No. 04-822

In the Supreme Court of the United States

AMMEX, INC., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner, a duty-free shop that sells fuel to individuals crossing the border into Canada, seeks a refund of the federal fuel excise taxes imposed on, and paid by, its suppliers that resulted in higher fuel prices to petitioner. Petitioner claims that the excise tax, as applied to its fuel, is unconstitutional under the Export Clause. Moreover, petitioner argues that it is entitled to recover the taxes under 26 U.S.C. 6421(c) and 6416(c). The questions presented are:

1. Whether petitioner lacks standing to maintain its refund action under the Export Clause.

2. Whether the court of appeals applied the proper level of deference to an Internal Revenue Service revenue ruling.

3. Whether petitioner is an "exporter" of fuel within the meaning of 26 U.S.C. 6416(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 367 F.3d 530. The decisions of the district court (Pet. App. 12a-32a, 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2004. A petition for rehearing was denied on September 17, 2004 (Pet. App. 37a). The petition for a writ of certiorari was filed on December 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a U.S. Customs Class 9 bonded warehouse, commonly known as a duty-free store, in Detroit, Michigan. Pet. App. 13a. Petitioner's warehouse is "sterile," which means that petitioner's

customers must cross the border into Canada upon exiting the warehouse due to the physical design and operation of the facility. *Ibid.* In short, petitioner's store is beyond the "point of no return" for individuals exiting the United States. *Ibid.*

During the first two quarters of 1999, petitioner sold gasoline and diesel fuel to individuals driving into Canada that it had purchased from local fuel the suppliers. Pet. App. 13a. Under 26 U.S.C. 4081, those suppliers were required to pay a federal excise tax on the fuel when it was removed from their fuel terminals for delivery to purchasers, such as petitioner. Pet. App. 13a-14a. Petitioner sought to purchase the fuel at a reduced price—that is, reduced by the amount of the tax—claiming that the fuel was an export exempted from the fuel excise tax, but the suppliers refused. *Id.* at 14a. Accordingly, petitioner paid its suppliers an amount that included the excise tax assessed against them.

Petitioner subsequently filed refund claims with the Internal Revenue Service (IRS), seeking to recoup the fuel excise taxes on the ground that the tax, as applied to the fuel that petitioner had purchased, was unconstitutional. Pet. App. 14a-15a. Petitioner had not filed federal excise tax returns reporting liability for the taxes in the periods at issue. C.A. App. 316-317. Moreover, petitioner had not paid the excise tax to the IRS, and the IRS had not assessed the excise tax against petitioner or otherwise attempted to collect the tax from it. *Ibid.* The IRS disallowed the claims. Pet. App. 15a.

2. Petitioner commenced this action in the district court for a refund of the fuel excise taxes it claimed to

have paid during the first six months of 1999.[1] Petitioner argued that it was entitled to a refund because, as an exporter, it was exempt from the fuel excise tax under the Export Clause of the Constitution, Art. I, § 9, Cl. 5, and also claimed that it could recover under 26 U.S.C. 6416(c) and 6421(c), both of which permit third parties to recoup excise taxes paid by others in special circumstances. Petitioner and the government cross-moved for summary judgment.

3. The district court granted the government's motion for summary judgment and denied petitioner's motion. Pet. App. 12a-36a. As is relevant here, the district court held that petitioner lacked standing to seek a refund under the Export Clause, because petitioner could "not establish an injury in fact caused by defendant." *Id.* at 24a. The court reasoned that the alleged injury was instead caused by the fuel suppliers, stating that petitioner's "suppliers included federal excise taxes as a line item in the invoice cost of the gasoline and diesel fuel purchased by [petitioner]," after "refus[ing] to sell the fuel without including the excise tax." *Id.* at 21a.

In addition, the court concluded that petitioner was not entitled to a refund under 26 U.S.C. 6421(c), because it did not sell gasoline "for export" within the meaning of that provision. Pet. App. 28a-30a. Section 6421(c) provides that, if gasoline is sold to any person for a purpose defined in 26 U.S.C. 4221(a)(2)-(5), including "for export" under Section 4221(a)(2), the person shall

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[1] Petitioner also commenced an action in the United States Court of Federal Claims that raised the same issue but involved tax years 1994 to 1998. A petition for a writ of certiorari in that case is pending before this Court. See *Ammex* v. *United States*, No. 04-860 (filed Dec. 23, 2004).

be paid (without interest) an amount equal to the tax. Pet. App. 25a, 28a. Petitioner's fuel was not, in the district court's view, sold "for export" within the meaning of the provisions, because the fuel was too integrated with the purchaser's automobile to constitute an exportable product. *Id.* at 28a-30a.

For support, the district court cited Revenue Ruling 69-150, 1969-1 C.B. 286. In that ruling, the IRS concluded that gasoline is not exported within the meaning of 26 U.S.C. 4221(a)(2) when sold as fuel for a vehicle that immediately departs the United States. The IRS reasoned that, once placed in the vehicle's tank, the fuel is incorporated into the vehicle and loses its identity as a separate, exportable commodity. For the same reason, individuals who drive vehicles into the United States do not "import" the fuel that is in their tanks. Citing that ruling, the district court concluded that the fuel at issue here is "so assimilated by the vehicle that it becomes one of its constituent parts" and cannot be "exported" within the meaning of 26 U.S.C. 4221(a)(2) and 6421(c). Pet. App. 28a.

The court also rejected petitioner's claim under Section 6416(c). Section 6416(c) allows an "exporter" to recover taxes "erroneously or illegally collected in respect of any article exported" if the person who paid the tax waives its claim to a refund. The court observed that the definition of "exporter" in 26 C.F.R. 48.0-2 is "the person named as shipper or consignor in the export bill of lading." Pet. App. 25a. Petitioner, by contrast, is a duty-free operator, defined as a person that sells duty-free merchandise "for exportation by, or on behalf of, individuals departing from the customs territory." 19 U.S.C. 1555(b)(8)(D). Thus, petitioner's *customers* may

qualify as exporters, but petitioner does not. Pet. App. 25a-26a.

4. a. The court of appeals affirmed. Pet. App. 1a-11a. The court held that petitioner lacked standing to bring a claim for refund under the Export Clause, because its alleged injury (higher fuel costs) was not "caused" by the government. *Id.* at 5a. The court acknowledged that "the Government did impose an excise tax on the fuel that [petitioner] purchased and later sold at its 'duty-free' facility," but "that tax was not assessed against [petitioner]." *Ibid.* "Instead, the tax was imposed on [petitioner's] suppliers who, in turn, added the amount of the tax to the wholesale price of the fuel [petitioner] purchased." *Id.* at 5a-6a. For that reason, "any alleged injury suffered by [petitioner] in the form of increased fuel costs was not occasioned by the Government," but by the "discretion of [petitioner's] suppliers to charge [petitioner] for the challenged tax amount." *Ibid.*

The court of appeals also concluded that petitioner did not sell fuel "for export" within the meaning of 26 U.S.C. 6421(c), citing Revenue Ruling 69-150. Pet. App. 7a-8a. The court declined to decide whether the revenue ruling was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concluding instead that the ruling was "obviously" entitled to at least "some level of deference" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7a-8a (citing *United States* v. *Mead Corp.*, 533 U.S. 218 (2001)). The court explained that "the IRS possesses 'relative expertness' in the application of the Code to particular facts, given the technical complexity of federal tax law," and that the IRS had "left Revenue Ruling 69-150 virtually unchanged for over three de-

cades," which demonstrated "the soundness of the decision there made." *Id.* at 8a. Petitioner also had "failed to identify any infirmity in this longstanding and sensible interpretation of the statutory scheme." *Ibid.*

Finally, the court of appeals held that petitioner was not an "exporter" within the meaning of 26 U.S.C. 6416(c). Pet. App. 8a-9a. Rejecting petitioner's argument that it was an exporter because it was a duty-free enterprise, the court noted that the definition of "duty-free enterprise"—one who delivers duty-free merchandise for exportation *by others*—demonstrates that petitioner cannot, itself, be an exporter. *Id.* at 9a.

b. Judge Merritt concurred. He expressed "serious doubts about the conclusion that [petitioner] does not have standing to bring this claim under the Export Clause of the Constitution." Pet. App. 10a. Judge Merritt concluded, however, that petitioner was not an "exporter" within the meaning of the Export Clause or the Internal Revenue Code, stating that, "[w]hen [petitioner] pours gas into the tank of a car, mixing it with what is there, it is no more of an exporter than the gas station which does the same thing a few blocks before reaching the bridge." *Id.* at 10a-11a.

ARGUMENT

Petitioner contends that the court of appeals' decision has created "conflicts and confusion" with respect to the requirements for Article III standing and administrative deference, and that the decision is inconsistent with this Court's precedents. To the contrary, however, the court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The court of appeals correctly concluded that petitioner lacks standing to pursue its refund claim under the Export Clause. It is well established that a plaintiff has standing to maintain a tax-refund action to recover only overpayment of its own taxes or overpayment of a third party's taxes that the plaintiff was coerced into paying. See *United States* v. *Williams*, 514 U.S. 527 (1995). Where the plaintiff is a purchaser of goods seeking to recover a tax paid by the supplier that increases the costs of those goods, the courts have uniformly held that the plaintiff lacks standing to recover the tax, unless some special statutory provision authorizes recovery or requires the supplier to shift the tax to its customers. See, *e.g.*, *Ontario Power Generation, Inc.* v. *United States*, 369 F.3d 1298, 1303 (Fed. Cir. 2004) (dismissing coal purchaser's claim that the coal excise tax violated the Export Clause because the purchaser's injury was not caused by the government, but rather by the coal suppliers who "made an independent decision" to include the amount of the tax in the price of coal sold); *Emerald Int'l Corp.* v. *United States*, 54 Fed. Cl. 674, 681 (2002) (same); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *United States*, 845 F.2d 139, 142 (7th Cir. 1988) (holding that a purchaser lacked standing to sue for a refund of federal excise tax paid by another, even though the purchaser bore the economic burden of the tax); *JAT Oil & Supply, Inc.* v. *United States*, 80 A.F.T.R.2d (RIA) 97-6137, 97-6141 (E.D. Tenn. 1997) (same), aff'd, 166 F.3d 1214 (6th Cir. 1998) (Table).

Here, no federal statute required the fuel suppliers to charge petitioner for the fuel excise tax imposed upon them. As the court of appeals observed, petitioner's increased fuel cost was caused not by the government,

but by the suppliers exercising "discretion" "to charge [petitioner] for the challenged tax amount." Pet. App. 6a. Because any alleged injury "was not occasioned by the Government," petitioner lacks standing to seek a refund from it. *Ibid.*

To hold otherwise, and permit a plaintiff to assert a refund claim based simply on the economic consequences of a tax, would create an unworkable rule. Such an approach "would potentially require [a] court to consider the overlapping claims not only of the seller/manufacturer and its immediate purchaser, but also those of any subsequent purchasers *ad infinitum*, any one of which might plausibly argue that it bore at least a portion of the damages caused by the unconstitutional imposition of" the tax. *Emerald*, 54 Fed. Cl. at 683. Put simply, "[n]o right of recovery is given a person not initially paying the tax although he may have borne the burden. Manifestly, it would be impracticable to do so as a person paying the tax may have passed it on to hundreds of others and so many claims might be filed they could not be handled." *Savannah Sugar Ref. Corp.* v. *Commissioner*, 121 F.2d 426, 427 (5th Cir. 1941).

Petitioner attempts (Pet. 5, 8-9) to sidestep established standing principles in tax-refund actions by recasting the court of appeals' decision. Petitioner characterizes the court as holding that only direct injuries are cognizable under Article III and asserts that the decision below therefore conflicts with other court of appeals' decisions holding that "an 'indirect' injury can confer constitutional standing." Pet. 9. But as is clear from the text of its decision, the court of appeals did not conclude that indirect injuries are never cognizable; it assumed that petitioner suffered an

injury[2] and held that "any alleged injury" was not sufficient under Article III in the circumstance of this case because it "was not occasioned by the Government." Pet. App. 6a.

b. When the decision below is properly understood, it is clear that petitioner is wrong to argue (Pet. 12-13) that the decision conflicts with *Maryland* v. *Louisiana*, 451 U.S. 725 (1981). In that case, this Court held that Maryland, a consumer of natural gas, had standing to challenge Louisiana's natural gas tax, even though the tax was paid by fuel suppliers, because the suppliers were statutorily required to charge consumers for the tax. *Id*. at 736. Thus, the plaintiff not only bore the economic burden of the tax but bore the tax as "a direct result" of the statutory design. *Id*. at 739.

In this case, by contrast, federal law does not direct fuel suppliers to pass the cost of the fuel excise tax to purchasers. To the contrary, the Internal Revenue Code contemplates that suppliers can absorb the cost of the excise tax instead of passing it on to purchasers. See 26 U.S.C. 6416(a); *Emerald*, 54 Fed. Cl. at 681 & n.13 (characterizing Section 6416(a) as prohibiting refunds of excise taxes unless the taxpayer establishes that it "has not included the tax in the price of the article with respect to which it was imposed" or "has repaid the amount of the tax to the ultimate purchaser").

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[2] Whether petitioner suffered any injury is an open question; neither the court of appeals nor the district court found that petitioner absorbed the economic burden of the tax, and in the related litigation before the Court of Federal Claims, the court found that petitioner had, in fact, passed the tax burden to its customers. *Ammex* v. *United States*, 56 Fed. Cl. 1, 14 (2003), aff'd on other grounds, 384 F.3d 1368 (Fed. Cir. 2004).

In all events, *Maryland* v. *Louisiana* fails to aid petitioner, because it concerned a State's right to enjoin the operation of another State's law, not a claim for a tax refund, which can be maintained only to recover taxes a party has itself overpaid. See pp. 7-8, *supra*. Indeed, the Court acknowledged the standing problem here, when it suggested that individual consumers who did not possess the special attributes of the State and were "not directly responsible to Louisiana for payment of the taxes, * * * [would be] foreclosed from suing for a refund in Louisiana's courts." 451 U.S. at 739.

This Court's other decisions on which petitioner relies (Pet. 13-14) are similarly inapposite. In *Clinton* v. *City of New York*, 524 U.S. 417, 434 (1998), for example, the Court found that a cooperative seeking to buy a food processing facility had standing to challenge the line-item veto of a tax provision that would have provided the seller of the facility tax relief on the sale, reasoning that cooperatives "were the intended beneficiaries" of the provision. And, in *Boston Stock Exchange* v. *State Taxation Commission*, 429 U.S. 318, 320 n.3 (1977), the Court held that an out-of-state business had standing to challenge a statute specifically designed to injure out-of-state businesses. Unlike *Clinton* and *Boston Stock Exchange*, this case does not involve a tax provision that has the direct result and purpose of injuring or benefitting petitioner. Moreover, unlike the plaintiffs in those actions, who sought only *declaratory* relief, petitioner seeks a *refund* of taxes, which requires it to demonstrate that it paid the taxes over to the government or is otherwise permitted by statute to recover them. See pp. 7-8, *supra*. Accordingly, both the general nature of the tax and the particular nature of peti-

tioner's claim, a refund action, distinguish this case from the indirect standing cases considered by this Court.

c. The court of appeals' decision similarly does not conflict with the standing decisions of other courts of appeals. Contrary to petitioners' claim (Pet. 9-10), the Tenth Circuit in *Sac & Fox Nation* v. *Pierce*, 213 F.3d 566 (2000), cert. denied, 531 U.S. 1144 (2001), did not consider a Tribe's standing to seek a refund of taxes paid by third parties. See pp. 7-8, *supra*. Rather, the court held only that a Tribe had standing to seek an injunction preventing the operation of a state tax imposed on third parties that burdened the Tribe. 213 F.3d at 573-575. The Seventh Circuit, which has considered a Tribe's standing to sue for refunds of third-party taxes, has concluded consistent with the decision below (see pp. 7-8, *supra*) that Tribes have no such standing, because "only the person legally liable for paying a given federal tax may bring a refund suit." See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *United States*, 845 F.2d 139, 142 (1988). In any event, *Sac & Fox Nation* involves the unique application of Indian law, and as the Tenth Circuit observed, "[i]n resolving challenges to state taxation affecting tribal businesses on Indian lands, the Supreme Court has addressed the legal incidence of a tax as a question intertwined with the merits of the case." 213 F.3d at 574.

The Eighth Circuit's decision in *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372, cert. denied, 522 U.S. 1029 and 1036 (1997), is also consistent with the result below. In that case, the court held that the plaintiffs lacked standing to challenge an ordinance regulating the conduct of others, reasoning that the mere economic burden caused by the ordinance

did not confer standing on the plaintiffs. *Id.* at 1381. Although the Eighth Circuit concluded that the plaintiffs failed the prudential standing requirements and the court below concluded that petitioner lacked Article III standing, the result reached by the two courts is the same—plaintiffs have no standing to recover the consequential economic damages they suffer as a result of laws regulating others.[3]

d. Petitioner errs in contending (Pet. 11 n.13, 12) that denying it standing would "shield" the tax at issue from constitutional scrutiny. If the tax were subject to a legitimate Export Clause challenge, the fuel suppliers would be capable of asserting the claim. And, contrary to petitioner's contention (Pet. 11-12), the fact that the suppliers have the ability to attempt to pass their tax burden to third parties does not destroy their standing to challenge a tax they are legally obligated to pay or undercut their incentive to commence suit. See *Bacchus*

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[3] The remaining decisions petitioner cites (Pet. 11 n.14) similarly do not conflict with the decision below. In *G&G Fire Sprinklers, Inc.* v. *Bradshaw*, 156 F.3d 893, 900 (1998), vacated on other grounds, 526 U.S. 1061 (1999), the Ninth Circuit concluded that a plaintiff-subcontractor had standing where the challenged state action "targeted" the plaintiff, and "the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused [plaintiff's] injury." In contrast, here, the disputed tax did not target petitioner, and as the court of appeals found, petitioner's injury was caused by the independent choices of the fuel suppliers. The remaining cases petitioner cites concern entirely distinguishable standing questions. See *Autolog Corp.* v. *Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984) (concluding that "length" of "chain of causation" is not determinative of standing, and not deciding whether a break in the chain of causation could determine standing); *Adams* v. *Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (considering inapposite issue of "competitor standing"); *United States* v. *Colorado*, 666 F. Supp. 1479, 1480 (D. Colo. 1987) (involving government's challenge to tax that, in its view, was "imposed upon it").

Imports, Ltd. v. *Dias*, 468 U.S. 263, 267 (1984) (holding that a taxpayer had standing to challenge a tax even though the taxpayer had passed the cost of the tax to its customers because the taxpayer was "liable for the tax" "whether or not their customers pay their bills"); see also *Ontario Power*, 369 F.3d at 1300 (noting that coal suppliers who allegedly have passed on the cost of a tax have challenged that tax under the Export Clause). Indeed, petitioner continues to challenge the tax even though it passed the costs associated with the excise tax to its customers. See *Ammex*, 56 Fed. Cl. at 14.[4]

2. a. The court of appeals did not misapply this Court's decisions in *Skidmore* and *Mead* in concluding that Revenue Ruling 69-150 is entitled to at least "some deference" as "a long-standing and highly persuasive precedent" that is "sensible" and "logical." Pet. App. 6a-8a. In *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227, 234 (2001), this Court held that informal agency rulings are entitled to at least "some level" of judicial deference, depending on "the degree of the agency's care [in formulating its position], its consistency, formality, and relative expertness, and * * * the persuasive-

[4] In all events, the result in this case is correct because petitioner's Export Clause claim lacks merit. As explained below, see pp. 16-17, *infra*, the fuel that petitioner purchased was not exported, because it lost its identity as an independent exportable commodity once it was incorporated into a motor vehicle. In addition, the Export Clause does not prohibit the government from taxing goods *before* they enter the stream of exportation. *United States* v. *IBM Corp.*, 517 U.S. 843, 848-850 (1996) (noting that a tax may be "imposed on goods intended for export" as long as they are not yet in the "course of exportation" at the time of taxation). Because, here, the incidence of taxation was on the removal of the fuel from the suppliers' terminals, not the subsequent sales by petitioner to its customers, the fuel excise tax was imposed prior to the fuel's entering the exportation stream.

ness of the agency's position." *Mead*, 533 U.S. at 228, 234 (footnotes omitted).[5]

Consistent with *Mead*, the court of appeals concluded that Revenue Ruling 69-150 is entitled to "at least some level of deference," because revenue rulings are reviewed by a "central board or office" within the IRS that "accords a great degree . . . of care to their issuance" and concern issues within the technical expertise of the

[5] The position of the United States is that IRS revenue rulings are generally entitled to *Chevron* deference. The IRS promulgates revenue rulings pursuant to its statutory authority "to prescribe all needful rules and regulations for the enforcement of" the Code. 26 U.S.C. 7805(a); Treas. Order 111-2, 1981-1 C.B. 698, 699. Revenue rulings are formal interpretive rulings involving "substantive tax law." 26 C.F.R. 601.601(d)(2)(v)(a). They are issued by the IRS National Office and published in the Internal Revenue Bulletin as the agency's "official" position to guide taxpayers and IRS officials alike. 26 C.F.R. 601.601(d)(2)(i)(a). Like regulations, revenue rulings have legal force and effect in that they constitute "precedents to be used in the disposition of other cases" that "may be cited and relied upon for that purpose." 26 C.F.R. 601.601(d)(2)(v)(d). And a taxpayer's disregard of applicable revenue rulings can result in the imposition of penalties. 26 U.S.C. 6662; 26 C.F.R. 1.6662-3(b)(2). Although revenue rulings, unlike regulations, are not subject to notice and comment, this Court has made clear that the absence of notice-and-comment rulemaking and formal adjudication does not preclude *Chevron* deference, so long as it appears that Congress intended to grant the agency the power to make rules with the "force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-227, 230-231; see *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002) (according *Chevron* deference to a "longstanding" agency interpretation reached through "means less formal than 'notice and comment' rulemaking"). Thus, revenue rulings have the "force of law" within the meaning of *Mead*, and *Chevron* deference is required. *Mead*, 533 U.S. at 227. Whether revenue rulings are entitled to *Chevron* deference, however, is not presented in this case, because the court of appeals concluded that deference was due even under the less deferential *Skidmore* standard.

IRS. Pet. App. 8a (internal quotation marks and citation omitted). In addition, Revenue Ruling 69-150 had particular persuasive value, in the court's view, because it has been "virtually unchanged for over three decades" and provides a "sensible interpretation of the statutory scheme." *Ibid*.

Petitioner's claim that this Court "has not decided whether revenue rulings are owed *any* deference," Pet. 18 (emphasis added), is incorrect. Before *Chevron*, this Court consistently held that the IRS's rulings were entitled to deference, particularly where they were consistently applied over a lengthy period of time. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 483-484 nn.16-19 (1979); *United States* v. *Correll*, 389 U.S. 299, 302 n.10, 306-307 (1967). Since *Chevron*, this Court has found it unnecessary to consider the degree of deference due to IRS revenue rulings in general, but has observed that revenue rulings "attract[] substantial judicial deference" at least where they reflect the IRS's longstanding interpretation of its own regulations. *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001); see *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991).

Petitioner also errs in suggesting (Pet. 14-16) that the court of appeals relied on Revenue Ruling 69-150 to determine the meaning of the Export Clause. As the face of its opinion makes clear, the court of appeals relied on the revenue ruling solely to aid its interpretation of terms in a statutory provision, Section 6421(c). Pet. App. 6a-7a (introducing discussion of Revenue Ruling 69-150 by observing that "[b]ecause the excise tax provisions of the Code do not define 'export,' extrinsic aids for construction may be relied on in interpreting the meaning of export for purposes of § 6421(c) and

§ 4221(a)2)"). With respect to the Export Clause, the court held only that petitioner lacked standing to assert a refund action. *Id.* at 6a ("Without an injury in fact, caused by the Government, we hold that [petitioner] does not have standing to pursue its claim based on the Export Clause.").

Petitioner's disagreement (Pet. 16-17) with the court of appeals' evaluation of the persuasive value of Revenue Ruling 69-150, moreover, does not warrant review by this Court. That issue concerns merely the fact-bound application of well-settled legal principles to this case. Contrary to petitioner's assertion (Pet. 15, 17), the revenue ruling is not unpersuasive simply because it does not specifically address duty-free stores or the Export Clause. Neither has any bearing on the ruling's rationale, which depends on the relationship between a vehicle and the fuel in its tank, or on the ruling's purpose, which is to clarify a statutory provision, not a constitutional one.

b. The decision below also does not conflict with other decisions regarding the deference attributable to Revenue Ruling 69-150. Indeed, no other court of appeals appears to have addressed the persuasive value of the revenue ruling. And while, as petitioner observes (Pet. 18-19 & n.21), several courts of appeals indicated prior to this Court's decision in *Mead* that revenue rulings are not entitled to *Chevron* deference, the decision below is not to the contrary, because the court declined to decide that question. See note 5, *supra*; Pet. App. 7a.

3. Finally, the court of appeals correctly held that petitioner was not an "exporter" of fuel within the meaning of 26 U.S.C. 6416(c). Every court that has considered whether fuel in a vehicle is "exported" has

concluded that it is not. See *Valley Ice & Fuel Co.* v. *United States*, 30 F.3d 635, 639 (5th Cir. 1994) (holding that a marine fuel station on the border of the United States and Mexico selling fuel to customers who departed for Mexico was a retailer, not an exporter of such fuel); *Ammex* v. *United States*, 52 Fed. Cl. 303, 312 (2002) (holding that petitioner is not an exporter), aff'd on other grounds, 384 F.3d 1368 (Fed. Cir. 2004). As the court of appeals explained, that result necessarily follows from the statutory definition of "duty-free sales enterprise," which provides that a duty-free store sells goods for *others* to export, and thus does not itself act as an exporter within the meaning of the Internal Revenue Code. Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 367 F.3d 530. The decisions of the district court (Pet. App. 12a-32a, 33a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2004. A petition for rehearing was denied on September 17, 2004 (Pet. App. 37a). The petition for a writ of certiorari was filed on December 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a U.S. Customs Class 9 bonded warehouse, commonly known as a duty-free store, in Detroit, Michigan. Pet. App. 13a. Petitioner's warehouse is "sterile," which means that petitioner's

customers must cross the border into Canada upon exiting the warehouse due to the physical design and operation of the facility. *Ibid.* In short, petitioner's store is beyond the "point of no return" for individuals exiting the United States. *Ibid.*

During the first two quarters of 1999, petitioner sold gasoline and diesel fuel to individuals driving into Canada that it had purchased from local fuel the suppliers. Pet. App. 13a. Under 26 U.S.C. 4081, those suppliers were required to pay a federal excise tax on the fuel when it was removed from their fuel terminals for delivery to purchasers, such as petitioner. Pet. App. 13a-14a. Petitioner sought to purchase the fuel at a reduced price—that is, reduced by the amount of the tax—claiming that the fuel was an export exempted from the fuel excise tax, but the suppliers refused. *Id.* at 14a. Accordingly, petitioner paid its suppliers an amount that included the excise tax assessed against them.

Petitioner subsequently filed refund claims with the Internal Revenue Service (IRS), seeking to recoup the fuel excise taxes on the ground that the tax, as applied to the fuel that petitioner had purchased, was unconstitutional. Pet. App. 14a-15a. Petitioner had not filed federal excise tax returns reporting liability for the taxes in the periods at issue. C.A. App. 316-317. Moreover, petitioner had not paid the excise tax to the IRS, and the IRS had not assessed the excise tax against petitioner or otherwise attempted to collect the tax from it. *Ibid.* The IRS disallowed the claims. Pet. App. 15a.

2. Petitioner commenced this action in the district court for a refund of the fuel excise taxes it claimed to

have paid during the first six months of 1999.[1] Petitioner argued that it was entitled to a refund because, as an exporter, it was exempt from the fuel excise tax under the Export Clause of the Constitution, Art. I, § 9, Cl. 5, and also claimed that it could recover under 26 U.S.C. 6416(c) and 6421(c), both of which permit third parties to recoup excise taxes paid by others in special circumstances. Petitioner and the government cross-moved for summary judgment.

3. The district court granted the government's motion for summary judgment and denied petitioner's motion. Pet. App. 12a-36a. As is relevant here, the district court held that petitioner lacked standing to seek a refund under the Export Clause, because petitioner could "not establish an injury in fact caused by defendant." *Id.* at 24a. The court reasoned that the alleged injury was instead caused by the fuel suppliers, stating that petitioner's "suppliers included federal excise taxes as a line item in the invoice cost of the gasoline and diesel fuel purchased by [petitioner]," after "refus[ing] to sell the fuel without including the excise tax." *Id.* at 21a.

In addition, the court concluded that petitioner was not entitled to a refund under 26 U.S.C. 6421(c), because it did not sell gasoline "for export" within the meaning of that provision. Pet. App. 28a-30a. Section 6421(c) provides that, if gasoline is sold to any person for a purpose defined in 26 U.S.C. 4221(a)(2)-(5), including "for export" under Section 4221(a)(2), the person shall

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[1] Petitioner also commenced an action in the United States Court of Federal Claims that raised the same issue but involved tax years 1994 to 1998. A petition for a writ of certiorari in that case is pending before this Court. See *Ammex* v. *United States*, No. 04-860 (filed Dec. 23, 2004).

be paid (without interest) an amount equal to the tax. Pet. App. 25a, 28a. Petitioner's fuel was not, in the district court's view, sold "for export" within the meaning of the provisions, because the fuel was too integrated with the purchaser's automobile to constitute an exportable product. *Id.* at 28a-30a.

For support, the district court cited Revenue Ruling 69-150, 1969-1 C.B. 286. In that ruling, the IRS concluded that gasoline is not exported within the meaning of 26 U.S.C. 4221(a)(2) when sold as fuel for a vehicle that immediately departs the United States. The IRS reasoned that, once placed in the vehicle's tank, the fuel is incorporated into the vehicle and loses its identity as a separate, exportable commodity. For the same reason, individuals who drive vehicles into the United States do not "import" the fuel that is in their tanks. Citing that ruling, the district court concluded that the fuel at issue here is "so assimilated by the vehicle that it becomes one of its constituent parts" and cannot be "exported" within the meaning of 26 U.S.C. 4221(a)(2) and 6421(c). Pet. App. 28a.

The court also rejected petitioner's claim under Section 6416(c). Section 6416(c) allows an "exporter" to recover taxes "erroneously or illegally collected in respect of any article exported" if the person who paid the tax waives its claim to a refund. The court observed that the definition of "exporter" in 26 C.F.R. 48.0-2 is "the person named as shipper or consignor in the export bill of lading." Pet. App. 25a. Petitioner, by contrast, is a duty-free operator, defined as a person that sells duty-free merchandise "for exportation by, or on behalf of, individuals departing from the customs territory." 19 U.S.C. 1555(b)(8)(D). Thus, petitioner's *customers* may

qualify as exporters, but petitioner does not. Pet. App. 25a-26a.

4. a. The court of appeals affirmed. Pet. App. 1a-11a. The court held that petitioner lacked standing to bring a claim for refund under the Export Clause, because its alleged injury (higher fuel costs) was not "caused" by the government. *Id.* at 5a. The court acknowledged that "the Government did impose an excise tax on the fuel that [petitioner] purchased and later sold at its 'duty-free' facility," but "that tax was not assessed against [petitioner]." *Ibid.* "Instead, the tax was imposed on [petitioner's] suppliers who, in turn, added the amount of the tax to the wholesale price of the fuel [petitioner] purchased." *Id.* at 5a-6a. For that reason, "any alleged injury suffered by [petitioner] in the form of increased fuel costs was not occasioned by the Government," but by the "discretion of [petitioner's] suppliers to charge [petitioner] for the challenged tax amount." *Ibid.*

The court of appeals also concluded that petitioner did not sell fuel "for export" within the meaning of 26 U.S.C. 6421(c), citing Revenue Ruling 69-150. Pet. App. 7a-8a. The court declined to decide whether the revenue ruling was entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), concluding instead that the ruling was "obviously" entitled to at least "some level of deference" under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Pet. App. 7a-8a (citing *United States* v. *Mead Corp.*, 533 U.S. 218 (2001)). The court explained that "the IRS possesses 'relative expertness' in the application of the Code to particular facts, given the technical complexity of federal tax law," and that the IRS had "left Revenue Ruling 69-150 virtually unchanged for over three de-

cades," which demonstrated "the soundness of the decision there made." *Id.* at 8a. Petitioner also had "failed to identify any infirmity in this longstanding and sensible interpretation of the statutory scheme." *Ibid.*

Finally, the court of appeals held that petitioner was not an "exporter" within the meaning of 26 U.S.C. 6416(c). Pet. App. 8a-9a. Rejecting petitioner's argument that it was an exporter because it was a duty-free enterprise, the court noted that the definition of "duty-free enterprise"—one who delivers duty-free merchandise for exportation *by others*—demonstrates that petitioner cannot, itself, be an exporter. *Id.* at 9a.

b. Judge Merritt concurred. He expressed "serious doubts about the conclusion that [petitioner] does not have standing to bring this claim under the Export Clause of the Constitution." Pet. App. 10a. Judge Merritt concluded, however, that petitioner was not an "exporter" within the meaning of the Export Clause or the Internal Revenue Code, stating that, "[w]hen [petitioner] pours gas into the tank of a car, mixing it with what is there, it is no more of an exporter than the gas station which does the same thing a few blocks before reaching the bridge." *Id.* at 10a-11a.

ARGUMENT

Petitioner contends that the court of appeals' decision has created "conflicts and confusion" with respect to the requirements for Article III standing and administrative deference, and that the decision is inconsistent with this Court's precedents. To the contrary, however, the court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. a. The court of appeals correctly concluded that petitioner lacks standing to pursue its refund claim under the Export Clause. It is well established that a plaintiff has standing to maintain a tax-refund action to recover only overpayment of its own taxes or overpayment of a third party's taxes that the plaintiff was coerced into paying. See *United States* v. *Williams*, 514 U.S. 527 (1995). Where the plaintiff is a purchaser of goods seeking to recover a tax paid by the supplier that increases the costs of those goods, the courts have uniformly held that the plaintiff lacks standing to recover the tax, unless some special statutory provision authorizes recovery or requires the supplier to shift the tax to its customers. See, *e.g.*, *Ontario Power Generation, Inc.* v. *United States*, 369 F.3d 1298, 1303 (Fed. Cir. 2004) (dismissing coal purchaser's claim that the coal excise tax violated the Export Clause because the purchaser's injury was not caused by the government, but rather by the coal suppliers who "made an independent decision" to include the amount of the tax in the price of coal sold); *Emerald Int'l Corp.* v. *United States*, 54 Fed. Cl. 674, 681 (2002) (same); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *United States*, 845 F.2d 139, 142 (7th Cir. 1988) (holding that a purchaser lacked standing to sue for a refund of federal excise tax paid by another, even though the purchaser bore the economic burden of the tax); *JAT Oil & Supply, Inc.* v. *United States*, 80 A.F.T.R.2d (RIA) 97-6137, 97-6141 (E.D. Tenn. 1997) (same), aff'd, 166 F.3d 1214 (6th Cir. 1998) (Table).

Here, no federal statute required the fuel suppliers to charge petitioner for the fuel excise tax imposed upon them. As the court of appeals observed, petitioner's increased fuel cost was caused not by the government,

but by the suppliers exercising "discretion" "to charge [petitioner] for the challenged tax amount." Pet. App. 6a. Because any alleged injury "was not occasioned by the Government," petitioner lacks standing to seek a refund from it. *Ibid.*

To hold otherwise, and permit a plaintiff to assert a refund claim based simply on the economic consequences of a tax, would create an unworkable rule. Such an approach "would potentially require [a] court to consider the overlapping claims not only of the seller/manufacturer and its immediate purchaser, but also those of any subsequent purchasers *ad infinitum*, any one of which might plausibly argue that it bore at least a portion of the damages caused by the unconstitutional imposition of" the tax. *Emerald*, 54 Fed. Cl. at 683. Put simply, "[n]o right of recovery is given a person not initially paying the tax although he may have borne the burden. Manifestly, it would be impracticable to do so as a person paying the tax may have passed it on to hundreds of others and so many claims might be filed they could not be handled." *Savannah Sugar Ref. Corp.* v. *Commissioner*, 121 F.2d 426, 427 (5th Cir. 1941).

Petitioner attempts (Pet. 5, 8-9) to sidestep established standing principles in tax-refund actions by recasting the court of appeals' decision. Petitioner characterizes the court as holding that only direct injuries are cognizable under Article III and asserts that the decision below therefore conflicts with other court of appeals' decisions holding that "an 'indirect' injury can confer constitutional standing." Pet. 9. But as is clear from the text of its decision, the court of appeals did not conclude that indirect injuries are never cognizable; it assumed that petitioner suffered an

injury[2] and held that "any alleged injury" was not sufficient under Article III in the circumstance of this case because it "was not occasioned by the Government." Pet. App. 6a.

b. When the decision below is properly understood, it is clear that petitioner is wrong to argue (Pet. 12-13) that the decision conflicts with *Maryland* v. *Louisiana*, 451 U.S. 725 (1981). In that case, this Court held that Maryland, a consumer of natural gas, had standing to challenge Louisiana's natural gas tax, even though the tax was paid by fuel suppliers, because the suppliers were statutorily required to charge consumers for the tax. *Id*. at 736. Thus, the plaintiff not only bore the economic burden of the tax but bore the tax as "a direct result" of the statutory design. *Id*. at 739.

In this case, by contrast, federal law does not direct fuel suppliers to pass the cost of the fuel excise tax to purchasers. To the contrary, the Internal Revenue Code contemplates that suppliers can absorb the cost of the excise tax instead of passing it on to purchasers. See 26 U.S.C. 6416(a); *Emerald*, 54 Fed. Cl. at 681 & n.13 (characterizing Section 6416(a) as prohibiting refunds of excise taxes unless the taxpayer establishes that it "has not included the tax in the price of the article with respect to which it was imposed" or "has repaid the amount of the tax to the ultimate purchaser").

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[2] Whether petitioner suffered any injury is an open question; neither the court of appeals nor the district court found that petitioner absorbed the economic burden of the tax, and in the related litigation before the Court of Federal Claims, the court found that petitioner had, in fact, passed the tax burden to its customers. *Ammex* v. *United States*, 56 Fed. Cl. 1, 14 (2003), aff'd on other grounds, 384 F.3d 1368 (Fed. Cir. 2004).

In all events, *Maryland* v. *Louisiana* fails to aid petitioner, because it concerned a State's right to enjoin the operation of another State's law, not a claim for a tax refund, which can be maintained only to recover taxes a party has itself overpaid. See pp. 7-8, *supra*. Indeed, the Court acknowledged the standing problem here, when it suggested that individual consumers who did not possess the special attributes of the State and were "not directly responsible to Louisiana for payment of the taxes, * * * [would be] foreclosed from suing for a refund in Louisiana's courts." 451 U.S. at 739.

This Court's other decisions on which petitioner relies (Pet. 13-14) are similarly inapposite. In *Clinton* v. *City of New York*, 524 U.S. 417, 434 (1998), for example, the Court found that a cooperative seeking to buy a food processing facility had standing to challenge the line-item veto of a tax provision that would have provided the seller of the facility tax relief on the sale, reasoning that cooperatives "were the intended beneficiaries" of the provision. And, in *Boston Stock Exchange* v. *State Taxation Commission*, 429 U.S. 318, 320 n.3 (1977), the Court held that an out-of-state business had standing to challenge a statute specifically designed to injure out-of-state businesses. Unlike *Clinton* and *Boston Stock Exchange*, this case does not involve a tax provision that has the direct result and purpose of injuring or benefitting petitioner. Moreover, unlike the plaintiffs in those actions, who sought only *declaratory* relief, petitioner seeks a *refund* of taxes, which requires it to demonstrate that it paid the taxes over to the government or is otherwise permitted by statute to recover them. See pp. 7-8, *supra*. Accordingly, both the general nature of the tax and the particular nature of peti-

tioner's claim, a refund action, distinguish this case from the indirect standing cases considered by this Court.

c. The court of appeals' decision similarly does not conflict with the standing decisions of other courts of appeals. Contrary to petitioners' claim (Pet. 9-10), the Tenth Circuit in *Sac & Fox Nation* v. *Pierce*, 213 F.3d 566 (2000), cert. denied, 531 U.S. 1144 (2001), did not consider a Tribe's standing to seek a refund of taxes paid by third parties. See pp. 7-8, *supra*. Rather, the court held only that a Tribe had standing to seek an injunction preventing the operation of a state tax imposed on third parties that burdened the Tribe. 213 F.3d at 573-575. The Seventh Circuit, which has considered a Tribe's standing to sue for refunds of third-party taxes, has concluded consistent with the decision below (see pp. 7-8, *supra*) that Tribes have no such standing, because "only the person legally liable for paying a given federal tax may bring a refund suit." See *Lac Courte Oreilles Band of Lake Superior Chippewa Indians* v. *United States*, 845 F.2d 139, 142 (1988). In any event, *Sac & Fox Nation* involves the unique application of Indian law, and as the Tenth Circuit observed, "[i]n resolving challenges to state taxation affecting tribal businesses on Indian lands, the Supreme Court has addressed the legal incidence of a tax as a question intertwined with the merits of the case." 213 F.3d at 574.

The Eighth Circuit's decision in *Ben Oehrleins & Sons & Daughter, Inc.* v. *Hennepin County*, 115 F.3d 1372, cert. denied, 522 U.S. 1029 and 1036 (1997), is also consistent with the result below. In that case, the court held that the plaintiffs lacked standing to challenge an ordinance regulating the conduct of others, reasoning that the mere economic burden caused by the ordinance

did not confer standing on the plaintiffs. *Id.* at 1381. Although the Eighth Circuit concluded that the plaintiffs failed the prudential standing requirements and the court below concluded that petitioner lacked Article III standing, the result reached by the two courts is the same—plaintiffs have no standing to recover the consequential economic damages they suffer as a result of laws regulating others.[3]

d. Petitioner errs in contending (Pet. 11 n.13, 12) that denying it standing would "shield" the tax at issue from constitutional scrutiny. If the tax were subject to a legitimate Export Clause challenge, the fuel suppliers would be capable of asserting the claim. And, contrary to petitioner's contention (Pet. 11-12), the fact that the suppliers have the ability to attempt to pass their tax burden to third parties does not destroy their standing to challenge a tax they are legally obligated to pay or undercut their incentive to commence suit. See *Bacchus*

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[3] The remaining decisions petitioner cites (Pet. 11 n.14) similarly do not conflict with the decision below. In *G&G Fire Sprinklers, Inc.* v. *Bradshaw*, 156 F.3d 893, 900 (1998), vacated on other grounds, 526 U.S. 1061 (1999), the Ninth Circuit concluded that a plaintiff-subcontractor had standing where the challenged state action "targeted" the plaintiff, and "the prime contractors' only role in the dispute is that of a conduit, not some third party whose independent choices caused [plaintiff's] injury." In contrast, here, the disputed tax did not target petitioner, and as the court of appeals found, petitioner's injury was caused by the independent choices of the fuel suppliers. The remaining cases petitioner cites concern entirely distinguishable standing questions. See *Autolog Corp.* v. *Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984) (concluding that "length" of "chain of causation" is not determinative of standing, and not deciding whether a break in the chain of causation could determine standing); *Adams* v. *Watson*, 10 F.3d 915, 922 (1st Cir. 1993) (considering inapposite issue of "competitor standing"); *United States* v. *Colorado*, 666 F. Supp. 1479, 1480 (D. Colo. 1987) (involving government's challenge to tax that, in its view, was "imposed upon it").

Imports, Ltd. v. *Dias*, 468 U.S. 263, 267 (1984) (holding that a taxpayer had standing to challenge a tax even though the taxpayer had passed the cost of the tax to its customers because the taxpayer was "liable for the tax" "whether or not their customers pay their bills"); see also *Ontario Power*, 369 F.3d at 1300 (noting that coal suppliers who allegedly have passed on the cost of a tax have challenged that tax under the Export Clause). Indeed, petitioner continues to challenge the tax even though it passed the costs associated with the excise tax to its customers. See *Ammex*, 56 Fed. Cl. at 14.[4]

2. a. The court of appeals did not misapply this Court's decisions in *Skidmore* and *Mead* in concluding that Revenue Ruling 69-150 is entitled to at least "some deference" as "a long-standing and highly persuasive precedent" that is "sensible" and "logical." Pet. App. 6a-8a. In *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227, 234 (2001), this Court held that informal agency rulings are entitled to at least "some level" of judicial deference, depending on "the degree of the agency's care [in formulating its position], its consistency, formality, and relative expertness, and * * * the persuasive-

[4] In all events, the result in this case is correct because petitioner's Export Clause claim lacks merit. As explained below, see pp. 16-17, *infra*, the fuel that petitioner purchased was not exported, because it lost its identity as an independent exportable commodity once it was incorporated into a motor vehicle. In addition, the Export Clause does not prohibit the government from taxing goods *before* they enter the stream of exportation. *United States* v. *IBM Corp.*, 517 U.S. 843, 848-850 (1996) (noting that a tax may be "imposed on goods intended for export" as long as they are not yet in the "course of exportation" at the time of taxation). Because, here, the incidence of taxation was on the removal of the fuel from the suppliers' terminals, not the subsequent sales by petitioner to its customers, the fuel excise tax was imposed prior to the fuel's entering the exportation stream.

ness of the agency's position." *Mead*, 533 U.S. at 228, 234 (footnotes omitted).[5]

Consistent with *Mead*, the court of appeals concluded that Revenue Ruling 69-150 is entitled to "at least some level of deference," because revenue rulings are reviewed by a "central board or office" within the IRS that "accords a great degree . . . of care to their issuance" and concern issues within the technical expertise of the

[5] The position of the United States is that IRS revenue rulings are generally entitled to *Chevron* deference. The IRS promulgates revenue rulings pursuant to its statutory authority "to prescribe all needful rules and regulations for the enforcement of" the Code. 26 U.S.C. 7805(a); Treas. Order 111-2, 1981-1 C.B. 698, 699. Revenue rulings are formal interpretive rulings involving "substantive tax law." 26 C.F.R. 601.601(d)(2)(v)(a). They are issued by the IRS National Office and published in the Internal Revenue Bulletin as the agency's "official" position to guide taxpayers and IRS officials alike. 26 C.F.R. 601.601(d)(2)(i)(a). Like regulations, revenue rulings have legal force and effect in that they constitute "precedents to be used in the disposition of other cases" that "may be cited and relied upon for that purpose." 26 C.F.R. 601.601(d)(2)(v)(d). And a taxpayer's disregard of applicable revenue rulings can result in the imposition of penalties. 26 U.S.C. 6662; 26 C.F.R. 1.6662-3(b)(2). Although revenue rulings, unlike regulations, are not subject to notice and comment, this Court has made clear that the absence of notice-and-comment rulemaking and formal adjudication does not preclude *Chevron* deference, so long as it appears that Congress intended to grant the agency the power to make rules with the "force of law" and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-227, 230-231; see *Barnhart* v. *Walton*, 535 U.S. 212, 221-222 (2002) (according *Chevron* deference to a "longstanding" agency interpretation reached through "means less formal than 'notice and comment' rulemaking"). Thus, revenue rulings have the "force of law" within the meaning of *Mead*, and *Chevron* deference is required. *Mead*, 533 U.S. at 227. Whether revenue rulings are entitled to *Chevron* deference, however, is not presented in this case, because the court of appeals concluded that deference was due even under the less deferential *Skidmore* standard.

IRS. Pet. App. 8a (internal quotation marks and citation omitted). In addition, Revenue Ruling 69-150 had particular persuasive value, in the court's view, because it has been "virtually unchanged for over three decades" and provides a "sensible interpretation of the statutory scheme." *Ibid*.

Petitioner's claim that this Court "has not decided whether revenue rulings are owed *any* deference," Pet. 18 (emphasis added), is incorrect. Before *Chevron*, this Court consistently held that the IRS's rulings were entitled to deference, particularly where they were consistently applied over a lengthy period of time. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 483-484 nn.16-19 (1979); *United States* v. *Correll*, 389 U.S. 299, 302 n.10, 306-307 (1967). Since *Chevron*, this Court has found it unnecessary to consider the degree of deference due to IRS revenue rulings in general, but has observed that revenue rulings "attract[] substantial judicial deference" at least where they reflect the IRS's longstanding interpretation of its own regulations. *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 220 (2001); see *Cottage Sav. Ass'n* v. *Commissioner*, 499 U.S. 554, 561 (1991).

Petitioner also errs in suggesting (Pet. 14-16) that the court of appeals relied on Revenue Ruling 69-150 to determine the meaning of the Export Clause. As the face of its opinion makes clear, the court of appeals relied on the revenue ruling solely to aid its interpretation of terms in a statutory provision, Section 6421(c). Pet. App. 6a-7a (introducing discussion of Revenue Ruling 69-150 by observing that "[b]ecause the excise tax provisions of the Code do not define 'export,' extrinsic aids for construction may be relied on in interpreting the meaning of export for purposes of § 6421(c) and

§ 4221(a)2)"). With respect to the Export Clause, the court held only that petitioner lacked standing to assert a refund action. *Id.* at 6a ("Without an injury in fact, caused by the Government, we hold that [petitioner] does not have standing to pursue its claim based on the Export Clause.").

Petitioner's disagreement (Pet. 16-17) with the court of appeals' evaluation of the persuasive value of Revenue Ruling 69-150, moreover, does not warrant review by this Court. That issue concerns merely the fact-bound application of well-settled legal principles to this case. Contrary to petitioner's assertion (Pet. 15, 17), the revenue ruling is not unpersuasive simply because it does not specifically address duty-free stores or the Export Clause. Neither has any bearing on the ruling's rationale, which depends on the relationship between a vehicle and the fuel in its tank, or on the ruling's purpose, which is to clarify a statutory provision, not a constitutional one.

b. The decision below also does not conflict with other decisions regarding the deference attributable to Revenue Ruling 69-150. Indeed, no other court of appeals appears to have addressed the persuasive value of the revenue ruling. And while, as petitioner observes (Pet. 18-19 & n.21), several courts of appeals indicated prior to this Court's decision in *Mead* that revenue rulings are not entitled to *Chevron* deference, the decision below is not to the contrary, because the court declined to decide that question. See note 5, *supra*; Pet. App. 7a.

3. Finally, the court of appeals correctly held that petitioner was not an "exporter" of fuel within the meaning of 26 U.S.C. 6416(c). Every court that has considered whether fuel in a vehicle is "exported" has

concluded that it is not. See *Valley Ice & Fuel Co.* v. *United States*, 30 F.3d 635, 639 (5th Cir. 1994) (holding that a marine fuel station on the border of the United States and Mexico selling fuel to customers who departed for Mexico was a retailer, not an exporter of such fuel); *Ammex* v. *United States*, 52 Fed. Cl. 303, 312 (2002) (holding that petitioner is not an exporter), aff'd on other grounds, 384 F.3d 1368 (Fed. Cir. 2004). As the court of appeals explained, that result necessarily follows from the statutory definition of "duty-free sales enterprise," which provides that a duty-free store sells goods for *others* to export, and thus does not itself act as an exporter within the meaning of the Internal Revenue Code. Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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