

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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FOOD AND DRUG ADMINISTRATION,            )  
ET AL.,    )  
  Petitioners,            )  
  v.    ) No. 23-1187  
R.J. REYNOLDS VAPOR CO., ET AL.,        )  
  Respondents.            )  
- - - - -

Pages: 1 through 83  
Place: Washington, D.C.  
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6    v.    ) No. 23-1187  
7   R.J. REYNOLDS VAPOR CO., ET AL.,        )  
8    Respondents.            )  
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11   Washington, D.C.  
12   Tuesday, January 21, 2025  
13  
14           The above-entitled matter came on for oral  
15   argument before the Supreme Court of the United States  
16   at 10:04 a.m.  
17  
18   APPEARANCES:  
19   VIVEK SURI, Assistant to the Solicitor General,  
20           Department of Justice, Washington, D.C.; on behalf  
21           of the Petitioners.  
22   RYAN J. WATSON, ESQUIRE, Washington, D.C.; on behalf  
23           of the Respondents.  
24  
25

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 23-1187, the Food and Drug Administration versus R.J. Reynolds Vapor Company.

Mr. Suri.

ORAL ARGUMENT OF VIVEK SURI

ON BEHALF OF THE PETITIONERS

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

The court of appeals has effectively nullified the Tobacco Control Act's restrictions on venue. Under the Act, an adversely affected person may challenge the denial of an application only in its home circuit or the D.C. Circuit. But, under the decision below, an applicant may challenge a denial in any circuit anywhere in the country so long as it can enlist a local retailer willing to join its petition.

That decision is wrong in two different ways. First, the only person entitled to challenge the denial of an application is the applicant itself, not the applicant's retailers. Retailers are bystanders to the application

1 process. They don't submit information to the  
2 agency, don't participate in the agency's review  
3 process, don't receive the order issued by the  
4 agency at the end of that process, and don't  
5 even get to see the full contents of the  
6 application or administrative record. Their  
7 interests lie outside the zone that Congress  
8 sought to protect.

9 Second, even if the retailers could  
10 sue, applicants don't get to ride in on their  
11 coattails. Venue must be established separately  
12 for each party. And an applicant, the  
13 manufacturers here, may not lay venue based on  
14 the retailer's residence.

15 The judgment of the Fifth Circuit  
16 should be reversed.

17 JUSTICE THOMAS: So, if -- if your  
18 argument is that only applicants are covered,  
19 what do you do with the language "any person  
20 adversely affected?"

21 MR. SURI: The language "any person  
22 adversely affected" requires the court to infer  
23 the class of appropriate plaintiffs from the  
24 structure of the statute. And the language was  
25 used by Congress with respect to two classes of

1 actions: regulations and denials.

2 With respect to regulations, the class  
3 of adversely affected persons won't refer to  
4 applicants because there's no application  
5 process there. But, with respect to denials,  
6 the only person properly regarded as adversely  
7 affected is the applicant itself.

8 And the main reason for that is the  
9 structure of the statute. It is implausible  
10 that Congress set up a system in which someone,  
11 the retailers, would have a right to challenge  
12 an agency order but wouldn't have a right to be  
13 notified of the order in the first place. It's  
14 simply unlikely that Congress would have  
15 expected such a person to be able to challenge  
16 the order within 30 days after it's issued.  
17 They don't even know that it's been issued in  
18 the first place.

19 JUSTICE KAGAN: But just --

20 CHIEF JUSTICE ROBERTS: Well, I -- I  
21 think they probably do in terms of what they're  
22 following. I think it's a bit much to call them  
23 bystanders. I mean, their business depends upon  
24 this or, in other circumstances, whatever the  
25 retailers are. And the whole purpose of the

1 proceeding is -- is to overturn a decision  
2 preventing retailers from doing what retailers  
3 do with respect to the -- the particular  
4 product.

5 I mean, that's the whole point of it  
6 from the government's point of view, the  
7 regulatory point of view, and what's harmful to  
8 the public, is whether or not these products are  
9 going to be sold, I don't know why the retailers  
10 aren't the most likely people to bring an  
11 action --

12 MR. SURI: The most --

13 CHIEF JUSTICE ROBERTS: -- a challenge  
14 to it.

15 MR. SURI: The most likely people to  
16 bring an action are the applicants themselves.  
17 We are not aware of a single case where a  
18 retailer has brought a freestanding challenge  
19 unaccompanied by the applicant. That's because  
20 it's simply practically implausible that the  
21 retailer would be able to do so. Again, the  
22 retailer isn't notified that the order has been  
23 issued and doesn't get to see the contents of  
24 the application.

25 So, as a practical matter, what's

1 going on is that the retailer is simply a prop  
2 being used by the manufacturer to enable them to  
3 get into the circuit they prefer. They're not  
4 adding any value to the case itself.

5 JUSTICE KAGAN: What you suggested,  
6 Mr. Suri, about the structure of the statute, I  
7 mean, I would think that this structure says --  
8 points in the exact opposite direction from what  
9 you said.

10 You know, it says (A) is the  
11 promulgation of a rule and (B) is the denial of  
12 an application, and as to both of those, any  
13 person adversely affected can file a petition.  
14 And you're essentially reading this so that the  
15 "any person adversely affected" is -- has two  
16 different meanings, two different definitions,  
17 for the (A) and the (B), and I would think that  
18 that's a very strange way to think about this  
19 section.

20 MR. SURI: I respectfully disagree  
21 with the premise of that question, Justice  
22 Kagan. We are reading "adversely affected" to  
23 have the same meaning for (A) and (B). It means  
24 the zone-of-interest test. It means you must  
25 infer from the structure of the statute the



1 appropriate class of plaintiffs. It's just that  
2 the interests protected by the provisions  
3 authorizing regulations are different from the  
4 interests protected by the provisions  
5 authorizing denials of applications.

6 JUSTICE KAGAN: Well, I guess I see  
7 the point. If you, you know, broaden out the  
8 generality, you can say, oh, it's still any  
9 person adversely affected. But, as to (A), it's  
10 one group of people; as to (B), it's only the  
11 applicant.

12 And, you know, I guess I just wouldn't  
13 understand a person writing this provision to  
14 have that in mind, to think that it can flip  
15 around as between (A) and (B) when the same  
16 language comes after it.

17 MR. SURI: On any reading of the  
18 statute, Justice Kagan, there are going to be  
19 different classes of people adversely affected  
20 under (A) than under (B). (A) refers to  
21 regulations establishing and revoking tobacco  
22 product standards. So the adversely affected  
23 people could potentially include smoking  
24 cessation groups that believe that the tobacco  
25 manufacturers are being under-regulated.

1                   (B), however, refers only to the  
2 denial of an application. It doesn't refer to  
3 the grant of an application. So it doesn't  
4 allow for under-regulation to be challenged.

5                   JUSTICE KAVANAUGH: Does the retailer  
6 have Article III standing?

7                   MR. SURI: Yes. We accept that the  
8 retailer has Article III standing.

9                   JUSTICE KAVANAUGH: Why?

10                  MR. SURI: The retailer is, in this  
11 case, being ultimately prevented by the Act from  
12 selling the products that the retailer wishes to  
13 sell. If the denial were reversed, then there  
14 is a chance that that injury would be redressed  
15 because the --

16                  JUSTICE KAVANAUGH: That sounds like  
17 adversely affected.

18                  MR. SURI: That might sound like  
19 adversely affected in the colloquial sense of  
20 the term. "Adversely affected" -- we don't  
21 deny, that as an ordinary use of the English  
22 language, you might regard this as an adverse  
23 effect. But the whole point of this Court's  
24 cases interpreting "adversely affected" and  
25 "aggrieved" is that those are legal terms of

1 art. They don't refer to the problem of --

2 JUSTICE KAVANAUGH: Well, how do you  
3 deal with a case like Bank of America?

4 MR. SURI: Bank of America was a Fair  
5 Housing Act case where there was a special  
6 definition of the term "aggrieved person." The  
7 Court in the 1970s had interpreted it to extend  
8 all the way to the limits of Article III. While  
9 more recent cases of the Court have questioned  
10 whether it really goes quite that far, it does  
11 go beyond the normal meaning of the term.

12 JUSTICE KAVANAUGH: Well, you do  
13 agree, don't you, that "adversely affected"  
14 usually in administrative law includes  
15 competitors or includes others in the -- the  
16 chain of distribution, the manufacturers, the  
17 retailers, the distributors? It usually can  
18 include all those as a matter of basic ad law  
19 principles?

20 MR. SURI: I agree with the first part  
21 of that statement. It certainly includes  
22 competitors in a wide variety of contexts.  
23 Almost all of this Court's APA zone-of-interests  
24 cases have involved competitors or other  
25 entities with interests adverse to the directly

1 regulated party.

2           This is a very different circumstance.  
3 This is an ally of the directly regulated party  
4 whose interests are derivative of that party.  
5 The only case I'm aware of that looks like that  
6 is Block against Community Nutrition Institute,  
7 the case about the milk consumers and milk  
8 handlers. In that case, the Court said that the  
9 milk consumers didn't have the opportunity to  
10 sue.

11           One of the reasons given by then Judge  
12 Scalia in his opinion in the D.C. Circuit was  
13 they're indirectly affected, and the directly  
14 affected party is the more natural plaintiff.  
15 That's exactly the situation here.

16           JUSTICE JACKSON: And isn't --  
17 conceptually, I guess, isn't it the case that  
18 the retailer's real interest kicks in when a  
19 product is marketed? So, when it's on the  
20 market, then we say: Okay, we understand that  
21 retailers can invest, they want to put it in  
22 their stores, they want to sell it to their  
23 customers. But I guess, conceptually, there  
24 might be a distinction between that and the  
25 retailer's interest in premarket development and

1 research.

2           Wouldn't you think they would be sort  
3 of agnostic as to products in development  
4 from -- from the retail perspective?

5           MR. SURI: That's absolutely right,  
6 Justice Jackson. And I think this case suffers  
7 from a bit of an optical illusion: The fact  
8 that the products are on the market is a result  
9 of FDA's deferred enforcement policy.

10           But, in trying to figure out what  
11 Congress intended in the statute, it's helpful  
12 to put FDA's enforcement decisions to the side  
13 and look at how Congress anticipated that this  
14 scheme would play out.

15           JUSTICE JACKSON: And it anticipated  
16 that this would be happening, "this" meaning the  
17 approval, prior to market, that --

18           MR. SURI: Absolutely.

19           JUSTICE JACKSON: -- that the denial  
20 that -- that is at issue here is happening  
21 before this product ever is sold by anyone. And  
22 so then the question becomes: What is the  
23 retail -- retailer's interest in that?

24           MR. SURI: Exactly. And the question  
25 the Court should ask itself is: Would Congress

1 have anticipated that you have a scheme where a  
2 retailer doesn't know this application process  
3 is going on, doesn't know that the agency has  
4 issued a denial order, probably doesn't even  
5 know that the product exists under the statute's  
6 confidentiality provisions. Does this retailer  
7 get to swoop in out of nowhere and within 30  
8 days institute a judicial review?

9 JUSTICE KAVANAUGH: It's losing a lot  
10 of money --

11 CHIEF JUSTICE ROBERTS: I think that's  
12 a very impractical understanding of the -- the  
13 reason -- I don't -- it's not premature from one  
14 perspective.

15 The reason the manufacturer is doing  
16 this stuff is because it wants to make a product  
17 that the retailers want to sell. And the  
18 retailers presumably will identify problems and  
19 the manufacturers will know about it and they'll  
20 try to undertake research, whatever, to -- to --  
21 to -- to fix it.

22 MR. SURI: I'm sorry, Mr. Chief  
23 Justice, it's not realistic to say that the  
24 retailers are contributing something valuable to  
25 the case.

1                   Look at this case, for example. The  
2 basic claim is that the agency unfairly  
3 surprised the applicant by changing the  
4 standards under which it evaluated the  
5 application. Now the retailer has no idea  
6 whether the applicant was surprised or not  
7 because --

8                   CHIEF JUSTICE ROBERTS: Why do you say  
9 that? You don't think there's conversations or  
10 discussions or conferences for all I know  
11 between the retailers and the manufacturers of a  
12 product they sell?

13                   MR. SURI: There may be, but this  
14 statute does not require that the agency even  
15 reveal the existence of the application to the  
16 retailer or the existence of the order.

17                   So the question simply is: Does the  
18 manufacturer get to talk to the retailer on the  
19 side and thereby enlist the retailer to  
20 participate?

21                   The only reason for the manufacturer  
22 to do that is to try to get around the venue  
23 restrictions. It's not because the retailer is  
24 adding some facts or information or legal  
25 analysis to the case that the manufacturer

1       couldn't have otherwise.

2                   JUSTICE KAVANAUGH:  You're analyzing  
3       it as if the statute only allows suit by the  
4       most adversely affected.  I mean, the retailer  
5       is losing money, substantial money, that it  
6       would otherwise be able to potentially make.

7                   And that's -- that financial injury  
8       certainly sounds like adverse effect under any,  
9       as you would say, ordinary understanding of the  
10      term but also any administrative law  
11      understanding of the term that I'm familiar  
12      with.

13                  MR. SURI:  No, but you could say  
14      similarly about the milk consumers in Block  
15      against Community Nutrition Institute that they  
16      were adversely affected because they had to pay  
17      more for the milk.  Yet Judge Scalia said --

18                  JUSTICE KAVANAUGH:  Consumers --  
19      consumers are arguably analyzed a little  
20      differently than those who are in the upstream  
21      or downstream chain of production and  
22      distribution and sale.

23                  MR. SURI:  I respectfully disagree  
24      with that, Justice Kavanaugh.

25                  The entire point of authorizing these



1 e-cigarettes, if they're ultimately authorized,  
2 would be to save the lives of consumers. It  
3 would be to ensure that they can switch from  
4 more dangerous products like cigarettes to less  
5 dangerous, potentially, products like  
6 e-cigarettes.

7 So, if they're outside the zone of  
8 interest, then the retailers, whose substantive  
9 interests Congress really didn't care about at  
10 all, are certainly outside of the zone --

11 JUSTICE KAGAN: Do you think that  
12 there's anybody who is adversely affected other  
13 than the applicant?

14 MR. SURI: No.

15 JUSTICE KAGAN: So why didn't they  
16 just say the applicant?

17 MR. SURI: Because Congress drafted a  
18 provision covering both regulations and denials.  
19 And the fact that it yoked those two together in  
20 a single provision forced it to use a more  
21 general term, "adversely affected," leading --

22 JUSTICE KAGAN: Yeah, I mean, you  
23 think that they're yoked together because  
24 Congress meant for the same people to be able to  
25 sue with respect to both.

1 MR. SURI: But, as I was explaining --

2 JUSTICE KAGAN: I mean, in the  
3 withdrawal section, it does use the word  
4 "applicant."

5 MR. SURI: But the withdrawal section  
6 applies only to withdrawals. It doesn't also  
7 refer to regulations. And for that reason --

8 JUSTICE KAGAN: Right. I was just  
9 thinking they knew how to use the word  
10 "applicant." If they -- if they thought that  
11 the denials should only be about applicants,  
12 then they should -- then they would have written  
13 a provision pretty much like the withdrawal  
14 provision that says, with respect to a denial,  
15 an applicant can sue.

16 MR. SURI: Well, let me try it this  
17 way. The fact that Congress used the word  
18 "adversely affected" in one provision and the  
19 phrase "applicant" in the other provision  
20 certainly requires an explanation.

21 One explanation is the one that  
22 Respondents have offered, which is "adversely  
23 affected" covers people beyond applicants. But  
24 there's another explanation, which is that the  
25 provision covers both regulations and denials

1 and Congress was forced to use the broader term.

2           There's also a structural  
3 implausibility in the other side's argument,  
4 which is that retailers are allowed to challenge  
5 denials but are not allowed to challenge  
6 withdrawals.

7           Withdrawals affect retailers far more  
8 directly than denials. It requires them to take  
9 off the shelves products that they have lawfully  
10 been selling. And yet, in that context,  
11 Congress made clear that only the applicant is  
12 allowed to sue.

13           Now no one has come up with any reason  
14 why a rational Congress would have set up the  
15 scheme that way.

16           JUSTICE JACKSON: Mr. Suri, can I just  
17 ask you, I -- I was a little surprised by your  
18 emphatic response to Justice Kagan that no one  
19 else fits into the category of "adversely  
20 affected."

21           What -- what about some -- I'm  
22 hypothesizing an interest group that really  
23 believes that the sale of flavored cigarettes is  
24 important for helping people to stop smoking,  
25 adults, and they really believe this, and in

1 their research, this is a net positive, despite  
2 the effects on children or whatever else.

3 Because they have an interest in this  
4 particular product, why wouldn't they be  
5 adversely affected for the purpose of this  
6 statute?

7 MR. SURI: Much as I'd like to be able  
8 to say that other entities would be included, I  
9 don't think we could say that.

10 The reason that they're not adversely  
11 affected and they're not entitled to sue is  
12 ultimately the same reason the retailers aren't  
13 entitled to sue either, which is Congress set up  
14 a scheme in which they're not entitled to  
15 participate in the administrative process and  
16 they get -- don't get notice of the order when  
17 it's issued.

18 If you're trying to ask what is the  
19 group of people Congress was -- whose interests  
20 Congress was trying to protect, a good proxy for  
21 that is whom did Congress allow to participate  
22 in the administrative process, who can --

23 JUSTICE JACKSON: Help me to  
24 understand then how you are reconciling the  
25 text, because I -- I don't quite understand it.

1           We do have text that says "any party  
2 adversely affected" on the one hand with respect  
3 to denials, and we have text with respect to  
4 withdrawals that say "the holder of an  
5 application."

6           You are interpreting those to be  
7 equivalent, but they're different language. So  
8 how -- how is it that we arrive there?

9           MR. SURI: We are not interpreting  
10 them to be equivalent.

11          JUSTICE JACKSON: Okay.

12          MR. SURI: One requires the Court to  
13 apply the zone-of-interests test. And with  
14 respect to a subset of the agency actions  
15 covered by the provision that refers to  
16 "adversely affected," with respect to the  
17 denials, it turns out that the only people  
18 adversely affected are the applicants.

19          JUSTICE BARRETT: Mr. --

20          MR. SURI: Another way --

21          JUSTICE BARRETT: Oh, sorry. Please  
22 finish with Justice Jackson.

23          MR. SURI: Please go ahead.

24          JUSTICE BARRETT: I just wanted to  
25 take you to the venue question, your venue and

1 joinder argument. I just don't want your time  
2 to expire before we talk about that a little  
3 bit.

4 Let's assume that I think we have the  
5 discretion to reach it.

6 MR. SURI: Yes.

7 JUSTICE BARRETT: You know, the Fifth  
8 Circuit -- we don't have a lot on it, right?  
9 And there's not a circuit split on it. We have  
10 a couple circuit -- you know, court of appeals  
11 opinions.

12 Assume that I think we have the  
13 discretion to do it. Why should we do it? And  
14 do we risk -- I mean, normally, we wait for  
15 things to percolate and develop so that we don't  
16 inadvertently forge ahead into areas where we  
17 might disrupt things. So why wouldn't that  
18 prudential concern apply here?

19 MR. SURI: You should do it because  
20 the degree of forum shopping that has happened  
21 under the Fifth Circuit's decision so far has  
22 been quite remarkable. In 2024, we counted  
23 about 14 petitions for review filed by  
24 e-cigarette companies under the Act.

25 JUSTICE BARRETT: But wouldn't this

1 have ramifications outside of the TCA? I mean,  
2 that's -- that's a little bit what I'm concerned  
3 about here. The government gets sued in a lot  
4 of places. And this would matter beyond just  
5 the TCA, correct?

6 MR. SURI: It could depending on how  
7 you rule. And I could offer the Court a way to  
8 limit its decision to statutes that are phrased  
9 just like this statute.

10 The Court could set aside the question  
11 of what is the default rule for suits against  
12 the government, whether everyone must have venue  
13 or only one party must have venue, and it could  
14 just focus on the language of this statute.

15 It says that an adversely affected  
16 person may file a petition for review in the  
17 circuit where the person resides or has its  
18 principal place of business. And the key verb  
19 there is "file."

20 I take my friends to be drawing a  
21 distinction between --

22 JUSTICE SOTOMAYOR: Sorry. I didn't  
23 hear that last part. The key?

24 MR. SURI: The key verb is "file."

25 JUSTICE SOTOMAYOR: It wasn't clear.

1 I just didn't hear -- okay.

2 MR. SURI: I take my friends to be  
3 drawing a distinction between filing a petition  
4 and joining a petition. But that argument  
5 ultimately doesn't stand up. When four  
6 different entities jointly file a petition,  
7 every single one of them is a filer of the  
8 petition. Reynolds is just as much a filer of  
9 this petition as the retailers are.

10 And the question is, are they filing  
11 their petition in a circuit that the statute  
12 permits them to? And they're not. They're not  
13 filing in the circuit where they reside or have  
14 their principal place of business, and they're  
15 not filing in the D.C. Circuit either.

16 JUSTICE ALITO: Some of the -- I'm  
17 sorry. Did you finish that sentence?

18 MR. SURI: I'm finished.

19 JUSTICE ALITO: Some of the amici  
20 claim that there are as many as 650 review  
21 provisions that are similar to the one here. So  
22 how many of those -- can you tell us how many of  
23 those would be subject to the limitation that  
24 you just set out?

25 MR. SURI: I don't have an exact



1 number, Justice Alito, but the amici are  
2 including in their numbers the general venue  
3 statute, which refers to suits in district  
4 court, and the Hobbs Act. But both of those are  
5 worded very differently. They don't talk about  
6 where a person may file a petition. They just  
7 say where venue is proper and use terms like  
8 "the petitioner" or "the plaintiff."

9 JUSTICE ALITO: Well, there are a lot  
10 of -- there are a lot of statutes that have  
11 specific -- specified venue provisions, right?

12 MR. SURI: Yes.

13 JUSTICE ALITO: And would this apply  
14 to all of the -- would our decision here apply  
15 to all of those?

16 MR. SURI: Not necessarily all of  
17 those. Some of those are worded like the  
18 statute here. I think the only example cited in  
19 the parties' briefs and the Chamber of Commerce  
20 amicus brief are the Investment Advisers Act and  
21 the Natural Gas Act.

22 Yes, it's true that the -- that other  
23 statutes that are worded the same way as this  
24 statute would be interpreted the same way as  
25 well.

1 JUSTICE ALITO: Well --

2 JUSTICE SOTOMAYOR: Well --

3 JUSTICE KAGAN: And what about 1391?

4 Would this be a way, essentially, to bracket  
5 1391? Or would 1391 -- you know, is it similar  
6 enough so that we would -- might be taken to say  
7 something about 1391?

8 MR. SURI: While we would very much  
9 like an opinion that addresses in dicta 1391 as  
10 well, the Court doesn't need to go that far.  
11 The Court could say we're just focusing on the  
12 language of this statute.

13 JUSTICE KAGAN: Sure. I'm just -- I'm  
14 just saying, you know, is -- is your  
15 suggestion -- which is you don't have to rely on  
16 any kind of default rule about the government  
17 and instead just focus on the language of this  
18 statute. What do you think candidly, honestly,  
19 that would suggest or not about 1391?

20 MR. SURI: What that would take away  
21 in the 1391 cases is this argument which I think  
22 is wrong in the first place that there's some  
23 special rule for suits against the government.  
24 What would be left in the 1391 cases is simply  
25 to analyze the language, history, and purpose of

1 that statute applying the normal rules of  
2 statutory interpretation.

3 While we think we have the better of  
4 those arguments, those would be the issues that  
5 the courts would have to resolve in that  
6 context.

7 JUSTICE SOTOMAYOR: Mr. Suri, I  
8 thought when I read the venue statute at issue  
9 here not that you were relying on the word  
10 "file" but that you were relying on the explicit  
11 use of something that's not in the other  
12 statutes, at least the ones that had been  
13 brought to our attention in the briefs.

14 The language here is "any person  
15 adversely affected" may file a petition for  
16 review in their residence or the District of  
17 Columbia "in which such person" -- it was the  
18 words "such person" which is missing from all  
19 the other statutes.

20 MR. SURI: It's not missing --

21 JUSTICE SOTOMAYOR: And I may be  
22 wrong, but I think it's missing from 1391.

23 MR. SURI: It is certainly missing  
24 from 1391 and the Hobbs Act. It's missing from  
25 the most important statutes --

1 JUSTICE SOTOMAYOR: Those were --  
2 those were the two I looked at, but --

3 MR. SURI: Yeah.

4 JUSTICE SOTOMAYOR: So I -- I --  
5 that's why I'm not sure. I know you'd like us  
6 to say that the government should not be treated  
7 differently, but, by suggesting that, you're  
8 inviting a -- a larger ruling than Justice  
9 Barrett suggests we might want to undertake.

10 MR. SURI: Well, I'd prefer to win as  
11 big as I can get away with, but, if the Court is  
12 concerned about issuing a broad ruling, it can  
13 certainly focus on the words "file" and "such  
14 person," which -- which are not unique to this  
15 statute but which do distinguish this statute  
16 from the others that the other side is most  
17 concerned about.

18 JUSTICE SOTOMAYOR: What do we do with  
19 your forfeiture, meaning the -- and Justice  
20 Barrett said we might have equity to -- to go  
21 by, and I do understand the forum-shopping  
22 concerns that you have.

23 But what do we do about the  
24 forfeiture?

25 MR. SURI: The issue was passed upon

1 below and was --

2 JUSTICE SOTOMAYOR: How if you  
3 forfeit? You didn't raise it explicitly in this  
4 way.

5 MR. SURI: It was passed upon at the  
6 top of page 3a and the bottom of page 5a of the  
7 petition appendix, where the court of appeals  
8 stated that venue is proper because two out of  
9 the four parties have their principal places of  
10 business within the circuit.

11 We didn't raise it in this case  
12 because we were foreclosed from doing so by  
13 circuit precedent. They argue that we didn't  
14 raise it in a previous case as well, the circuit  
15 precedent that foreclosed the issue in this  
16 case.

17 But I'd like just to quickly put that  
18 in context. There, the issue arose initially on  
19 a stay motion. We said there's a question as to  
20 venue, but we can't be sure because the record  
21 doesn't show where all the parties reside. They  
22 in their reply brief said it doesn't matter  
23 because one party resides in the circuit. And  
24 then the Fifth Circuit issued a published  
25 opinion accepting their theory.

1           We never really had a chance to engage  
2           on that issue. The Fifth Circuit issued a  
3           published opinion that is -- that was binding  
4           precedent in this case. We tried to make  
5           arguments that weren't foreclosed by that  
6           precedent, but the Fifth Circuit rejected that  
7           as well.

8           So all of that is properly before this  
9           Court.

10           JUSTICE KAGAN: And then what's your  
11           view of what question you brought to us?

12           MR. SURI: We brought the question  
13           whether a manufacturer can sue in the Fifth  
14           Circuit if it doesn't reside there or have its  
15           principal place of business there. And we gave  
16           two different reasons why they're not able to do  
17           so.

18           The Court could address either of  
19           those arguments in either order, and it would be  
20           sufficient to reverse if it agreed with us on  
21           the second part.

22           CHIEF JUSTICE ROBERTS: Thank you,  
23           counsel.

24           Justice Thomas?

25           JUSTICE THOMAS: We're definitely not

1 talking about jurisdiction here. We're merely  
2 talking about venue. And when I think of venue,  
3 I normally think of convenience to the parties.

4 As a practical matter, why is it  
5 inconvenient for the government to litigate in  
6 one circuit versus another?

7 MR. SURI: It's not inconvenient for  
8 the government, Justice Thomas.

9 JUSTICE THOMAS: So what's -- what's  
10 this all about?

11 MR. SURI: It's about Congress's  
12 choice in the statute. Congress could have  
13 passed a statute that said you can sue the  
14 government anywhere you want. It chose not to  
15 do that. It specified particular venues.

16 I think it had good reasons to do  
17 that. One is to minimize opportunities for  
18 forum shopping, ensuring that cases can  
19 percolate among multiple courts before they get  
20 to this Court.

21 Contrast Wages, where you had cases  
22 from eight different circuits that addressed the  
23 question before it got to this Court, to what's  
24 happening now, where almost all the cases are  
25 being filed in the Fifth Circuit. Congress had

1 good reason.

2 JUSTICE THOMAS: It seems like it's  
3 convenient for you then.

4 MR. SURI: Well, it's the statute  
5 Congress enacted and that's what we're asking  
6 the Court to apply.

7 JUSTICE THOMAS: So does it has --  
8 have anything to do with your -- your not  
9 winning in the Fifth Circuit?

10 MR. SURI: We have -- we neither like  
11 nor dislike the Fifth Circuit, Justice Thomas.  
12 What we dislike is for the other side to be able  
13 to choose whichever circuit is most convenient  
14 out of all 12 in the country.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Suppose a retailer  
17 continues to sell Vuse products and is  
18 criminally prosecuted. Could that retailer  
19 assert that the denial was unlawful as a defense  
20 in the criminal proceedings?

21 MR. SURI: There would be no  
22 jurisdictional bar to the retailer's doing so as  
23 there's nothing like the Hobbs Act issue that  
24 you'll be hearing about in the second case this  
25 morning. We would simply argue that the



1 retailer's defense would fail on the merits.

2           The statute says that the product may  
3 not be sold without authorization. And  
4 regardless of whether the denial was lawful or  
5 unlawful, that doesn't result in getting an  
6 authorization. That's like a driver driving  
7 without a license and saying: I should have  
8 been issued the license, but I wasn't. That  
9 usually wouldn't be regarded as a valid defense.

10           JUSTICE ALITO: Your friends on the  
11 other side say that this is -- this dispute is  
12 basically irrelevant because Petitioners  
13 challenging the same agency order in different  
14 circuits -- petitions, I'm sorry, challenging  
15 the order in different circuits will eventually  
16 be consolidated. What's your response to that?

17           MR. SURI: The response to that is  
18 that the multi-circuit petition process includes  
19 a provision that says that a court, at the end  
20 of that process, determines the most convenient  
21 forum and can send the cases to that forum.

22           They have circumvented that ability of  
23 a court to identify the most convenient forum.  
24 By allowing them to use the tactic that they  
25 have used, they can unilaterally send the cases

1 to whichever court they prefer.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor?

5 JUSTICE SOTOMAYOR: Explain that to  
6 me. I thought the multi-circuit rules required  
7 that the first filing controls, correct?

8 MR. SURI: The first filing controls  
9 if there's one filing in the first 10 days and  
10 then further filings after the first 10 days.

11 But regardless of whether the first  
12 filing controls, the court in which the  
13 petitions are consolidated can receive a motion  
14 to transfer the case to what it regards as the  
15 most convenient forum. And we have cited  
16 authority saying that preventing gamesmanship is  
17 a valid basis for granting such a motion.

18 So if they tried some tactic to  
19 engineer the cases to get to the Fifth Circuit,  
20 we would respond potentially by filing that type  
21 of motion. They have prevented us from doing  
22 that by not invoking the multi-circuit process  
23 by the stay.

24 JUSTICE SOTOMAYOR: I see. By filing  
25 everything in the Fifth Circuit.

1 MR. SURI: Exactly.

2 JUSTICE SOTOMAYOR: And joining  
3 everyone there.

4 MR. SURI: Exactly.

5 JUSTICE SOTOMAYOR: Got it.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?  
7 Justice Gorsuch?

8 JUSTICE GORSUCH: Mr. Suri, on -- on  
9 the second question, you say it's not  
10 inconvenient to litigate in the Fifth Circuit  
11 for the government. And I get that. But you  
12 say that there is forum-shopping concerns by  
13 allowing manufacturers to piggyback.

14 Is that right, those two things? We  
15 can hold those two ideas in our head at the same  
16 time?

17 MR. SURI: Yes.

18 JUSTICE GORSUCH: Okay. On -- on --  
19 if we got rid of the manufacturers piggybacking,  
20 what would stop manufacturers from simply  
21 funding retailer suits and we'd wind up in  
22 exactly the same place?

23 MR. SURI: The first problem with that  
24 would be that there is a question about the  
25 scope of the relief that would be issued. The

1 statute uses the phrase "set aside." And I know  
2 there's been some debate about whether that  
3 allows for universal relief or party-specific  
4 relief.

5 JUSTICE GORSUCH: Putting that aside.

6 MR. SURI: So it may be that there's  
7 relief only for the retailer.

8 JUSTICE GORSUCH: I understand that.

9 MR. SURI: Putting that aside, there  
10 might be additional reasons why a manufacturer  
11 is unable to fund the retailer. For example,  
12 the contents of the application often include  
13 trade secrets that the manufacturer may not be  
14 willing to share with the retailer.

15 JUSTICE GORSUCH: But suppose a  
16 manufacturer is.

17 MR. SURI: Well, then that's the price  
18 that the manufacturer is paying --

19 JUSTICE GORSUCH: Yeah.

20 MR. SURI: -- in order to --

21 JUSTICE GORSUCH: Yeah.

22 MR. SURI: It may well be --

23 JUSTICE GORSUCH: We could wind up in  
24 the same place, is I guess what I'm driving at.  
25 Third-party-funded litigation is not unknown in

1 this country.

2 MR. SURI: It is -- the -- the  
3 ingenious lawyers representing the applicants  
4 could come up with some --

5 JUSTICE GORSUCH: You're pretty  
6 ingenious too, Mr. Suri. Don't sell yourself  
7 short.

8 (Laughter.)

9 MR. SURI: -- may come up with some  
10 way to circumvent the ruling, I agree.

11 JUSTICE GORSUCH: Okay.

12 MR. SURI: But that is no reason not  
13 to enforce the limitations that Congress --

14 JUSTICE GORSUCH: I understand that.

15 And then back on the first QP, or how  
16 I perceive it, you rely very heavily on Block in  
17 your brief.

18 Your friends on the other say: Well,  
19 that's a different venue statute there. It  
20 said -- let's see. You could -- it may be  
21 brought in the district in which such handler,  
22 the milk handler, is located, rather than  
23 consumers or parties aggrieved or anything like  
24 that.

25 So what's -- what's your response?

1 I'm sure you've got one.

2 MR. SURI: I certainly do. The  
3 response is that the suit was not brought under  
4 that provision. The suit was brought under the  
5 APA.

6 JUSTICE GORSUCH: Understood.

7 But the Court relied on the -- the  
8 overall statutory structure in understanding  
9 what the zone-of-interest in that particular  
10 statute was informed, in part, by that -- that  
11 provision. As well as the fact that, I think  
12 there, the producers and the handlers had to  
13 vote on -- on -- on the regulation. And here, I  
14 -- I don't think -- I don't think the regulated  
15 community gets to vote on what you decide.

16 MR. SURI: The factors, the structural  
17 factors that the court in Block considered --

18 JUSTICE GORSUCH: Yeah. Why aren't  
19 those distinguishable, I guess is what I'm  
20 saying?

21 MR. SURI: There undoubtedly are some  
22 factors that are distinct, but the most  
23 important factors the court relied on also apply  
24 here.

25 First, it relied on the fact that the

1 milk consumers played no role in the agency  
2 process. And that's true of the retailers here.

3 Second, it relied on the fact that the  
4 consumers were indirectly affected --

5 JUSTICE GORSUCH: No, I -- I  
6 understand that. But I'm -- I'm not asking you  
7 to discuss the points of similarity. I'm asking  
8 you to address the points of dis-similarity.

9 MR. SURI: Yes. I acknowledge that  
10 there are points of dis-similarity. We're not  
11 saying this case is 100 percent controlled by  
12 that case.

13 JUSTICE GORSUCH: Okay.

14 MR. SURI: But we are saying the most  
15 important factors are points of similarity.

16 JUSTICE GORSUCH: Got it. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Kavanaugh?

19 JUSTICE KAVANAUGH: On consumers, that  
20 would open it up to basically anyone to sue.

21 MR. SURI: Potentially.

22 JUSTICE KAVANAUGH: Right. And that's  
23 a -- potentially a problem --

24 MR. SURI: Well, I --

25 JUSTICE KAVANAUGH: -- or at least the

1 Court might think that that's a strange way to  
2 read a statute --

3 MR. SURI: But -- but --

4 JUSTICE KAVANAUGH: -- as distinct  
5 from retailers is not going to present that kind  
6 of problem.

7 MR. SURI: But I think that's a  
8 problem with Respondents' position. The  
9 provision directing FDA to evaluate applications  
10 explicitly requires it to consider the  
11 consumers' interests. It is weighing their --  
12 the risk to their health against the benefits to  
13 their health.

14 And if they're not allowed to sue,  
15 then I would think that the retailers, who  
16 aren't even mentioned in the section, are even  
17 less entitled to sue.

18 JUSTICE KAVANAUGH: In response to  
19 Justice Thomas -- and I might have misheard you,  
20 so just correct me if I did -- I thought one of  
21 your answers about the Fifth Circuit was that  
22 prevents multiple circuits from being able to  
23 address the issue? Was that one of your  
24 answers?

25 MR. SURI: Yes.



1 JUSTICE KAVANAUGH: Well, doesn't the  
2 2112 process yield the same issue? And you say  
3 that's perfectly appropriate, of course, it has  
4 to be.

5 MR. SURI: The 2112 process will  
6 result in a single order being challenged in a  
7 single circuit. So that's true.

8 But there are multiple applicants with  
9 multiple orders all over the country. What's  
10 happening now is all of these applicants,  
11 whether they're in California or Michigan or  
12 Ohio or even China, are going to the Fifth  
13 Circuit to sue.

14 What would happen in the world that we  
15 think Congress envisioned is the California  
16 applicants would go to either D.C. or the Ninth  
17 Circuit and Ohio would go to the Sixth Circuit  
18 and Florida would go to the Eleventh Circuit.

19 And that way, similar orders would be  
20 addressed in different circuits. That's what's  
21 not happening right now under the Fifth  
22 Circuit's decision.

23 JUSTICE KAVANAUGH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Barrett?

1 JUSTICE BARRETT: Mr. Suri, I want to  
2 state something about what it means to be  
3 adversely affected or aggrieved, and then I want  
4 you to tell me if we're understanding it the  
5 right way.

6 Would you say that it's fair to say  
7 that the terms "adversely affected or aggrieved"  
8 have gained a particular meaning in the context  
9 of the APA, when they are used elsewhere, like  
10 in the TCA, they bring that old soil with them?  
11 So we would understand them to have that  
12 capacious APA style meaning unless aspects of  
13 the statutory structure and the organic statute  
14 overcome that?

15 Do you think that's fair?

16 MR. SURI: No.

17 JUSTICE BARRETT: Okay.

18 MR. SURI: The terms "adversely  
19 affected and aggrieved" acquired a legal meaning  
20 even before the APA, in the context of  
21 agency-specific statutes and non-APA statutes.  
22 And the Court has been applying that meaning in  
23 the context of non-APA cases even after the  
24 1970s APA cases.

25 So it has acquired a special meaning

1 in the APA context that is more lenient than its  
2 meaning in other contexts.

3 JUSTICE BARRETT: So it has kind of a  
4 term-of-art, old-soil meaning in -- in this  
5 other line of cases?

6 MR. SURI: Yes.

7 JUSTICE BARRETT: Okay.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Jackson? Anything further?

10 Thank you, counsel.

11 Mr. Watson.

12 ORAL ARGUMENT OF RYAN J. WATSON

13 ON BEHALF OF THE RESPONDENTS

14 MR. WATSON: Mr. Chief Justice, and  
15 may it please the Court:

16 This Court lacks jurisdiction to hear  
17 this case, as we explained in our brief. But if  
18 the Court does reach the merits, it should  
19 affirm.

20 The Tobacco Control Act allows any  
21 person adversely affected to challenge a  
22 marketing denial order. And retailers easily  
23 qualify.

24 The TCA contains two judicial review  
25 provisions that allow for three types of

1 challenges.

2 For withdrawals of marketing  
3 authorization, Congress limited review to the  
4 applicants.

5 For tobacco product standards and  
6 marketing denials, the latter of which is at  
7 issue here, Congress permitted review by any  
8 person adversely affected.

9 By allowing any person adversely  
10 affected to challenge denials, Congress plainly  
11 intended to extend review beyond the applicant.  
12 And the retailers are the next in line.

13 That plain text point is underscored  
14 by this Court's ordinary zone-of-interest test  
15 under which an entity harmed by agency action  
16 falls within the statutory zone when its  
17 interests are arguably protected or regulated by  
18 the statute.

19 And here, the retailers' interests are  
20 directly related to the statute because the  
21 provision under which FDA denied authorization  
22 governs what products may be sold, and the  
23 denial prohibits retailers from selling the  
24 products. Indeed, the harm to the retailers  
25 here could not be more plain. Retailer Avail of

1 Texas would go out of business if it could not  
2 sell Vuse products.

3 Finally, by failing to raise it below,  
4 FDA forfeited its argument that each Petitioner  
5 must independently establish venue, but FDA is  
6 wrong anyway. Congress enacted the TCA against  
7 a uniform judicial interpretation, holding that  
8 in cases challenging federal action only one  
9 challenger need establish venue.

10 In any event, ruling for FDA on this  
11 issue would change nothing. All four entities  
12 here would still end up in a consolidated case  
13 in the Fifth Circuit.

14 Therefore, the Court should dismiss  
15 the writ or affirm the order below. And I  
16 welcome the Court's questions.

17 JUSTICE THOMAS: Why do you think  
18 Congress would treat denials and withdrawals  
19 differently?

20 MR. WATSON: So as your question  
21 suggests, Justice Thomas, Congress did  
22 distinguish between those two scenarios. The  
23 plain text makes that clear. And if we think  
24 about why that is the case, it's helpful to look  
25 at 387j(d), which is the provision that governs

1 withdrawals.

2           The seven out of the eight reasons for  
3 issuing a withdrawal are focused on the  
4 applicant, for example, untrue statements in an  
5 application or mislading -- misleading labeling  
6 of an applicant or not maintaining the  
7 facilities properly from the applicant. It's a  
8 very applicant-focused decision by the agency.

9           And then, if the agency is considering  
10 withdrawing authorization, there is a notice and  
11 hearing process that is laid out for the  
12 applicant to participate before the agency  
13 before the withdrawal is issued. So it's  
14 evident throughout the statutory structure and  
15 the other provisions that withdrawals are very  
16 applicant-focused.

17           By contrast, a marketing denial is  
18 much more broadly focused as to whether the  
19 products may be sold, and in that respect, the  
20 applicant and the retailers have the same  
21 interest, which is selling the products.

22           JUSTICE JACKSON: Can I just --

23           JUSTICE SOTOMAYOR: But what else can  
24 you do? Meaning retailers have no greater  
25 rights. If the manufacturer fails to do

1 something in the administrative process, you  
2 can't make it up. You come in with the exact  
3 same rights for approval that the manufacturer  
4 has exercised or not exercised.

5 MR. WATSON: The decision that the  
6 agency is making under 387j is whether to  
7 authorize the marketing, the sale of the  
8 products, and in that regard, the applicants and  
9 the retailers are similarly situated. They both  
10 have an interest in selling those products.

11 JUSTICE SOTOMAYOR: Tell me what you  
12 can do that the manufacturer can't do in  
13 challenging the order. You're stuck with the  
14 record the manufacturer created, correct?

15 MR. WATSON: The administrative record  
16 would govern a challenge filed by retailers or  
17 by applicants.

18 JUSTICE SOTOMAYOR: So what arguments  
19 could you raise that would be different than the  
20 manufacturers'?

21 MR. WATSON: So I take your question,  
22 Justice Sotomayor, to be getting at why would  
23 retailers be involved in the litigation process,  
24 what do they add to that, what additional  
25 argument could there be, and in that regard, I

1 would point the Court to the fact that when a  
2 marketing denial order is issued, it's very  
3 important to everyone in that distribution chain  
4 to seek a judicial stay of that order  
5 immediately so that the products may continue to  
6 be sold. And we went into court immediately and  
7 sought such a stay.

8 When making that argument --

9 JUSTICE SOTOMAYOR: I keep going  
10 back --

11 MR. WATSON: --- the irreparable --

12 JUSTICE SOTOMAYOR: But the  
13 manufacturers could have done that if they  
14 really thought it was necessary. I --

15 MR. WATSON: Yeah.

16 JUSTICE SOTOMAYOR: What -- what --  
17 but they can't do it unless there's something  
18 inadequate in the record, correct?

19 MR. WATSON: Both -- both -- both the  
20 manufacturers and the applicants jointly did  
21 that in this case. And my point was that, in  
22 seeking a stay, irreparable harm has to be  
23 established. And the fact that, for example,  
24 Avail Texas, one of the retailers here, will  
25 have to go out of business if it cannot sell the



1 Vuse products --

2 JUSTICE SOTOMAYOR: I -- I -- I --

3 MR. WATSON: -- is well within that.

4 JUSTICE SOTOMAYOR: -- I fully  
5 understand the harm, but it's identical to  
6 withdrawal. So you're going to be harmed in any  
7 situation, whether there's approval not given or  
8 it's withdrawn.

9 JUSTICE JACKSON: But, Mr. --

10 MR. WATSON: It is true that we --

11 JUSTICE SOTOMAYOR: I am asking you  
12 what rights in the administrative -- what  
13 arguments, what evidence, what anything can you  
14 present that would be different than the  
15 manufacturers'?

16 MR. WATSON: The retailers can make  
17 the same arguments and it is based on the same  
18 administrative record, Justice Sotomayor.

19 But --

20 JUSTICE JACKSON: Mr. Watson -- sorry,  
21 go ahead.

22 MR. WATSON: But, here, Congress has  
23 distinguished between the withdrawal scenario,  
24 which is limited to applicants and to our --

25 JUSTICE JACKSON: Yes, and that's --

1 that distinction is what really bugs me about  
2 your position because I think we would all agree  
3 that the retailers have a significant interest  
4 once the product is on the market, that they  
5 have purchased it, they have stocked their  
6 shelves, they are ready to go. In fact, they  
7 might even have sales numbers where it's been  
8 out there and now their skin is really in the  
9 game. And yet, in that situation in which they  
10 would be clearly harmed if suddenly approval  
11 would be -- was withdrawn, Congress has made  
12 clear that they don't have the ability to sue.

13 And so it seems just at least  
14 peculiar, if not, in my view, sort of  
15 undermining your argument, that the retailers  
16 have an interest in the pre-market scenario,  
17 that would entitle them to sue. The fact that  
18 Congress has said in the very situation in which  
19 we would expect that retailers would be able to  
20 come in to protect their own interests, Congress  
21 has not allowed them to.

22 MR. WATSON: Justice Jackson, I think  
23 I would answer that in two parts.

24 The first is that very strong interest  
25 that you identify, we agree, and that is

1       implicated here because, in this case, these  
2       products are on the shelves of retailers.

3                 JUSTICE JACKSON:  Can we just pause --  
4       let's talk about the post, because I do want to  
5       get back to that.  But in -- I agree with you  
6       that once the product is marketed and the  
7       retailers -- I think, in some places, they  
8       actually purchased it to sell to their  
9       customers.

10                MR. WATSON:  Correct.

11                JUSTICE JACKSON:  I mean, they are in  
12       this thing.

13                MR. WATSON:  That's correct.

14                JUSTICE JACKSON:  Congress says, if  
15       the FDA withdraws its approval of products that  
16       they have already purchased and stocked their  
17       shelves, they can't sue.  So that suggests to me  
18       that Congress was really not in this statute  
19       protecting retailers' interests.

20                MR. WATSON:  It -- it is absolutely  
21       true that in the withdrawal scenario, they  
22       cannot sue, but Congress here drafted a separate  
23       provision that says any person adversely --

24                JUSTICE JACKSON:  No, I understand,  
25       but you're try --

1                   MR. WATSON: -- affected can challenge  
2 the marketing denial.

3                   JUSTICE JACKSON: -- but -- but we  
4 have to try to figure out what Congress wanted  
5 with respect to whether retailers were in the  
6 class of people that should be entitled to sue.

7                   MR. WATSON: Yes.

8                   JUSTICE JACKSON: And the clue from  
9 the statute here is that Congress was not  
10 focused on retailers because, if they were, they  
11 really would have given retailers the ability to  
12 sue where their interests are most seriously  
13 affected.

14                   Let me ask you about the pre-market  
15 assumption that retailers and manufacturers  
16 actually stand in the same shoes. I guess I'm  
17 not sure I understand that because it would seem  
18 to me that retailers really get their interest  
19 from marketed products. Again, it's -- once a  
20 product is on the market, the retailers come in,  
21 they buy it up, they do whatever, and they're  
22 ready to sell it to -- to customers.

23                   I'm not sure that they have the same  
24 interest as a manufacturer in pre-market,  
25 pre-development, is it going to be approved or

1 not. So can you say more about why you're just  
2 assuming that retailers and manufacturers have  
3 the same interest in the pre-market scenario?

4 MR. WATSON: Absolutely. It's clear  
5 that retailers are the next in line in terms of  
6 the harm suffered behind applicants, and the  
7 reason is that they want to sell these products,  
8 whether it's on their shelves right now or they  
9 just have a desire to do so for their business  
10 purposes --

11 JUSTICE JACKSON: But why is that a  
12 harm?

13 MR. WATSON: -- going forward.

14 JUSTICE JACKSON: Why is that a harm  
15 that -- that -- that Congress would want to  
16 protect here? I mean, it seems to me that  
17 retailers just want to sell some tobacco  
18 product. They see that this product might be  
19 developed. Mr. Suri says they don't even see  
20 that because, you know, this is happening  
21 confidentially. But, fine, they hear about this  
22 kind of product and they're excited. Okay, I  
23 understand that.

24 But why are they harmed if that  
25 product never gets approved?

1                   MR. WATSON: Because Section 387j,  
2                   which is the core section that we're talking  
3                   about here, governs whether the product may be  
4                   introduced into interstate commerce, and  
5                   retailers have business interests in selling  
6                   certain products over other products. They  
7                   don't just want to sell some product.

8                   Here, the retailers want to sell these  
9                   products and the thing that is stopping them  
10                  from doing so is the agency action.

11                  JUSTICE JACKSON: How is their  
12                  interest --

13                  JUSTICE BARRETT: Mr. --

14                  JUSTICE JACKSON: -- different than  
15                  the customer? What if -- so -- so say I'm a  
16                  customer out there that really is interested in  
17                  a flavored tobacco product because I think it's  
18                  going to help me to, you know, stop smoking, and  
19                  so just like the retailer, I hear about it. I  
20                  really want to buy it.

21                  Is that person adversely affected for  
22                  the purpose of this statute?

23                  MR. WATSON: The difference is that  
24                  the statute here prohibits the retailer from  
25                  selling a product that has been denied and

1 subjects them to severe penalties if they do so,  
2 which include imprisonment, civil monetary  
3 penalties, injunction, and seizure. None of  
4 that applies to a consumer who wants to purchase  
5 their product. Thus --

6 JUSTICE KAGAN: Can I flip you to your  
7 other argument, Mr. Watson? So let's assume  
8 that a retailer is adversely affected for  
9 purposes of this question.

10 So a person adversely affected may  
11 file a petition for review with the D.C. Circuit  
12 or the circuit in which such person resides.  
13 Such person is the person adversely affected who  
14 files a petition for review. How do we read  
15 that any other way than that each person  
16 petitioning for review do so in either the D.C.  
17 Circuit or that person's home district?

18 MR. WATSON: Justice Kagan, the way to  
19 read that is in light of the decades-long  
20 uniform judicial interpretation of nearly  
21 identical venue provisions that govern suits  
22 against the federal government.

23 JUSTICE KAGAN: Okay. I want to let  
24 you talk about that, but -- but, if that's the  
25 first sentence out of your mouth, it's kind of a

1 concession that this language, taken on its own,  
2 is best read against you, is best read for the  
3 government.

4 MR. WATSON: We don't concede that,  
5 but we do think that our best textual argument  
6 is you read that text in light of how it has  
7 been interpreted by courts and how we assume  
8 that Congress had in mind when it enacts it  
9 against that. But we don't concede -- happy to  
10 discuss the other reasons.

11 JUSTICE KAGAN: Well, okay, give me  
12 the other reasons.

13 MR. WATSON: Okay. So --

14 JUSTICE KAGAN: Just on the text  
15 itself.

16 MR. WATSON: Yes.

17 JUSTICE KAGAN: I mean, I want to know  
18 how to read that text your way.

19 MR. WATSON: So, at best for the FDA,  
20 the text is ambiguous because, yes, it refers to  
21 "such person." It also refers to "their," which  
22 is plural. And 1 U.S.C. 1, the Dictionary Act,  
23 says that singular can refer to the plural. I  
24 would also point out that even if it is  
25 singular, it doesn't actually answer the



1 question here.

2           So let's assume it's singular. That  
3 just means that at least one person has to  
4 satisfy it. It doesn't mean that every person  
5 has to satisfy it. And that's the --  
6 essentially, the rewriting that FDA's position  
7 does, is rewrite it to say every person has to  
8 satisfy it or all persons have to satisfy it.

9           JUSTICE KAGAN: Well, I take the point  
10 that it doesn't say "and we mean" and then  
11 answer the question in this case. But, you  
12 know, usually, you look at a statute, it says  
13 "such person." We're talking about a person.  
14 That's the person who's filed, and that person  
15 has -- and is given two choices, D.C. Circuit or  
16 the circuit -- the circuit in which the person  
17 resides.

18           MR. WATSON: Justice Kagan, the other  
19 point that I would make on this is that the --  
20 nothing in the Tobacco Control Act overrides the  
21 operation of basic joinder principles. And the  
22 four Respondents here filed the petition for  
23 review invoking Federal Rule of Appellate  
24 Procedure 15. 15(a) is what allows joinder  
25 where practicable if the parties are challenging

1 the same order and have the same interests, as  
2 is the case here.

3 So nothing in that provision overrides  
4 the background operation of joinder principles,  
5 which support our position and our approach  
6 here.

7 JUSTICE KAVANAUGH: Can you address,  
8 going back to the first argument, all your --  
9 all your responses to Block?

10 MR. WATSON: Yes. Happy to do that.

11 As an initial matter, Block supports  
12 our approach for how you look at the statute to  
13 construe what the zone of interest is. It looks  
14 at all of the relevant provisions in the entire  
15 structure of the statute, which is what we are  
16 suggesting that this Court should do.

17 The reason that Block is  
18 distinguishable is that included a collaborative  
19 price-setting process set out in the statute  
20 where, as Justice Gorsuch mentioned, their --  
21 the members of the industry, the handlers and  
22 the -- the processors, had votes as to the price  
23 setting. And then there was an administrative  
24 review mechanism, which was limited to handlers  
25 and did not involve consumers. There then was a

1 judicial review provision that was limited to  
2 handlers and not to consumers.

3 The consumers tried to go outside of  
4 all of that and invoke the APA in their own  
5 lawsuit. And the court said -- and this really  
6 wasn't even a zone-of-interest case. It was a  
7 case about precluding judicial review.

8 The court said: Well, the structure  
9 of the statute precludes judicial review there.  
10 That would be like if consumers or perhaps even  
11 retailers tried to file a district court APA  
12 challenge to a withdrawal decision, right?

13 This statute in the Tobacco Control  
14 Act has an administrative review process for  
15 withdrawals, and it's limited to applicants, and  
16 it has a judicial review provision for  
17 withdrawals, and it's limited to applicants.

18 If someone other than an applicant ran  
19 to district court and filed a challenge to a  
20 withdrawal decision, the court might say: The  
21 stat -- the statute precludes judicial review of  
22 a consumer suit in that context.

23 But that's not what we have here.  
24 Here, the TCA expressly distinguishes between  
25 applicants on the one hand and any person

1 adversely affected on the other.

2           So, once we decide that someone other  
3 than an applicant is included with any person  
4 adversely affected, the next question for the  
5 Court is: Who's the next in line in terms of  
6 being harmed? And, here, that is plainly the  
7 retailers. The retailers here are subject to a  
8 prohibition on selling the products after the  
9 denial and are subject to severe penalties if  
10 they violate that.

11           And, indeed, the FDA press releases  
12 that accompanied the marketing denial orders for  
13 the Vuse products expressly threaten enforcement  
14 against the retailers if they continue to sell  
15 the products.

16           So it's hard to see how retailers in  
17 that context would not be adversely affected by  
18 a marketing denial. And, as I noted in my  
19 opening --

20           JUSTICE JACKSON: That doesn't --  
21 they're sell --

22           JUSTICE BARRETT: Mr. --

23           JUSTICE JACKSON: -- they would have  
24 to -- I -- sorry. Go ahead.

25           JUSTICE BARRETT: I was just going to

1 ask you if you could respond to the same  
2 question that I asked Mr. Suri about the  
3 meanings of the terms "aggrieved" and "adversely  
4 affected."

5           You know, I asked him whether they had  
6 a special meaning that they'd acquired in  
7 administrative law that we assume presumptively  
8 applies elsewhere unless the statutory structure  
9 overcomes it.

10           And, you know, he just -- he responded  
11 that, really, they have a longer common-soil --  
12 a longer common law meaning that brings the old  
13 soil and that the APA is, as -- as I understood  
14 his answer, unique.

15           What's your understanding?

16           MR. WATSON: So my -- my understanding  
17 is that if we just look at the plain text here,  
18 we plainly prevail. But I do acknowledge that  
19 the Court has applied a zone-of-interest test in  
20 these contexts and that "any person adversely  
21 affected" has a meaning under those tests.

22           Where I would disagree with my friend  
23 is the notion that the Court's usual lenient  
24 zone-of-interest test has not been applied  
25 outside of the APA context.

1           The Bank of America case is an  
2           example. That was a Fair Housing Act case, and  
3           the Court applied a very lenient version of that  
4           test which included the word "arguably."

5           The Thompson case was a Title VII  
6           case. That likewise applied the -- the usual  
7           lenient version, and it used the word "arguably"  
8           again there.

9           JUSTICE BARRETT: But, when you say  
10          "usual" and -- and you point to the Bank of  
11          America case, I mean, really, what you're saying  
12          then is that the lenient test from the APA  
13          generally applies absent some of it?

14          MR. WATSON: Yes. And, in fact, this  
15          Court in the Bennett decision at page 163  
16          indicated that the usual test applies unless the  
17          statute expressly indicates otherwise.

18          In that case, "any person" was the  
19          phrase in the Endangered Species Act, and so the  
20          Court said: Well, that indicates otherwise.  
21          That's even broader.

22          Here, there's no express overriding of  
23          that test, and, in fact, the language of the  
24          judicial review provision at issue here is  
25          verbatim the same as the APA judicial review

1 provision.

2 JUSTICE BARRETT: And let me just ask  
3 you one question about venue. You know, your  
4 friend on the other side says, you know: Oh,  
5 no, no, no, don't worry about it. You know,  
6 Mr. Suri said we could have a large win on the  
7 venue joinder issue, and we would be happy with  
8 that, but a small win would be fine too.

9 And if we confine the holding just to  
10 the TCA, he said that would be -- you know, we  
11 would -- could assure ourselves that we wouldn't  
12 cause damage elsewhere.

13 What risks do you see if you lose on  
14 that issue?

15 MR. WATSON: If we lose on that issue,  
16 it is hard for me to see how it would be cabined  
17 to just the Tobacco Control Act context because  
18 the Tobacco Control Act's language is quite  
19 similar to the Hobbs Act, and the Hobbs Act is  
20 quite similar to the federal venue -- general  
21 venue statute, all of which have been construed  
22 to allow just one party to establish venue.

23 And that's all against --

24 JUSTICE KAGAN: So I -- I don't think  
25 that's quite right, Mr. Watson. I mean, you do

1 analogize primarily to the Hobbs Act, and the  
2 Hobbs Act strikes me as very different.

3           The original version of the Hobbs Act  
4 allowed for venue where any of the parties  
5 filing the petition for review resided. That  
6 was the original version. And then they  
7 maintained that meaning by just defining in  
8 their definition of Petitioner.

9           So the current version does the exact  
10 same thing by reference to a definition, that it  
11 makes it clear that you can get venue where any  
12 of the persons filing the petition for review  
13 resided, which is exactly what this section does  
14 not do.

15           MR. WATSON: Respectfully, Justice  
16 Kagan, none of the cases we point to under the  
17 Hobbs Act rely on the definitional provision,  
18 and, indeed, none of them even refer to that. I  
19 acknowledge, of course, that it was amended, but  
20 that is not the basis for those decisions.

21           JUSTICE KAGAN: Well, whatever --  
22 whatever the basis was and whether they were  
23 just sort of thinking about the old Hobbs Act,  
24 so they didn't have to say, oh, you know, the  
25 new Hobbs Act does the same thing by using a



1 definition, I mean, it does do the same thing by  
2 using a definition.

3 And what the Hobbs Act does and has  
4 always done is to say: Where any of the parties  
5 reside, that's where you can file.

6 MR. WATSON: What the courts in the  
7 Hobbs Act cases were largely doing is looking to  
8 the context in the previous interpretations of  
9 the general venue statute and how that had been  
10 construed.

11 So the Railway Labor Executives case  
12 from the Ninth Circuit is an example of  
13 construing the Hobbs Act in light of the federal  
14 gen -- federal general venue statute. And as  
15 this Court has seen, the courts of appeals have  
16 uniformly held that the federal gen -- general  
17 venue statute allows only one petitioner to  
18 establish venue, and that's because Congress,  
19 when it enacted that statute, was expressly  
20 trying to open up and broaden the venues that  
21 are available when entities are challenging  
22 governmental action.

23 The Sidney Coal case from the Sixth  
24 Circuit is a good example of a case that  
25 discusses that -- those policies in that ruling.

1 JUSTICE JACKSON: But -- but isn't  
2 that a different purpose than is at issue here?  
3 I mean, I think what's a little concerning is  
4 that if you're right that only one party needs  
5 venue here, it seems to directly undermine  
6 Congress's intent to channel this -- these kinds  
7 of actions in a particular way.

8 It seems like the statute gives those  
9 who are adversely affected by the denial two  
10 choices in terms of venue: They can file in the  
11 D.C. Circuit, or they can file in the circuit in  
12 which they reside.

13 If you're right, neither of those  
14 become limitations on people who want to sue.  
15 And so I guess I don't understand how your  
16 only-one-person rule works consistently with  
17 what Congress is trying to do here.

18 MR. WATSON: Respectfully, Justice  
19 Jackson, our position does not nullify the venue  
20 provisions, as my friend suggests, and there are  
21 a few examples I can give to demonstrate that.

22 One is that not all products are sold  
23 nationwide. Many e-cigarette products are sold  
24 by mom-and-pop vapor shops on -- on the street  
25 corner, and those mom-and-pop vape shops have to

1 seek authorization for each of their own  
2 e-liquids in the products.

3 If they do so and they receive a  
4 marketing denial order and wish to challenge it  
5 in court, they are not going to be able to sue  
6 all over the country. They're only going to be  
7 able to sue in the relevant locality where they  
8 sell those products.

9 But, even if we address the context of  
10 a product that is sold nationwide and, thus, is  
11 on retail shops --

12 JUSTICE JACKSON: Are you saying that  
13 Congress was not aware that some products are  
14 sold nationwide?

15 I mean, the venue provision has no  
16 carveout for national products versus local  
17 products. It seems pretty clear that you have a  
18 choice. If you don't want to sue where you  
19 reside, you can bring your suit in the D.C.  
20 Circuit.

21 MR. WATSON: I'm -- I'm simply  
22 suggesting that the nullification argument by my  
23 friend is not well put because there are  
24 scenarios where venue, even under our view, will  
25 impose an obstacle to the lawsuit being filed.

1 JUSTICE JACKSON: Well, but that's not  
2 the question I'm asking. I'm not saying: Do  
3 you always get away with it? I'm saying: Why  
4 would Congress have set up a -- a statute or  
5 scenario where, in the vast majority of cases,  
6 you can just do an easy end run around these  
7 limitations?

8 MR. WATSON: Because, as discussed in  
9 many of the cases that interpret the general  
10 venue statute, Congress has expressly intended  
11 that when entities are challenging governmental  
12 action, they should have many venue options  
13 available to them and they should not have to go  
14 just to D.C. That's the effect of what the  
15 government's argument is here, that we can only  
16 file in D.C. together. But that is not  
17 consistent with Congress's intent.

18 Normally, venue is a protection for  
19 defendants in the ordinary run of cases, but  
20 that policy reason is flipped in the --

21 JUSTICE JACKSON: Are you saying that  
22 Congress couldn't craft a statute in which it  
23 was trying to channel the venue in this way, in  
24 a way that was not a protection for defendants?  
25 Congress was trying to ensure that these kinds

1 of cases go in certain forums or that they're  
2 being litigated all over the country and not  
3 just in one place chosen by the defendants?

4 MR. WATSON: Congress certainly could  
5 craft a statute that makes venue very limited or  
6 makes there be very many options. And my point  
7 here is that the statute that we're looking at,  
8 read in the context of other statutes that  
9 authorize suits against the federal  
10 government --

11 JUSTICE JACKSON: Why do we have to  
12 read it in the context of other statutes? Why  
13 can't we look at what Congress was doing in this  
14 statute?

15 MR. WATSON: We read it in the context  
16 of the other statutes under this Court's  
17 decision in -- in *Bragdon*, in the Texas  
18 Department of Housing case. When there is a  
19 uniform interpretation by the lower courts, we  
20 assume that Congress intended the words that it  
21 was enacting to have the same meaning that those  
22 uniform courts have held. And, here, that  
23 supports our position.

24 But, as I was also discussing earlier,  
25 even setting that issue -- argument to the side,

1 basic joinder principles here support the fact  
2 that the four Respondents can and did jointly  
3 file a petition for review under Federal Rule of  
4 Appellate Procedure 15 in the Fifth Circuit, and  
5 there's nothing in the Tobacco Control Act that  
6 overrides the ability of the Petitioners to do  
7 so.

8 I would also note that if we prevail  
9 on the first question and retailers are indeed  
10 allowed to sue, the second question really is  
11 not one that the Court needs to reach both  
12 because of the forfeiture argument that we made  
13 in the briefs but also because 28 U.S.C. 2112(a)  
14 is going to result in all four of the  
15 Respondents being in the Fifth Circuit in a  
16 consolidated case challenging this marketing  
17 denial order. So it's not going to make a  
18 difference in this case.

19 JUSTICE GORSUCH: Can you explain that  
20 further, why that's the case?

21 MR. WATSON: Yes, because, in this  
22 instance, the four Respondents jointly filed  
23 their petition within the first 10 days after  
24 the marketing denial order. The government  
25 raised a venue objection very quickly. And so,

1 within the 30-day timeliness window but outside  
2 of the first 10 days, we went to the D.C.  
3 Circuit and jointly filed what's referred to as  
4 a protective petition there. And that's just  
5 been pursuant to the agreement of the parties.  
6 And the court held in abeyance in case we don't  
7 prevail on the venue issue in the Fifth Circuit.

8 If we -- if we have the scenario that  
9 I was just discussing, the retailers will be  
10 able to still stay in the Fifth Circuit, but  
11 Reynolds, the applicant, will be transferred to  
12 the D.C. Circuit.

13 JUSTICE SOTOMAYOR: But --

14 MR. WATSON: Its petition will --

15 JUSTICE GORSUCH: I'd like you just to  
16 finish that answer, please.

17 MR. WATSON: The protective petition  
18 will come alive at that point, and pursuant to  
19 28 U.S.C. 2112(a), the petition will be filed to  
20 the -- will be transferred to the only court in  
21 which there was a first 10-day petition --

22 JUSTICE GORSUCH: Got it.

23 MR. WATSON: -- and that's here the --  
24 the Fifth Circuit, and then they will be  
25 consolidated.

1 JUSTICE GORSUCH: I --

2 MR. WATSON: That's all mandatory  
3 under the statute.

4 JUSTICE GORSUCH: -- I got it. One  
5 other question. On -- on the forfeiture --

6 MR. WATSON: Yes.

7 JUSTICE GORSUCH: -- I'm struggling a  
8 little bit with that argument because the Fifth  
9 Circuit found venue, and -- and so it didn't  
10 necessarily pass upon the question, even if it  
11 didn't discuss it.

12 MR. WATSON: So it's conceded that it  
13 wasn't pressed below, and I don't think that the  
14 opinion below is fairly read as passing upon  
15 this either. The government was seeking relief  
16 below that is inconsistent with its theory now.  
17 It was asking that the court be -- the case be  
18 transferred to the Fourth Circuit or the D.C.  
19 Circuit, which their theory now is we couldn't  
20 ever be in the Fourth Circuit. I think that  
21 demonstrates the court wasn't considering the  
22 issue that we're discussing now.

23 Yes, they did comment in the opinion  
24 that in addition to establishing standing, two  
25 of the Petitioners were located in the circuit.



1 But that's the extent of it. And these issues  
2 that we're discussing now were not put before  
3 the court and I don't think fairly are read as  
4 having been answered by the court.

5 But, in any event, the other reasons  
6 why the second question doesn't matter are what  
7 we discussed before and the fact that the  
8 retailers and the applicant are seeking the same  
9 relief, namely, to set aside the order that  
10 we're here on.

11 JUSTICE SOTOMAYOR: Counsel, given  
12 2112, the Fifth Circuit still retained -- I'm  
13 sorry -- there still exists an equitable  
14 decision by it about whether it should transfer  
15 to the D.C. Circuit, meaning the manufacturer  
16 filed there outside the 10-day period, but it  
17 filed there. It has all of the materials. It  
18 was the party responsible for the application.

19 Many parts of it are under seal, and  
20 shouldn't it be the D.C. Circuit who decides how  
21 much of that the retailers should see? There  
22 may be some things -- Justice Gorsuch assumed  
23 the manufacturer might let the retailer look at  
24 everything. I'm not so sure. But that could be  
25 litigated by the court.

1                   So it's not an irrelevant decision by  
2                   us to say where each party has to file.

3                   MR. WATSON:   It is in the sense that  
4                   the operation of the statute will result in  
5                   mandatory --

6                   JUSTICE SOTOMAYOR:  No.  The --

7                   MR. WATSON:   -- transfer and  
8                   consolidation but at --

9                   JUSTICE SOTOMAYOR:  What the  
10                  government is saying, it could make an  
11                  application and the court still has equitable  
12                  powers under 2012 to decide differently.

13                  MR. WATSON:  Correct.  What I  
14                  understand the government to be saying is that  
15                  yes, the process that I just described will play  
16                  out, but, after it does and everyone is back in  
17                  the Fifth Circuit, they reserve the right to  
18                  file a motion to transfer based on convenience  
19                  at that point.  And I do agree that the statute  
20                  allows them to then --

21                  JUSTICE SOTOMAYOR:  That was my only  
22                  point.

23                  MR. WATSON:  But my friend conceded  
24                  that it's not inconvenient to the government to  
25                  be in the Fifth Circuit, which entails just

1 sending the Department of Justice lawyer to  
2 the Fifth Circuit --

3 JUSTICE SOTOMAYOR: No, but it --

4 MR. WATSON: -- for oral argument.

5 JUSTICE SOTOMAYOR: -- but it can  
6 argue game -- gamesmanship.

7 Having said that, on the  
8 zone-of-interests test, I agree with the  
9 government in part and with you in part. There  
10 is a common law zone of interest that is  
11 different from the APA. And we haven't  
12 routinely applied the APA test. We sort of look  
13 at the language of the statute and its  
14 structure. And that's the only point they're  
15 making, which is there isn't a routine  
16 application.

17 In Bank of America, for example, the  
18 case you rely on, we chose the APA formulation  
19 and even made it broader because we said the  
20 language was broader. We've done that a couple  
21 of times.

22 And so I don't think -- and the  
23 government hasn't pointed me to a statute where  
24 we narrowed it necessarily -- or maybe I'm wrong  
25 about that, I don't remember -- but the point

1 still remains that I don't think we can do this  
2 as a -- a common-meaning understanding of what  
3 "aggrieved" means.

4 MR. WATSON: I'll take that in two  
5 parts, Justice Sotomayor. The Bank of America  
6 case was applying the ordinary zone-of-interests  
7 test. And, yes, there was previous case law  
8 under the Fair Housing Act that had said, well,  
9 we think "aggrieved person" extends to the  
10 full -- full parameters of Article III. And  
11 that was actually disputed whether that  
12 precedent was still good law in that case, and  
13 the Court said we don't need to resolve that;  
14 we're just going to apply the ordinary test.  
15 And that's why we think it supports our position  
16 here.

17 But, even setting that aside and just  
18 looking at the text and the structure of the  
19 statute, we think that it's quite clear that  
20 retailers are within the zone of interests  
21 because the text distinguishes between  
22 applicants on the one hand and any person  
23 adversely affected on the other.

24 JUSTICE SOTOMAYOR: I -- I know the  
25 arguments. Thank you.

1 JUSTICE KAVANAUGH: Is it your  
2 position that "adversely affected" as a general  
3 proposition, usually, when there's regulation of  
4 a manufacturer, adversely affects a retailer and  
5 vice versa?

6 MR. WATSON: I think that often will  
7 be the case, but to answer that, we have to look  
8 at the organic statute at issue in context, and,  
9 here, it's quite clear that it would, and in  
10 many contexts, it will, though, in the ordinary  
11 course, it's possible that there would be a  
12 statute that makes clear that retailers are  
13 outside the zone. For example, a retailer  
14 trying to challenge the withdrawal here would be  
15 outside the zone because the text and structure  
16 of the statute are so clear to that effect.

17 JUSTICE KAVANAUGH: Well, and the  
18 economics of the situation, isn't that --

19 MR. WATSON: Correct.

20 JUSTICE KAVANAUGH: -- the key?

21 MR. WATSON: Absolutely.

22 JUSTICE KAVANAUGH: I mean, normally,  
23 it's going to impose cost on retailers if  
24 there's increased regulation of manufacturers,  
25 as well as distributors, and, similarly,

1 throughout the -- throughout the upstream and  
2 downstream chain, right?

3 MR. WATSON: Absolutely. I agree.  
4 And the Flemming decision from this Court is an  
5 example of a case where the Court looked to  
6 various entities in the distribution chain and  
7 held that they were all within the zone of  
8 interests.

9 JUSTICE KAVANAUGH: And so too, when  
10 there's under-regulation of someone, a  
11 competitor usually is disadvantaged?

12 MR. WATSON: Correct.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Justice Thomas?

16 Justice Alito?

17 Justice Sotomayor?

18 Justice Gorsuch?

19 Justice Kavanaugh, anything further?

20 JUSTICE KAVANAUGH: No.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Barrett?

23 JUSTICE JACKSON: Can I just --

24 CHIEF JUSTICE ROBERTS: Justice  
25 Jackson?

1 JUSTICE JACKSON: Can I just ask a  
2 quick question about enforcement? If the  
3 retailer continued selling the bubble  
4 gum-flavored e-cigarettes after a withdrawal,  
5 could the FDA initiate an enforcement action  
6 against it?

7 MR. WATSON: Yes. Now, to be clear,  
8 bubble gum products are not at issue here.  
9 These are menthol products or --

10 JUSTICE JACKSON: I apologize, yes.  
11 If there was withdrawal of a product, could an  
12 enforcement action be brought against the  
13 retailer?

14 MR. WATSON: Yes, because the retailer  
15 would be selling the product.

16 JUSTICE JACKSON: Would be in  
17 violation, right.

18 MR. WATSON: Correct.

19 JUSTICE JACKSON: So I guess -- and  
20 yet, still Congress did not, you concede, allow  
21 for retailers to challenge withdrawals, right?

22 MR. WATSON: Perhaps they could make a  
23 challenge as applied as a defense in that  
24 enforcement action. But I do concede that as a  
25 facial matter, challenging a marketing denial

1 order, which is what we're dealing with here,  
2 the --

3 JUSTICE JACKSON: But you still say  
4 that the enforcement possibility would yield the  
5 result that retailers should be allowed to  
6 challenge the denial on the front end because of  
7 enforcement? I just was trying to --

8 MR. WATSON: Correct.

9 JUSTICE JACKSON: I was just  
10 questioning how far your enforcement goes.

11 MR. WATSON: Correct. Correct. Here,  
12 the retailers are subject to the prohibition and  
13 the penalties, and FDA has expressly threatened  
14 enforcement. So this is an easy case to -- to  
15 identify that retailers here in this context  
16 certainly are within the zone of interests.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Rebuttal, Mr. Suri.

21 REBUTTAL ARGUMENT OF VIVEK SURI

22 ON BEHALF OF THE PETITIONERS

23 MR. SURI: Justice Barrett, you asked  
24 why it's important to resolve this case, why the  
25 Court should exercise its discretion to do so.



1 The practical reason is that a lot of these  
2 cases have been piling up in a single circuit.

3 In 2024, by our count, if you omit  
4 protective petitions, about 75 percent of  
5 e-cigarette cases were filed all in the Fifth  
6 Circuit, all of them by out-of-circuit  
7 applicants trying to use the tactic that was  
8 approved in the decision below.

9 If the Court doesn't resolve this  
10 issue now, then petitions will continue to pile  
11 up in that circuit, potentially you'd have to  
12 reverse those venue decisions years down the  
13 line, and all of those cases would have to be  
14 distributed again, all over the country, to be  
15 done from scratch. It's more efficient for the  
16 Court to resolve the issue now.

17 Justice Sotomayor, you asked about if  
18 there's ever been a case in which the Court has  
19 narrowed the zone-of-interests test rather than  
20 broadened it. The best case we have for that is  
21 Lexmark, where the Court interpreted the Lanham  
22 Act's unfair competition provision to protect  
23 the interests of competitors but not the  
24 interests of consumers.

25 Justice Kagan, if I could address your

1 question to Mr. Watson about why -- about what  
2 textual argument they have based on the language  
3 of this statute. And I think, respectfully,  
4 they didn't have a textual argument about how  
5 "such person" could possibly be interpreted to  
6 allow a manufacturer to sue based on a  
7 retailer's residence.

8           They went, instead, to the Hobbs Act  
9 and the general venue statute. But, as you  
10 rightly pointed out, the Hobbs Act includes a  
11 different definitional provision and different  
12 history. The general venue statute includes  
13 different language, was passed with a different  
14 purpose.

15           So the narrower way to resolve this  
16 case is just to look at the language of this  
17 statute and to say this statute says where  
18 someone can file a petition.

19           Reynolds is filing a petition jointly  
20 to be sure, but it is still filing a petition in  
21 a place that the statute does not contemplate.

22           Now I take Justice Alito's concern  
23 about how there are 600 statutes pointed to in  
24 one of the amicus briefs. I went back and  
25 looked at that brief. It's 600 statutes that

1 use the term "adversely affected" or  
2 "aggrieved," not 600 statutes that use similar  
3 language to this statute with respect to venue.

4 So a decision about venue, while it  
5 could affect other statutes, is not going to be  
6 nearly as far-reaching as my opponents have  
7 suggested or their amici have suggested. It's  
8 going to be limited to statutes that are worded  
9 like the statute at issue here.

10 Now it's true, Justice Gorsuch, to  
11 address your question, about how they might come  
12 up with ways to circumvent whatever it is that  
13 we come up with in this case, and we will have  
14 responses to that, and that may eventually come  
15 back to this Court in a future case.

16 But the only issue that the Court  
17 needs to address now is whether multiple parties  
18 can sue in a -- in a place where only one of  
19 them resides. The language of this statute  
20 makes it clear that they can't do so.

21 I'd like to end just by noting that we  
22 have to be right either on the first issue or  
23 the second issue because, if we're wrong on both  
24 issues, then this venue provision, for all  
25 practical purposes, becomes meaningless.

1                   Congress specified two particular  
2 places where someone can sue: the home circuit  
3 and the D.C. Circuit. But the practical  
4 consequence of the decision below is that a  
5 person can sue anywhere in any circuit, and that  
6 can't possibly be right.

7                   We ask that the judgment be reversed.

8                   CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10                  The case is submitted.

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

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## Official - Subject to Final Review

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