No. 21-519

IN THE

Supreme Court of the United States

GROWTH ENERGY,

Petitioner,

v.

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The court of appeals' incorrect conclusion that Congress intended the Clean Air Act's waiver of the RVP limit for ethanol to apply only to E10 will have serious negative consequences. The RVP limit prevents the sale of E15 for more than one-third of the year, depriving the country of the economic, health, environmental, and security benefits that would come with increasing the amount of ethanol in the nation's gasoline.

The government agrees that the court of appeals erred, but opposes certiorari because, in its view (Opp. 9), the court below applied settled principles of statutory interpretation to an issue that is "open to debate." As Growth Energy's petition explained, however, the court's interpretation ascribes to Congress an irrational purpose in creating the ethanol waiver: to allow ethanol into the fuel supply but to exclude blends with *more* ethanol even if they meet the waiver's RVP limit. Applying controlling and well-established rules of statutory interpretation yields the conclusion that Congress intended the ethanol waiver to cover higher-ethanol blends, but at a minimum the lower court's conclusion that Congress intended to exclude such blends from the ethanol waiver cannot be squared with those rules.

The government also opposes certiorari because, it says, the question presented has little practical importance, noting several supposed economic and logistical impediments to increased E15 use. But some of the government's concerns *contradict EPA's own findings*, and the government vastly overstates the significance of the rest. Tellingly, and contrary to the government's assertion, the number of miles driven on E15 were markedly higher while the Final Rule was in effect—even though that period covered only one complete

summer season and fragments of two more, and even though fuel demand was dramatically lower for most of that period because of the Covid pandemic. And even under the government's conception of the size of the market, the Final Rule still affects about one quarter of all gallons of gasoline used in the United States.

Finally, the government speculates about the possibility of vacatur of the Final Rule on an alternative ground on remand, or an alternative regulatory or legislative mechanism to enable E15 to be sold subject to the same RVP limit as E10 year-round. But this Court routinely grants certiorari in the face of such possibilities.

The Court should grant the petition.

ARGUMENT

I. THE GOVERNMENT ACKNOWLEDGES THE STRENGTH OF GROWTH ENERGY'S MERITS ARGUMENTS

Growth Energy's petition explained (at 13-21) that the court of appeals' interpretation of 42 U.S.C. § 7545(h)(4) defies fundamental principles of statutory interpretation as established by this Court's precedents. Ordinary meaning, statutory structure, and purpose make clear that Congress intended the phrase "fuel blends containing gasoline and 10 percent denatured anhydrous ethanol" to include blends that have more than 10 percent ethanol, or at least that the statute reasonably permits that interpretation. In concluding instead that that phrase must be interpreted to include blends with precisely 10 percent ethanol and no more, the lower court violated the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and the related

principles that courts "cannot interpret federal statutes to negate their own stated purposes," *King* v. *Burwell*, 576 U.S. 473, 492-493 (2015) (quotation marks omitted), or to "lead[] to absurd … results," *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 138 (2004).

The government agrees with Growth Energy that the court of appeals' rejection of EPA's interpretation at *Chevron* step 1 was erroneous, and largely agrees with Growth Energy's reasoning. The government says (Opp. 8) that EPA "reasonably understood ordinary meaning and dictionary definitions to show ambiguity about the scope of the challenged statutory phrase," and that there are many "reasonable arguments weigh[ing] against the court of appeals' conclusion." *See also* Opp. 8-9 (cataloguing such arguments). Ultimately, the government's position is that EPA's interpretation should be upheld at *Chevron* step 2—a position with which Growth Energy agrees, in the alternative. *See* Pet.20-21.

Where the government parts ways with Growth Energy on the merits is only in how badly the court of appeals' analysis went off the rails. In the government's view (Opp. 8-9), the meaning of the ethanol waiver is "open to debate," and the court of appeals "appl[ied] … accepted methods" of statutory interpretation to resolve that ambiguity. The government is wrong about both the clarity of the statute and the soundness of the court of appeals' analysis.

First, the government contends (Opp. 8) that the statute is not "*unambiguous*" because "[n]either ordinary meaning nor dictionary definitions suggest that references to substances 'containing' a specified amount of a particular component *always* encompass substances that contain more than the specified amount."

Growth Energy, however, does not take that absolutist position; it merely argues (Pet.13-14) that "containing" a specified amount of a substance *sometimes* means "having at least" that amount of the substance, and that context shows this statute is such a time. Moreover, the government's argument disregards the well-established principle that a statute may be unambiguous even if its plain text is ambiguous. "[B]efore concluding that a [statute] is genuinely ambiguous, a court must exhaust all the traditional tools of construction," including not only the statute's "text" but also its "structure, history, and purpose." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quotation cleaned). Thus, as the petition noted (at 13), a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *King*, 576 U.S. at 492 (quotation cleaned). Indeed, this Court recently held in *HollyFrontier Cheyenne Refining, LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2178-2179 (2021), that another provision of the Clean Air Act was unambiguous even though the relevant text was susceptible of multiple possible meanings. The same is true here.

Second, the government contends (Opp. 9) that the court below did eventually "assess the statutory context, history, and purpose," pointing to the court's consideration of other statutory provisions and drafts of the provision at issue. But as the petition explained (at 13-20), the court disregarded, misapprehended, or contradicted an overwhelming supply of statutory evidence of Congress's intent. In the end, the court identified no compelling evidence supporting its conclusion that Congress clearly intended to accomplish the bi-

zarre aim of providing a 1-psi waiver for E10 but not for higher-ethanol blends. The court's analysis, therefore, cannot fairly be deemed faithful to applicable principles of statutory interpretation.

II. THE GOVERNMENT'S EFFORTS TO MINIMIZE THE STAKES FAIL

Growth Energy's petition explained (at 21-23) that the practical effect of the decision below is to bar the sale of E15 in the summer, which will result in significant harm to the nation's economy, health, environment, and security. The government attempts to minimize these harms, but its arguments are specious and even contradict EPA's own statements.

1. According to the government (Opp. 11), the question presented has "limited practical significance" because it affects the sale of gasoline only during the summer and only outside the roughly 30% of the market that can use reformulated gasoline. That is still a lot. Assuming conservatively that driving is constant throughout the year—in fact, driving is heavier in the four-and-a-half-month summer season, when the ethanol waiver would apply—the ethanol waiver affects approximately 26% of the gasoline sold annually (70% of 4.5/12). In 2020, when driving was historically low because of the Covid pandemic, that amounted to approximately 32 billion gallons of gasoline. *See* EPA, *Renewable Fuel Standard (RFS) Program: RFS Annual Rules* ("*2020-2022 Proposed Standards*") 63 (Dec. 7, 2021).[1] And that substantially understates the Final Rule's potential impact because, as Growth Energy has

[1] https://www.epa.gov/sites/default/files/2021-12/documents/rfs-2020-2021-2022-rvo-standards-nprm-2021-12-07.pdf.

explained (Pet.22), clearing the regulatory hurdles to summer E15 sales unlocks greater investment in E15 overall.

2. The government grossly understates (Opp. 11) that extending the ethanol waiver to E15 would merely "make it more affordable to sell E15" in the summer. As the petition noted (at 11 n.3) and as EPA and the court below themselves acknowledged, producing E15 that could meet the 9.0 psi RVP limit in the summer—and thus that could be sold without the ethanol waiver—is "cost-prohibitive." Pet.App.6a; *accord* CAJA014. Therefore, denying E15 the ethanol waiver "would likely result in the *termination* of the availability of [E15] in the marketplace" during the summer. CAJA014 (emphasis added). Thus, as the court of appeals found, "[b]y removing the otherwise applicable 9-psi volatility limit, the E15 Rule is substantially likely to increase demand for E15." Pet.App.9a. Indeed, the court noted EPA's estimate that extending the ethanol waiver to E15 would raise "annual per-station sales of E15" by "about 16%." Pet.App.10a.[2]

The government, however, maintains (Opp. 12) that there was "no rapid expansion of E15 usage" while the Final Rule was in force. That contention is unfair and incorrect. First, consider the period when the Final Rule was in force: The Rule was issued in June 2019,

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[2] Because the transportation-fuels market is so competitive, even a price increase of a few cents per gallon can have a significant effect on consumer demand. And the decision of whether to use the more-expensive lower-volatility blendstock needed to create E15 with a 9.0 psi RVP is up to petroleum refiners—the *competitors* of ethanol producers that challenged the Final Rule in hopes of keeping E15 out of the summer market. Pet.App.9a-10a (holding that refiner petitioners had "competitor standing" to challenge Final Rule).

midway through the summer season. And retailers could not turn instantly begin selling E15; they needed time to arrange to buy E15, phase out the E10 that was in their tanks and pumps, and change hose configurations and pump labeling (non-trivial tasks given the number of tanks and pumps). Next, the summer of 2020 came amid the pandemic, which caused a "drastic fall in transportation fuel demand generally." *2020-2022 Proposed Standards* 28. And then the court of appeals vacated the ethanol waiver in July 2021, during the summer season. On top of all that, the pendency of this lawsuit, and the attendant risk that the ethanol waiver would be invalidated, discouraged market participants from making E15-related investments, lest their investments be stranded. *See* Pet.6, 22-23. Yet, as Growth Energy has shown (Pet.11-12), drivers still logged as many miles on E15 while the Final Rule was in effect as they had in the previous 10 years combined.

3. Somehow, despite these facts, the government insists (Opp. 6, 11-12) that upholding EPA's interpretation of the ethanol waiver "would not lead to widespread use of E15 … because of independent economic, administrative, and logistical barriers" to E15 expansion. The government is wrong.

a. The government points (Opp. 11-12) to various supposed economic and logistical barriers: consumer reluctance; the cost of upgrading retail stations to E15-compatible pumps and tanks; and the challenges of distributing E15 to areas outside the Midwest, where most ethanol is produced. Those certainly are not barriers to increased summer sale of E15; the consumers buying E15 outside the summer and the stations selling E15 outside the summer are already unaffected by any such barriers.

Nor would those supposed barriers prevent meaningful expansion of E15 beyond extending summer E15 to drivers already buying E15 outside the summer. The government says (Opp. 11-12) some unquantified number of consumers will not use E15 because vehicles made before 2001 are not permitted to use E15 and some later-model vehicles' manuals "warn against using E15." But E15-compatible vehicles will account for about 98% of vehicle miles travelled in 2022. *See* Air Improvement Resources, Inc., *Analysis of Ethanol-Compatible Fleet for Calendar Year 2022*, at 2 (Nov. 16, 2021).[3] Moreover, EPA itself already rejected the concern about vehicle warranties, noting that "manufacturers may not deny a warranty claim based on use of a different fuel if that fuel did not cause the problem for which the warranty claim is made." EPA, *Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to RFS RIN Market Regulations: Response to Comments* 69 (May 2019).[4]

The government's concerns about incompatible infrastructure are similarly infirm. Nearly all tanks made in the past 30 years are compatible with E15. Growth Energy, *Retailer Hub*[5]; U.S. Department of Energy, National Renewable Energy Lab, *E15 and Infrastructure* vi (May 2015).[6] Further, a typical station

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[3] https://growthenergy.org/wp-content/uploads/2021/12/Analysis-of-Ethanol-Compatible-Fleet-for-Calendar-Year-2022-16Nov21.pdf.

[4] https://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100WR63.pdf.

[5] https://growthenergy.org/resources/retailer-hub/.

[6] https://afdc.energy.gov/files/u/publication/e15_infrastructure.pdf.

could upgrade its tanks, dispensers, and associated infrastructure to be compatible with E15 for a modest sum (about $5,000 to $15,000). Stillwater Associates LLC, *Infrastructure Changes and Cost to Increase Consumption of E85 and E15 in 2017*, at 20-22 (July 11, 2016), attached as Ex. D to Growth Energy, *Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2017 and Biomass-Based Diesel Volume for 2018* (EPA docket ID EPA-HQ-OAR-2016-0004-3499).[7]

Finally, there is no problem distributing E15 outside the Midwest. Today there are terminals distributing E15 throughout the Mid-Atlantic, Southeast, and South-Central regions, *see* Growth Energy, *Retailer Hub*.

b. As for the supposed administrative impediment, the government says (Opp. 12-13) that reversal of the decision below might not enable E15 to be sold during the summer because on remand, the court of appeals could vacate the Final Rule's determination that E15 is "substantially similar" to E10 under 42 U.S.C. § 7545(f)(1). There are several flaws in the government's argument. First, this Court routinely grants certiorari in the face of potential alternative grounds for affirmance, leaving it to the lower courts to address them in the first instance on remand. *See, e.g.*, Opp. 35-38, *Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, No. 12-786 (U.S. Apr. 3, 2013); Opp. 11-22, *Fitzgerald* v. *Barnstable Sch. Comm.*, No. 07-1125 (U.S. May 5, 2008). Notably, the government offers neither authority nor rationale for its notion that the possibility of an

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[7] https://www.regulations.gov/comment/EPA-HQ-OAR-2016-0004-3499.

affirmance on other grounds on remand is a basis to deny certiorari.

Second, EPA's "substantially similar" determination affects a vanishingly small segment of the E15 market. That determination enables "fuel manufacturers" to introduce E15 into commerce without a waiver under 42 U.S.C. § 7545(f)(4). *See* Pet.11; § 7545(f)(1). But in the Final Rule, EPA also determined that oxygenate blenders are *not* fuel manufacturers and therefore may sell E15 regardless of § 7545(f), CAJA3, 30, that portion of the Final Rule was not challenged, and oxygenate blenders account for at least 90% of the E15 introduced into commerce. Moreover, EPA could render the "substantially similar" determination irrelevant by amending the waivers that EPA previously granted E15 under § 7545(f)(4) to permit the sale of E15 at 10 psi. *See* Pet.10; Pet.App.2a-3a, 7a.

III. THE GOVERNMENT ERRS IN SUGGESTING THAT THIS CASE IS NOT ESSENTIAL FOR ENABLING NATIONWIDE SUMMER SALE OF E15

Growth Energy has explained (Pet.23-24) that its petition presents the sole opportunity for this Court to correct the lower court's error and allow a 1-psi waiver for the summer sale of E15. The government disagrees, for speculative and insubstantial reasons.

The government contends (Opp. 10 n.2) that "[t]his Court … does not grant certiorari simply because a single circuit has exclusive jurisdiction over a particular category of cases." That misses the point. The certiorari petition explained (at 23-24) that because the D.C. Circuit has exclusive jurisdiction, there will never be an opportunity for the issue to percolate in the lower courts, let alone a circuit conflict on the issue. This is

undisputedly the only case that will ever present this question.

The government also speculates about the possibility of other regulatory or legislative solutions to the RVP problem for E15. The government notes (Opp. 13) that a state may "request" that EPA remove the 1-psi waiver for ethanol entirely if certain conditions are met, which would then subject *both* E10 and E15 to the 9-psi RVP limit (rather than the 10-psi limit under the ethanol waiver). *See* 42 U.S.C. § 7545(h)(5). That supposed solution is far-fetched. Requests must be made by individual states, so it is not a path to widespread relief, the government does not say whether applicant states could make the requisite showing, and governors face a strong disincentive to make such a request, namely, blame for raising the price of gasoline in their state.

The government also posits (Opp. 13-14) that Congress could amend § 7545 to "make clear" that the ethanol waiver applies to E15. Although some bills have been introduced to do so, no further action has been taken on them. Moreover, the potential for a legislative solution is far too sweeping a basis to deny certiorari, since amendment is always a possibility in a statutory-interpretation case. Indeed, this Court has routinely granted certiorari—often at the government's behest—in the face of a pending legislative solution, even where the bill was further along in the legislative process. *See, e.g.*, Cert. Reply 10 n.8, *Gonzales* v. *Duenas-Alvarez*, No. 05-1629 (U.S. Sept. 6, 2006) ("it remains uncertain whether legislation addressing the question presented in this case will be passed"), *cert. granted*, 127 S. Ct. 35 (Sept. 26, 2006); *see also* Cert. Reply 9, *Commissioner of Internal Revenue* v. *Banks*, No. 03-892 (U.S. Mar. 11, 2004) (arguing that "pending legisla-

tion … does not remove the need for this Court's review" because "the legislation has merely been proposed, and it is far from clear that it will ever be enacted into law, much less enacted soon enough to reduce the need for this Court's review"), *cert. granted*, 124 S. Ct. 1712 (Mar. 29, 2004).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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