No. 15-1328

United States Court of Appeals for the D.C. Circuit

MEXICHEM FLUOR, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

THE CHEMOURS COMPANY FC, LLC, ET AL.,

Intervenors.

JOINT RESPONSE OF PETITIONERS MEXICHEM FLUOR, INC. AND ARKEMA INC. TO INTERVENORS' PETITIONS FOR PANEL REHEARING AND REHEARING EN BANC

On Petition for Review of Final Action by the
United States Environmental Protection Agency

Consolidated with No. 15-1329

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GLOSSARY

CAA	Clean Air Act
CFC	Chlorofluorocarbon
EPA	Environmental Protection Agency
HCFC	Hydrochlorofluorocarbon
HFC	Hydrofluorocarbon
HFO	Hydrofluoroolefin
NRDC	Natural Resources Defense Council
SNAP	Significant New Alternatives Policy
TSCA	Toxic Substances Control Act

INTRODUCTION

Intervenors seek rehearing of a decision that partially vacates a 2015 EPA rule promulgated pursuant to President Obama's Climate Action Plan. In March 2017, President Trump issued an Executive Order that rescinds the Climate Action Plan and directs agency heads to take appropriate action to suspend, revise, or rescind any rule relating to or arising from the Plan. Intervenors are thus asking the en banc Court to reinstate a rule that the EPA Administrator has been directed to reconsider—even if, as intervenors maintain, there was statutory authority to issue the rule. Unsurprisingly, EPA itself—the agency that issued the rule and is responsible for administering it, and the respondent and losing party in this case—has *not* sought rehearing. Surprisingly, intervenors do not so much as mention the Executive Order in their petitions, or acknowledge that EPA has decided not to seek rehearing. EPA's obligation to reassess the rule that intervenors ask this Court to reinstate is sufficient reason for denying rehearing.

But it is hardly the only reason. The petitions do not begin to satisfy the criteria for rehearing en banc. The panel's decision does not conflict with any decision of this Court, another court of appeals, or the Supreme Court. Nor did the panel decide any separation-of-powers or other exceptionally important constitutional question of a kind that is often at issue in the rare cases in which this Court

grants rehearing en banc. Instead it decided an issue that panels of this Court address routinely: whether a particular agency action was authorized by statute.

Lacking any traditional basis for rehearing, intervenors argue that the case is exceptionally important because the panel's decision (1) will leave EPA unable to regulate toxic substances, especially those that contribute to climate change, and (2) will hinder innovation by creating disincentives for companies to develop new substances. For both arguments, intervenors offer only proof by assertion that is easily shown to be wrong.

As the panel's decision explains, and as EPA made clear when it issued the initial SNAP rule more than 20 years ago, there are other statutory mechanisms for regulating hazardous chemicals that are not replacing ozone-depleting substances and thus are not covered by the SNAP program. Intervenors never have denied this.

Nor will the panel's decision stifle innovation. Various persons (including industry intervenors and petitioners alike) had developed products (including HFOs) to compete with HFCs years before EPA decided to use the SNAP program to ban previously approved substances. Industry intervenors are rent-seekers trying to use the government to foreclose their competitors' products, not to foster development of new ones. And the panel's decision does nothing to stop industry intervenors from selling their products today.

Intervenors' final argument—and ultimately their principal one—is that the panel misinterpreted the CAA. Disagreement with a panel's interpretation of a statute is not a basis for rehearing. Regardless, the panel's decision is correct. CAA § 612 authorizes EPA to designate replacements for ozone-depleting substances (*e.g.*, CFCs and HCFCs), but it does not authorize EPA to ban substances that *replaced* ozone-depleting substances and do not deplete ozone (*e.g.*, HFCs). Nor is there anything in the uninvited briefs of would-be *amici* that justifies rehearing.

STATEMENT

1. 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 treaty obligations 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 EPA "has identified an alternative to such replacement" that "reduces the overall risk to human health and the environment." *Id.* § 7671k(c). The same subsection requires EPA to publish a list of prohibited and safe substances.

To implement Section 612(c), EPA promulgated the initial SNAP rule in 1994. It "clarified" there that "SNAP addresses only those substitutes or alternatives actually replacing the class I and II compounds." Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044, 13,049-13,050 (Mar. 18, 1994). EPA then 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, EPA 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 2015 rule at issue in this case. *See* Op. 12-13 & n.3.

2. In June 2013, President Obama released his Climate Action Plan, which announced that EPA would use the SNAP program to reduce HFC emissions. EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 10 (2013). In August 2014 EPA issued a proposed rule, and in July 2015 a final rule, that did just that. The final rule reclassified 38 individual HFCs or HFC blends as unacceptable for 25 uses. 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). In each such use, class I and class II substances for the most part have already been replaced. *See* Petrs.' Panel Br. 20-21. Petitioners Mexichem Fluor, Inc. and Arkema Inc., which manufacture HFCs, filed these consolidated petitions for review in September 2015, arguing primarily that Title VI of the CAA does not authorize EPA to use SNAP to require the replacement of non-ozone-depleting substances.

In March 2017, President Trump issued his Executive Order on Promoting Energy Independence and Economic Growth. The Executive Order rescinds the Climate Action Plan and directs heads of agencies to take steps to suspend, revise, or rescind any agency action related to or arising from the Plan. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, 16,094 (Mar. 31, 2017) (attached as addendum hereto).

In August 2017, a panel of this Court granted the petitions for review and vacated the final rule insofar as it requires manufacturers to replace HFCs. After analyzing the text and legislative history of CAA § 612, and considering the consequences of EPA's then-current interpretation of it, the panel concluded that, while EPA may de-list HFCs, it cannot use its authority under Section 612 to "order the replacement of substances that are not ozone depleting." Op. 17; *see* Op. 13-15. The panel emphasized that "EPA still possesses several statutory authorities to regulate HFCs," which it discussed at length. Op. 16; *see* Op. 16-17. The panel also left open the possibility that the entire rule could be sustained under an "alternative theory" that EPA may consider on remand. Op. 18; *see* Op. 18-21. Finally, the panel rejected petitioners' argument that, even if EPA may use the SNAP program to ban HFCs, it did so in an arbitrary and capricious way. Op. 21-24. Judge Wilkins disagreed with the panel majority's interpretation of the statute and dissented.

ARGUMENT

A. The Government's Recent Actions Make Rehearing Unwarranted

President Obama's 2013 Climate Action Plan announced that EPA would "use its authority through the [SNAP] Program" to reduce HFC emissions. CLIMATE ACTION PLAN at 10. The EPA rule at issue here "primarily recognizes [this] call" in the Climate Action Plan (Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 79 Fed. Reg. 46,126, 46,134 (Aug. 6, 2014)) and is "consistent with [that] provision" of the Plan (80 Fed. Reg. at 42,880).

President Trump's 2017 Executive Order "rescind[s]" the Climate Action Plan. 82 Fed. Reg. 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.*

The Executive Order thus directs the EPA Administrator to take appropriate action 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 reason to deny rehearing. This Court should not convene en banc to decide whether to reinstate a rule that the President has directed EPA to reassess—an obligation that is binding

on EPA even if, as intervenors contend, EPA had statutory authority to issue the rule. Remarkably, intervenors do not even *mention* the Executive Order in their petitions for rehearing, let alone attempt to explain why rehearing should be granted despite the directive contained therein.

Judge Srinivasan recently explained why en banc rehearing was unwarranted in another case involving a challenge to agency action when there was an indication that the action would be replaced by the agency itself following a change in administrations:

> En banc review would be particularly unwarranted at this point in light of the uncertainty surrounding the fate of the FCC's Order. The agency will soon consider adopting a Notice of Proposed Rulemaking that would replace the existing rule with a markedly different one. In that light, the en banc court could find itself examining, and pronouncing on, the validity of a rule that the agency had already slated for replacement.

U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 382 (D.C. Cir. 2017) (Srinivasan, J., joined by Tatel, J., concurring in denial of rehearing en banc) (citation omitted). So too here.

There is a second action by the government that makes rehearing unwarranted: *its decision not to request rehearing*. It would be quite odd for this Court to take the extraordinary step of sitting en banc to reconsider a panel decision that partially invalidates a rule when the agency that issued the rule—indeed, the agency that is the respondent and losing party in the case—has not advocated rehearing.

It would be doubly odd to do so when the rule might not survive no matter what the en banc Court did. This Court has recently denied petitions for rehearing filed by intervenors in several cases in which an agency lost before the panel and did not seek rehearing itself. *Bais Yaakov of Spring Valley v. FCC*, No. 14-1234 (D.C. Cir. June 6, 2017); *Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. July 3, 2017); *Clean Air Council v. Pruitt*, No. 17-1145 (D.C. Cir. Aug. 10, 2017); *Global Tel*Link v. FCC*, No. 15-1461 (D.C. Cir. Sept. 26, 2017). The Court should do the same here.

B. The Case Does Not Satisfy The Criteria For Rehearing

Apart from the above considerations, this case does not satisfy the criteria for rehearing en banc. Intervenors do not maintain that the panel's decision "conflicts with a decision of the United States Supreme Court or of the court to which the petition[s] [are] addressed," or that it "conflicts with *** decisions of other United States Courts of Appeals." Fed. R. App. P. 35(b)(1). There is thus no need for rehearing to "secure or maintain uniformity of the court's decisions," or on the theory that an inter-circuit conflict makes this case one of "exceptional importance." Fed. R. App. 35(a), (b)(1).

Nor is the case exceptionally important on the ground that it involves some separation-of-powers or other constitutional question of surpassing significance, as was true in the two most recent cases in which this Court granted rehearing en

banc. *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. May 24, 2017) (argued); *Raymond J. Lucia Cos. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (decided by equally divided Court). Instead, as the panel put it, this case involves a "statutory interpretation issue that arises again and again in this Court": "whether an *** agency has statutory authority from Congress to issue a particular regulation." Op. 2. Intervenors disagree with the panel's interpretation of the governing statute, but that is true of the losing side in almost every statutory case. This accordingly is a routine case, not an exceptionally important one that justifies the extremely "rare" remedy of rehearing en banc. D.C. Cir. Handbook of Practice & Internal Procedures XIII.B.2.

Finally, the panel did not "overlook[] or misapprehend[]" any point of law or fact, such that panel rehearing could be warranted. Fed. R. App. 40(a)(2). The issues raised in the rehearing petitions were fully aired in the briefs and at oral argument before the panel.

C. The Panel's Decision Will Not Prevent EPA From Regulating HFCs

Intervenors contend that rehearing is warranted because the panel's decision "block[s] EPA from limiting" HFCs and other "substitutes found to be *** hazardous" (NRDC Pet. 1-2) and "[i]mpairs U.S. [e]fforts to [c]ombat [c]limate [c]hange" (Industry Pet. 17). This contention is specious. The panel did *not* hold that EPA may not ban HFCs; it held only that EPA may not use *the SNAP program*

to ban HFCs *that have already replaced ozone-depleting substances*. As the panel explained (at 16):

> 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.

Intervenors' only responses to this critical point are (1) that, "[e]ven if these [other] laws could be [used] for this purpose, there is no reason to discard the specific provision Congress enacted" in Section 612 (NRDC Pet. 15 n.7), and (2) that "the panel provides no support for its assertion that these other options are viable" (Industry Pet. 15). The first response begs the question presented—and effectively concedes that there *are* other mechanisms for regulating HFCs. The second is ironic, given that intervenors have never suggested 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 the TSCA) exist to ensure protection of human health and the environment").

Indeed, the panel emphasized that HFCs can be banned *through the SNAP program*, so long as it is ozone-depleting substances that are being replaced. *See*

Op. 16 ("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.* ("EPA still has statutory authority to require product manufacturers to replace substitutes that (unlike HFCs) are themselves ozone depleting."). The Court even held open the possibility that the rule at issue could be justified *in its entirety* on another ground (Op. 18-21) and gave EPA the opportunity "to pursue this 'retroactive disapproval' approach" on remand (Op. 19). Finally, the Court held that, insofar as the rule is statutorily authorized in part, it is not arbitrary and capricious—rejecting petitioners' arguments on this point. Op. 21-24. As industry intervenors acknowledge (at 18), the panel thus "*affirmed* EPA's authority to consider global warming potential in assessing available alternatives" and it "did not question EPA's authority to move HFCs from the approved to the prohibited list on that basis."[1]

[1] NRDC asserts that the panel's decision will "undercut international cooperation to curb the explosive growth of HFCs world-wide," citing the Kigali Amendment to the Montreal Protocol, which would phase out HFCs. NRDC Pet. 2 & n.1. But as NRDC has elsewhere recognized, the panel's decision "does not speak to" the as-yet-unratified Kigali Amendment, which petitioners support. David Doniger, *Divided DC Circuit Panel Sets Back HFC Transition*, NRDC EXPERT BLOG (Aug. 9, 2017), https://www.nrdc.org/experts/david-doniger/divided-dc-circuit-panel-sets-back-hfc-transition.

D. The Panel's Decision Will Not Hinder Innovation

Intervenors also contend that rehearing is warranted because the panel's decision "[u]ndermines [i]ncentives to [i]nnovate." Industry Pet. 16; *accord* NRDC Pet. 2. This argument rests on the erroneous premise that the decision prevents EPA from regulating HFCs. But the conclusion would not follow even if the premise were correct. For industry intervenors claim to have developed a superior product to replace HFCs that customers already were adopting *without* a ban on HFCs. Industry Panel Br. 17-18. Their argument masks their true interest in this case, which is to have government choose market winners and losers, thereby stifling competition.

The panel's decision in no way prevents industry intervenors (or anyone else) from manufacturing and selling their products today; it just prevents them from doing so without competition from manufacturers and sellers of other products. There is no basis for the histrionic assertion that the decision "renders years of massive investment by companies that developed safer chemicals all but worthless." Industry Pet. 3. Indeed, after the panel issued its decision, intervenor 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/investor-

relations/investor-news/press-release-details/2017/Chemours-Responds-to-EPA-2015-Ruling-to-Regulate-HFCs/ default.aspx.

E. The Panel's Decision Is Correct

In the end, intervenors' principal argument for rehearing is that they disagree with the panel's interpretation of CAA § 612. Industry Pet. 8-16; NRDC Pet. 8-16. That of course is no basis for rehearing. More importantly, the panel's interpretation of the CAA is correct.

1. Intervenors' threshold argument is that the petitions for review were untimely. Industry Pet. 8-10; NRDC Pet. 8-9. EPA—which is not petitioning for rehearing—took the same position before the panel. Not even the panel dissent adopted it, and understandably so.

The petitions for review were filed within 60 days of the appearance in the Federal Register of the only EPA decision petitioners challenged: the 2015 final rule banning HFCs. The petitions therefore were timely. *See* 42 U.S.C. § 7607(b)(1). Contrary to intervenors' assertion, petitioners did not challenge the 1994 SNAP rule; they contended that the 2015 rule exceeded EPA's authority. Petitioners could not have brought that challenge in 1994. And the panel decision partially vacated only the 2015 rule.

Indeed, the challenge would be timely even if it somehow could be reframed as directed at EPA's initial SNAP rule. The 2015 rule sought to regulate in ways

that EPA had not previously regulated, exposing a large class of substances (non-ozone-depleting HFCs) to SNAP regulation for the first time and changing their status. This is still true if the resulting restriction is characterized as stemming from the ban in 40 C.F.R. § 82.174(d) on use of an "unacceptable substitute[]" (Industry Pet. 5, 9-10; NRDC Pet. 8), because—consistent with the statute—"substitute" there includes only a chemical "intended for use as a replacement for a class I or II compound" (40 C.F.R. § 82.172). The banning of HFCs that were *not* intended for such use was a dramatic alteration of the legal landscape, for which petitions for review are allowed. "By establishing a new [regulation] for a new [substance], the EPA exposes its [new] regulation[], including whether it has authority to adopt the [regulation] *** , to challenge." *Sierra Club v. EPA*, 705 F.3d 458, 466-67 (D.C. Cir. 2013).

2. On the merits, the panel correctly found that EPA "tried to jam a square peg *** into a round hole." Op. 17. 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 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" (Op. 17), the panel 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.

Op. 14. Intervenors insist that "replace" has multiple meanings and that the text thus is ambiguous. Industry Pet. 10-13; NRDC Pet. 9-11. As industry intervenors acknowledge (at 13), however, "[c]ourts must consider the specific context in which th[e] language is used, and the broader context of the statute as a whole" (internal quotation marks omitted). In *this* context, no one employing ordinary English usage would say that, when an industry or company switches from HCFCs to HFCs, and then years later switches from HFCs to HFOs, the HFOs are "replacing" the HCFCs; anyone using ordinary English would say that the HFOs are "replacing" the HFCs—or "substituting for" them (Industry Pet. 11; *see* Op. 14 n.4).

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.

Op. 15 (citations omitted). Industry intervenors offer no response. As for NRDC, it seems to concede that the Senate bill contained a policy section that was analogous to CAA § 612(a) but directed EPA to replace *all* covered substances, including those contributing to climate change. NRDC argues, however (at 15-16), that the Senate bill did not grant EPA authority to issue regulations in a subsection analogous to CAA § 612(c). This overlooks the fact that the Senate bill gave EPA even broader rulemaking authority than that in Section 612(c); it just placed that authority in a separate section. S. 1630, 101st Cong. § 520 (1990).

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.

Op. 14-15. Intervenors' chief response is not to refute this point but to embrace it. Industry Pet. 16; NRDC Pet. 18. NRDC also faults the panel (at 12) for "never explain[ing] *** how its interpretation serves the statutory purpose of reducing overall health and environmental risk 'to the maximum extent practicable.'" Perhaps more than any other, this statement reflects the fundamental flaw in intervenors' interpretation. For the purpose of CAA § 612 is not to "reduce overall risks to human health and the environment" whenever and however EPA may choose; it is, as the statute plainly states, to "replace[]" "class I and class II substances" with chem-

icals that "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). Intervenors would read one of the two essential elements out of the statute, thereby transforming a limited program into a limitless one.[2]

F. The Would-Be *Amici* Offer No Basis For Rehearing

This Court's Rule 35(f) directs that "[n]o amicus curiae brief *** in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court." Two sets of prospective *amici* nevertheless have lodged proposed briefs in support of intervenors' rehearing petitions, together with motions for an "invitation" to file the briefs. "That technique makes a mockery of [the Court's] rule" and should not be permitted. *Elec. Power Supply Ass'n v. FERC*, No. 11-1486 (D.C. Cir. Sept. 17, 2014) (Silberman, J., dissenting); *see* EMILY POST, ETIQUETTE IN SOCIETY, IN BUSINESS, IN POLITICS AND AT HOME 117 (1923) ("One may never ask for an invitation for oneself anywhere!"). If the motions are granted, however, the Court should consider the following arguments in response to the briefs.

1. The would-be *amici* law professors maintain that rehearing should be granted because the panel's decision "distorts the familiar *** framework" of

[2] NRDC claims (at 17) that the panel required EPA to "show a clearer statutory foundation for climate change regulations than for other rules." It did no such thing. The panel said only (at 17) that an agency "must have statutory authority for the regulations it wants to issue" and that "congressional inaction does not license an agency to take matters into its own hands." That is true for every agency rule.

Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984). Professor Br. 3. Because this asserted error "was in application rather than articulation of the [*Chevron*] standard," the professors, like intervenors, are ultimately just objecting to the way the panel interpreted the statute, and its decision therefore "does not present the extraordinary circumstances warranting *en banc* review." *Johnson v. Gov't of D.C.*, 2014 WL 12579819, at *7 (D.C. Cir. Aug. 1, 2014) (Pillard, J., concurring in denial of rehearing en banc). The professors' arguments also fail on their own terms; there was no error in the application of *Chevron*.

The professors first accuse the panel of having "rel[ied] on a single, narrow dictionary definition to restrict EPA's authority under *** Section 612." Professor Br. 1. Only a careless reading of the decision could lead to that conclusion. The panel relied on much more than a dictionary: it analyzed the statutory text and legislative history, and took into account the consequences of a contrary interpretation. Op. 13-15. That is what panels of this Court—indeed what all courts—do every day in statutory cases.

The professors next fault the panel for "invok[ing] the specter of 'indefinite' or 'boundless' EPA replacement authority, exercised for '100 years or more,' to suggest that Congress must have intended 'replace' to have [a] restrictive meaning." Professor Br. 3 (quoting Op. 14-15). The professors characterize the panel's decision as having "reason[ed] that because EPA could *someday* stretch its re-

placement authority beyond reasonable bounds," the statute "should be read narrowly *today* to strip EPA of any such authority." *Id.* (emphasis added). But the panel was not considering two different interpretations of the statute—one that was adopted "today" and another that might be adopted "someday." The interpretation the panel disapproved was the one employed in the rule "today," and one reason the panel rejected it is that it would have the consequences the panel identified—consequences showing the interpretation to "border[] on the absurd." Op. 15. 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 EPA to order the replacement of a fifth-generation non-ozone-depleting substance with a sixth-generation non-ozone-depleting substance in 2115.

Surely a court is permitted to consider where a particular interpretation of a statute will lead in deciding what Congress intended. Indeed, a court is *obligated* to do that. As Justice Scalia put it:

> [T]he "traditional tools of statutory construction" include not merely text and legislative history but also *** the consideration of policy consequences. *** [O]ne of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce "absurd" results ***. Policy evaluation is *** part of the traditional judicial tool-kit that is used in applying the first step of *Chevron* ***.

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515.

2. The 11 would-be *amici* states support rehearing because, they say, they want to "preserv[e] established deference to reasonable agency interpretations" and "protect[] the[] states from the risks climate change poses to human health and the environment." State Br. 1. Given the asserted importance of the issues to them, one wonders why none of the 11 states sought to intervene or file an *amicus* brief at the panel stage, and why apparently only one of them even commented on the proposed rule before EPA. As for their proposed *amicus* brief supporting rehearing, it nowhere describes how the panel's decision interferes with their ability to replace any class I or class II substance. This is perhaps the best illustration that the HFC bans, and the concerns of the states, are unrelated to Title VI of the CAA, which addresses ozone depletion.

Even if the alleged harms had some connection to Section 612, the states' brief would suffer from one of the defects present in intervenors' petitions for rehearing—it nowhere addresses, or even mentions, President Trump's Executive Order directing EPA to suspend, revise, or rescind the rule at issue. The rule is slated to be reconsidered regardless of whether the Court grants rehearing, and any effect the panel's decision might have on the 11 states will be overtaken by events.

The states' claim that the panel's decision "upends states' historic reliance on EPA's action in this area" (State Br. 4) is particularly curious, since EPA never before "sought to order the replacement of a non-ozone depleting substitute that had previously been deemed acceptable by the agency" (Op. 13). But if the states do expect EPA action in this area, they nowhere question EPA's ability to regulate HFCs apart from Section 612. *See* Op. 16. On top of those federal authorities, the states emphasize that they have their own legislation and policies that they believe authorize reductions of greenhouse gases, including HFCs, and that they are using despite EPA's issuance of the rule at issue. State Br. 7-8. Nothing in the panel's decision prevents the greenhouse-gas regulation that the 11 states claim to seek.

CONCLUSION

The petitions for rehearing should be denied.

October 18, 2017

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Petitioners hereby certify as follows:

Mexichem Fluor, Inc. is a Delaware corporation. Mexichem, S.A.B. de C.V., a publicly held company, directly or indirectly owns all the stock of Mexichem Fluor, Inc.

Arkema Inc. 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.

Petitioners produce industrial chemicals. As relevant here, they manufacture products that have been subjected to regulation pursuant to Section 612 of the Clean Air Act, 42 U.S.C. § 7671k. Petitioners are affected by Environmental Protection Agency requirements promulgated thereunder, including the final rule at issue in these consolidated petitions for review.

October 18, 2017

/s/ Dan Himmelfarb
Dan Himmelfarb

/s/ W. Caffey Norman
(with permission)
W. Caffey Norman

CERTIFICATE OF COMPLIANCE

I hereby certify that this response complies with the type-volume limitation of this Court's October 3, 2017 Order because the body of the response contains 5,195 words. I further certify that this response was prepared in 14-point Times New Roman font using Microsoft Word.

October 18, 2017

/s/ Dan Himmelfarb
Dan Himmelfarb

CERTIFICATE OF SERVICE

I hereby certify that, on October 18, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

October 18, 2017

/s/ Dan Himmelfarb
Dan Himmelfarb

ADDENDUM

Federal Register
Vol. 82, No. 61
Friday, March 31, 2017

Presidential Documents

Title 3—

The President

Executive Order 13783 of March 28, 2017

Promoting Energy Independence and Economic Growth

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. *Policy.* (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

Sec. 2. *Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources.* (a) The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, ''burden'' means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have

agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. *Rescission of Certain Energy and Climate-Related Presidential and Regulatory Actions.* (a) The following Presidential actions are hereby revoked:

(i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled ''Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews,'' which is referred to in ''Notice of Availability,'' 81 *Fed. Reg.* 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, 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 in section 1 of this order.

Sec. 4. *Review of the Environmental Protection Agency's ''Clean Power Plan'' and Related Rules and Agency Actions.* (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled ''Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,'' 80 *Fed. Reg.* 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled ''Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units,'' 80 *Fed. Reg.* 64509 (October 23, 2015); and

(iii) The proposed rule entitled ''Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule,'' 80 *Fed. Reg.* 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the ''Legal Memorandum Accompanying Clean Power Plan for Certain Issues,'' which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the administrative actions described in subsection (a) of this section.

Sec. 5. *Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis.* (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

(i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);

(ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);

(iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);

(iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);

(v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016); and

(vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A–4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost-benefit analysis.

Sec. 6. *Federal Land Coal Leasing Moratorium.* The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. *Review of Regulations Related to United States Oil and Gas Development.* (a) The Administrator shall review the final rule entitled ''Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,'' 81 *Fed. Reg.* 35824 (June 3, 2016), and any rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.

(b) The Secretary of the Interior shall review the following final rules, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules:

(i) The final rule entitled ''Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,'' 80 *Fed. Reg.* 16128 (March 26, 2015);

(ii) The final rule entitled ''General Provisions and Non-Federal Oil and Gas Rights,'' 81 *Fed. Reg.* 77972 (November 4, 2016);

(iii) The final rule entitled ''Management of Non-Federal Oil and Gas Rights,'' 81 *Fed. Reg.* 79948 (November 14, 2016); and

(iv) The final rule entitled ''Waste Prevention, Production Subject to Royalties, and Resource Conservation,'' 81 *Fed. Reg.* 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

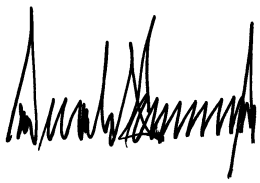
Sec. 8. *General Provisions.* (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
March 28, 2017.

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