

# CLEANING UP VENUE: *CHEVRON* DEFERENCE AND THE VENUE PROVISION OF THE CLEAN AIR ACT

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## INTRODUCTION

Section 307(b)(1) of the Clean Air Act specifies that petitions challenging certain agency actions under the Clean Air Act must be filed in the United States Courts of Appeals.<sup>1</sup> That same section contains a complex framework directing petitioners to the appropriate Court of Appeals. Petitions challenging rules of regional or local applicability may only be filed in the “United States Court of Appeals for the appropriate Circuit.”<sup>2</sup> On the other hand, petitions challenging rules that are national in scope or are “based on a determination of nationwide scope or effect” can only be filed in the United States Court of Appeals for the District of Columbia Circuit.<sup>3</sup>

In 2016, the Fifth Circuit addressed an EPA petition to dismiss or transfer venue to the D.C. Circuit under this section in a challenge to an EPA regulation that included a finding that the regulation was based on a determination of nationwide scope or effect.<sup>4</sup> In the course of its decision, the Fifth Circuit refused to defer to EPA’s interpretation of the venue provision and conducted a *de novo* review of EPA’s assertion that the rule at issue was based on a determination of nationwide scope.<sup>5</sup> Meanwhile, in a concurrence to a 2018 decision, Judge Silberman of the D.C. Circuit explained his belief that courts should defer to agencies on this issue in order to assure national uniformity in environmental regulation.<sup>6</sup>

The disagreement between these two courts presents an important issue. The venue problem often leads to substantial side litigation that detracts from the central challenge to the agency rule. And, as the Fifth Circuit decision demonstrates, different outcomes in different circuits concerning the same rule that applies nationwide can create significant uncertainty for the agency. Agency attempts to unify national regulation can present significant and thorny issues around agency non-acquiescence and conflicting rulemakings.

This Note argues that courts should defer to EPA’s based-on findings when faced with motions to transfer venue under the Clean Air Act’s venue provision. Deference is warranted under the well-established *Chevron* framework, and court and litigant resources would be saved by affording deference to the agency. Nevertheless, to avoid

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1. 42 U.S.C. § 7607(b)(1) (2018).

2. *Id.*

3. *Id.*

4. *Texas v. EPA*, 829 F.3d 405, 417 (5th Cir. 2016).

5. *Id.* at 418–24.

6. *Nat’l Env’tl. Dev. Ass’n’s Clean Air Project v. EPA (NEDACAP II)*, 891 F.3d 1041, 1052–53 (D.C. Cir. 2018) (Silberman, J., concurring).

the appearance of forum shopping and the selection of “friendly judges,” EPA should exercise its authority to make the based-on finding sparingly and reserve it for rules that are truly based on a determination of nationwide scope or effect.

Part I of this Note will explore the text and legislative history of the provision in order to determine whether Congress expressed any view on the propriety of deference in challenges to venue. Part II will provide a detailed account of the Fifth Circuit and D.C. Circuit litigations at issue, with a particular focus on the policy rationales each court put forward to support its holding. Part III will argue that Judge Silberman’s approach is correct, as a matter of congressional purpose, general *Chevron* deference principles, and regulatory certainty in nationally uniform regulations.

## I.

### STATUTORY AND LEGISLATIVE BACKGROUND

Section 307(b)(1) of the Clean Air Act is a complex, convoluted statute that “is not a model of statutory clarity.”<sup>7</sup> In fact, section 307(b)(1) has forced agencies and litigants to expend a great deal of resources in addressing venue issues that arise in both rulemaking<sup>8</sup> and litigation.<sup>9</sup> The lack of clarity in the statutory text and the courts’

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7. *Texas*, 829 F.3d at 419.

8. *See, e.g.*, Emissions Monitoring Provisions in State Implementation Plans Required Under the NO<sub>x</sub> SIP Call, 83 Fed. Reg. 48,751, 48,753 (proposed Sept. 27, 2018) (proposing to find that a rule to amend previously promulgated regulations “address[ing] interstate transport of air pollution across the eastern half of the” United States is “‘nationally applicable’ or, in the alternative, is based on a determination of ‘nationwide scope and effect’ within the meaning of section 307(b)(1)’”); Approval of Application Submitted by Eastern Shoshone Tribe and Northern Arapaho Tribe for Treatment in a Similar Manner as a State Under the Clean Air Act, 78 Fed. Reg. 76,829, 76,830 (Dec. 19, 2013) (directing petitioners to file for review of a rule treating two Native American tribes in a similar manner as a state for certain Clean Air Act purposes in the United States Court of Appeals for the Tenth Circuit).

9. *See, e.g.*, *Texas*, 829 F.3d at 417 (considering EPA’s motion to dismiss or transfer based on section 307(b)(1)); *Nebraska v. EPA*, 812 F.3d 662, 669 (8th Cir. 2016) (maintaining petitioners’ challenge in the Sixth Circuit because “EPA did not find and publish a determination that the plan has nationwide scope or effect”); *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 878 (D.C. Cir. 2015) (addressing petitioners’ arguments that venue was not proper in the D.C. Circuit); *Am. Road & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013) (refusing to decide whether EPA’s decision whether to make a based-on finding was reviewable because even under the arbitrary-and-capricious standard EPA’s decision not to make a based-on finding was reasonable); *Alcoa, Inc. v. EPA*, No. 04-1189, 2004 WL 2713116, at \*1 (D.C. Cir. Nov. 24, 2004) (per curiam) (refusing to transfer a case to the Seventh Circuit because the Administrator published a finding that the regulation at issue was based on a determination of nationwide scope or effect); *W. Va. Chamber of Commerce v. Browner*, No. 98-1013, 1998 WL 827315, at \*7 (4th Cir. Dec. 1, 1998)

disagreement over the level of deference owed to EPA's administration of section 307(b)(1) have only contributed to the cost of resources that agencies, litigants, and courts have expended on litigating and deciding appropriate venue.<sup>10</sup> Before delving into the question of whether courts should defer to EPA determinations under section 307(b)(1), it is useful to review the statute's text and legislative history.

### A. *The Statutory Text*

Section 307(b)(1) provides in relevant part:

A petition for review of action of the Administrator in promulgating [rules, standards, or determinations under specific provisions of the Clean Air Act], or *any other nationally applicable regulations* promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any [rules, standards, or determinations under specific provisions of the Clean Air Act], or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) *which is locally or regionally applicable* may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia 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*.<sup>11</sup>

As of the writing of this Note, only the Fifth Circuit and the D.C. Circuit have expressly interpreted the statute's text. The D.C. Circuit has interpreted this provision to determine venue in the following way:

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(transferring to the D.C. Circuit because regulation was nationally applicable, but refusing to consider EPA's argument that the regulation was based on a determination of nationwide scope or effect); *Puerto Rican Cement Co., Inc. v. EPA*, 889 F.2d 292, 300 (1st Cir. 1989) (dismissing for lack of venue because regulation was "based on a determination of nationwide scope or effect"). This list is not exhaustive. The Courts of Appeals have struggled with venue under the Clean Air Act in many other cases.

10. *Compare Texas*, 829 F.3d at 421 (applying de novo review to EPA's determination that venue was only appropriate in the D.C. Circuit) *with NEDACAP II*, 891 F.3d at 1053 (Silberman, J., concurring) (arguing EPA's venue determinations "should be entitled to deference").

11. 42 U.S.C. § 7607(b)(1) (2018) (emphasis added).

- Petitions for review of certain enumerated nationally applicable actions and rules “or any other nationally applicable regulations promulgated, or . . . final action taken . . . may be filed only in the United States Court of Appeals for the District of Columbia.”
- Petitions for review of certain enumerated locally or regionally applicable actions “or any other final action . . . which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit.”
- Petitions for review of “locally or regionally applicable” final actions “may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action [EPA] finds and publishes that such action is based on such a determination.”<sup>12</sup>

The Fifth Circuit has characterized the statutory structure as creating “a default presumption . . . that petitions for review of locally or regionally applicable actions ‘may only be filed in the United States Court of Appeal for the appropriate circuit.’”<sup>13</sup> The court went on to characterize the statute’s language “based on a determination of nationwide scope or effect”<sup>14</sup> as an exception to this general rule, subject to EPA’s following the statutorily required procedures.<sup>15</sup> Those procedures require the EPA to find and publish that the relevant action “is based on a determination of nationwide scope or effect.”<sup>16</sup>

The statute’s text does not, by itself, explicitly address the question whether courts should defer to EPA’s determination that a rule is “nationally applicable” or “based on a determination of nationwide scope and effect.” And here is where the split emerges. According to the Fifth Circuit, allowing EPA to make determinations that a rule is “nationally applicable” would reverse what the court saw as section 307(b)(1)’s presumption that court review of EPA SIP decisions would take place in the regional circuits. Judge Silberman, on the

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12. *Dalton Trucking*, 808 F.3d at 879–80 (quoting 42 U.S.C. § 7607(b)(1)). The Fifth Circuit characterized the provision as “sort[ing] petitions for review . . . into three types”:

- (1) “nationally applicable”;
- (2) “locally or regionally applicable”; or
- (3) locally or regionally applicable but “based on a determination of nationwide scope or effect,” provided that “the Administrator finds and publishes that such action is based on such a determination.”

*Texas v. EPA*, No. 10-60961, 2011 WL 710598, at \*3 (5th Cir. Feb. 24, 2011).

13. *Texas*, 829 F.3d at 419 n.16.

14. 42 U.S.C. § 7607(b)(1). To avoid repetition of this unwieldy statutory language throughout this Note, I will often refer to this provision as the “based-on finding.”

15. *Texas*, 829 F.3d at 419.

16. *Id.* at 420.

other hand, understands this language to be a congressional delegation of “unusual authority to an administrative agency,” justifying deference to the EPA’s published determination.<sup>17</sup> The statutory text does not, by itself, reveal whether Congress intended courts to defer to the authority it delegated to EPA. It is therefore useful to review the statute’s legislative history to shed light on whether Congress intended to delegate the “unusual authority” to EPA to direct challenges to certain EPA regulations to the D.C. Circuit.

### B. *The History of the Clean Air Act Amendments*

Making matters worse, the legislative history of the statute provides *no* guidance on how Congress thought the judiciary should review the EPA finding (or the related question of whether EPA’s decision to make such a finding is reviewable). As this Section will show, Congress tried and failed to amend the statute in 1976. Reform efforts continued under the auspices of the Administrative Conference of the United States, when Professor David Currie laid out several recommended proposals. Congress again tried to amend the statute in 1977, incorporating some but not all of Currie’s proposals. Even though the statute was amended, it failed to explicitly address whether the EPA or the relevant Court of Appeals gets to decide whether or not a rule is “nationally applicable.” As Section I.C goes on to show, the legislative history nevertheless supports the inference that Congress realized that it could not possibly capture all situations in which nationally uniform review of particular regulations might be desirable, and intended to create an administrative schema that permitted the Administrator to exert influence over which types of regulations should be reviewed in which Courts of Appeals.

The first judicial review provision was added to the Clean Air Act by the Clean Air Act Amendments of 1970.<sup>18</sup> As explained below, the provision’s original language spawned a tremendous amount of wasteful and ancillary litigation in all of the nation’s Courts of Appeals.<sup>19</sup> Presumably in response to the courts’ difficult experience with section 307(b)(1), the Administrative Conference of the United States [“ACUS”] studied the issue and made recommendations to Congress to amend section 307(b)(1) in order to provide more clarity

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17. *NEDACAP II*, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring).

18. Clean Air Act Amendments of 1970, Pub. L. No. 91-604, § 12(a), 84 Stat. 1676, 1705, 1708 (codified as amended at 42 U.S.C. § 7607(b)(1) (2018)).

19. See *infra* notes 25–36 and accompanying text.

to EPA, litigants, and the courts.<sup>20</sup> Congress amended section 307(b)(1) in the Clean Air Act Amendments of 1977.<sup>21</sup> Substantively, section 307(b)(1) has remained the same since, with the exception of minor technical amendments as other portions of the Clean Air Act were amended.<sup>22</sup>

### 1. *Clean Air Act Amendments of 1970*

The Clean Air Act's venue provision was added by the Clean Air Act Amendments of 1970.<sup>23</sup> The original language read:

A petition for review of action of the Administrator in promulgating [certain regulations under specific sections of the Clean Air Act] may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating [certain state implementation plans under sections 110 or 111(d) of the Clean Air Act] may be filed only in the United States Court of Appeals for the appropriate circuit.<sup>24</sup>

The original statutory language differed from the current language in three important and relevant ways. First, the first sentence of the subsection did not contain the “nationally applicable” phrase. Second, the second sentence of the subsection did not contain the “locally or regionally applicable” language. Finally, the original statute did not contain the instruction to file challenges to regulations “based on a determination of nationwide scope or effect” in the D.C. Circuit. In effect, then, section 307(b)(1) at the time contained venue rules only for the very specific Administrator actions listed in the subsection. The statute did not provide direction on where to file petitions challenging any other actions of the Administrator.

The first major application of section 307(b)(1) illustrates the problems presented by the provision's confusing structure. In 1972, environmental organizations challenged EPA's grant of a “two-year extension of the statutory deadline for attainment of air quality stan-

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20. See 41 Fed. Reg. 56,767 (Dec. 30, 1976) (codified at 1 C.F.R. § 305.76-4 (1978)); David P. Currie, *Judicial Review Under Federal Pollution Laws*, 62 IOWA L. REV. 1221, 1225 n.37 (1977). Professor Currie's law review article is a reprinting of his report to the ACUS, updated with developments that occurred after the ACUS published its recommendations in the Code of Federal Regulations.

21. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(c)(1)–(4), 91 Stat. 685, 776 (codified as amended at 42 U.S.C. § 7607(b)(1) (2018)).

22. E.g., Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 302(g), 104 Stat. 2399, 2574 (codified as amended at 42 U.S.C. § 7607(d)(1)(D) (2018)); *id.* § 702(c), 104 Stat. at 2681; *id.* § 706, 104 Stat. at 2682.

23. Clean Air Act Amendments of 1970, § 12(a), 84 Stat. at 1708.

24. *Id.*

dards for transportation-related pollutants under 42 U.S.C. § 1857c-5(e)” and EPA’s approval of state air pollution control plans they felt were statutorily inadequate.<sup>25</sup> Because the environmental organizations’ challenge was to EPA’s actions relating to state implementation plans, the 1970 judicial review provision required the petition to be filed in the “appropriate circuit.”<sup>26</sup> The petitioners, however, filed their challenge in the D.C. Circuit.<sup>27</sup>

EPA then moved in the D.C. Circuit for “a declaratory judgment . . . that its decision would apply generally to the Administrator’s decisions as they affected all states.”<sup>28</sup> The D.C. Circuit denied the petitioners’ motions.<sup>29</sup> In order to avoid blowing section 307(b)’s statute of limitations at the time,<sup>30</sup> the petitioners then filed petitions in every single circuit court in the country.<sup>31</sup> The petitioners then asked each circuit to transfer the respective petition to the D.C. Circuit, in order to avoid duplicative litigation.<sup>32</sup> Five circuit courts transferred their petitions to the D.C. Circuit, and five others “stayed proceedings pending the outcome in the” D.C. Circuit.<sup>33</sup>

Only two of the circuit courts—the First Circuit and the D.C. Circuit—published opinions relating to the environmental organizations’ transfer requests. The First Circuit agreed with the environmental petitioners that the D.C. Circuit was the “appropriate circuit,”<sup>34</sup> and the D.C. Circuit affirmed that it was the “appropriate circuit” to decide all petitions transferred to it.<sup>35</sup>

Courts’ first experience with the judicial review provision of the Clean Air Act thus provides an excellent illustration of the issues caused by Congress’s inartful drafting of the Clean Air Act’s original judicial review provision. The statute specified where specific challenges should be filed according only to the specific statutory provisions the challenged regulations were promulgated under. This

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25. *Nat. Res. Def. Council, Inc. v. EPA (NRDC I)*, 465 F.2d 492, 493 (1st Cir. 1972) (per curiam).

26. Clean Air Act Amendments of 1970, § 12(a), 84 Stat. at 1705, 1708.

27. *See Nat. Res. Def. Council, Inc. v. EPA (NRDC II)*, 475 F.2d 968, 969 (D.C. Cir. 1973) (per curiam).

28. *NRDC I*, 465 F.2d at 493.

29. *Id.*

30. 42 U.S.C. § 1857h-5(b)(1) (Supp. IV 1974) (“Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action, or after such date if such petition is based solely on grounds arising after such 30th day.”).

31. *NRDC I*, 465 F.2d at 493; *see Currie, supra* note 20, at 1263.

32. *Currie, supra* note 20, at 1263.

33. *Id.* at 1263 & n.293.

34. *NRDC I*, 465 F.2d at 495.

35. *NRDC II*, 475 F.2d 968, 969–70 (D.C. Cir. 1973) (per curiam).



structure failed to take into account the possibility that such regulations might affect the country as a whole, or at least affect multiple states within different circuits, leaving litigants and courts with a great deal of uncertainty regarding where their challenges could or should be filed. That uncertainty, in turn, affected litigants' substantive rights. Failing to file their petitions in every circuit court in the country before the extremely short statute of limitations arrived, despite the indisputable inefficiency of this approach, would have left litigants without a chance to challenge EPA's actions in court.<sup>36</sup>

## 2. *Clean Air Act Amendments of 1976*

Congress first considered a major set of amendments to the Clean Air Act in 1976.<sup>37</sup> The bill originated in the House of Representatives and was referred to the Committee on Interstate and Foreign Commerce.<sup>38</sup> Sections 305(c)(1) through (c)(3)(C) of the version of House Bill 10498, which was reported out of committee in October 1975, amended section 307(b)(1) of the Clean Air Act Amendments of 1970 to include the “nationally applicable,” “locally or regionally applicable,” and “based on a determination of nationwide scope or effect” language as it exists in the Clean Air Act today.<sup>39</sup> That language was not changed when the bill passed the House in May 1976.<sup>40</sup>

The Committee Report accompanying the bill discussed the changes section 305 made to administrative procedures and standards of judicial review.<sup>41</sup> But the report did not even acknowledge the amendments' changes to the venue provision.<sup>42</sup> Needless to say, the Report also did not discuss the rationale behind the relevant language or the House's view on judicial review of the EPA determination.<sup>43</sup> The Senate version of the bill that was reported out of the Committee on Public Works did not contain any comparable amendment to sec-

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36. That result would have been especially problematic in this case. The D.C. Circuit ultimately agreed with the environmental organizations that EPA violated the statute's clear terms in granting the two-year extension for the implementation plans at issue. *Id.* at 970–72.

37. *See generally* H.R. 10498, 94th Cong. (as reported by H. Comm. on Interstate & Foreign Commerce, Oct. 31, 1975).

38. *See id.*

39. *See id.* § 305(c)(1)–(3)(C).

40. *Compare id. with* H.R. 10498, 94th Cong. § 305(d)(3)(C) (as passed by House, May 15, 1976). Although the section numbering changed, the relevant language stayed the same.

41. *See* H.R. REP. NO. 94-1175, at 259–64 (1976).

42. *See id.*

43. *See id.*

tion 307(b)(1).<sup>44</sup> The version of the bill that passed the Senate likewise did not amend section 307(b)(1).<sup>45</sup>

The Conference Committee could not reach agreement on the amendments to the Senate bill proposed by the House.<sup>46</sup> Instead, the Committee recommended to their respective Houses “[t]hat the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment” as provided in the reconciled version of Senate Bill 3219.<sup>47</sup> The version of the bill reported out of conference *did* contain amendments to section 307(b)(1), but the language was not identical to that of the House bill.<sup>48</sup> The relevant language in the reconciled bill would have added the language “any nationally applicable regulations promulgated under the authority of amendments made by the Clean Air Act Amendments of 1976” to the first sentence of section 307(b)(1), making challenges to nationally applicable regulations reviewable only in the D.C. Circuit.<sup>49</sup> The reconciled bill also would have the phrase “regulations promulgated under the authority of amendments made by the Clean Air Act of 1976 which are locally or regionally applicable” to the second sentence of section 307(b)(1), making challenges to locally or regionally applicable regulations reviewable only in the “appropriate circuit.”<sup>50</sup> But the reconciled bill *would not* have added the language making challenges to regulations with the Administrator’s based-on finding reviewable only in the D.C. Circuit.<sup>51</sup>

The Conference Report contained no explanation as to why the reconciled bill retained versions of the “nationally applicable” and “locally and regionally applicable” language, while it scrapped the “based on a determination of nationwide scope or effect” language.<sup>52</sup> Strangely enough, the Conference Report did explain the House bill’s amendments to the rest of section 307, namely its changes to the re-

44. *See generally* S. 3219, 94th Cong. (as reported by S. Comm. on Pub. Works, Mar. 29, 1976). The bill would have added a new subsection (d) to section 307, providing for costs and attorney’s fees for parties that prevail against EPA or the United States in Clean Air Act litigation. *Id.* § 35.

45. *See generally* S. 3219, 94th Cong. (as passed by Senate Aug. 5, 1976). Because these bills did not amend section 307(b)(1), the Senate reports accompanying these bills did not address section 307’s venue provision.

46. H.R. REP. NO. 94-1742, at 1 (1976) (Conf. Rep.).

47. *Id.*

48. *Compare* S. 3219, 94th Cong., § 304(c)(1)–(2) (as reported by Conf. Comm., Sept. 30, 1976) *with* H.R. 10498, 94th Cong., § 305(d)(3)(C) (as passed by House, May 15, 1976).

49. S. 3219 § 304(c)(1).

50. *Id.* § 304(c)(2).

51. *See generally* S. 3219.

52. *See generally* H.R. REP. NO. 94-1742 (1976).

quirements for the administrative record and hearings and its changes to the standards of judicial review.<sup>53</sup> But it did not include the House bill's amendments to section 307(b)(1), and it did not include an explanation of the reconciled bill's amendments to section 307(b)(1). Instead, the Report simply stated that the Senate bill contained "[n]o comparable provision" and, inexplicably, that the Conference agreement contained "[n]o comparable provision."

Ultimately, the Conference Committee's attempt to save the Clean Air Act Amendments of 1976 was unsuccessful. The conference report was defeated by a filibuster by Senator Jake Garn of Utah.<sup>54</sup> Because the legislative session ended that day, the bill was defeated and Congress was left to address the amendments to the Clean Air Act in the next session.<sup>55</sup>

### 3. *Administrative Conference of the United States Recommendations*

Meanwhile, in December 1976, the ACUS<sup>56</sup> convened a plenary session to consider recommendations to Congress to "amend[ ] . . . the judicial review provisions of the Clean Air Act and Federal Water Pollution Control Act."<sup>57</sup> Professor David Currie submitted a report to ACUS containing his analysis of the problems created by the Clean Air Act's 1970 judicial review provisions and his recommendations to Congress to clean up the statute's language.<sup>58</sup>

According to Professor Currie's analysis, the venue provision's language as it existed prior to 1977 was "intolerably vague[ and] len[t] itself to useless threshold litigation over four conflicting interpretations" of the phrase "appropriate circuit."<sup>59</sup> Professor Currie identified

53. *Id.* at 124–25.

54. *Clean Air Amendments Die at Session's Close*, CQ ALMANAC 1976, at 128 (32d ed. 1977) [<https://perma.cc/2WJ4-7TJ>].

55. *Id.*

56. The ACUS "was established . . . to study the efficiency, adequacy and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and to make recommendations for improvement to administrative agencies, collectively or individually, to the President, Congress, and the Judicial Conference of the United States." Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,767, 56,767 (Dec. 30, 1976) (citing 5 U.S.C. § 574(1) (Supp. II 1966)).

57. *Id.* (codified at 1 C.F.R. § 305.76-4 (1978)). Recommendations of the ACUS are no longer published in the Code of Federal Regulations. See *Recommendations of the Administrative Conference of the United States*, FSU C. L., <https://fall.law.fsu.edu/admin/acus/acustoc.html> (last visited Jun. 4, 2020).

58. See Currie, *supra* note 20, at 1225 n.37 (1977).

59. *Id.* at 1268. In Professor Currie's view the courts could interpret "appropriate circuit" to 1) "require an ad hoc determination of the most appropriate forum in [each]

as a possible solution “[a] bill recently passed by the House [that] would provide for exclusive District of Columbia review of implementation-plan approval ‘if such action is based on a determination of nationwide scope or effect and if the Administrator finds and publishes that such action is based on such a determination.’”<sup>60</sup>

Although he recognized the House bill as a potential solution, Professor Currie criticized its approach because it left intact “the vague reference to the ‘appropriate’ circuit” when EPA does not make the finding.<sup>61</sup> To Professor Currie, this would 1) continue to “spawn additional litigation” about the “appropriate circuit” under certain circumstances; 2) require D.C. Circuit review for “all national issues” even when the challenged regulation did not implicate multiple states; 3) split certain cases in two if they present both regional and national issues; and 4) “burden the D.C. Circuit with issues local to another circuit.”<sup>62</sup> Importantly, Professor Currie further criticized the amendment for leaving open the question of “the extent judicial review of the EPA’s certification is to be allowed.”<sup>63</sup> Professor Currie recommended that “[i]f such a provision is enacted, it should at least make clear that issues that are not national in scope are to be reviewed in the circuit containing the state whose plan is at issue, [and] that the EPA’s certification is not reviewable.”<sup>64</sup>

#### 4. *Clean Air Act Amendments of 1977.*

Although Congress failed to pass the Clean Air Act Amendments of 1976, it did pass the Clean Air Act Amendments of 1977. The “nationally applicable,” “regionally applicable,” and “based on a determination of nationwide scope or effect” language originated with House Bill 6161 and did not change through the reconciliation process. This

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case”; 2) “refer all issues of ‘national’ concern to the District of Columbia Circuit”; 3) “hold analogous venue statutes incorporated in section 307”; or 4) “read ‘appropriate’ as a euphemism for ‘local.’” *Id.*; see *id.* at 1263–67. Professor Currie found significant problems with each of these approaches. See *id.* at 1268.

60. *Id.* at 1268 (citing H.R. 10498, 94th Cong., 2d Sess., § 305(c)(4) (1976)).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1268–69. Professor Currie noted that his general preference for “divergent views on questions of national import” caused him “to recommend codification of the Senate Committee position that all questions respecting implementation plans are reviewable in the circuit containing the state whose plan is challenged, relying on the transfer power to alleviate undue multiplicity of litigation in extreme cases such as *NRDC [I]*.” *Id.* at 1269.

language was added when the Clean Air Act Amendments of 1977 were signed into law.<sup>65</sup>

The Clean Air Act Amendments of 1977 began with House Bill 6161. Interestingly, the Committee on Interstate and Foreign Commerce drafted the venue amendments using the language from House Bill 10498 rather than the language from the reconciled version of Senate Bill 3219.<sup>66</sup> The Committee reported the bill to the full House favorably. In its report, the Committee explained that one purpose of the amendments was “to establish uniform bases and procedures for standard setting under the act.”<sup>67</sup> The Committee explained that the “nationally applicable” language was added to “make[ ] it clear that any nationally applicable regulations promulgated by the Administrator under the Clean Air Act could be reviewed only in the U.S. Court of Appeals for the District of Columbia.”<sup>68</sup> The “locally or regionally applicable” language was added to “provide[ ] for essentially locally, statewide, or regionally applicable rules or orders to be reviewed in the U.S. court of appeals for the circuit in which such locality, State, or region is located.”<sup>69</sup> The Committee also found, however, that “if any action of the Administrator is found by him to be based on a determination of nationwide scope or effect (including a determination which has scope or effect *beyond a single judicial circuit*), then exclusive venue for review is in the U.S. Court of Appeals for the District of Columbia.”<sup>70</sup> Neither the bill nor the House Committee’s report explained whether or how the judiciary should review the EPA determination.

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65. Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 305(c)(1)–(4), 91 Stat. 685, 776 (codified as amended at 42 U.S.C. § 7607(b)(1) (2018)).

66. See H.R. 6161, 95th Cong., § 305(c)(1)–(4) (as reported by H. Comm. on Interstate & Foreign Commerce, May 12, 1977).

67. H.R. REP. NO. 95-294, at 2 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1079.

68. *Id.* at 323. For example, the Committee believed “regulations to carry out the nonattainment policy referred to in section 117 of” the Clean Air Act Amendments of 1977 would be “nationally applicable” regulations within the meaning of section 307(b)(1). *Id.*

69. *Id.* The Committee believed “the [A]dministrator’s action in approving or promulgating an implementation plan for any State” would count as a “locally or regionally applicable” regulation. *Id.* at 323–24. Importantly, the Committee understood that the Administrator’s finding that a regulation was based on a determination of nationwide scope or effect would trump the local or regional character of a rule approving or promulgating a state implementation plan. *Id.* (“This provision applies, except as otherwise provided in [Clean Air Act Amendments of 1977 § 305(c)(4)], to the administrator’s action in approving or promulgating an implementation plan for any State.”).

70. *Id.* at 324 (emphasis added).

As explained above, the ACUS recommendation grew out of Professor Currie's report to the conference.<sup>71</sup> The ACUS recommendation with which the House Committee concurred was contained in item A of the ACUS report. Item A contained four suggestions, two relating to the Federal Water Pollution Control Act and two relating to the Clean Air Act. The Clean Air Act recommendations were to 1) "amend section 307(b) of the Clean Air Act . . . to make explicit that the Administrator's action in approving or promulgating state implementation plans is reviewable in the circuit containing the state whose plan is challenged" and 2) make clear in the amendments that the Courts of Appeals had power to transfer petitions to more appropriate circuits in order to avoid duplicative litigation.<sup>72</sup>

The House Committee explained that it adopted the "nationally applicable" language because it approved of "the portion of the Administrative Conference of the United States recommendation . . . that deals with venue."<sup>73</sup> The Committee was also in agreement, however, with "item No. 1 of the separate statement of G. William Frick, which accompanied the Administrative Conference's views."<sup>74</sup> G. William Frick was General Counsel to EPA at the time the ACUS recommendations were drafted and while Congress was drafting and debating the Clean Air Act Amendments of 1977.<sup>75</sup> In his separate statement, Frick argued that Congress should make it clear that any nationally

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71. See *supra* text accompanying note 58.

72. Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,767, 56,768 (Dec. 30, 1976). The recommendations the Committee did not consider concerned whether certain types of challenges should be filed in the district courts or courts of appeals and notice requirements for "non-statutory review action[s]." See H.R. REP. NO. 95-294, at 324; 41 Fed. Reg. at 56,768. The Committee explicitly rejected recommendations to permit challenges to the validity of regulations during enforcement proceedings and late-filed petitions if petitioners could show reasonable grounds for failing to file before the deadline. See H.R. REP. NO. 95-294, at 324; 41 Fed. Reg. at 56,768.

Note that none of the recommendations in the ACUS report incorporated Professor Currie's suggestion to clarify the scope of judicial review with respect to the Administrator's "nationwide scope or effect" determination. The ACUS does not explain its failure to address this recommendation. Professor Currie's report referred to House Bill 10498, which passed in October of 1976, well before the ACUS convened in December. It is true that neither the Committee nor the House paid much attention to section 307's venue provisions, but Professor Currie purposefully addressed this amendment in his report. See *supra* notes 20, 63 & 64 and accompanying text.

73. H.R. REP. NO. 95-294, at 324.

74. *Id.* The Committee stressed that it did not consider items B and C of the ACUS's recommendation, and it explicitly rejected recommendations in items D1 and D3 of the report. *Id.*

75. See *Current and Former EPA General Counsels*, U.S. EPA, <https://www.epa.gov/history/current-and-former-epa-general-counsels> (last updated Nov. 26, 2018) [<https://perma.cc/XCN2-5GEN>].

applicable regulation should be reviewed only in the D.C. Circuit, even if the regulation was an action approving or promulgating a state implementation plan.<sup>76</sup> Frick recognized that although state implementation plans often involved local or regional issues, the Administrator's actions in approving or promulgating state implementation plans could affect multiple regions or the nation as a whole.<sup>77</sup>

Notably, none of the ACUS recommendations or Frick's separate statement suggested that Congress should provide for D.C. Circuit review when the Administrator finds that a regulation was based on a determination of nationwide scope or effect, but that language still made it into the statute. The House Conference Report did not explain where that provision came from or discuss the amendments to section 307(b)(1)'s judicial review provision at all.<sup>78</sup> The Senate Committee Report did not discuss the venue selection provisions of section 307 either.<sup>79</sup>

The Clean Air Act Amendments of 1977 were passed by Congress and signed by President Richard Nixon.

### C. *Lessons from the Legislative History*

The legislative history of section 307(b)(1) provides little guidance on how much discretion EPA retains in determining whether a regulation is based on a determination of nationwide scope or effect. The history provides no guidance at all on how Congress thought the judiciary should review the EPA finding (or the related question of whether the EPA's decision to make such a finding is reviewable<sup>80</sup>).

The lack of attention Congress paid to the section 307(b)(1) amendments should come as no surprise. The Clean Air Act Amendments of 1977 were the first massive overhaul of the incredibly complex set of environmental protections Congress passed in 1970. The Amendments added substantial, complex, and controversial environ-

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76. Recommendations of the Administrative Conference of the United States, 41 Fed. Reg. 56,767, 56,768 (Dec. 30, 1976).

77. *Id.* at 56,768–69. Frick cited *NRDC II*, 475 F.2d 968 (D.C. Cir. 1973) (per curiam), in support of his argument.

78. *See generally* H.R. REP. NO. 95-564, at 177–78 (1977) (conference report) (discussing amendments to section 307 but not discussing the venue amendments). The Conference Report *does* discuss amendments to section 307 regarding administrative procedures in EPA rulemaking, specifically the content of the record, requirements for hearings, and standards of judicial review. *See id.* at 177–78. That section of the Conference Report does not discuss the venue provisions of section 307 at all. *See id.*

79. *See generally* S. REP. NO. 95-127 (1977).

80. *See Am. Road & Transp. Builders Ass'n v. EPA*, 705 F.3d 453, 456 (D.C. Cir. 2013).

mental programs to the Act<sup>81</sup> and even made several important substantive changes to the rest of section 307.<sup>82</sup> It is understandable that Congress would devote relatively little attention to the changes it was making to the Act's venue provisions.

However, there are some indications of Congressional intent in the record. It is clear, for example, that the Committee agreed with the ACUS that the venue statute as it existed was unacceptable. Every single version of the House bill from 1976 through 1977 amended section 307(b)(1) in exactly the same way, with the sole exception of the failed attempt at reconciliation at the end of the 94th Congress. Moreover, the Committee expressly agreed with the recommendations of Frick and the ACUS to provide a mechanism by which specific actions of the Administrator were reviewable in specific courts while allowing for exceptions under certain circumstances. Those exceptions included review of agency action that implicated as few as two states in two different circuits.<sup>83</sup> In other words, it is clear that Congress desired national uniformity in the resolution of challenges to certain regulations, while ensuring the D.C. Circuit was not burdened with reviewing regulations that were truly regional in scope.

Finally, as noted above, there is no evidence of where the language to amend the third sentence of section 307(b)(1) came from. That language did not appear in the ACUS recommendations or in Frick's separate statement. It has been present in every version of the House bill since it was first introduced as the Clean Air Act Amendments of 1976.<sup>84</sup> A reasonable inference to draw from this history is that Congress realized that it could not possibly capture all situations in which nationally uniform review of particular regulations might be desirable. Congress therefore came up, on its own, with a scheme that permitted the Administrator to exert influence over which types of

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81. These new programs include the prevention of significant deterioration (PSD) program and new regulations governing pollutant emissions from motor vehicles. *See generally* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, §§ 127, 201, 91 Stat. 685, 731-42, 751-53 (codified as amended at 42 U.S.C. §§ 7470-7479, 7521 (2018)).

82. *See id.* § 305(a), 91 Stat. at 772. These amendments instituted new requirements to the Clean Air Act's original standards for informal rulemaking. For example, section 305(a) required certain material to be included in the administrative record when the agency engaged in informal rulemaking. The same section also required hearings for certain agency actions and listed requirements for the procedures of those hearings. These administrative changes were relatively controversial and garnered a good deal of attention from both industry interest groups and environmental organizations.

83. *See supra* note 70 and accompanying text.

84. Again, with the sole exception of the failed reconciled bill at the end of the 94th Congress.



regulations should be reviewed in which Courts of Appeals. After all, the Administrator's decision works in two ways: a finding that a regulation is based on a determination of nationwide scope or effect directs challenges to that regulation to the D.C. Circuit, but a refusal to make that finding directs the petition to the regional circuit.<sup>85</sup>

That said, some judges famously do not care for legislative history.<sup>86</sup> Even for those who do find value in legislative history, the scant history of the amendments to section 307(b)(1) does not provide much evidence to answer the question at issue: did Congress intend for courts to defer to EPA's finding that a regulation is based on a determination of nationwide scope or effect? It is worth turning to how courts have actually grappled with this issue.

## II.

### LITIGATION BACKGROUND

Normally, at this point in the analysis, a Court would consider whether or not to apply *Chevron* deference. Surprisingly, however, neither the Fifth Circuit nor Judge Silberman in his concurrence explicitly engaged in *Chevron* analysis. Both opinions appear to rest on policy-driven outcomes and the desirability of court deference to agency regulations rather than analyzing the question under *Chevron* Step Zero.

#### A. *The Fifth Circuit*

The Fifth Circuit was the first, and so far only, court to consider whether to defer to the EPA's finding.<sup>87</sup> The Clean Air Act requires states to adopt state implementation plans (SIPs) according to certain EPA guidelines to improve visibility in federal lands identified by EPA.<sup>88</sup> The Administrator must then review each SIP and approve, disapprove, or order a revision of the SIP.<sup>89</sup> If a state fails to adequately revise or promulgate a new plan within two years following the Administrator's disapproval or revision order, the Administrator must promulgate a federal implementation plan (FIP).<sup>90</sup>

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85. See, e.g., *Am. Road & Transp. Builders Ass'n*, 705 F.3d at 456 (transferring to the Ninth Circuit in part because EPA refused to make the finding).

86. ROBERT A. KATZMANN, *JUDGING STATUTES* 39–47 (2014) (discussing the textualist critique of the purposivist use of legislative history in statutory interpretation and the textualists' impact on statutory interpretation in general).

87. *Texas v. EPA*, 829 F.3d 405 (5th Cir. 2016).

88. *Id.* at 412; see 42 U.S.C. §§ 7491(a)(2), (b)(1)–(2) (2018); 40 C.F.R. §§ 51.308, 81.400–81.437 (1981).

89. 42 U.S.C. § 7410(a)(3)(B) (2018).

90. *Id.* § 7410(c).

In *Texas v. EPA*, Texas and regulated entities challenged a FIP promulgated by EPA after it determined that Texas and Oklahoma's SIPs, which were designed to reduce haze in the region, failed to conform to certain EPA requirements.<sup>91</sup> Before the Fifth Circuit could rule on the merits, EPA filed a motion to dismiss the petition or transfer it to the D.C. Circuit under the venue provision of the Clean Air Act.<sup>92</sup>

In both the proposed and final rules disapproving Texas and Oklahoma's revised SIPs and promulgating a FIP in their stead, EPA found that its "action on the Texas and Oklahoma regional haze SIPs, which includes the promulgation of a partial FIP for each state, is based on a determination of nationwide scope and effect."<sup>93</sup> EPA justified its finding principally on two grounds: 1) because the rule involved an agency "interpretation of multiple provisions of the Regional Haze Rule," which was "applicable to all states, not just Texas and Oklahoma"; and 2) because the rule's scope and effect "extends to two judicial circuits"—the Fifth Circuit for the Texas portion of the rule and the Tenth Circuit for the Oklahoma portion.<sup>94</sup>

EPA argued to the Fifth Circuit that its finding was essentially unreviewable. According to EPA, the court's role was limited to determining whether the finding was actually made and whether the EPA published that finding with the rule.<sup>95</sup> EPA argued in the alternative that the court should "review whether [EPA's] finding is arbitrary or capricious" under the *Chevron* framework.<sup>96</sup> The state and industry petitioners challenging the rule argued that the Fifth Circuit's review is *de novo* "because the inquiry governs the powers of the court rather than those of the agency."<sup>97</sup>

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91. *Texas*, 829 F.3d at 414–17.

92. *Id.* at 417 (citing 42 U.S.C. § 7607(b)(1)).

93. Approval and Promulgation of Implementation Plans; Texas and Oklahoma, 81 Fed. Reg. 296, 346 (Jan. 5, 2016); Approval and Promulgation of Implementation Plans; Texas and Oklahoma, 79 Fed. Reg. 74,818, 74,888 (Dec. 16, 2014) (proposed rule); see *Texas*, 829 F.3d at 421 n.23.

94. Approval and Promulgation of Implementation Plans; Texas and Oklahoma, 79 Fed. Reg. at 74,888.

95. *Texas*, 829 F.3d at 420. EPA also argued that if any court may decide whether an action actually was based on a determination of nationwide scope and effect, only the D.C. Circuit may conduct that review. *Id.* at 420 n.18. The Fifth Circuit dispensed with that argument in a footnote, holding that the "argument is unsupported by any statutory text and is directly contrary to the familiar maxim that '[w]hen judicial review depends on a particular fact or legal conclusion, then a court may determine whether that condition exists.'" *Id.* (quoting *Okoro v. INS*, 125 F.3d 920, 925 n.10 (5th Cir. 1997)).

96. *Id.* at 421.

97. *Id.*

The Fifth Circuit sided with the petitioners. The court began its analysis by asserting that it does not “defer to the agency’s interpretation when determining venue.”<sup>98</sup> The court rejected EPA’s argument that its finding was unreviewable, holding that no “part of § 7607(b)(1) giv[es] it such exclusive authority.”<sup>99</sup> The court also held that EPA could not establish under *Heckler v. Chaney* that Congress gave the agency unreviewable authority by the terms of the statute.<sup>100</sup> Instead, the Court held, “the statute provides a clean metric by which a court can assess the scope or effect of the relevant determinations. The reviewing court merely asks whether the scope or effect of the determinations is nationwide.”<sup>101</sup>

The court also rejected EPA’s alternative argument that its finding could only be reviewed under the APA’s arbitrary and capricious standard.<sup>102</sup>

Because the answer to [whether EPA’s action was based on a determination of nationwide scope or effect] controls the role of the court, we are persuaded that we must make an independent assessment of the scope of the determinations just as we make an independent assessment of the applicability of the action.<sup>103</sup>

The court, therefore, held it must review de novo the Administrator’s finding that the rule was based on a determination of nationwide scope or effect. The court concluded that the final rule was based “on a number of intensely factual determinations . . . [that] all related to the particularities of the emissions sources in Texas and the confluence of factors impacting visibility at two locations in Texas and one in Southwest Oklahoma.”<sup>104</sup> It thus found that EPA’s based-on finding was inappropriate.

The court then explained why it would reject the finding as unreasonable under the arbitrary and capricious standard anyway. The court rejected EPA’s contention that the challenge belonged in the D.C. Circuit because the rule affected states in two different regional circuit courts.<sup>105</sup> The court reasoned that EPA’s explanation “improperly focuse[d] on the nature of the rule as a whole and not on the

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98. *Id.* at 417–18 (citing *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 927–28 (6th Cir. 2014)). For a criticism of both this holding and the court’s reliance on the *Smith* case, see *infra* Section III.B.1.

99. *Texas*, 829 F.3d at 420.

100. *Id.* at 420 n.19.

101. *Id.* at 420.

102. *Id.* at 421.

103. *Id.*

104. *Id.* (footnotes omitted).

105. *Id.* at 422.

determinations on which the Final Rule is based,”<sup>106</sup> and besides, EPA had taken a different approach to rules affecting states in different circuits in the past.<sup>107</sup> EPA’s failure to explain its different approach was fatal to its argument for transferring the petition to the D.C. Circuit.

EPA also argued that its interpretation of the Regional Haze Rule in the final rule would guide how it evaluated all other states’ visibility SIPs in the future.<sup>108</sup> The Court rejected this argument for three reasons. First, because all SIP decisions are informed to a certain extent by SIP decisions from other states, this argument would reverse what the court saw as section 307(b)(1)’s presumption that court review of EPA SIP decisions would take place in the regional circuits.<sup>109</sup> Second, this argument was undermined by past EPA practice of allowing for flexibility in determinations about different states’ SIP plans.<sup>110</sup> Finally, because EPA issued the final rule at the very end of the 2008 to 2018 round of SIP determinations, it would have little to no effect on how EPA evaluated any other SIPs in the future.<sup>111</sup>

The court, therefore, held that the final rule was actually locally or regionally applicable, despite EPA’s finding that it was based on a determination of nationwide scope or effect.<sup>112</sup> The court went on to grant the petitioners’ motion for a stay of the final rule because “[p]etitioners have demonstrated a strong likelihood of success in es-

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106. *Id.* The Court also rejected EPA’s reliance on the legislative history of section 307(b)(1). EPA had pointed the court to the House committee report that accompanied House Bill 6161 out of committee. *Id.* at 422 n.27 (ruling that it would “not consider passing commentary in the legislative history . . . when the statutory text itself yields a single meaning” (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989))); *see supra* note 70 and accompanying text.

The court believed that, if anything, the House report actually supported its ruling that the petition should remain in the Fifth Circuit. *Texas*, 829 F.3d at 422 n.27 (“The House Report from which EPA extracted its passing reference explicitly adopted the views expressed by the Administrative Conference of the United States, which observed that ‘available transfer provisions’ could prevent any ‘undue duplication of proceedings.’” (quoting *Recommendations of the Administrative Conference of the United States*, 41 Fed. Reg. 56,767 (Dec. 30, 1976))). That explanation is puzzling though. The court ignored the fact that the ACUS recommendations only related to the “nationally applicable” language of section 307(b)(1), and it failed to recognize that the based-on finding was added by Congress outside of the ACUS recommendations. The court’s explanation also ignores the committee’s adoption of Frick’s separate statement, which focused on channeling nationally applicable regulations to the D.C. Circuit. *See supra* notes 72–79 and accompanying text.

107. *Texas*, 829 F.3d at 423.

108. *Id.*

109. *Id.*

110. *Id.* at 423–24.

111. *Id.* at 424.

112. *Id.*

tablishing that EPA acted arbitrarily, capriciously, and in excess of its statutory authority when it disapproved the Texas and Oklahoma implementation plans and imposed a federal implementation plan.”<sup>113</sup>

### B. *The D.C. Circuit*

Judge Laurence Silberman of the D.C. Circuit is the only other judge to consider whether or how courts should defer to EPA’s determination under the Clean Air Act’s venue provision.<sup>114</sup> In Judge Silberman’s view, EPA could avoid expensive and time-consuming side litigation by making a based-on finding, which the courts should defer to.<sup>115</sup> But in order to understand Judge Silberman’s point of view, it is essential to understand the history of the litigation leading up to his opinion.

#### 1. *The Rule at Issue*

In 2012, the Sixth Circuit issued its decision in *Summit Petroleum Corp. v. EPA*.<sup>116</sup> In that case, the petitioner challenged an EPA interpretation of its own regulation that allowed it to aggregate multiple smaller sources into a single stationary source if three conditions were met.<sup>117</sup> The challenged interpretation held that the rule’s “physical requirement of adjacency can be established through mere functional relatedness” (rather than through physical proximity) for purposes of EPA’s regulation of existing stationary sources under Title V of the Clean Air Act.<sup>118</sup> EPA aggregated the petitioner’s multiple smaller stationary sources into a single stationary source, thus qualifying it as a major source for regulation under Title V.<sup>119</sup> The court held that EPA’s interpretation of adjacent was contrary to the plain meaning of the word<sup>120</sup> and vacated and remanded the rule for the agency to reconsider its classification of the petitioner’s sources in light of the unambiguous meaning of adjacent.<sup>121</sup>

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113. *Id.* at 435–36.

114. *See NEDACAP II*, 891 F.3d 1041, 1052–54 (D.C. Cir. 2018) (Silberman, J., concurring).

115. *See id.* at 1052–53.

116. 690 F.3d 733 (6th Cir. 2012).

117. *Id.* at 737 (citing 40 C.F.R. § 71.2).

118. *Id.* at 735. The rule at issue is important to both EPA and the regulated industry, because EPA may only regulate stationary sources that are “major source[s]” of air pollution. *Id.* at 736 (quoting 42 U.S.C. § 7661a(a)). EPA regulations allow it to regulate polluting activities from multiple smaller sources if those smaller sources can be aggregated under certain circumstances. *Id.* at 737.

119. *Id.* at 737–40.

120. *Id.* at 741–44.

121. *Id.* at 751.

*Summit Petroleum* by itself did not implicate section 307(b)(1)'s venue provision. But the case, "which started this whole donnybrook,"<sup>122</sup> led to a flurry of agency activity that culminated in the D.C. Circuit's decision and Judge Silberman's concurrence in *NEDACAP II*.

In response to the Sixth Circuit's denial of its rehearing petition, "the Director of EPA's Office of Air Quality and Standards wrote a directive to the Regional Air Directors of each of the ten EPA regions 'to explain the applicability of the decision by the [Sixth] Circuit Court of Appeals.'"<sup>123</sup> The directive explained that EPA would continue to consider "functional relatedness" when making Title V aggregation decisions outside of the Sixth Circuit.<sup>124</sup> EPA would use the Sixth Circuit's definition of "adjacent" when making Title V aggregation decisions only within the geographical boundaries of that circuit.<sup>125</sup>

Industry petitioners challenged the directive as a violation of the Clean Air Act and EPA's own regulations.<sup>126</sup> Specifically, they argued that the directive violated numerous EPA regulations requiring regional offices to ensure uniform application of other EPA rules.<sup>127</sup> EPA responded that section 307(b)(1)'s venue provision "contemplates divergence between circuits and, thus, permits the agency to apply varied standards in different circuits."<sup>128</sup> The court refused to decide whether the agency, in general, could invoke the intercircuit nonacquiescence doctrine in this way because EPA's own regulations unambiguously required the adoption of uniform EPA rules.<sup>129</sup> The court, therefore, vacated the directive.<sup>130</sup>

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122. *NEDACAP II*, 891 F.3d 1041, 1053 (D.C. Cir. 2018) (Silberman, J., concurring).

123. *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA (NEDACAP I)*, 752 F.3d 999, 1003 (D.C. Cir. 2014).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1009 (citing 40 C.F.R. § 56.3(a)–(b), 56.5(a)(2)).

128. *Id.* at 1010. To make this argument, EPA "invoke[d] the doctrine of intercircuit nonacquiescence," *id.*, by which "an agency is entitled to maintain its independent assessment of the dictates of the statutes and regulations it is charged with administering, in the hope that the other circuits, the Supreme Court, or Congress will ultimately uphold the agency's position," *id.* (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J., dissenting)).

129. *Id.* at 1011 ("We need not determine whether the [Clean Air Act] allows EPA to adopt different standards in different circuits. Since EPA's regulations preclude the . . . [d]irective by requiring uniformity, there is no need for us to address whether the Act does.").

130. *Id.*

## 2. NEDACAP II

“Almost immediately after the decision in *NEDACAP I* was issued,” EPA began the rulemaking process to amend the regulations the D.C. Circuit found to conflict with the directive.<sup>131</sup> The amended regulations

make it clear that “only the decisions of the U.S. Supreme Court and decisions of the U.S. Court of Appeals for the D.C. Circuit Court that arise from challenges to ‘nationally applicable regulations . . . or final action,’ as discussed in Clean Air Act section 307(b) . . . , shall apply uniformly.”<sup>132</sup>

The amended regulations further provide that

[t]he Administrator shall not be required to issue new mechanisms or revise existing mechanisms . . . to address the inconsistent application of any rule, regulation, or policy that may arise in response to the limited jurisdiction of either a federal circuit court decision arising from challenges to “locally or regionally applicable” actions, as provided in Clean Air Act section 307(b) . . . , or a federal district court decision.<sup>133</sup>

In *NEDACAP II*, the D.C. Circuit upheld the amended regulation in the face of a challenge by industry petitioners.<sup>134</sup> In the court’s view, “the Amended Regulations reflect permissible and sensible solutions to issues emanating from intercircuit conflicts and agency nonacquiescence.”<sup>135</sup> In an *Irons* footnote, the panel overruled the parts of *NEDACAP I* that were inconsistent with the opinion so that *NEDACAP II* now constitutes the law of the circuit.<sup>136</sup>

## 3. A Simpler Way

Judge Silberman concurred in full with the court’s opinion in *NEDACAP II*.<sup>137</sup> He wrote separately, though, “to point out that the EPA can often rather easily mitigate the inter-circuit nonacquiescence problem—and it should.”<sup>138</sup> In his view, whenever the Administrator

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131. *NEDACAP II*, 891 F.3d 1041, 1044 (D.C. Cir. 2018).

132. *Id.* (quoting 40 C.F.R. § 56.3(d)) (citation omitted).

133. 40 C.F.R. § 56.4(c) (2019).

134. *NEDACAP II*, 891 F.3d at 1045.

135. *Id.*

136. *Id.* at 1052 n.1. The *Irons* footnote is a procedure unique to the D.C. Circuit by which the panel circulates an opinion that might be inconsistent with one or more prior-panel precedents to all active judges of the court for approval to overrule the previous panel’s opinion. *See Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

137. *NEDACAP II*, 891 F.3d at 1052 (Silberman, J., concurring).

138. *Id.*

declares that a decision is based on a determination of nationwide scope and effect, the “Administrator should . . . so declare[ ], and then any challenge should . . . be[ ] brought to the D.C. Circuit.”<sup>139</sup> To Judge Silberman, section 307(b)(1) “delegated unusual authority [to the Administrator] to control the venue of judicial review” the exercise of which any circuit court could evaluate under the APA’s arbitrary-and-capricious standard.<sup>140</sup>

Judge Silberman acknowledged that the Fifth Circuit had rejected that argument.<sup>141</sup> But to Judge Silberman, that opinion was “quite wrong.”<sup>142</sup> Given the “unusual authority” Congress delegated to the Administrator, her “determination . . . should be entitled to deference.”<sup>143</sup> Judge Silberman also pointed to policy to support his argument:

Indeed, I think deference in this situation should be particularly generous because the Administrator, as the national regulator, is in a much better position than a regional circuit court to evaluate the nationwide impact of her action. Congress recognized that comparative advantage by delegating this unusual authority to an administrative agency.

Judge Silberman even left open the possibility that the Administrator could assert that she based her decision on a determination of nationwide scope *after* litigation had begun in order to funnel certain cases to the D.C. Circuit.<sup>144</sup> According to Judge Silberman, “[a]ll of these procedural pathways can and should work together to give effect to what I understand to be a clear Congressional mandate: uniform judicial review of regulatory issues of national importance.”<sup>145</sup>

In other words, EPA could have avoided the undue complexity of revising existing regulations to avoid the nonacquiescence problem by simply making a based-on finding with the expectation that courts would defer to that declaration. The agency could also avoid the thorny issue of ignoring circuit rulings outside of that circuit until either the D.C. Circuit or the Supreme Court spoke to the issue directly. This in turn would provide a greater level of certainty as to the validity or invalidity of certain EPA regulations—if a given EPA regulation were struck down in the D.C. Circuit, other EPA regulations require it to honor that ruling throughout the country.

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139. *Id.* at 1053.

140. *Id.*

141. *Id.* (citing *Texas v. EPA*, 829 F.3d 405, 417–22 (5th Cir. 2016)).

142. *Id.*

143. *Id.*

144. *Id.* at 1053–54.

145. *Id.*



## III.

## WHAT'S THE RIGHT ANSWER?

Given these two directly contrary approaches to judicial deference to EPA venue determinations, which is the best result? As it turns out, neither the Fifth Circuit nor Judge Silberman's concurrence analyzed the problem (explicitly, at least) according to relevant Supreme Court doctrine. Both opinions seem to focus on policy-driven outcomes and the desirability of court deference to agency regulations rather than analyzing the question under *Chevron Step Zero*.

A. *Chevron Step Zero*

Under the familiar two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, federal courts should defer to an agency's interpretation of its governing statute if the statutory language is silent or ambiguous on the relevant issue.<sup>146</sup> In the years after *Chevron* was decided, courts grappled with the question of what types of agency interpretations deserved *Chevron* deference.

In its first case to address this question, the Supreme Court distinguished interpretations in documents like "opinion letters[,] . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law" and interpretations "arrived at after, for example a formal adjudication or notice-and-comment rulemaking."<sup>147</sup> Courts should analyze interpretations contained in opinion-letter-like documents under the less-deferential *Skidmore* standard.<sup>148</sup> Under *Skidmore*, courts should "consider that the rulings, interpretations and opinions of the [agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."<sup>149</sup> "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity

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146. 467 U.S. 837, 842–43 (1984).

147. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); see Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 211–12 (2006).

148. *Christensen*, 529 U.S. at 587; Sunstein, *supra* note 147, at 212–13. *Christensen* also presented an interesting debate, in dueling concurrences, between Justices Scalia and Breyer concerning the appropriate breadth of the inquiry. See Sunstein, *supra* note 147, at 212–13. To Justice Scalia, the procedures the agency followed to arrive at its interpretation were irrelevant; "[a]ll that mattered . . . was whether the position at issue 'represents the authoritative view' " of the agency. *Id.* at 212 (quoting *Christensen*, 529 U.S. at 591 (Scalia, J., concurring)). Justice Breyer, on the other hand, reasoned that the most relevant question was simply whether Congress delegated interpretative authority to the agency. *Id.* at 213 (quoting *Christensen*, 529 U.S. at 596–97 (Breyer, J., concurring)).

149. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>150</sup>

The second case to elaborate on the *Chevron* Step Zero analysis was *United States v. Mead Corp.*<sup>151</sup> Significant to the Court in *Mead* was whether “it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority.”<sup>152</sup> *Chevron* deference, in other words, may be appropriate when the agency promulgates rules and regulations according to a formal process provided by Congressional delegation.<sup>153</sup> The Court, however, also left open the possibility that rules issued in “want of . . . procedure” may still nonetheless receive *Chevron* deference.<sup>154</sup>

The Court next confirmed in *Barnhart v. Walton* that “the fact that [an agency] previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking . . . does not automatically deprive that interpretation of the judicial deference otherwise its due.”<sup>155</sup> The Court summarized from its precedents the factors that lower courts should consider when deciding whether an agency’s interpretation should be analyzed under *Chevron* in the first place:

[T]he interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue.<sup>156</sup>

Since *Barnhart*, the Court has clarified how the procedures the agency follows in issuing its regulations influence the Step Zero analysis. In *Encino Motorcars, LLC v. Navarro*, the Court held that a Department of Labor regulation interpreting a Fair Labor Standards Act employment classification deserved no *Chevron* deference.<sup>157</sup> That regulation was a reversal of a recent Department regulation.<sup>158</sup> Crucial

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150. *Id.*

151. 533 U.S. 218 (2001).

152. *Id.* at 226–27; see Sunstein, *supra* note 147, at 213.

153. See Sunstein, *supra* note 147, at 214.

154. *Mead*, 533 U.S. at 230–31; see Sunstein, *supra* note 147, at 214–15.

155. 535 U.S. 212, 221 (2002).

156. *Id.* at 222.

157. 136 S. Ct. 2117, 2127 (2016).

158. *Id.* at 2123–24.

to the Court's analysis was the Department's failure to "provide a reasoned explanation for the change" to its prior policy.<sup>159</sup> Because of the agency's "'[u]nexplained inconsistency' in [its] policy," the Court found that the regulation was arbitrary and capricious.<sup>160</sup> And because an arbitrary and capricious regulation "is itself unlawful," it should "receive[ ] no *Chevron* deference."<sup>161</sup>

A final limit the Court has placed on the Step Zero analysis is what some call the "major-question doctrine."<sup>162</sup> According to that "doctrine,"<sup>163</sup> courts should not afford deference to agency interpretations of "question[s] of deep 'economic and political significance' that is central to th[e] statutory scheme" absent an "express" delegation of that question to the agency.<sup>164</sup>

### B. Application to These Cases

From these cases, we can synthesize a handful of factors that determine whether a given agency action should deserve *Chevron* deference. An agency action carrying the force of law pursuant to an express or implied delegation by Congress generally receives *Chevron* deference. That is particularly true if the action is made by following formal procedures pursuant to a congressional mandate. Whether Congress requires the agency to use such procedures is not dispositive of the question, but the existence of such formal procedural requirements weighs in favor of *Chevron* deference. If, however, Congress or the Court has required agencies to use such procedural formalities and the agency fails to abide by those commands, the action will not receive deference because it was an arbitrary-and-capricious action in the first place. Finally, courts will not defer to agency answers to major questions unless Congress has explicitly instructed the agency to answer that question.

Curiously, neither the Fifth Circuit nor Judge Silberman's opinion formally analyzed these factors to determine whether EPA's venue determination should receive *Chevron* deference. But a careful consideration of the relevant factors shows that EPA's venue determination is undoubtedly entitled to deference.

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159. *Id.* at 2125.

160. *Id.* at 2126.

161. *Id.*

162. Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2191 (2016).

163. Indeed, many scholars question whether the major-question doctrine can even be called a doctrine at all. *See id.* at 2191 & n.5 (noting disagreement among scholars concerning the "major question exception" and collecting commentary).

164. *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

First, EPA was acting pursuant to an express delegation of Congress. Section 301(a)(1) of the Clean Air Act Amendments of 1970 directs the EPA Administrator “to prescribe such regulations as are necessary to carry out his functions under this chapter.”<sup>165</sup> “[T]his chapter” is chapter 85 of title 42 of the United States Code, which includes 42 U.S.C. § 7607(b)(1), the venue provision. The litigation history described above, and Congress’s subsequent actions in delegating authority to the Administrator to direct certain nationally important cases to the D.C. Circuit, suggest that Congress believed venue determinations to be “necessary to carry out” the Administrator’s functions under chapter 85. Sections 301(a)(1) and 307(b)(1), taken together, represent an express delegation by Congress to EPA to issue regulations concerning venue.<sup>166</sup>

Even if sections 301(a)(1) and 307(b)(1) do not constitute an express delegation of authority to the agency, section 307(b)(1) by itself is surely an implied delegation of authority to EPA. Authority may be impliedly delegated when Congress leaves a gap for the agency to

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165. 42 U.S.C. § 7601(a)(1) (2018).

166. Indeed, section 301(a)(1) by itself likely represents an express delegation of rulemaking authority deserving of *Chevron* deference when EPA acts pursuant to that authority. See, e.g., *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.* 467 U.S. 837, 844 (1984) (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .” (citations omitted)); *Mont. Envtl. Info. Ctr. v. Thomas*, 902 F.3d 971, 977 (9th Cir. 2018) (“With respect to the [Clean Air Act], Congress has given [the Agency] general rulemaking authority, 42 U.S.C. § 7601(a)(1), which, when exercised, requires our deference in accordance with *Chevron*.” (quoting *Sierra Club v. EPA*, 671 F.3d 955, 962 (9th Cir. 2012))); *Comm. for a Better Arvin v. EPA*, 786 F.3d 1169, 1175 (9th Cir. 2015) (same); *Sierra Club v. EPA*, 671 F.3d 955, 962 (9th Cir. 2012) (same but finding that because EPA did not “exercise[ ] its authority to make rules *carrying the force of law* to fill in [a statutory gap],” the agency deserved no deference) (emphasis added); *Vigil v. Leavitt*, 381 F.3d 826, 834 (9th Cir. 2004) (same). That broad grant of authority does not mean, of course, that the agency ultimately will *prevail on the merits* of its *Chevron* argument. *WildEarth Guardians v. EPA*, 830 F.3d 529, 539 (D.C. Cir. 2016) (“Of course, ‘EPA cannot rely on its gap filling authority to supplement the Clean Air Act’s provisions when Congress has not left the agency a gap to fill’—i.e., ‘when there is statutory language on point.’” (quoting *Nat. Res. Def. Council v. EPA*, 749 F.3d 1055, 1063–64 (D.C. Cir. 2014))); *Nat. Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 40–41 (D.C. Cir. 1992) (declining to defer to interpretation of Clean Air Act provisions EPA made pursuant to section 301 because the statute precluded the agency’s interpretation); cf. *Gonzales v. Oregon*, 546 U.S. 243, 264–65 (2006) (“It would go . . . against the plain language of the text to treat a delegation for the ‘execution’ of [the Attorney General’s] functions as a further delegation to define other functions well beyond the statute’s specific grants of authority.”). But the delegation alone may answer the specific question whether the court should analyze the litigants’ arguments under the *Chevron* standard in the first place.

fill.<sup>167</sup> Under section 307(b)(1), it is up to the Administrator, and the Administrator only, to “find and publish[ ]” whether his action “is based on a determination of nationwide scope or effect.”<sup>168</sup>

Second, EPA’s venue determinations carry the force of law. The Court in *Mead*, for example, placed significant weight on whether the ruling at issue in that case was of the type that could bind third parties in the future.<sup>169</sup> Here, parties challenging EPA action must file their challenges in the correct court of appeals *as determined by EPA in the relevant regulation*.<sup>170</sup> The EPA regulation, in other words, limits the right of the challengers to choose venue by requiring a transfer to the D.C. Circuit when it declares that the rule is based on a determination of nationwide scope or effect.<sup>171</sup> Regulations that determine the legal rights and obligations of third parties are classic examples of those issued with the force of law.<sup>172</sup>

Third, Congress authorized EPA to make venue determinations carrying the force of law pursuant to formalized procedure.<sup>173</sup> The Administrator must “find and publish[ ] that [the] action is based on” a determination of nationwide scope or effect in order for the determination to have any force.<sup>174</sup> And, in the *Texas* case at least, EPA actually

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167. *Chevron*, 467 U.S. at 844 (“Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”). Courts routinely defer to EPA when they find gaps in statutes Congress intended EPA to fill. *E.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (deferring to EPA’s interpretation of the Clean Water Act to permit the use of cost-benefit analysis in determining “best technology available” to limit environmental effects of cooling water intake structures); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666–67 (2007) (deferring to EPA’s interpretation of its potentially competing obligations under the Endangered Species Act and Clean Water Act); *Chevron*, 467 U.S. at 840, 866 (deferring to EPA’s interpretation of the word “source” to include total emissions from an entire plant rather than from each individual structure within the plant).

168. 42 U.S.C. § 7607(b)(1) (2018).

169. 533 U.S. at 233.

170. 42 U.S.C. § 7607(b)(1).

171. *Id.*

172. *See, e.g.*, *Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 826–27 (9th Cir. 2012).

173. 42 U.S.C. § 7607(b)(1).

174. *Id.*; *see, e.g.*, *Texas v. EPA*, 829 F.3d 405, 420 & n.17 (5th Cir. 2016) (recognizing that the “based on a determination of nationwide scope or effect” element of the venue provision is not met if EPA does not publish the finding); *S. Ill. Power Coop. v. EPA*, 863 F.3d 666, 671 (7th Cir. 2017) (“If the EPA Administrator issues a *published* finding that a locally or regionally applicable agency action has ‘nationwide scope or effect,’ venue lies in the D.C. Circuit.” (emphasis added)); *Nat’l Parks Conservation Ass’n v. McCarthy*, 816 F.3d 989, 993 (8th Cir. 2016) (finding that challenge could only be filed in the D.C. Circuit if the regulation at issue was “nationally

followed this congressionally mandated procedure,<sup>175</sup> so there is no basis to withhold *Chevron* deference on an *Encino Motorcars*-type theory.<sup>176</sup> (Judge Silberman likewise recognized that, under his theory, EPA could only receive deference on its finding if it was adequately published pursuant to section 307(b)(1).)<sup>177</sup>

Finally, the EPA's interpretation of the Clean Air Act's venue provision cannot be said to violate the major-question doctrine. The decision of where to funnel challenges to a particular agency regulation is not a decision of the kind of "vast 'economic and political significance'" that motivates the doctrine.<sup>178</sup> True, other kinds of EPA regulations may implicate questions of such significance.<sup>179</sup> But, if anything, funneling challenges to those regulations to the D.C. Circuit for nationwide determination would seem to further the policy underlying the doctrine. The D.C. Circuit is an "expert" court when it comes to agency rulemaking, so if any court is to review an agency rule *de novo*, the D.C. Circuit is the court to do so.

### I. Texas v. EPA

Taken together, every factor the Supreme Court has identified as relevant to the Step Zero inquiry weighs (fairly heavily) in favor of

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applicable" because EPA had "not found and published a determination of nationwide scope or effect for the" action).

175. The court in *Texas* did not even discuss whether EPA had published its finding (presumably because all parties conceded that it had, *see* Approval and Promulgation of Implementation Plans; Texas and Oklahoma, 81 Fed. Reg. 296, 349 (Jan. 5, 2016)) even though it noted that EPA recognized that courts could and should inquire into whether EPA published its finding in an adequate manner. *See Texas*, 829 F.3d at 420 n.17. The court only analyzed whether the action actually was, in the court's view, based on a determination of nationwide scope and effect. *Id.* at 420–24.

176. *See Lion Oil Co. v. EPA*, 792 F.3d 978, 981–82 (8th Cir. 2015) (EPA's notice to only the petitioner in that case that its decision was based on a determination of nationwide scope or effect did not constitute "publish[ing]" that finding, so venue was appropriate in the Eighth Circuit rather than the D.C. Circuit). *But see NEDACAP II*, 891 F.3d 1041, 1053–54 (D.C. Cir. 2018) (Silberman, J., concurring) (suggesting it might be permissible for the Administrator to channel a particular challenge to the D.C. Circuit after litigation begins in a regional circuit by publishing a based-on finding). An interesting question, beyond the scope of this Note, is whether a court should defer to EPA's interpretation of the word "publish" in the venue provision. The Eighth Circuit refused to address that question because "EPA [did] not assert a different meaning of 'publish.' Instead, EPA argue[d] for an exception because it honored [the petitioner's] request to protect certain confidential business information." *Lion Oil Co.*, 792 F.3d at 982.

177. *NEDACAP II*, 891 F.3d at 1053.

178. *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

179. *See, e.g., id.*; Note, *supra* note 162, at 2198–99 (identifying *Massachusetts v. EPA*, 549 U.S. 497 (2007), as an "anti-case" to the major-question doctrine).

analyzing EPA's venue determinations under the *Chevron* framework. Why, then, did the Fifth Circuit find otherwise, without even addressing these factors?

The Fifth Circuit began its analysis by asserting that it would not defer to the agency's interpretation of section 307(b)(1) "[b]ecause 'the determination of our jurisdiction is exclusively for the court to decide.'"<sup>180</sup> True enough. But all courts to have considered whether section 307(b)(1) is a jurisdictional provision or a venue provision have found that it functions as both.<sup>181</sup> EPA's interpretation of section 307(b)(1) does not purport to divest the courts of appeals of jurisdiction; had EPA attempted to do so through a regulation that funneled certain challenges covered by section 307(b)(1) to, say, a district court, the Fifth Circuit would certainly be entitled—indeed it would be required—to refuse to analyze that interpretation under the *Chevron* framework.<sup>182</sup> But the EPA's interpretation implicated the proper venue in which challengers should file their actions, not the jurisdiction of the courts of appeals.

The Fifth Circuit addressed this argument with the conclusory statement, "Nor do we defer to the agency's interpretation when determining venue."<sup>183</sup> The sole support the agency cited for that broad holding was a Sixth Circuit case called *Smith v. Aegon Co. Pension Plan*.<sup>184</sup> But *Smith* is entirely off point.

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180. *Texas*, 829 F.3d at 417 (quoting *Lopez-Elias v. Reno*, 209 F.3d 788, 791 (5th Cir. 2000)).

181. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 593 (1980); *Dalton Trucking, Inc. v. EPA*, 808 F.3d 875, 879 (D.C. Cir. 2015) ("Lest there be any confusion going forward . . . : Section 307(b)(1) is a 'conferral of jurisdiction upon the courts of appeals.' . . . [S]ection 307(b)(1) is also a venue provision, specifying which types of section 307(b)(1) challenges can be filed in which federal circuits courts." (internal citations omitted)). The Fifth Circuit adopted this "two-folding" reading of the provision in *Texas* itself. *Texas*, 829 F.3d at 418; see also Kevin O. Leske, *Cleaning up Jurisdiction: Divining Congressional Intent of Clean Air Act Section 307(b)*, 42 *ECOLOGY L.Q.* 37, 69 (2015) ("[I]t is clear that section 307(b)(1) is jurisdictional with respect to giving the courts of appeals exclusive jurisdiction to hear appeals from agency action under 307(b)(1). . . . However, an analysis of the text, context, and historical treatment of section 307(b) demonstrates that the requirement that certain petitions must be filed in the D.C. Circuit or in local circuit courts is non-jurisdictional.").

182. See *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented. . . . Subject-matter jurisdiction can never be waived or forfeited." (citing *United States v. Cotton*, 535 U.S. 625, 630 (2002))).

183. *Texas*, 829 F.3d at 417–18 (citing *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 928 (6th Cir. 2014)).

184. *Id.*

*Smith* was an appeal of a district court decision dismissing the plaintiff's ERISA claim for improper venue.<sup>185</sup> At the Sixth Circuit, the Secretary of Labor submitted an amicus brief expressing his position "that venue selection clauses are incompatible with ERISA."<sup>186</sup> Notably, that position had only ever been set forth in the amicus brief in *Smith* "and in one prior amicus brief."<sup>187</sup> The Sixth Circuit was required, therefore, "to determine the level of deference to be afforded the Secretary[']s . . . position."<sup>188</sup> The Court held, right off the bat, that "[t]he Secretary's interpretation is not entitled to deference under *Chevron*" given the Court's instruction in *Mead* that only agency action carrying the force of law should receive *Chevron* deference.<sup>189</sup> Positions in amicus briefs, of course, do not carry the force of law.<sup>190</sup>

The court was left to decide, then, whether the Secretary's position was deserving of *Skidmore* respect.<sup>191</sup> The factors courts consider when deciding whether an agency position is deserving of *Skidmore* deference include, among others, the agency's "relative expertness."<sup>192</sup> The court in *Smith*, therefore, was analyzing a factor of *Skidmore* deference when it held that "the Secretary is no more expert than this Court is in determining whether a statute proscribes venue selection."<sup>193</sup>

*Smith* is, therefore, inapposite to the Fifth Circuit's conclusion for at least two reasons. First, the court was considering the factors that influence whether to afford an agency interpretation deference under *Skidmore*, not *Chevron*. As recounted above, the *Chevron* Step Zero analysis does not take into account the agency's expertise. So, whether EPA is more expert than a federal court in interpreting its governing venue provision is irrelevant to deciding whether an agency action is deserving of *Chevron* deference.

Second, even under the terms of the Fifth Circuit's incorrect holding, the court should have deferred to EPA's venue determination. The Sixth Circuit's holding was *not* that courts should never defer to an agency interpretation of venue. Instead, the Sixth Circuit held that the court had just as much expertise as the agency in determining whether ERISA, as a statutory matter, prohibited venue-selection

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185. *Smith v. Aegon Cos. Pension Plan*, 769 F.3d 922, 925 (6th Cir. 2014).

186. *Id.* at 926.

187. *Id.*

188. *Id.*

189. *Id.* at 927 (citing *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001)).

190. *Id.* (citing *Rosales-Garcia v. Holland*, 322 F.3d 386, 403 n.22 (6th Cir. 2003)).

191. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

192. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001).

193. *Smith*, 769 F.3d at 928 (emphasis added).



clauses in pension plan documents.<sup>194</sup> Interpretation of the application of the Clean Air Act's venue is very different. Finding that an EPA action was based on a determination of nationwide scope or effect involves technical, scientific, and intensely fact-bound decisions.<sup>195</sup> So, to the extent that agency expertise is relevant to the analysis, the Fifth Circuit should have found that the circumstances of the EPA finding warranted deference.<sup>196</sup>

## 2. Judge Silberman's Concurrence

Judge Silberman's concurrence in *NEDACAP II* came closer to performing the proper Step Zero analysis, but it still failed to address all of the relevant factors. But that failure can be explained by the fact that the Step Zero analysis was not even at issue in the case before the D.C. Circuit. Judge Silberman was simply providing his view on an alternative way the agency could encourage consistency in the nationwide application of its rules without going through the notice-and-comment process to write a needlessly complicated procedural regulation. In his short opinion, Judge Silberman at least based his rationale on the "unusual authority" that Congress explicitly delegated to EPA when it amended the Clean Air Act's venue provision, a Step Zero factor the Fifth Circuit did not even mention.<sup>197</sup>

### C. Who Is Correct? Judge Silberman or the Fifth Circuit?

Based on the explanation above, Judge Silberman is correct to afford *Chevron* deference to EPA's based-on finding, and the Fifth Circuit's decision is incorrect and rested on a mistaken legal analysis. What explains the Fifth Circuit's holding?

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194. *Id.* at 928 ("But the Secretary is no more expert than this Court in determining whether a statute proscribes venue selection." (emphasis added)).

195. Ordinarily, "broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)). Indeed, the Fifth Circuit's alternative holding that EPA's interpretation would be unreasonable even if the court analyzed it under *Chevron* involved analysis of complex scientific and factual determinations like, for example, the modeling of sulfate-emission effects on visibility. *Texas v. EPA*, 829 F.3d 405, 421 n.23 (5th Cir. 2016).

196. The Fifth Circuit may very well be correct that EPA's venue interpretation was unreasonable even under the *Chevron* standard. See *Texas*, 829 F.3d at 418–24, for the court's reasoning on the reasonableness of EPA's venue interpretation in that case.

197. Compare *NEDACAP II*, 891 F.3d 1041, 1053–54 (D.C. Cir. 2018) (Silberman, J., concurring), with *Texas*, 829 F.3d at 417–18, 420–21.

The holding may simply be a mistake of law of the kind overextended appeals courts inevitably make from time to time. One also can imagine the court may have been motivated to protect its turf. The states and regional courts of appeals understandably prefer to have the regional circuits decide issues that affect the states within the region, rather than the D.C. Circuit issuing nationwide rulings when the issue in the case may only affect a couple of states.

The Fifth Circuit's approach may also reflect the growing distrust of the *Chevron* doctrine among conservative federal judges and legal academics. A few of the more conservative Justices of the Supreme Court, for example, have recently questioned the continued viability of the *Chevron* doctrine.<sup>198</sup> Taking this cue, the Fifth Circuit may have been (understandably, if incorrectly as a matter of doctrine) reluctant to extend *Chevron*, especially to an agency interpretation of venue,

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198. See, e.g., *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908–09 (2019) (Gorsuch, J., dissenting) (opining that it was “all to the good” for petitioner to “devote[ ] scarcely any of its briefing to *Chevron*” and that petitioner likely chose that strategy because it was “well aware of the mounting criticism of *Chevron* deference,” and praising the majority for “rightly afford[ing] the parties before us an independent judicial interpretation of the law”); *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring) (“[I]t seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision.”); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (noting that EPA’s “request for deference” to its interpretation of section 112(n) of the Clean Air Act “raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes”); *City of Arlington v. FCC*, 569 U.S. 290, 327 (2013) (Roberts, C.J., dissenting) (proposing to narrow *Chevron* by requiring courts to assure themselves that Congress “has in fact delegated lawmaking power to an agency within the Executive Branch, before the Judiciary defers to the Executive on what the law is”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (“[T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come to face the behemoth.”); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150–54 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)) (criticizing courts’ implementation of *Chevron*); Valerie C. Brannon & Jared P. Cole, Cong. Research Serv., LSB10204, *Deference and Its Discontents: Will the Supreme Court Overrule Chevron?* 1–2 (2018) (describing judicial and academic criticism of the *Chevron* doctrine), <https://fas.org/sgp/crs/misc/LSB10204.pdf>; Jonathan H. Adler, *Justice Gorsuch Side-Swipes Chevron*, REASON (Mar. 4, 2019, 6:22 PM), <https://reason.com/2019/03/04/justice-gorsuch-side-swipes-chevron/> (speculating that the court, in light of Justice Gorsuch’s dissent in *BNSF Railway Co.*, may “simply stop relying upon [*Chevron*], and hope that agencies get the message,” rather than overturn or narrow it outright).

For a recent overview of arguments against *Chevron* deference in the academic sphere, see Christopher J. Walker, *Attacking Auer and Chevron Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL’Y 103, 110–20 (2018) (collecting academic criticism of *Chevron* deference).

which is an area with which the federal courts have significant experience.

Although I agree with Judge Silberman's approach, it may not be to EPA's benefit to aggressively assert *Chevron* deference to its based-on findings in order to funnel challenges to the D.C. Circuit, for a few reasons. First, although not an explicit rationale underlying the Fifth Circuit's reasoning, aggressive use of the based-on finding may encourage forum shopping. Whether true or not, public perception is that judges decide cases based on their political affiliations<sup>199</sup> and that judges appointed by Democratic presidents are more likely to uphold federal agency (and particularly EPA) regulations. Overly aggressive use of section 307(b)(1) by the EPA may have the further effect of undermining EPA's credibility as a technical and scientific agency by creating the appearance that it alters its technical findings to accommodate its litigation preferences. These factors may all work together to legitimize the public's perception of judicial decision making and call into question the legality of EPA's actions, regardless of what the D.C. Circuit decides.<sup>200</sup>

Second, and relatedly, petitioners challenging agency action have resorted to a troubling strategy, namely filing challenges in courts certain to assign the challenge to a conservative or liberal judge in order to obtain a favorable ruling. These challenges usually involve immediate motions for preliminary injunctions that apply nationwide.<sup>201</sup> The result can be, for example, a single district judge in a rural part of

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199. *E.g.* Max Greenwood, *Majority of Voters Believe Federal Judges Inject Politics into Rulings: Poll*, HILL (Dec. 3, 2018, 12:25 PM), <https://thehill.com/homenews/campaign/419457-majority-of-voters-believe-federal-judges-inject-politics-into-rulings-poll>.

200. For this reason, Judge Silberman's suggestion that EPA might be able to direct certain challenges to the D.C. Circuit by retroactively making a based-on finding after litigation has begun may not be the wisest course of conduct for EPA. *Compare NEDACAP II*, 891 F.3d at 1053–54 (Silberman, J., concurring) (“[I]f a petition for review had already been filed in a geographical circuit and the EPA Administrator promptly followed with her national declaration, it would seem logical that the case should then be transferred to the D.C. Circuit—though it remains an open question how § 7607(b)(1) deals with retroactivity.”) *with* *W. Va. Chamber of Commerce v. Browner*, No. 98-1013, 1998 WL 827315, at \*8 (4th Cir. Dec. 1, 1998) (“Since we reach the conclusion that the Ozone Transport SIP Call is nationally applicable we need not address the EPA’s contention that the rule is ‘of nationwide scope and effect.’ This argument by the EPA raised some troubling issues, especially given that the EPA first came to the conclusion that the Ozone Transport SIP Call was of nationwide scope and effect only after this litigation was well underway. We would be hesitant to allow proper venue to be wholly contingent upon such a post hoc determination by the EPA.”)

201. Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2123 n.166 (2017) (collecting cases).

Texas enjoining the government from implementing a policy anywhere in the country based on an incomplete record and preliminary legal arguments.<sup>202</sup>

Finally, under Judge Silberman's conception of section 307(b)(1), EPA's based-on finding would still be subject to some level of review, even if deferential. If reviewing courts continuously find EPA's based-on finding unreasonable or arbitrary and capricious, EPA would lose credibility on these determinations, which could force Congress to amend the statute.

For these reasons, EPA should restrain itself in making its based-on findings for rules that are not clearly nationally applicable but still involve fact-finding or application of nationwide determinations. EPA should also clearly articulate why it would be necessary for the D.C. Circuit to resolve challenges to the regulation at issue in a nationally uniform way. It should refrain from making conclusory based-on findings that fail to explain why challenges to the regulation require national resolution. And it should try to explain the difficulties that might arise if multiple regional circuit courts hear similar challenges and decide them differently. None of these factors are required by the statute, and the presence or absence of any of these should not be determinative in the *Chevron* analysis. But good government practice counsels in favor of clear, specific articulation when EPA exercises the "unusual authority" Congress delegated to it in section 307(b)(1).<sup>203</sup>

#### D. *Chevron's Usefulness*

As noted above, "[t]he *Chevron* doctrine has attracted relentless criticism" from certain legal circles.<sup>204</sup> The correctness of *Chevron* as a general matter is far beyond the scope of this Note. *Chevron* deference, however, is particularly appropriate to judicial interpretation of the Clean Air Act's venue provisions.

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202. *E.g.*, *Texas v. United States*, 340 F. Supp. 3d 579 (N.D. Tex. 2018) (treating motion for preliminary injunction as a motion for partial summary judgment and declaring the Affordable Care Act unconstitutional in its entirety), *aff'd in part, vacated in part*, 945 F.3d 355 (5th Cir. 2019), *cert. granted sub nom.* *California v. Texas*, 140 S. Ct. 1262 (2020); *Texas v. United States*, 86 F. Supp. 3d 591, 676, 677–78 (S.D. Tex. 2015) (granting preliminary injunction preventing the Department of Homeland Security from implementing Deferred Action for Parents of Americans and Lawful Permanent Residents), *aff'd*, 809 F.3d 134, *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

203. *NEDACAP II*, 891 F.3d at 1053 (Silberman, J., concurring).

204. See Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 945 & n.155 (2006); *supra* note 198.

First, based-on findings often involve complex scientific findings. In *Texas v. EPA*, for instance, the regulation at issue required the modeling of sulfate-emission effects on visibility, and the Fifth Circuit's alternative holding that EPA's interpretation would be unreasonable even if the court analyzed it under *Chevron* involved analysis of those complex scientific and factual determinations.<sup>205</sup> In a final 2017 regulation making attainment designations for the 2010 sulfur dioxide National Ambient Air Quality Standards, EPA made a based-upon finding because "[a]t the core of th[e] action [was] the EPA's nationwide analytical approach and technical analysis, including evaluation of monitoring data and air quality modeling, applied to the available evidence for each area."<sup>206</sup> These are the types of determinations that are especially well committed to agency expertise, rather than to the generalist practice of the appellate courts. Indeed, under *Chevron*, "broad deference is all the more warranted when . . . the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily requires significant expertise and entail the exercise of judgment grounded in policy concerns.'"<sup>207</sup>

As recounted above, the agency's expertise relative to courts does not figure in the Step Zero inquiry.<sup>208</sup> The question there focuses instead on factors such as congressional intent, the binding legal effect of the agency action, or the formality of the procedures according to which the agency acted.<sup>209</sup> But *Chevron* itself justified the principle of agency deference on the basis of agency expertise,<sup>210</sup> and supporters

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205. 829 F.3d 405, 421 n.23 (5th Cir. 2016).

206. Air Quality Designations for the 2010 Sulfur Dioxide (SO<sub>2</sub>) Primary National Ambient Air Quality Standard—Round 3, 83 Fed. Reg. 1098, 1099, 1104 (Jan. 9, 2018).

207. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).

208. *See supra* notes 192–193 and accompanying text.

209. *See supra* notes 147–164 and accompanying text.

210. 467 U.S. 837, 865–66 (1984) ("Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."); Garry, *supra* note 204, at 943–44.

of deference frequently refer to this justification.<sup>211</sup> Therefore, deference is particularly appropriate when courts review EPA's based-on findings.

Second, agencies may be well suited to see the national implications of their actions as whole, as opposed to appellate judges who may be presented with only a very narrow statutory or regulatory issue.<sup>212</sup> The problem may be "that [multiple or conflicting] purposes [of complex federal statutes] are often locked in a Byzantine web of interlocking provisions that can be fully comprehended only by a full-time legal expert."<sup>213</sup> That seems to be precisely the problem section 307(b)(1) was enacted to solve. Congress recognized the agency's expertise in seeing the full picture when it acts under the Clean Air Act. When EPA believes its regulation involves determinations of nationwide scope and effect under the complex and interlocking statutory and regulatory provisions of the Clean Air Act, it should have the power to direct litigation around that regulation to a single forum for national, uniform resolution.

Finally, writing ambiguity into statutory language can sometimes facilitate the legislative process. Leaving interpretive decisions to agencies for courts to review may promote the passage of legislation so that it does not get gummed up over relatively small details.<sup>214</sup> The legislative history of section 307(b)(1) suggests that the "unusual authority"<sup>215</sup> Congress delegated to EPA may have been in the interest of facilitating the passage of the Clean Air Act Amendments of 1977. The courts had significant experience with the unworkable venue provision that preceded today's incarnation of section 307(b)(1).<sup>216</sup> But in

211. See, e.g., Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO L.J. 833, 861 (2001) (arguing that federal programs "have become so complex that it is beyond the capacity of most federal judges to understand the full ramifications of the narrowly framed interpretational questions that come before them"). "Whereas courts are generalists, agencies are specialists, chosen by Congress to administer a particular statute." Garry, *supra* note 204, at 944.

212. Merrill & Hickman, *supra* note 211, at 861–62 (citing Sydney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 824–40) (identifying "[t]he environmental laws" as "a primary illustration of this phenomenon").

213. *Id.* at 862.

214. KATZMANN, *supra* note 86, at 47 ("The [statutory] language may be imprecise in order to facilitate the bill's passage, such that even competing interests can find language in the bill that supports their position. Ambiguity . . . can be the solvent of disagreement, at least temporarily." (citing HERBERT KAUFMAN, *TIME, CHANCE AND ORGANIZATIONS: NATURAL SELECTION IN A PERILOUS ENVIRONMENT* 52 (1985)).

215. *NEDACAP II*, 891 F.3d 1041, 1053–54 (D.C. Cir. 2018) (Silberman, J., concurring).

216. See *supra* notes 25–35 and accompanying text.

1976 and 1977, Congress was consumed with enacting sweeping changes to the Clean Air Act that have since matured into massively complex federal programs. Identifying every issue that might count as nationally or regionally applicable may have been virtually impossible at that stage, and congressional horse trading over each one may have impeded the enactment of an extremely important statutory scheme. Faced with this reality, Congress may well have judged the agency to be the best arbiter of these complicated issues.

A faithful application of existing Supreme Court precedent strongly suggests courts should defer to EPA's based-on findings under *Chevron*. The wisdom and continued viability of *Chevron* are topics outside the scope of this Note. But the Clean Air Act's venue provisions provide an illustration of *Chevron*'s steadfast usefulness, to both agencies and federal courts.

#### CONCLUSION

The opaque statutory text and scant legislative history of section 307(b)(1) do not answer the question of whether EPA deserves deference to its venue findings under the *Chevron* framework. But a straightforward Step Zero analysis under well-established (if sometimes confusing) Supreme Court precedent weighs heavily in favor of that result. *Chevron* deference is particularly well suited to these types of venue decisions that involve highly technical and scientifically-complex determinations. Even if EPA chooses to exercise its authority under section 307(b)(1), however, it should do so carefully and articulately in order to avoid public misperception about the interaction between the agency and courts that an aggressive use of the based-on finding might encourage. Following this approach has the distinct advantage of conserving judicial and litigant resources, bringing a level of certainty to the agency and the regulated industry, and obtaining national resolution of nationally important regulatory issues.