Nos. 17-1703 & 18-2

IN THE

Supreme Court of the United States

HONEYWELL INTERNATIONAL INC., ET AL.,
Petitioners,

v.

MEXICHEM FLUOR, INC., ET AL.,
Respondents.

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,

v.

MEXICHEM FLUOR, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR DAIKIN U.S. CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE *AMICUS CURIAE*[1]

Daikin U.S. Corporation ("Daikin") is one of several affiliated companies based in the United States ("the Daikin Group"). The Daikin Group has a unique viewpoint from the corporate petitioners, in that certain members of the Daikin Group manufacture heating, ventilation and air conditioning ("HVAC") equipment while others manufacture refrigerant used by and critical to the operation of that HVAC equipment.[2] By injecting uncertainty into a well-established regulatory regime, the majority opinion below impairs the Daikin Group's ability to replace existing refrigerants and refrigerant-using equipment with substitutes that are more environmentally beneficial and more energy efficient.

INTRODUCTION AND SUMMARY OF ARGUMENT

The regulatory structure governing the introduction and use of refrigerants that are substitutes for ozone-depleting substances ("ODS") has been in place for over twenty years. This structure has provided predictability and stability for both the manufacturers of ODS-substitute refrigerants and the manufacturers of equipment that use those ODS-substitute refrigerants,

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[1] Rule 37 statement: All parties received timely notice of *amicus*'s intent to file this brief, and all parties consented to the filing of this *amicus curiae* brief. Further, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* funded its preparation or submission.

[2] The Daikin Group's United States operations primarily consist of the manufacture of HVAC equipment but also consist of the manufacture of fluorochemicals including ODS substitutes. Daikin appears in this matter as *amicus* as a manufacturer of equipment that constitutes an end-use of ODS substitutes.

allowing each to conduct its businesses in an efficient manner and to introduce environmentally beneficial products. However, the majority opinion of the District of Columbia Circuit Court of Appeals inserts ambiguity that potentially hinders those efforts.

The majority opinion eliminates EPA's ability to reclassify ODS substitutes from approved to disapproved under § 7671k if the substitute is not directly replacing an ODS, potentially freezing the status of substitutes on the safe substitutes list if they would replace a non-ODS. Thus, the majority's interpretation of Section 612 of the Clean Air Act, 42 U.S.C. § 7671k – which applies both to manufacturers of class I and class II substances [i.e., ODS] and to manufacturers of equipment that uses ODS and ODS substitutes – allows certain members in the supply chain of HVAC equipment to continue the use of ODS substitutes even in cases where EPA determines that those previously approved substitutes now constitute an environmental or human health threat that prohibits their continuing use. This disrupts the incentive for Daikin and other companies to develop future ODS substitutes that reduce environmental and human health risks since many ODS substitute users will continue to use the previously approved substitutes to avoid the cost of converting to new substitutes.

These ambiguities threaten the business interests of not only the manufacturers of ODS substitutes but also the business interests of users of ODS substitutes and the manufacturers of equipment in which ODS substitutes play an essential operational role. Without regulatory clarity, manufacturers and users of ODS substitutes may be unable introduce the next generation of ODS substitutes and associated equipment that can reduce human health risks and simultaneously

benefit the environment due to improved energy efficiency.

A member of the Daikin Group recently opened the Daikin Texas Technology Park, an approximately $500 million research and manufacturing facility near Houston, Texas, and other Daikin Group members have invested many millions of dollars in developing HVAC equipment to use environmentally beneficial replacement refrigerants such as R-32. All of these investments are at risk as a result of the majority opinion in this matter.

ARGUMENT

I. CLEAN AIR ACT SECTION 612 IS AN ESTABLISHED REGIME TO MANAGE THE USES OF OZONE-DEPLETING SUBSTANCE SUBSTITUTES, AND THE DECISION BELOW PLACES AT RISK EPA'S CAREFULLY CRAFTED IMPLEMENTING REGULATIONS

A. The Section 612 Statutory Framework Governing Uses of ODS Substitutes Encourages the Orderly Development of Substitutes and Products that Benefit Human Health and the Environment

Section 612 of the Clean Air Act, Pub. L. No. 101-549, tit. VI, § 602(a), 104 Stat. 2667 (1990) (codified at 42 U.S.C. §7671k), provides:

> (a) Policy
>
> To the maximum extent practicable, class I and class II substances [i.e., ODS] shall be replaced by chemicals, product substitutes or alternative manufacturing processes that

> reduce overall risks to human health and the environment.
>
> * * *
>
> (c) Alternatives for class I or II substances
>
> Within 2 years after November 15, 1990, the Administrator shall promulgate rules under this section providing that it shall be unlawful to replace any class I or class II substance with any substitute substance which the Administrator determines may present adverse effects to human health or the environment, where the Administrator has identified an alternative to such replacement that-
>
> (1) reduces the overall risk to human health and the environment; and
>
> (2) is currently or potentially available.
>
> The Administrator shall publish a list of (A) the substances prohibited under this subsection for specific uses and (B) the safe alternatives identified under this subsection for specific uses.

The Section 612 statutory framework provides for the structured elimination of ODS, and for their orderly replacement with ODS substitutes. However, the majority opinion's interpretation of the statute creates confusion regarding a critical element in this framework, EPA's ability to replace ODS substitutes in cases where new substitutes reduce overall risks to human health and the environment, and are currently or potentially available. *Id.*

Although the decision below recognizes that "the lists of safe substitutes and prohibited substitutes are not set in stone," Appendix to the Petition for

Certiorari of Honeywell International, Inc. *et al.* (hereinafter "App."), at 6a, the majority opinion proceeds effectively to freeze the status of substitutes on the safe substances list if they would replace a non-ODS. *Id.* at 26a. The dissent articulates some of the confusion the majority opinion creates with this holding:

> Suppose a retailer needs to refurbish an air conditioner manufactured in the early 1990s that uses a class I substance as a refrigerant. If the retailer chooses to have the air conditioner serviced by recharging it with new refrigerant, she is prohibited from "replacing" the class I substance with a chemical substitute "which the Administrator determines may present adverse effects to human health or the environment[,]" 42 U.S.C. § 7671k(a). If the retailer chooses to purchase a new air conditioner instead, she is still "replacing" a class I substance, and the new air conditioner cannot contain an unsafe substitute. *Id.* Either way, the retailer's action falls within the scope of the mandates in Section 612. And if the retailer purchases a new air conditioner, the fact that the manufacturer may have previously "replaced" a class I substance with an HFC as the refrigerant in its air conditioners does not mean that "the replacement has [already] been effectuated" with respect to that retailer. *See* Maj. Op. 14. By the express terms of the statute, if the EPA determines as of 2017 that HFCs are no longer safe substitutes for class I substances given available refrigerant alternatives, it would appear that Congress has given EPA the authority to prohibit the further use of

> HFCs in air conditioners so that the retailer in our example cannot "replace" her class I substance-utilizing air conditioner with a new air conditioner utilizing an unsafe substitute. The majority holds otherwise. Alternatively, the express terms of the statute appear to give EPA the authority to prohibit the retailer from recharging her old air conditioner with an HFC as the refrigerant, which the agency could implement by restricting the manufacture, marketing, and use of HFCs. Given its focus on product manufacturers, the majority opinion is curiously silent about how its statutory interpretation affects retailers and other end users who have products utilizing class I and class II substances, despite the obvious importance of the issue.

App. 32a-33a.

Since their enactment, Section 612 and EPA's implementing regulations have provided a reliable and predictable framework for the manufacture of ODS substitutes and equipment that uses them, facilitating the development and introduction of new products that have substantially reduced environmental impacts and improved energy efficiency. Daikin and other manufacturers of ODS substitutes and equipment that uses ODS substitutes depend on a clear and unambiguous statutory and regulatory regime to justify the substantial investments necessary to continue to improve these products and to increase their environmental benefits. And the absence of this regulatory certainty jeopardizes the human health and environmental benefits that would otherwise be achieved.

B. The Majority Decision Creates Confusion in the Regulatory Regime that EPA Carefully Crafted under Section 612 to Reduce Human Health Risks and Improve Environmental Benefits

EPA's regulations that implement Section 612 of the Clean Air Act are contained in 40 C.F.R. Part 82, Subpart G, and are reproduced in their entirety in the Appendix to the Petition for Certiorari of Honeywell International, Inc., *et al.,* at App. 49a-128a. EPA's implementing regulations provide in pertinent part:

> **§ 82.170 Purpose and scope.**
>
> (a) The purpose of these regulations in this subpart is to implement section 612 of the Clean Air Act, regarding the safe alternatives policy on the acceptability of substitutes for ozone-depleting compounds . . . . The objectives of this program are to identify substitutes for ozone-depleting compounds, to evaluate the acceptability of those substitutes, to promote the use of those substitutes believed to present lower overall risks to human health and the environment, relative to the class I and class II compounds being replaced, as well as other substitutes for the same *end-use*, and to prohibit the use of those substitutes found, based on the same comparisons, to increase overall risks.
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> * * *
>
> **§ 82.172 Definitions.**
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> * * *
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> *End-use* means processes or classes of specific applications within major industrial

> sectors where a substitute is used to replace an ozone-depleting substance.
>
> * * *
>
> *Use* means any use of a substitute for a Class I or Class II ozone-depleting compound, including but not limited to use in a manufacturing process or product, in consumption by the end-user, or in intermediate uses, such as formulation or packaging for other subsequent uses.

The decision below deprives the regulatory regime in 40 C.F.R. Part 82, Subpart G of an essential element – EPA's ability to move ODS substitutes from the approved uses list to the prohibited uses list as new substitutes emerge that present fewer human health and environmental risks than the preceding substitutes. As a result of this missing element in the regulatory regime, it becomes difficult to achieve a key regulatory objective stated in 40 C.F.R. § 82.170(a), which is to prohibit uses of substitutes that increase overall risks.

The inability to place ODS substitutes on the prohibited uses list and the resulting ambiguity also hinder the achievement of the overall regulatory purpose of § 82.170(a) to lower overall risks to human health and the environment from ODS and ODS substitutes. Because the decision below prevents EPA from prohibiting the use of ODS substitutes despite the emergence of new, environmentally superior substitutes, the incentive is diminished for Daikin and other companies to invest in the research and development activities necessary to bring new, more energy efficient and environmentally beneficial ODS substances and the products that use them to the

market place. The majority opinion has introduced significant ambiguity to the regulatory regime that exists to implement Section 612.

This ambiguous regulatory posture discourages Daikin, and others, from making continued business investments to develop more energy efficient heating, ventilating and air conditioning technologies based on new ODS substitutes.

II. THE DECISION BELOW DISCOURAGES THE DEVELOPMENT OF NEW ODS SUBSTITUTES

Amicus Daikin endorses the conclusions stated by the petitioners regarding the majority opinion's interpretation of the word "replace" in Section 612 and urges this Court to grant certiorari. Because the Clean Air Act does not define "replace," the term should be given its ordinary meaning. *See Encino Motorcars, LLC v. Navarro*, 584 U.S. at __ (slip op., at 6) (2018), *Taniguchi v. Kan Pacific Saipan, Ltd.*, 556 U.S. 560, 566 (2012). As Circuit Judge Wilkins stated in his dissent below, "the connotation of 'replace' as 'to provide a substitute for' more accurately reflects the intent of Congress given the use of the term and sentence structure in [Section 612]." App. at 33a.

Based on its definition of "replace," the majority opinion stops at step one of the *Chevron* analysis. App. at 16a. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). However, the majority's own definition introduces even more ambiguity in understanding that statute. Daikin agrees with the dissent (App. at 39a) that the appropriate course would have been to apply step two of the *Chevron* analysis of EPA's interpretation of Section 612, and that the appropriate conclusion of

applying the *Chevron* step two analysis is that EPA's interpretation of Section 612 as reflected in its implementing regulations was reasonable and should have been sustained. *Id.* EPA has effectively administered Section 612 throughout the history of the program, and it should be allowed to continue to do so.

The result of the majority decision will be the chaotic end of a decades-old predictable and stable regulatory program that has well-served its statutory purposes of reducing overall risks to human health and the environment. The ongoing clarity and stability of this program are critical for Daikin and others to be able to continue to make the investments and to conduct the research necessary to continue to provide consumers with the environmental benefits of improved energy efficiency and reduced risks to human health.

CONCLUSION

For the foregoing reasons, and for those stated by petitioners, the Court should grant certiorari.

Respectfully submitted,

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