

CLEAN AIR ACT VENUE LITIGATION

Internal deliberative pre-decisional - FOR USE BY 2024 PRESIDENT-ELECT TRANSITION TEAM MEMBERS ONLY

ISSUE SUMMARY:

The Supreme Court has granted petitions for writs of *certiorari* to review two decisions reaching contrary conclusions on the meaning of the Clean Air Act's venue provision in 42 U.S.C. § 7607(b)(1):

- *Calumet Shreveport Ref., L.L.C. v. EPA*, 86 F.4th 1121 (5th Cir. 2023) (denying EPA's motion to dismiss or transfer to the D.C. Circuit). EPA filed a petition for *certiorari* on May 20, 2024 (*EPA v. Calumet Shreveport Refining, et al.*, No. 23-1229).
- *State of Oklahoma, et al. v. EPA*, 93 F. 4th 1262 (10th Cir. 2024) (granting EPA's motion to transfer to the D.C. Circuit). State and industry litigants filed petitions for *certiorari* on March 28, 2024 (*Oklahoma, et al. v. EPA, et al.*, No. 23-1067; *Pacificorp, et al. v. EPA, et al.*, No. 23-1068). EPA filed an opposition to these petitions on May 21, 2024.

The question presented in all three cases is whether the challenged actions must be reviewed in the D.C. Circuit or in a regional circuit court under § 7607(b)(1).

UPCOMING MILESTONES:

On October 21, 2024, the Supreme Court granted the state and industry petitions for writs of *certiorari* in *Oklahoma* and consolidated the two cases. Justice Alito took no part in the consideration or decision of these petitions. The Court also granted EPA's petition for a writ of *certiorari* in *Calumet*.

BACKGROUND:

Section 307(b)(1) of the CAA (42 U.S.C. 7607(b)(1)) mandates that challenges to two kinds of final actions under the CAA be heard exclusively in the D.C. Circuit: (1) any "nationally applicable" action, and (2) any "locally or regionally applicable" action that is "based on a determination of nationwide scope or effect" made and published by the Administrator. Challenges to any "locally or regionally applicable" final action *not* based on a determination of nationwide scope or effect must be heard in "the appropriate" regional circuit court.

As explained in EPA's petition for *certiorari*, before *Calumet*, courts had held that an action applicable to multiple states or entities located in different judicial circuits is "nationally applicable." See, e.g., *ATK Launch Systems, Inc. v. EPA*, 651 F.3d 1194 (10th Cir. 2011) and *Southern Ill. Power Coop. v. EPA*, 863 F.3d 666 (7th Cir. 2017). In *Calumet*, however, the Fifth Circuit presented a new legal test for determining venue. *Calumet*, 86 F. 4th at 1131-33 and 1143-46 (Higginbotham, dissenting). *Calumet* involves two EPA actions denying petitions filed by over 30 small refineries in 18 states who had requested exemptions from Clean Air Act requirements concerning the blending of renewable fuels ("Denial Actions"). Six small refineries filed petitions for review in the Fifth Circuit challenging EPA's denial of their exemption requests. A divided Fifth Circuit panel denied EPA's motion to dismiss or transfer the case to the D.C. Circuit, finding the Denial Actions "locally or regionally applicable" because their "legal effect" was limited to the small refineries whose petitions EPA had denied, and rejecting EPA's "nationwide scope or effect" determination. *Id.* EPA's petition for *certiorari* explains how *Calumet* squarely conflicts with a published decision of the Eleventh Circuit, see *Hunt Ref. Co. v.*

EPA, 90 F.4th 1107, 1109-1112 (2024), and with unpublished decisions of four other regional courts of appeals, all of which – in challenges to the same action – found that venue lies exclusively in the D.C. Circuit.

Oklahoma involves an EPA action disapproving SIP submissions from 21 states for failure to satisfy the CAA’s “Good Neighbor” provision (“SIP Disapproval Action”). Oklahoma, Utah, and several industry groups filed petitions for review in the Tenth Circuit challenging EPA’s disapproval as to Oklahoma and Utah. A unanimous Tenth Circuit panel granted EPA’s motion to transfer the challenges to the D.C. Circuit, finding the SIP Disapproval Action “nationally applicable.” As noted in EPA’s opposition to *certiorari*, Oklahoma does not conflict with any other final decision in challenges to the SIP Disapproval Action, as none of the six other regional circuit courts where these challenges are pending has entered a final judgment. Four of these courts have denied EPA’s motions to dismiss or transfer to the D.C. Circuit.

KEY EXTERNAL STAKEHOLDERS:

- ☒ Congress
- ☒ Industry
- ☒ States
- ☐ Tribes
- ☐ Media
- ☒ Other Federal Agency
- ☒ NGO
- ☐ Local Governments
- ☒ Public

MOVING FORWARD: