No. 18-2

IN THE

Supreme Court of the United States

NATURAL RESOURCES DEFENSE COUNCIL,

Petitioner,

v.

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

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

REPLY BRIEF

The decision below will cause grave health and environmental harm affecting millions of Americans and will permanently disable the Clean Air Act program Congress designed specifically to prevent that harm. The decision disrupts billion-dollar investments in safer alternatives made in reliance on that program. And the decision substitutes a divided panel's cramped interpretation of statutory language for a manifestly reasonable and longstanding agency interpretation consistently held across multiple administrations. Absent this Court's review, that single, divided panel decision will permanently preclude *any* future administration from using this Clean Air Act provision to protect the public in the way Congress intended. This Court should grant certiorari.

I. The Exceptionally Harmful Impacts and Permanent Legal Consequences of the Decision Below Warrant This Court's Review

The permanent harmful consequences of the lower court ruling require this Court's review. The decision will cause grave health and environmental harm by blocking the 2015 HFC Rule at issue in this case. More than that, it precludes EPA, whether in this or any future administration, from ever again using Section 612 of the Clean Air Act to curb *any* kind of dangerous substitutes for ozone-depleting substances – including ones that are highly toxic, flammable, or otherwise harmful – unless they also happen to deplete the ozone layer. The exclusive jurisdiction of the D.C. Circuit means the issue can never be litigated again in any court of appeals. This Court's review is the only way to correct the lower court's

error and restore Section 612 to its intended scope and function.

A. The Decision Will Cause Grave Health and Environmental Harm

The health and environmental significance of the ruling below is difficult to overstate. As EPA recognized in 1994, HFCs are extremely potent greenhouse gases, with thousands of times the heat-trapping power of carbon dioxide. NRDC Pet. 8–9. By 2015 EPA found that HFC use was growing much faster than anticipated in 1994, and at a rate much faster than any other greenhouse gas. NRDC Pet. 14. EPA found that absent regulation, ever-increasing HFC emissions will significantly intensify the devastating impacts of climate change, including deadly heatwaves, droughts, extreme storms, rising seas, and the spread of disease. *Id.* EPA also found the grave harms from HFCs could be largely averted at low cost because safer alternative chemicals are now readily available. NRDC Pet. 12–13.[1] Yet despite affirming all of EPA's fact-finding on HFCs' serious climate-change impacts, the lower court decision blocks any effective remedy under the very statute Congress designed to regulate them.

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[1] EPA found the Rule would produce large climate benefits at low costs. It would avoid HFC emissions equivalent to as much as 31 million metric tons of carbon dioxide in 2020, 64 million metric tons in 2025, and 101 metric tons in 2030, with amounts rising every subsequent year. 80 Fed. Reg. 42,870, 42,949 (July 20, 2015). The cost of the Rule fell "well below the $100 million per year threshold to consider this an economically significant rule" under Executive Order 12,866. *Id.* at 42,944.

The decision will have even further-reaching health and environmental consequences because it strips EPA of authority to curb *any* dangerous substitute that is already in use but does not happen to deplete ozone. Though EPA's brief ignores it, the agency used this authority at least twice before – stopping the use of hexafluoropropylene (HFP) (a kidney toxin) in refrigeration in 1999 and the use of sulfur hexafluoride (SF_6) (a potent greenhouse gas) in aerosols in 1996. *See* NRDC Pet. 11–12.[2] If it were confronted by those dangerous substitutes now, EPA would be powerless to respond. Even more disconcerting, the majority opinion allows any person who no longer uses ozone-depleting substances to reintroduce toxic, flammable, and otherwise dangerous alternatives that have long been banned. NRDC Pet. 31. Congress created no such protected status for harmful but non-ozone-depleting substitutes. Rather, in a clear formulation used repeatedly in Section 612, Congress focused on "reduc[ing] overall risk to public health and the environment." *E.g.*, 42 U.S.C. § 7671k(a).

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[2] Industry Respondents ("Mexichem") falsely imply these substitutes were not already in use and thus are no precedent for stopping incumbent manufacturers from continuing to use prohibited non-ozone-depleting substitutes. Mexichem Opp. 7 n.2. In fact, "[a]s late as about 1995, [SF_6] was being used in at least two automotive products" (aerosols products for inflating flat tires). Montfort A. Johnsen, *Propellant Injection*, SPRAY Technology and Marketing (Oct. 2014), https://www.spraytm.com/propellant-injection.html. And EPA acted quickly to ban the kidney toxin HFP because "refrigerant blends that contain HFP may currently be commercially available and in actual use around the nation." 64 Fed. Reg. 3,865, 3,867 (Jan. 26, 1999).

B. The Decision Upends Legitimate Business Reliance Interests and Burdens States

The ruling also does grave damage to the well-founded reliance interests of the industry petitioners and *amici* companies that have developed safer alternatives to perform the functions of the original ozone-depleting substances. The decision upends the quarter-century-old regulatory structure they relied on to invest well over a billion dollars to develop these safer substitutes and redesign products to use them. Honeywell Pet. 3–4, 21–22; Carrier Br. 4–5, 8; Daikin Br. 2–3, 6.

The decision harms the State *amici* as well by saddling them with new regulatory burdens to achieve at least a portion of the health and environmental protections they had long counted on EPA to deliver. Massachusetts Br. 8–11.

C. EPA's About-Face Would Forever Disable Section 612 While Leaving No Viable Regulatory Alternative

EPA's brief affirms that the agency had consistently interpreted Section 612 since 1994 to authorize the agency to prohibit the use of any harmful substitute – whether ozone-depleting or not – and to forbid any person – whether a current user or not – from using it thenceforth, if the Administrator determines that a safer alternative is available. *See* EPA Opp. 4–6 ("[A]ny substitute designed to replace [an ozone-depleting substance] is subject to review under section 612," because 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.") (citations and quotation marks omitted). EPA notes that the agency "reiterated" that longstanding view when it adopted the 2015 HFC Rule. EPA Opp. 6.

The current administration defended this longstanding interpretation and the 2015 Rule in the court below. The government's brief here marks the first time EPA has ever endorsed the convoluted construction adopted by the panel majority.

The agency's about-face in litigation does not diminish the need for certiorari. Today's EPA management, with different policy preferences than three prior administrations, may now wish to disavow its legal authority. But that is not a sound basis for forever locking in a divided panel's restrictive construction of Congress's enactment. Far from serving "little or no purpose" or being "of limited prospective importance," EPA Opp. 9–10, this Court's review is essential.

In response to our showing that the majority opinion cuts the heart out of Section 612, EPA wanly observes that the lower court left a remnant on the operating room floor. To be sure, the opinion lets EPA bar the few manufacturers that still use ozone-depleting substances from switching to HFCs. EPA Opp. 11. But far more consequential is the authority the opinion takes away. When EPA listed HFCs in 1994 as acceptable "near-term" substitutes for CFCs, it gave industry fair notice that it could revisit that listing if new data emerged on the dangers of HFCs or if safer substitutes became available. NRDC Pet. 8–9. That is exactly what EPA did in the 2015 Rule. The majority opinion destroys that authority. It does not just

block this one rule. It forever grandfathers all current uses of *any* dangerous substitute (not just HFCs) that does not deplete ozone.

Neither EPA nor Mexichem have shown any feasible or timely alternative path forward. EPA asserts that an "upcoming rulemaking" may resolve "some" of petitioners' concerns. EPA Opp. 12–13. That rulemaking, however, *cannot* solve the fundamental problem: the lower court's erroneous construction of Section 612, which absent this Court's review will permanently foreclose EPA's authority over dangerous substitutes like HFCs.[3]

Mexichem (but not EPA) invokes the panel majority's suggestion that EPA might be able to re-regulate HFCs under other Clean Air Act provisions or the Toxic Substances Control Act (TSCA). Mexichem Opp. 15. Regulating HFCs under these other authorities would require interpretive efforts far more challenging than reasonably construing Section 612.[4] There is

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[3] In fact, EPA's initial steps in that rulemaking have only made things worse. In April 2018 EPA stated, with no prior notice or opportunity to comment, that the agency "will not apply the HFC listings in the 2015 Rule *for any purpose*." 83 Fed. Reg. 18,431, 18,436 (Apr. 27, 2018) (emphasis added). This will allow *even more* manufacturers to adopt HFCs and gain a permanent grandfather status – even manufacturers *still using ozone-depleting substances*, which the lower court agreed are properly subject to regulation.

[4] The Prevention of Significant Deterioration program, for example, requires permits for a small number of large new industrial sources, not millions of small products like air conditioners. *See Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Also, in 2016 Congress directed EPA to address a backlog of *other* harmful chemicals under TSCA, including those that have long lingered on the agency's TSCA work plan, a task that will

no reason to attempt that task when Congress designed Section 612 specifically for this job. Further, EPA's current management has given no indication that it would consider using these authorities, nor has Mexichem committed not to oppose that effort.

Also without EPA, Mexichem references a "retroactive disapproval" theory advanced by the majority opinion. Mexichem Opp. 17. This would require EPA – 25 years later – to establish on the 1994 record that it made a mistake in originally approving HFCs. *See* Pet. App. 19a–22a. The theory would seem to require EPA to ignore information on risks and alternatives that became available only *after* 1994. In any case, we know of no instance where a "retroactive disapproval" theory was used so aggressively or over this expanse of time, and EPA has shown no interest in the option.

Mexichem also urges reliance on the Kigali Amendment to the Montreal Protocol, which the administration has not yet sent to the Senate for advice and consent to ratification, and a Senate bill that has not yet been acted on. Mexichem Opp. 17–18. Neither one is a present option or has any bearing on the importance of resolving the meaning of Section 612 and restoring the efficacy of the safe alternatives program enacted in 1990.

Finally, Mexichem suggests that President Trump's Executive Order 13,783, titled "Promoting Energy In-

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consume the agency's capacity under that law for many years. Lautenberg Chemical Safety Act, Pub. L. No. 114-182, § 6, 130 Stat. 448, 460 (2016). HFCs have never been on the TSCA work plan. *See* EPA, *TSCA Work Plan for Chemical Assessments: 2014 Update* (Oct. 2014), https://bit.ly/2CkWtso.

dependence and Economic Growth," is somehow relevant. But the Order targeted rules related to "oil, natural gas, coal, and nuclear energy," not the HFC Rule. Exec. Order No. 13,783, §2(a), 82 Fed. Reg. 16,093 (Mar. 31, 2017). And even as to the targeted rules, the Order instructed agencies only to reconsider them "as appropriate and consistent with law." *Id.* § 3(d).

None of these arguments minimizes the gravity and permanence of the harm done by the lower court decision. Rather, they underscore the importance of this Court's review to preserve an important statutory authority that a single administration has no right to give up for all time.

II. The Decision Below is Wrong

In our petition, we showed that the decision below was wrong twice over: first, because EPA's longstanding construction is the *only* reasonable interpretation of Section 612 in light of the statutory text, structure, and purpose, NRDC Pet. 24–32, and second, because Mexichem's attack on that interpretation was untimely, NRDC Pet. 24.

Notably, EPA *does not disagree* that the lower court erred on the latter point. EPA's brief states that *"[t]he court of appeals viewed* the 2015 Rule as representing a 'new interpretation of Section 612(c)'" and that the petitions for review were "timely" only *"[o]n that view*." EPA Opp. 7 n.2 (emphasis added). The brief affirms, however, that EPA interpreted Section 612 consistently since 1994, with *no change* in 2015. EPA Opp. 4–6; *see supra* pp. 4–5. The government thus acknowledges that the court's "view" that EPA changed position in 2015 is factually wrong.

That makes Mexichem's challenge untimely under Section 307(b)(1) of the Clean Air Act, which requires petitions for review to have been brought within 60 days of promulgation of the relevant final action – the 1994 rule. 42 U.S.C. § 7607(b)(1). As we have explained, the trade association to which Mexichem belongs actually brought – and dropped – this very claim against the 1994 rule. NRDC Pet. 11, 24; Honeywell Pet. 31. The lower court should have rejected Mexichem's second bite at the apple in 2015 as untimely. That error provides a straightforward basis for reversing the majority's deeply disruptive decision.

The panel majority is also flatly wrong in its interpretation of Section 612. The dissent and the petitions for certiorari demonstrate that the critical term "replace" does not unambiguously have the single restrictive meaning the panel majority asserts. To be sure, "replace" *can be* a one-time event, like replacing a broken tea cup. But it equally can be, as Judge Wilkins said in dissent, a multi-step industrial process, such as replacing the internal combustion engine or prescription drugs, in which "the ubiquitous product that has become the industry standard is 'replaced' by a number of substitutes, and the replacement takes place not at a specific point in time, not just once, and not by a single substitute." Pet. App. 30a–31a.

The petitions and *amicus* briefs give many other examples of the ordinary English usage of "replace" in just this sense. NRDC Pet. 25; Honeywell Pet. 33–34; Massachusetts Br. 19–20 (substitute teachers, hip replacements, sugar substitutes, iconic sports stars). EPA and Mexichem offer no response to these many examples.

The panel majority therefore cannot tenably assert that "replace" has *only* the one-time broken-teacup meaning. Congress's purpose in Section 612 was to regulate an evolving industry, and it is far more natural for Congress to have used "replace" in the continuing-process sense that Judge Wilkins describes. The term is certainly broad enough to encompass this meaning, and it was reasonable for EPA to so interpret it in the context of Section 612.

EPA and Mexichem also ignore the many unreasonable, illogical consequences that flow from adopting the one-time-only meaning of "replace." *See* Pet. App. 31a–37a; NRDC Pet. 29–32; Honeywell Pet. 33–35. Neither responds to the perverse loophole identified by the dissent, Pet. App. 34a, that a manufacturer could start using a substitute before EPA has had time to evaluate it, which – under the majority opinion – would forever insulate the manufacturer from a subsequent prohibition. NRDC Pet. 29–30. Neither responds to the irrational distinctions between companies introduced by the majority opinion – for example, the manufacturer of building air conditioners ("chillers") containing an ozone-depleting HCFC will soon have to switch to a non-HFC alternative, but its competitors that already use HFCs are forever grandfathered. NRDC Pet. 31.

And neither EPA nor Mexichem has any answer to the gaping loophole created by the majority opinion that would allow any person no longer using ozone-depleting substances to *reintroduce* dangerous alternatives that EPA banned decades ago. NRDC Pet. 31. Companies could now start using the highly flammable "Hydrocarbon Blend A" – EPA's flagship example

of a dangerous substitute appropriately banned in 1994. *See* EPA Opp. 3.

As EPA explained in the 1994 rulemaking, these loopholes and perverse distinctions are avoided by the manifestly reasonable interpretation that manufacturers "replace" ozone-depleting substances each time they use a substitute in an application that formerly used ozone-depleting substances. *See* EPA Opp. 4 (quoting 59 Fed. Reg. at 13,048); NRDC Pet. 10.

Mexichem offers two more arguments that EPA does not join. First, Mexichem references EPA's 1994 explanation of a different provision, Section 612(e). Mexichem Opp. 6–7. That provision, which obligates companies to submit "unpublished health and safety studies" for potential new substitutes before marketing them, does not even use the term "replace." 42 U.S.C. § 7671k(e). As the dissent recognized, Section 612(e) has no bearing on EPA's authority to prohibit existing substitutes under Section 612(c). *See* Pet. App. 40a–43a.

Second, Mexichem echoes the majority's complaint that under EPA's interpretation the agency could prohibit a so-called "twelfth generation" substitute 100 years from now. Mexichem Opp. 28. As we have already explained, many Clean Air Act provisions operate indefinitely, and there is no evidence Congress intended Section 612 authority to sunset. NRDC Pet. 28. The simplest check on unreasonable EPA action is the "arbitrary and capricious" test, by which the D.C. Circuit could easily reject a rule that did not demonstrate a meaningful reduction in overall health or environmental risk and the availability of safer alternatives. Regarding HFCs, however, the lower

court unanimously upheld EPA's authority to act based on climate impacts and rejected all Mexichem's arbitrary and capricious challenges. Pet. App. 22a–25a.

None of these arguments supports the decision below. This Court's review is essential to restore the vital health and environmental safeguards Congress enacted Section 612 to provide. Congress designed this provision precisely to ensure that in responding to one environmental disaster – destruction of the ozone layer – we would not blunder into new and even greater difficulties. Unless reversed, the divided ruling below will permanently destroy the effectiveness of that program and cause great harm to human health and the environment. The Court should grant the petitions.

CONCLUSION

For all these reasons, the Court should grant the petitions for certiorari in Nos. 18-2 and 17-1703.

Respectfully submitted,

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