No. 11-102

In the Supreme Court of the United States

NATIONAL PETROCHEMICAL AND REFINERS ASSOCIATION AND AMERICAN PETROLEUM INSTITUTE, PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, 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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
DANIEL R. DERTKE
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Environmental Protection Agency exceeded its authority under the Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492, by promulgating regulations that took effect on July 1, 2010, and established renewable-fuel quotas for the entire year 2010.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 630 F.3d 145. The court of appeals' order denying rehearing en banc (Pet. App. 48a-59a) is reported at 643 F.3d 958.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2010. A petition for rehearing was denied on April 22, 2011. The petition for a writ of certiorari was filed on July 21, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The federal renewable-fuel program, established by Section 211(*o*) of the Clean Air Act, 42 U.S.C. 7545(*o*) (2006 & Supp. III 2009), is designed "to increase the use of renewable fuels in motor vehicle fuel consumed in the" United States. EPA, *Regulation of Fuels and Fuel Additives: Renewable Fuel Standard Program*, 72 Fed. Reg. 23,900, 23,903 (2007) (*RFS2007*). The program's objectives are "to simultaneously reduce dependence on foreign sources of petroleum, increase domestic sources of energy, and diversify [the Nation's] energy portfolio to help transition to alternatives to petroleum in the transportation sector." *Ibid.*

a. Congress originally established the renewable-fuel program in the Energy Policy Act of 2005 (EPAct), Pub. L. No. 109-58, 119 Stat. 1067. The EPAct directed the Environmental Protection Agency (EPA) to "promulgate regulations to ensure that gasoline sold or introduced into commerce in the [continental] United States * * * on an annual average basis, contains" a specified volume of "renewable fuel" (*e.g.*, natural gas or fuel produced from agricultural products). 42 U.S.C. 7545(*o*)(2)(A)(i) (2006);[1] see 42 U.S.C. 7545(*o*)(1)(C). The EPAct included a table specifying the volumes of renewable fuel that the EPA should require for the years 2006 through 2012. 42 U.S.C. 7545(*o*)(2)(B)(i). For each of those years, the statute directed the EPA to use the relevant annual quota, along with an estimate (provided by the Department of Energy) of the total amount of gasoline projected to be sold or introduced into commerce that year, to compute the percentage of total fuel that

[1] Unless otherwise noted, citations to 42 U.S.C. 7545(*o*) refer to the 2006 edition of the United States Code.

should be renewable. 42 U.S.C. 7545(*o*)(3)(A) and (B)(i). The EPAct further directed the EPA to publish the annual percentage requirement for each upcoming year in the Federal Register by November 30 of the previous year. 42 U.S.C. 7545(*o*)(3)(B)(i). Each of the various "refineries, blenders, and importers" covered by the statute would then be required to apply that percentage to its annual production to determine the number of gallons of renewable fuel for which it would be responsible. 42 U.S.C. 7545(*o*)(3)(B)(ii) (2006).

The EPAct required the EPA to promulgate its initial regulations by August 8, 2006. 42 U.S.C. 7545(*o*)(2)(a)(i). Congress provided, however, that a default standard of 2.78 percent would apply for 2006 if regulations were not promulgated. 42 U.S.C. 7545(*o*)(2)(a)(iv). Congress further specified certain features that the regulations should have, "[r]egardless of the date of promulgation." 42 U.S.C. 7545(*o*)(2)(A)(iii).

The EPA published its regulations implementing the EPAct in May 2007, and those regulations took effect on September 1 of that year. *RFS2007*, 72 Fed. Reg. at 23,900. To comply with those regulations, a covered entity was not required to carry out the process of blending renewable fuel into gasoline. Rather, a covered entity could fulfill its regulatory obligations by acquiring Renewable Identification Numbers (RINs), which represent renewable fuel produced or imported. *Id.* at 23,908. As the EPA explained, "if a refiner ensures that a certain volume of renewable fuel has been produced, in effect they have also ensured that this volume will be blended into gasoline or otherwise used as a motor vehicle fuel" because there is no other reasonable use for such renewable fuel. *Id.* at 23,929. To establish that it

had complied with the regulations, a covered entity was required to demonstrate to the EPA after each calendar year that it had accumulated sufficient RINs to meet its renewable-fuel obligations. *Id.* at 23,932. A covered entity could also carry a surplus or deficit of RINs for one year into the following year. *Ibid.*

b. The Energy Independence and Security Act of 2007 (EISA), Pub. L. No. 110-140, 121 Stat. 1492, was enacted on December 19, 2007, and it amended the EPAct to expand and modify the renewable-fuel program. As particularly relevant here, the EISA increased the required volumes of renewable fuel, 42 U.S.C. 7545(*o*)(2)(B)(i)(I) (Supp. III 2009), and created three subcategories of renewable fuel—advanced biofuel, cellulosic biofuel, and biomass-based diesel—each with its own annual volume quota. 42 U.S.C. 7545(*o*)(1)(B), (D) and (E) and (*o*)(2)(B)(i)(II), (III) and (IV) (Supp. III 2009). The revised statute retains the directive that the EPA publish the annual percentage requirement for each upcoming year in the Federal Register by November 30 of the previous year. 42 U.S.C. 7545(*o*)(3)(B)(i) (Supp. III 2009).

The EISA directed the EPA to issue revised regulations by December 19, 2008. 42 U.S.C. 7545(*o*)(2)(A)(i) (Supp. III 2009). Unlike the EPAct, the EISA does not specify a default percentage that would apply in the absence of timely regulations. The revised statute does, however, retain the provision specifying certain features that the regulations should or should not contain "[r]egardless of the date of promulgation." 42 U.S.C. 7545(*o*)(2)(A)(iii). In particular, the statute mandates that, whenever they are promulgated, the EPA's regulations "shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as ap-

propriate, to ensure that the requirements of this paragraph are met." 42 U.S.C. 7545(*o*)(2)(A)(iii)(I).

In November 2008, the EPA published in the Federal Register a notice informing interested parties that it was still developing proposed rules to implement the EISA. EPA, *Renewable Fuel Standard for 2009, Issued Pursuant to Section 211(o) of the Clean Air Act*, 73 Fed. Reg. 70,643 (2008) (*RFS2009*). The EPA explained that until new regulations could be promulgated, the existing EPAct regulations would continue in effect. *Ibid.* In order to implement the EISA's requirements to the extent possible within the existing regulatory framework, the EPA issued a 2009 renewable-fuel standard that conformed to the volume required by the EISA (rather than the lower volume that had previously been required under the EPAct). *Ibid.* The EPA did not issue a 2009 standard for cellulosic biofuels because the EISA did not specify a minimum volume for that fuel for 2009. 42 U.S.C. 7545(*o*)(2)(B)(i)(III) (Supp. III 2009). The EPA also did not issue 2009 standards for biomass-based diesel or for advanced biofuels, because, although the EISA did specify 2009 volumes for those fuels, the existing regulations did not "provide a mechanism" for regulating them. *RFS2009*, 73 Fed. Reg. at 70,643; see EPA, *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program*, 75 Fed. Reg. 14,670, 14,718 (2010) (*RFS2010*).

In May 2009, the EPA published a notice of proposed rulemaking setting forth its planned regulatory framework for implementing the EISA. EPA, *Regulation of Fuels and Fuel Additives: Changes to Renewable Fuel Standard Program*, 74 Fed. Reg. 24,904 (2009). The notice explained that, for a variety of reasons pertaining to the complexity of the task, the agency had been un-

able to promulgate its regulations by December 19, 2008. *Id.* at 24,913. In substance, the notice proposed "to continue to use the Renewable Identification Number (RIN) system currently in place * * *, with modifications to implement the EISA provisions." *Id.* at 24,909.

On February 3, 2010, the EPA promulgated its final EISA regulations, which became effective on July 1, 2010, "the start of the [first] quarter following completion of the statutorily required 60-day Congressional Review period." *RFS2010*, 75 Fed. Reg. at 14,675; see Pet. App. 12a; see also 5 U.S.C. 801(a)(3) (requiring a 60-day period for congressional review before a "major rule" can take effect). As relevant here, the regulations set the final 2010 percentage standards for cellulosic biofuel, advanced biofuel, biomass-based diesel, and total renewable fuel based on the quotas set forth in the EISA. *RFS2010*, 75 Fed. Reg. at 14,675. The 2010 standards for biomass-based diesel were adjusted to account for the 2009 quota that the agency had been unable to implement under the prior regulations. *Ibid.* "As a transition measure, obligated parties were allowed to use RINs generated under the [previous EPAct] program in 2009 and in the first part of 2010 to meet the [new] renewable volume obligations, even though these [prior] RINs may have been generated for fuel that did not meet" the EISA's new requirements. Pet. App. 13a-14a (citing *RFS2010*, 75 Fed. Reg. at 14,723, 14,724). Additionally, "[w]ith certain limitations, parties could also use 2008 RINs to comply with the 2010 biomass-based diesel standard." *Id.* at 14a (citing *RFS2010*, 75 Fed. Reg. at 14,719). The rule gave covered entities until February 28, 2011, to demonstrate their compliance. *RFS2010*, 75 Fed. Reg. at 14,676.

2. Petitioners, two national petroleum and petrochemical trade associations, petitioned for judicial review of the final rule. Pet. App. 2a; see 42 U.S.C. 7607(a). The court of appeals denied the petitions. Pet. App. 3a.

As relevant here, petitioners argued that the rule was "impermissibly retroactive because it applies to transactions occurring up to six months before it took effect." Pet. 11; see Pet. App. 29a. The court of appeals rejected that contention. *Id.* at 28a-42a. The court assumed, without deciding, that petitioners had "shown that the legal obligations for pre-July 1, 2010 production or importation changed to their detriment" under the final regulations. *Id.* at 38a. The court concluded, however, that even if petitioners had made that showing, "EPA had clear albeit implicit authority under the EISA to apply both the 2009 and 2010 volume requirements in the 2010 calendar year in order to achieve the statutory purpose." *Id.* at 39a.

The court of appeals first observed that, even if the EPA had promulgated its rules by the EISA's December 19, 2008, deadline, the rules still would have had the feature that petitioners viewed as "retroactive," *i.e.*, they would have set standards for the entire calendar year during which they took effect. Pet. App. 40a. The court explained that any such regulations "would have applied to all of an obligated party's production or importation of gasoline or diesel fuel in the 2009 calendar year," even though the required 60-day congressional review period, 5 U.S.C. 801(a)(3), would have prevented rules promulgated on December 19, 2008, from taking effect before February 18, 2009. Pet. App. 40a. The court further observed that 42 U.S.C. 7545(*o*)(2)(A)(iii) (which requires the EPA's EISA regulations to conform to cer-

tain requirements "[r]egardless of the date of promulgation") "indicates as well Congress' focus on ensuring that the annual volume requirement was met regardless of EPA delay." *Id.* at 41a.

3. The court of appeals denied rehearing en banc, with Judge Brown and Chief Judge Sentelle dissenting. Pet. App. 48a-59a.

ARGUMENT

The court of appeals correctly held that the EPA acted within its statutory authority in promulgating rules that took effect on July 1, 2010, and established renewable-fuel quotas for the entire year 2010. The decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners do not currently dispute that the EPA was authorized to issue regulations implementing the EISA even after the statutory deadline of December 19, 2008, had passed. See Pet. App. 19a (explaining that "where there are less drastic remedies available for an agency's failure to meet a statutory deadline, courts should not assume Congress intended for the agency to lose its power to act"); *id.* at 19a-26a; *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (explaining that this Court has consistently declined to construe "a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later"). Rather, petitioners contend (Pet. 11, 13-31) that the EPA's regulations were beyond the agency's statutory authority because those rules became effective in the middle of 2010 and set standards for all of 2010.

That argument lacks merit. As the court of appeals observed (Pet. App. 40a), the EISA expressly contem-

plates the EPA's issuance of implementing regulations that take effect during a calendar year and govern fuel importation and production during that entire calendar year. The EISA required the agency to promulgate its regulations by December 19, 2008. 42 U.S.C. 7545(*o*)(2)(A)(i) (Supp. III 2009). A "major rule" cannot take effect until after the expiration of a 60-day review period, however, see 5 U.S.C. 801(a)(3), and there is no dispute that the EPA's EISA regulations were subject to that requirement, see *RFS2010*, 75 Fed. Reg. at 14,675; 5 U.S.C. 804(2); Pet. App. 11a n.16. Accordingly, if the EPA had promulgated its regulations on December 19, 2008, the rules could not have taken effect until February 18, 2009, even though they would have set forth renewable-fuel standards for all of 2009. Pet. App. 40a.

Petitioners contend (Pet. 29) that "even if Congress permitted a limited amount of retroactivity, it did not authorize EPA to apply the rule for a longer period of time, as is the case here." That contention overlooks 42 U.S.C. 7545(*o*)(2)(A)(iii). Section 7545(*o*)(2)(A)(iii) specifies that "[r]egardless of the date of promulgation, the regulations promulgated under" Section 7545(*o*)(2)(A)(i)—which authorizes the EPA to issue rules implementing the EISA—"shall contain compliance provisions applicable to refineries, blenders, distributors, and importers, as appropriate, to ensure that the requirements of this paragraph are met." The "requirements of this paragraph" include the 2010 (and, in some cases, 2009) quotas for various types of renewable fuel. 42 U.S.C. 7545(*o*)(2)(B)(i)(I)-(IV) (Supp. III 2009). Section 7545(*o*)(2)(A)(iii) thus makes clear that, even if the EPA promulgates EISA regulations after the statutory deadline, those rules should nevertheless imple-

ment the relevant quotas specified in the statute. The EPA can comply with that requirement only by promulgating rules that cover an entire calendar year, regardless of when in the year the regulations become effective.[2]

2. Contrary to petitioners' contention (Pet. 18-24), the court of appeals' decision does not conflict with any decision of this Court. Petitioners suggest (Pet. 18-22) that the court of appeals' decision is at odds with the general presumption against retroactivity. They rely in particular (see Pet. 19) on the court's use of the word "implicit" to describe the manner in which the EISA authorized the EPA to promulgate the rules at issue here. See, *e.g.*, Pet. App. 39a ("EPA had clear albeit implicit authority under the EISA to apply both the 2009 and 2010 volume requirements in the 2010 calendar year in order to achieve the statutory purpose.").

Petitioners acknowledge, however, that the decision on which they primarily rely, *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204 (1988), "did not expressly foreclose the possibility that Congress could implicitly grant retroactive rulemaking authority." Pet. 20. More fundamentally, petitioners' focus on the court of appeals' use of the word "implicit" largely ignores the court's conclusion that the EPA had "clear" authority to act as

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[2] Petitioners note (Pet. 28) that the EISA, unlike the EPAct, did not specify the renewable-fuel percentage that would apply if the EPA did not meet the statutory deadline for issuing implementing regulations. As the court of appeals observed, however, such a provision was unnecessary because by the time the EISA was enacted, "Congress was expanding an existing renewable fuel program and EPA could, as it did, leave in place the [original] regulatory program, adjusting it to incorporate the 2009 volume requirement, until the revised regulations under the EISA * * * were finalized." Pet. App. 41a.

it did. The thrust of the court of appeals' analysis was that, although the EISA does not say in so many words that the EPA may issue "retroactive" rules, or that it may promulgate rules governing the entire calendar year in which the regulations take effect, the text and structure of the statute unambiguously authorize that regulatory approach. See Pet. App. 39a-41a. None of the cases on which petitioners rely (see Pet. 20-22) suggests that this sort of unmistakable implication is insufficient, or that any alternative verbal formulation is necessary, to rebut the general presumption against retroactive rulemaking. And, to the extent petitioners argue that the court of appeals simply misread the pertinent EISA provisions, that case-specific challenge raises no legal issue of broad importance warranting this Court's review.

Petitioners also contend (Pet. 22-24) that the court of appeals' decision conflicts with decisions of this Court concerning repeals by implication. Petitioners did not raise that argument in the court of appeals, however, and the court of appeals did not address the presumption against repeals by implication. This Court does not ordinarily consider issues that were neither pressed nor passed on below, see, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993), and there is no reason for it to do so here. In any event, petitioners' argument lacks merit. Even assuming that authorizing a specific rule with retroactive effect could properly be considered a "repeal by implication" of the general statutory definition of a rule as having only "future effect," 5 U.S.C. 551(4), petitioners' argument rests on the same faulty premise as their presumption-against-retroactivity argument—namely, that the EISA lacks a sufficient indication of congressional intent to authorize rules govern-

ing an entire calendar year to become effective during that calendar year.

3. Petitioners are also wrong in contending (Pet. 13-18) that the D.C. Circuit's decision conflicts with decisions of other courts of appeals. None of the decisions cited by petitioners demonstrates that another court of appeals would have reached a different result on the facts of this case.

a. Petitioners contend (Pet. 14) that the court of appeals' decision conflicts with Federal and Second Circuit decisions that, according to petitioners, hold that an agency cannot "issue a retroactive rule to compensate for missing a statutory deadline." Contrary to petitioners' assertion, however, the court below did not recognize a far-reaching "missed-deadline exception" (*ibid.*) to the presumption against retroactivity. Rather, the court simply held, based on the text and structure of the particular statutory scheme at issue in this case, that the EPA was authorized to apply to the entire 2010 calendar year regulations that took effect in July 2010. Pet. App. 39a-41a. Indeed, far from treating the missed EISA deadline as the decisive factor justifying the EPA's regulatory approach, the D.C. Circuit attached substantial weight to the fact that, if the EPA had *complied* with the December 19, 2008, deadline, its regulations would have covered the entire calendar year in which they took effect. See *id.* at 40a.

The Federal and Second Circuit decisions on which petitioners rely do not cast doubt on the court of appeals' analysis. In *Liesegang* v. *Secretary of Veterans Affairs*, 312 F.3d 1368 (Fed. Cir. 2002), amended by 65 Fed. Appx. 717, 2003 WL 21265262 (May 15, 2003), the plaintiffs argued that because an agency had missed certain statutory deadlines for issuing a regulation un-

der the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, the court should treat the regulation as having taken effect on the date when it would have taken effect if the deadlines had been met. 312 F.3d. at 1376. The Federal Circuit rejected that argument, explaining that it lacked authority to "sanction[]" the agency for its lateness by altering the regulation's effective date. *Id.* at 1377-1378. In a footnote, the court stated that "[i]n any case," it would be inappropriate to give the regulation retroactive effect because "[t]here is no provision in the [Agent Orange Act's] text that would suggest that Congress expressly granted the agency the authority to promulgate a retroactive regulation." *Id.* at 1377 n.1. That statement was dictum, since the only question before the Federal Circuit was whether the *court* could order retroactive application of the regulations, not whether the agency could have chosen that course. In any event, the Federal Circuit's observation about the Agent Orange Act sheds no light on the proper understanding of the EISA provisions at issue here.

In *Sweet* v. *Sheahan*, 235 F.3d 80 (2000), the Second Circuit similarly rejected a plaintiff's argument that a belatedly-promulgated regulation should be given an earlier effective date based on when the regulation would have become effective if the agency had met statutory deadlines. *Id.* at 89. The court explained that congressional intent for an agency to issue a regulation by a certain date is not the "clear congressional intent" required to "impose new duties with respect to transactions already completed." *Ibid.* (citations omitted). As in *Liesegang*, the court did not consider the circumstances under which an agency can choose to give its regulations retroactive effect, and it had no occasion to construe the EISA.

b. Petitioner also cites (Pet. 15-18) a handful of additional cases for the proposition that "express statutory authorization is necessary for retroactive rulemaking." Pet. 15. In two of the decisions (one of which is unpublished), that proposition was dictum, as each court concluded that the regulation before it did not have retroactive effect. See *Durable Mfg. Co.* v. *United States Dep't of Labor*, 578 F.3d 497 (7th Cir. 2009); *Nash* v. *Apfel,* No. 99-7109, 2000 WL 710491, at *2 (10th Cir. June 1, 2000). In the other two decisions—one of which has been vacated on rehearing en banc—the courts simply concluded that particular statutes did not authorize retroactive rulemaking under particular circumstances. See *Combs* v. *Commissioner of Soc. Sec.*, 400 F.3d 353, 359 (6th Cir. 2005) ("[W]e must conclude that nothing in the Social Security Act grants the Commissioner the authority to engage in retroactive rulemaking."), superseded by 459 F.3d 640 (6th Cir. 2006) (en banc); *University of Iowa Hosps. & Clinics* v. *Shalala*, 180 F.3d 943, 952 (8th Cir. 1999) ("The Secretary's brief nowhere even suggests a possible statutory basis for imposing retroactive record-keeping standards upon Medicare providers, and our own research reveals no such authorization.") (internal footnote omitted). None of those decisions addresses the precise level of specificity with which Congress must authorize retroactive rulemaking, and none casts doubt on the D.C. Circuit's conclusion that the EPA had "clear" statutory authority to promulgate rules covering the entire calendar year in which they took effect. Pet. App. 39a.

4. Finally, petitioners argue (Pet. 27-31) that this case raises issues of exceptional importance because the court of appeals' decision allows agencies to "promulgate retroactive rules after they miss a statutory deadline."

Pet. 29. As explained above, however, the court of appeals decision does not sweep so broadly, but simply addresses whether a particular statute authorizes a particular regulatory approach. See Pet. App. 39a-42a; p. 12, *supra*. Petitioners' suggestion that the decision will dictate the outcome in other cases where an agency misses a statutory deadline (Pet. 30) reflects a fundamental misunderstanding of the court of appeals' opinion. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

DANIEL R. DERTKE
Attorney

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