No. _____

IN THE

Supreme Court of the United States

SUNOCO, INC.,

Applicant,

v.

UNITED STATES,

Respondent.

APPLICATION DIRECTED TO THE HONORABLE JOHN G. ROBERTS, JR.
FOR AN EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Applicant

April 8, 2019

RULE 29.6 STATEMENT

The following entities constitute the parent corporations and publicly held companies that own 10% or more of stock in Applicant Sunoco, Inc. (which is now known as ETC Sunoco Holdings LLC):

Energy Transfer LP

Energy Transfer Operating, L.P.

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To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the Federal Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Applicant Sunoco, Inc., respectfully requests a 30-day extension of time, to and including May 24, 2019, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case. The Federal Circuit issued its opinion on November 1, 2018. (A copy of the court's decision, *Sunoco, Inc. v. United States,* 908 F.3d 710 (Fed. Cir. 2018), is attached as Attachment 1.) Sunoco timely filed a petition for panel rehearing and rehearing en banc, which the Federal Circuit denied on January 24, 2019. (A copy of the order denying rehearing is attached hereto as Attachment 2.) Currently, any petition would be due on April 24, 2019. This application has been filed more than 10 days before the date a petition would be due. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the judgment in this case. The decision in this case raises complex and important questions concerning the internal revenue laws, implicates potentially billions of dollars of tax liability for fuel suppliers such as Applicant, and conflicts with the decisions of other courts regarding the circumstances in which a tax credit earned through government-incentivized activities operates as a payment of tax liability rather than a reduction in tax incurred. Additional time is necessary to narrow the questions presented for this Court's consideration and adequately prepare a petition.

BACKGROUND

I. STATUTORY BACKGROUND

Congress has long imposed a federal excise tax on gasoline, codified in 26 U.S.C. § 4081(a), as a means of generating revenue to pay for maintenance of the Nation's roadways. A taxpayer incurs that excise tax when it removes the gasoline from a refinery or terminal or takes certain other acts. *See id.* When a taxpayer pays or incurs this excise tax, it reduces its taxable income because the excise tax is an "ordinary and necessary expense[] paid or incurred during the taxable year in carrying on a[] trade or business." 26 U.S.C. § 162(a).[1]

Along with raising revenue, Congress also uses the Internal Revenue Code to incentivize certain activities. In 1978, Congress enacted an excise tax exemption designed to encourage taxpayers to make environmentally friendly renewable or blended fuels, such as ethanol-gasoline mixes. In 1982, Congress replaced the full exemption with a reduced excise tax rate for blended fuels. This scheme was so successful in encouraging production of blended fuels, however, that it greatly reduced the revenue flowing into the Highway Trust Fund (due to the reduced excise tax rate for such blended fuels).

In 2004, Congress sought to correct that funding deficiency while at the same time continuing to promote renewable fuels. Congress created an across-the-board tax rate for all gasoline, then created a tax credit for producers that make blended fuels. Under 26 U.S.C. § 6426(b)(1), for the tax years at issue here, a producer

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[1] The reduction comes either from a deduction from gross income under 26 U.S.C. § 162(a) or an exclusion from gross income under 26 U.S.C. § 212.

receives a monetary credit of 51 cents for every gallon of alcohol that it mixes with gasoline.

A producer can earn the credit without regard to whether it incurs excise tax. If the producer has incurred excise tax, Section 6426(a) allows the taxpayer to apply the credit "against the tax imposed by Section 4081" to satisfy some or all of its excise tax obligations. 26 U.S.C. § 6426(a)(1). *See* H.R. Rep. No. 108-755, at 304 (2004) (Conf. Rep.) ("The credit is treated as a payment of the taxpayer's tax liability . . . ."). If the producer has *not* incurred excise tax in the first place (as in the case of a company that purchases gasoline from a wholesaler and then mixes it with alcohol for resale), there is no tax to pay with the mixture credits and the producer is entitled to a cash rebate in the amount of its unused credits. *See* 26 U.S.C. § 6427(e)(1). That cash rebate is not taxed as income. *Sunoco, Inc.*, 908 F.3d at 716 ("The IRS does not tax as income direct payments to taxpayers made under this subsection.").

To solve the funding problem, Congress further specified that the "taxes received" under the revised excise tax provision—which automatically are deposited into the Highway Trust Fund—"shall be determined *without reduction* for credits under section 6426." 26 U.S.C. § 9503(b)(1) (emphasis added). Thus, "the *full* amount of user excise taxes levied [are] collected and remitted to the Highway Trust Fund," and manufacturers entitled to credits are separately compensated from the General Fund. 149 Cong. Rec. S10,680 (daily ed. July 31, 2003) (statement of Senator Grassley, a sponsor of the 2004 legislation) (emphasis added).

II. THIS CASE

During the tax years in question, Sunoco incurred excise tax liability under Section 4081(a) through its production of gasoline. As part of its fuel supply business, Sunoco also mixed ethanol with gasoline to create alcohol fuel mixtures, entitling it to more than $1 billion in Section 6426 credits that it used to satisfy part of its multi-billion dollar Section 4081(a) excise tax liability during the period. In calculating its cost of goods sold, however, Sunoco failed to include the portion of its excise tax liability that it had satisfied with mixture credits. As a result, the taxable income Sunoco reported was more than $1 billion higher than it should have been, resulting in an approximately $306 million income tax overpayment.

After discovering its error, Sunoco filed this refund suit in the Court of Federal Claims to recover its overpayments. 28 U.S.C. § 1491. Sunoco explained that it was entitled to deduct the *full* amount of excise tax it had incurred under Section 4081, including the portion it had paid using the valuable credits earned through its mixing activities. The government disagreed, arguing that the credits had reduced Sunoco's excise tax liability in the first place and, therefore, there was no overpayment. The Court of Federal Claims rejected Sunoco's refund claim. *Sunoco, Inc. v. United States*, 129 Fed. Cl. 322 (2016).

The Court of Federal Claims recognized that, "on paper, fuel blenders . . . pay the full amount of the § 4081 excise tax." *Id.* at 327. But it concluded that, "in reality, the full excise tax rates were *not* imposed." *Id.* In the court's view, Congress had created a "legal fiction" through the combination of Section 4081 and Section 6426, under which it appeared to apply the same excise tax rates to mixed

fuels but actually applied a lower rate. *Id.* The court attributed this "accounting sleight-of-hand" to Congress's desire to fully fund the so-called Highway Trust Fund, in which the taxes received under Section 4081(a) are deposited. *Id.* Because the court believed the practical effect of Congress's "legal fiction" was that producers "do[] not pay the full of amount of [their] excise tax liability," it held that Sunoco could not deduct its full excise tax liability as part of its cost of goods sold. *Id.*

The Federal Circuit affirmed. In doing so, it took as a given that tax credits operate "to reduce the taxpayer's overall tax liability," rather than as a payment of taxes incurred. 908 F.3d at 716 (citing secondary authorities). It then held that Section 6426(a)(1)—which "provides that the 'credit,' i.e., the Mixture Credit, is applied 'against' the gasoline excise tax imposed under § 4081,"—must mean that the credit reduced, rather than paid, tax liability. *Id.* The Federal Circuit then reasoned that the statute "treats 'credits' differently from 'payments,'" because Congress had explicitly provided for the payment of cash rebates to producers of blended fuels that do not also incur excise tax liability. *Id.* (citing 26 U.S.C. § 6427(e)(1)). Because it believed that "the plain meaning of the statute is clear," the panel dismissed legislative history confirming that "[t]he credit is treated as a payment of the taxpayer's tax liability." *Id.* at 717-18 (alteration in original) (citation omitted).

REASONS FOR GRANTING THE APPLICATION

1. While the underlying statutory scheme here is complex and addressed to a particular subject, the tax principle at the heart of this case is fundamental and recurring: Does a tax credit operate as a *reduction* of tax liability or as a *payment* of

tax liability? The Federal Circuit's decision is grounded on the premise that a tax credit reduces a taxpayer's tax liability to begin with. That decision not only depreciates the value of tax credits offered by Congress in exchange for conduct, but conflicts with decisions of other courts—and is incorrect.

A federal taxpayer's ability to deduct other types of taxes from its taxable income (such as federal excise taxes or state and local property taxes) depends on whether those taxes have been "paid or incurred." *See* 26 U.S.C. § 162 (deduction of excise taxes); 26 U.S.C. § 212 (exclusions from income); 26 U.S.C. § 164(a)(1) (state and local property taxes). Importantly, however, it does not depend on *how* those taxes are paid. "[T]he source of the funds . . . used to make payment generally is not relevant." Stephen F. Gertzman, *Federal Tax Accounting* ¶ 3.04[3][a] (2d ed. Sept. 2018 online update); *see also id.* n.127 (citing Rev. Rul. 78-173, 1978-1 C.B. 73 (taxpayer permitted to deduct medical payments made by a parent on his behalf); Rev. Rul. 78-38, 1978-1 C.B. 67 (use of credit cards deemed equivalent of payment of liability with borrowed funds); Rev. Rul. 78-39, 1978-1 C.B. 73 (same)). It follows that where a taxpayer's taxes are paid through some means other than a cash payment by that taxpayer to the Treasury, the taxpayer is still entitled to whatever benefits flow from the payment of the tax. *See, e.g.*, Treas. Reg. § 1.901-2(f)(1).

The Second Circuit applied this principle in analogous circumstances in *Consolidated Edison Co. of New York, Inc. v. United States*, 10 F.3d 68, 74 (2d Cir. 1993). Like this case, *Consolidated Edison* involved the federal income tax implications of a taxpayer's use of tax credits to satisfy tax liability. There, the

deductible taxes in question were local property taxes. *See id.* at 70. Consolidated Edison had paid a portion of its local property taxes using credits, called "discounts," that the city had offered to taxpayers if they submitted their payments early. *See id.* When Consolidated Edison sought to deduct the full of its property taxes—including the amount paid through the credits—on its federal income tax return, the Internal Revenue Service (IRS) disallowed the deduction, arguing that "taxes never became 'due' in the amount of the discounts because the City forgave these taxes in exchange for Con Edison's prepayment." *Id.* at 74. Consolidated Edison sued the IRS arguing that it was entitled to the full deduction and, on appeal, the Second Circuit agreed.

The Second Circuit held that Consolidated Edison's use of the discount credits "did not reduce Con Edison's underlying tax liability." *Id.* Rather, the court held, the discount credits were "effectively utilized to discharge Con Edison's full tax liability." *Id.* The city had offered the discount credits as "consideration for the prepayment" in order to incentivize a particular activity, and when Consolidated Edison engaged in that activity to earn the discount credits and then used those credits to satisfy its tax liability, it was paying the *full* amount of the tax. *See id.*

The Federal Circuit's decision in this case is directly at odds with the analysis in *Consolidated Edison*. The Federal Circuit held that "the Mixture Credit works to reduce the taxpayer's overall excise-tax liability." 908 F.3d at 716. For that proposition, it pointed to several quotations from a tax practitioner's guide to the effect that a credit "is any amount that is allowable as a *subtraction from tax*

liability for the purpose of computing the tax due or refund due." *Id.* (emphasis added) (quoting James Edward Maule, 506-3rd T.M., *Tax Credits: Concepts and Calculation* 43 (BNA 2018)). But the Federal Circuit here failed to appreciate what the Second Circuit had understood in *Consolidated Edison*—that the way in which the credit reduces the amount of tax due is by *satisfying* a portion of the liability. *See Consolidated Edison*, 10 F.3d at 74.

Although the Federal Circuit sought to ground its conclusion in this case in specific statutory provisions, nothing in Section 6426, or any other provision, purports to prevent the taxpayer from incurring the liability that arises from Section 4081. To the contrary, the legislative record points to the opposite conclusion. Ultimately, therefore, the panel's entire analysis flowed from the premise that a tax credit *always* operates to reduce tax liability, rather than pay it. *Sunoco*, 908 F.3d at 716. But that premise is simply unsustainable, as *Consolidated Edison* underscores.

Take, for example, one of the most important tax credits in the Internal Revenue Code—the wage withholding credit. Tracking the "against the tax imposed" language of the primary provision on which the Federal Circuit relied here (Section 6426(a)(1)), Section 31 of the Code provides that amounts withheld from an individual's wages are "allowed to the recipient of the income as a credit against the tax imposed." 26 U.S.C. § 31(a). Yet 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," *Sunoco*, 908 F.3d

at 716, such that she has not incurred or paid any income taxes for the year. Instead, the wage-withholding credit operates as a *payment* of taxes incurred.

The conflict on this basic tax principle merits this Court's review.

2. A brief extension of time is warranted so that undersigned counsel may prepare and file a petition for certiorari in this case. The issues presented by the case are both complex and important, impact many of the nation's largest fuel suppliers, and demonstrate confusion among the lower courts on a fundamental and recurring question of tax law. Undersigned counsel had an oral argument in *Hyosung TNS Inc. v. ITC,* Fed. Cir. No. 2017-2563, on April 1, 2019, and is counsel of record for petitioners in *Emulex Corp. v. Varjabedian*, No. 18-459, in which petitioners' reply brief is due (on an expedited schedule) on April 8, 2019, and in which argument will be held on April 15, 2019. The additional time will not impact the Court's consideration of the case in the event it grants certiorari. Accordingly, counsel respectfully requests a 30-day extension of time to prepare and file a petition that will best assist this Court's review.

CONCLUSION

For the foregoing reasons, the time for filing Applicant's petition for a writ of certiorari in this case should be extended to and including May 24, 2019.

April 8, 2019

Respectfully submitted,

GREGORY G. GARRE
Counsel of Record
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Applicant Sunoco, Inc.

ATTACHMENT 1

503 U.S. 30, 37, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) ("[T]he 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in the statutory text. If clarity does not exist there, it cannot be supplied by a committee report."); *De Archibold v. United States*, 499 F.3d 1310, 1313–14 (Fed. Cir. 2007) ("We cannot resort to the legislative history to find a waiver not otherwise unequivocally expressed in the statute.").

[16, 17] Also misplaced is Appellants' reliance on its view of OPM's 1981 regulation defining "pay, allowances, and differentials." Language in a regulation cannot take the place of the statutory language needed in order to meet the requirement of an express waiver of sovereign immunity. "Only an express *statute* suffices to waive the sovereign immunity of the United States." *Former Emps. of Quality Fabricating, Inc. v. U.S. Sec'y of Labor*, 448 F.3d 1351, 1354 (Fed. Cir. 2006) (emphasis added) (citing *West v. Gibson*, 527 U.S. 212, 217, 119 S.Ct. 1906, 144 L.Ed.2d 196 (1999)).

In any event, even if the 1981 regulation could, as a matter of law, provide the required waiver, it fails to do so. We agree with the Court of Federal Claims in *Athey III* that while the 1981 OPM regulation defined "pay, allowances, or differentials" broadly, a broad definition cannot overcome the settled requirement that waivers of sovereign immunity be explicit, with any ambiguity construed in favor of the United States. *See Shaw*, 478 U.S. at 318, 106 S.Ct. 2957. In this case, since the 1981 regulation never explicitly mentioned lump-sum payments either way, we construe that ambiguity in favor of the United States and conclude that the regulation did not authorize the payment of BPA interest.

In sum, since Appellants' lump-sum payments do not constitute "pay, allowances, or differentials," Appellants have failed to demonstrate the required waiver of sovereign immunity. We therefore affirm the Court of Federal Claims's holding that the United States is not liable for pre-judgment interest under the BPA.

CONCLUSION

For the foregoing reasons, the decisions of the Court of Federal Claims in *Athey I* and *Athey III*, as incorporated in the court's final judgment of June 30, 2017, are affirmed.

AFFIRMED

COSTS

No costs.

SUNOCO, INC., Plaintiff-Appellant

v.

UNITED STATES, Defendant-Appellee

2017-1402

United States Court of Appeals,
Federal Circuit.

Decided: November 1, 2018

Background: Taxpayer, an alcohol fuel blender, brought tax refund action against United States, challenging IRS requirement that taxpayer subtract amount of alcohol fuel mixture credit from its gross excise tax liability when calculating deductions against its federal income tax liability. The Court of Federal Claims, Thomas C. Wheeler, J., 129 Fed.Cl. 322, granted United States' motion for judgment on the pleadings, and denied taxpayer's cross-mo-

tion for partial summary judgment. Taxpayer appealed.

Holding: The Court of Appeals, Reyna, Circuit Judge, held that taxpayer failed to show that legislative history to the American Jobs Creation Act extraordinarily contradicted the plain reading of statute providing that credit must first be applied to reduce any excise-tax liability, with any remaining credit paid to the taxpayer.

Affirmed.

1. Federal Courts ⚿3587(2)

Court of Appeals reviews de novo the Court of Federal Claims' grant of judgment on the pleadings. Fed. R. Civ. P. 12(c).

2. Federal Civil Procedure ⚿1053.1, 1055

On a motion for judgment on the pleadings, courts accept the facts alleged by the plaintiff as true and draw all reasonable inferences in the plaintiff's favor. Fed. R. Civ. P. 12(c).

3. Federal Courts ⚿3574

Statutory interpretation is a legal question that appellate courts review de novo.

4. Internal Revenue ⚿4334

To determine the tax treatment of the alcohol fuel mixture credit for producers of alcohol fuel blends under the American Jobs Creation Act, appellate court would start with the plain language of the statute. 26 U.S.C.A. §§ 4081, 6426(b).

5. Internal Revenue ⚿4334

Appellate court's inquiry into the tax treatment of the alcohol fuel mixture credit for producers of alcohol fuel blends under the American Jobs Creation Act ends with the plain language of the statute if the statutory language is unambiguous and the statutory scheme is coherent and consistent. 26 U.S.C.A. §§ 4081, 6426(b).

6. Statutes ⚿1102

Whether statutory language is unambiguous is determined by the text itself, the context in which the language is used, and the statutory scheme as a whole.

7. Statutes ⚿1242, 1346

To overcome the plain meaning of a statute, establishing that the legislative history embodies an extraordinary showing of contrary intentions is required.

8. Internal Revenue ⚿4334

Taxpayer, an alcohol fuel blender, failed to show that legislative history to the American Jobs Creation Act extraordinarily contradicted the plain reading of statute providing that alcohol fuel mixture credit for producers of alcohol fuel blends must first be applied to reduce any excise-tax liability, with any remaining credit paid to the taxpayer; Congress intended for any payment of credit to go to the taxpayer only if the taxpayer's excise-tax liability was zero, and treating credit as a deductible expense would have provided taxpayer with a tax benefit twice as taxpayer never incurred a cost equal to credit. 26 U.S.C.A. §§ 4081, 6426(b), 6427(e).

9. Internal Revenue ⚿4325, 4334

Under the American Jobs Creation Act, the alcohol fuel mixture credit for producers of alcohol fuel blends is a reduction of excise-tax liability, with any credit amount exceeding said excise-tax liability to be paid to the taxpayer. 26 U.S.C.A. §§ 4081, 6427(e).

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00587-TCW, Judge Thomas C. Wheeler.

GREGORY G. GARRE, Latham & Watkins LLP, Washington, DC, argued for plain-

tiff-appellant. Also represented by ELANA NIGHTINGALE DAWSON, BENJAMIN SNYDER; GEORGE MILLINGTON CLARKE, III, ERIC M. BISCOPINK, VIVEK ASHWIN PATEL, KATHRYN E. RIMPFEL, Baker & McKenzie LLP, Washington, DC; DANIEL ALLEN ROSEN, New York, NY.

JUDITH ANN HAGLEY, Tax Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by GILBERT STEVEN ROTHENBERG, RICHARD FARBER, DAVID A. HUBBERT.

Before REYNA, TARANTO, and HUGHES, Circuit Judges.

REYNA, Circuit Judge.

This case concerns whether, under 26 U.S.C. § 6426, a taxpayer that is entitled to an alcohol fuel mixture credit may treat the credit as a tax-free direct payment regardless of excise-tax liability, or whether a taxpayer must first use the mixture credit to reduce any excise-tax liability before receiving payment for any amount of mixture credit exceeding excise-tax liability. Sunoco, Inc. appeals from the Court of Federal Claims' grant of the United States' motion for judgment on the pleadings and denial of Sunoco, Inc.'s cross-motion for partial summary judgment. The Court of Federal Claims determined that the alcohol fuel mixture credit must first be applied to reduce a taxpayer's gasoline excise-tax liability, with any remaining credit amount treated as a tax-free payment. We affirm.

1. Unless otherwise specified, all sections referenced in this opinion are to the Internal Revenue Code set forth in Title 26 of the United States Code.

2. The 18.3 cents per gallon excise tax for gasoline increases to 18.4 cents per gallon after accounting for the 0.1 cents per gallon amount diverted to the Leaking Underground Storage Tank Trust Fund. § 9503(a)(2)(B). Certain exhibits thus refer to the excise-tax rate under § 4081 as being 18.4 cents per gallon.

BACKGROUND

1. Statutory Framework

Since 1932, the United States has imposed an excise tax on various types of fuel, including gasoline. *See* Revenue Act of 1932, ch. 209, § 617(a), 47 Stat. 169 (1932) (current version at 26 U.S.C. § 4081).[1] Excise taxes are taxes collected on the "manufacture, sale, or use of goods," or "on an occupation or activity." *Excise*, Black's Law Dictionary (10th ed. 2014). Under § 4081, the United States imposes an excise tax upon the occurrence of events involving the removal of gasoline from a refinery or terminal; the entry of gasoline into the United States for consumption, use, or warehousing; and the sale of gasoline to certain purchasers. § 4081(a)(1)(A). In particular, § 4081 imposes an excise tax of 18.3 cents per gallon of gasoline (other than aviation gasoline). § 4081(a)(2)(A)(i).[2]

Pursuant to § 9503, the § 4081 gasoline excise tax is used to fund the Highway Trust Fund, created by the Federal-Aid Highway Act of 1956 ("Highway Revenue Act"), Pub. L. No. 84-627, § 209, 70 Stat. 374, 397 (codified at 26 U.S.C. § 9503). These funds are used to construct and maintain the nation's highways and other infrastructure.

In 1978, Congress started enacting tax incentives for renewable fuels, such as alcohol fuel blends. *See* Energy Tax Act of 1978, Pub. L. No. 95-618, § 221, 92 Stat. 3174, 3185. One of these tax incentives was a reduced excise-tax rate for alcohol fuel mixtures. *See* Highway Improvement Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097.

While these tax incentives popularized the production of alcohol fuel mixtures, the lower excise-tax rate resulted in fewer tax dollars flowing into the Highway Trust Fund. Roberta F. Mann & Mona L. Hymel, *Moonshine to Motorfuel: Tax Incentives for Fuel Ethanol*, 19 Duke Envtl. L. & Pol'y F. 43, 49 (2008). The depletion of funds caught the attention of Congress and triggered a legislative response. H.R. Rep. No. 108-548, pt. 1, at 141–42 (2004) ("Committee Report").

On October 22, 2004, the American Jobs Creation Act of 2004 ("Jobs Act") passed. Pub. L. No. 108-357, 118 Stat. 1418. In the Jobs Act, Congress sought to increase the flow of revenue to the Highway Trust Fund, but did not want to eliminate the monetary incentives for producers to blend alcohol with fuel. Congress thus restructured the relevant statutory framework in three respects: (1) it eliminated the reduced excise-tax rate for alcohol fuel blends under § 4081(c), thus leaving an 18.3 cents per gallon excise tax on all non-aviation gasoline; (2) it enacted an alcohol fuel mixture credit for producers of alcohol fuel blends set forth in § 6426(b) (the "Mixture Credit"); and (3) it amended § 9503 to appropriate all excise taxes imposed under § 4081 to the Highway Trust Fund "without reduction for credits under section 6426." Jobs Act §§ 301, 853. Congress stated that the Mixture Credit "provide[s] a benefit equivalent to the reduced tax rates, which are being repealed under the provision." Committee Report, at 142.

By amending § 9503 of the Highway Revenue Act to require the 18.3 cents per gallon excise tax be deposited into the Highway Trust Fund in its entirety, and mandating that the new Mixture Credit be given to producers at an amount equivalent to the now-eliminated reduced excise-tax rate, Congress manufactured a way to shift funds from the General Fund at the U.S. Department of the Treasury ("Treasury") to the Highway Trust Fund without affecting revenue. *See* H.R. Rep. No. 108-755, at 305 (2004) (Conf. Rep.) ("Conference Report") ("The provision also authorizes the full amount of fuel taxes to be appropriated to the Highway Trust Fund without reduction for amounts equivalent to the excise-tax credits allowed for alcohol fuel mixtures, and the Trust Fund is not required to reimburse any payments with respect to qualified alcohol fuel mixtures."); *see also* Staff of Joint Committee On Taxation, *Estimated Budget Effects of the Conference Agreement for H.R. 4520, the "American Jobs Creation Act of 2004"* (JCX-69-04) at Provision III.A.1 (listing the "excise tax credit (in lieu of reduced tax rate on gasoline) to certain blenders of alcohol mixtures" as having "No Revenue Effect"). Under this new regime, the Highway Trust Fund would consistently receive 18.3 cents per gallon under § 4081 regardless of whether the excise tax was actually paid by the taxpayer or obtained from the General Fund at Treasury. In return, alcohol fuel producers would receive the Mixture Credit without impacting the Highway Trust Fund.

The statutory changes to §§ 4081, 6426, and 9503 also led to the creation of § 6427(e)—added to account for the Mixture Credit—which requires the Secretary of the Treasury to pay, interest-free, to an alcohol fuel producer "an amount equal to the alcohol fuel mixture credit." § 6427(e)(1). But "[n]o amount shall be payable . . . with respect to any mixture or alternative fuel with respect to which an amount is allowed as a credit under section 6426." *Id.* § 6427(e)(3).

2. Procedural History

Sunoco, Inc. ("Sunoco"), a petroleum and petrochemical company, blends ethanol with gasoline to create alcohol fuel

mixtures. Sunoco filed consolidated tax returns for 2004 through 2009, and claimed the Mixture Credit under § 6426 as a credit against its gasoline excise-tax liability for the years 2005 through 2008.[3]

In 2013, Sunoco changed its tax position by submitting both informal and formal claims with the Internal Revenue Service (IRS) to recover over $300 million based on excise-tax expenses for the years 2005 through 2008. Sunoco claimed that it erroneously reduced its gasoline excise tax by the amount of Mixture Credit it received, which had the effect of including the Mixture Credit in its gross income. In its view, Sunoco was entitled to deduct the full amount of the gasoline excise tax under § 4081—without regard to the Mixture Credit—and keep the Mixture Credit as tax-free income.[4] On March 11, 2015, the IRS issued a statutory notice of disallowance denying Sunoco's claims.[5] On June 10, 2015, Sunoco filed its refund suit in the United States Court of Federal Claims ("COFC"). *Sunoco, Inc. v. United States*, 129 Fed.Cl. 322, 324 (2016); J.A. 16, 1001–13.

On February 12, 2016, the Government moved for judgment on the pleadings pursuant to Rule 12(c) of the Rules of the Court of Federal Claims,[6] arguing that the Jobs Act requires a two-step, or "bifurcated," approach, in which first, the Mixture Credit reduces any excise-tax liability, and then the taxpayer is compensated for any remaining Mixture Credit via a direct payment pursuant to § 6427. *Sunoco*, 129 Fed. Cl. at 325–26. Under the Government's interpretation, applying the Mixture Credit to first reduce the excise-tax liability turns the Mixture Credit into taxable income up to the point in which excise-tax liability is reduced to zero. *Id.* at 329.

Sunoco responded with a cross-motion for partial summary judgment on liability, arguing that the Mixture Credit does not affect its excise-tax liability under § 4081. Sunoco maintained that although the Mixture Credit can be used to offset excise-tax liability, such liability remains constant and does not reduce the cost of goods sold under the statute, therefore making the excise-tax liability fully deductible. *Id.* at 325–26. In Sunoco's view, the entirety of the Mixture Credit is a tax-free payment to the taxpayer under § 6427. *Id.* at 326.

The COFC found the statutory scheme to be ambiguous, but agreed with the Government's interpretation and granted the Government's motion for judgment on the

3. Sunoco only sought to recover income tax payments for the years 2005 through 2008, but included its claims for years 2004 and 2009 because "changes to the taxable income in those years affect the amount of the refunds for the other years at issue in this case." J.A. 1001–02.

4. As a taxpayer that sells inventory in its trade or business, a gasoline producer and fuel supplier like Sunoco can recover expenses related to the gasoline excise tax under § 4081 by subtracting, or deducting, the expense from its gross income. These deductions are also known as "cost of goods sold." §§ 162, 263A; Treas. Reg. § 1.61-3(a)("Gross income derived from business."). Applying any such deduction under § 4081, i.e., including the gasoline excise tax in the cost of goods sold, results in a decrease in income tax liability.

5. The IRS also denied Sunoco's request to increase its 2009 net operating loss for additional deductions based on its claim for an increased gasoline excise-tax deduction. J.A. 1011.

6. Rule 12(c) of the Rules of the Court of Federal Claims is identical to its counterpart Rule 12(c) of the Federal Rules of Civil Procedure. We apply the same law to these comparable Rules. *Kraft, Inc. v. United States*, 85 F.3d 602, 605 n.6 (Fed. Cir. 1996), *opinion modified on other grounds on denial of reh'g*, 96 F.3d 1428 (Fed. Cir. 1996).

pleadings.[7]

Sunoco appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

Standard of Review

[1–3] We review de novo the COFC's grant of judgment on the pleadings under Rule 12(c). *Xianli Zhang v. United States*, 640 F.3d 1358, 1364 (Fed. Cir. 2011). We accept the facts alleged by Sunoco as true and draw all reasonable inferences in its favor. *Id.* (citing *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009)). Statutory interpretation is a legal question that we review de novo. *Id.* (citing *Norfolk Dredging Co. v. United States*, 375 F.3d 1106, 1108 (Fed. Cir. 2004)); *Shoshone Indian Tribe of Wind River Reservation v. United States*, 364 F.3d 1339, 1345 (Fed. Cir. 2004).

Discussion

Sunoco asks this court to permit it to deduct, as a cost of goods sold, an excise-tax expense that it never incurred or paid. Neither the text of the Jobs Act nor its legislative history supports such a reading of the Internal Revenue Code.

A. Statutory Language

[4–6] The parties agree there is no dispute as to the material facts in this case. J.A. 1044, 1085. Therefore, to determine the tax treatment of the Mixture Credit, we start with the plain language of the statute. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Our inquiry ends there "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' " *Id.* (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last."). Whether the statutory language is unambiguous is determined by the text itself, the context in which the language is used, and the statutory scheme as a whole. *Robinson*, 519 U.S. at 341, 117 S.Ct. 843 (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S.Ct. 2589, 120 L.Ed.2d 379 (1992), and *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S.Ct. 1737, 114 L.Ed.2d 194 (1991)).

Relevant here is the interrelationship among three statutory sections of the Internal Revenue Code: §§ 6426, 6427, and 9503. Section 6426 provides for the Mixture Credit, in relevant part, as follows:

> **(a) Allowance of credits.**—There *shall be allowed as a credit*—
>
> **(1)** *against the tax imposed by section 4081* an amount equal to the sum of the credits described in subsections (b), (c), and (e) [8] . . .
>
> **(b) Alcohol fuel mixture credit.**—
>
> **(1) In general.**—For purposes of this section, the alcohol fuel mixture credit is the product of the applicable amount and the number of gallons of alcohol

7. During the pendency of this action before the COFC, the IRS published a notice informing claimants that they must apply fuel credits awarded under § 6426 to their § 4081 excise-tax liability, and that a claimant can only receive direct payments for credits under § 6427 for fuel credits exceeding the claimant's § 4081 liability. I.R.S. Notice 2015-56, 2015 WL 4779497 (Aug. 15, 2015). As part of the resolution of a discovery dispute, the COFC determined that the IRS's notice was not entitled to deference under *Skidmore v. Swift*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944). *Sunoco, Inc. v. United States*, 128 Fed.Cl. 345, 346 (2016).

8. Subsections (c) and (e) refer to the biodiesel mixture credit and the alternative fuel mixture credit, respectively.

> used by the taxpayer in producing any alcohol fuel mixture for sale or use in a trade or business of the taxpayer.

§ 6426 (a), (b) (emphasis added).

Section 6427(e) grants an interest-free payment to taxpayers of an amount equal to the Mixture Credit, when alcohol, biodiesel, or alternative fuels are used to produce a mixture. Section 6427(e) states in relevant part

> **(e) Alcohol, biodiesel, or alternative fuel.**—Except as provided in subsection (k)—
>
> **(1) used to produce a mixture.**—If any person produces a mixture described in section 6426 in such person's trade or business, the Secretary shall pay (without interest) to such person an amount equal to the alcohol fuel mixture credit . . . with respect to such mixture.
>
> . . . .
>
> **(3) coordination with other repayment provisions.**—*No amount shall be payable* under paragraph (1) or (2)[9] with respect to any mixture or alternative fuel with respect to which an amount is *allowed as a credit* under section 6426.

§ 6427(e)(1), (e)(3) (emphasis added). The IRS does not tax as income direct payments to taxpayers made under this subsection.

Section 6426(a)(1) explicitly provides that the "credit," i.e., the Mixture Credit, is applied "against" the gasoline excise tax imposed under § 4081. In other words, the Mixture Credit works to reduce the taxpayer's overall excise-tax liability. "[A] credit is any amount that is allowable as a subtraction from tax liability for the purpose of computing the tax due or refund due." James Edward Maule, 506-3rd T.M., *Tax Credits: Concepts and Calculation* 43 (BNA 2018); *see also id.* at 1 ("Generally, items that are allowable as credits decrease tax liability by that amount."); *Tax Credit*, Black's Law Dictionary (10th ed. 2014) ("An amount subtracted directly from one's total tax liability, dollar for dollar, as opposed to a deduction from gross income.—Often shortened to *credit*.").

Sunoco argues that a "credit" under § 6426 is a "payment" of its § 4081 excise-tax liability. We disagree. The Jobs Act treats "credits" differently from "payments," as evidenced by the language in § 6427(e)(1), which grants payment to a taxpayer in the same amount as the Mixture Credit, to the extent the taxpayer's excise-tax liability is zero. Appellant's Br. 10 (stating taxpayer receives "tax-free payment" of the outstanding credit amount when taxpayer has no excise-tax liability or the Mixture Credit amount exceeds excise-tax liability); Appellee's Br. 7–8 (same). That payment, however, is reduced by the amount of Mixture Credit applied to offset the taxpayer's excise-tax liability: "*No amount shall be payable* under paragraph (1) . . . with respect to which an amount is allowed as a credit under section 6426." § 6427(e)(3) (emphasis added). The plain language of § 6427(e)(3) therefore distinguishes the § 6426 "credit" from the "payment" allowable under § 6427(e)(1). *See Randall v. Loftsgaarden*, 478 U.S. 647, 657, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986) (stating benefit of tax credit is the "use [of] tax credits to reduce the taxes otherwise payable"); *Schaeffler v. United States*, 889 F.3d 238, 248–49 (5th Cir. 2018) (rejecting argument that foreign tax credit is a payment under the Internal Revenue Code).

Section 9503 only reinforces this reading of § 6426. Section 9503 directs that the entirety of the 18.3 cents per gallon gasoline excise tax under § 4081 be appropriat-

9. Subsection (e)(2) refers to alternative fuel.

ed to the Highway Trust Fund. In this particular instance—financing the Highway Trust Fund—"taxes received under sections 4041 and 4081 shall be determined *without reduction* for credits under section 6426." § 9503(b)(1) (emphasis added).

Sunoco contends that this language shows Congress did not intend the Mixture Credit to reduce excise-tax liability because the Treasury would not "receive" the amount of tax offset by the Mixture Credit. Sunoco's argument fails for a number of reasons. First, the statute explicitly states that for § 9503(b) purposes only, the amount of funds deposited into the Highway Trust Fund is "equivalent to the" gasoline excise tax imposed under § 4081 "without reduction" for the Mixture Credit, meaning that the funds deposited into the Highway Trust Fund are not diminished by any amount of Mixture Credit that might act against a taxpayer's excise-tax liability. This is a logical reading of the statute given that the Jobs Act was enacted with the intention of maximizing funds deposited into the Highway Trust Fund. Second, to interpret § 9503 as Sunoco proposes would render a portion of the statutory language unnecessary; 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" if the Mixture Credit were not to serve as an offset of a taxpayer's excise-tax liability imposed under § 4081. Expressed differently, if the Mixture Credit were a tax-free payment regardless of excise-tax liability, rather than a reduction of the 18.3 cents per gallon gasoline excise tax, portions of § 9503 would lack meaning. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

Sunoco contends that where Congress intended a credit to reduce a taxpayer's excise-tax liability, it explicitly said so. Specifically, Sunoco points to §§ 45H and 280C, where a taxpayer's deductions are "reduced by the amount of the credit determined for the taxable year under section 45H(a)." Appellant's Br. 29. Indeed, no such explicit language appears with respect to the Mixture Credit, but §§ 45H and 280C operate differently from §§ 4081 and 6426. Section 45H concerns income tax credit for low sulfur diesel fuel production. § 45H(a). Section 280C, titled "Certain expenses for which credits are allowable," simply prevents the taxpayer from obtaining a double benefit by forbidding a deduction for expenses already contemplated by the § 45H income tax credit. *Cf.* § 162(a) (allowing deduction of business expenses). In contrast, the Mixture Credit described in § 6426 is a credit, not an expense—Sunoco never pays it. *See* 6 William H. Byrnes, IV et al., *Mertens Law of Fed. Income Tax'n* § 25:1 (Sept. 2018) ("Section 162 requires that deductions for a business expense must have been paid or incurred during the taxable year."). Consequently, there is no need to expressly include a provision prohibiting a taxpayer from deducting the Mixture Credit because it is not an expense incurred by the taxpayer.

B. Legislative History

[7] The plain meaning of the statute is clear—the Mixture Credit 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). To overcome the plain meaning of the statute, Sunoco must show that the legislative history "embodies an '*extraordinary showing* of contrary intentions.' " *Sharp v. United States*, 580 F.3d 1234,

1238 (Fed. Cir. 2009) (quoting *Glaxo Operations UK Ltd. v. Quigg*, 894 F.2d 392, 396 (Fed. Cir. 1990) (looking at legislative history "only to determine whether a clear intent contrary to the plain meaning exists")). Sunoco has failed to satisfy this heavy burden.

[8] Sunoco relies on a single sentence from the legislative history to show that Congress intended the Mixture Credit to be a payment of excise-tax liability, as opposed to a reduction in that liability: "[t]he credit is treated as a payment of the taxpayer's tax liability received at the time of the taxable event." Conference Report, at 304. But other relevant portions of the Conference Report belie Sunoco's position: "In lieu of the reduced excise tax rates, the provision provides that the alcohol mixture credit provided under section 40 may be applied against section 4081 excise tax liability." *Id.* (describing the Mixture Credit as "a benefit equivalent to the reduced tax rates"); *see also id.* at 308 ("These payments are intended to provide an *equivalent benefit* to replace the partial exemption for fuels to be blended with alcohol and alcohol fuels being repealed by this provision." (emphasis added)). Thus, the tax benefit of the Mixture Credit is a reduction in excise-tax liability intended to match the excise-tax rate reduction in place prior to the enactment of the Jobs Act.

In addition, the only payments contemplated by Congress refer to those made to the taxpayer under § 6427(e):

> *Payments with respect to qualified alcohol fuel mixtures*
>
> To the extent the alcohol fuel mixture credit exceeds any section 4081 liability of a person, the Secretary is to pay such person an amount equal to the alcohol fuel mixture credit with respect to such mixture. These payments are intended to provide an equivalent benefit to replace the partial exemption for fuels to be blended with alcohol and alcohol fuels being repealed by the provision.

Id. at 304; *see also id.* at 308. The Conference Report further states that "if the person has no section 4081 liability, the credit is totally refundable." *Id.* at 308; *see also id.* at 303. Thus, Congress intended for any payment of the Mixture Credit to go to the taxpayer only if the taxpayer's excise-tax liability is zero. The legislative history is therefore at odds with Sunoco's position and supports the plain reading of the statute—that the Mixture Credit must first be applied to reduce any § 4081 excise-tax liability, with any remaining Mixture Credit paid to the taxpayer under § 6427(e).

The reason for this is simple: a taxpayer can claim either an excise-tax benefit, i.e., the Mixture Credit, or an income tax benefit, but not both. *See id.* at 304 ("The benefit obtained from the excise tax credit is coordinated with the alcohol fuels income tax credit."); § 40(c); J.A. 1003. In Sunoco's case, it wishes both to pocket the Mixture Credit as a tax-free refundable payment and to claim an income tax benefit by including in full its gasoline excise-tax liability in its cost of goods sold, thereby reducing its total taxable income. But such double-dipping was not intended by Congress. *Cf.* Conference Report at 305–06 (stating biodiesel fuel credit, which is similar to the Mixture Credit, "cannot be claimed for both income and excise tax purposes"). Indeed, while not probative of congressional intent in 2004, in 2009, members of the Joint Committee on Taxation read § 6426 the same way as this court does: "[t]he alcohol fuel mixture credit must first be taken to reduce excise tax liability for gasoline, diesel fuel or kerosene. Any excess credit may be taken as a payment or income tax credit." Joint Committee on Taxation, *Tax Expenditures for*

Energy Production & Conservation, JCX-25-09R at 24 (2009).

Sunoco wishes to treat the Mixture Credit as a deductible expense because it considers the Mixture Credit as a payment of its tax liability. But Sunoco never incurs a cost equal to the Mixture Credit. Such a method of accounting would result in an overall lower taxable income, resulting in a windfall to Sunoco. We have already established that Congress does not generally allow taxpayers to receive a tax benefit twice. Nor has Sunoco shown that Congress intended the Jobs Act to increase excise-tax subsidies for fuel blenders. Sunoco has failed to show that the legislative history extraordinarily contradicts the plain reading of the Jobs Act.

CONCLUSION

[9] In light of the plain language of the Jobs Act, we conclude that the § 6426(a) Mixture Credit is a reduction of § 4081 excise-tax liability, with any credit amount exceeding said excise-tax liability to be paid to the taxpayer under § 6427(e).

AFFIRMED

COSTS

No costs.

K-CON, INC., Appellant

v.

SECRETARY OF the ARMY, Appellee

2017-2254

United States Court of Appeals, Federal Circuit.

Decided: November 5, 2018

Background: Contractor, which had entered into two contracts with United States Army for pre-engineered metal buildings, appealed from decision of the Armed Services Board of Contract Appeals, Nos. 60686, 60687, 2017 WL 372992, which found that bonding requirements were incorporated into contracts by operation of law, such that contractor was not entitled to equitable adjustment for delay caused by contractor complying with bonding requirements.

Holdings: The Court of Appeals, Stoll, Circuit Judge, held that:

(1) contracts were patently ambiguous as to whether they were construction contracts or contracts for commercial items;

(2) bonding requirements were mandatory in government construction contracts; and

(3) bonding requirements expressed significant or deeply ingrained strand of public procurement policy.

Affirmed.

1. Public Contracts ⚿258

United States ⚿689

A patent ambiguity in a federal government contract is present when the contract contains facially inconsistent provisions that would place a reasonable contractor on notice and prompt the contractor to rectify the inconsistency by inquiring of the appropriate parties.

2. Public Contracts ⚿257

United States ⚿688

A patent ambiguity in a federal government contract is distinct from a latent ambiguity, which exists when the ambiguity is neither glaring nor substantial nor patently obvious.

ATTACHMENT 2

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

SUNOCO, INC.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee

2017-1402

Appeal from the United States Court of Federal Claims in No. 1:15-cv-00587-TCW, Judge Thomas C. Wheeler.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*[*].

PER CURIAM.

O R D E R

Appellant Sunoco, Inc. filed a combined petition for panel rehearing and rehearing en banc. The petition was

referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on January 31, 2019.

FOR THE COURT

January 24, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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* Circuit Judge Moore did not participate.