Nos. 17-1703 and 18-2

In the Supreme Court of the United States

HONEYWELL INTERNATIONAL INC., ET AL., PETITIONERS

v.

MEXICHEM FLUOR, INC., ET AL.

NATURAL RESOURCES DEFENSE COUNCIL, PETITIONER

v.

MEXICHEM FLUOR, INC., ET AL.

ON PETITIONS FOR WRITS 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 Section 612 of the Clean Air Act, 42 U.S.C. 7671k, which authorizes the Environmental Protection Agency (EPA) to regulate the replacement of ozone-depleting substances with substitute substances, authorizes EPA to require a person who has already begun using a non-ozone-depleting substitute to switch to a different substance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-46a[1]) is reported at 866 F.3d 451.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2017. Petitions for rehearing were denied on January 26, 2018 (Pet. App. 47a-48a). On March 8, 2018, the Chief Justice extended the time within which to file

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 17-1703.

a petition for a writ of certiorari in No. 17-1703 to and including June 25, 2018, and the petition was filed on that date. On March 16, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari in No. 18-2 to and including June 25, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The stratospheric ozone layer "shields the earth's surface from dangerous ultraviolet (UV-B) radiation." 53 Fed. Reg. 30,566, 30,566 (Aug. 12, 1988). In 1988, the United States ratified the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), *done* Sept. 16, 1987, S. Treaty Doc. No. 10, 100th Cong., 1st Sess. (1987), 1522 U.N.T.S. 3. The central purpose of that international agreement is to phase out the production and consumption of substances that contribute to ozone depletion. See *id.* art. 2, S. Treaty Doc. No. 10, at 2-4, 1522 U.N.T.S. 31-33.

In 1990, Congress amended the Clean Air Act, 42 U.S.C. 7401 *et seq.*, by enacting a new Title VI to implement the Montreal Protocol. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, Tit. VI, § 602(a), 104 Stat. 2648-2670 (42 U.S.C. 7671 *et seq.*). Title VI sets limits on the production and consumption of ozone-depleting substances, 42 U.S.C. 7671c, 7671d, such as chlorofluorocarbons and hydrochlorofluorocarbons, 42 U.S.C. 7671a(a) and (b). The statute provides for those limits to be lowered over time, 42 U.S.C. 7671c, 7671d, causing those substances to be "phas[ed] out," 42 U.S.C. 7671c(c), 7671d(c).

Section 612 of the Clean Air Act, 42 U.S.C. 7671k, regulates the replacement of ozone-depleting substances as their use decreases. Section 612(a) provides: "To the

maximum extent practicable, [ozone-depleting] substances shall be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment." 42 U.S.C. 7671k(a). Section 612(c) authorizes the Environmental Protection Agency (EPA) to prohibit the use of a particular substance as a "replace[ment]" if EPA determines that the substance "may present adverse effects to human health or the environment" and identifies an "alternative" that "(1) reduces the overall risk to human health and the environment; and (2) is currently or potentially available." 42 U.S.C. 7671k(c). Under Section 612(c), EPA must publish a list of "substitutes prohibited * * * for specific uses," along with a list of "safe alternatives." *Ibid.* "Any person may petition" EPA to "add" a substance to, or "remove" a substance from, either of those lists. 42 U.S.C. 7671k(d).

2. In 1994, EPA promulgated a rule for "evaluating and regulating substitutes for ozone-depleting chemicals being phased out" under Title VI. 59 Fed. Reg. 13,044, 13,044 (Mar. 18, 1994) (1994 Rule). That rule included EPA's "first set of determinations" as to the "acceptability" of particular substitutes under Section 612(c). *Id.* at 13,047. In making those determinations, EPA observed that "Section 612 requires that substitutes be evaluated by use." *Id.* at 13,046; see 42 U.S.C. 7671k(c). EPA therefore arranged its "lists of unacceptable and acceptable substitutes" according to specific "end use[s]" within various "industrial sectors." 59 Fed. Reg. at 13,067-13,068. For example, EPA listed Hydrocarbon Blend A as an unacceptable substitute when used as a refrigerant in retrofitted "centrifugal chillers," a type of air-conditioning system. *Id.* at 13,128; see *id.* at 13,070, 13,082, 13,152. EPA thus prohibited any "person" from

"us[ing]" Hydrocarbon Blend A in that manner after the effective date of the 1994 Rule. 40 C.F.R. 82.174(d); see 59 Fed. Reg. at 13,057.

By contrast, EPA listed various hydrofluorocarbons (HFCs) as acceptable substitutes for ozone-depleting substances when used as refrigerants, foam-blowing agents, cleaning solvents, fire-suppression agents, and aerosol propellants. 59 Fed. Reg. at 13,071-13,072, 13,083, 13,091-13,092, 13,100, 13,113-13,114. EPA determined, for instance, that unlike Hydrocarbon Blend A, an HFC called HFC-134a was "acceptable as a substitute * * * in retrofitted centrifugal chillers." *Id.* at 13,074; see *id.* at 13,122. EPA explained that, although "rapid expansion of the use of some HFCs could contribute to global warming," HFCs "do not contribute to destruction of stratospheric ozone" and thus provided "a near-term option for moving away from [ozone-depleting substances]." *Id.* at 13,071-13,072.

In issuing the 1994 Rule, EPA addressed public comments expressing concern that EPA might "remov[e] substitutes previously deemed acceptable as newer and more environmentally benign substitutes are developed." 59 Fed. Reg. at 13,048. EPA responded that it understood Congress to "have intended to cover future use of existing substitutes." *Ibid.* EPA stated that ozone-depleting substances "are 'replaced' within the meaning of section 612(c) each time a substitute is used, so that once EPA identifies an unacceptable substitute, any future use of such substitute is prohibited." *Ibid.* EPA also addressed "whether there exists a point at which an alternative should no longer be considered" a "substitute" for an ozone-depleting substance under Section 612. *Id.* at 13,052. EPA responded that, "as long as [ozone-depleting] chemicals are being used, any

substitute designed to replace these chemicals is subject to review under section 612." *Ibid.*

In subsequent notices, EPA approved HFCs as substitutes for ozone-depleting substances in additional contexts. See, *e.g.,* 74 Fed. Reg. 50,129, 50,135-50,137 (Sept. 30, 2009); 61 Fed. Reg. 4736, 4740-4742 (Feb. 8, 1996).

3. In 2013, President Obama issued his Climate Action Plan, a policy document focused on "slow[ing] the effects of climate change." Exec. Office of the President, *The President's Climate Action Plan* 5 (June 2013), https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf. The Climate Action Plan identified HFCs as "potent greenhouse gases" and announced that EPA "will use its authority" under Section 612(c) to reduce HFC emissions. *Id.* at 10.

In 2015, EPA issued a rule "consistent with" the Climate Action Plan. 80 Fed. Reg. 42,870, 42,880 (July 20, 2015) (2015 Rule). The agency explained that it had reviewed its lists of acceptable and unacceptable substitutes under Section 612(c) with a focus on "those listed substitutes that have a high [global warming potential] relative to other alternatives." *Id.* at 42,871. Following that review, EPA had determined that HFCs pose a greater "overall risk to human health and the environment" than other alternatives that are "available or potentially available." *Ibid.* The 2015 Rule thus changed the listing of various HFCs from acceptable to unacceptable in certain "end-uses." *Ibid.*; see *id.* at 42,872-42,873.

In promulgating the 2015 Rule, EPA addressed concerns that the rule "would require users that have already 'replaced' [an ozone-depleting substance] with [an HFC] to make a second replacement, and that EPA lacks authority to require this second replacement." 80 Fed. Reg. at 42,936. EPA responded that it did not

"view the replacement of a[n] [ozone-depleting substance] with a substitute (*e.g.*, HFC-134a) as limited to the first time a product manufacturer uses the substitute." *Ibid.* Rather, EPA reiterated that it had "interpreted the term 'replace' to apply 'each time a substitute is used.'" *Ibid.* (citation omitted). EPA thus took the view that "the fact that HFC-134a is already in use as a replacement for [an ozone-depleting substance] does not mean that its future use is any less of a replacement." *Id.* at 42,937. On that understanding of the term "replace," EPA maintained that the 2015 Rule "addresse[d] only substances that are direct replacements for [ozone-depleting substances]." *Ibid.*

4. Mexichem Fluor, Inc., and Arkema Inc., makers of HFCs, petitioned for review of the 2015 Rule. Pet. App. 9a; see 17-1703 Pet. ii; 18-2 Pet. ii. They argued, *inter alia*, that Section 612 does not authorize EPA "to require manufacturers to replace HFCs, which are non-ozone-depleting substances, with alternative substances." Pet. App. 9a. Honeywell International Inc., Chemours Company FC, LLC, and the Natural Resources Defense Council (petitioners in this Court) intervened in support of the 2015 Rule. 17-1703 Pet. ii; 18-2 Pet. ii.

a. The court of appeals granted the petitions in part and denied them in part. Pet. App. 1a-26a.

The court of appeals held that "Section 612 does not require (or give EPA authority to require) manufacturers to replace non-ozone-depleting substances such as HFCs." Pet. App. 3a. The court observed that "Section 612(c) makes it unlawful to 'replace' an ozone-depleting substance that is covered under Title VI with a substitute substance that is on the list of prohibited substitutes." *Id.* at 13a (quoting 42 U.S.C. 7671k(c)). "In common parlance," the court explained, "the word 'replace'

refers to a new thing taking the place of the old." *Id.* at 14a. Based on that "ordinary meaning" of the word, the court rejected EPA's view that "a manufacturer continues to 'replace' the ozone-depleting substance every time the manufacturer uses the substitute substance, indefinitely into the future." *Ibid.* Rather, the court concluded, "manufacturers 'replace' an ozone-depleting substance when they transition to making the same product with a substitute substance." *Ibid.* "After that transition," the court stated, "the replacement has been effectuated," and "there is no ozone-depleting substance to 'replace.'" *Ibid.*

The court of appeals therefore concluded that EPA lacks "authority under Section 612(c) to prohibit manufacturers from making products that contain HFCs if those manufacturers already replaced ozone-depleting substances with HFCs at a time when HFCs were listed as safe substitutes." Pet. App. 12a (emphasis omitted). The court found that EPA's contrary view "fail[ed] at *Chevron* step 1" and, in the alternative, was "unreasonable" at "*Chevron* step 2." *Id.* at 16a (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 & n.9 (1984)). The court accordingly "vacate[d] the 2015 Rule to the extent it requires manufacturers to replace HFCs with a substitute substance," and it remanded to EPA for further proceedings. *Id.* at 26a.[2]

The court of appeals separately addressed "whether EPA reasonably removed HFCs from the list of safe

[2] The court of appeals viewed the 2015 Rule as representing a "new interpretation of Section 612(c)," under which EPA could "order the replacement of a non-ozone-depleting substitute that had previously been deemed acceptable." Pet. App. 13a. On that view, the petitions for review in the court of appeals were timely. 42 U.S.C. 7607(b)(1).

substitutes in the first place." Pet. App. 22a. The court determined that "EPA's decision to remove HFCs from the list of safe substitutes" was not "arbitrary" or "capricious." *Ibid.* The court therefore concluded that EPA may "prohibit any manufacturers that still use ozone-depleting substances that are covered under Title VI from deciding in the future to replace those substances with HFCs." *Id.* at 16a.

b. Judge Wilkins concurred in part and dissented in part. Pet. App. 27a-46a. He disagreed with the court of appeals' conclusion that Section 612 "unambiguously prohibits EPA from requiring the replacement of HFCs." *Id.* at 27a. Judge Wilkins concluded that "'replacing' [an ozone-depleting] substance is not necessarily a one-time event," *id.* at 33a, and that a substance may be "'replaced' by any number of substitutes over the course of years," *id.* at 31a. Finding "the word 'replace' sufficiently ambiguous to require a *Chevron* step two analysis," Judge Wilkins would have upheld EPA's interpretation of Section 612 as "reasonable." *Id.* at 46a.

c. Petitioners sought rehearing en banc. The court of appeals denied their petitions. Pet. App. 47a-48a.

5. While this case was pending in the court of appeals, President Trump issued an Executive Order revoking the Climate Action Plan and directing federal agencies to "suspend, revise, or rescind" actions arising from that plan "as appropriate and consistent with law." Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017). After the court issued its mandate, EPA published a notice in the Federal Register announcing its intention to conduct a new rulemaking in light of the court's decision. 83 Fed. Reg. 18,431, 18,431 (Apr. 27, 2018). EPA noted the court's determination

that the agency "did not have authority to 'require manufacturers to replace HFCs with a substitute substance.'" *Id.* at 18,433 (citation omitted). EPA observed, however, that neither its 1994 Rule nor its 2015 Rule had distinguished "between someone using an HFC and someone using an [ozone-depleting substance]." *Id.* at 18,434. EPA explained that a new rulemaking therefore would be necessary for the agency to consider, *inter alia*, whether "to establish distinctions between users still using [ozone-depleting substances] and those who have already replaced [ozone-depleting substances]," *id.* at 18,435, and whether to "clarify when the replacement of an [ozone-depleting substance] occurs," *id.* at 18,436. EPA announced that, until it completes such a rulemaking, it "will not apply the HFC listings in the 2015 Rule." *Id.* at 18,432.

ARGUMENT

Petitioners challenge the court of appeals' determination that EPA lacks "authority under Section 612(c) to prohibit manufacturers from making products that contain HFCs if those manufacturers already replaced ozone-depleting substances with HFCs at a time when HFCs were listed as safe substitutes." Pet. App. 12a (emphasis omitted); see 17-1703 Pet. 31-36; 18-2 Pet. 23-32. That challenge does not warrant this Court's review. Although EPA argued below that it had "authority to require manufacturers to stop using HFCs and to use a different substitute," Pet. App. 14a, EPA has revisited the issue in light of the court of appeals' ruling. The agency now believes that the decision below reflects the better understanding of Section 612(c).

Given EPA's current position, the question presented is of limited prospective importance. Granting review to consider an interpretation of EPA's authority

that EPA itself no longer supports would serve little or no purpose. Petitioners do not contend that the court of appeals departed from the proper interpretive framework or failed to adhere to principles adopted by other circuits. Rather, petitioners challenge only the court's application of established administrative-law principles to the particular statutory provision at issue in this case. Some of petitioners' concerns, moreover, may be addressed in an upcoming EPA rulemaking. This Court's review therefore is unwarranted.

1. In the court of appeals, EPA argued that Section 612(c) authorizes it "to require manufacturers to stop using HFCs and to use a different substitute," on the theory that manufacturers "'replace' ozone-depleting substances with HFCs every time they use HFCs in their products." Pet. App. 14a; see EPA C.A. Br. 20-21 & n.8, 31-32. EPA has reexamined the issue in light of the decision below, however, and is now of the view that the court's decision reflects the better understanding of Section 612(c).

Section 612(c) authorizes EPA to make it "unlawful to replace" an "[ozone-depleting] substance" with a substitute on EPA's list of "prohibited" substitutes. 42 U.S.C. 7671k(c). As the court of appeals explained, the word "'replace'" is most naturally understood to refer to "a new thing taking the place of the old." Pet. App. 14a. Just as President Obama "replaced" President Bush on "January 20, 2009, at 12 p.m.," "manufacturers 'replace' an ozone-depleting substance" "at a specific moment in time": "when they transition to making the same product with a substitute substance." *Ibid.* Thus, Section 612(c) is better understood to mean that, once a particular manufacturer transitions to using HFCs, "there is

no ozone-depleting substance to 'replace.'" *Ibid.* To require a manufacturer to stop using HFCs after that point would have the practical effect of requiring it to replace a *non*-ozone-depleting substance. Section 612 does not authorize EPA to impose that requirement.

Petitioners contend that the court of appeals' decision "dramatically curtails" EPA's authority under Section 612. 17-1703 Pet. 17; see 18-2 Pet. 20 (arguing that the decision below "renders Section 612 toothless"). But the court of appeals held only that EPA may not prohibit the use of HFCs by those particular persons who had "already replaced ozone-depleting substances with HFCs at a time when HFCs were listed as safe substitutes." Pet. App. 12a (emphasis omitted). EPA may still "move HFCs from the list of safe substitutes to the list of prohibited substitutes, as it did in the 2015 Rule." *Ibid.*; see *id.* at 22a-25a (determining that EPA's decision to do so was not arbitrary or capricious). Having made that change, the agency may "bar any manufacturers that still make products that contain ozone-depleting substances from replacing those ozone-depleting substances with HFCs." *Id.* at 12a (emphasis omitted). And it may "require product manufacturers to replace substitutes that (unlike HFCs) are themselves ozone depleting." *Id.* at 17a.

Petitioners also contend that the court of appeals' decision has caused so much "chaos" that EPA has "given up on carrying out the regulatory scheme." 17-1703 Pet. 16. That contention is incorrect. EPA plans to implement the court's interpretation of Section 612 through a new rulemaking, and it has decided not to "apply the HFC listings in the 2015 Rule" only "in the near-term," pending the completion of that process. 83 Fed. Reg. at 18,431. To be sure, "regulated entities"

have expressed "confusion and uncertainty" regarding the meaning of the court's decision. *Id.* at 18,434. But EPA's notice in the Federal Register dispelled the immediate confusion, and the purpose of the upcoming rulemaking is to resolve the remaining uncertainty. *Id.* at 18,435-18,436.

2. The limited prospective importance of the question presented underscores the absence of any need for this Court's review. EPA now believes that the court of appeals' decision reflects the better understanding of the statute. Given that position, there is no sound reason for this Court to determine whether EPA's *prior* interpretation of the statute was sustainable. Indeed, the dissenting judge below, who would have sustained EPA's prior interpretation as "reasonable" under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), did not suggest that EPA was *required* to adopt that approach. Pet. App. 27a, 46a (Wilkins, J., concurring in part and dissenting in part).

The question presented in this case involves the interpretation of a single statutory provision. Petitioners do not contend that the court of appeals applied the wrong interpretive framework, misunderstood the administrative-law principles articulated in *Chevron* and subsequent cases, or departed from canons of statutory construction that other circuits have followed. Rather, petitioners contend only that, in applying established legal principles to the interpretive problem posed by this case, the court misread Section 612(c). See 17-1703 Pet. 31-36; 18-2 Pet. 23-32. That argument does not implicate any issue of general importance warranting this Court's review.

In any event, the upcoming rulemaking may resolve, or at least narrow, some of petitioners' concerns about

the court of appeals' interpretation of Section 612(c). If petitioners are dissatisfied with the outcome of that rulemaking, they may seek judicial review at that juncture. The reviewing court would then have the benefit of EPA's consideration of whatever "larger implications" of the decision below there may be. 83 Fed. Reg. at 18,435.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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