No. 23-1229

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER,

v.

CALUMET SHREVEPORT REFINING, L.L.C., ET AL., RESPONDENTS.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

JENNIFER B. DICKEY
ANDREW R. VARCOE
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

Counsel for Amicus Curiae
(Additional counsel listed inside cover)

ERIC GROTEN
VINSON & ELKINS LLP
200 West 6th St.,
Suite 2500
Austin, TX 78701

GARRETT T. MEISMAN
VINSON & ELKINS LLP
845 Texas Ave.,
Suite 4700
Houston, TX 77002

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Other Authorities:

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has an interest in maintaining efficient and predictable mechanisms for judicial review of federal agency action. An important, frequently recurring, and oft-litigated threshold question in such cases is which court or courts are the proper venue for challenges. All stakeholders—even those whose underlying interests in the merits of a dispute may be diametrically opposed—have a shared interest in having clear and readily administrable rules governing the selection of venue. Unclear and unpredictable venue rules can lead to wasteful and time-consuming threshold litigation about whether venue is proper, increasing the overall cost and uncertainty, and delaying the ultimate resolution, of challenges to agency action.

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

The venue provisions in Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), are significant in their own right, as they specify venue for judicial review of a broad range of actions taken by the Environmental Protection Agency under the Clean Air Act—actions that, individually and in aggregate, can have significant practical and economic consequences for members of the nation's business community. Uncertainty and confusion about the meaning of these important provisions can have materially negative effects—as vividly illustrated by the circumstances and lengthy procedural history of the cases under review and other related litigation.

The Chamber files this brief as *amicus curiae* in support of neither party, taking no position on the Court's ultimate judgment in this case. Instead, the Chamber urges the Court to adopt an interpretation that provides clarity and predictability to all stakeholders, and minimizes or avoids unnecessary and wasteful threshold litigation over the appropriate venue for challenges brought under the Clean Air Act. In the Chamber's view, those interests would be best served by an interpretation of Section 307(b)(1) that is faithful to the ordinary meaning of the statutory text, discerned using the traditional tools of statutory construction.

By contrast, interests in clarity and predictability would be disserved by a reading that allows the government to unilaterally select (or even manipulate) the proper venue through its choice of formalities, such as whether to "bundle" together several individual actions into a single omnibus notice for purposes of publication in the Federal Register. Similarly,

interests in clarity and predictability would be disserved by an interpretation that fails to give meaning and independent significance to each of the separate provisions in Section 307(b)(1), which provide guidance to litigants by drawing a line between cases that can be brought only in the D.C. Circuit and cases for which venue lies exclusively in the appropriate regional circuit. The Court should not endorse a reading that would deprive any portion of Section 307(b)(1) of meaningful independent effect. Such a reading would not comport with the statutory text and would have adverse consequences for members of the nation's business community and for other litigants.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. The nation's businesses, no less than other litigants, benefit from clarity and predictability in rules regarding where and when lawsuits can be brought, including rules regarding the selection of venue in challenges to federal agency action. Litigants avoid spending time and money litigating threshold issues, when it is clear up front which court should adjudicate a particular dispute. Clarity in the articulation of venue principles, in turn, promotes predictability in their application, enabling private parties to make informed business and investment decisions and otherwise order their affairs. In short, certainty, transparency, and predictability regarding where certain types of claims will be litigated yield real-world benefits to litigants and other stakeholders.

By contrast, complexity and uncertainty in the rules governing where a case may be brought consume valuable resources as parties litigate the choice of the

appropriate forum. In the context of litigation challenging federal agency actions, uncertainty regarding venue rules can generate still further inefficiencies, such as the filing and consideration of protective petitions in multiple courts, when the law is unclear as to which court is appropriate, and the preparation and consideration of merits briefs in cases that are ultimately dismissed for improper venue. Meanwhile, resolution of merits issues is delayed, undermining Congress's decision to expedite challenges to certain federal agency actions by (as here) authorizing direct appellate review. Delay in resolving challenges to EPA's actions in administering the Clean Air Act can harm all stakeholders, increasing transition and compliance costs for regulated parties, and extending periods of uncertainty while EPA's actions remain under review.

II. Section 307(b)(1) specifies that EPA's nationally applicable actions will be reviewed in the D.C. Circuit, while regionally or locally applicable actions will be reviewed in the appropriate regional circuit, unless such an action is based on a determination of nationwide scope or effect. Although the Chamber takes no position on the Court's ultimate judgment in this case, and does not attempt to provide a universal taxonomy of the cases that belong in the D.C. Circuit versus regional circuits, this brief offers several interpretative points that would advance interests of clarity and predictability.

First, a key textual distinction in Section 307(b)(1) is whether a given EPA action is "nationally" versus "locally or regionally" applicable. 42 U.S.C. § 7607(b)(1). While hard cases for drawing that line

may exist, the inquiry should remain focused on the *substance* of the actions being taken by EPA, with close attention to the statutory authority pursuant to which EPA has acted. That approach follows from the statutory text, which defines venue for different categories of cases by cross-referencing substantive provisions of the Clean Air Act. Where the substance of an EPA action is specific to a particular region or locality, that action should be reviewed in the appropriate regional circuit. Conversely, when the substance of EPA's action is nationally applicable, the case belongs in the D.C. Circuit.

Second, and relatedly, venue determinations should not turn on formalistic or procedural distinctions that are disconnected from the substance of EPA's action. Such an interpretation would open the door to manipulation, undermining interests in predictability and certainty. It would be improper, therefore, to treat the analysis of venue under Section 307(b)(1) as affected or even determined by whether EPA decides to bundle multiple individual actions into a single notice for publication in the Federal Register, if in fact each individual action pertains to a specific location. Allowing such bundling to affect the venue analysis would increase uncertainty and inefficiency for actions that, in substance, are fundamentally local or regional in nature. And it would disserve interests in predictability, because regulated parties would have no way of knowing in advance whether EPA would combine multiple individual actions (each regional or local in character) into a single publication package.

Third, meaningful effect should be given to each separate part of the venue provisions in Section 307(b)(1). Congress took care to identify and distinguish between classes of cases that are always subject to review in the D.C. Circuit (first sentence), and classes of cases that are presumptively subject to review in the regional circuits (second sentence). And Congress provided a narrow exception to the second sentence, for regional actions that are "based on a determination of nationwide scope or effect" (third sentence). The third sentence should be interpreted in light of that structure and not as a means for overriding the division in the previous two sentences.

III. Applying these principles to the issues before the Court, a few limiting principles become clear. First, EPA has argued under the first sentence of Section 307(b)(1) that it can effectively channel *any* case to the D.C. Circuit by packaging together multiple individual actions. That argument, however, runs afoul of each of the principles discussed above, that interpretation of the venue provisions should focus on the statutory text and the substance of EPA's actions, and that the Court should avoid an interpretation that would fail to give meaningful import to each sentence in the provisions.

Second, an interpretation that makes an action reviewable in the D.C. Circuit under the third sentence of Section 307(b)(1), so long as EPA identifies and applies some underlying "statutory interpretation" or "economic analysis" that applies throughout the country and that functions as even one among potentially many "but-for" causes of the agency's action, would improperly deprive the second sentence of Section

307(b)(1) of much, if not all, meaningful effect. After all, it should almost always be the case that, in adjudicating individual applications, the agency will acknowledge and apply some interpretation of the Clean Air Act or other analytical framework that plays a meaningful causal role in its decisionmaking. More is required to trigger the third sentence of Section 307(b)(1).

Third, consistent with ordinary principles of statutory construction, meaningful effect must be given to each of the separate provisions in Section 307(b)(1)—including the first, second, and third sentences.

However the Court resolves the specific issues presented here, it should strive to adopt a clear interpretation of the venue provisions of Section 307(b)(1) that gives effect to each of their components.

ARGUMENT

I. Members of the Nation's Business Community, Like All Litigants, Benefit from Clear and Predictable Rules Regarding Venue.

This Court favors, and litigants benefit from, "clear boundaries" and "administrative simplicity" when it comes to the interpretation of statutes dictating where a case should be heard. *Direct Mktg. Ass'n* v. *Brohl*, 575 U.S. 1, 11 (2015); *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). As courts and commentators have long recognized, such "clarity generally reduces litigant costs," Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 Va. L. Rev. 1, 8 (2011), by reducing the need for "adjudication that has little to do with the merits," Barry Friedman, *Under the Law of*

Federal Jurisdiction: Allocating Cases Between Federal and State Courts, 104 Colum. L. Rev. 1211, 1225 (2004).

Simple rules "promote greater predictability," which also "is valuable to corporations making business and investment decisions," *Hertz*, 559 U.S. at 94, and "facilitate[s] efficient private bargaining in the shadow of the law," Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 Vand. L. Rev. 509, 522 (2012); see also William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 Marq. L. Rev. 375, 415 (2016) (clear and predictable rules "allow[] individuals and businesses to order their affairs and have rational expectations about where potential disputes could be resolved").

On the other hand, complex tests governing jurisdiction, venue, and other threshold questions "complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Hertz*, 559 U.S. at 94; see also *Navarro Sav. Ass'n* v. *Lee*, 446 U.S. 458, 464 n.13 (1980) (in discussing related question of jurisdiction, emphasizing that "[i]t is of first importance to have a definition * * * [that] will not invite extensive threshold litigation * * * over whether the case is in the right court," which "is essentially a waste of time and resources"). Complex and unclear rules "produce appeals and reversals, [and] encourage gamesmanship." *Hertz*, 559 U.S. at 94; see also *Dodson*, *supra*, at 8 ("[W]hen the court does resolve a jurisdictional issue under clear doctrine, that decision is likely to be accurate, causing fewer appeals and fewer

reversals."). The resources spent litigating such questions "could otherwise be used to expand business, create jobs, and develop new products"; in many contexts, those costs may instead be "passed on to consumers in the form of higher prices." Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004).

In cases such as this one involving challenges to federal agency action, uncertainty over proper venue can spawn unnecessary (and often fruitless) litigation in multiple respects. For instance, although parties may raise objections to venue in preliminary motions, appellate courts regularly carry venue questions with the case, deferring their resolution to the merits panel. See, *e.g.*, Order, *Calumet Shreveport Refin., L.L.C.* v. *EPA*, No. 22-60266, Doc. No. 120 (5th Cir. Oct. 21, 2022); Order, *Hunt Ref. Co.* v. *EPA*, No. 22-11617, Doc. No. 25 (11th Cir. Aug. 31, 2022). As a result, parties must devote considerable time and resources to fully briefing the merits of a case that may ultimately be transferred or dismissed for improper venue, leading to duplication of effort and re-briefing in the new forum. *E.g.*, *Hunt Ref. Co.* v. *EPA*, 90 F.4th 1107, 1113 (11th Cir. 2024). And even where venue is retained, the assigned court is forced to dedicate substantial energy to addressing venue issues. See *Kentucky* v. *EPA*, No. 23-3216, 2024 WL 5001991 (6th Cir. Dec. 6, 2024) (devoting roughly 15 pages of 41-page opinion to Section 307(b)(1) venue issue).

Additionally, to hedge against the risk that a petition for review in one court might be dismissed on venue grounds, parties often "protectively" file cases in

multiple venues, leading to additional expenditures of resources by the courts and parties. See*, e.g.*, *Hunt*, 90 F.4th at 1113 (in case where the petitioner had filed petitions for review in both the Eleventh and D.C. Circuits of EPA denial of small refinery exemption, dismissing on basis that venue was proper in the D.C. Circuit); *Texas* v. *EPA*, 829 F.3d 405, 416 n.12 (5th Cir. 2016) (similar, for EPA disapproval of state implementation plan); *Dalton Trucking, Inc.* v. *EPA*, 808 F.3d 875, 878 (D.C. Cir. 2015) (similar); *Chevron U.S.A. Inc.* v. *EPA*, 45 F.4th 380, 384, 388 (D.C. Cir. 2022) (similar); *Sierra Club* v. *EPA*, 926 F.3d 844, 847 (D.C. Cir. 2019) (similar). This Court encountered such a practice in *National Association of Manufacturers* v. *Department of Defense*, which addressed and resolved confusion over whether a particular EPA decision fell within a statutorily enumerated list of actions that must be reviewed in federal courts of appeals, rather than district courts. 583 U.S. 109, 114 (2018). Due to uncertainty regarding this question, numerous parties had "file[d] 'protective' petitions for review in various Courts of Appeals to preserve their challenges in the event that their District Court lawsuits were dismissed for lack of jurisdiction." *Id.* at 119. Divergent jurisdictional decisions ensued: one court of appeals exercised jurisdiction to stay EPA's rule, while a district court held that it had jurisdiction to review the rule, and other district courts dismissed for lack of jurisdiction. *Ibid.*

While parties and courts work to resolve confusion as to venue questions, the ultimate resolution of the underlying merits is further delayed, with negative practical consequences for regulators, regulated

entities, and other stakeholders. For example, in the Fourth Circuit and Eleventh Circuit litigation involving EPA's disapprovals of West Virginia's and Alabama's plans to address "good neighbor" obligations arising out of the most recent ozone air quality standards, the courts have postponed deciding the cases on the merits pending this Court's resolution of the venue question in cases 23-1067 and 23-1068. Order, *Alabama* v. *EPA*, No. 23-11196, Doc. No. 56 (11th Cir. Oct. 24, 2024); Order, *West Virginia* v. *EPA*, No. 23-1418, Doc. No. 126 (4th Cir. Oct. 21, 2024). In parallel cases in the Fifth and Eighth Circuits, the courts likewise have not yet disposed of petitions for review on the merits, despite having acted on stay motions for those disapprovals more than 18 months ago. See Order, *Arkansas* v. *EPA*, No. 23-1320, Doc. No. 5280996 (8th Cir. May 25, 2023); *Texas* v. *EPA*, No. 23-60069, 2023 WL 7204840 (5th Cir. May 1, 2023).

All of these inefficiencies add up to very real costs for litigants and the courts. The resultant delays are hard to square with Congress's intention to expedite resolution of the challenges by allowing direct review in the courts of appeals. See *Virginia* v. *United States*, 74 F.3d 517, 525 (4th Cir. 1996) (direct appellate review creates a streamlined process for "prompt and conclusive" judicial review of agency actions); accord *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985) (direct appellate review of agency decisions avoids "duplication of the identical task in the district court and in the court of appeals"). And regulated parties will incur higher transition and compliance costs, and all stakeholders will experience extended periods

of uncertainty while EPA's actions remain under review.

These negative consequences can be mitigated, and clarity and predictability improved, by adopting an interpretation of the Clean Air Act's venue rules that adheres faithfully to the statutory text. See Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at xxix (2012) (interpretive approach grounded in the text will typically "provide greater certainty in the law, and hence greater predictability"). That precept is especially true with respect to the interpretation of Section 307(b)(1), where Congress crafted a reticulated and balanced statutory scheme that channels certain kinds of cases to the D.C. Circuit and others to the appropriate regional circuits.

II. This Court Should Interpret Section 307(b)(1) of the Clean Air Act in a Manner that Provides Clear, Predictable, and Administrable Principles for Determining Venue.

Section 307(b)(1) provides a three-part structure for determining which court of appeals must hear a petition for review of a final action by EPA:

- The first sentence of Section 307(b)(1) states that a petition for review of any of an enumerated list of EPA actions, "or any other ***nationally applicable*** regulations promulgated, or final action taken, by [EPA] under this chapter[,] may be filed only in" the U.S. Court of Appeals for the D.C. Circuit.
- The second sentence provides that a petition for review of any of another enumerated list of EPA

actions "or any other final action * * * which is ***locally or regionally applicable*** may be filed only in" the U.S. Court of Appeals "for the appropriate circuit."

- The third sentence creates a limited exception to the second, stating that an action referenced in the second sentence is reviewable only in the D.C. Circuit "if such action is ***based on a determination of nationwide scope or effect*** and if in taking such action the Administrator finds and publishes that such action is based on such a determination."

42 U.S.C. § 7607(b)(1) (emphases added).

Three principles from this text provide a helpful guide for understanding its application in cases like this one.

1. First, decisions about whether a particular EPA action is "nationally applicable," "locally or regionally applicable," or "based on a determination of nationwide scope or effect" should be grounded in the *substance* of the relevant actions EPA is taking. This interpretation aligns with, and follows from, the detailed statutory enumerations of actions reviewable in particular circuits that Congress included here.

The references to specific categories of agency actions in Section 307(b)(1) focus on the substantive nature of, and legal authority underlying, those actions, as indicated by the extensive statutory cross-references to other substantive provisions of the Clean Air Act authorizing EPA to act. For example, the actions that are to be reviewed exclusively by the D.C. Circuit include those that promulgate "any national * * *

ambient air quality standard [NAAQS]," "any emission standard" for hazardous air pollutants under 42 U.S.C. § 7412, and "any standard of performance" for stationary sources of pollutants under 42 U.S.C. § 7411. See 42 U.S.C. § 7607(b)(1). Actions presumptively reviewable in the appropriate regional circuit, by contrast, include "approving or promulgating any [state] implementation plan" under 42 U.S.C. § 7410, any order granting a waiver of performance requirements for a specific emissions source ("with the consent of the Governor of the State in which the source is to be located") under 42 U.S.C. § 7411(j), and any order imposing a noncompliance penalty for a specific emissions source under 42 U.S.C. § 7420. 42 U.S.C. § 7607(b)(1).

The Court can thus infer that, where the statute subsequently refers to "any other nationally applicable * * * final action," "any other final action * * * which is locally or regionally applicable," and "a determination of nationwide scope or effect," Congress was likewise concerned with whether the *substance* of the agency's action has national, local, or regional applicability, or whether the *substance* of the underlying determination has nationwide scope or effect. See *Bissonnette* v. *LePage Bakeries Park St., LLC*, 601 U.S. 246, 252 (2024) (Under the *ejusdem generis* canon, "courts interpret a general or collective term at the end of a list of specific items in light of any common attribute[s] shared by the specific items.") (quotation marks omitted). Under this textual and interpretative approach, the appropriate regional circuit should review an EPA action that makes determinations specific to a particular locality or region.

2. Second, and relatedly, venue selection should not turn on purely formalistic distinctions or factors that are otherwise disconnected from the substance of the agency action in question, such as EPA's decision (or not) to "bundle" individual actions together for purposes of publication in the Federal Register. The enumeration of EPA actions in Section 307(b)(1), as discussed above, looks to the underlying substantive authority being exercised, not the form in which the agency chooses to *publish* one or more of its actions. Indeed, if Congress had wanted to peg reviewability to the form in which EPA published its actions, it could easily have done so.

By tying review to the substance of EPA's action, Congress also avoided opening the venue question to the sort of manipulation that this Court has sought to discourage. *Hertz*, 559 U.S. at 94. And it promoted predictability and certainty for regulated parties, who commonly undertake a great deal of decisionmaking and preparatory work in advance of an EPA order—whether in seeking authorizations, investing in future compliance, or in making other strategic business judgments—some of which may be affected by the expected venue in which a petition for review of the agency's action may be heard. See *Hertz*, 559 U.S. at 94; Nash, *supra*, at 522; Lambert, *supra*, at 415. If the form in which EPA chooses to publish an agency action prevails over the substance of the action in determining venue, the resulting uncertainty would hamper regulated parties' ability to engage in informed decisionmaking.

Indeed, if formalistic characteristics like the "bundling" of actions for publication were dispositive under

Section 307(b)(1), confusion as to the proper venue could linger even *after* EPA issues a notice combining various regionally applicable actions. Assuming for the sake of argument that an EPA action becomes "national" in character merely because it has been published together with numerous other actions that collectively cover different areas of the country, "[w]ould this logic reach an action that covered only California, Maine, and Alabama because they fall in different parts of the country? If not, how many more States are needed?" *Kentucky*, 2024 WL 5001991, at *8.

Channeling cases to the D.C. Circuit for reasons of form rather than substance would pose particular problems whenever the agency concurrently issues a large number of actions that are each locally focused and fact-intensive. The administrative record for any individual agency action can consist of many hundreds or thousands of pages. But where EPA's decision in reality consists of a series of distinct actions, each resting on individualized, fact-bound analysis focused on a particular state or region, the aggregation of all those actions into a single review proceeding before a single court could easily result in an excessively large record and a need for briefs covering a panoply of complex issues specific to each of EPA's actions. Forcing such cases to the D.C. Circuit could place significant strain on judicial resources, as well as deprive the parties of a full opportunity to argue the complex, locality-specific issues that would be more fully vetted in a proceeding in a regional circuit devoted to those issues alone—as Congress intended.

3. Third, meaningful effect must be given to each of the separate provisions in Section 307(b)(1)—

including the first, second, and third sentences. After all, it is a "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Liu* v. *SEC*, 591 U.S. 71, 89 (2020). In applying ordinary principles of statutory construction, this Court has long avoided interpretations that would treat any aspect of Congress's scheme as "meaningless" or having "no consequence." *Ibid.*; *Nielsen* v. *Preap*, 586 U.S. 392, 414 (2019).

Here, Congress divided responsibility for review of EPA's decisions under this scheme between the D.C. Circuit and the regional circuits. This Court should adopt a reading that respects the balance that Congress struck, and does not deprive one provision of the statute of meaningful effect (e.g., the part enumerating cases to be heard "only" in the regional circuits) through an overbroad interpretation of another provision (e.g., the part ensuring that certain actions based on a determination of nationwide scope or effect are reviewed "only" in the D.C. Circuit). The balance struck by Congress accounts for a variety of considerations. For example, Congress presumably knew that regional circuit courts are most likely to be familiar with and well-informed regarding legal and factual issues that affect local and regional interests. These can include principles of state law that often arise in cooperative federalism regimes such as the Clean Air Act, and the mix of legal, economic, social, and other practical considerations affecting major regulatory actions. Cf. *Texas* v. *EPA*, 829 F.3d at 424 (asserting venue over challenges to EPA's disapproval of Texas's and Oklahoma's plans for implementing air visibility standards); *Texas* v. *EPA*, 706 F. App'x 159 (5th Cir.

2017) (same, for EPA's designation of three areas in Texas as not attaining revised air quality standards for sulfur dioxide). And channeling regionally focused EPA actions to the regional circuits avoids disconnecting litigation from the areas where the effects of the agency's action are most acutely and directly felt. So too does siting cases in the regional circuits avoid burdening litigants with the higher travel and logistical costs associated with litigating challenges in D.C. And it avoids potential optical concerns that an agency may enjoy a "hometown advantage" in defending its decisions in Washington, D.C.

By contrast, siting review of truly nationally applicable regulations, and certain determinations of nationwide scope or effect, in the D.C. Circuit avoids the prospect of conflicting decisions from multiple circuits over the same agency actions. Multiple petitions filed in the D.C. Circuit can simply be consolidated, allowing for more efficient review for all—the government, private litigants, and the courts.

In sum, Congress contemplated that both the D.C. Circuit and regional circuits would have a meaningful role. This is not a statute, like some, that centralizes all review in the D.C. Circuit,[2] or that vests regional circuits with exclusive and irrebuttable jurisdiction over an entire category of cases.[3] None of the sentences in Section 307(b)(1)'s venue provisions should be interpreted to undermine Congress's choices in

---

[2] Cf., *e.g.*, 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation, and Liability Act).

[3] Cf. 15 U.S.C. § 717r(d)(1) (Natural Gas Act).

assigning venue for judicial review of different kinds of EPA actions.

III. As Applied in This Case, These Principles Support Adopting an Interpretation that Gives Real and Substantial Effect to the Entire Text of Section 307(b)(1)'s Venue Provisions.

Although the Chamber takes no position on the Court's ultimate judgment in this case, the principles articulated above provide some important guideposts in resolving the specific venue questions presented here. This case concerns EPA's denial of petitions from a number of small oil refineries seeking exemptions from the requirements of the agency's Renewable Fuel Standards program. Pet. I; Pet. App. 48a, 193a.

Among the various arguments advanced in this case, some are difficult to square with the interpretative principles outlined above. In particular, the government argues that its actions were nationally applicable, implicating the first sentence of 307(b)(1), because EPA published two notices that, in aggregate, collectively disapproved 105 exemption petitions from refineries located in multiple judicial circuits across the country. Gov't Br. 19-24 (challenged denial notices "resolved the exemption petitions of more than 30 small refineries located in multiple judicial circuits across the country"); accord Pet. App. 48a, 193a. EPA also argues that its denials were based on determinations of nationwide scope and effect, implicating the exception in the third sentence, because EPA relied on "statutory interpretation and economic analysis" that apply "uniformly to small refineries across the country" and those principles can be understood as one of

the but-for causes of its action. Gov't Br. 30-31, 34-35. But as discussed above, EPA's bundling argument is difficult to reconcile with an interpretative approach that focuses on the *substance* and underlying statutory authority of EPA's actions, rather than distinctions based on administrative convenience or form. See *supra* § II.2.

EPA's interpretation also risks depriving the second sentence of any real and meaningful effect, thereby undermining interests of clarity and predictability. See *Brohl*, 575 U.S. at 11; *Hertz*, 559 U.S. at 94. As the government has articulated its position, there is no apparent constraint on EPA's ability to bundle multiple locally focused decisions into a single rule or order for purposes of publication, as it did here. See Gov't Br. 26-27 (arguing that no provision of the Clean Air Act "restricts EPA's ability to consider petitions together and resolve common issues in a single action"). In fact, EPA appears to believe that it could channel even the types of actions expressly enumerated in the second sentence of Section 307(b)(1) to the D.C. Circuit by issuing multiple such actions together. So if the "bundling" of individual actions transformed local actions into a single, national action, the agency would effectively "have the choice" of which tribunal would hear a case, and it could ensure that virtually none of its actions were reviewed outside the D.C. Circuit. See *Travis* v. *United States*, 364 U.S. 631, 634 (1961).

Similar concerns are implicated by an interpretation under which the third sentence of Section 307(b)(1) would be satisfied whenever the agency articulates or applies a justification or rationale with nationwide importance and that can be understood as

one among the (potentially many) but-for causes of an agency action. To be sure, the sentence does not ask whether the action "is *exclusively* based on" a determination of nationwide scope or effect; it says "is based on." But "is based on" does not mean "comprises" or "involves," either.

Requiring *only* but-for causation would risk neutering the second sentence of the venue provisions. In most circumstances, the agency will rely, in some material respects, on a consistent, generally applicable understanding of the statutes and rules governing its administration of the Clean Air Act. See *West Virginia* v. *EPA*, 90 F.4th 323, 329-330 (4th Cir. 2024) ("[I]f application of a national standard * * * were the controlling factor, there never could be a local or regional action as recognized by the Clean Air Act because every action of the EPA purportedly applies a national standard."); *Chevron*, 45 F.4th at 387 ("[M]any locally or regionally applicable actions may require interpretation of the Clean Air Act's statutory terms, and that kind of interpretive exercise alone does not transform a locally applicable action into a nationally applicable one. * * * [T]hat a challenged action 'applies a broad regulation to a specific context' and 'may set a precedent for future * * * proceedings' does not make it nationally applicable."). And if the requisite causal relationship is present whenever "judicial invalidation of the relevant determination would provide a sufficient basis for finding the final action [arbitrary]," Gov't Br. 35, the theory of but-for causation would be troublingly broad. Cf. *Consol. Edison Co. of N.Y.* v. *FERC*, 823 F.2d 630, 641-642 (D.C. Cir. 1987) (remanding where "agency ha[d] given multiple reasons for a new

policy, some of which are acceptable, some of which are not"). Perhaps for this reason, the government's brief uses language suggesting that certain determinations on which EPA relies for D.C. Circuit venue have a tighter causal relationship to the specific actions under review than would be required by a but-for causation standard. See, *e.g.*, Gov't. Br. 16 (EPA's determinations "were the core rationales" for EPA's actions); *id.* at 31 (quoting *Texas* v. *EPA*, 829 F.3d at 419, for the propositions that the relevant determinations must "lie at the core of the agency action" and cannot be "[m]erely peripheral or extraneous"); *id.* at 35 (EPA's "core determinations played a decisive role in EPA's denial actions" and "were essential to the validity of the challenged denial actions").

The government also suggests that the word "determination" in the third sentence of Section 307(b)(1) "suggests a resolution of an unsettled issue." Gov't Br. 41. So, the government reasons, the Court "may" discern whether EPA's action was "based on" a determination of nationwide scope or effect by "consider[ing] whether EPA announced the rule or policy at roughly the same time as the challenged agency action itself" and whether "circumstances suggest" that rule or policy is likely to be challenged in court. *Id.* at 41-42. This principle could, in theory, provide a useful constraint on EPA's unilateral ability to channel cases to the D.C. Circuit under the third sentence of Section 307(b)(1). However, a standard that asks whether an agency announced a particular rule or policy at "roughly the same time" as the challenged EPA action (Gov't Br. 41) follows at best indirectly from the statutory text. Moreover, EPA's limiting principle may

prove difficult to apply in practice, raising line-drawing problems about whether a given agency action relies on a sufficiently "new" determination of policy or law, given the reality that agencies often build on, extend, or reaffirm prior understandings in applying them to new contexts. Similarly, it will often be difficult for courts to determine at the outset of a case, when venue is typically challenged, whether a particular rule or policy is "likely" to be litigated.

Regardless of which textual theory it ultimately adopts, the Court should not embrace an interpretation of Section 307(b)(1) that would, as a practical matter, perpetuate confusion among regulated parties, effectively give the government unilateral discretion to select venue, or neuter either the regional-review provision or the D.C. Circuit review provisions of the statute.

CONCLUSION

Whatever this Court's ultimate judgment in this case, it should adopt a clear interpretation of Section 307(b)(1), grounded firmly in the statutory text, that promotes predictability and certainty in the selection of venue.

Respectfully submitted.

JENNIFER B. DICKEY
ANDREW R. VARCOE
U.S. CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

ERIC GROTEN
VINSON & ELKINS LLP
200 West 6th St., Suite 2500
Austin, TX 78701

GARRETT MEISMAN
VINSON & ELKINS LLP
845 Texas Ave., Suite 4700
Houston, TX 77002

Counsel for Amicus Curiae

DECEMBER 2024