Nos. 17-1703 & 18-2

In the Supreme Court of the United States

HONEYWELL INTERNATIONAL INC., ET AL.,
Petitioners,

v.

MEXICHEM FLUOR, INC., ET AL.,
Respondents.

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,

v.

MEXICHEM FLUOR, INC., ET AL.,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF MASSACHUSETTS, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, IOWA, MAINE, MARYLAND, MINNESOTA, BY AND THROUGH ITS POLLUTION CONTROL AGENCY, NEW JERSEY, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are the Commonwealths of Massachusetts, Pennsylvania, and Virginia, the States of Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maine, Maryland, Minnesota, by and through its Minnesota Pollution Control Agency, New Jersey, New York, North Carolina, Oregon, Vermont, and Washington, and the District of Columbia. The *Amici* States share a substantial interest in protecting the health of their residents and the environment from the risks of harmful chemical substitutes for ozone-depleting substances. Given the global nature and complexity of the chemical industry, and the ubiquity of products containing ozone-depleting substances or substitutes, a strong federal regulatory floor is vital to protect the *Amici* States and their residents and businesses from the risks of substitutes for ozone-depleting substances. The *Amici* States therefore seek to ensure that the U.S. Environmental Protection Agency (EPA) may exercise its longstanding and consistently applied authority under the Clean Air Act to ban all uses of unsafe substitutes, including the dangerous pollutants known as hydrofluorocarbons (HFCs), for which a safer alternative is available.

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[1] Per Rule 37.6, the *Amici* States affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *Amici* States contributed monetarily to the preparation or submission of this brief. The *Amici* States timely notified counsel of record for all parties of their intent to file this brief as required by Rule 37.2(a). All parties have given their consent to the filing of this brief.

The *Amici* States have long relied on EPA's reasonable exercise of its statutory authority to protect human health and the environment from the harmful effects of substitutes for ozone-depleting substances, and to incentivize industry investment in cleaner, safer alternatives. For decades, EPA's regulatory program has been remarkably effective and efficient at promoting the development and use of those alternatives nationwide. The decision below harms the *Amici* States' interests by holding that EPA can no longer ban unsafe substitutes for ozone-depleting substances where it determines safer alternatives are available. Indeed, the decision produces the incongruous result that a statute intended to reduce overall risks could now *increase* risks, as it renders EPA powerless to ban chemicals that are riskier than both newer substitutes and the ozone-depleting substances themselves. This holding guts EPA's effective regulatory program and exposes human health and the environment to grave risks. The decision is irreconcilable with Congress' intent and how EPA has long implemented the program, casting doubt on the program's scope and generating enormous uncertainty for states and regulated entities.

The *Amici* States also share a substantial interest in ensuring that courts preserve and uphold foundational principles of statutory construction and separation of powers, and avoid improperly disrupting sensible and longstanding federal regulatory schemes upon which the *Amici* States, businesses, and consumers rely. The decision below departs from these principles, adopting an interpretation of the Clean Air Act that ignores the statute's structure and its purpose to protect human health and the environment. Because

the D.C. Circuit has exclusive authority over challenges to EPA's regulatory program, 42 U.S.C. § 7607(b)(1), only this Court can correct the decision below.

STATEMENT

In 1990, Congress enacted Title VI of the Clean Air Act to phase out the production and use of substances that harm the stratospheric ozone layer. *See* 42 U.S.C. §§ 7671a, 7671c–7671d. The ozone layer shields Earth from dangerous levels of the sun's ultraviolet radiation. Depletion of the ozone layer increases the incidence of skin cancer, among other health and environmental harms. Congress adopted section 612 of the Clean Air Act, the "safe alternatives policy," to ensure that the phase-out of ozone-depleting substances, which were then widely used in consumer products and industrial applications, did not give rise to dangerous substitute chemicals. The safe alternatives policy makes it unlawful for anyone to "replace" an ozone-depleting substance with a "substitute" that EPA "determines may present adverse effects to human health or the environment" if EPA has identified an available alternative that "reduces the overall risk to human health and the environment." *Id.* § 7671k(c). The safe alternatives policy ensures that over time, and "to the maximum extent practicable," everyone is using the safest available substitutes for ozone-depleting substances. *Id.* § 7671k(a).

To this end, section 612(c) requires EPA to publish and update lists of acceptable and prohibited substitutes "for specific uses." *Id.* § 7671k(c). Any person may petition EPA at any time to add or remove a substitute from its lists of acceptable and prohibited sub-

stitutes. *Id.* § 7671k(d). EPA makes listing determinations through its Significant New Alternatives Policy—or "SNAP"—Program. Under that program, EPA, from time to time, has moved substitutes from its acceptable list to its prohibited list, in keeping with advances in science and technology and its statutory mandate to reduce health and environmental risks to "the maximum extent practicable." *See, e.g.*, 64 Fed. Reg. 3865, 3867 (Jan. 26, 1999) (moving the refrigerant hexafluoropropylene, or HFP, from the acceptable list to the prohibited list based on emerging evidence of its toxicity); 61 Fed. Reg. 54,030, 54,038 (Oct. 16, 1996) (prohibiting uses of the climate-change-causing pollutant sulfur hexafluoride, or SF_6, in aerosol products). A longstanding EPA rule codified in 1994, 59 Fed. Reg. 13,044, 13,148 (Mar. 18, 1994), bans the "use [of any] substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes." 40 C.F.R. § 82.174(d); *see also id.* § 82.172 (defining "use" broadly to include use by manufacturers, intermediate users, and end-users).

The 2015 Rule at issue here followed EPA's well-developed regulatory path. In the 2015 Rule, EPA prohibited specific uses of HFCs after it identified available alternatives that are safer for both the ozone layer and the climate. 80 Fed. Reg. 42,870 (July 20, 2015). HFCs are climate super-pollutants with hundreds to thousands of times the global-warming potential of carbon dioxide. *See id.* at 42,879. HFC emissions are among the fastest growing sources of greenhouse-gas pollution in the country, and, if left unregulated, could "double by 2020 and triple by 2030." *Id.*

SUMMARY OF ARGUMENT

For nearly 25 years, states have relied on EPA's SNAP Program to protect consumers, businesses, and the environment from unsafe substitutes for ozone-depleting substances. In particular, EPA's ban on all uses of prohibited substitutes has provided a uniform floor of strong national regulation and incentivized clean-industry investments that have benefited states and their residents. States have developed their own regulatory programs that assume the benefits of this national floor.

The divided D.C. Circuit decision below has thrown EPA's 25-year-old regulatory program—and the states, consumers, and businesses that have long relied on it—into disarray. The court held that EPA can no longer ban all uses of a prohibited substitute under the SNAP Program, no matter how poisonous, explosive, or harmful to the environment the substitute may be. The decision is based on an implausibly cramped reading of the word "replace" in section 612 of the Clean Air Act. Relying on that misreading, the court concluded that some substitute users, including certain manufacturers that previously "replaced" ozone-depleting substances with HFCs, are now exempt from EPA's ban on the use of prohibited substitutes. The court vacated EPA's 2015 Rule "to the extent the Rule requires manufacturers to replace HFCs with a substitute substance." Honeywell Pet. App. 22a. The Court was critically unclear as to how far the new exemption it created extends.

In a vigorous dissent, Judge Wilkins observed that the majority's "extreme" interpretation subverted the practical effect of EPA's authority to list substances as prohibited. *Id.* 35a. The majority's interpretation, he

emphasized, "makes a mockery" of Congress' intent to reduce overall health and environmental risks. *Id.* 34a. Indeed, if the majority's decision is not reversed, EPA's SNAP Program could now have the perverse effect of *increasing* overall risks by exempting from EPA's regulatory ambit uses of chemicals that pose greater dangers than ozone-depleting substances themselves.

The decision below not only is plainly wrong but also imposes deleterious consequences on the *Amici* States and the country as a whole.

First, the majority disrupted states' decades-long reliance on EPA's exercise of its statutory authority and technical expertise to restrict use of unsafe substitutes. If the decision below stands, states can no longer rely on the SNAP Program to ensure that millions of air conditioners, refrigerators, cosmetics, spray cans, household cleaners, and myriad other substitute-containing products do not pose undue dangers to their residents and the environment. States also can no longer rely on the SNAP Program to provide strong incentives to the global chemical industry to invest in the development of cleaner, safer alternatives.

States that seek to act in EPA's stead will face the Hobson's choice of leaving chemical uses unregulated or endeavoring to regulate the use of substitutes for ozone-depleting substances in what could amount to millions of products, facilities, and applications that cross and span state borders. New state policies in this complex area could be costly to state agencies and time-consuming to develop and implement, and potentially lead to varying regulatory schemes across states. And a state-by-state regulatory regime could

never match the effectiveness, efficiency, and enforceability of the strong national floor that the court below dismantled.

Second, the decision below has generated nonsensical results, as well as "substantial confusion and uncertainty." 83 Fed. Reg. 18,431, 18,434 (Apr. 27, 2018). EPA is struggling to implement the court's holding because it conflicts with the core purposes and tenets of the regulatory program and with the practical realities of how ozone-depleting substances and substitutes are used. *See id*. The decision has cast doubt on the scope of the program, leaving states uncertain as to what state action may now be necessary to protect human health and the environment from dangerous substitutes. The court left unclear, for example, whether other types of users, beyond product manufacturers that previously "replaced" ozone-depleting substances with a non-ozone-depleting substitute, might also now be exempt from EPA's ban on prohibited substitutes. Until these uncertainties are resolved, EPA announced it will not enforce the prohibitions in the 2015 Rule against *anyone*, including current users of ozone-depleting substances. *Id.* at 18,432. Meanwhile, unrestricted uses of HFCs are causing irreversible climate harm that adversely affects public health and the environment, and imposes substantial costs on states. *See* 80 Fed. Reg. at 42,870, 42,879, 42,944.

Because the D.C. Circuit has exclusive jurisdiction over EPA's implementation of the safe alternatives policy, only this Court can end the current chaos and stem further injury to states, their residents, and their businesses from the erroneous decision below. *See* 42 U.S.C. § 7607(b)(1).

REASONS FOR GRANTING THE PETITION

I. The Decision Below Inflicts Substantial Harm on States That Only This Court Can Remedy.

Congress established the safe alternatives policy to ensure that the transition away from ozone-depleting substances would not be a cure worse than the disease. For nearly 25 years, states and businesses have relied on EPA to implement its SNAP Program consistent with this mission, through the continued regulation of unsafe substitutes. The decision below radically disrupted this sensibly crafted scheme. The decision's consequences for states are vast, and state policies alone cannot remedy the resulting harms. Unless this Court steps in, states will continue to suffer substantial and indefinite injury.

A. The Court Upended States' Reliance on the SNAP Program as a Strong National Regulatory Floor to Reduce Human Health and Environmental Risks.

The decision below upset states' decades-long reliance on the SNAP Program's robust nationwide regulation of substitutes for ozone-depleting substances. EPA can no longer universally prohibit all users from using unsafe substitutes, no matter how dangerous or deadly the substitute may be. Consequently, states can no longer be reasonably assured that their consumers and businesses are purchasing and using the safest available products and processes. And states can no longer have confidence that the SNAP Program is protecting their residents and the environment from

dangerous substitutes, consistent with Congress' directive to "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a).

The decision below also diluted the important market signal that EPA's strong national regulatory regime previously sent to the chemical industry. A weaker regime will lessen incentives for the industry to continue the vitally important work of developing new, high-performing substitutes that reduce health and environmental risks, to the benefit of states and their residents. To be clear, continued use of ozone-depleting substances—particularly in the supermarket refrigeration and motor-vehicle air conditioning sectors—remains an ongoing concern to the *Amici* States. In the wake of the decision below, the *Amici* States will face increased health and environmental harms from ozone-depleting substances, HFCs, and other harmful substitutes for what could be decades, or more, to come.

B. State-By-State Regulation Cannot Fill the Substantial Regulatory Gap Created by the Decision Below.

By significantly undercutting EPA's authority to address this public health and environmental threat, the D.C. Circuit has abruptly shifted the burden to states to ensure that their residents, businesses, and environment are protected from dangerous substitutes for ozone-depleting substances. But states face considerable challenges and limitations in attempting to regulate substitute use. Unfortunately, there is no way for even the most motivated and well-resourced state to completely fill the hole created by the decision below.

A sophisticated chemical regulatory regime is not built overnight. Developing and enforcing state-level policies would be costly and time-consuming for resource-strapped states. This is particularly problematic because states may lack the resources to evaluate and police substitute use and need time to develop this capacity. Notably, while EPA has nearly a quarter-century of experience regulating ozone-depleting substances and their substitutes, many states would be examining this issue for the first time. Some states may even need to seek new legislative authority or secure additional staff for implementation and enforcement of state-level policies. Meanwhile, until strong state policies are in place, the harms associated with now-unrestricted uses of dangerous substitutes would continue to accumulate.

Indeed, even if every state were to regulate substitutes for ozone-depleting substances, a state-by-state regulatory regime would have at least two inherent limitations as compared to a federal regulatory regime that sets a strong national floor.

First, it is challenging for states to protect their residents from the risks of the many substitute-containing products that cross state or international borders. States that attempt to regulate substitutes for ozone-depleting substances may have difficulty adequately policing smuggling and interstate supply-chain operations. And states with stringent use restrictions may be bordered by states with lenient or no restrictions. Such states would face practical challenges in enforcing restrictions against residents and businesses that purchase a substitute-containing product, such as an air-conditioning unit, in a neighboring state and bring that product home to use. And

uses of substitutes that contribute to global climate change, such as HFCs and sulfur hexafluoride, would harm all states no matter where the use occurs.

Second, state-by-state regulations would likely fail to achieve the same reductions in uses of unsafe chemicals as a national program. Diverse state standards, no matter how stringent, would not create the same incentives as a strong national floor for industry to commit big investments to cleaner, safer processes and to shift behavior on a national and global scale. *See* Daniel Esty, *Revitalizing Environmental Federalism,* 95 Mich. L. Rev. 570, 619–20 (1996) ("[D]evolution [of centralized environmental regulation] promises to exacerbate the difficulty of achieving scale economies sufficient to promote innovation, bring new technologies to bear on U.S. environmental problems, and lower the cost of environmental protection."). The desire among states to attract new business investment, coupled with the political influence of regional, national, and multinational corporations, may impede the adoption of strong health and environmental protections at the state level, and could even generate a race to the bottom among some states.[2]

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[2] *Cf.* Honeywell Pet. 16, 23; *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281–82 (1981) (deferring to Congress' finding that nationwide surface coal mining standards were "essential" to avoid "destructive interstate competition" that might undermine state environmental standards); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1215–16 (1977) (noting that decentralized pollution-control regimes may have spillover effects, whereby states with laxer standards "inflict economic loss (in the form of

C. The Ruling Has Generated Illogical Results and Enormous Regulatory Uncertainty.

States, EPA, and regulated entities alike are struggling to make sense of the substantial illogical consequences and critical ambiguities of the court's interpretation. Indeed, following the decision, EPA has decided that it cannot administer the current program due to the "considerable ambiguity about who is the 'manufacturer' for certain products" and other "practical difficulties for implementation" the decision has created. 83 Fed. Reg. at 18,434. Neither regulators nor regulated parties know who remains subject to EPA's ban on prohibited substitutes and who is now exempt. States and regulated businesses are thus in limbo, with little guidance from EPA or the D.C. Circuit for their respective policy and investment decisions, and with no clear timeline for when this uncertainty will be resolved. Unless this Court steps in, it could well be years before states have clarity about the scope of EPA's authority to regulate use of harmful substitutes for ozone-depleting substances.

The significant regulatory uncertainty that states and their businesses are now experiencing flows from the fact that the majority's directive simply makes no sense from either a policy or a practical perspective. For instance, EPA does not know how to apply the decision where a single piece of equipment involves multiple uses of chemicals, such as a commercial refrigerator that uses both a refrigerant and insulation foam, either of which could be an ozone-depleting substance

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industrial migration or decreased economic growth) on other states that prefer a higher level of environmental quality").

or a substitute. *See id.* at 18,434. Nor does EPA know how to apply the decision where companies own multiple facilities or assemble multiple products, some of which may still use ozone-depleting substances while others may use substitutes. *See id*. at 18,435.

The 2015 Rule, for its part, made no distinctions between product manufacturers and other users of ozone-depleting substances. *See id.* at 18,433. Nor has EPA ever distinguished between manufacturers and other users who were using ozone-depleting substances at the time of a listing decision and those who were not. *Id.* at 18,433–34. Indeed, EPA confirms that it has never required users to record or report when they switch from an ozone-depleting substance to a substitute. *Id.* These regulatory decisions all make sense under a regime where EPA distinguishes among *uses* and not *users*. The decision below upset EPA's longstanding program with a raft of implementation questions that have no evident answers.

These questions could ultimately place particularly substantial burdens and costs on smaller businesses, which are vitally important to state economies. The decision could be interpreted to allow certain product manufacturers to make products containing substitutes that end-users are prohibited from using. *Id.* at 18,436. This illogical result could be enormously disruptive and costly for smaller businesses that have traditionally relied on product manufacturers' compliance with EPA's listing decisions. *Id.* at 18,436. Nothing in the safe alternatives policy indicates that Congress intended to impose such inefficient and costly regulatory burdens on end-users as opposed to manufacturers and other users higher in the supply chain. *Cf.* 59 Fed. Reg. at 13,121 (expecting that the SNAP

Program would impose "minor" costs and be "unlikely to adversely affect small businesses"). Yet, the court below neither took account of such consequences, nor said anything to forestall them. *See* Honeywell Pet. App. 10a, n. 1. Notably, it would be difficult for states to mitigate these potential burdens on smaller businesses in their states.

More irrational consequences could flow from the ambiguity of the decision below. The decision could be read to allow a new manufacturer that has never used an ozone-depleting substance to begin using any prohibited substitute in its products (as the new manufacturer would not be "replacing" an ozone-depleting substance, under the court's reading of the statutory term "replace"). This would be so even though an older competitor manufacturing the same type of products, but with ozone-depleting substances, would be prohibited from switching to that same substitute. Yet, the substitute poses equal health and environmental dangers regardless of which manufacturer is using it. Congress could not have intended its program to discriminate needlessly against some regulated parties to the disadvantage of others. Indeed, the statute is focused entirely on unsafe *uses* and makes no distinctions among substitute users. *See* 42 U.S.C. § 7671k(c) (requiring EPA to list "substitutes prohibited . . . for specific uses").

The decision below cast further uncertainty by alluding to the possibility that users beyond product manufacturers could fall within the new exemption the court created. In a footnote, the majority noted that, "[a]lthough we focus primarily on product manufacturers in this case, our interpretation of Section

612(c) applies to any regulated parties that must replace ozone-depleting substances . . . ." Honeywell Pet. App. 10a, n. 1. While this may have been an attempt to clarify the opinion's scope, it simply complicated matters further by implicating other entities that are subject to EPA's listing determinations beyond just product manufacturers, including service technicians, packagers, grocery stores, and many more. Because of the court's decision, EPA may now have to determine when and if such users have "replaced" ozone-depleting substances with non-ozone-depleting substitutes—a difficult, if not impossible, task. For instance, how can EPA apply the majority's distinction to technicians who install, service, and repair both equipment that contains ozone-depleting substances and equipment that contains non-ozone-depleting substitutes? The majority did not mention this complexity or offer any guidance.

The decision could even be read to allow regulated parties to manipulate the program by switching from a safer substitute to a cheaper, more dangerous one, even if the cheaper substitute has been on the prohibited list for years (as such parties would not be directly "replacing" an ozone-depleting substance). The *Amici* States' concern about this possible outcome is not a mere academic fear. As Petitioners Honeywell and Chemours explain, there is a real danger that companies seeking to minimize production costs could revert to less-safe alternatives, which are commonly less expensive. Honeywell Pet. 23. Congress could not have intended such a nonsensical result, especially where it flows from an isolated reading of a single word in a statute designed to "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a); *see infra* pt. II-A.

Unsurprisingly, EPA has acknowledged that the decision is causing "substantial confusion and uncertainty." 83 Fed. Reg. at 18,434. To the *Amici* States' and the public's great detriment, EPA has given up trying to sort out the chaos. In May, EPA announced that it "will not apply the HFC listings in the 2015 Rule" to *anyone*—including prohibitions the court below upheld as reasonable, such as prohibiting manufacturers that are using ozone-depleting substances from switching to HFCs. *Id.* at 18,431, 18,432. While the *Amici* States believe EPA's response was unlawful,[3] there can be no doubt that the substantial confusion and disorder generated by the decision below has wreaked havoc on EPA's existing, longstanding regulatory scheme.

In addition to the obvious concerns on the part of regulated entities, this uncertainty is harming states, as well. For instance, several of the *Amici* States relied on the 2015 Rule in developing strategies to achieve state-level greenhouse-gas emission-reduction goals.[4] Massachusetts, Maryland, and New York rely

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[3] In *State of New York, et al. v. EPA*, No. 18-1174 (D.C. Cir. June 26, 2018), some of the *Amici* States and several other states are challenging EPA's response to the decision below. EPA's decision not to apply the HFC listings in the 2015 Rule exacerbates the pollution harms from the decision by allowing entities that still use ozone-depleting substances, such as a significant number of grocery stores and supermarkets with commercial refrigeration systems, to switch to HFCs, despite the court's express ruling upholding EPA's authority to prohibit such replacement. *See* Honeywell Pet. App. 12a.

[4] *See, e.g.*, MASS. GEN. LAWS c. 21N, § 4(a) (imposing a legally binding requirement on Massachusetts to reduce its greenhouse-gas emissions 25% below 1990 levels by 2020 and 80% by 2050);

on EPA's rules to help achieve state emission-reduction targets and have so far not adopted regulations regarding HFCs at the state level.[5] If EPA cannot enforce the provisions of the 2015 Rule, it is likely that HFCs will account for a higher percentage of states' greenhouse-gas emissions, thereby making state emission-reduction targets and mandates more difficult to achieve. Moreover, the partial vacatur ordered below broadly threatens to harm all states, regardless of whether they currently have state emission-reduction targets, because all states benefit from federal prohibitions of HFC use that help mitigate the harmful effects of global climate change. *See Massachusetts v. EPA*, 549 U.S. 497, 519–23 (2007) (finding that states have a quasi-sovereign interest in mitigating the serious harms associated with climate change). To the extent the decision below has effectively gutted the federal regulatory regime for HFCs, such states may need to attempt to limit the resulting harms.

II. The Court Below Disregarded the Plain Text of the Clean Air Act.

These disruptions and harms follow from a decision that disregarded the text, structure, and purpose of the Clean Air Act's safe alternatives policy. It is a "fundamental canon of statutory construction that the

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EXEC. ORDER NO. 166 (N.Y. 2017) (committing New York to reduce its greenhouse-gas emissions by 40% by 2030 and 80% below 1990 levels by 2050).

[5] *See, e.g.*, EXEC. OFF. OF ENERGY & ENVTL. AFFAIRS, MASSACHUSETTS CLEAN ENERGY AND CLIMATE PLAN FOR 2020: 2015 UPDATE 38 (2015), https://tinyurl.com/yavykfsa (considering the 2015 Rule in Massachusetts' plan to achieve its near-term emission-reduction mandate).

words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Yet the court below divorced the word "replace" from the context in which it appears, including Congress' mandate that the transition from ozone-depleting substances to substitutes "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). The resulting decision is incompatible with the statute.

A. The Court's Reading of "Replace" Is Inappropriately Narrow, and Conflicts with the Statute's Structure and Purpose.

Although the opinion below mentioned the importance of carefully construing statutory language, it gravely misread the Clean Air Act, which unambiguously indicates Congress' intent to restrict all uses of substitutes for ozone-depleting substances where a safer alternative is available. The court's flawed interpretation hinged on its reading of the single term "replace" in section 612. Section 612(c) states that "it shall be unlawful to replace any [ozone-depleting] substance with any substitute substance" for which EPA has identified a safer available alternative. 42 U.S.C. § 7671k(c). According to the court, "the word 'replace' refers to a new thing taking the place of the old" at a specific point in time, as when President Obama "replaced" President Bush in January 2009. Honeywell Pet. App. 14a. Therefore, the court held, "manufacturers '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 EPA's authority is abruptly cut off. *Id.*

But the court's reading of "replace" is inappropriately narrow and defies common usage. As Judge Wilkins aptly noted in his dissent, the "statute is not directed to a specific individual or position." *Id.* 30a. Instead, the "replace" requirements of section 612 extend broadly to *all uses* of alternatives for ozone-depleting substances by any user. "[T]he majority's example noting that 'President Obama *replaced* President Bush at a specific moment in time,' . . . is therefore inapposite." *Id.* Correctly stated, President Obama and President Bush both replaced President Washington. And voters will continue to elect new replacements for the ongoing role of the President of the United States (the *use*), which can be served at different points over time by a variety of individuals with different characteristics (*alternatives*).

This common understanding of the term "replace" is ubiquitous in everyday parlance. Reportedly, the Boston Red Sox "struggled to replace [Mo] Vaughn's pop in the lineup," following the All-Star hitter's departure from the team at the end of the 1998 season.[6] The Philadelphia Phillies have "struggled to find the long-term replacement" for right-fielder Jayson Werth after his departure from the team in 2010.[7] And the New York Jets "have been searching for [quarterback Joe Namath's] replacement ever since" he retired in

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[6] JOSH PAHIGIAN, THE RED SOX IN THE PLAYOFFS: A POSTSEASON HISTORY, 1903–2005, at 173 (2006).

[7] George Stockburger, *Phillies: Seven Years Later, Phillies Still Haven't Replaced Werth in Right Field*, THAT BALL'S OUTTA HERE (Jan. 30, 2017), https://tinyurl.com/y9kto3ty.

1976.[8] Sportswriters and fans do not view the very next player to occupy a position as the one and only "replacement" for an iconic player.

In the same way, manufacturers and other users continually seek to "replace" ozone-depleting substances with high-performing alternatives that, "[t]o the maximum extent practicable, . . . reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). And Congress evidently intended that search for replacements to be an ongoing pursuit—not a one-time event. The structure of the safe alternatives policy—including EPA's authority to update its lists of substitutes over time, *id.* § 7671k(c), and the right of any person to petition EPA to add or remove substances from its lists at any time, *id.* § 7671k(d)—indicate Congress' intent to establish an ongoing, dynamic regulatory program targeting all users of unsafe substitutes. The statute thus promotes continuing innovation and investment in developing safer alternatives, as Congress intended. *See, e.g.*, *id.* § 7671k(b) (requiring that EPA "shall" recommend broad research programs and initiatives "to promote the development and use of safe substitutes" and "maintain a public clearinghouse of alternative chemicals"); *see also* Honeywell Pet. 21. Indeed, if Congress had intended to enact a short-lived program, it certainly knew how to do so; but Congress did not do so here. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) ("Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms

[8] Brian Costello, *Inside the Jets' Decades-Old Search to Replace Joe Namath*, N.Y. POST, Oct. 28, 2014, https://tinyurl.com/y7x3nf2y.

when it wishes to enlarge, agency discretion."); *see also EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1601 (2014) (citing *Jama v. Immigration & Customs Enf't*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply . . . .")).

The broader, common understanding of "replace" is compelled by section 612's text and structure and is therefore the only interpretation that effectuates Congress' intent. *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001) (interpreting the text of section 109(b) of the Clean Air Act "in its statutory and historical context and with appreciation for its importance to the [Act] as a whole"). By contrast, the court's narrow understanding of "replace" improperly disregards Congress' explicit mandate that EPA list prohibited substitutes "for specific *uses*." 42 U.S.C. § 7671k(c) (emphasis added). "As this Court has noted time and time again, the Court is 'obliged to give effect, if possible, to every word Congress used.'" *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). Under the D.C. Circuit's reading, however, at least some manufacturers can use a dangerous or deadly substitute even though other manufacturers are prohibited from switching to that substitute *for an identical use*. This illogical result is irreconcilable with EPA's mandate to prohibit "specific uses" and underscores the court's erroneous interpretation. 42 U.S.C. § 7671k(c).

B. The Court's Reliance on EPA's Purported Prior Interpretation Was Wholly Misplaced.

From the inception of its SNAP Program, EPA reasonably maintained that it had authority to ban any and all present and future uses of prohibited substances. *See* 40 C.F.R. § 82.174(d); *see also id.* § 82.172 (defining "use" broadly to include use by manufacturers, intermediate users, and end-users). "Under any other interpretation," EPA explained in 1994, the agency "could never effectively prohibit the use of any substitute, as some user could always start to use it prior to EPA's completion of the rulemaking required to list it as unacceptable." 59 Fed. Reg. at 13,048. Congress, which sought to reduce overall environmental and health risks to the maximum extent, "could not have intended such a result." *Id.* EPA's regulation setting forth its longstanding ban was not before the court below and was not vacated; indeed, the jurisdictional limitation on challenging the ban has long since passed. 42 U.SC. § 7607(b)(1) (requiring that petitions for judicial review of Clean Air Act regulations generally must be filed within 60 days). Perplexingly, the court below did not acknowledge this limitation or offer any guidance on how to reconcile its directive with EPA's longstanding interpretation.

Instead, in partially vacating the 2015 Rule, the court focused on other EPA statements that had no bearing on the issue before it. As Judge Wilkins noted in his dissent, the majority cherry-picked from the record below, taking prior agency statements out of context to support its conclusion that EPA lacks authority to proscribe use of non-depleting substitutes for ozone-depleting substances. Honeywell Pet. App. 40a–44a.

But as EPA explained, the cited statements merely clarify limitations on the scope of EPA's reporting and notice requirements for *producers* of certain substitutes under section 612(e). *See* 40 C.F.R. § 82.176(a); 59 Fed. Reg. at 13,052. Substitute *users*, by contrast, have been subject to EPA's ban on the use of prohibited substances since the SNAP Program's inception. 40 C.F.R. § 82.174(d). In other words, the statements on which the majority relied simply were irrelevant.

* * *

In the end, the court's opinion below did not rest on the statute's text, structure, and purposes, in contravention of foundational principles of statutory construction. Instead, it appears the court was diverted by a concern that EPA was attempting to misuse a statutory scheme focused on substitutes for ozone-depleting substances. Honeywell Pet. App. 17a–19a. The resulting interpretation lost its way, negating Congress' intent and displacing an expert agency's reasonable and longstanding interpretation of the statute Congress charged it to implement. States have a significant interest in ensuring that courts faithfully interpret statutes by employing ordinary rules of statutory construction, whatever the subject. Because the court below did not follow these rules, resulting in an erroneous and illogical opinion that inflicts substantial harms on the *Amici* States and indeed the entire country, this Court should grant the petitions for review.

CONCLUSION

The petitions for writ of certiorari should be granted.

Respectfully submitted,

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