No. 21-519

In the Supreme Court of the United States

GROWTH ENERGY, PETITIONER

v.

AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a provision of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, that eases seasonal volatility limitations for "fuel blends containing gasoline and 10 percent * * * ethanol," 42 U.S.C. 7545(h)(4), applies to fuel blends that contain gasoline and 15 percent ethanol.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (D.C. Circuit):

American Fuel & Petrochemical Manufacturers v. *EPA*, No. 19-1124 (July 2, 2021)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 3 F.4th 373.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2021. Petitions for rehearing were denied on September 9, 2021 (Pet. App. 21a-24a). The petition for a writ of certiorari was filed on October 4, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In October 2018, the President directed the Environmental Protection Agency (EPA) to initiate a rulemaking to consider easing summertime regulatory standards for gasoline containing up to 15% ethanol (E15).

Pet. App. 1a-2a. In June 2019, EPA issued a rule adopting such changes. *Id.* at 2a. Several challengers filed petitions for review. *Id.* at 7a. Other groups, including petitioner, intervened to defend the rule. *Id.* at 11a. The court of appeals vacated the challenged portion of the rule. *Id.* at 2a.

1. The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, establishes various requirements and limitations pertaining to the content of motor fuel. 42 U.S.C. 7545; see, *e.g.*, *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2175 (2021). One limitation is that no fuel or fuel additive may be introduced into commerce unless it is either "substantially similar to" a fuel or fuel additive certified for use in vehicles or engines after model year 1975, 42 U.S.C. 7545(f)(1), or is the subject of a waiver granted by EPA, 42 U.S.C. 7545(f)(4). In 1979, EPA granted a waiver for gasoline containing up to 10% ethanol (E10). Pet. App. 5a. In 2010 and 2011, EPA granted a waiver for the use of E15, subject to certain conditions. *Ibid.*

The CAA also imposes limits on fuel volatility, which at high levels can generate large amounts of ozone, particularly during the summer. 42 U.S.C. 7545(h); see Pet. App. 3a-4a. Of particular relevance here, the CAA directs EPA to issue regulations making it unlawful during the summer season to sell or supply gasoline with a volatility—measured by Reid Vapor Pressure (RVP)—above 9.0 pounds per square inch (psi). 42 U.S.C. 7545(h)(1); see 40 C.F.R. 1090.80 (defining the summer season). The CAA creates an exception to that limit for "fuel blends containing gasoline and 10 percent * * * ethanol." 42 U.S.C. 7545(h)(4). For fuels within that exception, the volatility limit "shall be one [psi] greater than the" otherwise-applicable limit established

by EPA. *Ibid.* Thus, while summertime volatility for most fuels is limited to 9.0 psi, "fuel blends containing gasoline and 10 percent * * * ethanol" may have a volatility of up to 10.0 psi during that portion of the year. *Ibid.*; see Pet. App. 4a-5a.[1]

2. For nearly 30 years, EPA interpreted the phrase "fuel blends containing gasoline and 10 percent * * * ethanol," 42 U.S.C. 7545(h)(4), to apply to fuels containing gasoline and 9-10% ethanol—*i.e.*, E10, with a small margin for some measurement uncertainty, see 56 Fed. Reg. 64,704, 64,710 (Dec. 12, 1991); Pet. App. 5a-6a. Under that interpretation, E15 did not qualify for the 1-psi summertime allowance in Section 7545(h)(4) and was accordingly subject to the default summertime volatility limit of 9.0 psi. Pet. App. 5a-6a. In addition, that 9.0 psi summertime volatility limit was a condition of the waivers that EPA granted allowing the use of E15 in 2010 and 2011. See *ibid.*; p. 2, *supra*. Because it is considerably more costly to produce ethanol blends with volatility not exceeding 9.0 psi, E15 generally was not sold during the summer months. Pet. App. 6a.

In October 2018, the President directed EPA to initiate a rulemaking to consider modifying the volatility limits for E15 to make it easier for E15 to be lawfully sold throughout the year. Pet. App. 6a. In June 2019, EPA promulgated a rule that adopted such modifi-

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[1] The CAA establishes lower volatility limits in areas deemed to be in nonattainment with the National Ambient Air Quality Standards. See 42 U.S.C. 7545(h)(1)-(2); Pet. App. 4a-5a. The CAA also establishes different volatility limits in areas that use reformulated gasoline. See 42 U.S.C. 7545(k). As discussed further below, there is no practical barrier to the summertime use of E10 or E15 in reformulated-gasoline areas because the gasoline blendstock used in those areas can produce E10 and E15 blends that fall below the applicable volatility limit without any need for an extra allowance.

cations. 84 Fed. Reg. 26,980, 26,981-26,982 (June 10, 2019) (E15 rule). EPA concluded that the statutory reference to "fuel blends containing gasoline and 10 percent * * * ethanol," 42 U.S.C. 7545(h)(4), is ambiguous and can reasonably be interpreted to encompass fuel blends that contain gasoline and *at least* 10% ethanol, see 84 Fed. Reg. at 26,992; Pet. App. 6a-7a. EPA separately concluded that, when used in model year 2001 and newer light-duty vehicles, E15 is "substantially similar" to E10 and accordingly could be introduced into commerce pursuant to 42 U.S.C. 7545(f)(1), thereby removing the obstacle created by the conditions in the waivers granted under 42 U.S.C. 7545(f)(4). Those regulatory changes together allowed E15 to be sold at a volatility of 10.0 psi during the summer. See Pet. App. 7a.

3. Three groups of challengers filed petitions for review of the E15 rule in the D.C. Circuit. Pet. App. 7a; see 42 U.S.C. 7607(b) (vesting the D.C. Circuit with exclusive jurisdiction over petitions for review of certain EPA actions under Section 7545). A group of biofuel groups including Growth Energy (petitioner in this Court) intervened to defend the rule. Pet. App. 11a. The court of appeals concluded that at least one challenger —a trade association representing manufacturers of petroleum fuels that compete with E15—had standing to challenge the rule. *Id.* at 8a-10a.

On the merits, the court of appeals concluded that the E15 rule exceeded EPA's authority under Section 7545(h)(4). Pet. App. 10a-18a. The court determined that the phrase "containing gasoline and 10 percent * * * ethanol," 42 U.S.C. 7545(h)(4), unambiguously "refers to E10"—*i.e.*, a fuel blend containing gasoline and 10% ethanol (allowing for a compliance margin), and does not encompass a blend (like E15) that contains

gasoline and *more than* 10% ethanol, Pet. App. 12a. The court based its conclusion on "dictionary definitions" and "ordinary meaning," both of which the court understood as limiting the statutory phrase to the "specific quantity" of 10% ethanol. *Id.* at 12a-13a. The court also observed that other CAA provisions use modifiers like "*at least*" to designate a minimum quantity or percentage, *id.* at 13a (quoting 42 U.S.C. 7554(c)(2)(A)), and it inferred that Congress likely would have used similar language if it had intended that Section 7545(h)(4) would encompass blends like E15, see *ibid.* The court found further support for its interpretation in the statutory history, which the court read to suggest that Section 7545(h) had codified EPA's prior regulatory framework, which had limited summertime volatility to 9 psi for most fuels while allowing fuels containing 9-10% ethanol to have a volatility of 10 psi. *Id.* at 14a-15a. The court also observed that EPA had read Section 7545(h) in that way for decades. *Id.* at 15a-16a.

The court of appeals rejected the counterarguments advanced by EPA and the intervenors. Pet. App. 16a-18a. The court agreed that in some contexts the term "containing" can mean "containing at least" a specified amount, but it viewed the context of Section 7545(h)(4) as unambiguously foreclosing that reading. *Id.* at 16a (citations omitted). The court found no inconsistency between its interpretation of "containing … 10 percent" and the unchallenged understanding that Section 7545(h)(4) encompasses blends containing between 9 and 10% ethanol. *Ibid.* In the court's view, allowing that 1% buffer was simply "recognizing some compliance margin." *Ibid.* The court also rejected EPA's and the intervenors' reliance on the legislative history, which the court found ambiguous. *Id.* at 17a-18a. The

court recognized that allowing broader use of E15 could be viewed as consistent with an important statutory purpose, but it concluded that Section 7545(h)(4) "reflects a compromise, not simply a desire to maximize ethanol production at all costs." *Id.* at 18a.

Because the court of appeals found that the challenged portion of the rule was inconsistent with Section 7545(h)(4), it did not address the challengers' separate argument that the rule exceeded the agency's authority under Section 7545(f)(1). See Pet. App. 19a.

ARGUMENT

The central question in this case is whether the CAA's reference to fuel blends "containing gasoline and 10 percent * * * ethanol," 42 U.S.C. 7545(h)(4), can reasonably be interpreted to encompass fuel blends that contain more than 10% ethanol. Although EPA offered sound arguments in defense of its position below, the court of appeals examined Section 7545(h)(4)'s text and history and reached a different conclusion. The D.C. Circuit's holding does not conflict with any decision of this Court or any other court, and it has limited legal and practical consequences. As a legal matter, the effect of the decision below is to restore the interpretation of Section 7545(h)(4) that EPA maintained for most of the past three decades. And as a practical matter, a number of economic, logistical, and administrative barriers unrelated to the rule at issue here independently impede the widespread use of E15. This Court's review is not warranted.

1. As petitioner appears to accept (Pet. 23), the D.C. Circuit's holding does not conflict with any decision of this Court or another court of appeals. Petitioner contends (Pet. 4, 13) that the court below departed from this Court's general statutory-interpretation principles.

Petitioner's principal argument (Pet. 13-20) is that, read in its statutory context, Section 7545(h)(4)'s reference to "fuel blends containing gasoline and 10 percent * * * ethanol," 42 U.S.C. 7545(h)(4), *unambiguously* encompasses all blends that contain *at least* 10% ethanol. But the unanimous D.C. Circuit panel applied well-settled principles of statutory interpretation to reach its contrary conclusion. Although EPA argued that the statute is ambiguous and permits the agency's reasonable construction, EPA did not contend —and no valid argument suggests—that the statute *requires* petitioner's interpretation. And even if petitioner's argument that the statute is unambiguous had greater force, it would still amount to a request for error correction with respect to the interpretation of a single CAA provision. Petitioner accordingly fails to establish a sound basis for this Court's review.

a. The court of appeals correctly began its analysis with the statutory text. Pet. App. 11a-13a. The court determined that both ordinary meaning and dictionary definitions indicate that the key statutory phrase—"fuel blends containing gasoline and 10 percent * * * ethanol," 42 U.S.C. 7545(h)(4)—refers only to E10. Pet. App. 12a. The court compared the statutory language to a wine label stating that a bottle "'contains 10% alcohol by volume,'" which the court stated would commonly be understood as "a literal statement of the actual amount of alcohol in a serving." *Ibid.* The court also cited dictionaries defining "contain" to mean "to have within" or to "hold" a "specific substance or quantity." *Id.* at 12a-13a (citations omitted). In the court's view, those definitions indicated that the statutory language "is best read to concern gasoline" with "a specific quantity (10%)" of ethanol. *Id.* at 13a.

Some reasonable arguments weigh against the court of appeals' conclusion. As the court recognized later in its opinion, a speaker of ordinary English might well use the formulation "containing [a particular percentage]" to mean that an item contains *at least* the specified percentage. See Pet. App. 16a (acknowledging that a statement that a "patient's blood must 'contain 10% white blood cells'" to repel infections would be understood to mean that the blood must contain "*at least* 10% white blood cells") (quoting Gov't C.A. Br. 40). And EPA's reading of the statute is not clearly inconsistent with the dictionary definitions the court credited, because E15 does "ha[ve] within it" or "hold[]" 10% ethanol, even though it contains additional ethanol as well. *Id.* at 13a. Just as Section 7545(h)(4) does not include the words "at least," it likewise does not refer explicitly to fuel blends containing "only" or "precisely" 10% ethanol. EPA thus reasonably understood ordinary meaning and dictionary definitions to show ambiguity about the scope of the challenged statutory phrase.

The court of appeals' contrary conclusion, however, did not rest on any dispute about appropriate methods of statutory interpretation; it turned only on the application of those methods to the particular statutory language (and overall statutory scheme) at issue here. And, contrary to petitioners' principal argument in this Court, applying those accepted methods does not support the conclusion that Section 7545(h)(4) *unambiguously* encompasses fuel blends that contain more than 10% ethanol. Neither 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. Pet. App. 16a (citation omitted);

cf. *HollyFrontier Cheyenne Ref., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2178-2179 (2021) (explaining that the word "extension" in another provision of Section 7545 has multiple possible meanings).

b. The court of appeals, moreover, did not rely on its reading of the statutory text alone. The court appropriately proceeded to assess the statutory context, history, and purpose. See Pet. App. 13a-18a. The court noted that other fuel-regulation provisions, other legislation addressing ethanol fuel blends, and proposed drafts of Section 7545(h)(4) all contained language that would have clearly incorporated the "at least 10 percent" meaning that the E15 rule ascribed to the disputed statutory language. *Id.* at 16a. The court then applied the recognized principle that the "absence of such a term" in Section 7545(h)(4) "may properly be understood as purposeful." *Id.* at 14a (citing *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 452 (2002)).

Again, while the court of appeals identified well-accepted legal principles, its application of those principles to this case is open to debate. Another provision of Section 7545 suggests that, in at least one statutory context, "contains" and "contains at least" can have the same meaning. 42 U.S.C. 7545(*o*)(2)(A)(i). Congress, moreover, rejected a proposed bill that would have expressly limited Section 7545(h)(4) to fuel blends containing "*not more than*" 10% ethanol. Pet. App. 17a (citation omitted). And the court of appeals acknowledged that construing Section 7545(h)(4) to permit broader summertime use of E15 would be consistent with a statutory purpose to permit greater ethanol use. *Id.* at 18a. But while those responses call into question whether the statute compels the court of appeals' interpretation,

they do not support petitioner's argument that the statute unambiguously supports its contrary construction.

c. The court of appeals also relied on EPA's longstanding view that Section 7545(h)(4) applies only to E10, and not to blends that contain more than 10% ethanol. See Pet. App. 15a-16a. It is often appropriate for a court to take into account an agency's prior reading of the statute that the court is interpreting. See, *e.g.*, *Loving* v. *IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) (Kavanaugh, J.) (finding "it rather telling that the [agency] had never before maintained that it possessed this authority"). At the same time, an agency is "surely free to change (or refine) its interpretation of a statute it administers," so long as the revised reading is reasonable and adequately explained. *Ibid.* (citing *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

Ultimately, the effect of the court of appeals' holding is to restore the interpretation of Section 7545(h)(4) that EPA maintained for nearly three decades and that the agency has continued to view as a reasonable construction. See Pet. App. 11a. While legitimate questions exist about the court's conclusion that its reading of the statute was the *only* permissible one, the court's holding was based on a thorough application of settled statutory-interpretation principles. Absent a conflict in authority regarding the proper interpretation of Section 7545(h)(4) itself, the court of appeals' analysis does not reflect any serious error in interpretive methodology that might warrant this Court's review.[2]

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[2] Petitioner observes (Pet. 5, 23-24) that the D.C. Circuit has exclusive jurisdiction over challenges to EPA rules like the E15 rule, see 42 U.S.C. 7607(b), and that a circuit conflict regarding the rule is accordingly not possible. This Court, however, does not grant

2. The question presented here has limited practical significance.

a. It is undisputed that E15 may lawfully be sold year round throughout the country; that E15 is sold in the non-summer months throughout the country; and that E15 is sold year round in areas (which account for more than 30% of the domestic gasoline supply) that use reformulated gasoline. 84 Fed. Reg. at 27,010; p. 3 n.1, *supra*. The narrow issue in this case is whether E15 producers can benefit from relaxed summertime volatility controls that would make it more affordable to sell E15 in areas that use conventional gasoline and are subject to a default volatility limit of 9.0 psi. Although that question has economic significance to E15 producers, its overall importance is relatively modest.

Upholding the rule at issue here would not lead to widespread use of E15. In issuing the E15 rule, EPA explained that, because of independent economic, administrative, and logistical barriers, the rule would "not result in a significant expansion of E15 offered at retail stations." 84 Fed. Reg. at 27,009. The barriers that EPA identified include, *inter alia*, the costs of upgrading fuel dispensers to ensure compatibility with E15, which can be especially challenging for the many gas stations that are small businesses; the logistical and financial challenges associated with distributing E15 to areas outside the Midwest and to stations that do not blend ethanol on site; the need for fuel retailers to demonstrate that their underground storage tank systems are compatible with E15; and limited consumer acceptance of E15, particularly among drivers of vehicles

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certiorari simply because a single circuit has exclusive jurisdiction over a particular category of cases, and petitioner does not satisfy the Court's usual certiorari criteria for the reasons discussed.

manufactured before 2001 (which are not permitted to use E15) and of certain later-model vehicles whose owner's manuals warn against using E15. *Id.* at 27,009-27,010.

Experience under the E15 rule demonstrated that those concerns were well-founded, because no rapid expansion of E15 usage has occurred. Petitioner asserts (Pet. 22) that, according to its own recent analysis, the number of retail stations selling E15 increased from about 1300 to almost 2500 while the E15 rule was in force. Those figures are not as probative of the rule's effect as petitioner suggests,[3] but even taking them at face value, they indicate that E15 was available at less than 2% of all fuel-retail stations. See 84 Fed. Reg. at 26,986. The growth rate of stations offering E15 while the rule was in effect, moreover, is generally consistent with the growth rate before the rule was adopted and with EPA's modest projections. See *id.* at 27,010.

b. In and of itself, reversing the decision below would not allow E15 to be sold more easily during the

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[3] Petitioner's estimate of almost 2500 stations selling E15 includes stations that are not registered in EPA's E15 survey program. If that data set is used, the appropriate baseline for comparison is not 1300 stations (the number registered in EPA's E15 survey program in 2019) but about 1800 stations (the number of total stations selling E15 in 2019, including those not registered in EPA's program). See 84 Fed. Reg. at 26,986-26,987. Petitioner also ignores that the increase in stations selling E15 may be driven not only by the E15 rule, but also by funding made available through various government and private programs. See, *e.g.*, U.S. Dep't of Agriculture, *Biofuel Infrastructure Partnership*, https://www.fsa.usda.gov/programs-and-services/energy-programs/bip/index (discussing federal grant program); Growth Energy, *Expanding the Market for Ethanol at Home and Abroad*, https://growthenergy.org/choice-at-the-pump/expanding-the-market-for-ethanol-at-home-and-abroad (discusing private programs to boost E15 sales).

summer in the areas of the country affected by the E15 rule. As noted above (see pp. 3-4, *supra*), the E15 rule involved two separate regulatory changes: construing Section 7545(h)(4) to encompass fuel blends containing more than 10% ethanol, and concluding that E15 is "substantially similar" to E10 for purposes of 42 U.S.C. 7545(f)(1). Both of those regulatory changes were challenged, and the court of appeals addressed only the first. See Pet. App. 19a. If this Court granted certiorari and reversed the judgment below, the court of appeals would need to address the pending challenge to the second regulatory change, and the rule would remain in effect only if that challenge was rejected.

c. The E15 rule is not the only mechanism by which petitioner and other supporters of E15 could seek to promote increased use of that product. A separate CAA provision allows a State to request that EPA remove the additional 1-psi allowance for "all fuel blends containing gasoline and 10 percent * * * ethanol" for any area of the State in which the allowance "will increase emissions that contribute to air pollution." 42 U.S.C. 7545(h)(5)(A). If EPA granted such a request, E10 and E15 would be placed on equal footing in the affected areas, potentially prompting the development of fuel blends that can satisfy the 9.0 psi volatility limit using either E10 or E15—just as has occurred in areas of the country that use reformulated gasoline. See pp. 3 n.1, 11, *supra*.

In addition, Congress could amend Section 7545 to make clear that fuel blends that have a volatility of 10 psi and that contain more than 10% ethanol may be sold during the summer. After the court of appeals issued its decision in this case, bills were introduced in both the House and Senate that would amend Section 7545(h)(4)

and Section 7545(f)(4) to extend the 1-psi volatility allowance to E15. See Year-Round Fuel Choice Act of 2021, H.R. 4410, 117th Cong., 1st Sess. § 2 (2021); Consumer and Fuel Retailer Choice Act, S. 2339, 117th Cong., 1st Sess. § 2 (2021). Congress could respond to the policy arguments raised by petitioner by making those or similar legislative changes, thereby obviating any need for this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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