

Nos. 17-1703 & 18-2

IN THE
Supreme Court of the United States

HONEYWELL INTERNATIONAL INC., *et al.*,
Petitioners,

v.

MEXICHEM FLUOR, INC., *et al.*,
Respondents.

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,

v.

MEXICHEM FLUOR, INC., *et al.*,
Respondents.

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

***AMICI CURIAE* BRIEF OF CARRIER
CORPORATION, INGERSOLL RAND, LENNOX
INTERNATIONAL INC., NORTEK GLOBAL
HVAC, AND RHEEM MANUFACTURING CO.
IN SUPPORT OF PETITIONERS**

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July 26, 2018

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INTEREST OF *AMICI CURIAE*¹

Amici are five of the leading U.S. manufacturers of heating, ventilation, air conditioning and commercial refrigeration (“HVACR”) equipment. Together with another manufacturer filing its own *amicus* brief, they account for well over 75% of the residential and commercial air conditioning and commercial refrigeration equipment that is manufactured and sold in North America. In reliance on the 25-year-old regulatory program that the D.C. Circuit invalidated in *Mexichem Fluor, Inc. v. Env’tl. Prot. Agency*, 866 F.3d 451 (D.C. Cir. 2017), they have collectively invested well over a billion dollars in developing new air conditioning and refrigeration equipment that can operate on safer substitutes for ozone-depleting chemicals. This is over and above the investments that chemical producers have made to develop these substitutes.

But the impact of the decision below on *Amici* goes well beyond this dollar amount. The decision completely upends a regulatory program that has worked well for almost 25 years – for chemical producers and users, for consumers, and for the environment. In reliance on this program, our

¹ Pursuant to Rule 37.6, counsel hereby certifies that the brief authored on behalf of *Amici curiae* was not authored in whole or in part by counsel for a party, and no party or counsel for a party have made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Each party’s counsel has been contacted regarding the submission of this *Amici* brief, and counsel for each party has responded and confirmed its client’s consent to the filing of this brief.

industry and the chemical producers that supply it have been on a well-established and reasonable path toward new, environmentally safer alternatives, but the decision below has torn up this path and created enormous uncertainty and associated costs for all of us. Given the importance of the U.S. market, it is not an exaggeration to say that, unless the decision below is overturned by this Court (or by Congress), it will disrupt ongoing international efforts to develop and transition to more environmentally benign chemicals in a number of industries.

Air conditioning and refrigeration equipment relies on chemicals known as refrigerants – substances that have certain thermodynamic and other properties that allow for efficient cooling. For many years, chlorofluorocarbons (CFCs) and related compounds were the most widely used refrigerants worldwide, but as researchers came to understand that these chemicals were depleting the stratospheric ozone layer, there was an international effort to phase them out and switch to safer substitutes. This effort culminated in the Montreal Protocol, which is widely regarded as the most successful and consequential international environmental agreement in history.²

² Patrick Low, “Why the Montreal Protocol is the Most Successful Climate Agreement Ever,” *So. China Morning Post*, Oct. 26, 2016, <https://www.scmp.com/business/article/2040177/why-montreal-protocol-most-successful-climate-agreement-ever> (“The Montreal Protocol has been characterised by former UN Secretary General Kofi Annan as ‘perhaps the most successful international agreement to date.’ Among other things, this refers to its singular success in addressing the problem it was set up to fix – a growing hole in the earth’s ozone layer...”); Justin Gillis, “The Montreal Protocol, a Little Treaty That Could,” *N.Y. Times*, Dec. 9, 2013,

In order to carry out U.S. obligations under the Montreal Protocol, Congress adopted Title VI of the Clean Air Act in 1990. In certain key respects, Title VI goes beyond the Protocol. An important example is the statutory provision at issue in this case – Section 612, which is titled “Safe Alternatives Policy.” 42 U.S.C. § 7671k. With Section 612, Congress sought to ensure that the chemicals used to replace CFCs and other ozone-depleting substances would not cause other health or environmental problems – and in fact would be the safest possible products that would work effectively in any particular application. The express purpose of Section 612 is to ensure “[t]o the maximum extent practicable” that substitutes for ozone-depleting chemicals “reduce overall risks to human health and the environment.” *Id.* § 7671k(a).

Congress made it clear that, to determine whether a chemical substitute would “reduce overall risks to human health and the environment,” the U.S. Environmental Protection Agency (“EPA” or “Agency”) must take into account all potential risks, including toxicity, flammability, and atmospheric impacts – and not just risks related to ozone depletion. 136 Cong. Rec. H12908 (daily ed. Oct. 26, 1990), *reprinted in* 1 A LEG. HIST. OF THE CLEAN AIR ACT AMENDMENTS OF 1990, at 1428 (1993). Since the beginning of the program, EPA has considered the global warming impact of potential substitutes as an important part of this determination (a practice reaffirmed by the court below). 59 Fed. Reg. 13,044,

<https://www.nytimes.com/2013/12/10/science/the-montreal-protocol-a-little-treaty-that-could.html> (“The Montreal Protocol is widely seen as the most successful global environmental treaty.”).

13055 (Mar. 18, 1994) (“1994 Rule”); Pet. App. 23a-24a.³

This case involves chemicals called hydrofluorocarbons (“HFCs”), which do not deplete ozone and have low toxicity but are very potent greenhouse gases, with a global warming potential more than a thousand times higher than carbon dioxide (although still lower than most CFCs). In 1994, when EPA approved the use of HFCs as substitutes for CFCs in certain applications (including refrigeration and air conditioning), the Agency expressed concern that, although they were clearly better than CFCs in terms of overall environmental impacts, “rapid expansion of the use of some HFCs could contribute to global warming.” 59 Fed. Reg. at 13,071. Accordingly, the Agency made it clear that HFCs might only be a “near-term option for moving away from CFCs.” *Id.* at 13,071-72. In the same rule, EPA made clear that certain approved substitutes could be disapproved in the future based on new health or environmental risk information or the emergence of safer alternatives. *Id.* at 13,047.

Thus, HVACR manufacturers and their chemical suppliers have known for many years that, under the framework established by the 1994 Rule, they would likely need to develop and use substitute refrigerants with much lower global warming potential than HFCs. In reliance on this same framework, chemical manufacturers and their suppliers have invested more than a billion dollars to develop safer substitutes and to construct new

³ *Amici* cite to the Appendix to the Petition for a Writ of Certiorari of Honeywell International Inc., *et al.*, in *Honeywell International Inc. v. Mexichem Fluor, Inc.* (“Pet. App.”).

facilities to manufacture them. Pet. Honeywell 21-22. These new compounds have most of the performance characteristics of CFCs, but they are not “drop-in” substitutes. As a result, our industry and others as well have also invested hundreds of millions of dollars to develop equipment and products that can employ these new, safer substitutes. At the same time, we have worked with EPA and the Department of Energy (“DOE”) to establish a reasonable schedule for moving to these new refrigerants while at the same time meeting new energy efficiency standards that DOE is required to develop for HVACR equipment.

Our industry has made very substantial investments and worked closely with our chemical suppliers and our regulators for many years to ensure that there would be a reasonable regulatory scheme and timeline for transitioning away from HFCs. All these efforts were made in reliance on the regulatory framework that was established in 1994 – a framework that petitioners below could have challenged then but chose not to pursue. Everyone involved in our industry (except perhaps for the two Respondents in this case) has made business and investment decisions based on the understanding that EPA would require all HVACR manufacturers that sell products in the U.S. to transition away from HFCs and employ safer substitutes on the schedule that EPA and DOE have established after extensive consultation with the industry. The decision below has completely upended all these actions and created enormous uncertainty.

We are in a very competitive industry, and the new, safer substitutes are more expensive than the HFCs that Respondents want to continue selling. If this Court allows the decision below to stand, there

will be business and competitive pressures to continue using cheaper HFCs, even for companies that are committed to environmental protection and want to use safer substitutes.

It is notable that, of all the companies involved in the U.S. HVACR industry, only two multinational chemical manufacturers challenged the 2015 EPA rule that required the industry to transition away from HFCs. These companies have not made significant investments in developing safer alternatives and will benefit disproportionately from continued HFC sales. No other chemical producer and none of the many companies involved in manufacturing air conditioning or refrigeration equipment challenged the 2015 rule, which everyone expected. The decision below rewards two companies who want to continue selling an environmentally harmful product at the expense of the rest of the industry and the environment. If the law mandated this result, then this would of course be understandable. But, for the reasons discussed below, the D.C. Circuit's 2-1 decision in *Mexichem* was wrongly decided and should be reversed.

SUMMARY OF ARGUMENT

The decision by the divided court below is wrong. In Title VI of the Clean Air Act ("CAA"), Congress created a comprehensive framework to phase out the use of CFCs and other ozone-depleting substances and gave EPA authority to manage the transition to ensure that, "to the maximum extent practicable" the use of substitutes would "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). To accomplish this goal,

Congress required EPA to maintain lists of acceptable and unacceptable substitutes and to update those lists as new, safer substitutes were developed. It also provided that “it shall be unlawful to replace any [ozone-depleting substance] with any substitute substance” that, in EPA’s view, may be harmful to human health or the environment if EPA has identified a safer substitute. *Id.* at § 7671k(c).

Despite this statutory framework, the majority below held that EPA may not require a company to use safer CFC substitutes if the company had previously started to use a non-ozone-depleting substance to replace CFCs. Cherry-picking just one of several dictionary definitions of “replace” – “to take the place of” what immediately came before – the majority insists that, once a company has replaced any ozone-depleting substance with one that does not deplete ozone, it may forever use that product no matter how harmful it may be to human health or the environment.

As the dissent explains, other dictionary definitions,” including “to substitute for” or “to assume the former role, position, or function of” something that came before – are consistent with EPA’s long-standing interpretation of Section 612(c): “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. 13,048. This interpretation is not just reasonable, but is the only way to read the term “replace” that is consistent with the structure and purpose of Title VI.

Just as important, EPA's interpretation was developed through notice-and-comment rulemaking and finalized in 1994. Petitioners below could have challenged it then but chose not to. As a result, *Amici* and many other companies have made investment and other business decisions in reliance on EPA's interpretation of Section 612(c) that they reasonably believed was settled long ago. This Court has recognized that "[l]ongstanding [regulatory] policies may have 'engendered serious reliance interests.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations*, 129 S.Ct. 1800, 1811 (2009)). In reliance on EPA's long-standing interpretation, chemical producers and their suppliers have invested more than a billion dollars to develop and produce CFC replacements that are safer than HFCs. Pet. Honeywell 21-22. *Amici* and other manufacturers of HVACR equipment, in reliance on the same interpretation, have also made substantial investments in developing equipment that accommodates HFC-alternatives. The HVACR industry and its chemical suppliers have been on a well-established and reasonable path to transition away from harmful HFCs, but the majority's decision has blocked this path and produced enormous uncertainty.

In addition, the decision below has created a regulatory mess that EPA has been unable to fix even now, almost a year after the decision was handed down. In a recent notice, EPA admitted that it does not know how to implement it. 83 Fed. Reg. 18,431, 18,435-36 (Apr. 27, 2018). Under the 1994 regulatory framework, product manufacturers knew that they were prohibited from using certain chemicals in certain applications after a specified date. Now, the

court below has called upon EPA and the industry to make distinctions that have never before been relevant – distinctions between companies that have already switched to HFCs and those that have not – without any guidance as to how this can be done when many companies employ different chemicals in many different products in many different facilities. A company that manufactures many types of equipment may have started to use HFCs in some products but not others, and chemical users may use HFCs in some locations but not others, and there are no recordkeeping requirements designed to track these distinctions and when they may have arisen.

In light of these (and other) difficulties, EPA threw up its hands and issued a notice saying that it could not apply any aspect of the 2015 Rule's HFC prohibitions against anyone (manufacturer, retailer, or end-user) until it could go through a new rulemaking to figure out how the D.C. Circuit's decision can be applied in the real-world. *Id.* Not surprisingly, there is now litigation over this decision. Unless this Court steps in, the result will be an extended period of regulatory uncertainty, almost certainly including years of litigation challenging the new rule that EPA ultimately develops to implement a confusing D.C. Circuit decision that was wrongly decided. Given that this decision has completely upended a major regulatory program that many companies have relied on for almost 25 years and has created regulatory uncertainty for major industrial sectors that will otherwise last well into the future, this case clearly merits review by this Court.

ARGUMENT

I. The Decision Below is Incorrect as a Legal Matter

Title VI of the CAA requires users of ozone-depleting substances to transition to safer substitutes and gives EPA a number of regulatory tools to manage this process. Under Section 612(c), it is “unlawful to replace” an ozone-depleting substance with a substitute that EPA has listed as prohibited because a safer alternative is available. 42 U.S.C. § 7671k(c). Section 612 does not just require the use of non-ozone-depleting alternatives, but of alternatives that “reduce overall risks to human health and the environment.” 42 U.S.C. § 7671k(a); *see id.* §§ 7671k(b), (c). To incentivize the research and development needed to identify and produce safer alternatives, Congress also required EPA to maintain lists of prohibited and acceptable substitutes and gave the Agency explicit authority to add or remove substances from either list and to move substances from one list to the other as new alternatives become available. *Id.* §§ 7671k(c), (d).

In the 1994 Rule, EPA established the Significant New Alternatives Policy—or “SNAP”—program to implement this statutory framework. Since then, as safer alternatives became available, EPA has periodically moved substances from the acceptable list to the unacceptable list. This is what happened here. In 1994, EPA had listed HFCs as acceptable substitutes for CFCs in certain applications, including refrigeration and air conditioning. In that same rule, the Agency expressed concern that, although they were clearly safer than

CFCs in terms of overall environmental impacts, “the rapid expansion of the use of some HFCs could contribute to global warming.” 59 Fed. Reg. at 13,071. Accordingly, the Agency made it clear that HFCs might only be a “near-term option for moving away from CFCs.” *Id.* at 13,071-72.

In the 2015 Rule at issue here, EPA reclassified HFCs as unacceptable and prohibited their use in certain products (including new commercial refrigeration systems and motor-vehicle air conditioners) because several companies had developed new alternative non-ozone-depleting chemicals that have very little impact on global warming but perform the same function as CFCs. *See* 80 Fed. Reg. 42,870 (July 20, 2015) (“2015 Rule”). In the decision below, the D.C. Circuit unanimously upheld EPA’s decision to reclassify HFCs as unacceptable and prohibit their use in the listed applications, but a divided court went on to say that this prohibition could not apply to any company that, before the publication of the 2015 rule, had already started to use HFCs as a substitute for any ozone-depleting substances. Under this decision, EPA could add HFCs to the prohibited list where a safer alternative became available, but could not apply the prohibition to manufacturers or others that had already begun using HFCs to replace CFCs or other similar substances. Given that virtually all (if not all) HVACR manufacturers companies had previously transitioned to HFCs in at least some of their products, this holding made EPA’s prohibition on HFCs essentially meaningless. Surely this is not what Congress intended when it called upon EPA to reclassify acceptable products as prohibited when new, safer products became available and called on

EPA to ensure that CFC substitutes would “reduce overall risks to human health and the environment” “to the maximum extent possible.”

Rather than considering the statutory structure of Section 612, the majority insists that the following language in 612(c) can be interpreted in only one way:

[T]he Administrator shall promulgate rules . . . 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.

42 U.S.C. § 7671k(c).

According to the majority, the word “replace” here can only mean one thing: “to take the place of” what immediately came before. Under this reading, because EPA is authorized only to make it “unlawful to replace” an ozone-depleting substance with a substance listed as unacceptable by EPA, once a company has started to use a CFC substitute that is not an ozone depleter, EPA cannot require the company to replace the initial substitute with a safer substance, no matter how harmful the initial substitute turns out to be. Thus, the majority

explicitly rejects the interpretation of Section 612(c) that had been adopted through notice-and-comment rulemaking back in 1994 and not challenged:

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. 13,048.

As the dissent explained, the majority’s narrow interpretation, which is based on just one of several dictionary definitions of “replace,” is inconsistent with the structure and express purpose of Section 612(c). It is also contrary to common usage and common sense. As noted by Petitioners Honeywell and Chemours (hereinafter “Honeywell”), the term “replace” has several different meanings, including “to substitute for” or “to assume the former role, position, or function of” something that came before. Pet. Honeywell 32. Not surprisingly, the term “replacement,” which is also used in Section 612(c), also has multiple meanings, including something “that replaces another especially in a job or *function*.” *Id.* Section 612(c)’s language is thus broad enough to encompass EPA’s interpretation of “replace”: someone “replaces” an ozone-depleting substance each time it uses another chemical to perform the same function in a specific application.

In common usage, this is how the words “replace” and “replacement” are often used. As Honeywell points out, the case of sweeteners is a good

example. Pet. Honeywell 33-34. When someone starts using stevia in his coffee, it would be natural to say that he is using it to “replace” sugar, even if he has been using NutraSweet for many years. Similarly, after Coca-Cola started to use Splenda instead of aspartame in Diet Coke, the company referred to Splenda as a “sugar substitute” – not an “aspartame substitute.”⁴ As Judge Wilkins observed, the “ubiquitous product” (sugar) is “replaced” by a number of functional substitutes (high fructose corn syrup, saccharin, aspartame, sucralose, stevia) that were developed “over the course of years” and “not at a specific point in time, not just once, and not by a single substitute.” Pet. App. 30a-31a.

In any case, the statutory text alone does not support the majority’s insistence that “replace” has only one reasonable meaning. Even without any statutory context, the term “replace” can be read to mean “to assume the function of” just as easily as “to take the place of” what immediately came before. But this Court has often reminded both agencies and lower courts that, when interpreting any statutory provision, they must also consider the statutory context. *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2442 (2014) (“Even under *Chevron’s* deferential framework, agencies must operate within the bounds of reasonable interpretation. And reasonable statutory interpretation must account for both the specific context in which language is used and the broader context of the statute as a whole.”)

⁴ The Coca-Cola Co., “What Coca-Cola products contain Splenda?” (“SPLENDA is one of the sugar substitutes we use to give people great-tasting beverage choices with fewer or no calories.”), <https://www.coca-colaproductfacts.com/en/faq/reduced-no-sugar-substitutes/soda-with-splenda/>.

(internal quotations omitted); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984). In the context of a statutory scheme that calls on EPA to manage the transition away from CFCs in a way that “reduce[s] *overall risks* to human health and the environment” – in part by changing the classification of potential substitutes from acceptable to prohibited as new substitutes are developed – EPA’s interpretation of “replace” is more than reasonable.

Since 1994, EPA has exercised authority to “initiate changes to SNAP determinations” based on “new data on either additional substitutes or on characteristics of substitutes previously reviewed,” and considering risks to human health and the environment other than ozone depletion. 59 Fed. Reg. at 13,047. The majority below recognized that “the lists of safe substitutes and prohibited substitutes are not set in stone” and that, “if EPA places a substitute on the list of safe substitutes, EPA may later change its classification.” Pet. App. 6a. Indeed, Section 612(d) explicitly authorizes anyone, at any time, to petition EPA to make a change, and requires EPA to act upon that petition promptly, no matter when it was filed. 42 U.S.C. § 7671k(d).

But the majority renders this scheme essentially meaningless by allowing anyone to use a CFC substitute forever, no matter how harmful it may turn out to be, as long as the CFC substitute is not an ozone depleter. The majority did not even try to reconcile its decision with the statutory mandate for EPA to ensure, “[t]o the maximum extent practicable,” the use of substitutes that “reduce overall risks to human health and the environment.” *Id.* § 7671k(a). Interpreting the statute to bar EPA from prohibiting

continued use of an unsafe substitute by certain chemical users is flatly inconsistent with this mandate.

II. The Adverse Impacts of the Decision Below are So Substantial that Supreme Court Review is Warranted

A. The Decision Below Upsets the Legitimate Reliance Interests of Many Companies

“Longstanding [regulatory] policies may have ‘engendered serious reliance interests.’” *Encino Motorcars*, 136 S. Ct. at 2126. As discussed by Honeywell, chemical producers and their suppliers, in reliance on the SNAP program that EPA established in 1994, have invested more than a billion dollars to develop and produce CFC replacements that are safer than HFCs. *Pet. Honeywell* 4. And the HVACR industry’s substantial investment in developing equipment that accommodates HFC-alternative refrigerants was predicated on the industry’s nearly twenty-year understanding that, under the SNAP program, EPA could and likely would require companies to transition from HFCs to safer substitutes when they became available. By holding that EPA lacks authority to prohibit the use of HFCs as CFC substitutes, even though the Agency has determined that they “present adverse effects to human health or the environment,” 42 U.S.C. § 7671k(c), the D.C. Circuit has upended the business decisions made by many companies that have made substantial investments in reliance on the long-standing understanding that EPA has authority to require companies to use safer CFC substitutes as

they are developed, regardless of whether the CFC substitute currently being used is itself an ozone depleter.

As discussed above, Title VI set forth a comprehensive framework intended to manage the transition away from ozone-depleting substances. An important part of this framework is the “Safe Alternatives Policy” embodied in Section 612, which instructed EPA to develop a regulatory program to make it unlawful to replace any identified ozone-depleting substance with any substitute substance that EPA determines may present “adverse effects to human health or the environment” when EPA has identified a safer substitute that can be used in the same application. 42 U.S.C. § 7671k(c).

Since 1994, EPA has implemented this statutory requirement under the SNAP program. 59 Fed. Reg. at 13,044. For more than twenty years, numerous industry sectors⁵ have relied on the SNAP program’s regulatory framework to support business planning decisions and investment in the development of new products employing safe alternatives to ozone-depleting substances. With certainty as to when EPA would phase down unsafe chemicals, affected industries like ours were able to determine the appropriate timing and investment for development of equipment that employs new alternatives and the phase-out of equipment using delisted substances. Adhering to a predictable

⁵ In 1994, EPA identified eight end use sectors: refrigeration and air conditioning; foam blowing; solvents cleaning; fire suppression and explosion protection; sterilants; aerosols; tobacco expansion; and adhesives, coatings, and inks. 59 Fed. Reg. at 13,070.

schedule facilitated by SNAP's ongoing listing and delisting of acceptable substitutes allows manufactures to align design changes with listings and avoid duplicative design cycles that are costly for manufactures and consumers alike.

The majority below says that the 2015 rule at issue here is the first time that EPA claimed authority to require an industry to switch away from a CFC substitute that had no impact on ozone depletion – and that, in the past, EPA had acknowledged that it could not prohibit anyone from using a non-ozone-depleting chemical that had previously been listed as an acceptable substitute. This is simply incorrect. The prior EPA statements quoted in the majority opinion concerned separate data and reporting requirements under Section 612(e), 42 U.S.C. § 7671k(e), and have nothing to do with the issue here. Pet. App. 41a-44a (Wilkins, J., dissenting); *see* 59 Fed. Reg. at 13,052.

In fact, since 1994, EPA has clearly asserted authority to require companies to transition from one CFC substitute (Substitute One) to another (Substitute Two), when EPA finds that Substitute Two is safer than Substitute One, regardless of whether Substitute One is an ozone-depleter. The express purpose of Section 612 is to ensure that, when companies transitioned away from CFCs and similar substances that were widely used until the 1990s, they would use substitutes that “reduce overall risks to human health and the environment” – not just that they would use non-ozone-depleting substances. The majority below held that EPA does in fact have authority to require companies that used CFCs in the past to switch from first- to second- to third generation substitutes, as long as all the prior substitutes have

some impact on ozone depletion. But once a company employs any non-ozone-depleting substance to replace an ozone-depleting substance, the majority says, EPA lacks authority to prohibit its use as a CFC replacement, regardless of the harm it may cause to human health and the environment. Such an interpretation could not reasonably have been anticipated in 1994 – given the comments on this issue that were submitted during the 1994 rulemaking and rejected by EPA.

Some commenters in that rulemaking – including the corporate predecessor of Arkema, one of the petitioners below – argued that anyone using a substitute listed as acceptable could never be required to change. *See* Pet. NRDC 9. Under their interpretation of Section 612, once a company replaces an ozone-depleting substance with a substitute approved by EPA, EPA lacks authority to require that company to replace it, even if a safer alternative were to become available after the initial listing.

EPA expressly rejected these arguments in the final 1994 Rule, stating: “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 went on to say:

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.

The Agency also asserted its authority to change the listing of a chemical from acceptable to prohibited based on new information about that chemical 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 regulations codified this understanding, explicitly providing 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 state 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 rulemaking record makes a distinction between a company that initially uses an ozone-depleting substance as a CFC replacement and one that uses a non-depleting substitute. Under the regulations, if EPA changes the status of a substitute from acceptable to unacceptable for a particular use, then “no person” may use it for that particular use, regardless what that person is currently using. 40 C.F.R. § 82.174(d).

Certain industry commenters petitioned for review of the 1994 Rule and specifically raised the issue of “grandfathering in the event of a change in . .

. listing.” Pet. NRDC 11. They later dropped the case, however, and chose not to challenge the interpretation set forth in the in 1994 Rule. *Id.*

Although the precise issue raised here certainly could have been challenged in 1994, petitioners below were given a second bite at the apple – in apparent contravention of Section 307(b)(1) of the CAA, which requires challenges to be filed within 60 days of a rule’s promulgation. 42 U.S.C. § 7607(b)(1). Even if petitioners were not barred from raising the issue below, the Court should recognize the significant reliance interests at stake. HVACR manufacturers and their chemical suppliers have invested well over a billion dollars based on the regulatory framework established in 1994. These same companies and many others, including the five companies submitting this brief, have made other significant business decisions based on the clear understanding that EPA had authority to – and would at some point – prohibit the HVACR industry from continuing to use HFCs as CFC substitutes. The unexpected decision from the divided court below, based on an issue that, in our view, had been resolved in 1994, has completely upended those business and investment decisions and warrants review by this Court.

**B. The Decision Below Has Created
Long-Lasting Regulatory
Uncertainty**

The majority below wrongly rejected EPA’s reasonable interpretation of Section 612 and concluded that the 2015 Rule must be partially vacated. Because of the disconnect between the decision below and the regulatory framework established in 1994 to implement Section 612, EPA

recently announced that, even now, almost a year after the decision was handed down, it has been unable to figure out how to implement the decision. 83 Fed. Reg. 18,431, 18,435-36 (Apr. 27, 2018).

Among other things, the majority assumes that there is a clear-cut distinction between regulated entities that have “replaced” ozone-depleting substances and those that have not. Such a distinction ignores the complexities associated with the broad use of CFC substitutes and the challenges associated with determining when such a substance has been “replaced.” As EPA explains, it is common for a single manufacturer to own multiple facilities, operate multiple production lines at a single facility, and make multiple products. 83 Fed. Reg. 18,435.

At what point has such a manufacturer “replaced” ozone-depleting substances? If it has used a non-ozone depleter to replace an ozone-depleter in any of its products? Only after it has stopped using any ozone depleters in any of its equipment or operations. Or perhaps if it has started using non-ozone-depleters in a majority of its products? If so, would this be based on the number of products, the total number of all products sold (since it may sell few of some products and many of others), or a majority in terms of the dollar value of products sold?

In a footnote, the majority recognizes that the 2015 Rule also applies to non-manufacturing companies that use ozone-depleting substances in a variety of applications. The footnote says that the decision applies to them too, but the majority provides no guidance as to how it could and should be applied in myriad of different situations where ozone-depleting substances and HFCs are used.

The impact of the D.C. Circuit's decision is not limited to EPA. As EPA described it, "regulated entities are experiencing substantial confusion and uncertainty regarding the meaning of the vacatur in a variety of specific situations." 83 Fed. Reg. at 18,434. Regulated entities need certainty with future compliance dates to guide plans for future operations. Phasing out the use of HFCs requires significant planning and steps in advance to accomplish the retooling, testing, and certifications necessary for a shift of such magnitude. Based on their reliance on the 2015 Rule, *Amici* began this process several years ago and have already invested hundreds of millions of dollars into the transition away from HFCs. EPA's inability to give effect to the D.C. Circuit's decision and provide certainty to regulated entities throws this planning into chaos.

Importantly, the decision below has much broader effect than simply the 2015 Rule. The decision attacks the heart of EPA's authority to prohibit the use of substitutes determined to have unacceptable health or environmental impacts – authority underpinning the SNAP program generally. EPA recognizes the potentially broad import of the D.C. Circuit's decision; but again, the path forward is not clear, with EPA saying that it will eventually need to undertake notice-and-comment rulemaking. 83 Fed. Reg. 18,435. As to when this may happen, the Agency is just now identifying the types of questions it may consider as it prepares to undertake such a rulemaking. *Id.*

Unless this Court steps in, the result will be an extended period of regulatory uncertainty, almost certainly including years of litigation challenging the new rule that EPA ultimately develops to implement

a confusing D.C. Circuit decision that was wrongly decided. Given that this decision has completely upended a major regulatory program that many companies have relied on for almost 25 years and has created regulatory uncertainty for major industrial sectors that will otherwise last well into the future, this case clearly merits review by this Court.

CONCLUSION

For the reasons discussed above, the Court should grant certiorari in this case.

Respectfully submitted,

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July 26, 2018