No. 17-____

IN THE

Supreme Court of the United States

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress enacted Title VI of the Clean Air Act to phase out the production of chemicals that destroy the stratospheric ozone layer and to ensure the safety of the substitutes developed to replace them in millions of products, from air conditioners to aerosol sprays. Section 612, titled "Safe Alternatives Policy," serves the latter objective, directing that "[t]o the maximum extent practicable" ozone-depleting substances "shall be replaced" by substitutes "that reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). Section 612 makes it unlawful to replace an ozone-depleting substance with a dangerous substitute where EPA has determined that a safer alternative is available, and directs EPA to establish and update lists of substitutes that are safe or prohibited for specific uses. *Id*. § 7671k(c), (d).

For more than two decades EPA interpreted Section 612 to bar *anyone* from using a dangerous substitute in applications listed as prohibited. In the decision below, however, a divided D.C. Circuit panel decided that EPA's authority ends once product manufacturers adopt substitutes that do not deplete ozone. Under the ruling, no matter how toxic, flammable, or environmentally harmful those substitutes may be, and no matter how much safer the available alternatives, such manufacturers are immune from further regulation under Section 612.

The question presented is:

Whether EPA has authority under Section 612 to prohibit use of dangerous but non-ozone-depleting substitutes by any person, including by product manufacturers who began using such substitutes before EPA placed them on the prohibited list?

PARTIES TO THE PROCEEDINGS

Petitioner Natural Resources Defense Council was an intervenor in support of EPA in the court of appeals. Additional respondent-intervenors in support of EPA were Honeywell International, Inc., and the Chemours Company FC, LLC.

EPA was respondent in the court of appeals.

Petitioners below, who are respondents here, are Mexichem Fluor, Inc. ("Mexichem"), and Arkema Inc. ("Arkema").

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Natural Resources Defense Council has no parent company and has issued no publicly held stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is reported at 866 F.3d 451. The opinion may be found in the Appendix to the Petition for Certiorari of Honeywell International, Inc., et al., filed June 25, 2018 (hereinafter "App.") at 1a.

JURISDICTION

The D.C. Circuit's judgment was entered on August 8, 2017. That court denied petitions for rehearing on January 26, 2018. App. 47a. On March 16, 2018, Chief Justice Roberts extended the time for filing a petition for certiorari until June 25, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS

A. Statutes

Section 612 of the Clean Air Act, 42 U.S.C. § 7671k, titled "Safe Alternatives Policy," states in relevant part:

> (a) Policy
>
> To the maximum extent practicable, class I and class II substances [i.e., ozone-depleting substances] 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 [ozone-depleting]

> 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 substitutes prohibited under this subsection for specific uses and (B) the safe alternatives identified under this subsection for specific uses.
>
> (d) Right to petition
>
> Any person may petition the Administrator to add a substance to the lists under subsection (c) of this section or to remove a substance from either of such lists. The Administrator shall grant or deny the petition within 90 days after receipt of any such petition. If the Administrator denies the petition, the Administrator shall publish an explanation of why the petition was denied. If the Administrator grants such petition the Administrator shall publish such revised list within 6 months thereafter. . . .

B. Regulations

The Environmental Protection Agency ("EPA") promulgated the regulations required by Section 612(c) in 1994 at 40 C.F.R. Part 82. 59 Fed. Reg. 13,044 (Mar. 18, 1994). Excerpts of the regulatory text are reprinted at App. 49a-72a.

EPA promulgated the final rule challenged in this case in 2015. 80 Fed. Reg. 42,870 (July 20, 2015). Excerpts of the rule are reprinted at App. 73a-128a.

INTRODUCTION

The divided ruling below cuts the heart out of Section 612 of the Clean Air Act, the provision that Congress enacted in 1990 to ensure the safety of chemicals that substitute for ozone-depleting substances in millions of air conditioners, refrigerators, aerosol cans, insulating foams, and other products. Congress sought to ensure that industry did not respond to the dangers of ozone depletion by jumping from the frying pan into the fire – by adopting substitutes for ozone-depleting substances that create new and avoidable health or environmental risks, possibly even greater than those posed by the original chemicals.

To this end, Section 612 establishes the policy of replacing ozone-depleting substances "[t]o the maximum extent practicable" with substitutes and alternatives that "reduce overall risk to human health and the environment." 42 U.S.C. § 7671k(a). Section 612 directs EPA to make it "unlawful to replace" an ozone-depleting substance with a substitute that is dangerous to human health or the environment where there is a lower-risk alternative. *Id.* § 7671k(c). The statute also directs EPA to establish and keep up-to-date a list of substitutes that are prohibited for specific uses, and a list of safe alternatives. *Id.* § 7671k(c), (d).

Since it was established in 1994, EPA's safe alternatives program under Section 612 has effectively protected millions of consumers from dangerous substitutes, and efficiently guided multi-billion-dollar investments by hundreds of companies to develop safer substitutes and products. The majority's ruling,

however, gravely misreads Section 612 to leave both the public protections and the business incentives of the safe alternatives program in tatters.

From the program's outset in 1994, EPA has interpreted Section 612(c) to bar *anyone* from utilizing a dangerous substitute in a use the agency has listed as prohibited. Updating the safe and prohibited lists more than 20 times since then, EPA has prohibited the use of both ozone-depleting and non-ozone-depleting substitutes in dozens of applications because those substitutes are toxic, flammable, damaging to the climate, or otherwise environmentally dangerous, and because safer alternatives are available. The 2015 rule at issue in this case, prohibiting certain uses of the potent greenhouse gases called hydrofluorocarbons ("HFCs"), was just the latest such action.

The majority ruling, however, opens a gaping loophole in the safe alternatives program by redefining the meaning of "replac[ing]" an ozone-depleting substance. Under the ruling, once a product manufacturer adopts a substitute that does not deplete ozone, the company is grandfathered from further regulation under Section 612, and it may continue using the substitute in perpetuity regardless of any subsequent prohibition by EPA. In one swoop, the majority ruling deprived Section 612 of almost all force and effect. *See* App. 22a.[1] A ruling this consequential for both health and environmental protection and industrial innovation requires this Court's review.

The majority ruling guts not only the HFC rule; it rewrites the fundamentals of Section 612 so that it will

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[1] Appendix citations are to the Appendix to the Petition for Certiorari of Honeywell International, Inc., et al., filed June 25, 2018.

never again be effective at protecting the public or promoting innovation. The ruling relegates EPA to the role of neighborhood scold – it can tell companies that certain substitutes are bad for human health and the environment, but (except for a few remaining early substitutes that themselves deplete ozone) the agency is powerless to stop companies that already use dangerous substitutes from continuing to do so.

As a result, the decision leaves millions of Americans at risk from toxic, flammable, climate-changing, or otherwise harmful chemicals in products they use every day. And it destroys the incentives that innovative businesses relied on to invest billions of dollars in bringing safer alternatives to market. The decision protects only two chemical companies whose business plans depend on continuing to sell old and dangerous chemicals.

As Judge Wilkins explained in dissent, this dangerous result has no basis in the statutory text, contradicts the statute's structure, and "makes a mockery" of Section 612's express purpose of replacing ozone-depleting substances with substitutes that reduce overall health and environmental risks to the maximum practicable extent. App. 34a. The majority opinion creates irrational distinctions and perverse consequences that Congress could not have intended – including allowing companies to *reintroduce* unsafe chemicals that have been prohibited since 1994, provided that those companies are not switching directly from an ozone-depleting substance.

Supreme Court review is the only means of preserving Section 612's vital health and environmental safety program. Because the Clean Air Act assigns exclusive jurisdiction to the D.C. Circuit, the statutory authority question in this case can never come before

another circuit or arise in a future case. For this reason, the Court regularly reviews divided D.C. Circuit decisions that undermine important Clean Air Act programs. *See e.g., EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014). The Court should grant certiorari to correct the panel majority's erroneous decision and prevent Section 612 from becoming a dead letter.

STATEMENT OF THE CASE

A. The Safe Alternatives Program

1. Clean Air Act Section 612

In 1990, Congress enacted Title VI of the Clean Air Act, 42 U.S.C. §§ 7671–7671q, to implement and go beyond the requirements of the Montreal Protocol on Substances that Deplete the Ozone Layer.[2] Title VI phases out the production of ozone-depleting substances (called "class I and class II substances") more rapidly than required by the Protocol. And to make sure that the transition from ozone-depleting substances does not lead to other, possibly even worse, health or environmental problems, Congress adopted Section 612, titled "Safe Alternatives Policy," to regulate the safety of the substitutes and alternatives for ozone-depleting substances. 42 U.S.C. § 7671k.

The express purpose of Section 612 is to assure "[t]o the maximum extent practicable" that substitutes for ozone-depleting substances "reduce overall risks to human health and the environment." *Id*. § 7671k(a). As stated in a summary of the conference committee agreement: "[T]he [EPA] Administrator shall base risk

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[2] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29.

estimates on the total environmental risk (toxicity, flammability, atmospheric, etc.) that is perceived to exist, not just the risk as it relates to ozone depletion."[3]

Section 612(c) directs EPA to promulgate rules making it unlawful for anyone "to replace" an ozone-depleting substance with a substitute that EPA has found to adversely affect human health or the environment, where the agency has identified an available alternative that "reduces the overall risk to human health and the environment." *Id.* § 7671k(c). The same subsection directs EPA to publish lists of "(A) the substitutes prohibited under this subsection for specific uses and (B) the safe alternatives identified under this subsection for specific uses." *Id.* Underscoring the intent that these lists are intended to evolve with new information on risks and alternatives, Section 612(d) provides a right to petition EPA to add or remove substances from the safe and prohibited lists, and it requires the agency to quickly respond to such petitions. *Id.* § 7671k(d).

2. The 1994 Regulations

EPA issued regulations in 1994 establishing a comprehensive safe alternatives program to implement Section 612. 59 Fed. Reg. 13,044 (Mar. 18, 1994) (hereinafter "1994 rule"). The regulations state the program's objectives: "to promote the use of those substitutes believed to present lower overall risks to human health and the environment relative to the [ozone-depleting] compounds being replaced, as well as to other substitutes for the same end-use, *and to prohibit the use of those substitutes found, based on the*

[3] 136 Cong. Rec. H12908 (Oct. 26, 1990), *reprinted in* 1 A LEG. HIST. OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1428 (1993).

same comparisons, to increase overall risks." 40 C.F.R. § 82.170(a) (emphasis added).

The 1994 rule established the initial lists of prohibited and safe substitutes required under Section 612(c). The rule designated various substitutes as "acceptable" (safe) for dozens of uses (sometimes with use conditions or limitations). *See* 40 C.F.R. § 82.180; 59 Fed. Reg. at 13,122–46 (initial lists). The rule also listed various substitutes as "unacceptable" (prohibited) for particular uses in light of their high risks and the availability of safer alternatives. *Id*.

EPA made these acceptable and unacceptable listing decisions through a seven-factor comparative risk analysis that includes consideration of atmospheric effects and health and environmental impacts, toxicity, flammability, occupational and consumer risks, ecosystem risks, and the availability of other substitutes. 40 C.F.R. § 82.180(a)(7). From the outset, EPA considered a substitute's contribution to climate change as one factor in listing decisions, using an index called "global warming potential" ("GWP"), which measures a chemical's heat-trapping potency relative to carbon dioxide. *Id.* § 82.178(6); *see* 59 Fed. Reg. at 13,055.

Evaluating HFCs, EPA noted in the 1994 rule that they are not ozone-depleting, but they are potent greenhouse gases, with thousands of times the heat-trapping power of carbon dioxide. As a result, "rapid expansion of the use of some HFCs could contribute to global warming." 59 Fed. Reg. at 13,071. At the time, however, the agency concluded that HFCs posed "lower overall risk than continued use of" chlorofluorocarbons ("CFCs"), which both deplete ozone and have even higher GWPs than HFCs. *Id*. Based on this comparison, EPA determined that, absent available lower-risk alternatives, HFCs could serve as a "near-term option

for moving away from CFCs." *Id.* at 13,071–72. Accordingly, the agency listed HFCs as acceptable substitutes for certain end-uses of CFCs. *See id.* at 13,074–13,081 (refrigeration and air conditioning), 13,085–89 (foams), 13,116 (aerosols). At the same time, however, EPA made clear that these initial acceptable listings could be revised in the future based on new health or environmental risk information or the emergence of safer alternatives. *Id.* at 13,047.

Some commenters in that rulemaking – including the corporate predecessor of Arkema, one of the petitioners below – argued that a substitute's "acceptable" status could never be revoked, and a person using that substitute could never be required to change. Unless the substitute itself depletes ozone, they argued, EPA lacked authority to require someone to replace it, even if a safer alternative were to become available after the initial listing. *See, e.g.*, Elf Atochem (now Arkema), Comments on the Proposed Significant New Alternatives Policy Program at 1, EPA Air Docket No. A-91-42-IV-D-30 (June 18, 1993) ("Once a substance has been approved and is in use in a particular application, the Agency's authority ceases."). In the alternative, the company asked EPA to guarantee that the "acceptable" listings would last for 10 years, a period the company said "will allow for an appropriate return on investment." *Id.*

EPA expressly rejected the argument that "replacing" ozone-depleting chemicals happens only once and that companies that begin using non-ozone-depleting substitutes are exempt from any further regulation. The 1994 rule stated: "EPA believes 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." 59 Fed. Reg. at 13,048. The agency continued:

> Under any other interpretation, EPA could never effectively prohibit the use of any substitute, as some user could always start to use it prior to EPA's completion of the rulemaking required to list it as unacceptable. EPA believes Congress could not have intended such a result, and must therefore have intended to cover future use of existing substitutes.

Id.

Accordingly, EPA affirmed its authority to change listings based on new risk information or the emergence of safer alternatives: "[T]he Agency may revise these [listing] decisions in the future as it reviews additional substitutes and receives more data on substitutes already covered by the program." *Id.* at 13,047. The agency promised to take such actions through rulemaking: "[O]nce a substitute has been placed on either the acceptable or the unacceptable list, EPA will conduct notice-and-comment rulemaking to subsequently remove a substitute from either list." *Id*.

The regulations codified this understanding. Implementing Section 612(d), the rules provide for petitions "to delete a substitute from the acceptable list and add it to the unacceptable list." 40 C.F.R. § 82.184(b)(3). And they provide that "[n]o person may use a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes." *Id.* § 82.174(d).

Nothing in the 1994 regulatory language, preamble, or listing decisions distinguishes between an entity that is still using an ozone-depleting substance and an entity that has already switched to a non-depleting substitute. If EPA changes the status of a substitute from acceptable to unacceptable, then 40 C.F.R. § 82.174(d) specifies that "no person" may use it, regardless what that person is currently using.

The industry commenters petitioned for review of the 1994 rule through their trade association, specifically raising the issue of "grandfathering in the event of a change in . . . listing." *See Alliance for Responsible CFC Policy, Inc. v. EPA*, No. 94-1396 (D.C. Cir. filed June 16, 1994); *see also* Joint Status Report at 3, *Alliance*, No. 94-1396 (D.C. Cir. Sept. 24, 1997) (listing issues). The association dropped the case, however, obtaining no relief. *See* Order, *Alliance*, No. 94-1396 (D.C. Cir. Feb. 5, 2002), ECF No. 656132 (terminating case).

3. Listing Decisions Since 1994

In succeeding years, EPA implemented the safe alternatives policy as established in 1994. The agency regularly added newly-developed substitutes to the acceptable list. It also added existing substitutes to the unacceptable list based on new information revealing serious health and environmental risks and the availability of alternatives.

For example, in 1996 the agency prohibited continued use of sulfur hexafluoride ("SF_6") as a substitute propellant in aerosol products, because that chemical has a global warming potential 24,900 times that of carbon dioxide, and because safer alternative propellants were available. 61 Fed. Reg. 54,030, 54,038 (Oct. 16, 1996).

And in 1999 EPA banned use of hexafluoropropylene ("HFP") as a substitute refrigerant because it was shown to cause kidney damage in exposed workers. 64 Fed. Reg. 3,865 (Jan. 26, 1999).

Both of these substitutes were highly dangerous, yet neither one depletes the ozone layer. In both cases, the bans applied to all parties. They precluded new users, of course. But far more importantly, they required persons who were already using these chemicals to stop doing so.

B. 2015 Regulation of HFCs

As noted above, Mexichem and Arkema were put on notice in 1994 that because HFCs are potent greenhouse gases with thousands of times the global warming potential (GWP) of carbon dioxide, EPA had approved them as a "near-term option," and reserved the right to revise this classification if new data showed greater risks or if safer substitutes emerged. 59 Fed. Reg. at 13,071, 13,107.

Both of those conditions came to pass over the next two decades. In 2009, EPA determined that HFCs and five other greenhouse gases endanger public health and the environment by contributing to climate change that is, among other things, intensifying deadly heatwaves, droughts, extreme storms, rising seas, and the spread of disease. 74 Fed. Reg. 66,496, 66,497–98 (Dec. 15, 2009). The D.C. Circuit upheld the endangerment finding in 2012. *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), *rev'd in part on other grounds, Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

Over this same period industry developed and EPA approved numerous new acceptable substitutes for many end-uses that formerly used ozone-depleting

substances and now use HFCs. For example, chemical producers had developed hydrofluoroolefins ("HFOs") with much less heat-trapping power than HFCs. One such substance, HFO-1234yf, an alternative suitable for car air conditioners, is approximately 1,300 times less potent than HFC-134a, one of the substitutes that EPA approved in 1994 as a "near term option" for ozone-depleting CFCs. In 2011, EPA listed HFO-1234yf as an acceptable substitute for CFCs in car air conditioning. 76 Fed. Reg. 17,488 (Mar. 29, 2011).

In 2010 and 2012, the Natural Resources Defense Council and other organizations petitioned EPA under Section 612(d) to remove various uses of HFCs from the list of acceptable alternatives, citing new evidence of danger and the advent of safer substitutes.[4] Scientific evidence continued to mount, as researchers reported in 2013 that unrestrained HFC growth could add significantly to global average temperatures in this century, seriously amplifying the dangers of climate change.[5]

In 2015, after notice and comment, EPA added HFCs to the unacceptable list for specific uses, including aerosol propellants, motor vehicle air conditioners, various supermarket cooling systems, vending machines,

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[4] *See* Letter from David. D. Doniger, NRDC, to Lisa P. Jackson, Administrator, EPA (May 7, 2010), https://www.nrdc.org/sites/default/files/air_10050701a.pdf; Letter from David. D. Doniger, NRDC, to Lisa P. Jackson, Administrator, EPA (Apr. 27, 2012), https://www.nrdc.org/sites/default/files/glo_1204 2701a.pdf.

[5] Y. Xu et al., *The Role of HFCs in Mitigating 21st Century Climate Change,* 13 Atmos. Chem. Phys. 6083, 6087 (2013), *available at* https://doi.org/10.5194/acp-13-6083-2013.

and some insulating foams. 80 Fed. Reg. 42,870 (July 20, 2015).

In the final rule, EPA observed that "HFC emissions are projected to increase substantially and at an increasing rate over the next several decades if left unregulated." *Id*. at 42,879. HFC emissions in the United States are increasing "more quickly than those of any other [greenhouse gases], and globally they are increasing 10-15% annually," driven in part by the rapid growth of air conditioning. *Id*. EPA projected that HFC emissions would "double by 2020 and triple by 2030." *Id*. Once in the air, HFCs "rapidly accumulat[e] in the atmosphere." *Id*. Atmospheric concentrations of specific HFCs were rising by 10-16 percent per year. *Id*. EPA found that if this growth were unchecked, the contribution to global warming from HFC emissions in 2050 could reach 27 to 69 percent of the warming from that year's carbon dioxide emissions. *Id*.

In comments on the proposal, Arkema repeated arguments that had been raised and resolved against it in the 1994 rule, including the contention that "replace" is a one-time-only event. 80 Fed. Reg. at 42,936–37. EPA responded by tracing how the agency had resolved those issues in 1994. *See id*. The agency did not reopen those issues. Rather, it made clear that it was applying the decision-making criteria established in the 1994 rule to an expanded body of information on risks and substitutes:

> It has now been over twenty years since the initial [safe alternatives] rule was promulgated. In that period, the menu of available alternatives has expanded greatly and now includes many substitutes with diverse characteristics and varying effects on human health and the environment. . . . In addition to an

> expanding menu of substitutes, developments over the past 20 years have improved our understanding of global environmental issues. . . . GWPs and climate effects are not new elements in our evaluation framework, but . . . the amount and quality of information has expanded.

Id. at 42,878. The 2015 rule set effective dates for each end-use that allowed reasonable transition times for terminating the use of HFCs. *See, e.g.*, *id.* at 42,883–84 (aerosols), 42,892–96 (motor vehicle air conditioning), 42,905–06 (retail food refrigeration). Overall, those deadlines afforded HFC producers and users more than twice the 10-year span that Elf Atochem (now Arkema) said in 1994 would allow industry to recoup its investments. *See supra* p. 9.

Mexichem and Arkema filed petitions for review of the 2015 rule invoking the D.C. Circuit's jurisdiction under Section 307(b)(1) of the Act, 42 U.S.C. § 7607(b)(1).[6]

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[6] In 2016, the parties to the Montreal Protocol adopted an amendment to phase down production of HFCs. Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer, Oct. 15, 2016, U.N.T.C. XXVII.2.f. The current administration stated in 2017 that it has initiated the process to consider ratification of the amendment by the United States. *See* Remarks at the 29th Meeting of the Parties to the Montreal Protocol by Judith G. Garber, Principal Deputy Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs (Nov. 23, 2017), https://www.state.gov/e/oes/rls/remarks/2017/275874.htm. EPA's authority to prohibit specific uses of HFCs, however, is rooted in domestic law – Section 612 of the Clean Air Act – and is entirely independent of the amendment.

C. The Decision Below

On August 8, 2017, a divided panel of the D.C. Circuit issued a decision that eviscerates Section 612 and leaves the safe alternatives program in total disarray.

First, the panel unanimously upheld EPA's authority under Section 612(c) to move HFCs from the acceptable list to the unacceptable list and rejected all of Mexichem's and Arkema's claims that the listing change was arbitrary and capricious. App. 11a–12a, 22a. The panel also specifically affirmed that adverse climate impacts are a valid basis for prohibiting a substitute under Section 612. App. 22a–24a.

Nonetheless, over Judge Wilkins' forceful dissent, Judges Kavanaugh and Brown went on to hold that even though EPA could add HFCs to the statutory list of prohibited substitutes, EPA could not stop product manufacturers that already use HFCs from continuing to do so – no matter how harmful HFCs may be, or how much safer the available alternatives. App. 17a–18a.

1. The Majority Opinion

The majority first characterized the 2015 rule as a "new interpretation" of EPA's legal authority, rejecting the agency's explanation that it had adopted the current interpretation in the 1994 rule and consistently applied it in 2015. App. 13a. The majority then held that "Section 612 does not require (or give EPA authority to require) manufacturers to replace non-ozone-depleting substances such as HFCs." App. 3a.

The majority's statutory analysis hinges on its interpretation of the term "replace." Where EPA interpreted "replace" as a continuing process, occurring each time a manufacturer uses HFCs instead of

ozone-depleting substances, the majority held that dictionary definitions unambiguously confine "replace" to only "a one-time occurrence." App. 14a. According to the majority, once a manufacturer transitions from ozone-depleting substances to a non-depleting substitute, "there is no ozone-depleting substance to 'replace,'" and EPA has no further authority. *Id*.

Despite upholding the listing of HFCs as unacceptable, prohibited substitutes, the majority vacated the 2015 Rule "to the extent it requires manufacturers to replace HFCs with a substitute substance." App. 26a.

2. The Dissent

Judge Wilkins dissented. He explained that the majority's definition of the term "replace" was not the only one available, and that "[b]ecause the term 'replace' is susceptible of multiple interpretations in this context, it cannot serve as the basis for discerning clear congressional intent." App. 27a. He cited examples from the same dictionaries that the majority consulted, describing replacement processes that play out over time, such as the transition from internal combustion engines to hybrids and electric cars, and the transition from older medicines to generic substitutes. App. 30a–31a. In those cases, Wilkins wrote:

> the ubiquitous product that has become the industry standard is "replaced" by a number of substitutes, and the replacement takes place not at a specific point in time, not just once, and not by a single substitute. Instead, the ubiquitous item is "replaced" by any number of substitutes over the course of years, and it may be the case that one

> substitute is succeeded by a better substitute at some point in time.

Id.

Examining the statutory structure, context, and purpose, Judge Wilkins concluded that EPA had reasonably interpreted "replace" and that the 2015 rule should have been upheld in its entirety. App. 29a–40a.

D. EPA's 2018 Guidance

The decision below has upset the business plans of myriad companies and end-users affected by the 2015 rule. In an April 2018 guidance document issued after the lower court decision, EPA underscored that "regulated entities are experiencing substantial confusion and uncertainty regarding the meaning of the vacatur." 83 Fed. Reg. 18,431, 18,434 (Apr. 27, 2018). The agency also noted that implementing the partial vacatur would create illogical results. For example, under the panel decision, EPA acknowledged that product manufacturers will be able to keep making HFC-containing products that "an end user still using an [ozone-depleting substance] may not be able to purchase and use." *Id.* at 18,436.

The decision would require EPA to make other complex distinctions among categories of users that are not found in the statute or in the 1994 and subsequent regulations. For example, EPA observed that nothing in its regulatory language "draws a distinction between product manufacturers and other users of substitutes . . . nor between someone using an HFC and someone using an [ozone-depleting substance]." *Id.* at 18,434. EPA explained that even the meaning of "product manufacturer" is not self-evident, giving the example of supermarket refrigera-

tion systems that are made in a factory, but not filled with HFCs until assembled at the site where they will be used. *Id.* Further, the panel decision does not provide clarity on "the date by which a manufacturer must have switched to an HFC in order to avoid being subject" to the 2015 rule, which could lead to "confusion about whether or not the listings . . . apply to individual manufacturers." *Id.* The decision also does not address how the prohibited listing applies to a manufacturer that is using HFCs in some product lines and ozone-depleting substances in others. *Id.* at 18,435.

As a result, even though the court upheld the prohibited-listing of HFCs and ordered only a partial vacatur as to product manufacturers, EPA threw up its hands and announced that it "will not apply the HFC use restrictions or unacceptability listings in the 2015 Rule *for any purpose*" and "will implement the court's vacatur by treating it as striking the HFC listings in the 2015 Rule *in their entirety*" pending a future rulemaking in which some restrictions may be re-proposed at an unknown date. *Id.* at 18,436 (emphasis added). The guidance document thus has magnified the harm to public health and the environment, while simultaneously leaving industry in the dark on the scope and timing of their responsibilities.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DESTROYS A CORE CLEAN AIR ACT PROGRAM AND PUTS MILLIONS OF AMERICANS IN DANGER

When Congress enacted Title VI of the Clean Air Act it wanted to make sure that the phase-out of ozone-depleting substances would not create other health or

environmental risks – risks that could be even *greater* than those from the original chemicals. *See supra* pp. 6–7. Section 612 was enacted to ensure that, "[t]o the maximum extent practicable," the phase-out would "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a).

This was not intended to be just a one-shot exercise. Congress set no sunset date for the safe alternatives program established by Section 612. To the contrary, Congress envisioned a continuing program evolving toward new and safer alternatives and reduced overall health and environmental risk. Congress underscored this objective by giving any person the right to petition EPA at any time to update the lists of safe and prohibited substitutes based on new information on risks and safer alternatives. *See* 42 U.S.C. § 7671k(d).

The panel majority disregarded these statutory provisions and congressional purposes when it created a permanent grandfathered status for unsafe alternatives that are already in use. That grandfathering renders Section 612 toothless, with dire consequences for human health and the environment.

The decision leaves EPA powerless to act when new scientific data shows that an existing substitute poses greater risk than understood when it was initially deemed acceptable – in this instance, as evidence emerged of HFCs' extreme heat-trapping potency and extraordinarily rapid growth rate. It also leaves EPA powerless to act when industrial innovators develop new alternatives with a tiny fraction of the adverse health or environmental impact of the substitutes currently in use – in this instance, punishing companies that invested more than one billion dollars to bring to market safer refrigerants with less than one-thousandth the impact of HFCs, and to commercialize new air

conditioners, refrigerators, and other products adapted to use them.

By loosening restraints on the rapid growth of these extremely potent greenhouse gases, the decision will seriously worsen the impacts of climate change – impacts that are now far more evident and urgent than when this Court heard *Massachusetts v. EPA*, 549 U.S. 497 (2007).[7]

And the health and environmental consequences of this crippling interpretation go well beyond the present HFC rule. The decision below would have blocked EPA from stopping the use of the kidney-toxic refrigerant HFP in 1999, which threatened grave damage to exposed workers. And it would have blocked EPA from stopping the use of the super-potent greenhouse gas SF_6 in aerosol products in 1996, when safer propellants were readily available. *See supra* pp. 11–12. Worse still, the majority decision would even allow manufacturers to re-start using HFP, SF_6, or any other substitute that EPA has listed as prohibited, as long as the manufacturer had already ceased using ozone-depleting substances.

The decision has upset HFC transition plans across a wide variety of industries that, in EPA's words, "are experiencing substantial confusion and uncertainty regarding the meaning of the vacatur." 83 Fed. Reg.

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[7] U.S. Global Change Research Program, *Climate Science Special Report: Fourth National Climate Assessment, Volume I* at 12 (Donald. J. Wuebbles et al. eds., 2017) (Since the 2014 publication of the Third National Climate Assessment, "stronger evidence has emerged for continuing, rapid, human-caused warming of the global atmosphere and ocean. . . . The last few years have also seen record-breaking, climate-related weather extremes, the three warmest years on record for the globe, and continued decline in arctic sea ice.").

at 18,434. Although the majority professed concern for the reliance interests of HFC-using product manufacturers, not a single product manufacturer joined the lawsuit to block the 2015 Rule. Instead of protecting these stakeholders, the decision rewards two chemical companies whose business strategy is to keep making old and dangerous HFCs in old chemical plants that have been fully paid off. As Arkema admitted in 1994, HFC producers needed 10 years to recoup their investments. *See supra* p. 9. The 2015 rule gave them more than 20 years.

The majority's ruling favors these two companies at the expense of the innovative chemical makers and product manufacturers that invested heavily in reliance on the ground rules established nearly 25 years ago. They reasonably counted on the acceptable and unacceptable lists continuing to evolve in response to new science and new alternatives. The decision destroys their incentives and their investment-backed expectations.

Most of all, the ruling gravely harms millions of consumers that rely on the safe alternatives program to make sure that the products they use are safe for their health, their immediate surroundings, and the environment world-wide.

Congress did not intend these hazardous and perverse results. This Court's intervention is now the only way to preserve this important public health and environmental program.

II. THE MAJORITY'S ERROR CAN BE CORRECTED ONLY BY THIS COURT

Without this Court's review, Section 612's safe alternatives policy will be a dead letter. Because the D.C. Circuit has exclusive jurisdiction over Clean Air Act rules of national applicability, 42 U.S.C. § 7607(b)(1), there is no possibility for a circuit split to develop. Nor is there any other avenue for further percolation. Unless the Court grants this petition, the D.C. Circuit's decision will be the final word on the future of Section 612 and the safe alternatives program.

The Court regularly reviews D.C. Circuit opinions concerning nationally significant regulations, where a circuit split is unlikely or, as in this case, impossible to develop because the D.C. Circuit has exclusive jurisdiction. *See, e.g.*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014) (reversing divided panel decision invalidating Cross-State Air Pollution Rule); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016) (reversing divided decision invalidating demand response rule under Federal Power Act); *see also Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). This case equally merits the Court's review.

III. THE DECISION BELOW CONFLICTS WITH THE TEXT, STRUCTURE, AND PURPOSE OF SECTION 612

Section 612(c) makes it unlawful for anyone to use a substitute for ozone-depleting substances in a manner that EPA has found to be unsafe, regardless whether a party was already using the substitute when the agency added it to the prohibited list, and regardless when a party last used an ozone-depleting substance.

This is how EPA has consistently interpreted Section 612 since 1994. *See* 40 C.F.R. § 82.174(d) ("No person may use a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes."). *See supra* pp. 9–11.

The petitioners below challenged this interpretation through their trade association in 1994, but obtained no relief. *See supra* p. 11. The panel erred in giving the petitioners a second bite at the apple. In order to promote the finality and stability of Clean Air Act rules, Section 307(b)(1) of the Act requires challenges to be filed within 60 days of the rule's promulgation. 42 U.S.C. § 7607(b)(1). EPA objected to the untimely attack on the 1994 rule in its brief below. EPA Br. 18–19 (ECF No. 1615278). The majority nonetheless proceeded to review EPA's interpretation and to misconstrue Section 612.

EPA's longstanding construction of Section 612 is undoubtedly a reasonable reading of that provision. Indeed, this is the *only* reasonable interpretation of the provision. The majority's contrary interpretation misreads the statutory text, structure, and purpose and produces a host of irrational results that Congress could not have intended. As the dissent found, the traditional tools of statutory construction do not command these counterintuitive and counterproductive results.

A. The Statutory Text Does Not Mandate the Majority's Restrictive Interpretation of "Replace"

Section 612(c) provides that EPA "shall promulgate rules under this section providing that it shall be unlawful to replace any [ozone-depleting] substance with any substitute" found to be unsafe. Purporting to

rely on a dictionary definition, the majority held that the term "replace" as used in this provision unambiguously means a "one-time occurrence." App. 14a–15a. Based on its interpretation of this term, the majority held that EPA could not regulate a product manufacturer's use of a substitute after the manufacturer ceased using ozone-depleting substances, because at that point "there is no ozone-depleting substance to 'replace.'" App. 14a.

The majority's textual analysis is deficient for several reasons. First, the majority ignored dictionary definitions that undermine its conclusion. In dissent, Judge Wilkins cited examples from the *same dictionaries* consulted by the majority that define "replace" as a substitution process occurring in stages over time, such as the replacement of internal combustion engines by hybrid and electric cars. In those cases, "the ubiquitous item is 'replaced' by any number of substitutes over the course of years, and it may be the case that one substitute is succeeded by a better substitute at some point in time." App. 29a–31a.

Other examples of continuing replacement processes come readily to mind. If a teacher is absent for maternity leave, her students may have a succession of substitute teachers. In common usage, each substitute "replaces" not only the one before, but also the original teacher. Soft drink bottlers have replaced sugar with a succession of artificial sweeteners (*e.g.*, saccharin, aspartame, and sucralose). Each "sugar substitute" replaces sugar, regardless of the order in which they were adopted. A long-lived individual may have multiple replacements of the same hip. Each one replaces the original hip, not just the one before.

Second, the majority failed to read the terms "replace" and "replacement" in light of the synonyms

Congress used in Section 612. As the dissent observed, "substitute" appears ten times in Section 612 and "alternative" twelve times. App. 33a. An "alternative" is "[o]ne of a number of possible choices or courses of action." Am. Heritage Dictionary (5th ed. 2018 online). A new and lower-risk refrigerant is an alternative to its ozone-depleting predecessor even if a company adopted a different alternative first. The term "substitute" is equally broad, referring to items that can be used to serve the same function. The interchangeable use of these capacious synonyms reinforces that it was Congress's intention to create an ongoing process to fill the functions originally served by ozone-depleting substances with progressively safer substitutes.

For these reasons, the statutory text does not support the majority's conclusion that "replace" is unambiguously a one-time occurrence. As the dissent wrote: "Because the term 'replace' is susceptible of multiple interpretations in this context, it cannot serve as the basis for discerning clear congressional intent." App. 27a. The error in the majority's conclusion is further demonstrated by the context, structure, and purpose of the statute.

B. The Majority's Interpretation Conflicts with the Statutory Context and Structure

The majority's restrictive interpretation of "replace" is inconsistent with the statutory context and structure. As the dissent explained, Section 612(a) and the first sentence of Section 612(c) are "written in the passive voice and without identifying a particular target of the regulation [and] appear to apply to anyone and everyone, including retailers, product manufacturers and chemical manufacturers." App.

31a. As the dissent notes, *id.* n.1, in other provisions of Title VI, Congress wrote prohibitions that specify the regulated parties with particularity. If Congress had intended the prohibition to apply only to entities still using ozone-depleting substances when a substitute was listed as unsafe, it surely would have said so.

The point is reinforced by the second sentence of Section 612(c), which directs EPA to list "substitutes prohibited . . . for specific uses." Like the prior sentence, the prohibited-list sentence applies to anyone and everyone; it does not say prohibited for only some entities engaged in those uses. By grandfathering all of the entities already using the substitute in that way, the majority's holding deprives the prohibited list of nearly all force and effect.

The majority's interpretation also conflicts with the "[r]ight to petition" created under Section 612(d). The dissent explained that "[b]y creating this petition process, it is evident that Congress desired the safe alternatives list to be a fluid and evolving concept that promotes those alternatives that pose the least overall risk to human health and the environment." App. 36a. Yet the "process becomes a half measure if EPA is only allowed to 'replace' an ozone-depleting substance once and only once." *Id*. By depriving EPA of the authority to take meaningful action in response to a Section 612(d) petition, the majority's decision defeats the "[r]ight to petition" created by that provision.

C. The Majority's Interpretation Conflicts with the Express Statutory Policy

Section 612(a) states Congress's policy of ensuring "[t]o the maximum extent practicable" that ozone-depleting substances are replaced by "chemicals, product substitutes, or alternative manufacturing pro-

cesses that reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). As the dissent found, the majority's interpretation "makes a mockery" of that congressional purpose by halting the process of risk reduction at the adoption of the first non-ozone-depleting substitute. *See* App. 34a. If allowed to stand, the majority's interpretation will leave EPA powerless to respond to new data on previously unknown or underestimated risks, as the agency did by banning the kidney toxin HFP and the greenhouse gas SF_6, and as it has tried to do with HFCs. The majority's interpretation will also undermine the statutory purpose of promoting development of new alternatives. If EPA cannot make incumbent users stop using prohibited substitutes when new and safer alternatives become available, the incentives for industry to invest in developing such alternatives are destroyed.

The majority hypothesized that without limiting "replace" to its restrictive one-time-only reading, EPA could continue regulating substitutes for "even 100 years or more." App. 15a. But there is no textual, structural, or purposive evidence that Congress intended Section 612 to sunset. To the contrary, Congress's inclusion of a petition process indicates that Section 612 was intended to function indefinitely as many other Clean Air Act provisions do. *See, e.g.,* 42 U.S.C. § 7409 (National Ambient Air Quality Standards reviewed every five years). The fact that courts have conventional tools to restrain any excesses is also pertinent. If EPA, for example, were to require another refrigerant transition without demonstrating a meaningful reduction in overall health and environmental risk or the availability of safer alternatives, the D.C. Circuit could easily find that listing action arbitrary and capricious. Here, however, the panel

unanimously *upheld* EPA's HFC listing decision against all such challenges. App. 22a–25a.

Finally, even though the majority agreed that EPA could add HFCs to the prohibited list based on climate risk, their opinion suggested that EPA's authority to regulate manufacturers currently using HFCs was undermined by Congress's "failure to enact general climate change legislation." App. 18a. This Court's seminal climate change decision, *Massachusetts v. EPA*, rejected that very argument, holding that the current Clean Air Act authorizes regulation of greenhouse gases and that Congress's failure to pass additional legislation is irrelevant. 549 U.S. at 529-30. By charging EPA to "reduce overall risk to human health and environment," Section 612 plainly encompasses climate risk, and no new enactment is needed.[8]

D. The Majority's Interpretation Produces Illogical Consequences and Perverse Incentives That Congress Could Not Have Intended

The majority's interpretation opens loopholes and creates illogical distinctions that Congress could not have intended. As EPA pointed out in 1994, the one-time-only interpretation of "replace" allows regulated parties to grandfather themselves from impending restrictions on unsafe substitutes simply by starting to use them before EPA can complete a rulemaking to

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[8] The majority suggested that EPA could accomplish the same ends under other Clean Air Act provisions or the Toxic Substances Control Act. App. 17a. The majority never elaborated how these laws might apply. Even if they could be jury-rigged for this purpose, that is no reason to discard Section 612, which Congress enacted to address this specific problem, with full knowledge of those other laws.

put them on the unacceptable list. 59 Fed. Reg. at 13,048. As noted above, the dissent found that this opportunity for evasion grossly undercuts the statutory purpose of reducing overall human health and environmental risk. App. 34a.

The majority's reading has already sown, in EPA's words, "substantial confusion and uncertainty" among the regulated industry. 83 Fed. Reg. at 18,434. *See supra* pp. 18–19. And going forward, it will produce utterly illogical consequences. For example, hundreds of thousands of commercial buildings and supermarkets still operate equipment containing ozone-depleting refrigerants, equipment that will need to be retired and replaced over the coming years.[9] As the dissent observed, the owners of these facilities are not permitted to replace that equipment with new HFC-containing equipment – equipment that the majority opinion allows product manufacturers to keep making. App. 32a. The majority opinion, as EPA recently acknowledged, creates "cases where product manufacturers may be making some products that an end user still using an [ozone-depleting substance] may not be able to purchase and use." 83 Fed. Reg. at 18,436. Congress could not have intended this result.

The majority opinion creates irrational distinctions between competing manufacturers making products for the same end-use. For example, most manufacturers of new cooling systems for large buildings ("chillers") converted their product line from ozone-depleting CFCs to HFCs in the 1990s, but one company manu-

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[9] *See* ICF International, *Technical Support Document: Analysis of the Economic Impact and Benefits of Final Revisions to the National Recycling and Emission Reduction Program* at 19, Docket No. EPA-HQ-OAR-2015-0453-0225 (Sept. 2, 2016).

factures chillers using a hydrochlorofluorocarbon ("HCFC") – an ozone-depleting refrigerant that the statute allows to be used in new equipment manufactured before 2020.[10] *See* 42 U.S.C. § 7671d(a)(3). Now that safer alternatives are available for chillers, EPA placed this use of HFCs on the prohibited list and set reasonable deadlines for chiller manufacturers to adopt non-HFC alternatives. 81 Fed. Reg. 86,778 (Dec. 1, 2016). Under the majority opinion, however, only the company still using the ozone-depleting HCFC will have to adopt non-HFC alternatives, while its competitors are grandfathered to keep using HFCs indefinitely. Congress could not have intended this disparate treatment.

Worst of all, the majority opinion creates a loophole that would allow the *reintroduction* of dangerous substitutes that EPA prohibited in *1994*. For example, EPA banned use of a compound called "Hydrocarbon Blend A" in a variety of air conditioning and refrigeration applications because leaky uses "may pose a high risk of fire." 59 Fed. Reg. at 13,082. It would now be legal for an entity that presently uses HFCs to replace them with Hydrocarbon Blend A, because it would not be (in the majority's words) "taking the place of" an ozone-depleting substance. Congress could not have intended to open this loophole.

These illogical and perverse results further confirm that EPA's long-standing interpretation of Section 612's text, structure, and purpose ~~establish~~ is unambiguously correct. Even if there were residual ambiguity, EPA's interpretation is reasonable, as Judge Wilkins correctly concluded. App. 39a–46a. The majority's

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[10] *See* Trane, *CenTraVac Centrifugal Water-Cooled Chillers*, https://tinyurl.com/yc6favav (last visited June 20, 2018).

failure to defer to that construction is another ground for reversal. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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