No. 21-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Clean Air Act prohibits the summertime sale of gasoline whose volatility, measured in Reid Vapor Pressure, exceeds 9 pounds per square inch. 42 U.S.C. § 7545(h)(1). Blending ethanol into gasoline increases the gasoline's volatility. So, to promote the use of ethanol in gasoline, the Act includes an "[e]thanol waiver" that increases the summertime volatility limit by 1 pound per square inch "[f]or fuel blends containing gasoline and 10 percent denatured anhydrous ethanol." 42 U.S.C. § 7545(h)(4).

The question presented is:

Whether the United States Environmental Protection Agency may interpret the ethanol-waiver provision in 42 U.S.C. § 7545(h)(4) to apply to fuel blends whose concentration of ethanol exceeds 10 percent.

PARTIES TO THE PROCEEDING

Petitioner, intervenor below, is Growth Energy.

Respondents, petitioners below, are American Fuel & Petrochemical Manufacturers; American Motorcyclist Association; American Petroleum Institute; Citizens Concerned About E15; Coalition of Fuel Marketers; the National Marine Manufacturers Association; and Small Retailers Coalition.

Respondent below was the United States Environmental Protection Agency.

Other petitioners below were Urban Air Initiative; the Farmers' Educational & Cooperative Union of America, d/b/a National Farmers Union; Farmers Union Enterprises, Inc.; Big River Resources, LLC; Glacial Lakes Energy, LLC; Clean Fuels Development Coalition; Fagen, Inc.; Jackson Express, Inc.; Jump Start Stores, Inc.; Little Sioux Corn Processors, LLC; and South Dakota Farmers Union.

Other intervenors below were the Renewable Fuels Association and the National Corn Growers Association.

CORPORATE DISCLOSURE STATEMENT

Growth Energy has no parent company and no publicly held company has a 10% or greater ownership interest in Growth Energy.

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Growth Energy respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

Ethanol is a renewable fuel that has long been blended with gasoline to make finished transportation fuel. When ethanol is blended with gasoline, it raises the volatility of the fuel relative to pure gasoline. Volatility, measured in pounds per square inch ("psi") of Reid Vapor Pressure ("RVP"), reflects how readily a

fuel evaporates. Evaporative emissions contribute to the formation of harmful smog.

Concerned about evaporative emissions, Congress amended the Clean Air Act in 1990 to prohibit the sale of gasoline whose RVP exceeds 9 psi during the summer, when there is greater potential for evaporative emissions to form smog. 42 U.S.C. § 7545(h)(1). Because blending ethanol with gasoline raises the RVP of the fuel above 9 psi, that volatility limit would have barred ethanol-blend gasoline from the market. That was intolerable because, Congress recognized, "ethanol blending … [has] beneficial environmental, economic, agricultural, energy security and foreign policy implications." S. Rep. No. 101-228, at 110 (1989). So, to ensure that "ethanol blending … continue[s] to be a viable alternative fuel," Congress also created an "[e]thanol waiver" that raised § 7545(h)(1)'s summertime RVP limit by 1 psi "[f]or fuel blends containing gasoline and 10 percent denatured anhydrous ethanol." 42 U.S.C. § 7545(h)(4).

At that time, the only ethanol blend that met EPA's other applicable regulatory requirements to be introduced into domestic commerce was E10, which is a blend of 90% gasoline and 10% ethanol. EPA promptly adopted a regulation that ensured that E10 would remain the only commercially available ethanol blend. The regulation stated that to qualify for the 1-psi waiver, a fuel blend's "concentration of the ethanol … must be at least 9% and no more than 10%." 56 Fed. Reg. 64,704, 64,710 (Dec. 12, 1991). Thus, even after EPA later approved E15—a blend of 85% gasoline and 15% ethanol—for introduction into commerce, that regulation effectively barred the sale of E15 during the summer. Today, more than 98% of all gasoline used in the United States is E10—even though E15, with 50%

more ethanol than E10, better achieves the economic, health, environmental, and security goals Congress sought to achieve by creating the ethanol waiver for volatility.

In 2019, EPA finally acknowledged that its interpretation of the ethanol waiver in 42 U.S.C. § 7545(h)(4) made no sense and undermined Congress's objectives. There is no reason to believe that § 7545(h)(4)—whose purpose was to promote the many important benefits of ethanol blending, which is titled "[e]thanol waiver," and which expressly applies to "blends" of gasoline and ethanol—was intended to be restricted to a single ethanol blend, E10, to the exclusion of blends that contain more ethanol. Higher-ethanol blends increase the benefits of ethanol that Congress sought, without increasing fuel volatility, since they would still be subject to the same RVP limit as E10 under the ethanol waiver. In fact, as Congress understood when it created the ethanol waiver, the RVP of E15 (and other higher-ethanol blends) is actually *lower* than the RVP of E10.

EPA, therefore, adopted the rule challenged here "to create parity in the way the RVP of both E10 and E15 fuels is treated under EPA regulations." CAJA002. Reinterpreting § 7545(h)(4) to "establish[] a lower limit, or floor, on the minimum ethanol content" required for the 1-psi waiver, EPA amended its volatility regulations to make the 1-psi waiver available to ethanol blends with "at least 10 percent ethanol," including E15. CAJA013.

The court of appeals set aside the rule because it held at *Chevron* step one that Congress intended the ethanol waiver to apply only to E10. In the court's view, the ordinary meaning of the word "contain"—standing alone, without a "modifier" such as "at

least"—is "contain exactly," and therefore the statutory phrase "containing … 10 percent … ethanol" means "containing *exactly* 10% ethanol."

The court's decision flouts 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," *King* v. *Burwell*, 576 U.S. 473, 492 (2015) (quotation marks omitted), and the related principle that courts "cannot interpret federal statutes to negate their own stated purposes," *id.* at 493 (quotation marks omitted), or to "lead[] to absurd … results," *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 138 (2004). The text, structure, and history of the ethanol waiver show that Congress intended it to apply to various ethanol blends to enable greater use of ethanol, and that in context, Congress intended "containing" to mean "having at least." EPA's interpretation serves that purpose while faithfully adhering to the volatility levels Congress deemed acceptable. The court of appeals' interpretation, in contrast, necessarily attributes to Congress a self-defeating and bizarre intent: facilitating increased ethanol use as long as the specified volatility limits are met, yet foreclosing blends that have more ethanol than E10 from the market even if their RVP is no higher than E10's or the specific limits.

It is imperative that this Court reject the court of appeals' interpretation—and do so in this case. The decision below effectively bars E15 from being sold during the summer. The direct harm from those lost sales is significant in its own right, but the potentially lost economic, health, environmental, and security benefits of increased ethanol use are much greater. E15 is poised to grow significantly and could begin supplanting E10 as the default transportation fuel in the United

States—and every gallon of E15 that replaces E10 increases the amount of ethanol used by 50%. But that can happen only if E15 can be sold year-round.

This petition presents the only opportunity for this Court to correct the court of appeals' error and avert its serious harmful consequences. Because the court of appeals held that the statute is unambiguous and because the D.C. Circuit has exclusive jurisdiction to review EPA regulations implementing § 7545(h)(4), there is no possibility of further percolation, a circuit split, or even a future decision from the D.C. Circuit that this Court could review.

The Court should grant the petition and reverse the decision below.

OPINIONS BELOW

The court of appeals' opinion (App.1a-19a) is published at 3 F.4th 373 (D.C. Cir. 2021).

JURISDICTION

The court of appeals issued its opinion on July 2, 2021, and denied a timely rehearing petition on September 9, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Relevant portions of 42 U.S.C. § 7545 are reprinted in the appendix to this petition. App.25a-69a.

STATEMENT

A. Factual Background

1. Ethanol is a renewable alcohol made primarily from corn. CAJA526. For more than forty years, etha-

nol has been used as a transportation fuel by being blended into gasoline. Ethanol blending benefits the economy, human health, the environment, and national security. *See infra* p.21; S. Rep. No. 101-228, at 110.

Different gasoline-ethanol blends are sold in the United States, including E10 (90% gasoline, 10% ethanol) and E15 (85% gasoline, 15% ethanol). Because E15 has 50% more ethanol than E10, E15 brings more of ethanol's many benefits than E10. CAJA031. Yet, today "more than 98% of U.S. gasoline" is E10. U.S. Dep't of Energy, Alternative Fuels Data Center, *Ethanol Fuel Basics*.[1]

The primary barrier to greater use of E15 is regulatory. As detailed below, EPA first allowed E15 to be sold in 2010, but EPA maintained volatility regulations effectively barring the sale of E15 during the four-and-a-half month summer season—the heaviest driving period of the year. The effect of that regulatory limitation was far greater than simply preventing E15 sales during the summer season; it hamstrung E15's ability to grow year-round and potentially to supplant E10 as the default fuel nationally. *See infra* pp.22-23.

2. "Measured in [psi] of [RVP], volatility reflects how readily gasoline evaporates." App.3a. The evaporative emissions of gasoline contribute to the formation of ground-level ozone smog, and "the greater the RVP, … the larger the amount of ozone formed." *Id.* (quotation marks omitted); CAJA008. The potential for evaporative emissions to form smog is higher in the summer. App.3a-4a; CAJA008.

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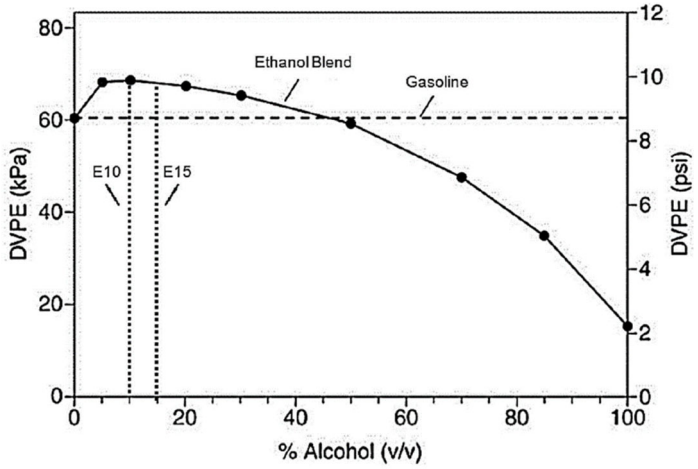
[1] https://afdc.energy.gov/fuels/ethanol_fuel_basics.html.

Ethanol affects the volatility of gasoline, but in a nonlinear way. During the summer, E10's RVP is about 10 psi, but that represents the peak RVP for ethanol-blends: adding ethanol to gasoline increases the fuel's RVP until the ethanol concentration reaches 10%—i.e., E10—at which point adding more ethanol *lowers* the fuel blend's RVP. CAJA254; CAJA051. The following graph depicts this phenomenon:



CAJA254 (vertical lines and accompanying labels added).

B. Statutory Framework and Prior EPA Volatility Regulations

The Clean Air Act establishes "a comprehensive scheme for regulating motor vehicle emission and fuel standards for the prevention and control of air pollution." App.2a (quotation marks omitted). As relevant here, 42 U.S.C. § 7545(f) declares that it "shall be unlawful for any [fuel] manufacturer … to first introduce into commerce, or to increase the concentration in use of, any fuel … for use by any person in motor vehicles … which is not substantially similar to any fuel … uti-

lized in the certification" of a "vehicle or engine." *Id.* § 7545(f)(1). But EPA may "waive" this restriction if it determines that a specified fuel or "concentration thereof[] will not cause or contribute to a failure of" any vehicle or engine to meet the emissions standards to which it was certified. *Id.* § 7545(f)(4).

E10 received a waiver under § 7545(f)(4) in 1978, allowing it to enter the transportation-fuel market in 1979. 44 Fed. Reg. 20,777 (Apr. 6, 1979); *see* App.5a. EPA later designated E10 a certification fuel for emissions testing of vehicles of model year 2017 and later. 79 Fed. Reg. 23,414, 23,419-23,420 (Apr. 28, 2014).

In 1989 and 1990, EPA promulgated regulations for gasoline volatility. 54 Fed. Reg. 11,868 (Mar. 22, 1989); 55 Fed. Reg. 23,658 (June 11, 1990). The regulations generally limited gasoline's RVP to 9 psi during "regulatory control periods," which ran from May 1 or June 1 (depending on the type of facility) to September 15. 40 C.F.R. § 80.27(a) (1990). Because the RVP of ethanol-blend gasoline is generally between 9 psi and 10 psi in the summer season, EPA's volatility regulation would have barred ethanol-blend gasoline from the market during the summer season. To avoid that, EPA included in its regulations "[s]pecial provisions for alcohol blends," which permitted such fuels to be used during the summer season if their RVP did "not exceed the [otherwise] applicable standard … by more than one" psi—i.e., if the RVP did not exceed 10 psi. *Id.* § 80.27(d)(1). To qualify for this 1-psi waiver, the regulation stated, "gasoline must contain at least 9% ethanol (by volume)," with "[t]he maximum ethanol content of gasoline … not exceed[ing] any applicable waiver conditions under" § 7545(f)(4). *Id.* § 80.27(d)(2).

At the time EPA adopted those regulations, the maximum ethanol content permitted under any applicable waiver conditions under § 7545(f)(4) was 10% (per the 1978 E10 waiver). Accordingly, in practice E10 was the highest-ethanol blend that could qualify for the 1-psi waiver. But these regulations would have allowed higher-ethanol blends, including E15, to receive the same 1-psi allowance had they also received a § 7545(f)(4) waiver.

Congress subsequently codified EPA's volatility regulations in § 7545(h). Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 216, 104 Stat. 2399, 2489. With certain exceptions not relevant here, § 7545(h) directs EPA to promulgate a regulation making it "unlawful for any person during the high ozone season to sell, offer for sale, dispense, supply, offer for supply, transport, or introduce into commerce gasoline with [RVP] in excess of 9.0" psi. 42 U.S.C. § 7545(h)(1). Consistent with its prior regulations, EPA defined the high ozone season, or "summer season," as May 1 or June 1 (depending on the type of facility) to September 15. 40 C.F.R. §§ 80.27(a)(1) & (2), 1090.80; *see* CAJA2 n.3.

But Congress recognized that the 9-psi RVP limit set by § 7545(h) "would likely result in the termination of the availability of ethanol in the marketplace" given its higher summer RVP, thereby depriving the country of the "beneficial environmental, economic, agricultural, energy security and foreign policy implications" of "ethanol blending." S. Rep. No. 101-228, at 110. Consequently, Congress also provided an "Ethanol waiver" in § 7545(h) that mirrored EPA's prior special provisions for alcohol blends. The first clause of the ethanol waiver adopts EPA's prior 1-psi allowance: "For fuel

blends containing gasoline and 10 percent denatured anhydrous ethanol, the [RVP] limitation under this subsection shall be one [psi] greater than the applicable [RVP] limitations established under" § 7545(h)(1). 42 U.S.C. § 7545(h)(4). The second clause establishes a compliance defense for downstream parties, such as distributors, blenders, and retailers, which have limited ability to control the content—and thus the RVP—of the blends they distribute. Under this defense, such downstream parties are "deemed to be in full compliance" with the volatility limits set by § 7545(h)(1) so long as the blend's gasoline portion complies with the applicable RVP limits, "the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4)"—*whatever* that limit might be—and there are no additives that increase the RVP of the ethanol portion. *Id.* § 7545(h)(4)(B).[2]

In 1991, EPA revised its volatility regulations to implement § 7545(h). The amended regulations provided that, to qualify for the 1-psi waiver, a fuel blend's "concentration of ethanol … must be at least 9% *and no more than 10%*." 56 Fed. Reg. 64,704, 64,710 (Dec. 12, 1991) (emphasis added). Thus, for the first time, the summer RVP allowance was legally restricted to E10.

Two decades later, EPA granted partial waivers for E15 under § 7545(f)(4), allowing E15 to be introduced into commerce. 75 Fed. Reg. 68,094 (Nov. 4, 2010); 76 Fed. Reg. 4,662, 4,682 (Jan. 26, 2011). But because EPA still restricted the 1-psi waiver to E10, E15

[2] "Denatured" ethanol is "unfit for human consumption," and "anhydrous" ethanol is no more than 1% water. 40 C.F.R. § 1090.80.

was nearly impossible to sell during the four-and-a-half month summer season. *See* App.5a-6a.[3]

C. The Final Rule

E15's access to the market remained stunted until the rulemaking at issue here. Recognizing the "anomal[y]" of using an RVP limit to bar the sale of a fuel—E15—that has a lower RVP than the predominant fuel—E10—EPA promulgated the Final Rule in June 2019 "to create parity in the way the RVP of both E10 and E15 fuels is treated under EPA regulations." CAJA002, 012. To do so, EPA first determined that E15 is "substantially similar" to E10 under § 7545(f)(1), thus permitting E15 to be sold irrespective of the conditions imposed by the partial waivers EPA had granted E15 under § 7545(f)(4). CAJA002; CAJA014. EPA then reinterpreted the phrase "containing gasoline and 10 percent denatured anhydrous ethanol" in § 7545(h)(4) to "establish[] a lower limit, or floor, on the minimum ethanol content" required for the 1-psi waiver. CAJA013. Accordingly, EPA concluded that blends with "at least 10 percent ethanol," including E15, were eligible for the 1-psi waiver. *Id.*

The Final Rule thus removed the RVP limited set by § 7545(h)(1) as a barrier to E15 year-round sale. E15 was in fact sold in the summers of 2019, 2020, and 2021, and predictably, annual E15 use immediately increased substantially: during those three years—in which driving overall was suppressed by the Covid-19 pandemic—drivers logged as many miles on E15 as they had in the previous 10 years combined. Growth Energy, *Ameri-*

[3] Today, "it is cost-prohibitive to produce ethanol blends with volatility not exceeding 9.0 psi," App.6a, as it was when Congress enacted the ethanol waiver, S. Rep. No. 101-228, at 110.

can Drivers Reach 10 Billion Miles Driven on E15 (June 11, 2019)[4]; Growth Energy, *American Drivers Reach 20 Billion Miles on E15* (Mar. 9, 2021).[5]

D. Proceedings Below

Petroleum-industry trade associations and others petitioned for review of the Final Rule in the D.C. Circuit, arguing that EPA's interpretation of § 7545(h)(4) conflicts with the statute because (they said) "containing" could only mean "containing exactly." Intervenors representing the biofuel industry—including petitioner here—countered that § 7545(h)(4), interpreted in light of its text, structure, purpose, and history, clearly means that the 1-psi waiver is available to blends with *at least* 10% ethanol. Alternatively, they argued that, at a minimum, the ethanol waiver is ambiguous and, for the same reasons, EPA's interpretation is reasonable. EPA defended its interpretation as reasonable.

Agreeing with the challengers, the court of appeals concluded at *Chevron* step one that the statute unambiguously foreclosed EPA's interpretation of § 7545(h)(4) and vacated the relevant section of the Final Rule. App.19a. Analogizing § 7545(h)(4) to "a scientific formula," the court declared that the "ordinary meaning" of "contain" is to specify a particular amount of the identified substance (here, ethanol). App.11a-12a. The court also noted that in other places Congress had modified "contain" with phrases like "at least" or "not less than," such that the absence of a modifier here "suggests that Congress intended Subsection 7545(h)(4)

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[4] https://growthenergy.org/2019/06/11/growth-energy-american-drivers-reach-10-billion-miles-driven-on-e15/.

[5] https://growthenergy.org/2021/03/09/growth-energy-american-drivers-reach-20-billion-miles-on-e15/.

to apply [only] to E10." App.14a. Finally, the court reasoned that its interpretation comported with the statute's purpose because in "limiting the 1-psi allowance," "Congress was balancing multiple interests." App.18a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH BASIC PRINCIPLES OF STATUTORY INTERPRETATION AS ESTABLISHED BY THIS COURT'S PRECEDENT

A. The Full Context Shows That "Containing" in Section 7545(h)(4) Means "Having at Least"

It is a "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." *King*, 576 U.S. at 492 (quotation marks omitted); *see id.* at 486. This canon is essential because "oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 486 (quotation marks omitted). Indeed, 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." *Id.* at 492 (cleaned). For example, courts "cannot interpret federal statutes to negate their own stated purposes." *Id.* at 493 (quotation marks omitted). Applying these principles—which the court of appeals failed to do faithfully—yields the conclusion that Congress used "containing gasoline and 10 percent … ethanol" to refer to fuel blends with *at least* 10% ethanol.

Like the word "extension" in a related provision of the Clean Air Act, "[t]he key word here—'[contain]'—is

nowhere defined in the statute and it can mean different things depending on context." *HollyFrontier Cheyenne Refin., LLC* v. *Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2176-2177 (2021). Although "contain" in some contexts denotes "has exactly," in other contexts it denotes "have within," i.e., "has at least." *Webster's New Collegiate Dictionary* 282 (9th ed. 1990). Accordingly, one may "use[] the phrase 'containing at least' in the same way—and essentially interchangeably—with the way [one] uses the word 'containing.'" *Waters Corp.* v. *Agilent Techs. Inc.*, 2019 WL 6255181, at *4 (D. Del. Nov. 22, 2019). For instance, § 7545 itself uses "contains the applicable volume" and "contains *at least* the applicable volume" equivalently, 42 U.S.C. § 7545(*o*)(2)(A)(i) (emphasis added), showing that, to Congress, the modifier "at least" need not always be express to be present. Likewise, a Food and Drug Administration regulation concerning statements on juice labels requires that beverages labeled as "containing 10% juice" contain *at least* 10% juice. 21 C.F.R. § 101.30(b)(1). Tellingly, again much like "extension" in *HollyFrontier*, neither the court of appeals nor the challengers have "point[ed] to a single dictionary definition of the term '[contain]' requiring" that there be *exactly* the specified amount. *HollyFrontier*, 141 S. Ct. at 2177.

The broader statutory structure and purpose make clear that, for purposes of § 7545(h)(4), Congress used "containing" to mean "having at least."

Congress titled § 7545(h)(4) "Ethanol waiver" and expressly made it available to "fuel blends containing" gasoline and 10% ethanol. Had Congress intended to restrict the waiver to a single blend (E10), Congress could have easily used much more direct language, ti-

tling the provision "E10 waiver" and making it available to "E10" or to "the blend containing" gasoline and 10% ethanol. "[T]he heading of a section [is a] tool[] available for the resolution of a doubt about the meaning of a statute." *Porter* v. *Nussle*, 534 U.S. 516, 528 (2002) (quotation marks omitted). Here, § 7545(h)(4)'s "unqualified heading scarcely aids the [court of appeals' view] that Congress meant to bi-sect the universe of" ethanol blends and restrict the waiver to E10. *Id.* And Congress's use of the plural "blend*s*" of gasoline and ethanol in the waiver provision closes the door on the lower court's interpretation, making crystal clear that Congress intended that the waiver be available not to a single ethanol blend but to any fuel blend whose ethanol concentrations is 10% or greater.

Further, Congress's aims are served only by interpreting § 7545(h)(4) to reach higher-ethanol blends. The Clean Air Act broadly facilitates the use of new fuels and concentrations thereof as long as they meet the minimum requirements to protect against harmful emissions. *See*, *e.g.*, 42 U.S.C. § 7545(f). Section 7545(h) furthers these goals in a specific context: volatility during the summer season. Section 7545(h)(4) itself embodies these twin objectives, allowing a waiver of the RVP limit for ethanol-based "fuel blends"—so that such blends can be used during the summer season—but only up to 1 psi more. *Id.* § 7545(h).

Section 7545(h)(4)'s evident purpose is also revealed in its legislative history. Congress recognized that "volatility reductions" were "necessary to protect public health and welfare," but also "recognize[d] that to require ethanol to meet a 9 pound RVP" would "likely result in the termination of the availability of ethanol in the marketplace," given the "prohibitive" "cost of producing and distributing" ethanol blends whose RVP

is 9 psi (or less) in the summer. S. Rep. No. 101-228, at 110. Consequently, Congress created the "ethanol waiver" to "allow ethanol blending to continue to be a viable alternative fuel, with its beneficial environmental, economic, agricultural, energy security and foreign policy implications." *Id.*

Congress's objectives are satisfied only by interpreting "containing" to mean "having at least"—and thus permitting the 1-psi waiver to apply to E15. This interpretation facilitates increased use of ethanol, and thus promotes the many significant benefits that Congress sought to achieve, without increasing fuel volatility above the level Congress already determined is acceptable. Under this interpretation, E15 (and other higher-ethanol blends) could be sold year-round, enabling the introduction of more ethanol into the nation's transportation-fuel supply. And those fuel blends could be sold year-round only if they satisfy the emissions requirements of § 7545(f) and only if their volatility remains within the specific limit Congress deemed acceptable in the ethanol waiver provision of § 7545(h)(4)—the very same limit that applies to E10.

In contrast, the court of appeals' contrary interpretation ascribes to Congress a bizarre intent: to promote increased ethanol use while guarding against evaporative emissions by specifying a fixed RVP limit, and yet to allow only a single blend whose concentration of ethanol is relatively low, just 10%, to be sold, even if a higher-ethanol blend meets the same fixed RVP limit. And further, the court of appeals' interpretation implies that Congress intended this outcome even though Congress understood at the time that the RVP of higher-ethanol blends would be *lower* than the RVP of E10. *See* App.18a; CAJA485 (citing CAJA424). In short, on the court of appeals' view, Congress intended to pro-

mote ethanol use while limiting volatility by foreclosing fuel blends that use *more* ethanol and have no greater—but in fact *lower*—RVP than E10 from the market for more than one-third of the year, dampening the market's incentive to invest in such blends' wider adoption.

Courts may not attribute such an absurd or bizarre intent to Congress absent clear evidence, and as discussed, there is no such evidence. *Nixon*, 541 U.S. at 138 (rejecting interpretation that implies "farfetched" congressional intent or "leads to absurd … results"); *Caron* v. *United States*, 524 U.S. 308, 315 (1998) ("Congress cannot have intended this bizarre result."); *Lindahl* v. *Office of Pers. Mgmt.*, 470 U.S. 768, 799 (1985) ("In the absence of any indication in the legislative history or persuasive functional argument to the contrary, we cannot assume that Congress intended to create such a bizarre jurisdictional patchwork.").

On the contrary, Congress consciously rejected a version of the ethanol-waiver provision that would have expressly confined the waiver to E10. The original draft of the bill provided a 1-psi allowance only for "gasoline containing at least 9 *but not more than* 10 per centum ethanol (by volume)." H.R. 3030, 101st Cong. § 214 (1989) (CAJA114-115) (emphasis added); S. 1490 101st Cong. § 214 (1989). The House and Senate both rejected that phrasing. This "drafting history showing that Congress cut out [specific] language … from the final statute … precludes any hope of a sound interpretation" that would restore the "trimmed" language, as the court of appeals' interpretation would. *Doe* v. *Chao*, 540 U.S. 614, 622-623 (2004); *see also, e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 579-580 (2006) ("Congress' rejection of the very language that would have achieved the result" favored by the court of appeals "weighs heavily against [that] interpretation.").

Finally, the second clause of § 7545(h)(4)—which the court of appeals ignored—confirms that Congress did not intend to restrict the 1-psi ethanol waiver to E10. As discussed above, that clause deems downstream participants compliant with the 9-psi RVP limit of § 7545(h)(1) if "the ethanol portion of the blend does not exceed its waiver condition under subsection (f)(4)." 42 U.S.C. § 7545(h)(4)(B). And § 7545(f)(4) is not limited to E10; indeed, EPA has granted a waiver to E15 under § 7545(f)(4). *Supra* p.10. Thus, Congress determined that market participants can be deemed compliant for using ethanol blends whose RVP exceeds 9 psi. Surely, Congress would not have done that had it intended the ethanol waiver's 1-psi allowance not to apply to those same blends.

B. The Court Below Incorrectly Held That Congress Intended "Containing" to Mean "Having Exactly"

The court of appeals erroneously determined that the phrase "containing … 10 percent … ethanol" in § 7545(h)(4) unambiguously means "containing *exactly* 10% ethanol" and therefore that the ethanol waiver applies only to E10.

The court brushed aside § 7545(h)(4)'s aim of promoting ethanol while capping volatility, stating vaguely that "Congress was balancing multiple interests" and giving "attention to wide-ranging economic, energy-security, and geopolitical implications." App.18a. Although Congress was indeed considering those interests, the court never explained how any of them would have led Congress to *confine* the ethanol waiver to E10. Nor could the court have done so because, as explained, Congress understood that those broader interests are served by *increased* ethanol use—such as

through E15—rather than through RVP limits, which (if set at 9 psi) hinder the availability of ethanol blends. *See supra* p.9-10. The sole purpose served by the statute's RVP limits is to limit RVP, and that purpose is served regardless of the ethanol concentration of a given blend because the statute's RVP limits, including in the ethanol waiver, are the same irrespective of the blend's ethanol concentration.

Further, the court's textual analysis begged the question. It stated that the word "contain" means "'to have within,' 'to hold,' or 'to comprise' in a manner that 'implies the actual presence of a specific substance or quantity within something.'" App.12a-13a. From that definition, the court reasoned, "Subsection 7545(h)(4) is best read to concern gasoline that 'has within it' or 'holds' a specific quantity (10%) of a specific substance (ethanol)." App.13a. But the court's preferred dictionary definition of "contains" does not support its conclusion that the statute unambiguously requires that the fuel blend have exactly 10% ethanol. E15 also "has within it" or "holds" a "specific substance"—ethanol—and in particular has, or holds, 10% of that substance within it, and then some.

The court also overread other provisions of the Clean Air Act. The court said, "Numerous provisions of the Clean Air Act … have percentages with modifiers," such as "at least 85 percent methanol," while § 7545(h)(4) does not. App.13-14a (quotation marks omitted). "But none of that means the bare term '[containing]' obviously and always includes a strict … requirement" that the exact amount of ethanol specified is present. *HollyFrontier*, 141 S. Ct. at 2179. Indeed, as noted, § 7545(*o*)(2)(A)(i) confirms that sometimes the Clean Air Act uses "contain [specified amount]" to mean "has at least" *without* including an express modi-

fier. *See supra* p.14. And sometimes Congress attaches an express modifier to "contain" to articulate not a floor but "exactly," as in "a mixture of alternative fuel and gasoline or diesel fuel containing exactly 50 percent gasoline or diesel fuel," 49 U.S.C. § 32901(a)(9)(C). This fuller accounting of the ways Congress uses "contain" shows that the word standing alone does not have a uniform or single meaning.

More broadly, this accounting is a reminder that the Clean Air Act "is far from a chef d'oeuvre of legislative draftsmanship," and thus that courts (and EPA) "must … bear[] in mind 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." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 319-320 (2014) (quotation marks omitted). Accordingly, "the presumption of consistent usage readily yields to context." *Id.* (quotation marks omitted). And here, as explained above, the context and overall statutory scheme compel the conclusion that the ethanol waiver in § 7545(h)(4) is available for all blends with at least 10% ethanol.

C. At Most, the Statute Is Ambiguous and EPA's Interpretation Is Reasonable

Even if it were not *clear* that Congress intended "containing" 10% ethanol to mean "having at least" 10% ethanol in § 7545(h)(4), the statutory provision would at most be ambiguous, and EPA's interpretation would be a reasonable resolution of that ambiguity entitled to deference—for all the same reasons discussed above. *See King*, 576 U.S. at 486 ("oftentimes the … ambiguity … of certain words or phrases may only become evident when placed in context" (quotation marks omitted)); *City of Arlington, Tex.* v. *FCC*, 569 U.S. 290, 296

(2013) ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency.").

II. THE DECISION BELOW WILL HAVE EXCEPTIONALLY IMPORTANT CONSEQUENCES

The decision below will have exceptionally important consequences for the nation's transportation fuel supply—and in turn for the economy, human health, the environment, and security.

Replacing some gasoline with ethanol in the nation's transportation-fuel supply brings many benefits. It promotes U.S. energy security and national security by diversifying the country's energy sources and rebalancing the country's energy trade, because it entails switching from a fuel that is, to a significant degree, imported to a fuel that is produced domestically. CAJA246; CAJA266. It spurs economic development in the rural areas that grow and convert corn to ethanol. CAJA031; CAJA328; CAJA266. It improves human health, national security, and the environment because ethanol reduces greenhouse gas emissions by more than 40% compared to the gasoline it replaces. *See* CAJA328. And it provides necessary gasoline octane. *Id.* Indeed, Congress created the Renewable Fuel Standard program "to force the market to create ways to produce and use greater and greater volumes of renewable fuel"—especially ethanol, by far the most widely used renewable fuel—in the nation's transportation-fuel supply annually. *Americans for Clean Energy* v. *EPA*, 864 F.3d 691, 696-697, 710 (D.C. Cir. 2017); *see* 42 U.S.C. § 7545(*o*).

E15 enhances these benefits of replacing some gasoline with ethanol relative to E10 because E15 uses

50% more ethanol than E10. Moreover, because E15's RVP is lower than E10's, using E15 reduces evaporative emissions, which harm human health and the environment. *See supra* pp.6-7.

The decision below effectively bars E15 use during the summer, substantially reducing the benefits the country could receive from ethanol. But the decision's harmful consequences are much greater than that. E15 was poised to grow significantly and potentially to begin replacing E10 as the default year-round transportation fuel, supercharging the benefits of replacing some gasoline with ethanol. About 95% of the national vehicle fleet can safely use E15. Air Improvement Resource, Inc., *Analysis of Ethanol-Compatible Fleet for Calendar Year 2021*, at 2 (Nov. 9, 2020).[6] During the three years in which the Final Rule was in effect, the number of retail stations selling E15 increased from about 1,300 (according to EPA), CAJA007, to almost 2,500, Growth Energy, *E15 Rapidly Moving into the Marketplace* (July 6, 2021).[7] And in those few pandemic-affected years, drivers logged as many miles on E15 as they had in the previous 10 years combined. *Supra* p.11-12. And the availability of E15-compatible vehicles and infrastructure will rapidly approach 100% because all new vehicles, pumps, and storage tanks are E15-compatible, and retail stations naturally upgrade their pumps and tanks roughly every seven years. Stillwater Associates LLC, *Infrastructure Changes and Cost to Increase Consumption of E85 and E15 in 2017*, at 19 (July 11, 2016) (attached as Ex. 16 to Growth

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[6] https://growthenergy.org/wp-content/uploads/2020/11/Analysis-of-Ethanol-Compatible-Fleet-for-Calendar-Year-2021-Final.pdf.

[7] https://growthenergy.org/wp-content/uploads/2021/07/e15-stations-2462-2021-07-06.pdf.

Energy Comments on EPA's Proposed Renewable Fuel Standard Program: Standards for 2019 and Biomass-Based Diesel Volume for 2020 (Aug. 17, 2018), EPA Dkt. # EPA-HQ-OAR-2018-0167-1292).[8]

The market, therefore, could well begin to favor E15 as the default fuel because of its higher octane rating, lower cost, and greater ability to satisfy requirements under the Renewable Fuel Standard program. The primary barrier to this switch was EPA's prior volatility regulations, which EPA tried to remedy with the Final Rule. The decision below entrenches that regulatory barrier, ensuring that E15 will not supplant E10 as the nation's default fuel, to the country's great misfortune.

III. THIS CASE PRESENTS AN IDEAL—INDEED, THE *ONLY*—VEHICLE TO RESOLVE THIS CRITICAL ISSUE

The decision below is unencumbered by alternative holdings or jurisdictional concerns. Thus, this petition presents an ideal vehicle for this Court to address the question presented and avert the enormous harmful consequences of the decision below.

More importantly, this case will be the Court's *only* opportunity to do so. Because the court of appeals held that the statute is unambiguous at *Chevron* step one, its decision forever forecloses EPA from re-adopting its interpretation. And no other court can ever address the issue because the D.C. Circuit has exclusive jurisdiction over this issue.[9] Therefore, there is no possibil-

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[8] https://www.regulations.gov/document/EPA-HQ-OAR-2018-0167-1292.

[9] The Clean Air Act grants the D.C. Circuit exclusive jurisdiction over challenges to "any control or prohibition under section

ity of further percolation, a circuit split, or even a future decision from the D.C. Circuit that this Court could review. If this Court does not hear this case, the current presidential administration and all future ones will be bound by the decision below. This Court regularly reviews decisions on EPA actions under the Clean Air Act despite the lack of a circuit split. *E.g.*, *Michigan* v. *EPA*, 576 U.S. 743 (2015); *EPA* v. *EME Homer City Generation, L.P.*, 572 U.S. 489 (2014); *Utility Air*, 573 U.S. 302; *see also HollyFrontier*, 141 S. Ct. 2172. The Court should do so here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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7545" or to "any other nationally applicable regulations promulgated, or final action taken, by [EPA] under" § 7545. 42 U.S.C. § 7607(b)(1). Section 7545(h) expressly involves a "[p]rohibition," *id.* § 7545(h)(1), and the Final Rule is a nationally applicable regulation promulgated under § 7545.