ORAL ARGUMENT NOT YET SCHEDULED
No. 17-1024

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

MEXICHEM FLUOR, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

HONEYWELL INTERNATIONAL, INC., ET AL.,

Intervenors.

JOINT BRIEF OF PETITIONERS MEXICHEM FLUOR, INC. AND ARKEMA INC.

On Petition for Review from the United States Environmental Protection Agency

Consolidated with No. 17-1030

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties. The parties in No. 17-1024 are petitioner Mexichem Fluor, Inc., respondent Environmental Protection Agency, and intervenors Honeywell International, Inc., The Chemours Company FC, LLC, The Boeing Company, and Natural Resources Defense Council. The parties in No. 17-1030 are petitioner Arkema Inc., respondent Environmental Protection Agency, and intervenors Honeywell International, Inc., The Chemours Company FC, LLC, The Boeing Company, and Natural Resources Defense Council.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioners certify as follows:

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

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 are subject to regulation pursuant to Section 612 of the Clean Air Act, 42 U.S.C. § 7671k. Petitioners are therefore affected by Environmental Protection Agency requirements promulgated thereunder, including the final rule at issue in these consolidated petitions for review.

2. Rulings Under Review. The petitions for review challenge the Environmental Protection Agency's final rule titled "Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane," which appears in the *Federal Register* at 81 Fed. Reg. 86,778 (Dec. 1, 2016) and in the joint appendix at 665-782.

3. Related Cases. In *Mexichem Fluor, Inc. v. Environmental Protection Agency*, Nos. 15-1328 & 15-1329 (D.C. Cir.), Mexichem Fluor, Inc. and Arkema Inc., petitioners here, filed consolidated petitions for

review on September 17, 2015, challenging the Environmental Protection Agency's final rule titled "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). They challenged the 2015 rule at issue in those cases on the same basis on which they challenge the 2016 rule at issue in these cases. On August 8, 2017, this Court vacated the 2015 rule in part. *See Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017). On January 26, 2018, the Court denied rehearing. On June 25, 2018, Honeywell International, Inc., The Chemours Company FC, LLC, and the Natural Resources Defense Council, which were intervenors in those cases, filed petitions for certiorari. *See Honeywell Int'l, Inc., et al. v. Mexichem Fluor, Inc., et al.*, No. 17-1703 (U.S.); *Natural Res. Def. Council v. Mexichem Fluor, Inc., et al.*, No. 18-2 (U.S.).

In *Compsys, Inc. v. Environmental Protection Agency*, No. 15-1334 (D.C. Cir.), Compsys, Inc. filed a petition for review on September 18, 2015, challenging the same 2015 rule that was at issue in the earlier *Mexichem* case. The *Compsys* case was initially consolidated with the earlier *Mexichem* case, but the Court subsequently ordered that the

consolidation be terminated and that Compsys' challenge be held in abeyance. The abeyance has continued since that time.

In *Natural Resources Defense Council v. Wheeler*, Nos. 18-1172 & 18-1174 (D.C. Cir.), Natural Resources Defense Council and a group of states led by New York filed consolidated petitions for review on June 26, 2018, challenging the Environmental Protection Agency's guidance document titled "Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program," 83 Fed. Reg. 18,431 (Apr. 27, 2018). That guidance document addresses this Court's partial vacatur of the 2015 rule in the earlier *Mexichem* case. Arkema Inc., Mexichem Fluor, Inc., and the National Environmental Development Association's Clean Air Project have intervened in those cases.

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GLOSSARY

CAA	Clean Air Act
CFC	Chlorofluorocarbon
EPA	Environmental Protection Agency
HCFC	Hydrochlorofluorocarbon
HFC	Hydrofluorocarbon
SNAP	Significant New Alternatives Policy

INTRODUCTION

This case involves Title VI of the Clean Air Act ("CAA"), which is named "Stratospheric Ozone Protection." That title requires that ozone-depleting substances—mainly chlorofluorocarbons ("CFCs") and hydrochlorofluorocarbons ("HCFCs"), which the statute calls "class I" and "class II" substances—be phased out over time, and it instructs the Environmental Protection Agency ("EPA" or "the agency") on how to regulate the phase-out. One provision of Title VI—Section 612—directs EPA to ensure that ozone-depleting substances are replaced with safe alternatives as they are phased out. Since 1994, the agency has implemented CAA § 612 through its Significant New Alternatives Policy ("SNAP") program. Hydrofluorocarbons ("HFCs"), which do not deplete stratospheric ozone, were among the first substitutes for class I and class II substances that EPA approved under the program.

More than 20 years later, in 2015, the agency issued a SNAP rule that banned HFCs and HFC blends in a variety of uses ("the 2015 Rule"). This was the first time EPA had used CAA § 612 to require, not that ozone-depleting substances be replaced with other substances, but that their *non-ozone-depleting replacements* be replaced. Petitioners,

which manufacture HFCs, challenged the rule in this Court, arguing that Congress did not authorize the agency to use the SNAP program for this purpose. The Court agreed and vacated the 2015 Rule to the extent that it required the replacement of HFCs. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017) ("*Mexichem I*").

In 2016, while *Mexichem I* was pending, EPA issued another SNAP rule that banned HFCs and HFC blends in other uses ("the 2016 Rule"). The same petitioners are challenging that rule on the same ground in these consolidated cases ("*Mexichem II*"). As the agency recognizes, the Court's decision in *Mexichem I* controls. The 2016 Rule should be vacated to the same extent that the 2015 Rule was vacated in *Mexichem I*, and for the same reasons.

STATEMENT OF JURISDICTION

These are consolidated petitions for review of a final EPA rule titled "Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane" and published at 81 Fed. Reg. 86,778 on December

1, 2016. Because EPA's rule has nationwide applicability, this Court has jurisdiction under 42 U.S.C. § 7607(b)(1). Mexichem Fluor, Inc. ("Mexichem") and Arkema Inc. ("Arkema") filed timely petitions for review on January 24, 2017 and January 27, 2017, respectively.

STATEMENT OF ISSUES

1. Whether this Court's decision in *Mexichem I* controls the question whether EPA lacks authority under CAA § 612 to order the replacement of substances that do not deplete stratospheric ozone.

2. Whether this Court's decision in *Mexichem I* controls the question whether petitioners' petitions for review were timely filed—and whether petitioners' petitions for review were timely filed even if *Mexichem I* does not control that question.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in a separately bound addendum.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

In the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 29, the United States and other nations agreed to phase out the production and

consumption of ozone-depleting substances. The United States meets its obligations under the Protocol through Title VI of the CAA, entitled "Stratospheric Ozone Protection." Clean Air Act Amendments of 1990, Pub. L. No. 101-549, tit. VI, 104 Stat. 2399. In Title VI, Congress divided ozone-depleting substances into "class I" substances (mainly CFCs) and "class II" substances (HCFCs); set timetables for eliminating them; and directed EPA to create market-based cap-and-trade systems for controlling them. 42 U.S.C. §§ 7671a, 7671c-7671f.

Substitutes, the subject of *Mexichem I* and *Mexichem II*, 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 environ-

ment," when the agency "has identified an alternative to such replacement" that (1) "reduces the overall risk to human health and the environment" and (2) "is currently or potentially available." *Id.* § 7671k(c). The same subsection calls for the agency to publish a list of "substitutes prohibited" and "safe alternatives" for "specific uses." *Id.*

To implement Section 612(c), EPA promulgated its initial SNAP rule in 1994. Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044 (Mar. 18, 1994). That rule contained the first list of acceptable substitutes for ozone-depleting substances, including HFCs in a variety of sectors. *Id.* at 13,067-13,120. The initial rule also "clarified" that "SNAP addresses only those substitutes or alternatives actually replacing the class I and II compounds." *Id.* at 13,049-13,050. For so-called "second-generation" substitutes, the agency explained, "[o]ther regulatory programs (e.g., other sections of the CAA, or section 6 of [the Toxic Substances Control Act]) exist to ensure protection of human health and the environment." *Id.* at 1352. 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 rules at issue in *Mexichem I* and *Mexichem II*. *See Mexichem I*, 866 F.3d at 455, 458 & n.3.

B. The 2015 SNAP Rule

In June 2013, President Obama released his Climate Action Plan, which (among other things) described HFC emissions as a climate-change threat and announced that EPA would "use its authority through the [SNAP] Program" to reduce them. EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 10 (2013). In August 2014 the agency issued a proposed rule, and in July 2015 a final rule, that for the first time did just that. Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 79 Fed. Reg. 46,126 (Aug. 6, 2014) (proposed rule); Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program, 80 Fed. Reg. 42,870 (July 20, 2015) (final rule). The 2015 Rule reclassified 38 individual HFCs or HFC blends as unacceptable for 25 uses. *See Mexichem I* J.A. 793-795. In each such use, class I and class II substances had already been either completely or nearly completely eliminated. *See, e.g.*, 80 Fed. Reg. at 42,888; *Mexichem I* J.A. 180, 528.

In September 2015, Mexichem and Arkema, which manufacture HFCs and are also petitioners here, filed consolidated petitions for review of the 2015 Rule in this Court, arguing primarily that Title VI of the CAA does not authorize EPA to use the SNAP program to require the replacement of non-ozone-depleting substances like HFCs. Honeywell International Inc. ("Honeywell") and the Chemours Company FC, LLC ("Chemours"), which manufacture replacements for HFCs and are also intervenors here, intervened in support of the 2015 Rule. So did Natural Resources Defense Council ("NRDC"), which is also an intervenor here.

In defending the 2015 Rule, EPA argued in its brief, among other things, that petitioners' statutory challenge was untimely and that this Court therefore lacked jurisdiction to consider it. *Mexichem I* EPA Br. 1, 12, 18-19. Mexichem and Arkema argued in their reply brief that EPA was wrong. *Mexichem I* Pet'rs Reply Br. 1, 3-7. The jurisdictional issue was then debated at oral argument. *Mexichem I* Oral Arg. at 1:35.

C. The 2016 SNAP Rule

In April 2016, less than one year after the 2015 Rule was released, EPA issued a proposal to ban HFCs and HFC blends in still more sec-

tors. Protection of Stratospheric Ozone: Proposed New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane, 81 Fed. Reg. 22,810 (Apr. 18, 2016) (JA161-261). Throughout its new proposal, the agency referred to the 2015 Rule (*e.g.*, *id.* at 22,850-22,851, 22,854 (JA202-203, 206)) and emphasized that its action was consistent with the 2013 Climate Action Plan (*id.* at 22,821 (JA173)).

In their comments on the proposed rule, both Mexichem and Arkema took the position that the proposal was "outside the scope of EPA's regulatory authority." Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane, 81 Fed. Reg. 86,778, 86,867 (Dec. 1, 2016) (JA754). Arkema in particular asserted that EPA was impermissibly "proposing to replace non-ODS with new non-ODS chemicals"

based on global warming potential (an "ODS" being an ozone-depleting substance). *Id.* (JA754) (internal quotation marks omitted).

Those arguments were rejected. EPA issued the final rule in December 2016, less than eight months after its proposal. 81 Fed. Reg. 86,778 (JA665-782). The 2016 Rule bans 39 HFCs or HFC blends in eight applications. *See* EPA, Fact Sheet (Dec. 1, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/snap_action_scr2_fact-sheet.pdf (JA660-664).[1] In delisting these compounds, EPA recognized that it was requiring replacements in sectors dominated by products that do not deplete ozone.[2] The agency also acknowledged that, to the extent that ozone-depleting substances were still available, their use

[1] Besides banning HFCs, the rule lists several other substances as acceptable, lists some as unacceptable, and exempts some from venting prohibitions. *See*, *e.g.*, 81 Fed. Reg. at 86,790, 86,798-86,799, 86,860-86,864 (JA677, 685-686, 747-751). Petitioners are not challenging those determinations.

[2] *See*, *e.g.,* 81 Fed. Reg. at 86,827 (JA714) ("R-717 is believed to be the most common refrigerant used in cold storage warehouses"); *id.* at 86,831 (JA718) (in the retail food refrigeration and dispensing sector, "R-404A is typically used for freezing applications and HFC-134a for refrigerated applications"); *id.* at 86,836 (JA723) ("[T]he most commonly used refrigerant in the United States for household refrigerators and freezers is R-134a").

was "severely restricted." *E.g.*, 81 Fed. Reg. at 86,806, 86,815, 86,836 (JA693, 702, 723).

In response to Mexichem and Arkema's comments, EPA simply "disagree[d] * * * that it lacks the authority to regulate the continuing replacement of ODS." 81 Fed. Reg. at 86,867 (JA754). For "additional discussion" of this subject, the agency referred the reader to the preamble to the 2015 Rule. *Id.* (JA754).

In January 2017, Mexichem and Arkema filed consolidated petitions for review of the 2016 Rule in this Court, arguing, as they did in *Mexichem I*, that Title VI of the CAA does not authorize EPA to use the SNAP program to require the replacement of non-ozone-depleting substances like HFCs. As they did in *Mexichem I*, Honeywell, Chemours, and NRDC intervened in support of the 2016 Rule. The Boeing Company ("Boeing") intervened as well. After the petitions for review were filed, this Court held *Mexichem II* in abeyance pending its disposition of *Mexichem I*.

D. This Court's Decision In *Mexichem I*

On August 8, 2017, this Court granted the petitions for review in *Mexichem I* and "vacate[d] the 2015 Rule to the extent it requires manu-

facturers to replace HFCs." *Mexichem I*, 866 F.3d at 464. Judge Kavanaugh wrote the Court's opinion.

After analyzing the text and legislative history of CAA § 612, and considering the consequences of EPA's then-current interpretation of the statute, the Court concluded that, while the agency may de-list HFCs, "EPA's authority to regulate ozone-depleting substances under Section 612 * * * does not give [it] authority to order the replacement of substances that are not ozone depleting." *Mexichem I*, 866 F.3d at 460; *see id.* at 458-59. In so holding, the Court emphasized that the agency continues to have "authority under Section 612(c) to prohibit any manufacturers that still use ozone-depleting substances * * * from deciding in the future to replace those substances with HFCs" and that EPA "possesses other statutory authorities * * * to directly regulate non-ozone-depleting substances" that are already in use, including the Toxic Substances Control Act and different provisions of the CAA. *Id.* at 460. The Court also left open the possibility that the entire rule could be reissued under an "alternative theory"—what the Court called a "retroactive disapproval" theory—that the agency was free to consider on remand. *Id.* at 461; see *id.* at 461-62. Finally, the Court rejected petitioners' claim

that, even if EPA may use the SNAP program to ban HFCs, it did so in an arbitrary and capricious way. *Id.* at 462-64. As far as its statutory holding is concerned, the Court stated that, although it "focus[es] primarily on product manufacturers in this case," its "interpretation of Section 612(c) applies to any regulated parties that must replace ozone-depleting substances within the timelines specified by Title VI." *Id.* at 457 n.1.

Judge Wilkins disagreed with the Court's interpretation of the statute and dissented. *Mexichem I*, 866 F.3d at 464-73.

Intervenors Honeywell, Chemours, and NRDC petitioned for rehearing. Both petitions included a challenge to the Court's jurisdiction. *Mexichem I* Honeywell/Chemours Reh'g Pet. 8-9; *Mexichem I* NRDC Reh'g Pet. 8-10. On January 26, 2018, the Court denied panel rehearing in *Mexichem I* and denied rehearing en banc in the case without any recorded dissent.

The three intervenors then filed petitions for certiorari. In its brief in opposition to the petitions, the government apprised the Supreme Court that it now believes this Court's decision in *Mexichem I* to be cor-

rect. Br. for Fed. Resp. in Opp. at 9-13, *Honeywell Int'l Inc. v. Mexichem Fluor, Inc.*, Nos. 17-1703 & 18-2 (U.S.), 2018 WL 4106461.

E. Proceedings To Date In *Mexichem II*

After this Court issued its mandate in *Mexichem I*, the parties filed motions to govern further proceedings in *Mexichem II*. EPA filed a motion for summary vacatur of the 2016 Rule in light of this Court's decision in *Mexichem I*. Petitioners also filed a motion for summary vacatur. Intervenors Honeywell, Chemours, and NRDC filed a motion to continue holding *Mexichem II* in abeyance pending the disposition of the certiorari petitions in *Mexichem I*. In their motion to vacate, Mexichem and Arkema made clear that they are challenging the 2016 Rule only to the extent that their challenge to the 2015 Rule was sustained in *Mexichem I—i.e.*, only on the ground that EPA lacks authority under CAA § 612 to order the replacement of substances that do not deplete stratospheric ozone.

On July 9, 2018, the Court denied the motion to continue abeyance and referred the motions to vacate to the merits panel.

SUMMARY OF ARGUMENT

Mexichem I held that the 2015 Rule, which banned HFCs in various uses, is invalid insofar as the ban applies to those who have already

replaced ozone-depleting substances. *Mexichem I* compels the same holding in *Mexichem II*: that the 2016 Rule, which bans HFCs in various other uses, is invalid insofar as the ban applies to those who have already replaced ozone-depleting substances.

In their responses to the motions for summary vacatur, intervenors Honeywell, Chemours, and NRDC did not contend otherwise. Instead, one of them argued that the relief petitioners (and EPA) are seeking in *Mexichem II* is broader than the relief this Court granted in *Mexichem I*. That is not correct. The relief sought in *Mexichem II* is precisely the same as that granted in *Mexichem I*: vacatur of the SNAP rule insofar as it requires the replacement of HFCs.

Intervenors also argued during the motions practice that the petitions for review in *Mexichem II* are untimely and that this Court therefore lacks jurisdiction. The same issue was briefed and argued in *Mexichem I*, and it was decided in petitioners' favor. Intervenors have nevertheless taken the position that the Court's jurisdictional ruling does not control here, because the issue was not expressly addressed in the Court's opinion. That is not correct either. Because the jurisdictional objection was raised and the Court exercised jurisdiction and granted re-

lief on the merits, it necessarily rejected the objection and its decision controls here.

Indeed, because of the identity of the parties, the Court's jurisdictional ruling in *Mexichem I* is not only *stare decisis* but collateral estoppel. The same issue was contested by the parties and submitted for judicial determination in the prior case; the issue was actually and necessarily determined by this Court in the prior case; and preclusion in the later case will not work a basic unfairness to the parties bound by the first determination. All the requirements for collateral estoppel are therefore satisfied.

Finally, whether precluded or not, intervenors' jurisdictional objection lacks merit. Their theory is that petitioners were obligated to raise their claim—that CAA § 612 does not authorize EPA to order the replacement of substances that do not deplete stratospheric ozone—when the agency issued the initial SNAP rule in 1994. Petitioners could not have raised this claim then, because EPA had never taken the position petitioners are challenging before 2015. Indeed, as the Court's decision in *Mexichem I* makes clear, the agency had consistently taken the

opposite position from 1994 through 2015. That is another way in which intervenors' jurisdictional objection is inconsistent with *Mexichem I*.

STANDING

As explained in more detail in the declarations of John Pacillo and Matthew Ritter, which appear in an addendum bound with this brief, Mexichem and Arkema have standing to challenge the 2016 Rule because they are "'object[s] of the action * * * at issue.'" *Energy Future Coalition v. EPA*, 793 F.3d 141, 144 (D.C. Cir. 2015) (Kavanaugh, J.) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Both Mexichem and Arkema produce and sell chemicals that EPA regulates pursuant to the SNAP program, including HFC-134a and other HFCs banned by the 2016 Rule. The 2016 Rule thus has serious economic consequences for both companies. Accordingly, Mexichem and Arkema are aggrieved by the 2016 Rule and their injuries can be redressed by a decision vacating it.

STANDARDS OF REVIEW

Whether a prior decision of this Court has preclusive effect, either as a matter of *stare decisis* or as a matter of collateral estoppel, is a question of law that the Court decides for itself. *Cf. GSS Grp. Ltd. v. Nat'l Port Auth. of Liberia*, 822 F.3d 598, 604-05 (D.C. Cir. 2016);

Engquist v. Oregon Dep't of Agric., 478 F.3d 985, 1007 (9th Cir. 2007); *Wilmer v. Bd. of Cnty. Comm'rs of Leavenworth Cnty.*, 69 F.3d 406, 409 (10th Cir. 2003). The same is true—even if the prior decision does not have preclusive effect—of the question whether the Court has jurisdiction to grant or deny a petition for review of agency action. *See NTCH, Inc. v. FCC*, 877 F.3d 408, 412 (D.C. Cir. 2017).

ARGUMENT

I. UNDER *MEXICHEM I*, THE 2016 RULE IS INVALID INSOFAR AS IT REQUIRES HFCS TO BE REPLACED

A. The 2015 Rule banned HFCs, in certain uses, that had already replaced substances that deplete stratospheric ozone. In *Mexichem I*, petitioners contended that CAA § 612 does not authorize EPA to do that. In *Mexichem I*, this Court agreed with petitioners; granted their petitions for review; held that the agency could not use Section 612 to ban HFCs that have replaced ozone-depleting substances; vacated the 2015 Rule insofar as it imposed such a ban; and remanded the matter to EPA for further proceedings.

The 2016 Rule likewise bans HFCs, in certain other uses, that have already replaced substances that deplete stratospheric ozone. In *Mexichem II*, petitioners likewise contend that CAA § 612 does not au-

thorize EPA to do that. It follows that this Court should do in *Mexichem II* what it did in *Mexichem I*: agree with petitioners; grant their petitions for review; hold that the agency cannot use Section 612 to ban HFCs that have replaced ozone-depleting substances; vacate the 2016 Rule insofar as it imposes such a ban; and remand the matter to EPA for further proceedings.

Mexichem I controls the outcome in *Mexichem II*. And this Court is "of course bound by [its] prior panel decision." *Util. Air Regulatory Grp. v. EPA*, 885 F.3d 714, 720 (D.C. Cir. 2018) (internal quotation marks omitted). "[O]ne panel cannot overrule another[.]" *United States v. Eshetu*, 898 F.3d 36, 37 (D.C. Cir. 2018) (per curiam) (citing *LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir. 1996) (en banc)). Only the Court sitting en banc can do that (*e.g.*, *Laffey v. Nw. Airlines, Inc.*, 740 F.2d 1071, 1077 n.2 (D.C. Cir. 1984) (per curiam)), and en banc review was denied in *Mexichem I* without a recorded dissent.

Indeed, in another CAA case involving many of the same parties (albeit one involving HCFCs rather than HFCs), this Court deemed itself bound by a prior decision. As it explained there:

> On the merits, Honeywell's main contention ultimately boils down to a claim that *permanent* inter-

> pollutant transfers are prohibited by Section 607 of the Clean Air Act. * * *
>
> Put simply, Honeywell's claim is foreclosed by this Court's decision in *Arkema* [*v. EPA*, 618 F.3d 1 (D.C. Cir. 2010)]. *Arkema* held that EPA, having approved the 2008 interpollutant transfers, had to honor them in the future * * * . [*Id.*] at 6-9. To reach that conclusion, as EPA correctly explains in its brief here, the *Arkema* Court necessarily concluded that permanent interpollutant transfers were permissible under the statute. That conclusion controls in this case.
>
> Honeywell disagrees strongly with this Court's decision in *Arkema*. For that matter, EPA says that it too disagrees with *Arkema*. (Intervenors Arkema and Solvay are of course happy with *Arkema*.) Absent en banc review, we are bound by the *Arkema* decision.

Honeywell v. EPA, 705 F.3d 470, 473 (D.C. Cir. 2013) (Kavanaugh, J.).

If anything, the same result follows in this case *a fortiori*, since there the decision in the earlier case had resolved the issue in the later case only *implicitly*, whereas here the decision in the earlier case resolved the issue in the later case *explicitly*. That is because the issues in *Mexichem I* and *Mexichem II* are one and the same. Indeed, because both the issues and *the parties* in the two cases are the same, *Mexichem I* controls as a matter not only of *stare decisis* but of collateral estoppel. *See* Point II.A.2 *infra*.

B. In their responses to the motions for summary vacatur, intervenors Honeywell, Chemours, and NRDC did not take issue with anything we have just said. They did not dispute that *Mexichem I* controls the outcome in *Mexichem II*. And they did not deny that a later panel cannot overrule an earlier one—indeed, they did not take the position that *Mexichem I* should be overruled. Instead, NRDC asserted that the relief EPA and petitioners seek in *Mexichem II* "goes well beyond the relief granted in *Mexichem I*." NRDC Resp. to Mots. for Partial Vacatur & Remand ("NRDC Resp.") 12. That assertion is frivolous. EPA and petitioners are asking the Court to do in *Mexichem II* precisely what it did in *Mexichem I*—no less and no more.

NRDC's argument is based on footnote 1 of this Court's opinion in *Mexichem I*, which says: "Although 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 within the timelines specified by Title VI. *See, e.g.*, 42 U.S.C. §§ 7671c, 7671d." *Mexichem I*, 866 F.3d at 457 n.1. EPA and petitioners have asked the Court to vacate the 2016 Rule "to the extent it requires manufacturers to replace HFCs with a substitute substance, as consistent

with footnote 1 of *Mexichem I*." EPA Mot. for Partial Summ. Vacatur & Remand ("EPA Mot.") 5. It is hard to see how repeating the exact conclusion reached in the prior case could "go beyond" the relief granted there.

NRDC nevertheless claimed that footnote 1 "is not part of the panel opinion's conclusion or the Court's judgment, both of which vacate the 2015 Rule [only] as to product manufacturers." NRDC Resp. 12 (citations omitted). But the opinion's conclusion states that the case is being remanded to EPA for proceedings "consistent with this opinion" (*Mexichem I*, 866 F.3d at 464), and the Court's judgment likewise orders that the case be remanded to the agency for further proceedings "in accordance with the opinion of the court" (*Mexichem I* J.). "[T]he direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length." *Gulf Refining Co. v. United States*, 269 U.S. 125, 135 (1925). And the Court's opinion in *Mexichem I* of course includes footnote 1.

NRDC also found it "difficult to understand how this footnote could be part of a vacatur related to HFC *use* restrictions," because the

footnote "references two provisions"—42 U.S.C. §§ 7671c and 7671d—that "set timetables for *chemical manufacturers to stop producing* ozone-depleting substances." NRDC Resp. 12. This should not be difficult to understand. As chemical manufacturers end production of ozone-depleting substances, persons using them in new equipment must stop as well. And 42 U.S.C. § 7671d(a) expressly limits the "use [of] any class II substance."

In any event, the precise meaning of footnote 1 of the *Mexichem I* decision has no bearing on whether vacatur is warranted in the *Mexichem II* case. Since EPA and petitioners are requesting vacatur of the 2016 Rule "consistent with footnote 1" (EPA Mot. 5), the relief in *Mexichem II* will be the same as in *Mexichem I* regardless of what the footnote means. Ultimately NRDC's objection—that "includ[ing] the footnote in a vacatur judgment" does "not make any sense" (NRDC Resp. 12)—is not to the relief requested in *Mexichem II* but to the decision in *Mexichem I*. It is too late to complain about that.

Accordingly, as it did in *Mexichem I*, the Court should "grant the petitions" for review; "vacate the 201[6] Rule to the extent it requires manufacturers" and other "regulated parties" to "replace HFCs with a

substitute substance"; and "remand to EPA for further proceedings consistent with th[e] opinion[s]" in *Mexichem I* and *Mexichem II*. *Mexichem I*, 866 F.3d at 457 n.1, 464; *accord id.* at 454, 462.

II. THE COURT HAS JURISDICTION

In their responses to the motions for summary vacatur, intervenors Honeywell, Chemours, and NRDC also argued that the petitions for review of the 2016 Rule are untimely and that the Court therefore lacks jurisdiction to consider them. This Court already decided, in *Mexichem I*, that a petition for review of a SNAP rule ordering the replacement of non-ozone-depleting substances is timely if it is filed within 60 days of the rule's publication in the *Federal Register*—as the petitions for review of both the 2015 Rule and 2016 Rule were. *Mexichem I*—which involved not only the same issue but the same parties—governs the jurisdictional question in *Mexichem II*, both as a matter of *stare decisis* and as a matter of collateral estoppel. Preclusion aside, moreover, this Court correctly found intervenors' jurisdictional argument meritless.

A. The Court Already Decided That It Has Jurisdiction In *Mexichem I*

1. As intervenors acknowledge, the very same jurisdictional objection they are raising in *Mexichem II* was briefed and argued in *Mexichem I*. *See* Chemours/Honeywell Resp. to Mots. for Partial Vaca-tur & Remand ("Chemours/Honeywell Resp.") 9 & n.7; NRDC Resp. 10. Because this Court granted the petitions for review in relevant part in *Mexichem I*, it necessarily rejected the jurisdictional objection. The jurisdictional issue was also raised by intervenors in their rehearing petitions in *Mexichem I*. Like the merits issue, it was found not to warrant either panel or en banc rehearing—which confirms that jurisdiction was not "overlooked or misapprehended" by the panel. Fed. R. App. P. 40(a)(2).

In their responses to the motions to vacate, intervenors nevertheless argued that, because this Court's opinion in *Mexichem I* did not expressly address jurisdiction, the Court in *Mexichem II* "is not bound" by its earlier decision. Chemours/Honeywell Resp. 9 n.7; NRDC Resp. 10. But the authorities that intervenors cite—*Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 144-45 (2011), and *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996)—

do not support their argument. *See* Chemours/Honeywell Resp. 9 n.7; NRDC Resp. 10-11. In cases quoted or cited in those decisions, the Supreme Court made clear that it is not bound by a prior decision when "the [jurisdictional] point * * * at issue [was not] suggested" to the Court (*Webster v. Fall*, 266 U.S. 507, 511 (1925)); when "no argument on [jurisdiction] was presented" (*KVOS, Inc. v. Associated Press*, 299 U.S. 269, 279 (1936)); when the exercise of jurisdiction "was not questioned" (*United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952)); and when the jurisdictional issue was not "br[ought] * * * before us" (*Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974)). In *Mexichem I*, of course, this Court's exercise of jurisdiction *was* questioned and the jurisdictional issue *was* suggested, presented, and brought before the Court. As for what this Court said in *American Portland Cement*, it is that jurisdictional issues "assumed but never expressly decided in prior opinions" lack precedential force. 101 F.3d at 776. In *Mexichem I*, jurisdiction was not merely "assumed," nor could it have been, since the Court did not deny relief on the merits but *granted* it. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998) (disapproving practice of "'assuming'" jurisdiction exists when "the prevailing party on the

merits would be the same as the prevailing party were jurisdiction denied").

There is irony in intervenors' position. The likely reason the Court did not discuss the jurisdictional objection in *Mexichem I* is that it was deemed too insubstantial to require comment. Tellingly, not even the dissenting judge endorsed it. Yet intervenors now seek to use that very insubstantiality to relitigate the same issue the Court decided against them just months ago in a case with the same parties.

2. Because the parties are the same, the Court's resolution of the jurisdictional question in *Mexichem I* is not only *stare decisis* but collateral estoppel. (Unlike the other intervenors in *Mexichem II*, Boeing was not an intervenor in *Mexichem I*, but Boeing has not raised a jurisdictional objection and petitioners are not asserting collateral estoppel against Boeing.) Also known as issue preclusion, collateral estoppel "bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks omitted). This rule serves "to protect the parties from the burden of relitigating

the same issue following a final judgment and to promote judicial economy by preventing needless litigation." *Consol. Edison Co. of N.Y., Inc. v. Bodman*, 449 F.3d 1254, 1258 (D.C. Cir. 2006) (internal quotation marks omitted). Collateral estoppel precludes relitigation of an issue—including a jurisdictional issue (*e.g., Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015); *Cutler v. Hayes*, 818 F.2d 879, 887-90 (D.C. Cir. 1987))—when three requirements are satisfied: (1) "the same issue now being raised must have been contested by the parties and submitted for judicial determination in the prior case"; (2) "the issue must have been actually and necessarily determined by a court of competent jurisdiction in that prior case"; and (3) "preclusion in the second case must not work a basic unfairness to the party bound by the first determination." *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 301 (D.C. Cir. 2015) (internal quotation marks omitted).

Each requirement is satisfied here. First, intervenors concede that the jurisdictional issue they have raised in *Mexichem II* was contested by the parties and submitted for judicial determination by this Court in *Mexichem I*. *See* Chemours/Honeywell Resp. 9 n.7 (*Mexichem II* "presents the same question of lack of subject matter jurisdiction that was

presented in *Mexichem I*"); NRDC Resp. 10 ("this jurisdictional issue was expressly raised in *Mexichem I*"). Second, intervenors cannot dispute that the jurisdictional issue was actually and necessarily determined by this Court in *Mexichem I*. In that connection, it does not matter that the Court's opinion did not expressly address jurisdiction, since "even when an opinion is silent on a particular issue, issue preclusion is applicable if resolution of that issue was necessary to the judgment." *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 365 (D.C. Cir. 1990). Third, preclusion in *Mexichem II* is not unfair to intervenors. Their "incentives to litigate the point now disputed were no less present in the prior case, nor are the stakes of the present case of vastly greater magnitude." *Martin v. DOJ*, 488 F.3d 446, 455 (D.C. Cir. 2007) (internal quotation marks omitted).

B. Intervenors' Jurisdictional Argument In Any Event Lacks Merit

Even if this Court's decision in *Mexichem I* were not preclusive, the Court still would have jurisdiction in *Mexichem II*. Under 42 U.S.C. § 7607(b)(1), a petition for review must be filed within 60 days of publication of the challenged EPA rule in the *Federal Register*. The 2016 Rule was published in the *Federal Register* on December 1, 2016, and

the petitions for review were filed on January 24 and January 27, 2017. They are therefore timely.

Contrary to intervenors' assertion (Chemours/Honeywell Resp. 9-10; NRDC Resp. 9-10), petitioners are not challenging the 1994 SNAP rule. Their claim is that the 2016 Rule exceeds EPA's authority—a claim they could not have brought in 1994.

Indeed, petitioners' challenge would be timely even if it somehow could be reframed as directed at the initial SNAP rule. The 2016 Rule seeks to regulate in ways that EPA had not regulated before 2015, subjecting a large class of substances—non-ozone-depleting HFCs—to the SNAP program and changing their status. This is true even if the resulting restriction is characterized as stemming from the ban in 40 C.F.R. § 82.174(d) on use of "unacceptable substitutes" (Chemours/Honeywell Resp. 10; NRDC Resp. 10), because—consistent with the statute and with *Mexichem I*—"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 are *not* intended for such use is 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).

In the end, intervenors' jurisdictional argument is inconsistent with *Mexichem I*, not only in the broader sense that the argument was necessarily decided against them in that case, but also in the narrower sense that it rests on a premise that was expressly rejected in the Court's opinion. The premise of the jurisdictional argument is that EPA had always believed that it could use the SNAP program to order the replacement of non-ozone-depleting substances. This Court squarely concluded otherwise in *Mexichem I*. It explained that EPA had taken the position that it "did not possess [such] authority" for "many years," including "in 1994," when the agency "indicated that once a manufacturer has replaced its ozone-depleting substances with a non-ozone-depleting substitute," CAA § 612(c) "does not give EPA authority to require the manufacturer to later replace that substitute with a different substitute." *Mexichem I*, 866 F.3d at 455, 458. The Court went on to say that, in the 2015 Rule, the agency sought to "order the replacement of a non-ozone-depleting substitute" for "the first time," under a "new inter-

pretation" of Section 612. *Id.* at 458. This Court's explication of the regulatory history completely undermines intervenors' jurisdictional argument.

CONCLUSION

The petitions for review should be granted, the 2016 Rule vacated to the same extent as in *Mexichem I*, and the matter remanded to EPA.

February 6 , 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(g), I hereby certify that this brief complies with the type-volume limitation of this Court's order of September 4, 2018 because the brief contains 6,046 words, excluding the parts exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

February 6, 2019

/s/ Dan Himmelfarb
Dan Himmelfarb

CERTIFICATE OF SERVICE

I hereby certify that, on February 6, 2019, 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.

February 6, 2019 *<u>/s/ Dan Himmelfarb</u>*
Dan Himmelfarb

STANDING ADDENDUM

No. 17-1024

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

MEXICHEM FLUOR, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

HONEYWELL INTERNATIONAL, INC., ET AL.,

Intervenors.

On Petition for Review from the United States Environmental Protection Agency

Consolidated with No. 17-1030

DECLARATION OF JOHN PACILLO

I, John Pacillo, hereby declare under penalty of perjury as follows:

1. Mexichem Fluor, Inc. ("MFI") is a Delaware corporation that manufactures hydrofluorocarbons (HFCs). I currently am Operations Director of MFI. My responsibilities include, among other things, managing the production operation for manufacture of HFCs. I have been in this position since August 2001 for INEOS Fluor, MFI's predecessor, and since April 2010 for MFI.

2. MFI is an indirectly wholly-owned subsidiary of Mexichem S.A.B. de C.V., a Mexican publicly traded company that produces the raw materials for key products used in infrastructure, housing, drinking water, and other vital industries.

3. Relevant to this case, MFI is the world's leading manufacturer of HFC-134a, a key alternative to chlorofluorocarbons (CFCs) and hydrochloro-fluorocarbons (HCFCs). The HFC-134a production represented 91% of MFI's revenues and 88% of its EBITDA (earnings before interest, taxes, depreciation, and amortization) in 2017.

4. MFI produces HFC-134a in St. Gabriel, Louisiana under the trade names Klea 134a and Zephex 134a. After first opening in 1992, MFI's St. Gabriel plant expanded its operations in 1994, 1996, and 2006 to meet increased market demand. Today, the St. Gabriel plant is the world's largest HFC-134a production facility with an enterprise value of approximately $300 million. MFI employs 75 people and is responsible for generating an additional 300 jobs indirectly through maintenance, support, and other economic activity.

5. HFC-134a is a refrigerant that has zero ozone-depletion potential ("ODP"), very low toxicity, and is practically non-flammable.

6. Over the past two decades, the Environmental Protection Agency ("EPA") approved HFC-134a under the Significant New Alternatives Policy ("SNAP") program as an acceptable substitute for ozone-depleting chemicals in many uses. For instance, in 1995, EPA approved HFC-134a as an acceptable substitute for CFC-12, a class I ozone-depleting chemical, for use in motor vehicle air conditioning ("MVAC") systems. *See* Protection of Stratospheric Ozone, 60

Fed. Reg. 31092 (Jun. 13, 1995). Also in 1995, HFC-134a became an acceptable substitute for R-400 (60/40) and CFC-114 in new industrial process air conditioning and for CFC-12 in new household refrigerators. *See* Protection of Stratospheric Ozone, 60 Fed. Reg. 3318 (Jan. 13, 1995). Then, in 1996, EPA approved and listed HFC-134a as an acceptable substitute for HCFC-22 in new household and light commercial air conditioning. *See* Protection of Stratospheric Ozone, 61 Fed. Reg. 4736 (Feb. 8, 1996). In 1999, HFC-134a was added to the list of acceptable substitutes for HCFCs in all foam blowing end-uses. *See* Protection of Stratospheric Ozone, 64 Fed. Reg. 30410 (Jun. 8, 1999). And, in 2001, EPA approved HFC-134a as an acceptable substitute for CFC-12 and R-502 in retail food refrigeration, cold storage warehouses, and refrigerated transport, and as an acceptable substitute for CFC-11, CFC-12, CFC-114, CFC-115, and R-502 in industrial process refrigeration. *See* Protection of Stratospheric Ozone: Notice 15 for Significant New Alternatives Policy Program, 66 Fed. Reg. 28379 (May 21, 2001).

7. On April 18, 2016, however, EPA published a notice of proposed rulemaking that proposed to de-list certain HFCs, including HFC-134a, based on the global warming potential ("GWP") of the previously approved HFCs. Protection of Stratospheric Ozone: Proposed New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam

Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane, 81 Fed. Reg. 22,810 (April 18, 2016).

8. Together with many other concerned parties, MFI submitted written comments, advancing several arguments as to why EPA's proposed rule had significant flaws. MFI's concerns about the proposed rule included the following: (i) EPA lacks statutory authority under Clean Air Act § 612 to regulate alternatives to non-ozone-depleting substances; (ii) the proposed rule does not show how any of the alternatives to HFC-134a "reduce overall risk to human health" under § 612; and (iii) de-listing HFC-134a, which is highly energy-efficient, may be counter-productive to EPA's goal of combating climate change. *See* Comments of Mexichem Fluor, Inc., EPA-HQ-OAR-2015-0663-0067 (June 14, 2016) (JA262-269).

9. MFI's and other commenters' concerns had no impact on the EPA, however, and on December 1, 2016, the Agency published a rule that changed the status of many individual HFCs or HFC blends from acceptable to unacceptable in many uses ("the Final Rule"). This effectively bans the use of those chemicals in the relevant applications.

10. The effect of the Final Rule for MFI is that it will lose a significant portion of sales and revenues from the manufacture of HFC-134a. Prior to EPA's

de-listing of HFC-134a, MFI's St. Gabriel plant manufactured, on average, 35,300 metric tons of HFC-134a annually. With the Final Rule in place, MFI will have no choice but to reduce HFC-134a production drastically. I estimate that the associated revenue loss to MFI will be at least 16% initially and over 20% as the regulation continues to take effect.

John Pacillo
Operations Director
Mexichem Fluor, Inc.

September 12, 2018

No. 17-1024

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

MEXICHEM FLUOR, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

HONEYWELL INTERNATIONAL, INC., ET AL.,

Intervenors.

On Petition for Review from the United States Environmental Protection Agency

Consolidated with No. 17-1030

DECLARATION OF MATTHEW RITTER

I, Matthew Ritter, hereby declare under penalty of perjury as follows:

1. I currently work for Arkema Inc. ("Arkema") at its U.S. headquarters in King of Prussia, Pennsylvania as Global Business Director, Fluorochemicals. My responsibilities include managing Arkema's fluorochemical product portfolios and business strategies. I have been in that position for more than two years and have worked for Arkema for 22 years. This declaration is based on my personal

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knowledge, and I am authorized to provide this declaration on Arkema's behalf.

2. Arkema is a world-class producer of industrial chemicals. Several of our fluorochemicals products are part of a chemical family called hydrofluorocarbons, or HFCs, because they are made up only of hydrogen, fluorine, and carbon atoms. One of Arkema's HFC products is the chemical 1,1,1,2-tetrafluoroethane, better known as HFC-134a and sometimes as R-134a (where the "R" stands for "refrigerant"). Arkema has two plants that make HFC-134a, one of which is located in Calvert City, Kentucky. Other Arkema products containing HFCs include the refrigerant blends R-404A, R-407A, R-407C, R-410A, and R-507A.

3. Because they do not contain a chlorine or bromine atom, none of the HFCs contributes to the ozone hole by depleting stratospheric ozone. Consequently, HFCs were recognized and utilized as effective substitutes for ozone-depleting chemicals such as chlorofluorocarbons and hydrochlorofluorocarbons.

4. Arkema's HFCs, including HFC-134a, serve as refrigerants for chillers, cold storage warehouses, retail food refrigeration, and

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household refrigerators. HFC-134a also is used as a "foam blowing agent," the material that helps expand, and may be trapped inside, polymer foams, thereby contributing to foam properties such as insulation value.

5. Arkema sells its HFCs to customers and distributors in the chiller, commercial refrigeration, retail refrigeration, home appliance, and foam blowing industries. The U.S. Environmental Protection Agency ("EPA") regulates Arkema's HFCs pursuant to the Significant New Alternatives Policy ("SNAP") program and the regulations at 40 C.F.R. Part 82, Subpart G. Until recently, HFC-134a and Arkema's other HFC products were on SNAP's list of approved substances for the above industries. But in the final rule ("the Final Rule") titled "Protection of Stratospheric Ozone: New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products Under the Significant New Alternatives Policy Program; and Revision of Clean Air Act Section 608 Venting Prohibition for Propane," 81 Fed. Reg. 86,778 (Dec. 1, 2016), EPA "delisted" various HFCs, including HFC-134a, and HFC blends, including R-404A, R-407A, R-407C, R-410A, and R-507A, by changing

their status to unacceptable for particular applications in the chiller, cold storage, retail refrigeration, household refrigerator, and foam blowing sectors as described in the attached Exhibit A.

6. If the delistings in the Final Rule had been in effect over the past five years, they would have prohibited use of more than 40 percent of the total volume of HFCs supplied by Arkema in the United States. Arkema will continue selling the HFCs subject to the Final Rule for those uses that remain authorized, but now will be losing sales as a direct result of the Final Rule. Even in those applications that remain authorized, Arkema will lose revenue as suppliers compete for a shrinking demand and prices drop. Over time, however, the Final Rule will result in closure of manufacturing plants, as Arkema and other producers adjust to chronic excess capacity.

7. Aside from the materials that EPA banned under the Final Rule, Arkema makes and sells other substances subject to SNAP rules. Some of those are HFCs and some are not. But for all of its

products subject to SNAP, Arkema needs objective standards so that it knows what is required and can act accordingly.

Dated September 11, 2018

Matthew Ritter

Exhibit A: HFC Status Changes by Sectors and End-Uses

AIR CONDITIONING

End-Uses	Substitutes	Decision
Centrifugal chillers (new)	HFC-134a, R-125/134a/600a (28.1%/70%/1.9%), R-125/290/134a/600a (55.0%/1.0%/42.5%/1.5%), R-404A, R-407C, R-410A, R-507A	Unacceptable, except as otherwise allowed under a narrowed use limit (for military marine vessels, and human-rated spacecraft and related support equipment), as of January 1, 2024
Positive displacement chillers (new)	HFC-134a, R-125/134a/600a (28.1%/70%/1.9%), R-125/290/134a/600a (55.0%/1.0%/42.5%/1.5%), R-404A, R-407C, R-410A, R-507A	Unacceptable, except as otherwise allowed under a narrowed use limit (for military marine vessels, and human-rated spacecraft and related support equipment), as of January 1, 2024

REFRIGERATION

End-Uses	Substitutes	Decision
Cold storage warehouse (new)	R-125/290/134a/600a (55.0%/1.0%/42.5%/1.5%), R-404A, R-407A, R-410A, R-507A	Unacceptable, as of January 1, 2023
Retail food refrigeration - refrigerated food processing and dispensing equipment (new)	R-125/290/134a/600a (55.0%/1.0%/42.5%/1.5%), R-404A, R-407A, R-407C, R-410A, R-507A	Unacceptable, as of January 1, 2021
Household refrigerators and freezers (new)	HFC-134a, R-125/ 290/134a/600a (55.0%/1.0%/42.5%/1.5%), R-404A, R-407C, R-410A, R-507A	Unacceptable, as of January 1, 2021

FOAM BLOWING

End-Uses	Substitutes	Decision
Rigid polyurethane (PU) high-pressure two-component spray foam	HFC-134a	• Unacceptable for all uses, except military or space- and aeronautics-related applications, as of January 1, 2020 • Acceptable, subject to narrowed use limits, for military or space- and aeronautics-related applications, as of January 1, 2020 • Unacceptable for military or space- and aeronautics-related applications as of January 1, 2025
Rigid PU low-pressure two-component spray foam	HFC-134	• Unacceptable for all uses, except military or space- and aeronautics-related applications, as of January 1, 2021 • Acceptable, subject to narrowed use limits, for military or space- and aeronautics-related applications, as of January 1, 2021 • Unacceptable for military or space- and aeronautics-related applications as of January 1, 2025

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End-Uses	Substitutes	Decision
Rigid PU one-component foam sealants	HFC-134a	Unacceptable, as of January 1, 2020

Source: EPA, Fact Sheet (Dec. 1, 2016), https://www.epa.gov/sites/production/files/2016-12/documents/snap_action_scr2_factsheet.pdf