No. 18-1474

IN THE
Supreme Court of the United States

SUNOCO, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

American Fuel & Petrochemical Manufacturers is a trade association representing the manufacturers of virtually the entire U.S. production of gasoline, diesel, jet fuel, other fuels, and home heating oil, as well as the petrochemicals used as building blocks for thousands of vital products in daily life.

26 U.S.C. § 6426(a) permits a producer of ethanol-blended gasoline to claim the Alcohol Fuel Mixture Credit as a "credit against" its Fuel Excise Tax liability. Here, the Federal Circuit held that the Alcohol Fuel Mixture Credit should be treated as reducing the amount of Fuel Excise Tax otherwise due rather than as a payment of that tax. Because payment of the Fuel Excise Tax is deductible for income tax purposes, the effect of the Federal Circuit decision is to reduce the amount of Fuel Excise Tax deductions producers of ethanol-blended gasoline can claim, which results in the payment of higher income taxes.

The decision below will adversely affect members of *amicus* and other producers of ethanol-blended fuels. The decision upsets the finely tuned system of incentives Congress enacted to encourage the production and sale of ethanol-blended fuels. The Alcohol Fuel Mixture Credit is a key part of a federal policy to encourage the blending of ethanol with gasoline. The Federal Circuit's decision undermines that policy by subjecting some producers of ethanol-

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[1] Both parties have consented to the filing of this brief, in accordance with Rule 37.2. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, and their counsel, made a monetary contribution to the preparation or submission of the brief.

gasoline blends to income tax on that subsidy, but allowing others to claim the subsidy tax-free with no apparent reason for making that distinction.

Virtually all producers of gasoline claimed the Alcohol Fuel Mixture Credit during the years it was available (2005 through 2011). And like Sunoco, many of those producers claimed the Alcohol Fuel Mixture Credit as a "credit against" its Fuel Excise Tax, only to have the IRS assert that doing so made the credit effectively taxable. All of these taxpayers engaged in the behavior Congress sought to encourage in the Jobs Act (blending ethanol into their gasoline), and therefore all of them should be entitled to the *full* benefits of that incentive.

STATUTORY BACKGROUND

Since 1956, all federal excise taxes the government collects on fuel (including the Fuel Excise Tax) have been deposited into the Highway Trust Fund. *See* 26 U.S.C. § 9503(b). The government uses these funds to construct and maintain highways. Today, and during the tax periods at issue in this case, the Fuel Excise Tax is imposed on the removal of gasoline from any refinery or terminal, as well as on certain importations and sales of "taxable fuels," which include gasoline, diesel, and kerosene. *Id.* §§ 4081(a)(1)(A), 4083(a)(1). In determining their annual federal *income* tax liability, producers deduct the payment of the Fuel Excise Tax either as an expense or as part of their cost of goods sold. *Id.* § 162(a); 26 C.F.R. § 1.61-3(a).

Congress has long used the tax system to encourage the production and use of renewable

fuels.[2] For many years, Congress provided a reduced rate of Fuel Excise Tax (or, in some years, an outright exemption from the Fuel Excise Tax) for gasoline that was blended with ethanol. *See, e.g.* 26 U.S.C. § 4081(c) (2003), prior to amendment by the American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 301(c)(7), 118 Stat. 1418, 1461 ("Jobs Act"). As the popularity of ethanol-blended fuels increased, however, this meant that less money was directed to the Highway Trust Fund.

Congress addressed this problem in § 301 of the Jobs Act, making four changes of significance here. First, Congress amended the statute imposing Fuel Excise Tax, 26 U.S.C. § 4081, to provide that the full amount of the Fuel Excise Tax would be imposed on ethanol-blended fuels. Jobs Act, § 301(c)(7), 118 Stat. at 1461. Second Congress created the Alcohol Fuel Mixture Credit, codified at 26 U.S.C. § 6426, which allowed producers of ethanol-gasoline blends to claim a tax credit against their Fuel Excise Tax. *Id.* § 301(a), 118 Stat. at 1459.[3] Third, Congress enacted 26 U.S.C. § 6427(e), which provides that producers eligible to claim the Alcohol Fuel Mixture Credit could instead receive a cash payment equivalent to that credit. *Id.* § 301(c)(9), 118 Stat. at 1462. Finally, Congress made clear that the full amount of Fuel Excise Tax imposed under § 4081

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[2] *See, e.g.,* Energy Tax Act of 1978, Pub. L. No. 95-618, § 221(a)(1), 92 Stat. 3174, 3185 (enacting former 26 U.S.C. § 4081(c) to provide for an excise tax exemption on ethanol-gasoline blends of at least 10 percent ethanol).

[3] 26 U.S.C. § 6426(c), which Congress added in § 302 the Jobs Act, provides for a credit for mixtures biodiesel-blended fuel (the Biodiesel Mixture Credit), which operates in a similar manner to the Alcohol Fuel Mixture Credit. *See* Jobs Act, § 302(a), 118 Stat. at 1463.

would be directed to the Highway Trust Fund by amending 26 U.S.C. § 9503(b) to provide that "taxes received under sections 4041 and 4081 shall be determined without reduction for credits under section 6426." Jobs Act, § 301(c)(11), 118 Stat. at 1462.

Significantly Congress's enactment of § 6427(e) meant that those producers who were not subject to the Fuel Excise Tax, or whose Alcohol Fuel Mixture Credit would otherwise have exceeded their Fuel Excise Tax, could receive a cash payment. 26 U.S.C. § 6427(e). The parties do not dispute that when a producer receives the Alcohol Fuel Mixture Credit as a cash payment, the payment is *not* taxable income for purposes of determining the producer's federal income tax liability.[4] The Alcohol Fuel Mixture Credit (whether claimed as a credit against the Fuel Excise Tax or a cash payment) expired at the end of 2011. *Id.* § 6426(b)(6).

Accordingly, the Jobs Act assured additional funding for the Highway Trust Fund, while preserving and expanding the incentives to produce ethanol-blended fuels through the Alcohol Fuel Mixture Credit. Elimination of the reduced rates of Fuel Excise Tax increased funding of the Highway Trust Fund, with the cost of the ethanol blending

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[4] 26 U.S.C. § 6427(j)(1) provides that cash payments under § 6427(e) are treated "as if [they] constituted refunds of overpayments" of the Fuel Excise Tax. Refunds of overpaid tax are generally not themselves taxable income, unless the taxpayer claimed a deduction for the overpayment, a circumstance that does not arise here, as no Fuel Excise Tax is imposed with respect to a § 6427 claim. The IRS has agreed that payments under § 6427(e) are not subject to income tax. IRS Chief Counsel Advice 201342010 (Aug. 8, 2014).

subsidy now shifted to the Treasury's General Fund (whether the Alcohol Fuel Mixture Credit is claimed as a credit against the Fuel Excise Tax or as a cash payment). 26 U.S.C. § 9503(b) (providing that the Fuel Excise Tax "received [by the Highway Trust Fund] . . . shall be determined without reduction for credits under section 6426.").

SUMMARY OF ARGUMENT

The Federal Circuit's legal analysis fails to take into account the general rules of operation that apply to tax credits. These principles provide that where the credit and the tax are calculated independently of one another, the credit functions as a payment (and not a reduction) of the tax, unless Congress explicitly provides otherwise. The Federal Circuit's analysis also does not properly consider how the statutory provisions of the Jobs Act work together to reflect a meaningful and harmonious incentive program. Lastly, the Federal Circuit misinterpreted the statutory scheme created by § 301 of the Jobs Act based on erroneous assumptions about Congressional motives. Because the issue is of exceptional importance and affects many producers of blended fuels, the Court should issue the writ.

ARGUMENT

A. The Federal Circuit's Legal Analysis Reflects a Fundamental Misunderstanding of How Tax Credits Operate for Federal Income Tax Purposes

The Federal Circuit found that the Alcohol Fuel Mixture Credit, when claimed as a "credit against" a producer's Fuel Excise Tax liability, reduced rather than satisfied that liability. *See* Pet. App. 10a. ("the

Mixture Credit works to reduce the taxpayer's overall excise-tax liability"). However, this conclusion is contrary to how tax credits work. When the calculation of the tax credit is independent of the underlying tax (*i.e.*, the credit is not limited by the tax), the credit satisfies, rather than reduces that tax. For example, the credit an employee claims with respect to federal wage withholdings made by his employer operates as a payment in satisfaction (rather than a reduction) of the underlying tax, the employee's personal income tax. *See* 26 U.S.C. § 31(a)(1) ("The amount withheld as tax under chapter 24 [of the Internal Revenue Code, relating to the 'Collection of Income Tax at Source on Wages'] shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle."). The wage withholding credit is independent of the employee's personal income tax because the wage withholding credit can (and often does) exceed the employee's personal income tax liability, resulting in an "overpayment" and a refund back to the employee. *Id.* § 6401(b)(1). There can be no question that credits like those provided in § 31(a)(1) operate as a payment in satisfaction of the employee's income tax liability: it is the way that millions of employees across the nation pay most or all of their income tax.

In the same way, the Alcohol Fuel Mixture Credit is independent of the Fuel Excise Tax because under § 6427(e) producers can receive the benefit of the credit even if they have no Fuel Excise Tax liability, and the amount of a producer's Alcohol Fuel Mixture Credit is in no way tied to the amount (if any) of its Fuel Excise Tax. This independence reflects that the activities that generate the credit (blending ethanol with gasoline) and the event that triggers liability

for the tax (certain removals or sales of gasoline) are different, as Congress implicitly recognized in the Jobs Act when it expanded the subsidy to those producers without any Fuel Excise Tax at all.

Treating independently calculated credits like the § 6426 Alcohol Fuel Mixture Credit and § 31(a)(1) wage withholding credits as payments in satisfaction of the underlying tax is perfectly sensible. Where the government is obligated to provide the credit regardless of whether the taxpayer has any tax liability, the credit is as good as a cash payment from the government to the taxpayer, and should be treated as such.

When Congress intends a federal tax credit to reduce rather than satisfy the underlying tax against which it is claimed, it says so explicitly. *See, e.g.*, 26 U.S.C. § 280C (reducing various federal income tax deductions where certain federal tax credits are allowed under other sections of the Internal Revenue Code), former § 280D prior to repeal by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1941(b)(4)(A), 102 Stat. 1107, 1324 (reducing the federal income tax deduction for the windfall profits tax satisfied by the excise tax credit allowable under former § 6429). Provisions like § 280C and former § 280D would be rendered meaningless if credits always reduced, rather than satisfied, the underlying tax.

It is unsurprising then, that when considering whether tax credits reduce or satisfy the underlying tax, other circuits have found that they serve to satisfy (rather than reduce) the tax. *See* Pet. Br. 11-14 (quoting *Consol. Edison Co. of N.Y. v. United States*, 10 F.3d 68, 74 (2d Cir. 1993) (finding that a tax credit "did not reduce Con Edison's underlying

tax liability" but rather was "effectively utilized to discharge [its] full tax liability") and *United States v. Piedmont Mfg. Co.*, 89 F.2d 296, 299 (4th Cir. 1937) (stating a "payment by credit . . . for all purposes of the United States and the taxpayer, is received as equivalent" to "a payment in cash")).

Given that no provision like § 280C or § 280D provides to the contrary, the Alcohol Fuel Mixture Credit should be construed to satisfy rather than reduce the Fuel Excise Tax. Because the Federal Circuit's decision adversely impacts a large segment of producers, the Court should grant certiorari to provide clarity on the tax treatment of tax credits.

B. The Federal Circuit's Interpretation of § 6426 Fails to Construe Properly § 301 of the Jobs Act as a Whole

The Federal Circuit stated that the phrase "credit against" in § 6426(a) means that the Alcohol Fuel Mixture Credit "reduce[s] the taxpayer's overall excise-tax liability." Pet. App. 10a. In doing so, the Federal Circuit failed to consider properly how other Jobs Act amendments inform the meaning of "credit against" in § 6426(a). *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) (statutes must be construed "in their context and with a view to their place in the overall statutory scheme").

The same section of the Jobs Act that enacted § 6426 also amended § 4081 to provide that the full amount of the Fuel Excise Tax is imposed on blenders, rather than the reduced rates that had previously been imposed. Jobs Act, § 301(c)(7), 118 Stat. at 1461. That section likewise added language to 26 U.S.C. § 9503(b) providing that, for purposes of funding the Highway Trust Fund, "taxes received

under sections 4041 and 4081 [the Fuel Excise Tax] shall be determined without reduction for credits under section 6426," which includes the Alcohol Fuel Mixture Credit. *Id.* § 301(c)(11), 118 Stat. at 1462. The most straightforward reading of this provision, in conjunction with the change Congress made to § 4081, is that the full amount of the Fuel Excise Tax imposed under § 4081 is "received" by the Department of the Treasury, and the amount that the Treasury "pays out" with respect to the Alcohol Fuel Mixture Credit does not reduce that amount.

In the Federal Circuit's view, the § 9503(b) language implied that only the amount of Fuel Excise Tax net of the credit was received by the Treasury in general, but that for purposes of funding the Highway Trust Fund, this amount was increased by the amount of Alcohol Fuel Mixture Credits claimed. Pet. App. 12a. This interpretation fails to recognize that the phrase "shall be determined without reduction for credits under section 6426" is precisely what demonstrates that the amount received includes the Alcohol Fuel Mixture Credit. Without that language, one might conclude that it is not clear whether the Alcohol Fuel Mixture Credit is borne by the Highway Trust Fund or the General Fund, but this phrase in conjunction with the rest of the changes Congress enacted in § 301 of the Jobs Act makes clear that: (1) the Highway Trust Fund receives the Fuel Excise Tax paid by producers; and (2) to the extent that the producers' Fuel Excise Tax is satisfied by the Alcohol Fuel Mixture Credit, there is no reduction to the Highway Trust Fund. If Congress thought that the Highway Trust Fund only "received" the amount of Fuel Excise Tax paid by the producer in cash, it would have used the *opposite* language, requiring that the Highway Trust Fund's

receipts be *increased* by the amount of the Alcohol Fuel Mixture Credit.

Finally, the Federal Circuit failed to consider properly the implications of § 6427(e), and thus treats producers differently depending on how the Alcohol Fuel Mixture Credit is claimed. Under the Federal Circuit's approach, producers (like Sunoco) who received the subsidy by claiming the Alcohol Fuel Mixture Credit against their Fuel Excise Tax must reduce their federal income tax deduction for that tax, which means the subsidy was effectively subject to the income tax. Conversely, producers who claim the subsidy as a cash payment under § 6427(e) receive the subsidy without having to pay income tax on it.

For example, consider producer A, who is entitled to $30 of Alcohol Fuel Mixture Credit and owes no Fuel Excise Tax. Because it has no Fuel Excise Tax liability, it simply claims the $30 credit as a cash payment under 26 U.S.C § 6427(e). It is undisputed that this $30 is not subject to income tax. Producer B also is entitled to $30 of Alcohol Fuel Mixture Credit, but it has $100 of Fuel Excise Tax liability. Producer B claims the Alcohol Fuel Mixture Credit against its Fuel Excise Tax, and pays the government the remaining balance of that tax ($70) in cash. Under the Federal Circuit's decision, the $30 credit now effectively reduces what would otherwise be a $100 federal income tax deduction to a $70 deduction, which–assuming a 35 percent tax rate–reduces the value of the credit by $10.50 ($30 x 35%). In other words, while Producer A receives a credit worth $30, Producer B only receives a credit worth $19.50, notwithstanding that they have

engaged in the exact same activity Congress sought to encourage – blending ethanol with gasoline.

The overall purpose of § 301 of the Jobs Act was to increase funding for the Highway Trust Fund while maintaining (and expanding) tax incentives to produce ethanol-blended gasoline. Given this, it is highly unlikely that Congress intended the Jobs Act to treat producers differently based on how they received the ethanol blending incentive (cash versus credit). If the Federal Circuit's decision is allowed to stand, Congress's incentive will have been blunted, because the subsidy for ethanol-blending will be subjected to income tax arbitrarily based on how producers claimed it.

C. The Federal Circuit Misinterpreted the Statutory Scheme Created By § 301 of the Jobs Act Based on Erroneous Assumptions About Congressional Motives

The Federal Circuit claims that, through the Jobs Act, Congress simply "manufactured a way to shift funds from the General Fund . . . to the Highway Trust Fund without affecting revenue." Pet. App. 4a.[5] This characterization brushes aside the fact that in achieving the congressional aim to assure additional funding for the Highway Trust Fund, Congress explicitly revised § 4081 to impose the full rate of Fuel Excise Tax on blended fuels, while separately providing the ethanol incentive in the form of the Alcohol Fuel Mixture Credit under § 6426, which in some instances could be received as a cash payment under § 6427(e). Section 9503(b)

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[5] The trial court was even more pointed, describing the enactment of the Alcohol Fuel Mixture Credit as an "accounting sleight-of-hand" and a "legal fiction." Pet. App. 27a.

confirms that the Fuel Excise Taxes received by the Highway Trust Fund include the full amount imposed under § 4081.

Describing these changes that Congress made as a "manufactured" means to shift the burden of the ethanol subsidy to the General Fund from the Highway Trust Fund effectively treats the changes made by the Jobs Act as little more than paper shuffling and ignores the income tax effect of these real statutory changes. As the Sixth Circuit has put it, "'[f]orm' *is* 'substance' when it comes to law. The words of law (its form) determine content (its substance)." *Summa Holdings, Inc. v. Comm'r*, 848 F.3d 779, 782 (6th Cir. 2017) (emphasis in original). Under a straightforward reading of the statutory text Congress enacted, producers of ethanol-blended gasoline paid the full amount of Fuel Excise Tax. The Federal Circuit effectively rendered the substance of that law ineffective. Pet. App. 3a.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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