No. 18-1474

In the Supreme Court of the United States

SUNOCO, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

A taxpayer who sells inventory in its trade or business generally is entitled to reduce the taxable income from the sale by subtracting from the sales price its costs of producing or acquiring the inventory. Those costs sometimes include federal excise taxes. Congress has imposed one such excise tax on gasoline. See 26 U.S.C. 4081(a). Congress also has provided a "credit * * * against the tax imposed by section 4081" to those who mix alcohol into gasoline. 26 U.S.C. 6426(a)(1). The question presented is as follows:

Whether a taxpayer who mixes alcohol into gasoline may claim as part of its costs the full amount of the gasoline excise tax listed in 26 U.S.C. 4081(a) even though it received an excise-tax credit under 26 U.S.C. 6426(a)(1) "against the tax imposed by section 4081" and thus never incurred or paid that full amount.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (Fed. Cir.):

Sunoco, Inc. v. *United States*, No. 17-1402 (Nov. 1, 2018)

United States Court of Federal Claims:

Sunoco, Inc. v. *United States*, No. 15-cv-587 (Nov. 22, 2016)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 908 F.3d 710. The opinion and order of the Court of Federal Claims (Pet. App. 17a-38a) is reported at 129 Fed. Cl. 322.

JURISDICTION

The judgment of the court of appeals was entered on November 1, 2018. A petition for rehearing was denied on January 24, 2019 (Pet. App. 39a-40a). On April 11, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 24, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. A taxpayer who sells inventory in its trade or business is taxed on its "'gross income'" resulting from

those sales, which includes among other things "the total sales, less the cost of goods sold." 26 C.F.R. 1.61-3(a). For example, if a business pays $12 for a widget and resells it for $20, it should report a taxable gross income of $8 because it is entitled to subtract the $12 cost from its $20 sale. In calculating its gross income, a business may subtract any costs that otherwise would be deductible. See 26 C.F.R. 1.446-1(c)(1)(ii). One notable example is federal excise tax. See 26 U.S.C. 263A(a)(2)(B); 26 C.F.R. 1.164-2(f). If the business in the example above pays $1 in federal excise tax (on top of the $12 purchase price) to acquire the widget, its "cost of goods sold" would be $13, and its taxable gross income would be $7.

Taxpayers may include in their costs only those qualifying expenses they actually incur. See *Affiliated Foods, Inc.* v. *Commissioner*, 128 T.C. 62, 80 (2007); 26 C.F.R. 1.461-4(g)(6); Rev. Rul. 85-30, 1985-1 C.B. 20; Rev. Rul. 84-41, 1984-1 C.B. 130. If the business in the example above receives a 50-cent rebate on its acquisition of the widget, it is permitted to subtract only its actual, post-rebate cost of $12.50 (not the full $13), resulting in a taxable gross income of $7.50 (not $7) on that sale. This case presents the question whether a taxpayer may include in its "costs" the full amount of a gasoline excise tax that it did not actually incur or pay because it received a statutory credit "against" that excise tax.

b. The federal government long has imposed an excise tax on certain types of fuel, including (as relevant here) gasoline used in highway transportation. See Revenue Act of 1932, ch. 209, § 617(a), 47 Stat. 266 (imposing "a tax of 1 cent a gallon" on gasoline); 26 U.S.C. 4081 (current codification of the gasoline excise tax). As

relevant here, Section 4081 generally imposes an excise tax on the removal of gasoline from a refinery or terminal, the entry of gasoline into the United States, and the sale of gasoline to certain purchasers. 26 U.S.C. 4081(a).

To encourage the use of renewable fuels, Congress has provided certain excise-tax and income-tax incentives for (as relevant here) producers that blend alcohol into gasoline for sale or use. Such blended fuel originally was exempt from the fuel excise tax. See Energy Tax Act of 1978, Pub. L. No. 95-618, § 221(a)(1), 92 Stat. 3185 (enacting 26 U.S.C. 4081(c) (Supp. II 1978)). Then it was subject to reduced excise-tax rates. See Highway Revenue Act of 1982, Pub. L. No. 97-424, Tit. V, Subtit. B, § 511(d)(1), 96 Stat. 2171 (amending Section 4081(c)). And eventually it was subject to reduced rates that varied depending on the amount of alcohol in the blend. See Energy Policy Act of 1992, Pub. L. No. 102-486, § 1920(a), 106 Stat. 3026 (amending Section 4081(c)); see also, *e.g.*, 26 U.S.C. 4081(c)(4) (2000). A blender who mixed alcohol into gasoline that already had been taxed at the full excise-tax rate could obtain a direct payment equal to the excise-tax incentive. Crude Oil Windfall Profit Tax Act of 1980 (Windfall Profit Act), Pub. L. No. 96-223, § 232(d)(1)(B), 94 Stat. 277 (enacting 26 U.S.C. 6427(f) (Supp. IV 1980)). In lieu of those excise-tax benefits, a blender could choose to take an income-tax benefit under Section 40 instead. Windfall Profit Act § 232(b)(1), 94 Stat. 273-274; see 26 U.S.C. 40; Joint Comm. on Taxation, 96th Cong., 1st Sess., *General Explanation of the Crude Oil Windfall Profit Tax Act of 1980*, at 89-92 (J. Comm. Print 1981) (*Windfall Profit Report*).

Section 4081's gasoline excise tax has been used to support federal highways since 1956, when Congress established the Highway Trust Fund. See Highway Revenue Act of 1956, ch. 462, Tit. II, § 209, 70 Stat. 397-401; see 26 U.S.C. 9503. As of 2004, Section 9503 "appropriated to the Highway Trust Fund amounts equivalent to the taxes received in the Treasury" under "section 4081 (relating to tax on gasoline, diesel fuel, and kerosene)," among other taxes. 26 U.S.C. 9503(b)(1)(D) (2000). By that time, however, Congress had become concerned that the reduced excise-tax rates for renewable fuels under Section 4081 were negatively affecting the Highway Trust Fund. See H.R. Rep. No. 548, 108th Cong., 2d Sess. 141-143 (2004). Accordingly, Congress restructured the excise-tax benefit for alcohol-fuel blends in a way that allowed "the full amount of tax on alcohol fuels" to be "credited to the Highway Trust Fund" while at the same time providing fuel blenders "a benefit equivalent to the reduced tax rates." H.R. Rep. No. 755, 108th Cong., 2d Sess. 308 (2004) (Conference Report).

To achieve that goal, Congress took three integrated steps in the American Jobs Creation Act of 2004 (2004 Jobs Act), Pub. L. No. 108-357, 118 Stat. 1418. First, it amended Section 4081 by eliminating the reduced excise-tax rates for alcohol-fuel blends. 2004 Jobs Act §§ 301(c)(7), 853, 118 Stat. 1461, 1609; see 26 U.S.C. 4081(a)(2). Second, in place of the reduced rates, Congress enacted Section 6426, which created an excise-tax credit for alcohol-fuel blends to be "allowed as a credit against the tax imposed by section 4081." 2004 Jobs Act § 301(a), 118 Stat. 1459; see 26 U.S.C. 6426(a). Third, Congress added a "new flush sentence" to Section 9503(b)(1), the provision addressing appropriations to the Highway Trust Fund, that read: "For purposes of

this paragraph, taxes received under sections 4041 and 4081 shall be determined without reduction for credits under section 6426." 2004 Jobs Act § 301(c)(11), 118 Stat. 1462.

The new excise-tax credit for alcohol-fuel blends under Section 6426 was the same as the rate used for the Section 40 income-tax credit, which Congress retained in the 2004 Jobs Act. See 26 U.S.C. 40(h) (2000 & Supp. IV 2004); 26 U.S.C. 6426(b)(2) (Supp. IV 2004). Blenders thus continued to have the option to select either the Section 40 income-tax benefit or the new Section 6426 excise-tax benefit (but not both). See 26 U.S.C. 40(c) (Supp. IV 2004). To retain the equivalence of those benefits, Congress continued to require any blender who chose the Section 40 benefit to include the income-tax credit in its gross income. 26 U.S.C. 87(1) (Supp. IV 2004); see *Windfall Profit Report* 92 n.3. A blender who chose the excise-tax benefit under Section 6426 could, if the amount of the excise-tax credit exceeded its excise-tax liability, continue to claim the excess amount as a payment. See 26 U.S.C. 6427(e)(2) (Supp. IV 2004).

Congress included a sunset provision for the excise-tax credit for blending alcohol into fuel under Section 6426(b): "This subsection shall not apply to any sale, use, or removal for any period after December 31, 2010." 2004 Jobs Act § 301(a), 118 Stat. 1460; see 26 U.S.C. 6426(b)(5) (Supp. IV 2004). That deadline later was extended to December 31, 2011, see Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 708(b)(1), 124 Stat. 3312, after which the credit expired.

2. a. During the tax years at issue here, petitioner operated a refining and wholesale fuel-supply business. C.A. App. 1003. In producing fuel for sale, petitioner

blended alcohol into gasoline as it was removed from the terminal rack. *Id.* at 1167. That activity subjected petitioner to the Section 4081 excise tax and allowed petitioner to claim an excise-tax credit under Section 6426(b). *Ibid.*

From 2005 to 2008, petitioner claimed more than $1 billion in Section 6426 excise-tax credits, which reduced its actual excise-tax expense under Section 4081 by a like amount. Pet. App. 5a & n.3; C.A. App. 1031-1032, 1148-1152, 1165. When computing its cost of goods sold for purposes of determining its gross income on its sales of blended fuel during that timeframe, petitioner included only its actual excise-tax expense—that is, the amount it paid to the government after claiming the Section 6426 excise-tax credits. *Ibid.*

In 2013, petitioner changed its reporting position and sought refunds of more than $300 million for tax years 2005-2008. See Pet. App. 5a. Petitioner argued that it should have included in its "cost of goods sold" the full excise tax nominally imposed by Section 4081, without regard to the Section 6426 excise-tax credit it had claimed against that tax during those years. *Id.* at 6a n.4 (citation omitted); see *id.* at 5a-6a; C.A. App. 1005-1009, 1147-1148, 1165. The IRS denied those refund claims. See C.A. App. 1148.

b. Petitioner filed suit in the Court of Federal Claims (CFC), asserting that the Section 6426 credits it had claimed had not actually *reduced* its excise-tax liability in the relevant years, but instead had simply helped petitioner to *pay for* that (unreduced) liability. See Pet. App. 5a-6a. According to petitioner, it therefore remained liable for the full amount of the Section 4081 excise tax—even though it had not actually paid that full amount—and thus was entitled to include that

full amount as part of its "costs" when computing its gross income. See *ibid.*

The CFC granted the government's motion for judgment on the pleadings. Pet. App. 17a-38a. The court observed that "[petitioner's] argument turns exclusively on statutory interpretation." *Id.* at 17a. The court found that "the phrase 'credit against the tax imposed under section 4081' could fit either the Government's or [petitioner's] interpretation." *Id.* at 25a. The court further explained, however, that "Congress's main aim" in passing the 2004 Jobs Act "was to replenish the Highway Trust Fund" by using an "accounting backdoor that allows Congress to shift money from the Treasury General Fund to the Highway Trust Fund." *Id.* at 27a-28a. That "accounting sleight-of-hand," in the court's view, meant that "in reality, the full tax rates [in Section 4081] were *not* imposed" on petitioner. *Id.* at 26a-27a. The court observed that petitioner's contrary view would "increase the subsidy" for blenders by 35 percent relative to the pre-2004 benefit, and it found "[n]o such inkling" in the text or history of the 2004 Jobs Act that Congress intended such a "drastic" result. *Id.* at 19a, 32a. The court further determined that case law supported the government's view, see *id.* at 33a-35a, and that any lingering doubt should be resolved by "the 'settled principle that exemptions from taxation are not to be implied; they must be unambiguously proved,'" *id.* at 37a (quoting *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 354 (1988)).

3. The court of appeals affirmed. Pet. App. 1a-16a. Like the CFC, the court of appeals began "with the plain language of the statute." *Id.* at 8a. The court found that the plain language of Section 6426, which "explicitly provides that the 'credit' * * * is applied

'against' the gasoline excise tax imposed under § 4081," means that the credit "works to reduce the taxpayer's overall excise tax liability." *Id.* at 10a (citation omitted). The court rejected petitioner's argument that the credit operates as a payment of the (unreduced) tax liability, in part because the "Jobs Act treats 'credits' differently from 'payments,' as evidenced by the language in § 6427(e)(1), which grants payment to a taxpayer" only "to the extent the taxpayer's excise tax liability is zero." *Id.* at 11a.

The court of appeals explained that "Section 9503 only reinforces this reading of § 6426." Pet. App. 11a. That provision "directs that the entirety of the 18.3 cents per gallon gasoline excise tax under § 4081 be appropriated to the Highway Trust Fund * * * '*without reduction* for credits under section 6426.'" *Ibid.* (citation omitted). The court observed that petitioner's reading would "render [that] portion of the statutory language unnecessary," for "if the [credit] were a tax-free payment regardless of excise tax liability," "there would be no reason to explicitly state that the amount to be deposited in to the Highway Trust Fund 'shall be determined without reduction for credits under section 6426.'" *Id.* at 12a (citation omitted). The court of appeals concluded that the "plain meaning of the statute is clear—the [credit in section 6426] is a credit, not a payment, which must first be used to decrease a taxpayer's gasoline excise tax liability before receiving any payment under § 6427(e)." *Id.* at 13a.

The court of appeals further concluded that the "legislative history" was "at odds with [petitioner's] position and supports the plain reading of the statute." Pet. App. 15a. The court explained that the credit was "intended to match the excise tax rate reduction in place

prior to the enactment of the Jobs Act," *id.* at 14a, and that "Congress intended for any payment of the [Section 6426 credit] to go to the taxpayer only if the taxpayer's excise tax liability is zero," *id.* at 15a. The court observed that petitioner, by contrast, "wishes both to pocket the [credit] as a tax-free refundable payment and to claim an income tax benefit by including in full [the Section 4081] gasoline excise tax liability in its cost of goods sold, thereby reducing its total taxable income." *Id.* at 15a. The court concluded that "such double-dipping was not intended by Congress," *ibid.*, noting that "Congress does not generally allow taxpayers to receive a tax benefit twice," *ibid.*, and that petitioner's reading of the statute would "result[] in a windfall to [petitioner]," *id.* at 16a.

ARGUMENT

Petitioner contends (Pet. 10-22) that it is entitled to claim as part of its "costs" the full amount of the excise tax listed in 26 U.S.C. 4081 without accounting for the credit it received against that tax. The court of appeals correctly held that the excise-tax credit for alcohol-fuel blenders under 26 U.S.C. 6426 reduces the blender's excise-tax liability under Section 4081, and that the blender in computing its gross income is not entitled to claim as "costs" the full amount of an excise tax that it never actually paid. That statute-specific determination does not conflict with any decision of this Court or another court of appeals. And the question presented is one of diminishing practical importance, since Congress allowed the excise-tax credit at issue here to expire in 2011. Further review is not warranted.

1. The court of appeals correctly held that petitioner is not entitled to claim as part of its "costs" the portion of an excise tax that it never incurred or paid. The text,

structure, and history of the applicable Internal Revenue Code provisions support that conclusion.

a. Section 6426 directs that the excise-tax credit for mixing alcohol and fuel "shall be allowed as a credit * * * against the tax imposed by section 4081." 26 U.S.C. 6426(a)(1). When a statutory credit is allowed "against" a tax, the "commonly accepted definition" is that the credit "is allowable as a subtraction from tax liability for purposes of computing the tax due." James Edward Maule & Jonathan Van Loo, 506-4th T.M., *Principles of Income Tax Credits* § I-B (2019). Under that approach, a "[c]redit is a direct reduction of tax liability." *Id.* § I-A. Nothing in Section 4081 or 6426 suggests that Congress intended to deviate from that common understanding of the phrase "credit * * * against the tax imposed." Accordingly, the plain meaning of Section 6426 is that the excise-tax credit reduces a taxpayer's excise-tax liability—just as a rebate reduces the effective price of a widget—and thus reduces the cost basis for purposes of computing the gross income on a sale.

That interpretation coheres with the ordinary meaning of "tax credit." Because the Internal Revenue Code does not define that term, courts look to its ordinary meaning in this context. See *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). The ordinary meaning of a "tax credit" is "[a]n amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income." *Black's Law Dictionary* 1501 (8th ed. 2004); *Black's Law Dictionary* (11th ed. 2019). Applying that definition here, the excise-tax credit is "subtracted directly from" the excise-tax liability, "dollar for dollar," thereby reducing the taxpayer's excise-tax liability. *Ibid.* The court of

appeals thus correctly held that, under the ordinary meaning of the relevant statutory provisions, petitioner is not entitled to claim as a "cost" the full amount of the excise tax listed in Section 4081(a) because petitioner never actually incurred or paid that full amount. Instead, petitioner is entitled to claim as a "cost" only the excise-tax liability it actually incurred after accounting for the excise-tax credit it received under Section 6426(a)(1).

Suppose that in 2011 a blender removed 10,000 gallons of gasoline from a terminal. As relevant here, Section 4081(a) would impose an excise tax of $1830 (18.3 cents per gallon of gasoline). See 26 U.S.C. 4081(a)(2)(A)(i). (For simplicity, this example ignores additional taxes on gasoline, such as the one in 26 U.S.C. 4081(a)(2)(B).) If the blender then mixed 1000 gallons of alcohol into those 10,000 gallons of gasoline, it would be entitled under Section 6426 to a tax credit of $450 (45 cents per gallon of alcohol). See 26 U.S.C. 6426(b)(2)(A)(ii). (Again for simplicity, this example ignores any excise tax on the alcohol itself.) Because that $450 is "allowed as a credit * * * against the tax imposed by section 4081," 26 U.S.C. 6426(a)(1), the blender's excise-tax liability would be reduced to $1380 ($1830 minus $450). That is the amount it would have to pay to the federal government and, accordingly, the amount the blender would be entitled to include in its "costs" when computing its gross income. Under petitioner's reading, by contrast, the blender would be entitled to claim the full $1830 in excise taxes among its "costs"—even though it would incur and pay only $1380—and would be entitled to exclude the $450 credit as tax-free income, giving it a windfall. That interpretation contravenes the ordinary meaning of both "credit"

and "credit * * * against the tax imposed" in 26 U.S.C. 6426(a)(1).

The court of appeals' interpretation of "credit * * * against the tax imposed" in Section 6426(a) also is supported by the use of that phrase in Section 4081(b). Section 4081(b) imposes the fuel excise tax even on blenders that mix alcohol into fuel that was previously taxed under Section 4081(a). See 26 U.S.C. 4081(b)(1). To avoid double taxation on the same fuel, subsection (b) provides that "the amount of the tax" already paid under subsection (a) "shall be allowed as a credit against the tax imposed" by subsection (b). 26 U.S.C. 4081(b)(2). That provision makes sense only if the excise tax previously paid under subsection (a) serves to reduce the tax liability imposed by subsection (b). See 26 C.F.R. 48.4081-3(g)(1). To return to the numerical example above (with the same simplifying assumptions), suppose that a blender acquires 2000 of the 10,000 gallons of gasoline from a third party that already removed the gasoline from a terminal. That third party already would have paid $366 (18.3 cents per gallon, multiplied by 2000 gallons) in excise tax under subsection (a). See 26 U.S.C. 4081(a)(2)(A)(i). Accordingly, subsection (b)(2) would allow that $366 as a "credit against the tax imposed" to reduce the blender's excise tax liability from $1830 to $1464. 26 U.S.C. 4081(b)(2). That is the amount the blender would owe in excise tax, and thus the amount it would be entitled to include in its "costs" (setting aside for the moment any blending credit under Section 6426).

By contrast, if petitioner's idiosyncratic reading of "credit against the tax imposed" were applied to Section 4081(b), the blender could claim as part of its "costs" the entire $1830—even though a *third party* had paid $366

of that amount—and could also claim the $366 as a deduction from its *own* income. That windfall would make no sense, and petitioner tacitly acknowledges that Section 4081(b) does not operate in that fashion. See Pet. 18-19 (positing a hypothetical involving previously taxed fuel that does not suggest such an outcome). But if the phrase "credit against the tax imposed" in Section 4081(b) does not operate in that fashion, then it should not operate in that fashion under Section 6426(a) either. The conclusion that the phrase should be given the same meaning in those related provisions is supported not only by basic principles of statutory interpretation, see *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998), but also by the Internal Revenue Code's directive that like terms should be given like meanings, see 26 U.S.C. 7701(a)(28).

Petitioner's reliance (Pet. 14-15) on similar language in Section 31 of the Internal Revenue Code is misplaced. Section 31 states that the "amount withheld as tax" from an individual's paycheck "shall be allowed to the recipient of the income as a credit against the tax imposed." 26 U.S.C. 31(a)(1). According to petitioner, "no one would suggest that if an individual's withholdings over the course of the year precisely equal her income tax liability, the withholdings 'reduce the taxpayer's overall income tax liability' to zero." Pet. 15 (brackets and citation omitted). That is true—but not because of the "credit against the tax imposed" language in Section 31.

Instead, an individual's withholdings under Section 31 do not reduce her income-tax liability because of a different Internal Revenue Code provision that petitioner does not cite: Section 6211, which states that an individual's income-tax liability is computed "without regard to the credit under section 31." 26 U.S.C.

6211(b)(1). Congress thus created an express exception for the Section 31 credit, such that—unlike ordinary tax credits—it does not reduce the relevant tax liability. (That exception makes sense, because paycheck withholdings are simply an expedient for individuals to prepay their own income-tax liabilities.) Congress's failure to create a similar exception for the excise-tax credit in Section 6426 strongly suggests that no such exception applies. See *State Farm Fire & Cas. Co.* v. *United States ex rel. Rigsby*, 137 S. Ct. 436, 442-443 (2016); see also 26 C.F.R. 48.4081-3(g)(1).

Section 9503, the Highway Trust Fund provision, further undermines petitioner's reading of the statutory provisions at issue here. As noted above, in 2004 Congress sought to ensure that the Highway Trust Fund would continue to be adequately funded. To that end, Congress enacted Section 9503(b)(1), which allocates to the Highway Trust Fund "amounts equivalent to the taxes received in the Treasury" under Section 4081 (among other Internal Revenue Code provisions), while making clear that "[f]or purposes of this paragraph, taxes received under sections 4041 and 4081 shall be determined without reduction for credits under section 6426." 26 U.S.C. 9503(b)(1) (Supp. IV 2004). That language ensures that any credits given to fuel blenders will not affect appropriations to the Highway Trust Fund. (As the CFC observed, "cars that use ethanol blends cause the same wear and tear on highways that purely gasoline-powered cars cause." Pet. App. 27a.)

If petitioner's interpretation of Section 6426 were correct, however, that language in Section 9503(b)(1) would be superfluous. There would have been no need for Congress to specify that the amount of excise taxes "under section[] * * * 4081 shall be determined without

reduction for credits under section 6426," 26 U.S.C. 9503(b)(1), because (on petitioner's view) the excise taxes under Section 4081 never would have been reduced by those credits in the first place. The only reason to include the language above is to make clear that, although the credits reduce the excise-tax liability *in general*, they do not reduce it "[f]or purposes of this paragraph"—*i.e.*, for purposes of determining the amount of appropriations for the Highway Trust Fund. *Ibid.*

Petitioner would assign significance to the fact that Section 9503(b) appropriates to the Highway Trust Fund amounts equivalent to the "excise tax 'received,'" rather than to the "'excise tax *imposed*.'" Pet. 16 (citation omitted). As just noted, however, subsection (b)(1) instructs that the "taxes received" under Section 4081 "shall be determined without reduction for credits under section 6426." 26 U.S.C. 9503(b)(1). Congress thus made clear that, however much the Treasury might actually receive in cash under Section 4081, the "taxes received" under that provision are "determined"—but only "[f]or purposes of this paragraph"—without regard to the credits under Section 6426. *Ibid.* As the CFC recognized (Pet. App. 27a), that was simply an "accounting sleight-of-hand" to "shift money" from one governmental fund to another. Indeed, Congress may have chosen a word other than "imposed" precisely because the excise tax *imposed* on the blender is in fact reduced by the credit—as the court of appeals correctly held.

Petitioner's repeated insistence (Pet. i, 1-2, 15-17, 20) that the excise-tax credit under Section 6426 "should be treated as a *payment* of [excise] tax liability" is incorrect. Pet. 1. When Congress wants a tax credit to operate as a payment, it uses some form of the word "pay."

For example, Section 6427(e) states that "the Secretary shall pay" blenders the amount of any fuel-blending excise-tax credit, 26 U.S.C. 6427(e)(1)—but not for any amount "allowed as a credit under section 6426," 26 U.S.C. 6427(e)(3). As petitioner recognizes (Pet. 6), Section 6427(e) thus authorizes such payments only when the amount of the tax credit exceeds the amount of the original tax. (That can occur when, for instance, a blender mixes alcohol into gasoline that already has been taxed under Section 4081(a).) That Congress directed the Secretary to "pay" blenders only the *excess* value of the credit indicates that Congress did not intend the credit to act as a payment when, as here, no such excess exists. See Joint Comm. on Taxation, 111th Cong., 1st Sess., *Tax Expenditures for Energy Production and Conservation* 24 (Comm. Print 2009) (observing that a credit under Section 6426 "must first be taken to reduce excise tax liability for gasoline," and that only a remaining "excess credit may be taken as a payment or income tax credit").

Indeed, Section 6427(e)(3) expressly distinguishes the amount of the credit that is "payable" to the blender from the amount that "is allowed as a credit under section 6426." 26 U.S.C. 6427(e)(3). The provision thus makes clear that (1) the two concepts are different, and (2) the credit must first be applied to reduce (until it eliminates) the blender's excise-tax liability before any remaining balance may operate as a payment to the blender. Consistent with that conclusion, judicial and administrative authorities addressing analogous provisions have long understood that a credit allowed "against a tax imposed" reduces, rather than pays, the taxpayer's tax liability. See *Maines* v. *Commissioner*, 144 T.C. 123, 135-136 (2015); *Hart Furniture Co.* v.

Commissioner, 12 T.C. 1103, 1107-1108 (1949), rev'd on other grounds by joint stipulation, 188 F.2d 968 (5th Cir. 1950) (per curiam); Rev. Rul. 79-315, 1979-2 C.B. 27.

b. The court of appeals' decision also is consistent with the history of the alcohol-fuel-blending excise-tax provisions. Before the 2004 Jobs Act, alcohol-fuel blenders could claim either an income-tax credit under 26 U.S.C. 40(a) (2000) or a reduced excise-tax rate under 26 U.S.C. 4081(c) (2000)—but not both. 26 U.S.C. 40(c) (2000) ("The amount of the credit determined under this section with respect to any alcohol shall * * * be properly reduced to take into account any benefit provided with respect to such alcohol solely by reason of the application of * * * section 4081(c)."). Congress further required taxpayers who opted for the Section 40 income-tax credit to include the amount of the credit in their gross income. 26 U.S.C. 87 (2000). As the Joint Committee on Taxation explained, that requirement ensured that either option—the Section 40 income-tax credit or the Section 4081(c) reduced excise-tax rate—would result in "the same net tax effect." *Windfall Profit Report* 92 n.3.

The 2004 Jobs Act replaced the reduced excise-tax rate with the excise-tax credit, but it retained the prohibition against claiming both an income-tax benefit under Section 40 and an excise-tax credit. 26 U.S.C. 40(c) (Supp. IV 2004); see 2004 Jobs Act § 301(c)(1), 118 Stat. 1461. Congress also retained the requirement that the Section 40 income-tax credit be included in gross income. 26 U.S.C. 87(1) (Supp. IV 2004); see 2004 Jobs Act § 302(c)(1)(A), 118 Stat. 1465. As explained above, the reason for that requirement is to equalize the benefits between the income-tax benefit and the excise-tax benefit.

As the court of appeals recognized (Pet. App. 14a-15a), however, those benefits are equalized only if the Section 6426 excise-tax credit reduces the taxpayer's excise-tax liability. If Congress had intended the excise-tax credit to pay for (and not reduce) the excise-tax liability, as petitioner contends, it also would have eliminated the requirement to include the Section 40 credits in gross income—for that would equalize the tax benefits once again. Yet Congress did not do so, despite amending the provision (26 U.S.C. 87) that establishes that requirement. See 2004 Jobs Act § 302(c)(1)(A), 118 Stat. 1465. In fact, Congress *added* a similar requirement for a new biodiesel fuel credit, 26 U.S.C. 87(2) (Supp. IV 2004); see 26 U.S.C. 40A (Supp. IV 2004), underscoring both its continued intent to equalize the benefits between the income-tax credit and the excise-tax credit and its intent that the excise-tax credit reduce, not pay for, the taxpayer's excise-tax liability.

The legislative history confirms that interpretation of the 2004 Jobs Act. The Conference Report states that the new "benefit obtained from the excise tax credit is coordinated with the alcohol fuels income tax credit." Conference Report 304. And as the court of appeals explained (Pet. App. 15a-16a), Congress intended the new "excise tax credit (in lieu of reduced tax rate on gasoline)" to have "no revenue effect." Joint Comm. on Taxation, 108th Cong., 2d Sess., *Estimated Budget Effects of the Conference Agreement for H.R. 4520, the "American Jobs Creation Act of 2004,"* at 2 (Comm. Print 2004) (capitalization and emphasis omitted). In light of Congress's retention of the Section 40 income-tax credit and the requirement in Section 87 to include that credit in gross income, those objectives can be achieved only if

the excise-tax credit serves to reduce (not pay) the taxpayer's excise-tax liability.

Petitioner relies in part on the Conference Report's statement that "'[t]he [Section 6426] credit is treated as a *payment* of the taxpayer's tax liability received at the time of the taxable event,' not as a reduction of the amount of tax imposed." Pet. 15-16 (citation omitted; brackets in original). But the snippet that petitioner quotes is from the Conference Report's discussion of the House bill, which contained language different from that of the conference bill that Congress ultimately enacted. See Conference Report 304. Instead of creating an excise-tax credit that would be allowed "against the tax imposed by section 4081," 26 U.S.C. 6426(a)(1), the House bill provided that an excise-tax credit "shall * * * be treated—(i) *as a payment* of the taxpayer's liability for tax imposed by section 4081," H.R. 4520, 108th Cong., 2d Sess., § 251(a)(1) (as introduced in the House on June 4, 2004) (emphasis added). The quoted snippet from the Conference Report thus refers to proposed statutory text that was rejected by the conference and does not appear in the enacted legislation.

Instead, the conference agreement "create[d] two new excise tax credits," including the "alcohol fuel mixture credit" in Section 6426. Conference Report 306. *That* credit is not a payment of a taxpayer's excise tax liability, but instead "may be taken against the tax imposed on taxable fuels (by section 4081)." *Ibid.*; accord 26 U.S.C. 6426(a)(1). As the court of appeals recognized (Pet. App. 14a-15a), the Section 6426 credit operates as a payment only "[t]o the extent the * * * credit exceeds any section 4081 liability," and such "payments are intended to provide an equivalent benefit to replace the [reduced rates] being repealed." Conference Report

308. Those statements in the Conference Report make clear that the excise-tax credit in Section 6426 operates to reduce—not pay—the taxpayer's excise-tax liability; otherwise, it would provide a "double-dipping" "windfall," not an equivalent benefit. Pet. App. 15a-16a.

c. Contrary to petitioner's contentions (Pet. 18-19), the court of appeals' decision does not create "arbitrary distinctions" or an "irrational result." Instead, as explained above, the decision below simply maintains the tax benefits for alcohol-fuel blenders as they were before the 2004 Jobs Act, as dictated by the text and structure of that Act. Even petitioner's contrived example (Pet. 19) does not demonstrate arbitrariness or irrationality. The two taxpayers in its example will incur different liabilities precisely because the two are not similarly situated: one is said to owe $510,000 more in excise tax than the other—perhaps because it is mixing alcohol into gasoline that has not yet been taxed while the other is mixing alcohol into already-taxed fuel. That is why (assuming petitioner's math is correct) the one ultimately pays $178,500 more in income tax than the other. That result is neither arbitrary nor irrational; it reflects Congress's express determination that the excise-tax credit under Section 6426 should operate as a "credit * * * against the tax imposed by section 4081." 26 U.S.C. 6426(a)(1). (And a blender who mixes alcohol into already-taxed fuel—and thus receives a "credit against the tax imposed" on the fuel, 26 U.S.C. 4081(b)(2)—probably paid more per gallon for the fuel in the first place to compensate the original party who paid that tax. Again, that is not arbitrary or irrational.)

Petitioner asserts (Pet. 20) that the court of appeals' decision creates "'puzzling' consequences" because "fuel blenders who do not incur excise tax * * * had received

no benefit *at all* under the pre-2004 regime." That is incorrect. As explained above, pre-2004 blenders who had no excise-tax liability could claim the income-tax credit under Section 40 in lieu of the reduced excise-tax rate. See 26 U.S.C. 40(c), 87 (2000). (That remained true under the 2004 Jobs Act. See 26 U.S.C. 40(c), 87(1) (Supp. IV 2004).) And a pre-2004 blender who purchased fully taxed fuel could receive a direct payment equal to the reduced excise-tax rate under Section 6427(f). See 26 U.S.C. 6427(f)(1) (2000). Petitioner's supposedly "puzzling" scenario (Pet. 20) is thus based on a mistaken premise.

Finally, petitioner suggests (Pet. 21) that the court of appeals' decision thwarts Congress's goal of encouraging "investment in and production of environmentally friendly fuels." But "no statute yet known 'pursues its stated purpose at all costs.'" *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (brackets and citation omitted). Congress provided ample tax benefits, both before and after 2004, to blenders who mixed alcohol and gasoline. See pp. 3-5, *supra*. Congress's goal in 2004 was to replenish the Highway Trust Fund while *maintaining* those tax benefits. Petitioner identifies nothing in the statutory text or history suggesting that Congress instead "intended the Jobs Act to *increase* excise tax subsidies for fuel blenders" like petitioner. Pet. App. 16a. "The best evidence of [congressional] purpose is the statutory text," *West Virginia Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 98 (1991), and here the relevant text makes clear that the excise-tax credit in Section 6426 is allowed "against the tax imposed by section 4081." 26 U.S.C. 6426(a)(1).

2. Neither this Court nor any other court of appeals has addressed whether the excise-tax credit under Section 6426 reduces a taxpayer's excise-tax liability under Section 4081. Petitioner's reliance (Pet. 2) on *Graham* v. *Goodcell*, 282 U.S. 409 (1931), and *United States* v. *Piedmont Manufacturing Co.*, 89 F.2d 296 (4th Cir. 1937), is misplaced. Petitioner describes those decisions as "recogniz[ing] that 'payments of taxes may be made in cash *or by credit*.'" Pet. 2 (brackets and citation omitted). But the court below did not say or hold otherwise. The court simply determined that the specific credit in Section 6426 operates as a reduction of the excise tax imposed under Section 4081, and that a taxpayer is not entitled to claim as a deductible "cost" an excise tax it never incurred or paid. Neither *Graham* nor *Piedmont* contradicts that determination. Indeed, petitioner acknowledges (Pet. 12) that those decisions do not even address "the deductibility of taxes paid with credits," much less the deductibility of taxes that (like the ones here) never were incurred or paid in the first place.

Graham and *Piedmont* are doubly inapposite, moreover, because both involved a unique form of income-tax credit—a taxpayer's overpayment of tax in one year that is credited to another year—that is unrelated to the excise-tax credit at issue here. See *Graham*, 282 U.S. at 424 (observing that the tax there could be "paid by the credit of the amount of an overpayment for another taxable year"); *Piedmont*, 89 F.2d at 298 (observing that an "overpayment in cash cannot be realistically distinguished from an overpayment by credit in determining the liability of a Collector"). As with the similar credit in Section 31, a credit resulting from a taxpayer's own overpayment is properly viewed as a prepayment

of his future tax liability rather than as a reduction of that liability. See pp. 13-14, *supra*. Petitioner elides that crucial difference between the excise-tax credit in Section 6426 and credits resulting from a taxpayer's own out-of-pocket expenditures. See *Schaeffler* v. *United States*, 889 F.3d 238, 248-249 (5th Cir. 2018) (holding that the "application of a foreign tax credit" to reduce tax liability is not a "payment" of tax, and distinguishing that credit from the "credit" that taxpayers receive for a prior "overpayment" of tax).

Contrary to petitioner's contention, the court below did not hold that "a tax credit *always* reduces a taxpayer's tax liability." Pet. 11 (emphasis added). Rather, the court analyzed the statutory text, context, and history of the specific federal tax credit at issue here and determined that the excise-tax credit in Section 6426 serves to reduce the excise tax in Section 4081. Pet. App. 8a-16a. To be sure, the court recognized that "[g]enerally, items that are allowable as credits decrease tax liability by that amount." *Id.* at 10a (citation omitted). But by using the word "generally," the court disclaimed any intent to announce a categorical rule. Consistent with the court of appeals' analysis here, this Court has recognized that credits often "can be used only to offset tax that would otherwise be owed." *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 854 (1986); cf. *United States* v. *State of New York*, 315 U.S. 510, 518-519 (1942) (credit for payments to an unemployment fund allowable "against the tax imposed" by the Social Security Act, 42 U.S.C. 301 *et seq.*, serves only to reduce that tax). And the Court has recognized that the determination of a tax credit's proper treatment ultimately is statute-specific. See *Sorenson*, 475 U.S. at 854-855; *New York*, 315 U.S. at 518-520. The

court of appeals engaged in such a statute-specific inquiry here. See Pet. App. 8a-16a.

Petitioner also contends (Pet. 12-14) that the court of appeals' decision "is directly at odds with" the Second Circuit's decision in *Consolidated Edison Co.* v. *United States*, 10 F.3d 68 (1993). Pet. 13. But that case involved an entirely different statutory scheme. Under the New York City charter at the time, taxpayers who prepaid their local property taxes were entitled to a discount on those taxes as consideration for the early payment. When Con Edison "prepaid a portion of its real property taxes in the amount of $50,000,000," the City credited it with having paid $50,937,814 worth of property taxes. *Consolidated Edison*, 10 F.3d at 70. Analyzing New York law, the Second Circuit determined that the prepayment discount "did not reduce Con Edison's underlying tax liability," but instead was "effectively utilized to discharge Con Edison's full tax liability, as evidenced by [an] amendment to the City Charter." *Id.* at 74 (citing 1 N.Y. City Charter & Admin. Code Ann. § 1518(6) (Williams Press 1976)). That statute-specific determination does not conflict with the Federal Circuit's statute-specific determination here that the excise-tax credit in Section 6426 reduces the taxpayer's excise-tax liability because it operates as a "credit * * * against the tax imposed by section 4081." 26 U.S.C. 6426(a)(1).

Even if a circuit conflict existed with respect to the proper treatment of the specific tax credit at issue, the question presented in this case would not warrant this Court's review because it lacks substantial prospective importance. As petitioner acknowledges (Pet. 8 n.4), the excise-tax credit at issue here expired nearly eight

years ago. See 26 U.S.C. 6426(b)(6); p. 5, *supra* (describing sunset provisions). Even the credits petitioner describes as "comparable" (Pet. 8 n.4) also have expired. See 26 U.S.C. 6426(c)(6), (d)(5), and (e)(3). And petitioner identifies no other analogous credits. The question presented here is thus of diminishing importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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