No. 17-1703

IN THE

Supreme Court of the United States

HONEYWELL INTERNATIONAL INC., ET AL.,

Petitioners,

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The decision below nullifies a federal regulatory scheme that ensures the safety of millions of products affecting millions of Americans. The decision invalidates an interpretation of § 612 of the Clean Air Act that EPA maintained consistently for nearly 25 years, through three administrations and the first part of the present administration. It immunizes forever the first replacement of an ozone-depleting chemical, no matter how harmful that replacement turns out to be and no matter how safe the alternatives. As Judge Wilkins explained in dissent, this interpretation "makes a mockery of the statutory purpose" to require the replacement of ozone-depleting chemicals with the safest available alternatives. Pet. App. 34a-35a.

This Court regularly grants certiorari in cases of this magnitude, where a federal court of appeals with exclusive jurisdiction eliminates a federal agency's regulatory authority. EPA does not dispute that—ordinarily—this would be a hugely consequential decision. EPA instead argues—joined by Industry Respondents—that the case is of "limited prospective importance," and the Court should deny review, because EPA has suddenly changed its mind about the meaning of § 612. Opp. 12. But if the Court denies certiorari, the decision below will bind *all future administrations*, because the D.C. Circuit held that its interpretation of "replace" is the *only* permissible interpretation of that term. Left intact, the decision will prevent future administrations from enforcing SNAP regulations against anyone using HFCs—or any other chemical that is non-ozone-depleting. This petition thus presents the Court's only chance to re-

view the D.C. Circuit's statute-gutting interpretation of § 612.

If this Court grants review and reverses on the theory that the 2015 rule was permitted but not compelled by § 612, EPA could still seek to revise the rule through ordinary notice-and-comment rulemaking. That is the appropriate way for administrations to make discretionary policy decisions that diverge from prior administrations; it would ensure political accountability; and it would leave the issue open for future administrations to revisit. But if this Court denies certiorari on the ground that *this* EPA has changed its mind, it will be letting this EPA finally interpret § 612 for all future EPAs. This Court should be the final arbiter. Certiorari should be granted.

I. This Case Is Exceptionally Important and This Petition Presents the Only Opportunity for This Court's Review

The decision below drains § 612 of the Clean Air Act of nearly all its force. It overturns an EPA interpretation that stood for nearly 25 years, and upon which state governments and businesses developed substantial reliance interests. It nullifies an important regulatory program by forever immunizing the vast majority of products to which the program is meant to apply. Pet. 17-21. It sows substantial confusion and uncertainty. Pet. 27-31. It destroys Petitioners' and other companies' investment-backed expectations. Pet. 21-23. And it will have a devastating impact on the environment and human health. Pet. 23-26. In short, the regulatory, economic, environmental, and health consequences of the decision below are extraordinary. Respondents can offer no persuasive response.

1. The decision below overturns EPA's long-standing interpretation of the Clean Air Act, one that persisted since 1994 through three administrations, Republican and Democrat, and the start of the current administration. For 25 years EPA interpreted § 612 to authorize EPA to prohibit the use of non-ozone-depleting substitutes. Gov't Opp. 4-5; Carrier Br. 8; States Br. 22. There is no dispute that § 612 and SNAP are the principal means by which the government regulates the health and environmental impacts of a vast array of products that historically were ozone-depleting. Pet. 17-21.

The decision below thus tears the heart out of the SNAP program. Now, EPA cannot prohibit unsafe non-ozone-depleting substitutes if they have been used even once, no matter how harmful they may be and no matter how safe or plentiful the alternatives. And, it is undisputed, the decision below will terminate EPA's authority under § 612 not only to ban chemicals that (as here) contribute to global warming, but also chemicals that are carcinogenic, toxic, or flammable. Pet. 19-20. As amici attest, the decision "renders this scheme essentially meaningless," Carrier Br. 15, means "the chaotic end of a decades-old predictable and stable regulatory program," Daikin Br. 10, and "guts EPA's effective regulatory program and exposes human health and the environment to grave risks," States Br. 2.

Respondents do not dispute that the decision below nullifies the SNAP program going forward—not just for HFCs but for all non-ozone depleting substitutes no matter their risks. They do not dispute that the D.C. Circuit's interpretation of § 612 will allow product manufacturers to forever escape oversight by starting to use a substitute before EPA reviews it.

Pet. 20-21. They do not dispute that the decision below affects millions of cars, refrigerators, air conditioners, and billions of aerosol products. Pet. 18-19. And they do not dispute the extraordinary environmental and health consequences that will result from continued use of HFCs. Pet. 23-26. These are reasons enough to grant certiorari.

Industry Respondents do note that the decision below permits EPA to regulate HFCs "so long as it is ozone-depleting substances that are being replaced." Opp. 16-17. But this is quibbling. As the Petition observed and no one contests, "[t]he vast majority of manufacturers today have already begun using substitutes for ozone-depleting chemicals." Pet. 15. The decision thus renders the vast majority of companies free to continue using HFCs (or any other harmful chemical) forever. Pet. 18-21, 34-35.

2. An enormous number and variety of entities relied for decades on EPA's longstanding interpretation, investing over $1 billion. Pet. 4; Carrier Br. 8. Seventeen states and the District of Columbia explain that the "decision below upset[s] states' decades-long reliance on the SNAP Program's robust nationwide regulation of substitutes for ozone-depleting substances." States Br. 8. Five leading U.S. product manufacturers document the "substantial investments" and "other business decisions" made "in reliance on the regulatory framework that was established in 1994." Carrier Br. 5, 8; *see* Daikin Br. 3 (noting $500 million in investments).

The government's brief in opposition says nothing at all about those reliance interests—effectively ignoring them altogether. Industry Respondents, for their part, argue that no one could have "relied" on EPA's interpretation because the 2015 rule came af-

ter Industry Petitioners developed their HFC substitutes. Opp. 20-21. Their timeline is backwards. From the beginning of the SNAP program, everyone knew substitutes safer than HFCs first had to be developed before EPA could prohibit them. What Petitioners—and countless others, Carrier Br. 5—relied on was § 612's requirement that EPA add substitutes like HFCs to the prohibited list once safer substitutes were developed, and EPA's consistent confirmation of that interpretation dating back to 1994.

As for Industry Respondents' contention that EPA adopted that interpretation for the "first time" in 2015, Opp. 20, EPA continues to disagree, Gov't Opp. 4-6. In a carefully worded sentence, Industry Respondents deny that EPA has previously "used the SNAP program to *change the status* of a non-ozone-depleting substitute," Opp. 7 (emphasis added), *i.e.*, to move such a substitute from the approved list. But EPA has repeatedly used the SNAP program to *ban* non-ozone-depleting substitutes that are already in use. Pet. 9, 17; NRDC Pet. 11-12. Under the D.C. Circuit's decision, EPA may no longer do so. If a manufacturer that once used a safe substitute for an ozone-depleting chemical starts using a cheaper non-ozone-depleting toxin, EPA is now completely helpless to do anything about it under SNAP.

Industry Respondents also deny that the decision will have any effect on incentives to innovate going forward, noting that the D.C. Circuit's decision does not prohibit anyone from choosing HFOs over HFCs, and that certain customers are doing so already. Opp. 19-20. On that theory, environmental regulations would never merit this Court's review and indeed would be unnecessary in the first place. Congress enacted § 612 because it understood that many

companies would use cheaper, less-safe chemicals absent a regulatory mandate, and that innovators need a financial incentive to invest in developing safer alternatives. Section 612 provides that incentive. The decision below eviscerates it.

3. The decision below has sown substantial confusion and uncertainty. Those are EPA's own words: "EPA is aware that regulated entities are experiencing substantial confusion and uncertainty regarding the meaning of the vacatur in a variety of specific situations." 83 Fed. Reg. 18,431, 18,434 (Apr. 27, 2018). EPA's own notice responding to the vacatur demonstrates about as well as any document can just how perplexing the decision below is. *Id.* at 18,433-35. EPA asserts, for example, that the decision draws distinctions EPA has never before drawn, and will likely require EPA to disregard that portion of the D.C. Circuit's ruling that upheld EPA's decision to list HFCs as unacceptable substitutes going forward. *Id.* Amici confirm that the decision is creating widespread confusion. States Br. 7, 16; Carrier Br. 22-23; Daikin Br. 4-5.

Respondents do not really dispute that the decision sows massive uncertainty, which EPA says it must fix by declining to implement any aspect of the rule. Industry Respondents claim that the confusion is Congress's fault, not the fault of the court below. *See* Opp. 21-22. But the fact that the interpretation Respondents and the decision below advance turns a straightforward regulatory program into a muddle of confusion and uncertainty is strong evidence that it

is wrong and an important reason that this Court should grant review.[1]

4. Respondents principally argue that the Court should deny review because EPA no longer supports the interpretation it has applied since 1994. Gov't Opp. 12-13; Ind. Opp. 14-16. As an initial matter, to roll back the 2015 rule, EPA would have had to justify its decision through notice-and-comment rulemaking. There is no guarantee that EPA would or could have done so, or that it will do so if the decision below is reversed.[2]

More important, the D.C. Circuit's decision will effectively prevent all future administrations from ever (1) addressing HFCs or other harmful replacements under the SNAP program or (2) returning to the interpretation of "replace" that held for 25 years across three-and-a-half administrations. The court issued its holding at *Chevron* Step One, stating that

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[1] Industry Respondents fault Petitioners for seeking an extension. Opp. 22-23. But the petition would have been set for the Long Conference even absent an extension. Nor are litigants obligated to seek a stay of the mandate.

[2] Industry Respondents contend that the rule was "promulgated pursuant to President Obama's 2013 Climate Action Plan," and President Trump has directed agencies to move to rescind such rules. Opp. 14-16. But while the 2015 rule's classification of HFCs was "consistent with" the Climate Action Plan, Pet. App. 97a-98a, the D.C. Circuit upheld the classification of HFCs. As the government acknowledges, Opp. 4-5, the interpretation of "replace" that the D.C. Circuit struck down—which is not restricted to HFCs—has been the government's interpretation since 1994 and was not a product of the 2013 Climate Action Plan. The Trump Administration defended the 2015 rule before the D.C. Circuit in this case and did not change its position when the Executive Order issued.

the 2015 rule's interpretation of the word "replace" was impermissible. Pet. App. 16a. Unless this Court grants review, the D.C. Circuit's decision will bind all future administrations and will prevent them from reverting to the interpretation that lasted from 1994 until EPA's opposition to certiorari last month.

In other words, the government's sole argument for denying certiorari depends on the badly mistaken premise that only this administration will be affected by this decision. But 4 or 8 or 12 years from now, a future EPA may decide that crucial economic and environmental benefits will accrue from a rule addressing HFCs or any other non-ozone-depleting chemical for which a safer substitute may be developed. The decision below makes such a future rule impossible. As the Court's practice of appointing amici demonstrates, this Court regularly grants certiorari when the government has changed its position, precisely because court of appeals decisions interpreting federal law have broad ramifications beyond any one administration. This will be the Court's only chance to address the interpretation of this statute, and it is imperative that the Court grant certiorari now.

If EPA then wishes to revisit the interpretation of "replace" through notice-and-comment rulemaking, it may do so consistent with this Court's interpretation. But the decision below should not evade review merely because EPA has flipped positions. EPA should not be permitted to effectively decide this issue for all future administrations.

5. Industry Respondents offer a smattering of other objections to certiorari, but none hold water.

Industry Respondents argue that eviscerating the SNAP program will have limited environmental

consequences because EPA might be able to restrict the use of HFCs through other means. Opp. 3-4, 8-9, 15-18. EPA notably does not join in this argument. The statutes Respondents identify (Opp. 15) do not apply to the same breadth of products to which SNAP applies. For example, the Prevention of Significant Deterioration program is limited to the control of "major emitting facilit[ies]," not mobile sources or diverse consumer products. 42 U.S.C. § 7475(a)(1). And none of these other authorities allow EPA to regulate based on "comparative risks." Pet. 36. Industry Respondents call this an "ipse dixit" because Petitioners do not "offer any explanation" why a comparative risk regime is needed. Opp. 16. But a comparative risk regime is not Petitioners' idea—it was Congress's, and it is express in the statute. *See* 42 U.S.C. § 7671k(a).

It is undisputed that § 612 has been the principal means of regulating the environmental consequences of a vast array of products since 1994. Pet. 17-18. Even if other regulatory programs could do some of the work of § 612, that would not diminish the importance of § 612 or of granting certiorari—as EPA recognized below. "[W]here 'Congress has given an agency … various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which … regulatory tools will be most effective.'" EPA C.A. Br. 24 (quoting *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966)).

Industry Respondents also argue that States might restrict HFCs. Opp. 18. But patchwork regulation by states is no substitute for uniform federal law—that is why Congress enacted § 612. And the possibility of such patchwork regulation certainly

does not diminish the importance of a decision gutting a federal law at *Chevron* Step One. Neither do the other not-yet-existent sources of regulation that Respondents cite, namely, the introduction of a bill in the Senate and the existence of a treaty that the United States has not ratified. The Court should not decline to decide whether Congress has *already* passed a statute authorizing EPA to require companies to stop using certain HFCs on the theory that Congress *might* pass such a statute in the future.

Finally, Industry Respondents note the absence of a split. Opp. 12-13. As they acknowledge, however, the D.C. Circuit has exclusive jurisdiction.

II. The Decision Below Is Wrong

The majority cherry-picked one definition of the word "replace" from among many and declared it to be the only definition allowed. Pet. 31-36. Respondents barely attempt to defend the court's analysis. Industry Respondents largely offer block quotations from the opinion without comment. Opp. 25-26. And the government states without explanation or meaningful analysis that it "now believes that the decision below reflects the better understanding of Section 612(c)." Opp. 9. Respondents make no effort to confront the dissenting opinion.

The dissent was correct. Respondents do not dispute that "replace" can mean to "substitute for" or "to assume the former role, position, or function of" something that came before. Pet. 32. They insist only that the term must be read "in context." Ind. Opp. 26. Petitioners could not agree more. The context of § 612 clearly demonstrates that Congress intended EPA to continually update and modify the lists of safe and prohibited alternatives. It did not imagine

the SNAP program would be obsolete by the mid-1990s. To that end, § 612(a) directs EPA to regulate replacements to "reduce overall risks to human health and the environment" "[t]o the maximum extent practicable." And § 612(d) allows anyone to petition to move a substance from the safe list to the prohibited list, without any limitation on when such petitions can be brought. The majority's unnatural definition of "replace" renders this provision a dead letter. Pet. 34-35. Respondents have no answer.

On the other side of the "context" ledger, Respondents cite § 612's appearance in a subchapter titled "Stratospheric Ozone Protection." Ind. Opp. 28. For one, a statute's title is relevant only to the extent that a statutory term is "ambiguous." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 483 (2001). Of course, if § 612 is ambiguous, then Respondents should have lost below. Beyond that, Congress's primary interest in eliminating ozone-depleting substances was intertwined with its interest in "reduc[ing] *overall* risks to human health and the environment." 42 U.S.C. § 7671k(a) (emphasis added). "[A] law may have multiple purposes." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 590 (1991).

Industry Respondents fret (at 28-29) that Petitioners' definition of "replace" would authorize EPA to continue regulating into the next century—in their view, an "illogical" and "absurd" result. To the contrary, it is perfectly logical that Congress would at once ban ozone-depleting substances and task EPA with ensuring that all future substitutes are safe. Congress knows how to specify time limitations, *Jama v. ICE*, 543 U.S. 335, 341 (2005), but did not under § 612.

If anything, Respondents' reading of the statute leads to far greater absurdity. As EPA explained below, "[respondents'] interpretation of the statute would force EPA to leave a toxic chemical on the approved list where that toxic effect was not discovered until years later, simply because it does not deplete ozone. Not only that, but it would also prohibit the alteration of the list of approved alternatives if one day after an alternative was added, a far-less-risky alternative was discovered." EPA C.A. Br. 24. Respondents make no effort to address these and other absurd results of their interpretation. Pet. 20-21, 35.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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