

OKLAHOMA, ET AL.,
Petitioners, v.
ENVIRONMENTAL
PROTECTION AGENCY,
ET AL., Respondents.
PACIFICORP, ET AL.,
Petitioners, v.) No. 23–
1068

ENVIRONMENTAL
PROTECTION AGENCY,
ET AL., Respondents
Oral Argument – March 25, 2025

John G. Roberts, Jr.

We'll hear argument next in Case 23–1067, Oklahoma versus the
Environmental Protection Agency.

Mr. Mansinghani.

Mithun Mansinghani

Thank you, Mr. Chief Justice, and may it please the Court: EPA actions to
approve or disapprove state implementation plans are the prototypical
action reviewed in the regional circuit.

As I believe Mr. Stewart confirmed in the previous argument, all parties
agree at this point that if EPA had disapproved Oklahoma's and Utah's

plans in separate Federal Register notices, those would be locally applicable actions.

So when it comes to applicability, the only disputed question is whether the disapprovals of these state plans are transformed into a single national action because EPA chose to process and publish them together with the disapprovals of 19 other states. But the text of the Act's venue provision directs the courts to look at the statutory authority under which EPA took its action, not the form of publication.

Here Section 7410 authorizes EPA to take local action, approval or disapproval of state implementation plans.

EPA's position that the form of publication dictates the action's applicability for venue purposes has no basis in the text of the statute and, indeed, is at war with it.

That leaves EPA's backup, that the Oklahoma and Utah disapproval actions must be reviewed in the D.C. Circuit because they are based on a determination of nationwide scope or effect.

That exception, however, only applies to actions where EPA arrives at a generic conclusion that applies uniformly to all states and that forms a dispositive reason for the agency's action, irrespective of local factors.

As Justice Gorsuch's and Kavanaugh's questions earlier today indicate, EPA's reading applying that exception any time EPA articulates a rubric or a standard and then applies it to a local circumstance would mean essentially every local EPA action is one that is based on a nationwide determination.

The Court should reverse the decision below and send this case back to the Tenth Circuit.

I welcome the Court's questions.

Clarence Thomas

You heard the last argument.

How does -- factually, how does your case differ from the refinery case?

Mithun Mansinghani

So one major difference is that state plan approvals and disapprovals are explicitly listed in the locally and regionally applicable part of the statute, in the second sentence of the statute. That's not true of -- of Renewable Fuel Standard exemptions, so that makes this a really easy case for -- for us to say this is locally or regionally applicable.

Sonia Sotomayor

Is the nature of the presumption here different? Meaning there were two, arguably in the first case, nationwide rules, one having to do with focusing just on compliance with legal requirement and the second, the presumption that you couldn't have hardship. Here it -- it -- it's been strange in my mind because you don't actually have to follow the EPA's formula, correct?

Mithun Mansinghani

That's correct.

We don't have to follow their modeling.

We don't have to follow their framework.

And EPA was very clear about that.

So I --

Sonia Sotomayor

Right.

So whatever their framework is, since you don't have to follow it, it's hard to see how it has a nationwide effect, isn't it?

Mithun Mansinghani

That's correct.

It -- it's not even meets their definition of a determination, which is the conclusive ending of a controversy.

If we didn't have to follow their framework, it's hard to see how it's even

Sonia Sotomayor

The only --

Mithun Mansinghani

-- a determination.

Sonia Sotomayor

-- argument that I see that might be different is that 1 percent rule that they have.

And there's at least a bunch of amici who say that, in absolutely every challenge to a SIP, that the 1 percent rule is being fought about. So could one say that that's determinative in the way that's nationwide?

Mithun Mansinghani

So EPA was also clear that with respect to the 1 percent rule, it has, quote, "not imposed a requirement that states use a 1 percent threshold." That's at page 9373 of the final Federal Register notice.

The other problem is that EPA didn't identify that as one of the nationwide determinations when they say --when they were invoking the venue exception.

So you have a Chenery problem there, and you also have a problem that the statute requires EPA to make a publication.

And, of course, this is also a long-standing thing that they've used.

In -- in page 47 of their brief, they -- they acknowledge they've used the 1 percent rule in prior transport orders and --and in EME Homer.

So it doesn't -- it also doesn't meet their test for that reason because, you know, I guess EPA would -- would consider it settled.

When Utah tried to use an alternative as a 1 parts per billion threshold instead of a 1 percent threshold, it gave very Utah-specific reasons for why it thought that a 1 part per billion threshold was more appropriate.

And EPA gave very Utah -specific reasons for why it was rejecting Utah's Utah-specific reasons.

Neil Gorsuch

Counsel, if I might just push back a little bit.

I would have thought that, if anything, the intuitive appeal of the idea that -- that your case involves nationwide determinations would be the stronger one in some ways for EPA, given that we're talking here about clean air obligations of states and the downwind impact of any state on others.

Its good neighbor obligations as the statute calls it.

I mean, gosh, if anything's --if anything is nationwide in impact, it's got to be air pollution because it travels.

Mithun Mansinghani

Well, the whole statute's about air pollution.

But with respect to the good neighbor provision, EPA made clear that interstate ozone transport is a "regional scale pollution problem." You can see that at page 9801 of Oklahoma's proposed disapproval.

Neil Gorsuch

Yeah, but it crosses the country in ways that don't respect our jurisdictional boundaries between circuits.

Mithun Mansinghani

Sure.

And I think, at most, that makes it something that has regional effects.

It's not of regional applicability when EPA disapproves this individual state's plan.

So, for example, Oklahoma's plan was disapproved because it was polluting -- allegedly significantly contributing to Texas non-attainment --

Neil Gorsuch

Well, you --

Mithun Mansinghani

-- and Utah --

Neil Gorsuch

-- got two circuits right there.

Mithun Mansinghani

And -- and for the reasons Mr. Huston gave in the prior case, I don't think their two-circuit rule really is -- is something that --

Neil Gorsuch

Why not? We're going to have different interpretations of the statute with different -- different circuits and all these terrible splits and -- and, gosh, we won't have the immediate resolution of the D.C. Circuit that we could have.

Mithun Mansinghani

Well, respectfully, I don't think splits are all that terrible.

Neil Gorsuch

Oh.

Oh.

Oh. (Laughter.)

Mithun Mansinghani

This Court's --

Neil Gorsuch

Really? We deal with them?

Mithun Mansinghani

This Court's landmark Clean Air Act cases, state implementation plan cases, Train and Union Electric, both arose from circuit splits where different circuits were adjudicating different state plans but it touched on cross-cutting issues such as whether variances could be allowed in a state plan or whether EPA had to consider costs or feasibility, technical feasibility, in approving or disapproving a state plan.

And there's no indication that those circuit splits that led to the -- this Court's landmark decisions in Train and Union Electric were the things that Congress was trying to do away with --

Ketanji Brown Jackson

And, Counsel, I --

Mithun Mansinghani

-- when it enacted the --

Ketanji Brown Jackson

-- I mean, I thought your original point was that the statute itself when -- in section -- sentence 2 talks about what counts as locally or regionally applicable and that should go in the appropriate circuit includes approval of SIPs.

Mithun Mansinghani

That's correct.

Ketanji Brown Jackson

I mean specifically.

Mithun Mansinghani

Specifically if --

Ketanji Brown Jackson

So, regardless of us thinking that air pollution seems national, Congress was putting it in the local or regional bucket.

Mithun Mansinghani

That's -- that's absolutely correct.

Neil Gorsuch

So are you making the argument, then, that -- that the third provision has no application to SIPs? Could never be applied to SIPs?

Mithun Mansinghani

No, Justice Gorsuch, I'm not making that argument.

Neil Gorsuch

Ah.

Ketanji Brown Jackson

You're making the argument that the first doesn't, because we're in the second, locally or regional.

And then we go to the exception, and we have to decide whether or not it's in the D.C. Circuit, but on the basis of the third prong, not the first one?

Mithun Mansinghani

That's correct, Justice Jackson.

So the examples historically that arose prior to the enactment of the exception are both things that relate to SIPs.

They weren't SIP approvals or disapprovals necessarily.

But the NRDC case -- cases from the First and D.C. Circuits that Mr. Stewart mentioned, the -- the First Circuit said it involved an automatic application of standard nationwide guidelines to all plans that simultaneously preordained wholesale extensions of the -- of the attainment deadline.

The Dayton Power case from the Sixth Circuit was the other case that -- that led to -- at least according to the legislation history, the enactment of this exception.

And there, the Sixth Circuit said what was at issue was a uniform rule that had the effect of amending every state's implementation plan in precisely the same way.

Neil Gorsuch

Were these rules?

Mithun Mansinghani

Say that again, Justice?

Neil Gorsuch

Were these rules?

Mithun Mansinghani

They -- it's hard to say that the amendment of a state plan is a rule-making, but it was published in the Federal Register as -- as a rule-making, in -- in perhaps what I would say is a single order.

And -- and it's those types of things where you have a -- a conclusion that applies uniformly to all states, and that forms the dispositive reason for the agency's action that are covered by the exception.

It's not the types of things that led to this -- this Court's cases in Train and Union Electric, where you have an intense mix of very local issues and perhaps some cross-cutting issues that may be true across different states.

Not every state was the 1 percent threshold an issue.

Not every state was the modeling that made the difference between approval or disapproval.

And here, of course, EPA had issued approvals of state plans individually or sometimes in groups.

And there's no indication that I have seen from EPA that there was a reason why its approvals were issued individually, would go to the regional circuit, and its disapprovals would go to -- to the D.C. Circuit.

Ketanji Brown Jackson

Can I ask you about the remedy? So if we agree with you that the court of appeals here was wrong to hold that this was nationally applicable under prong 1, would you say that we should remand it to the Tenth Circuit to apply steps 2 and potentially 3?

Mithun Mansinghani

That would certainly be an option, but not our first preference.

So I think this Court has fully in front of it the issue, and it's fairly encompassed within the question presented as to whether the exception applies.

And I think in elucidating how the exception applies in our case and the Calumet case, it will provide greater guidance to lower courts by -- by showing how it applies in two very different factual scenarios.

Neil Gorsuch

What weight should we give the EPA's determination? I mean, that -- that's -- that's a thing, right? I mean, EPA, you know, wrote the determination. Does that -- is it -- is that owed deference?

Mithun Mansinghani

It is not owed deference to the -- on the question of whether the action's, in fact, based on a nationwide determination of scope and effect.

And remember, this is a venue provision that we're interpreting.

And it's very unusual for this Court to defer to one party or another's choice of venue.

Instead, this Court applies the law de novo.

And so here, the statute, as -- as my friend Mr. Huston says, has two elements.

One, that it is based on a determination of nationwide scope and effect.

That's reviewed de novo.

And, second, that EPA publish a finding along those lines.

And I think that could be reviewed for arbitrary and capriciousness if EPA chose or didn't choose to publish a finding in any given circumstance, but the first thing is viewed -- is reviewed de novo.

Elena Kagan

Suppose that, you know, of these four de terminations -- let's just focus -- suppose that with -- just this one, which dealt with the contribution threshold. And suppose that the contribution threshold that EPA picked was super low.

Like, so instead of 1 percent, it was .01 percent or something like that.

So low that you knew that every SIP was going to get rejected, every state plan.

What would the answer be then?

Mithun Mansinghani

I think there would -- that would present a closer case.

And I think that would get closest to what would be a determination of nationwide effect.

So it wouldn't have nationwide scope because, you know, in theory a state could, possibly, be under that super low threshold, but it might still, nonetheless, be something that's of nationwide effect.

Elena Kagan

I mean, it's a nationwide -- you know, presumably they know what effect this is going to have in every state, in -- in my hypothetical.

So it's -- it seems actually unusual not to say it would be of nationwide scope.

And I'm not suggesting that my hypothetical is at all the same as your case.

I mean, actually, it seems to me that these four nation -- nationwide determinations, that the nature of them is the -- you still -- the agency still has to do a lot of work before deciding whether to issue -- whether to approve any state SIP.

But in my hypothetical, that's not right.

Basically, the nationwide determination is doing all the work.

Mithun Mansinghani

So I'll push back on one thing, Justice Kagan, which is to say that if the screening threshold operates in the same way in your hypothetical as it does in our rule, then, yes, there still has to be a lot of work done.

Because a screening threshold is just that, it screens out what are de minimis contributions and what are contributions that have to be further evaluated to determine whether they are significant.

So even a really low screening threshold would still require a lot of further analysis to determine whether any given state's contributions to another state are --

Elena Kagan

I take that point.

So I guess I was hypothesizing a more simple-minded inquiry --

Mithun Mansinghani

Right.

Elena Kagan

-- where basically this threshold was going to make the difference between approval and not.

And it was set at so low a level that it was clear that no state could meet it.

And then to me, that says: Okay, that should be in the D.C. Circuit.

Like, you don't want 11 circuits deciding whether that's a preposterously low level or not.

Mithun Mansinghani

Yeah.

So if it was an automatic generic conclusion that applied to all states uniformly, you didn't have to really consider whether the state's circumstances, yeah, I think that would get, you know, very close to meeting the exception.

Now, to be very clear, we would think that is very illegal, and the state -- the EPA doesn't have --

Elena Kagan

Yeah, yeah, yeah.

Mithun Mansinghani

-- the ability to set a screening threshold that low and to -- to cabin and state discretion that much.

But yes, a very legal thing could be adjudicated by the D.C.

Circuit as very illegal.

Brett M. Kavanaugh

Do you agree or -- do you disagree with anything Mr. Huston said in the prior argument in terms of the scope of the third sentence or how much effect the third sentence might have in practice?

Mithun Mansinghani

So I think the only gap in our position is that Mr. Huston's position is that the statute alone dictates what the relevant determination is.

And I think my test is a little bit more flexible.

That said, you know, if Mr. Huston's position is correct, I think we still also prevail.

Because in order to disapprove our state plans, EPA would have to conclude that Oklahoma was significantly contributing to another state.

That is the relevant determination.

Brett M. Kavanaugh

Right.

It has to look at the state-specific --

Mithun Mansinghani

That's precisely correct, Justice --

Ketanji Brown Jackson

I perceive Mr. Huston's argument to be substantially different than yours, so maybe I'm not understanding.

I -- I thought you were taking -- you were willing to accept the idea that the third prong allows for a generic conclusion by the EPA that applies uniformly irrespective of factual differences, and that that could be enough.

And I took Mr. Huston to be saying something different than that.

Mithun Mansinghani

So I take Mr. Huston to be saying that that generic conclusion has to be mandated by statute.

I don't -- I don't quite go that far.

Ketanji Brown Jackson

I see.

Mithun Mansinghani

But I think, otherwise, our tests are very similar.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel.

Anything further? Anything further? Thank you.

Mithun Mansinghani

Thank you, Your Honor.

John G. Roberts, Jr.

Mr. Tseytlin.

Misha Tseytlin

Mr. Chief Justice and may it please the Court: The Clean Air Act's venue provision challenge -- channels challenges to national EPA actions to the D.C. Circuit, while channeling challenges to local or regional EPA actions, such as SIP approvals and disapprovals, to the regional circuits.

As you heard this morning, EPA attempts to change this neutral venue rule, which respects cooperative federalism and the expertise of regional circuits, into something very different.

There are three fundamental problems with EPA's approach: First, it is at war with the statutory text, including because it requires, for it to not devolve into everything being in the D.C. Circuit, the creation of multiple non-statutory tests.

Like whether the bundling of multiple actions is a sham, like whether a determination made somewhere in a Federal Register preamble is novel.

Second, it leads to unadministrable, wasteful litigation about where actions should be brought.

We saw this with my -- with some of my friends' answers today about how you have to look at all the comments that were submitted, and I was thinking, for these 21 states, how tall the comment letters would be piling up next to me, that I'd have to read all of them to determine which court that I would need to sue in.

And, finally -- and we haven't heard that much about it today -- it leaves more of an opportunity of significant venue manipulation by EPA that Congress certainly did not envision.

I welcome the Court's questions.

Clarence Thomas

Just as a matter of curiosity, what is the difference between an action that is nationally applicable and one that is nationwide in effect or scope?

Misha Tseytlin

Right.

So whether an action is nationally applicable is based on the statutory authority under which Congress was acting.

So it's approvals or disapprovals under 110(k) that has to be done state by state.

However, hypothetically, there could be a SIP disapproval or SIP approval that hypothetically could have a nationwide effect. The -- the example that we talked about -- it's a completely hypothetical example that we talked about in our reply brief -- is if the state's pollution problem is so significant that it pollutes across the entire nation -- let's say it has that much NO_x emissions and it goes all across the nation -- theoretically, that locally applicable action would have nationwide effect. And so that would be an example where the exception would have a real meaning.

Now, I want to cover this issue of venue manipulation, and it hasn't gotten -- even though we've been here for, like, two hours, that hasn't gotten a lot of airing, and I think it's a very problematic aspect of both EPA's arguments on -- on the first two sentences and on its exception.

EPA essentially says that if it packages separate actions in a single -- in a single Federal Register notice, subject to an ill-defined sham exception, it can always get into the D.C. Circuit.

Further, EPA says that under the exception, if that's not good enough to get them to the D.C. Circuit every time, they can say, well, we can point to any general reasoning, which as Justice Gorsuch pointed out is just non-arbitrary/capricious rule-making under the APA, and say that that sends us to the D.C. Circuit under -- under the -- the third prong.

It -- it is that amount of power for EPA to essentially take local and regionally applicable actions and send them to D.C., send them here, is at war with the Clean Air Act's cooperative federalism regime.

And with regard to SIPs, which are a big part of that, in particular, the whole notion of SIPs, including with transport SIPs, is that those are state-specific.

Those are decisions made by the states, how to control pollution coming from sources in the state.

The venue provision here is just part and parcel of that, that when you have those state-specific decisions, you don't have to go to D.C. to litigate the legality of that.

You get to stay in your own backyard.

And the cases here, the ones that are pending in the lower courts are -- are a stark example of what would happen if you allowed EPA to essentially subvert this regime.

We --

Ketanji Brown Jackson

Can I ask you about your --

Misha Tseytlin

Yes.

Ketanji Brown Jackson

Can I ask you about your view of remand? Would you object if we reversed the decision on the nationally applicable prong and sent it back to the Tenth Circuit for a determination of whether or not there is -- the exception applies here?

Misha Tseytlin

Certainly, I never want to turn down a -- a win, but I would say that one of the arguments made by EPA in opposition to our -- on to our cert petition was that they -- was that that the Tenth Circuit hadn't decided that question.

And our answer in our reply brief wasn't, like, give us a round trip. It was that the issue had been fully briefed, it had been decided in other circuits, and this Court would be fully able to answer it.

We've now been here for -- we've had a lot of pages of briefing, had a lot of oral arguments.

I think that this Court is now in a good position to decide the meaning of that pro -- the meaning of that third sentence and to apply it both in the -- in the Calumet case and in our case here.

And -- and -- and so just to finish -- just to finish my thought, when thinking about what would be the -- the consequence of allowing EPA to -- to jam all these cases into the D.C.

Circuit, we took a look at how many pages in the Sixth Circuit, in the six circuits that are currently taking briefing in these -- in these cases; focused on these specific issues.

And we counted up 300 to pages of just merits briefing that were focusing just on the specific issues, not to say on the background section.

To say that all of this could be jammed into the D.C. Circuit and that these local, intensely local issues, quintessentially local issues would be able to practically get a -- a fair airing is I think -- don't think not realistic and not what Congress envisioned.

And I will say that we do have a different wrinkle in the way we approach the third sentence, which I --

Brett M. Kavanaugh

I thought your point on the venue --

Misha Tseytlin

Yes?

Brett M. Kavanaugh

-- was just convenience, not -- or is there more to it than that?

Misha Tseytlin

Sorry.

Brett M. Kavanaugh

In other words, you want to be able to litigate in your home. You know, it's more convenient to litigate in the -- in the circuit in the -- in the home --

Misha Tseytlin

It -- it's more convenient and it's also --

Brett M. Kavanaugh

Is there anything else to it that your -- is behind -- any other premise behind your comment there?

Misha Tseytlin

Yeah, well, it's -- it's -- I guess it depends how you define the word "convenient." I mean, the -- you get to litigate your issues without being jammed in with folks that want to submit 270 pages of briefing on issues in different parts of the country.

SIPs are quintessentially -- decisional SIPs -- quintessentially local.

You know, we had -- you know, there was -- there was, you know, again, the comment, the --

Brett M. Kavanaugh

Well, the premise there --

Misha Tseytlin

Yeah.

Brett M. Kavanaugh

-- I'm not going to dispute it too much, but --

Misha Tseytlin

Yes.

Brett M. Kavanaugh

-- you know, they -- they get fair attention in both courts.

Misha Tseytlin

It is true that the -- you know, the judges of -- of the D.C. Circuit are excellent judges and work very hard.

(Laughter.)

Misha Tseytlin

But --

Brett M. Kavanaugh

And they're not afraid to rule against EPA pretty routinely either.

Misha Tseytlin

Yeah.

Brett M. Kavanaugh

When justified.

Misha Tseytlin

When -- when justified. (Laughter.)

Misha Tseytlin

But -- but -- but I would also say that, as a practical matter, when you get -- when you get consolidated in the D.C. Circuit, the fight for word count and page count to raise intensively, that is -- I mean, I don't -- those of you who have -- it is fierce to get a couple of pages on these local-specific issues.

You know, these 300 pages, you know, they're -- there are, you know, when I thought our case is being transferred to D.C., thinking about how things that I had 15 pages to say I would now have 2 pages to say or 3 pages to say, that was a daunting thought and certainly not what Congress envisioned when it specifically listed in the second sentence the SIP approvals and disapprovals go to the regional circuits.

Elena Kagan

Mr. Tseytlin, explain to me how, notwithstanding the four determinations, how a SIP approval would vary among states? Like, what -- what -- what would the variations be, notwithstanding that the EPA has made these four nationwide determinations?

Misha Tseytlin

Well, if you're talking about the third sentence, our approach to the -- our --

Elena Kagan

I'm talking about the third sentence.

Misha Tseytlin

Our approach to the third sentence is -- is somewhat different, while it does ultimately lead to the same result as -- as my friends on the states have --

Elena Kagan

But mostly, I'm not talking about any sentence.

I'm actually just talking about, like, your sense of the practicalities of the situation.

You come in with a SIP.

EPA has to approve it.

It has to disapprove it.

They've said these four things which apply uniformly to all their approval/disapproval decisions.

But I'm taking it that you're saying, notwithstanding that they've said those four things, the supposed common denominator actually pales in significance relative to the state-specific circumstances and situations and arguments and so on.

And I think I want a little bit more meat on the bones as to what that would -- what that means.

Misha Tseytlin

Yeah, so, I mean, I will say that those kinds of observations are not really relevant to either one of our -- aspects of our test.

You know, our first test for applicable -- applicability is just --

Elena Kagan

I just want --

Misha Tseytlin

Yeah.

Elena Kagan

-- like, your sense of, like, what happens.

Misha Tseytlin

Okay.

Well, what happens is, for example, on the 1 -- the 1 -- the 1 percent threshold, you know, Utah's and, you know, PacifiCorp was my client there, our submission was that, you know, with regard to states in the west, the -- the 1 percent doesn't make sense.

And we used an example --

Elena Kagan

Not what I'm saying.

Misha Tseytlin

Okay.

Elena Kagan

Suppose we take these four nationwide determinations --

Misha Tseytlin

Mm-hmm.

Elena Kagan

-- and we just assume that the EPA is going to apply them uniformly. Is there still work to be done as to any SIP approval/disapproval decision?

Misha Tseytlin

Yes, of course.

So --

Elena Kagan

So what is -- what is the non-common denominator work that remains to be done?

Misha Tseytlin

The state specific arguments, for example, in Utah.

We made the argument that we are like Arizona, and Arizona a couple years before, EPA had declined to -- to apply the -- the 1 percent threshold, essentially because the down-state pollution there was to California and the mountains were essentially trapping most of the -- most of the pollution there, and so the 1 -- there was so much -- so little import to the contribution that Arizona was making to California that it wouldn't make any sense to apply the 1 percent threshold.

We said we, in Utah, we're -- we're told that we're triggering monitors in the Denver area.

We said look, there's mountains around Denver.

It's trapping it over there. And so treat us like Arizona.

Now, that is a very specific regional-specific thing that, you know, I wouldn't get to argue -- you know, it would get lost in -- in the D.C. Circuit and also it is not one of the four determinations.

It's something very particular.

John G. Roberts, Jr.

Thank you, counsel.

Justice Thomas? Anything further?

Brett M. Kavanaugh

It doesn't get lost.

I'll just say that.

John G. Roberts, Jr.

I'm sorry, Justice Gorsuch? Anything?

Neil Gorsuch

Yeah.

But there are four things, right? I mean, the EPA says they are uncommon to all and wouldn't it be efficient to have those determined in one venue with excellent judges who pay close attention to them.

(Laughter.)

Neil Gorsuch

And then any other regional matters to resolve regionally.

Misha Tseytlin

Well --

Neil Gorsuch

I mean, that would be a good system too, right?

Misha Tseytlin

Certainly that would be a system that Congress could enact.

Neil Gorsuch

Yeah.

Misha Tseytlin

Further --

Neil Gorsuch

Okay, thanks.

Misha Tseytlin

-- further the way that -- you know -- that -- you know --

John G. Roberts, Jr.

Justice Kavanaugh.

Brett M. Kavanaugh

Just to make sure on deference, are you saying no deference to EPA's determination that it's nationwide scope and effect?

Misha Tseytlin

Yeah, my position is the same as Mr. Huston, but I will have one addition -- sorry.

Brett M. Kavanaugh

Yeah.

Go ahead.

Misha Tseytlin

My additional wrinkle is that regardless of whether the Court believes that deference is warranted to -- when EPA applies the proper framework, here there's no deference to the fact that their -- the finding that they made was on the wrong thing.

So if you take a look at the Federal Register notice, the only thing that they're finding as a nationwide determination of a scope and effect is based on the fundamental flaw that applies to the first and second sentence, which is that they think that the -- the action is all 21.

So the fact that they identified the wrong -- the wrong action wouldn't be entitled to deference no matter what.

Brett M. Kavanaugh

I understand that point.

Misha Tseytlin

Yeah.

Brett M. Kavanaugh

Okay.

Thank you.

John G. Roberts, Jr.

Justice Barrett? Justice Jackson?

Ketanji Brown Jackson

Yeah, you said a couple of times that your approach to the third sentence differed, but you never quite got out how so.

Misha Tseytlin

Yeah.

So the sentence, the -- the key sentences, if such an action is based on a determination of scope -- of nationwide scope and effect, we think that the word "of" is ambiguous.

We take the states and maybe EPA to -- to read "of" as, if such an action is based on a determination that has a nationwide scope and effect.

We read that "of" to be, if such an action is based on a determination of that action's nationwide scope and effect.

And I -- I think if -- you know, as this opinion writes, I think if you take a look at that, that is the most administrable rule that can be made for the third sentence.

And it gives it real import, even though it's in a limited number of cases.

Ketanji Brown Jackson

Thank you.

John G. Roberts, Jr.

Thank you, counsel. Mr. Stewart.

Welcome back.

Malcolm L. Stewart

Thank you, Mr. Chief Justice and may it please the Court: Let me just make two or three observations and -- and then take questions.

The first is that there's been colloquy in both of these cases about the propriety of EPA getting deference on a question about what forum the case will be heard in. Under the statute, EPA has some influence on the question of whether the case, all challenges to a particular action will be heard in a centralized forum or whether, instead, they can be brought all throughout the country.

And if EPA chooses the former course, the fact that the cases go to the D.C. Circuit, the fact that the D.C. Circuit is the centralized forum, that's the choice of Congress.

That's not the choice of EPA.

And so it's not the case that EPA can direct challenges to whatever court it wishes.

The second thing I would say, and this goes back to the NRDC cases that I mentioned earlier, that when Congress was studying the venue provision in preparation for the 1977 amendments, it had in mind the SIP approval actions that had taken place and been challenged in many -- in NRDC cases. And when it chose the path that EPA's general counsel recommended, rather than the path that ACUS recommended, it wanted to ensure that there was some mechanism available for review

of national issues, even when they pertained to the approval or disapproval of SIPs.

And, finally, Justice Kagan, you said something to the effect that under EPA's framework here, as opposed to the framework in the case before, even once you got past the 1 percent threshold, the 1 -- the questions about the propriety of the 1 percent de minimis threshold, there was still a lot of work to be done.

And I think the analysis is complicated, but at the end of the day, EPA disapproved 21 plans.

It approved, I think, 23.

I believe that all 23 plans that were approved were approved on the ground that the state fell under the 1 percent de minimis threshold.

So as a practical matter, the determination of whether a particular state exceeded the 1 percent threshold had great predictive effect in terms of whether the plan would be approved or disapproved.

I welcome the Court's questions.

Clarence Thomas

But once you got past the 1 percent thresh -- threshold, which they have in common, the rest of it seems quite particularized.

And how would you deal with that as opposed to the refineries, where we were only talking about a couple of factors?

Malcolm L. Stewart

Well, I would say they do require analysis of particular state circumstances, but they -- they are still national in scope and they still were contested; that is, EPA received comments indicating that challenges to even the subsequent steps of the analysis were not simply going to be we accept these factors, but we think we satisfy them.

They were going to be challenges to the factors themselves.

John G. Roberts, Jr.

There's been talk about the benefit of having a simple and straightforward standard, and I think that's true.

I also think the point Mr. Tseytlin makes is a significant one too, that if you're -- however you want to put it -- more at home in your local circuit and less likely to get lost in the shuffle here in Washington.

And I wondered if you had a response to his concern in that respect.

Malcolm L. Stewart

I -- I mean, I think that just depends -- I mean, part of the awkwardness of the case is, the extent of the statute is the extent to which that is so depends on the extent to which your challenges are to the national criteria that EPA has promulgated or whether they are to the way in which those criteria are applied to your own state-specific circumstances. And the more that the latter is the case, the more it makes sense to be in the regional circuit.

The reason I say it's an awkwardness of the statute is the statute requires that the venue determination be made as of -- at the time that the action is taken, and it doesn't take into account what set of challenges do particular petitions for review choose to make.

And so the best we can do is have a test that tries to use proxies for actions that are -- as to which the national determinations are likely to be the focus of judicial review.

Ketanji Brown Jackson

So the statute does look at the action at the time it's taken.

And sentence 2 very clearly puts these kinds of actions, the SIPs, in the local or regional bucket.

So I guess I'm -- I'm confused as to why the government is even taking the position that the first bucket is applicable here.

Malcolm L. Stewart

I -- I mean, we see the specification of SIP decisions in prong 2 as referring to decisions regarding an -- an individual SIP.

And to the extent that we publish approvals or disapprovals of particular state SIPs on a one -- one-to-one basis, we would agree that those are regionally --

Ketanji Brown Jackson

So you think the statute was really meant to distinguish between 1 and 2 on the basis of the EPA's publishing determinations?

Malcolm L. Stewart

Well, I would say that the statute was meant to distinguish between 1 and 2 on the basis of the action that EPA took. And if -- if you regard the -- what EPA did here as simply a publishing decision, then we would say no, you should probably disregard it.

We -- we think of it as more than that in -- in the same way --

Ketanji Brown Jackson

Are they materially different? If what the EPA did here was separate out -- I mean, I understand.

I see one -- one publication that lists each state separately and has the analysis for each state separately.

If EPA put a page break between each one of the states and published them differently, would you say that's a sentence 2 scenario?

Malcolm L. Stewart

I -- I don't think a page break would be enough, but if EPA issued different -- you know, 21 different Federal Register notices on 21 consecutive days all applying the --

Ketanji Brown Jackson

With the same content --

Malcolm L. Stewart

With -- with --

Ketanji Brown Jackson

-- exactly the same content.

Malcolm L. Stewart

With the same kind of content as to the nationwide part of it, and then each one with a different analysis, how does this content, the nationwide content apply to the particular state involved, then we would say that's a series of discrete state-specific actions.

And in -- in a way the most straightforward way for us to prevail in this case ultimately is on prong 3, because the analysis under prong 3 doesn't depend on what if any weight the court gives to EPA's decision to issue these, all of these in one Federal Register notice.

Ketanji Brown Jackson

So on the thought, the prong 3 determination, what -- what is your view as to why this is still driven? I understand that you have four factors and you're applying the four factors.

And we would hope that that would be the case, that you would be assessing each state consistently using a set of criteria.

But I take your point that that's enough to make it a -- a determination of national scope or application?

Malcolm L. Stewart

Well, I mean, it is partly that they were the four criteria we were going to use.

It was partly that they at least to a degree were new and contested.

We anticipated from comments we received on the proposed disapprovals that the states would contest the methodology, not just its application.

The other thing I would say is all of the states whose plans were disapproved had proposed to take no further ameliorative action with respect to ozone transport beyond what they were already doing.

So it would have been a much more complicated analysis if various states had been planning to improve their plans in -- in different ways and EPA was required to make state-by-state determinations as to is this good enough.

In -- instead, we had -- we approved a lot of plans that -- for states that fell below the 1 percent threshold, disapproved a lot of plans for states that in our view fell above it and that didn't propose to do anything additional.

Neil Gorsuch

So they -- the -- you knew the challenges were going to be to the four factors --

Malcolm L. Stewart

Right.

Neil Gorsuch

-- because the plans in all the states was to do nothing.

And so it had to challenge the -- the factors that you were using?

Malcolm L. Stewart

We -- we anticipated that, and we had confirmation of that from the fact that we had proposed -- had -- had published proposed disapprovals for each of the states and had received comments on --

Neil Gorsuch

Saying as much.

Malcolm L. Stewart

Yes.

Neil Gorsuch

Exactly.

And so, again, as I take it, you -- you're consistent between the two cases in this respect.

You're saying: There are new criteria.

That's what's going to get challenged.

That should go to the D.C. Circuit.

And maybe 10 years later when the criteria are settled, and it really does turn on local factors, then -- then the regional circuits can take over again?

Malcolm L. Stewart

Yes, exactly.

Neil Gorsuch

Yeah.

Ketanji Brown Jackson

But isn't it here how those factors are actually working and the differences in the modeling in each state that is driving the determination? I mean, I think this goes back to Justice Kagan's points earlier that, yes, there -- the factors are new, they are going to be contested, and if those factors had necessarily come out the same way because we didn't really care about the facts of each case in the application, then perhaps it would make sense to have the D.C. Circuit doing it, but if you're applying new factors and it matters that you are Denver versus, you know, Arizona or whatever in terms of how the modeling works, I guess I don't see how this is necessarily the same as the refining -- the refinery determination.

Malcolm L. Stewart

I -- I mean, there's an obvious difference in outcomes in the sense that with the refineries, we ultimately denied all of 105 of the exemption applications; whereas with the various state plans that EPA got, we

disapproved 21 of them and approved 1 -- 23 or plus --plus or minus one or two of that.

So we were approving a little over half the plan submissions.

In that case, it -- it looks as though there's more --and there is -- more state-specific variation in outcome. The two things I would say are a -- a determination can be --a -- a nationwide determination can be central to the analysis and be the focus of judicial scrutiny and be the sort of thing that --for which centralized review is important, even if it doesn't kind of preordain the outcome of a particular matter.

And then the second thing I would say is, with respect to the state-by-state variations here, the big predictor was did you fall above or below the 1 percent threshold.

Ketanji Brown Jackson

I know, but we're in the exception.

I mean, the thing that -- the thing that troubles me about your first point, at least --

Malcolm L. Stewart

Right.

Ketanji Brown Jackson

-- is that we've already determined in the structure of the statute that these are local because we're in prong 3.

And the exception, I would think, would just be identifying the particular circumstances in which, even though we know we have state-specific variation that matters, that's why we're local, we're still going to say no, this is really being driven in a significant way by the -- the national determination.

And so I guess I just don't --it's -- it's hard to for me to square that understanding of the structure of the statute and the fact that we're in an exception with an argument that says yes, but there's a national standard doing some work here.

Malcolm L. Stewart

Well, I mean, obviously the only --the only people who -- who are going to seek judicial review are people who didn't get the result that they want from the agency. And so in -- in the case of SIP disapprovals, the --

– the disappointed parties would predominantly be states, to some extent industry.

And so you -- you would have to -- you would have to ask -- if you were trying to route to the D.C. Circuit the recurring national issues, while leaving local issues to the regional circuits, you -- you'd want to be anticipating as best you can are the people who are disappointed by this decision likely, in the main, to challenge it on the ground that the national framework was no good or, in the main, will they argue that even accepting the national framework, the outcome should have been different in my case? Again, based on the -- both the kind of the nature of the inquiry and the comments we had received on the proposed disapprovals, EPA anticipated that, in the main, the challenges would be to the nationwide aspects.

And although it's not directly relevant to the venue question, that's been borne out in practice.

The people who have challenged these -- the SIP disapprovals in the regional circuits have primarily focused on the nationwide framework, rather than on the site-specific application.

Brett M. Kavanaugh

In your rebuttal in the earlier case, where you said some cases have ended up in the D.C. Circuit without being challenged, the venue being challenged --

Malcolm L. Stewart

Right.

Brett M. Kavanaugh

-- and I think -- that's right, were you referring, though, to the prong 1 cases or prong 3 cases?

Malcolm L. Stewart

I -- I mean, I think in most of these cases, it would -- EPA would identify both in the rule-making as bases for D.C.

Circuit venue.

And so as -- as happened in this Federal -- these Federal Register notices

Brett M. Kavanaugh

So they're both prong 1 and 3.

Malcolm L. Stewart

Both prong 1 and 3.

And because the people sued in the D.C. Circuit and nobody contested venue, it -- it wasn't --

Brett M. Kavanaugh

But the point -- I think the point would be -- is different if it were an exclusively prong 3 situation.

Malcolm L. Stewart

I -- I -- I think that's right although --

Brett M. Kavanaugh

Anyway, that --

Malcolm L. Stewart

I guess my only --

Brett M. Kavanaugh

You get -- you get my point.

Malcolm L. Stewart

Yeah.

And my -- my response to Mr. Huston was just to the effect that the -- the fact that we can't point to published court of appeals opinions that have upheld prong 3 findings by EPA is more a function of those findings not being challenged in prior litigation than it is of we make findings, prong 3 findings, and sometimes they're struck down and -- but they're never upheld.

That -- that hasn't been the case.

We're not aware of any case in which EPA has made a prong 3 finding and a court has disapproved it.

I guess the last thing I wanted to say is I'm be -- I've always bemused in these papers by references to the D.C. Circuit as a hometown court for EPA because if location in D.C. meant that the D.C. Circuit is a hometown court, then this Court would be a hometown court for EPA, and I've never had that perception.

(Laughter.)

Malcolm L. Stewart

Thank you, Mr. Chief Justice.

John G. Roberts, Jr.

Anything further?

Malcolm L. Stewart

Or do --

John G. Roberts, Jr.

Yeah. Anything further? Thank you, counsel.

Malcolm L. Stewart

Thank you.

John G. Roberts, Jr.

Mr. Mansinghani.

Mithun Mansinghani

Thank you, Mr. Chief Justice.

Two quick points.

To Justice Kagan's question about whether the four determinations were sort of the be all/end all here, and it seems like Mr. Stewart seemed to think so with the 1 percent threshold, if you look at Oklahoma's plan, Oklahoma said, look, even -- even though we're above the screening threshold, here's why our contributions are not significantly going to contribute to non-attainment down-wind.

Look at the trends in Oklahoma's emissions due to the specific structure of the Southern Power Pool and to how Oklahoma operates its electric generating fleet.

And look at the dropping ozone levels in down-wind states like Texas, because of mobile source changes.

EPA rejected those rationales, but nonetheless those were state-specific things that ended up controlling the decision.

Similarly with Utah, Utah said based on a weight -- weight-of-the-evidence analysis, we don't think we're significantly contributing because in the west, as EPA had prior determined with states like Arizona and California, the -- the relative contributions are relatively

low. Around 6 to 7 percent are coming from other states, very different from what's happening in the east.

So these were all very state-specific things that EPA had to -- to adjudicate, even after it got past all of those four determinations.

The second thing I wanted to talk about was where we are with the text of the exception.

You know, Mr. Stewart's test has a lot of atextual things to it.

Well, it has to be a determination but a new one, not a -- not an old one.

We have to try to figure out where -- what -- what part of the action litigants are likely to challenge.

Are they likely to challenge the local aspects or the national aspects?

That -- that seems like a very hard-to-adjudicate venue test.

And it's also something that doesn't come from anywhere in the statute.

I think our test comes from the words "based on," which in this Court's Foreign Sovereign Immunities Act decision in *Sachs*, I think takes a similar approach as we do.

It has to be the gravamen -- gravamen or foundation of the action and not just an element.

And in that case, this Court declined to apply the commercial activities exception in a unanimous decision, even though plaintiffs had alleged commercial activities, because the Court said that alleging all of those things alone still entitled plaintiffs to nothing.

But then you also couple that with the fact that I think the third sentence has to be read in conjunction with the first two.

It has to be things like are in the first sentence, like the setting of a national uniform air quality standard or a national uniform standard of performance for sources.

Couple that with the types of cases that we talked about like the NRDC cases and Dayton Power cases and the fact that this is a venue clause, so it shouldn't be manipulable, and the fact that it's an exception, so it shouldn't be read to swallow the rule.

I think all of that leads to -- to our test.

John G. Roberts, Jr.

Thank you, counsel.

The case is submitted.
