOTOMAYOR: That's what it's
2 done.

3 JUSTICE GORSUCH: Or it could have a
4 rule, perhaps, that wouldn't be nationwide --
5 nationally applicable, but would be regionally
6 applicable. And perhaps that might wind up --
7 that rule might be reviewed in the D.C. Circuit,
8 or it applies to an industry or whatever.

9 MR. HUSTON: It could -- it --
10 certainly if it applies to the whole industry,
11 it says this is how we're going to regulate
12 stationery sources or power plants, all --
13 wherever they are located throughout the
14 nation --

15 JUSTICE GORSUCH: Even if it isn't all
16 across the nation. It doesn't have to be the
17 whole nation.

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

23 But consider the sort of absurd
24 textual consequence of my friend's position.
25 The Kansas City Metropolitan Air Quality Control

1 Region, when EPA promulgates a regional air
2 quality action for that region, my friends say,
3 well, that's actually a nationally applicable
4 action, it's not a regionally applicable action,
5 because it just happens to touch more than one
6 state and more than one circuit.

7 I think that's just brutally hard to
8 square with the ordinary meanings of the term
9 "nationally" and "regionally."

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

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

1 And here, that leads a very -- that
2 leads to a very simple answer. Because Congress
3 directed EPA, when it takes this kind of action,
4 to base that action on its consideration of a
5 refinery's local economic circumstances.

6 And that's what this refinery --
7 that's what EPA did, according to the agency's
8 own description.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 Justice Sotomayor?

14 Justice Kavanaugh?

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

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

25 MR. HUSTON: It has, Your -- it has,

1 Your Honor. And I would really urge the Court
2 not to, you know -- to breathe -- to breathe
3 enormous life into this third sentence, because
4 I think to do so would very significantly
5 disrupt the balance that has prevailed in the
6 lower courts.

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

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

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

1 solely on the nationwide scope -- determination
2 of nationwide scope or effect? Is that right?

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

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

10 MR. HUSTON: Yes.

11 JUSTICE KAVANAUGH: Okay.

12 MR. HUSTON: Yes, I think that's
13 right. It is -- it has to be -- in order to
14 adjudicate --

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

17 MR. HUSTON: Yes.

18 JUSTICE KAVANAUGH: -- being applied;
19 it's an adjudication.

20 MR. HUSTON: Correct. In an
21 adjudicatory posture, it is almost always going
22 to be the case that the action, a locally
23 applicable action, will be based on the local
24 facts and circumstances of the individual
25 petitioner.

1 That actually makes perfect sense
2 because, remember, the enumerated sections of
3 Section 7607 that Congress assigned as locally
4 applicable, they all have that form. They're
5 all adjudications of local factors. They're not
6 rule-makings unlike the enumerated nationally
7 applicable actions.

8 JUSTICE KAVANAUGH: Exactly. Okay.
9 Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 Justice Jackson?

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

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

1 some things that we are designating as national.
2 Here are some things that we are designating as
3 local.

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

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

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

23 JUSTICE JACKSON: Oh, I understand.
24 But you -- you -- you flip all the way to the
25 other side. You're saying it's never triggered

1 because you are just applying it to the facts of
2 the particular case.

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

6 JUSTICE JACKSON: I understand.

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

8 JUSTICE JACKSON: Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Rebuttal, Mr. Stewart?

12 REBUTTAL ARGUMENT OF MALCOLM L. STEWART
13 ON BEHALF OF THE PETITIONER

14 MR. STEWART: Thank you, Mr. Chief
15 Justice.

16 First, Mr. Huston said that we haven't
17 found a case in which a court of appeals has
18 upheld an EPA prong 3 finding. But I think
19 there are a fair number of cases in the D.C.
20 Circuit in which you have a pattern like this:
21 EPA announces a new framework, it applies the
22 framework to a number of different states or
23 regulated entities, says we regard this as
24 nationally applicable, says we find also that
25 it's based on a determination of nationwide

1 scope or effect, and parties sue in the D.C.
2 Circuit and because there's no dispute about
3 venue, the D.C. Circuit decides the case on the
4 merits without issuing an opinion that addresses
5 the question. I think that's the explanation
6 for why you don't have published decisions that
7 endorse our view of prong 3.

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

16 The next thing I'd say is I think
17 there's an -- an analogy here between prongs 1
18 and 3 and the types of cases this Court decides
19 that is sometimes this Court decides cases that
20 present facial challenges to an act of Congress
21 or a challenge to the validity of a nationwide
22 executive branch program, and the bottom line
23 disposition of the case will have national
24 impacts. But there are also cases that this
25 Court reviews that present purely local

1 disputes, really nobody but the parties cares
2 who wins and loses on the bottom line, but the
3 case presents a legal issue that has divided the
4 court of -- courts of appeals and is being
5 litigated all over the country, and it's
6 important to have centralization. And that's
7 the type of thing that prong 3 is for, the local
8 disputes that present recurring questions of
9 federal law.

10 There was a colloquy about does it
11 make is sense to give deference to the view of
12 an interested party as to where the case should
13 be heard? Well, we know that the Congress
14 wanted EPA to have some role in determining
15 venue because it allowed the EPA to make a prong
16 3 finding or not.

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

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

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

15 (Whereupon, at 11:48 a.m., the case
16 was submitted.)

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