Nos. 17-1703 and 18-2

In the Supreme Court of the United States

HONEYWELL INTERNATIONAL INC., ET AL., *Petitioners*,
v.
MEXICHEM FLUOR, INC., ET AL., *Respondents*.

NATURAL RESOURCES DEFENSE COUNCIL, *Petitioner,*
v.
MEXICHEM FLUOR, INC., ET AL., *Respondents*.

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

BRIEF IN OPPOSITION FOR RESPONDENTS MEXICHEM FLUOR, INC. AND ARKEMA INC.

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QUESTION PRESENTED

Title VI of the Clean Air Act requires the phase-out, over time, of substances that deplete stratospheric ozone. 42 U.S.C. §§ 7671-7671q. One provision of that title—Section 612—directs that these ozone-depleting substances be replaced with safe alternatives as they are phased out. 42 U.S.C. § 7671k. In the decision below, the District of Columbia Circuit held that Section 612 of the Clean Air Act does not grant the Environmental Protection Agency authority to require the replacement of substances that do *not* deplete stratospheric ozone. The question presented is whether that decision is correct.

CORPORATE DISCLOSURE STATEMENT

Respondent Mexichem Fluor, Inc. is a Delaware-incorporated company, with headquarters in St. Gabriel, Louisiana. It is an indirectly wholly owned subsidiary of Mexichem, S.A.B. de C.V., a Mexican publicly traded company. No publicly held corporation other than Mexichem, S.A.B. de C.V. owns 10% or more of Mexichem Fluor, Inc.

Respondent Arkema Inc. is a Pennsylvania corporation that is headquartered in King of Prussia, Pennsylvania. It is a wholly owned subsidiary of Arkema Delaware, Inc. There are no publicly held companies that own 10% or more of the stock of Arkema Inc. However, Arkema Inc. is indirectly owned by Arkema, S.A., a French public company.

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INTRODUCTION

This case involves Title VI of the Clean Air Act (CAA), which is named "Stratospheric Ozone Protection."[1] That title requires that ozone-depleting substances (mainly chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), which the statute calls "class I" and "class II" substances) be phased out over time, and it instructs EPA on how to regulate the phase-out. One provision of Title VI—Section 612—directs the agency to ensure that ozone-depleting substances are replaced with safe alternatives as they are phased out. Since 1994, EPA has implemented CAA § 612 through its Significant New Alternatives Policy (SNAP) program.

Hydrofluorocarbons (HFCs), which do not deplete stratospheric ozone, were among the first substitutes for class I and class II substances that EPA approved under the program. More than 20 years later, in

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[1] We refer to the three sets of parties as follows: petitioners Honeywell International, Inc. (Honeywell), The Chemours Company FC, LLC (Chemours), and Natural Resources Defense Council (NRDC), which were intervenors in support of the respondent below, are "petitioners," and petitioners Honeywell and Chemours are "industry petitioners"; respondents Mexichem Fluor, Inc. (Mexichem) and Arkema Inc. (Arkema), which were petitioners below, are "respondents"; and respondent Environmental Protection Agency, which was the respondent below, is "EPA" or "the agency." "Industry Pet." refers to the petition for certiorari filed by industry petitioners (No. 17-1703); "NRDC Pet." refers to the petition for certiorari filed by NRDC (No. 18-2); and "Pet. App." refers to the appendix to the petition filed by industry petitioners (No. 17-1703). "Mass. Br." refers to the *amicus curiae* brief filed by Massachusetts *et al.*; "Carrier Br." refers to the *amicus curiae* brief filed by Carrier Corporation *et al.*; and "Daikin Br." refers to the *amicus curiae* brief filed by Daikin U.S. Corporation.

2015, the agency issued a SNAP rule that banned HFCs in a variety of uses. This was the first time EPA had used CAA § 612 to require, not that ozone-depleting substances be replaced with other substances, but that their *non-ozone-depleting replacements* be replaced. Respondents, which manufacture HFCs, challenged the rule in the D.C. Circuit, arguing that Congress did not authorize the agency to use the SNAP program for this purpose. Petitioners, an environmental group and two companies that manufacture replacements for HFCs (mainly hydrofluoroolefins (HFOs)), intervened in support of the rule.

In an opinion by Judge Kavanaugh, the court of appeals agreed with respondents and vacated the rule in part. Petitioners now ask this Court to review the D.C. Circuit's decision. The petitions should be denied.

First and foremost, the decision below does not conflict with any decision of this Court, of another federal court of appeals, or of a state court of last resort. On the contrary, it is the first and only decision of *any* court to address the narrow question whether EPA may use the SNAP program to order the replacement of substances that do not deplete stratospheric ozone. The petitions thus fail to satisfy the most basic criterion for Supreme Court review.

Particularly given the absence of a conflict, this case is not nearly important enough to warrant a place on this Court's merits docket. That is true for a host of reasons, among which are the following:

- Far from presenting a separation-of-powers or other constitutional question of extraordinary importance, the case involves an ordinary question of administrative law that the D.C.

Circuit confronts virtually every day: whether a particular agency action is authorized by the governing statute.

- Although one would not know it from reading the petitions, an Executive Order issued while this case was pending in the D.C. Circuit requires EPA to take appropriate action to suspend, revise, or rescind the rule in question—even if, as petitioners maintain, there was statutory authority to issue it. Petitioners thus are likely to be in the same position regardless of how this litigation ends.
- The D.C. Circuit's decision does not prevent EPA from regulating HFCs in particular or non-ozone-depleting substances in general. As the decision below explains, and as EPA made clear when it issued the initial SNAP rule in 1994, there are other statutory mechanisms—including the Toxic Substances Control Act (TSCA) and different provisions of the CAA—for regulating non-ozone-depleting chemicals that have already replaced class I and class II chemicals. Petitioners have never disputed this point, which refutes their overblown claims of imminent environmental disaster. In addition to these existing statutory devices, the 2016 Kigali Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer and a bipartisan 2018 Senate bill address the phase-down of HFCs.
- The D.C. Circuit's decision also does not prevent industry petitioners from selling their HFO products. And, contrary to petitioners' contention, it will not stifle innovation. Various companies (including industry petitioners

and respondents) developed products (including HFOs) to compete with HFCs years before EPA decided to use the SNAP program to ban previously approved substances, so the ban could not have been the motivation for their development. Industry petitioners are rent-seekers attempting to use government regulation, not to create new products, but to foreclose existing products of competitors.

- Consistent with the above, and despite having lost the case, EPA did not petition for rehearing in the D.C. Circuit and has not petitioned for certiorari in this Court. It appears, instead, that the agency will oppose the petitions for certiorari. Indeed, shortly after the court of appeals issued the decision below, an EPA spokesperson indicated that the agency agrees with the decision.

- Petitioners did petition for en banc rehearing, but—also consistent with the above—the D.C. Circuit denied it without a single recorded dissent.

Finally, the D.C. Circuit's decision is correct. The statute provides that "class I and class II substances shall be replaced" with safe alternatives and requires EPA to promulgate rules making it unlawful "to replace any class I or class II substance" with a prohibited substance. 42 U.S.C. § 7671k(a), (c). Yet the rule in question directed companies to replace *replacements* for class I and class II substances. Petitioners insist that Section 612 authorized EPA to order the replacement of a first-generation non-ozone-depleting substance with a second-generation non-ozone-depleting substance in 2015 on the theory that, in doing so, the agency was ordering the replacement of

the original class I or class II substance. Yet the same theory would allow the agency to use the SNAP program to order the replacement of an eleventh-generation non-ozone-depleting substance with a twelfth-generation non-ozone-depleting substance in 2115. The fact that ozone-depleting substances were once used in a particular product would mean that EPA could, under CAA § 612, regulate the chemicals used in that product forever. As the court of appeals understandably concluded, this interpretation—of a statute trained on reducing ozone depletion—"borders on the absurd." Pet. App. 15a. SNAP is a limited program, not a limitless one.

STATEMENT

A. Statutory And Regulatory Background

In the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 29, the United States and other nations agreed to phase out the production and consumption of ozone-depleting substances. The United States meets its obligations under the Protocol through Title VI of the CAA, entitled "Stratospheric Ozone Protection." Clean Air Act Amendments of 1990, Pub. L. No. 101-549, tit. VI, 104 Stat. 2399. In Title VI, Congress divided ozone-depleting substances into "class I" substances (mainly CFCs) and "class II" substances (HCFCs); set timetables for eliminating them; and directed EPA to create market-based cap-and-trade systems for controlling them. 42 U.S.C. §§ 7671a, 7671c-7671f.

Substitutes, the subject of this case, are addressed in CAA § 612, which is meant to ensure that ozone-depleting substances are replaced with safe alternatives as they are phased out. Section 612 begins

with this statement of policy in subsection (a): "To the maximum extent practicable, class I and class II substances shall be replaced by chemicals, product substitutes, or alternative manufacturing processes that reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). Subsection (c) in turn requires EPA to promulgate rules making it "unlawful to replace any class I or class II substance with any substitute substance which the Administrator determines may present adverse effects to human health or the environment," when the agency "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." *Id.* § 7671k(c). The same subsection calls for the agency to publish a list of "substitutes prohibited" and "safe alternatives" for "specific uses." *Id.*

To implement Section 612(c), EPA promulgated its initial SNAP rule in 1994. Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044 (Mar. 18, 1994). That rule contained the first list of acceptable substitutes for ozone-depleting substances, including HFCs in a variety of sectors. *Id.* at 13,067-13,120. The initial rule also "clarified" that "SNAP addresses only those substitutes or alternatives actually replacing the class I and II compounds." *Id.* at 13,050. The rule provided an example of how this would work:

> [I]f a hydrofluorocarbon (HFC) is introduced as a first-generation refrigerant substitute for either a class I (e.g., CFC-12) or class II chemical (e.g., HCFC-22), it is subject to review and listing under section 612. Future substitutions to replace the HFC would then be exempt from reporting under section 612

> because the first-generation alternative did not deplete stratospheric ozone.

Id. at 13,052. The "key" is what the substance "is designed to replace." *Id.* For "second-generation" substitutes, the agency explained, "[o]ther regulatory programs (e.g., other sections of the CAA, or section 6 of TSCA) exist to ensure protection of human health and the environment." *Id.* Consistent with this view, EPA had never used the SNAP program to change the status of a non-ozone-depleting substitute until it promulgated the rule at issue in this case. See Pet. App. 3a, 6a, 12a-13a & n.3.[2]

B. The EPA Rule At Issue

In June 2013, President Obama released his Climate Action Plan, which (among other things) described HFC emissions as a climate-change threat and announced that EPA would "use its authority through the [SNAP] Program" to reduce them. EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 10 (2013). In August 2014 the agency issued a proposed rule, and in July 2015 a final rule, that for the first time did just that. Protec-

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[2] To the extent that NRDC suggests that EPA de-listed non-ozone-depleting substances in 1996 and 1999 (NRDC Pet. 11-12), it is mistaken. The 1996 decision was "on the acceptability of * * * substitutes not previously reviewed by the Agency." Protection of Stratospheric Ozone: Listing of Substitutes for Ozone-Depleting Substances, 61 Fed. Reg. 54,030, 54,030 (Oct. 16, 1996). The same is true of the 1999 decision. See Protection of Stratospheric Ozone: Listing Hexafluoropropylene (HFP) and HFP-Containing Blends as Unacceptable Refrigerants Under EPA's Significant New Alternatives Policy (SNAP) Program, 64 Fed. Reg. 3,864, 3,867 (Jan. 26, 1999) ("HFP has not historically been used in refrigeration equipment").

tion of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 79 Fed. Reg. 46,126 (Aug. 6, 2014) (proposed rule); Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 42,870 (July 20, 2015) (final rule). The rule "primarily recognizes [this] call" in the Climate Action Plan (79 Fed. Reg. at 46,134) and is "consistent with [that] provision" of the Plan (80 Fed. Reg. at 42,880).

The final rule reclassified 38 individual HFCs or HFC blends as unacceptable for 25 uses. See C.A. J.A. 793-795; Pet. App. 8a. In each such use, class I and class II substances had already been either completely or nearly completely eliminated. See 80 Fed. Reg. at 42,888; C.A. J.A. 180, 528; Mexichem/Arkema C.A. Br. 20-21; Pet. App. 7a, 10a-11a; Industry Pet. 15.

In September 2015, respondents Mexichem and Arkema, which manufacture HFCs, filed consolidated petitions for review in the D.C. Circuit, arguing primarily that Title VI of the CAA does not authorize EPA to use the SNAP program to require the replacement of non-ozone-depleting substances like HFCs. Petitioners Honeywell and Chemours, which manufacture replacements for HFCs, intervened in support of the final rule. So did petitioner NRDC.

In October 2016, while this case was pending, 197 countries adopted an amendment to the Montreal Protocol in Kigali, Rwanda, that phases down HFCs in a manner similar to that in which CFCs and HCFCs have been phased down under the Protocol. Amendment to the Montreal Protocol on Substances

that Deplete the Ozone Layer, Oct. 15, 2016, U.N. Doc. C.N.872.2016.TREATIES-XXVII.2.f. Although the United States has not yet ratified the Kigali Amendment, in November 2017 a senior State Department official announced that "the process to consider U.S. ratification of the Amendment" had been "initiated." Judith G. Garber, Principal Deputy Assistant Secretary, Bureau of Oceans and International Environmental and Scientific Affairs, Remarks at the 29th Meeting of the Parties to the Montreal Protocol (Nov. 23, 2017), https://www.state.gov/e/oes/rls/remarks/2017/275874.htm.

Meanwhile, in March 2017, with this case still pending in the D.C. Circuit, President Trump issued his Executive Order on Promoting Energy Independence and Economic Growth. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017). The Executive Order "rescind[s]" President Obama's Climate Action Plan. *Id.* at 16,094. It also directs the "heads of all agencies" to identify existing agency actions "related to or arising from" the Plan and, "as soon as practicable," to "suspend, revise, or rescind," or "publish for notice and comment proposed rules suspending, revising, or rescinding," any such actions, "as appropriate and consistent with law and with the policies" set forth elsewhere in the Order. *Id.*

C. The D.C. Circuit's Decision

On August 8, 2017, the D.C. Circuit granted respondents' petitions for review and vacated the final rule insofar as it requires manufacturers and other regulated parties to replace HFCs. Pet. App. 1a-46a. Judge Kavanaugh wrote the court's opinion. *Id.* at 2a-26a.

After analyzing the text and legislative history of CAA § 612, and considering the consequences of EPA's then-current interpretation of the statute, the court of appeals concluded that, while the agency may de-list HFCs, "EPA's authority to regulate ozone-depleting substances under Section 612 * * * does not give [it] authority to order the replacement of substances that are not ozone depleting." Pet. App. 17a; see *id.* at 13a-16a. In so holding, the court emphasized that the agency continues to have "authority under Section 612(c) to prohibit any manufacturers that still use ozone-depleting substances * * * from deciding in the future to replace those substances with HFCs" and that EPA "possesses other statutory authorities * * * to directly regulate non-ozone-depleting substances" that are already in use, including TSCA and different provisions of the CAA. *Id.* at 16a-17a. The court of appeals also left open the possibility that the entire rule could be sustained under an "alternative theory"—what the court called a "retroactive disapproval" theory—that the agency was free to consider on remand. *Id.* at 19a; see *id.* at 19a-22a. Finally, the court rejected respondents' claim that, even if EPA may use the SNAP program to ban HFCs, it did so in an arbitrary and capricious way. *Id.* at 22a-25a.

Judge Wilkins disagreed with the court of appeals' interpretation of the statute and dissented in relevant part. Pet. App. 27a-46a.

Soon after the D.C. Circuit decided this case, an EPA spokesperson was quoted as saying that the court's decision "underscores [the] fundamental principle" that "EPA must possess statutory authority for the rules and regulations that we seek to issue."

Dustin Smith, *DC appeals court strikes down Obama-era EPA HFC regulations*, CHEMWEEK.COM, Aug. 21, 2017. Consistent with that statement, EPA did not file a petition for rehearing in the court of appeals. Petitioners did petition for rehearing but, on January 26, 2018, the D.C. Circuit denied rehearing en banc without any recorded dissent. Pet. App. 47a-48a.

On February 15, 2018, a bipartisan group led by Senators Kennedy and Carper introduced a bill that requires the phase-down of HFCs consistent with the Kigali Amendment to the Montreal Protocol and subject to certain other requirements. S. 2448, 115th Cong. (2018).

On April 27, 2018, EPA published a guidance document that, among other things, "provides the Agency's plan to begin a notice-and-comment rulemaking process to address the [D.C. Circuit's] remand of the 2015 Rule." Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program, 83 Fed. Reg. 18,431, 18,431 (Apr. 27, 2018); see *id.* at 18,435-18,436.

REASONS FOR DENYING THE PETITIONS

Petitioners ask this Court to review the D.C. Circuit's holding that EPA cannot use the SNAP program to require the replacement of substances that do not deplete stratospheric ozone. The court of appeals' decision does not conflict with the decision of any other court. The question presented is not important enough to justify a grant of certiorari. And the decision below is correct. Further review is unwarranted.

A. The Decision Below Does Not Conflict With Any Decision Of Any Court

The D.C. Circuit's decision does not conflict with any decision of any other court of appeals or any state court of last resort. See Sup. Ct. R. 10(a). Nor does it conflict with any decision of this Court. See Sup. Ct. R. 10(c). Petitioners do not and cannot contend that there is any such conflict, for the very good reason that this is the first and only case in which any court at any level has addressed the narrow question whether EPA can use the SNAP program to require the replacement of non-ozone-depleting substances.

Except in rare circumstances, this Court exercises its certiorari jurisdiction to ensure that federal law is uniform. Federal law on the question presented in the petitions is already uniform. There is no need for the Court to grant certiorari in this case of first impression just to take a second look at the unique legal issues that were thoroughly considered and addressed by the court of appeals.

Petitioners point out that the D.C. Circuit has exclusive jurisdiction over this type of challenge to EPA action and that a circuit conflict therefore cannot develop. Industry Pet. 31; NRDC Pet. 23. We do not maintain, of course, that this Court *never* reviews a decision of the D.C. Circuit that does not conflict with a decision of another court. We maintain only what petitioners cannot deny: that, in the absence of a conflict, there must be especially compelling reasons for a grant of certiorari—something that ordinarily requires the question presented to be "important" even when there *is* a conflict. Sup. Ct. R.

10(a), (b), (c). As explained below, this case does not come close to satisfying that standard.

B. The Question Presented Is Not Sufficiently Important To Justify A Grant Of Certiorari

Lacking any decisional conflict, petitioners attempt to persuade the Court that this case is the rarest of the rare: one in which certiorari should be granted despite the absence of a conflict because of the exceptional importance of the question presented. The question presented is not exceptionally important. Far from it.

1. As an initial matter, this case does not involve any separation-of-powers or other constitutional question of surpassing importance—as was true, for example, in a recent case from the D.C. Circuit in which this Court granted certiorari. See *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018) (whether SEC administrative law judges are officers of the United States within meaning of Appointments Clause). (It bears mention that there was also a circuit conflict in that case—as there was, not surprisingly, in the two other most recent D.C. Circuit cases in which this Court granted review, see *Jam* v. *Int'l Finance Corp.*, 138 S. Ct. 2026 (2018); *Lorenzo* v. *SEC*, 138 S. Ct. 2650 (2018).) Instead, as the court of appeals put it, this case involves the kind of "statutory interpretation issue that arises again and again" in the D.C. Circuit: "whether an * * * agency has statutory authority from Congress to issue a particular regulation." Pet. App. 2a. In that respect, this is an ordinary case, not an extraordinary one.

2. There is another reason why the question presented is not sufficiently important to justify a grant

of certiorari. The EPA rule that petitioners defend was promulgated pursuant to President Obama's 2013 Climate Action Plan. President Trump's 2017 Executive Order "rescind[s]" the Climate Action Plan. 82 Fed. Reg. at 16,094. It also directs agency heads to identify existing agency actions "related to or arising from" the Plan and to "suspend, revise, or rescind," or "publish for notice and comment proposed rules suspending, revising, or rescinding," any such actions, "as appropriate and consistent with law and with the policies" described in the Order. *Id.*

The Executive Order thus directs EPA to take appropriate steps to suspend, revise, or rescind the rule at issue here, which both is "related to" and "arises from" the Climate Action Plan. This fact, by itself, is a reason to deny certiorari. The Court should not grant review to decide whether to reinstate a rule that the President has directed EPA to reconsider—an obligation that would bind the agency even if, as petitioners maintain, EPA had statutory authority to issue the rule.

The Executive Order was featured prominently in the briefing at the petition-for-rehearing stage in the D.C. Circuit, and may have been one of the reasons why that court denied rehearing. Remarkably, neither petition for certiorari even *mentions* the Executive Order, let alone attempts to explain why this Court should grant review in spite of it.

3. Industry petitioners instead insist that the question presented is exceptionally important because the D.C. Circuit's decision "increases the likelihood of disastrous climate impacts from global warming" assertedly caused by HFCs and "restricts EPA from addressing other health and safety risks

from [other] non-ozone-depleting substitutes." Industry Pet. 23, 26. In a similar vein, NRDC warns that this Court's intervention is necessary because the decision below will "worsen the impacts of climate change" and leave "millions of Americans at risk from toxic, flammable, climate-changing, or otherwise harmful chemicals in products they use every day." NRDC Pet. 5, 21.

These contentions are dramatic but specious. Under President Trump's Executive Order, the rule the D.C. Circuit vacated in part is slated to be reconsidered regardless of whether that decision stands. In any event, the court of appeals did *not* hold that EPA may not ban HFCs or other non-ozone-depleting substances; it held only that the agency may not use *the SNAP program* to ban HFCs or other non-ozone-depleting substances *that have already replaced ozone-depleting substances*. As the court explained:

> EPA possesses other statutory authorities, including the Toxic Substances Control Act, to directly regulate non-ozone-depleting substances that are causing harm to the environment. *See* 15 U.S.C. §§ 2601-2629 (Toxic Substances Control Act); *see also* 42 U.S.C. § 7408 (National Ambient Air Quality Standards program); *id.* § 7412 (Hazardous Air Pollutants program); *id.* §§ 7470-7492 (Prevention of Significant Deterioration program); *id.* § 7521 (Section 202 of Clean Air Act). Our decision today does not in any way cabin those expansive EPA authorities.

Pet. App. 17a.

The availability of these other, "expansive," statutory authorities shows that the decision below will

not prevent EPA from protecting human health and the environment. Petitioners' responses to this critical point—which appear in a footnote in NRDC's petition and on the last page of industry petitioners'—seem little more than an afterthought. They argue (1) that, even if the other laws can be used "for this purpose," there is "no reason to discard Section 612" (NRDC Pet. 29 n.8); (2) that the court of appeals "provided no support for its assertion that these other pathways are viable" (Industry Pet. 36; see also NRDC Pet. 29 n.8); and (3) that the other statutory authorities are not "practical for industry" because regulation under Section 612 is the only way to prohibit the use of HFCs "based on comparative risks" (Industry Pet. 36).

Petitioners' responses are as meritless as they are perfunctory. The first begs the question presented—and effectively concedes that there *are* other mechanisms for regulating HFCs. The second is ironic, given that petitioners have never shown—or even attempted to show—that the other options are *not* viable. EPA itself recognized that they are, when it promulgated the initial SNAP rule in 1994. See 59 Fed. Reg. at 13,052 (for "second-generation" substitutes, "[o]ther regulatory programs (e.g., other sections of the CAA, or section 6 of TSCA) exist to ensure protection of human health and the environment"). And the third is an *ipse dixit*, failing as it does to offer any explanation why "industry" needs a "comparative risk regime" to address "these problems." Industry Pet. 36.

The D.C. Circuit also emphasized that HFCs can be restricted, not only through other statutory regimes, but *through the SNAP program itself*, so long as it is ozone-depleting substances that are being re-

placed. See Pet. App. 16a ("EPA has statutory authority under Section 612(c) to prohibit any manufacturers that still use ozone-depleting substances that are covered under Title VI from deciding in the future to replace those substances with HFCs."); see also *id.* at 17a ("EPA still has statutory authority to require product manufacturers to replace substitutes that (unlike HFCs) are themselves ozone depleting."). The court of appeals even left open the possibility that the rule at issue could be justified *in its entirety* on another ground (*id.* at 19a-22a) and gave EPA the opportunity "to pursue this 'retroactive disapproval' approach" on remand (*id.* at 20a). Finally, the court held that, insofar as the rule is statutorily authorized in part, it is not arbitrary and capricious—rejecting each and every one of respondents' arguments on this point. *Id.* at 22a-25a. As petitioners acknowledge, the D.C. Circuit thus "unanimously concluded that § 612 allows EPA to consider the risks of climate change" (Industry Pet. 12) and "unanimously upheld EPA's authority under Section 612(c) to move HFCs from the acceptable list to the unacceptable list" on that basis (NRDC Pet. 16).

Besides these existing laws, there are other legal devices that would give EPA specific authority to regulate and ultimately ban HFCs—devices that, unlike Section 612 of the CAA, are indisputably intended to do that job. In 2016, well after EPA promulgated its SNAP rule, the international community amended the Montreal Protocol in Kigali to require a global phase-down of HFCs. That holistic approach—which respondents support—will alleviate the "urgent" and "alarming" worldwide environmental consequences that petitioners fear (NRDC Pet. 21; Industry Pet. 5), quite apart from any SNAP rule that could ban particular chemicals in specific sectors in

the United States. The 2018 Kennedy-Carper bill likewise calls for HFCs to be phased down in the way that ozone-depleting substances have been successfully phased down under the Montreal Protocol.

Industry petitioners do not mention either the treaty amendment or the Senate bill. And while NRDC does acknowledge the Kigali Amendment, it says only that "EPA's authority to prohibit specific uses of HFCs * * * in * * * Section 612" is "independent of the amendment." NRDC Pet. 15 n.6. As with its position on the other statutes, this response both begs the interpretive question presented here and recognizes that there are other ways to regulate HFCs.

For their part, *amici* states completely ignore both the other existing authorities and the additional ones that are under consideration. On top of all these *federal* laws, there are—as their brief acknowledges—numerous *state* mechanisms for regulating HFCs. See Mass. Br. 5-6, 16-17 & nn. 4-5; see also Amici Cal. *et al.* C.A. Br. 6-9 & nn. 4-6. Indeed, in response to the D.C. Circuit's decision in this very case, California took administrative action to preserve some of the HFC bans (Cal. Air Res. Control Bd., Prohibitions on Use of Certain Hydrofluorocarbons in Stationary Refrigeration and Foam End-Uses, Res. 18-14 (Mar. 23, 2018)), while its legislature is considering a measure to further align California law with the federal SNAP rule that was partially vacated (S.B. 1013, 2017-2018 Reg. Sess. (Cal. 2018)).

4. Industry petitioners also contend that this Court's review is needed because the D.C. Circuit's decision "eviscerates incentives to engage in * * * research and development of safer alternatives." Industry Pet. 22; see *id.* at 21-23. NRDC echoes this

view. NRDC Pet. 5, 20, 22. Petitioners' charge of stifled innovation is as overwrought as their claim of impending environmental catastrophe, and it is just as spurious.

To begin with, petitioners' argument about "incentives" rests on the premise that the court of appeals' decision prevents EPA from regulating HFCs and other non-ozone-depleting substances. As explained above, it does not. But the conclusion would not follow even if the premise were correct. For industry petitioners claim to have developed a superior product to replace HFCs that customers already were adopting *without* a ban on HFCs. See, *e.g.*, Honeywell/Chemours C.A. Br. 17 ("even before the Final Rule was issued, industry transitioned [to] HFOs for important uses"). Their argument masks their true interest in this case, which is to have government choose market winners and losers, suppressing competition.

The court of appeals' decision does not prevent industry petitioners (or anyone else) from manufacturing and selling their HFO products today; it just prevents them from doing so without competition from manufacturers and sellers of other products. There is thus no basis for their histrionic assertion that the decision below "upend[s] over a billion dollars in * * * investments." Industry Pet. 3. Indeed, after the D.C. Circuit issued its decision, petitioner Chemours announced that it expected the automotive sector to continue transitioning to its HFO. Press Release, Chemours, Chemours Responds to EPA 2015 Ruling to Regulate HFCs (Aug. 9, 2017), https://investors.chemours.com/news-releases/news-releases-details/2017/Chemours-Responds-to-EPA-2015-Ruling-to-Regulate-HFCs/default.aspx.

Much the same can be said about industry petitioners' invocation of "reliance" interests—and, in particular, their claims that they "made these investments in reliance on § 612 and the SNAP program" and that the decision below "prejudices companies that invested and structured their activities in reliance on SNAP." Industry Pet. 22; accord NRDC Pet. 22. Industry petitioners could not have "relied" on the rule the court of appeals vacated in part, because they developed their products long before 2015, when the rule was issued—and indeed long before 2013, when President Obama's Climate Action Plan was released. See, *e.g.*, Industry Pet. 10-11. Nor could they have reasonably "relied" on the agency's adopting such a rule in the future, because, as the court of appeals put it, EPA had never before "sought to order the replacement of a non-ozone-depleting substitute that had previously been deemed acceptable by the agency" (Pet. App. 13a)—and indeed had explicitly stated that it "did not possess authority under Section 612(c) to require the replacement of non-ozone-depleting substances" (*id.* at 12a). EPA adopted its "new interpretation" in 2015 "[f]or the first time." *Id.* at 13a.

What we have just said also disproves *amici* states' claim that they "relied" on the SNAP program as a "floor" in regulating HFCs and other non-ozone-depleting substances under state law. Mass. Br. 1-2, 5-8. It likewise refutes *amici* equipment manufacturers' assertion that they "relied" on the program in developing equipment that accommodates HFC substitutes. Carrier Br. 1-2, 4-6, 8-9, 16-21, 23-24; Daikin Br. 2-3, 6, 8-10. It bears emphasis, too, that the D.C. Circuit's decision does not prevent the use of such equipment any more than it prevents the pro-

duction and sale of the HFC replacements themselves.

One final point in this connection. In the course of making their arguments about "incentives" and "reliance," industry petitioners say that their "non-U.S. competitors" have "continued to make older, less safe products" and that the D.C. Circuit's decision gives an advantage to "cheap foreign substitutes." Industry Pet. 4, 22. To the extent that the "non-U.S." companies and "foreign" products to which they refer are meant to include respondents and the HFCs respondents manufacture, industry petitioners are mistaken. Respondents are not foreign companies, and they manufacture HFCs in the United States.[3] Nor is it true, as industry petitioners assert, that respondents "have not developed and do not produce HFC alternatives." *Id.* at 11-12. Meanwhile, industry petitioners continue to sell the "less-safe substitutes" (*id.* at 15) they claim to deplore.

5. Industry petitioners also maintain that the decision below has created "confusion" and "uncertainty" (Industry Pet. 28, 30) by virtue of "the distinction the D.C. Circuit drew between manufacturers who have and have not stopped using ozone-depleting chemicals" (*id.* at 27). Accord NRDC Pet. 21-22. It would be more accurate to say that this "distinction" was drawn by Congress, when it enacted Section 612

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[3] Although Mexichem's stock is directly or indirectly owned by a Mexican company, and Arkema's is indirectly owned by a French company, each respondent is incorporated and headquartered in the United States. Between them, moreover, respondents have dozens of facilities and thousands of employees in this country. Mexichem and Arkema manufacture HFCs in Louisiana and Kentucky, respectively.

of the CAA, and that any "confusion" or "uncertainty" is a result of EPA's attempt to use the SNAP program to ban non-ozone-depleting substitutes that are already widely used. In any case, as EPA's April 2018 guidance document makes clear, this issue and others will be considered in a notice-and-comment rulemaking that addresses the legal defects in the 2015 rule identified in the court of appeals' decision. See 83 Fed. Reg. at 18,435-18,436. Petitioners will have an opportunity to submit comments on the proposed rule to the agency and to challenge the final rule in court if there is a basis for doing so.

Industry petitioners are unhappy with the statement in the guidance that "EPA will not apply the HFC use restrictions or unacceptability listings in the 2015 Rule for any purpose prior to completion of rulemaking." 83 Fed. Reg. at 18,433; see Industry Pet. 29-30. But the fact that EPA is implementing the decision below in a manner that industry petitioners dislike hardly demonstrates a need for review of the decision itself.

Finally, industry petitioners complain that the rulemaking will leave regulated entities "in limbo" and that "this Court's review could obviate the need for such rulemaking in the first place." Industry Pet. 30. But petitioners did not seek a stay of the court of appeals' mandate, either in the D.C. Circuit or in this Court, and the case accordingly returned to the agency. Petitioners then sought and obtained a 60-day extension of time within which to file their petitions for certiorari, the maximum allowable. See 28 U.S.C. § 2101(c). On that schedule, this Court likely would not decide this case on the merits before Spring 2019, at the earliest, if it were to grant certiorari. So the "delay" petitioners are protesting (Indus-

try Pet. 30) is at least in part a result of their own actions and inactions.

6. Consistent with all of the above, EPA—the agency that administers the SNAP program, that issued the rule in question, that was the respondent in the court of appeals, and that was the losing party there—did not petition the D.C. Circuit for panel or en banc rehearing. Nor has EPA filed a petition for certiorari in this Court; it appears, instead, that it will file a brief in opposition to petitioners' certiorari petitions. Indeed, shortly after the court of appeals decided this case, an EPA spokesperson indicated that the agency believes the decision to be correct. See Smith, *supra*. It would be quite unusual for this Court to grant review in these circumstances.

Petitioners studiously ignore this proverbial elephant in the room—or rather this elephant that is *not* in the room. But the fact that EPA is not a petitioner here, and that it apparently will oppose the petitions for certiorari despite having lost below, is one of the many features that distinguishes this case from the cases that petitioners cite (Industry Pet 31; NRDC Pet. 23). In all but one of those cases, EPA (or another federal agency) either lost in the D.C. Circuit and petitioned for certiorari or opposed certiorari after winning below. See *FERC* v. *Elec. Power Sup-ply Ass'n*, 136 S. Ct. 760 (2016); *Michigan* v. *EPA*, 135 S. Ct. 2699 (2015); *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427 (2014); *EPA* v. *EME Homer City Generation, L.P.*, 134 S. Ct. 1584 (2014); *Massachusetts* v. *EPA*, 549 U.S. 497 (2007).[4]

[4] In the other case cited by petitioners, the federal government opposed certiorari after losing in the Second Circuit, but it apprised the Court that the decision below "is incorrect in im-

Unlike EPA, petitioners did petition for rehearing in the D.C. Circuit. But—also consistent with the above—the court of appeals denied rehearing en banc without a single recorded dissent. Like EPA's decision not to seek further review, the apparent unanimity of the decision not to rehear the case en banc, issued by a court of appeals whose members confront issues of the kind presented here almost daily and certainly know an exceptionally important question when they see one, is difficult to reconcile with the alarmist rhetoric that pervades the petitions for certiorari—and pervaded the petitions for rehearing en banc.

C. The Decision Below Is Correct

Petitioners also contend that the D.C. Circuit's interpretation of CAA § 612 is incorrect. Industry Pet. 31-36; NRDC Pet. 23-32. Especially in light of what we have shown above, that would not be a basis for certiorari even if petitioners' position had merit. And it does not.

1. The court of appeals correctly found that EPA "tried to jam a square peg (regulating non-ozone-depleting substances that may contribute to climate change) into a round hole (the existing statutory landscape)." Pet. App. 18a. CAA § 612 addresses the "replace[ment]" of "class I and class II substances." 42 U.S.C. § 7671k(a), (c). In holding that "EPA's au-

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portant respects"; that the decision "has great potential practical importance"; and that the government "would support reversal in the event that certiorari were granted." Br. for Fed. Resps. in Opp. at 25, *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208 (2009) (Nos. 07-588, 07-589, and 07-597), 2008 WL 582490, at *25. Unlike in this case, moreover, the petitioners in that case asserted the existence of multiple circuit conflicts. See *id.* at 9, 13, 20-24, 2008 WL 582490, at *9, *13, *20-24.

thority to regulate ozone-depleting substances under Section 612 * * * does not give [it] authority to order the replacement of substances that are not ozone depleting" (Pet. App. 17a), the D.C. Circuit carefully analyzed the statutory text and legislative history, and appropriately took into account the consequences of a contrary interpretation.

As to the statutory text:

> In common parlance, the word "replace" refers to a new thing taking the place of the old. * * * [M]anufacturers "replace" an ozone-depleting substance when they transition to making the same product with a substitute substance. After that transition has occurred, the replacement has been effectuated, and the manufacturer no longer makes a product that uses an ozone-depleting substance. At that point, there is no ozone-depleting substance to "replace," as EPA itself long recognized.

Pet. App. 14a.

As to the legislative history:

> The Senate's version of the safe alternatives policy would have required the replacement not just of ozone-depleting substances, but also of substances that contribute to climate change. In other words, the Senate bill would have granted EPA authority to require the replacement of non-ozone-depleting substances such as HFCs. But the Conference Committee did not accept the Senate's version of Title VI. Instead, the Conference Committee adopted the House's narrower focus on ozone-depleting substances.

Pet. App. 15a-16a (citations omitted).

As to the consequences of a contrary interpretation:

> Under EPA's [then-]current interpretation of the word "replace," manufacturers would continue to "replace" an ozone-depleting substance with a substitute even 100 years or more from now. EPA would thereby have indefinite authority to regulate a manufacturer's use of that substitute. That boundless interpretation of EPA's authority under Section 612(c) borders on the absurd.

Pet. App. 15a.

2. Petitioners offer no persuasive response to the D.C. Circuit's reasoning. They contend, for example, that the court's interpretation of the term "replace" in Section 612 is not the only possible one. Industry Pet. 32-34; NRDC Pet. 25-26. But "statutory language has meaning only in context." *Graham Cnty. Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 289 (2010) (internal quotation marks and brackets omitted). Whatever "replace" might mean in *other* contexts, in *this* context no one employing ordinary English usage would say that, when a company switches from HCFCs to HFCs, and then years later switches from HFCs to HFOs, it is "replacing" the HCFCs with the HFOs. Anyone using ordinary English would say that the HFOs are "replacing" the HFCs.

Petitioners also argue that the decision below is inconsistent with Section 612(a), which states that, "[t]o the maximum extent practicable, class I and class II substances shall be replaced by chemicals * * * that reduce overall risks to human health and

the environment." 42 U.S.C. § 7671k(a). According to petitioners, the court of appeals has prevented EPA from reducing overall risks to human health and the environment "to the maximum extent practicable." Industry Pet. 34-35; NRDC Pet. 27-28. This argument reflects a fundamental misunderstanding of the statute. The directive in CAA § 612(a) is not to "reduce overall risks to human health and the environment" whenever and however EPA chooses; it is, as the statute plainly states, to "replace[]" "class I and class II substances" with chemicals that "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). Petitioners would read one of the two essential elements out of the statute, transforming a limited program into a limitless one.

In a related "purpose"-based argument, petitioners maintain that the D.C. Circuit's decision "leave[s] EPA powerless to respond to new data on previously unknown or underestimated risks" (NRDC Pet. 28) and "permit[s] * * * the * * * regulated community to use a non-ozone-depleting substitute in perpetuity so long as the user employs that substitute before it is listed as unacceptable" (Industry Pet. 35). That of course is untrue, because the agency has numerous means of regulating HFCs outside the SNAP program. This point was emphasized by the D.C. Circuit (Pet. App. 17a), and petitioners do not seriously dispute it (see Point B.3, *supra*). Indeed, the availability of these other, "expansive," mechanisms for regulating and ultimately banning non-ozone-depleting substances (Pet. App. 17a) is further proof that Congress did not intend CAA § 612 to have the boundless scope that petitioners ascribe to it.

NRDC also insists that petitioners' interpretation is more consistent with the "statutory context

and structure." NRDC Pet. 26. NRDC ignores, however, the most compelling contextual and structural evidence, which is that Section 612 is found in a title of the CAA whose name is "Stratospheric Ozone Protection," whose principal object is the phase-out of substances that deplete stratospheric ozone, and whose unmistakable focus throughout is on ozone-depleting substances. This is hard to square with petitioners' position that CAA § 612 authorizes EPA to create an ongoing general regulatory regime to approve or disapprove any substance used for a purpose for which an ozone-depleting substance was once used, no matter how long ago. Petitioners would convert Section 612 into a sort of miniature TSCA, divorced from the regulation of ozone-depleting substances that Title VI addresses.

NRDC next asserts that the D.C. Circuit's interpretation has "illogical and perverse" consequences. NRDC Pet. 31. But it is petitioners' reading of Section 612—a provision intended to ensure that ozone-depleting substances are replaced with safe alternatives as they are phased out—that leads to the most illogical and perverse result. For if Section 612 authorized EPA to order the replacement of a first-generation non-ozone-depleting substance with a second-generation non-ozone-depleting substance in 2015, on the theory that in so doing it was ordering the replacement of the original class I or class II substance, the very same theory would allow the agency to order the replacement of an eleventh-generation non-ozone-depleting substance with a twelfth-generation non-ozone-depleting substance in 2115. If anything, the court of appeals was being charitable when it said that this interpretation merely "borders" on the absurd. Pet. App. 15a. Tellingly, far

from attempting to refute this point, NRDC embraces it. See NRDC Pet. 28.

Finally, NRDC claims that the D.C. Circuit "suggested that EPA's authority to regulate manufacturers currently using HFCs was undermined by Congress's 'failure to enact general climate change legislation.'" NRDC Pet. 29 (quoting Pet. App. 18a). In fact the court of appeals said the opposite—not that "Congress's failure to enact general climate change legislation" *prevents* EPA from acting when the agency otherwise *has* authority to do so, but that this congressional inaction "does not *authorize* EPA to act" when, as here, the agency otherwise does *not* have authority to do so. Pet. App. 18a. That is not a controversial proposition.

3. One of the themes of the petitions is that the decision below "cuts the heart out of Section 612" (NRDC Pet. 3) and "gut[s] [a] crucial 25-year-old environmental program" (Industry Pet. 3). In making this claim, however, petitioners assume the answer to the question presented in the case. That question is whether—as petitioners insist—CAA § 612 gives EPA the unlimited authority to order the replacement of any substance that is used for a purpose for which an ozone-depleting substance was once used, or instead—as respondents maintain, as the D.C. Circuit held, and as the agency had long recognized—Section 612 gives EPA only the limited authority to order the replacement of an ozone-depleting substance. For the reasons we have given, petitioners' position is wrong. Thus, far from having "cut the heart out" of Section 612 and "gutted" the agency's regulations, the D.C. Circuit simply kept the SNAP program within the bounds prescribed by Congress.

To the extent that the age of the program—going on 25 years—has any relevance, it supports respondents' position, not petitioners', since EPA had not sought to use the SNAP program for this purpose until 2015. See Pet. App. 3a, 6a, 12a-13a & n.3. It was the rule at issue that fundamentally changed the program, not the court of appeals' decision, which returned the SNAP program to its original and longstanding function.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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