

ORAL ARGUMENT NOT YET SCHEDULED

No. 17-1016

Consolidated with Nos. 17-1017, 20-1150, 20-1151

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S
CLEAN AIR PROJECT,*Petitioner,*

v.

ENVIRONMENTAL PROTECTION AGENCY,

*Respondent.*ALLIANCE FOR RESPONSIBLE ATMOSPHERIC POLICY, INC., *et al.*,*Intervenors.*

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

**INITIAL OPENING BRIEF OF PETITIONER
NRDC AND STATE AND MUNICIPAL PETITIONERS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), undersigned counsel of record certify as follows:

A. Parties and Amici

Petitioners

In Case No. 17-1016, filed on January 17, 2017, the petitioner is the National Environmental Development Association's Clean Air Project (NEDA/CAP). In Case No. 17-1017, filed on January 17, 2017, the petitioner is the Air Permitting Forum. In Case No. 20-1150, filed on May 11, 2020, the petitioner is Natural Resources Defense Council (NRDC). In Case No. 20-1151, filed on May 11, 2020, the petitioners are the State of New York, the State of Connecticut, the State of Illinois, the State of Maine, the State of Maryland, the State of Minnesota, the State of New Jersey, the State of Oregon, the Commonwealth of Virginia, the State of Washington, the District of Columbia, and the City of New York ("State Petitioners" and, with NRDC, "Petitioners").

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, petitioner NRDC in Case No. 20-1150 certifies that it is a non-governmental corporation with no parent corporation and no publicly held company holding 10% or more of its stock. NRDC, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving

the quality of the human environment and protecting the nation's endangered natural resources.

Respondents

Respondents in these consolidated proceedings include the U.S. Environmental Protection Agency (EPA), and Andrew Wheeler, as Administrator of EPA.

Intervenors

In Case Nos. 17-1016 and 17-1017, intervenors on behalf of respondent are the Alliance for Responsible Atmospheric Policy and NRDC. In Case Nos. 20-1150 and 20-1151, intervenors on behalf of respondents are the Air Permitting Forum and the Auto Industry Forum.

Amici

There are presently no amici.

B. Rulings Under Review

In Case Nos. 17-1016 and 17-1017, NEDA/CAP and the Air Permitting Forum seek review of a final EPA rule entitled "Protection of Stratospheric Ozone: Update to Refrigerant Management Requirements Under the Clean Air Act," published at 81 Fed. Reg. 82,272 (Nov. 18, 2016).

In Case Nos. 20-1150 and 20-1151, Petitioners seek review of a final EPA rule entitled "Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes," published at 85 Fed. Reg. 14,150 (Mar. 11, 2020).

C. Related Cases

The foregoing EPA actions have not been reviewed in this or any other court. By order dated August 17, 2020, the Court severed certain issues raised in Case Nos. 17-1016 and 17-1017; those issues were assigned to Case No. 20-1309 and have been held in abeyance pending further order of the Court.

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GLOSSARY OF ABBREVIATIONS

CFC	Chlorofluorocarbon
EPA	Environmental Protection Agency
HFC	Hydrofluorocarbon
JA	Joint Appendix
NRDC	Natural Resources Defense Council

INTRODUCTION

Large refrigeration equipment frequently uses hydrofluorocarbons (HFCs) as refrigerant. Potent greenhouse gases, HFCs have hundreds to thousands of times more heat-trapping potential than carbon dioxide on a pound for pound basis. HFC emissions, including from refrigeration equipment, are increasing rapidly as HFCs replace older refrigerants being phased out because they deplete the ozone layer. These emissions contribute to climate change and its myriad effects, including sea-level rise, rampant wildfires, and severe storms.

Section 608 of the Clean Air Act combats harms from refrigerant emissions through a national recycling and emission reduction program. 42 U.S.C. § 7671g(c). The program includes a “venting prohibition” that bars knowing releases into the environment of both ozone-depleting refrigerants and their substitutes, like HFCs, in the course of maintaining, servicing, repairing, and disposing of refrigeration equipment. Congress exempted “de minimis” releases from the prohibition, and authorized the U.S. Environmental Protection Agency (EPA) to define what actions equipment owners, operators, and technicians must take to avail themselves of the exemption.

For decades, EPA has implemented the venting prohibition as it applies to ozone-depleting refrigerants through comprehensive regulations designed to minimize emissions during equipment maintenance, service, repair, and disposal. Those regulations require owners, operators, and technicians to follow specific procedures

when handling refrigeration equipment. The regulations also set technician certification standards, restrict refrigerant sales, and require repair of substantial equipment leaks.

Because the venting prohibition applies both to ozone-depleting refrigerants and substitutes like HFCs, in 2016 EPA reasonably extended the same suite of refrigerant management regulations to substitute refrigerants. The extension of the leak-repair requirements alone would have yielded reductions in annual greenhouse gas emissions equivalent to 3 million tons of carbon dioxide.

In 2020, EPA reversed course and rescinded the leak-repair requirements for equipment containing substitutes, claiming it lacked statutory authority to issue the requirements. The Court must vacate this rescission because EPA's stated rationale—that retaining the requirements would be illegal—is erroneous. In 2016, EPA reasonably concluded that the venting prohibition covered refrigerant leaks that technicians, owners, and operators know are occurring and will continue absent repair. EPA now fails to show that the Clean Air Act compels a contrary interpretation. The agency cannot ground its 2020 rescission in a misjudgment about its range of options under the statute.

Moreover, EPA's 2020 interpretation is arbitrary. EPA inexplicably interprets the same statutory venting prohibition inconsistently for different refrigerants. And EPA relies on an unsupported reversal of its prior well-reasoned factual determination that applying uniform requirements to HFCs and ozone-depleting refrigerants would

promote consistent, effective compliance by technicians, owners, and operators, thereby reducing emissions of all refrigerants.

The Court cannot uphold a decision that is arbitrary and rests on EPA's incorrect legal conclusion that Congress mandated its action. The 2020 rule must be vacated.

STATEMENT OF JURISDICTION

NRDC and a group of state and local governments¹ (together, Petitioners) petitioned for review of a final rule published on March 11, 2020, by Respondents EPA and Administrator Andrew Wheeler (together, EPA) pursuant to their authority under the Clean Air Act (Act) titled, "Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes." 85 Fed. Reg. 14,150 (Mar. 11, 2020) (JA___). This Court has exclusive jurisdiction to review final, nationally applicable rules issued under the Act. 42 U.S.C. § 7607(b)(1).

Petitioners timely filed their petitions on May 11, 2020, within 60 days of the rule's publication in the Federal Register. *Id.*; Case No. 20-1150 (filed May 11, 2020); Case No. 20-1151 (filed May 11, 2020).

¹ The government petitioners ("State Petitioners") are the States of New York, Connecticut, Illinois, Maine, Maryland, Minnesota, New Jersey, Oregon, Virginia, and Washington; the District of Columbia; and the City of New York.

STATEMENT OF THE ISSUES PRESENTED

1. Did EPA erroneously conclude that Clean Air Act section 608 prohibits applying leak detection and repair requirements to refrigeration equipment using HFCs or other substitutes for ozone-depleting refrigerants?
2. Did EPA act arbitrarily and capriciously by withdrawing leak detection and repair requirements for HFCs and other substitutes for ozone-depleting refrigerants without reasoned explanations for (i) changing its interpretation of the scope of the Clean Air Act's prohibition on knowingly venting refrigerants; and (ii) rejecting its prior factual finding that consistent requirements for all refrigerants would reduce emissions of ozone-depleting substances?

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included as an addendum to this brief.

STATEMENT OF THE CASE

I. Harms to health and the environment from refrigerant emissions

Large refrigeration appliances and equipment are used to keep food cold in supermarkets; provide air-conditioning for large buildings; freeze ice in skating rinks; and manufacture products including food and beverages, chemicals, machinery, plastics, and electronics. *See* 81 Fed. Reg. 82,272, 82,273 (Nov. 18, 2016) (JA____, ____). These equipment emit refrigerants into the environment across their life cycles, including through leaks, releases when equipment is opened for servicing, and equipment disposal. *E.g.*, 58 Fed. Reg. 28,660, 28,664 (May 14, 1993). Leakage from

large equipment is very high: The average annual leak rate for commercial refrigeration equipment is 25 percent. 81 Fed. Reg. at 82,320.

Beginning in the 1970s, scientists discovered that some refrigerants, such as chlorofluorocarbons (CFCs), deplete the stratospheric ozone layer when released into the environment. 81 Fed. Reg. at 82,274-75; *NRDC v. EPA*, 464 F.3d 1, 3 (D.C. Cir. 2006). Ozone depletion increases penetration of the sun's ultraviolet radiation, increasing incidence of skin cancer and cataracts and damaging crops, other vegetation, and aquatic organisms. 58 Fed. Reg. at 28,660. In response, Congress directed EPA to phase out ozone-depleting chemicals under the Act, and the United States joined the Montreal Protocol, an international agreement that prescribes a global phase-out of those substances. 81 Fed. Reg. at 82,275; *see NRDC v. EPA*, 464 F.3d at 3.

HFCs—potent greenhouse gases—are one of the major substitutes for ozone-depleting refrigerants. While not ozone-depleting, they are still harmful because they contribute to climate change. *See* 81 Fed. Reg. at 82,277. Greenhouse gases trap heat in Earth's lower atmosphere, and the resultant warming “threaten[s] the health of Americans in multiple ways and touch[es] on nearly every aspect of public welfare.” *Id.* at 82,279; *see generally* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,523-26 (Dec. 15, 2009).

II. The Clean Air Act's refrigerant emission reduction program

Title VI of the Clean Air Act Amendments of 1990 implemented and went beyond the United States' obligations under the Montreal Protocol to phase out ozone-depleting substances. Pub. L. No. 101-549, §§ 601-18, 104 Stat. 2399, 2649-72; *see* S. Rep. No. 101-228, at 386 (1989). In addition to addressing harms from ozone-depleting refrigerants, the amendments included provisions to limit emissions of harmful substitute chemicals. 42 U.S.C. § 7671g(c); *see id.* §§ 7671k(c), 7671h(b)(1), 7671h(c). Congress was aware of and sought to limit the potential harms from substitute refrigerants. 101 Cong. Rec. 36,080 (1990) (Chafee-Baucus Statement of Senate Managers).

Section 608 of Title VI addresses these threats by establishing a “[n]ational recycling and emission reduction program” for refrigerants and granting EPA broad authority to regulate ozone-depleting refrigerants and their substitutes.² 42 U.S.C. § 7671g. Subsections 608(c) and 608(a) are relevant here.

Section 608(c) establishes a “venting prohibition,” making it “unlawful for any person, in the course of maintaining, servicing, repairing, or disposing of” refrigeration equipment “to knowingly vent or otherwise knowingly release” ozone-depleting or substitute refrigerants “in a manner which permits such substance

² Section 608 refers to ozone-depleting refrigerants as “class I” and “class II” substances, 42 U.S.C. § 7671g, lists of which appear at 42 U.S.C. § 7671a. Petitioners refer to class I and II substances together as “ozone-depleting refrigerants.”

to enter the environment.” *Id.* § 7671g(c)(1)-(2). EPA may exempt substitute refrigerants from this prohibition, but only if the agency “determines” that venting the substance “does not pose a threat to the environment.” *Id.* § 7671g(c)(2).³ EPA has made no such finding for HFCs. *See* 40 C.F.R. § 82.154(a)(1) (listing exempted substitutes). Congress also exempted from the prohibition “[d]e minimis releases associated with good faith attempts to recapture or recycle or safely dispose of” refrigerants. 42 U.S.C. § 7671g(c)(1). While the venting prohibition is self-executing, Congress left EPA the task of interpreting and defining the scope of the prohibition and its de minimis exemption by regulation. *See* 69 Fed. Reg. 11,946, 11,949 (Mar. 12, 2004) (noting that the scope of the de minimis exemption is not “self-explanatory”); 81 Fed. Reg. at 82,284-85; 85 Fed. Reg. 82,272, 14,154 (Nov. 18, 2016) (JA____, ____).

Section 608(a) required EPA to establish standards “regarding the use and disposal of [ozone-depleting refrigerants] during the service, repair, or disposal” of equipment. 42 U.S.C. § 7671g(a)(1)-(2). Congress required that these regulations “reduce the use and emission” of ozone-depleting refrigerants “to the lowest achievable level,” and “maximize the recapture and recycling of such substances.” *Id.* § 7671g(a)(3). Such regulations also “may include requirements to use alternative substances (including substances which are not [ozone-depleting refrigerants]).” *Id.*

³ For simplicity, Petitioners refer to substitute refrigerants not exempt from the prohibition as “substitutes” or “substitute refrigerants.”

III. EPA's refrigerant management regulations

EPA initially promulgated regulations implementing section 608 in 1993. 58 Fed. Reg. at 28,660, 28,713 (promulgating 40 C.F.R. pt. 82, subpt. F (§§ 82.150-82.166)). These regulations created a comprehensive regime “to reduce emissions of [ozone-depleting] refrigerants to the lowest achievable level during service, maintenance, repair, and disposal of” industrial refrigeration equipment. *Id.* at 28,713 (codified at 40 C.F.R. § 82.150(a) (1993)). For example, the regulations:

- established certification requirements for equipment technicians;
- required evacuation of refrigerant prior to opening or disposing of equipment;
- set standards for refrigerant recycling and recovery tools; and
- restricted refrigerant sales to certified technicians or other specified entities.

Id. at 28,714-21. From the beginning, the refrigerant management regulations have also required equipment owners and operators to repair significant refrigerant leaks (hereinafter, “leak-repair requirements”). *Id.* at 28,716 (codified at 40 C.F.R. § 82.156(i) (1993)). If a technician detects that equipment is leaking refrigerant beyond the regulatory limit, the owner or operator (hereinafter, operator) must generally repair the leak within 30 days or develop a plan to retrofit or retire the equipment. *Id.*

Because some refrigerant releases are inevitable in the course of properly maintaining, servicing, repairing, and disposing of equipment, EPA's 1993 rules also defined which releases would be considered de minimis and therefore not violate the

venting prohibition. EPA provided that regulated entities could avoid illegal venting by complying with enumerated refrigerant management requirements, reasoning that because compliance would “achieve the lowest achievable level of emissions,” the resulting emissions “will only be de minimis.” *Id.* at 28,667. The 1993 regulations thus defined releases as de minimis if they occurred when the regulated entity complied with the recovery and recycling requirements of 40 C.F.R. § 82.158, and the required practices listed in section 82.156—including leak-repair requirements for equipment containing ozone-depleting refrigerants. *Id.* at 28,714-15.

EPA has revised the 1993 regulations over time. *See* 81 Fed. Reg. at 82,275-76 (describing revisions). Among other changes, EPA expanded the list of practices the de minimis exemption incorporates to include the technician certification requirements of section 82.161, 70 Fed. Reg. 19,273, 19,278 (Apr. 13, 2005), as well as the reclamation requirements of section 82.164, the safe-disposal requirements of section 82.155, and the strengthened maintenance and leak-repair requirements of section 82.157, 81 Fed. Reg. at 82,352-60.

IV. Applying the venting prohibition to substitute refrigerants

A. The 2016 Rule

Although the Act applied the venting prohibition to substitute refrigerants beginning in 1995, 42 U.S.C. § 7671g(c)(2), before 2016, EPA had not specified what practices operators and technicians working with equipment containing substitutes must take to avoid illegal venting. Despite the increasing prevalence of planet-

warming substitutes like HFCs, regulated entities lacked clarity on how the venting prohibition and its de minimis exemption applied to substitute refrigerants. 81 Fed. Reg. at 82,283-84.

In January 2014, the Alliance for Responsible Atmospheric Policy, an industry coalition of manufacturers and businesses that produce, use, and reclaim refrigerants, petitioned EPA to address this lack of clarity by extending the refrigerant management regulations to substitutes. EPA-HQ-OAR-2015-0453-0165 (JA____).

On November 18, 2016, EPA issued a final rule updating its refrigerant management regulations and extending the full set of regulations to substitutes. 81 Fed. Reg. 82,272 (JA____) (“2016 Rule”). The 2016 Rule also strengthened some requirements applicable to both refrigerant types. EPA lowered the annual leak rates that trigger required repairs and required certain leak inspections. *Id.* at 82,280; 40 C.F.R. § 82.157(c)(2), (g). EPA explained that the 2016 Rule would “protect the stratospheric ozone layer by reducing emissions of [ozone-depleting] refrigerants and protect the climate system by reducing emissions of refrigerant gases with high [global warming potentials].” 81 Fed. Reg. at 82,278.

Another goal of the 2016 Rule was to “increase clarity, encourage compliance, and facilitate enforcement” of the refrigerant regulations by “harmoniz[ing] the requirements across all major refrigerant types ... to reduce uncertainty and complexity for the regulatory community.” *Id.* EPA found that creating a consistent regime across refrigerant types would increase overall compliance and thereby reduce

emissions of all regulated refrigerants, including ozone-depleting substances. *Id.* at 82,286. EPA expected that a consistent regime would reduce the chances that technicians would accidentally release ozone-depleting refrigerants, mistakenly believing equipment they were servicing contained substitute refrigerants subject to less stringent requirements. EPA projected that applying this single strengthened regime to all large refrigeration equipment, regardless of which covered refrigerant that equipment contained, would reduce annual ozone-depleting refrigerant emissions by 114 metric tons (weighted by ozone-depletion potential) and avoid approximately 7.3 million metric tons of carbon dioxide-equivalent greenhouse gas emissions. *Id.* at 82,274.

EPA concluded that sections 608(c) and 608(a) authorized it to extend the refrigerant management requirements to substitutes. EPA relied “largely on section 608(c),” which EPA reaffirmed provided it authority to interpret and enforce the venting prohibition and de minimis exemption. *Id.* at 82,283. EPA determined that the refrigerant management regulations, including the leak-repair requirements, did just that: they appropriately defined the scope of the de minimis exemption for releases of substitutes just as they long had for releases of ozone-depleting substances. *Id.* at 82,284-85. EPA concluded that requiring repair of substantial leaks avoids refrigerant releases covered by the venting prohibition because they occur in the course of equipment servicing and maintenance. EPA noted that Congress’s inclusion

of the term “maintain” in section 608(c) authorized it to address “a broad range of activities involved in preserving equipment in normal working order.” *Id.* at 82,291.

Moreover, in the 2016 Rule, EPA determined that a practice known as “topping off” violates the venting prohibition. *Id.* at 82,285. Topping off occurs when a technician discovers equipment is low on refrigerant and then adds more refrigerant to the equipment while servicing it. In 2016, EPA logically concluded that in this situation the technician knows the equipment is leaking, and that “if a person adds refrigerant to an appliance that he or she knows is leaking, he or she also violates the venting prohibition.” *Id.* The regulations thus provide that technicians topping off leaky equipment would *not* violate the venting prohibition if they notified the equipment operator of leaks above a specified regulatory limit and the operator promptly repaired such leaks or replaced or retrofitted the equipment in conformity with the leak-repair requirements. *Id.* at 82,285-86.

EPA invoked section 608(a) as supplementary authority for extending the refrigerant management requirements to substitutes. *Id.* at 82,286. That subprovision permits EPA to promulgate regulations to reduce emissions of ozone-depleting substances “to the lowest achievable level.” 42 U.S.C. § 7671g(a)(3)(A). EPA found that a fully consistent regulatory regime for ozone-depleting and substitute refrigerants would increase all-around compliance, thereby reducing emissions of ozone-depleting substances. *See supra* pp. 10-11.

B. The Rescission Rule

On March 11, 2020, EPA issued a final rule withdrawing the leak-repair requirements as to substitutes. 85 Fed. Reg. 14,150 (JA____) (“Rescission Rule”). EPA determined that, “as a legal matter, the 2016 Rule’s extension of the leak-repair requirements to ... substitute refrigerants exceeded the EPA’s statutory authority” under section 608. *Id.*; *see id.* at 14,156, 14,160, 14,166 (same). EPA claimed it was thus *required* to withdraw these regulations. *Id.* at 14,152; *id.* at 14,155 (determining that “the extension of the leak repair requirements ... must be rescinded”). The Rule left in place the remaining regulations EPA had extended to substitutes in 2016. *Id.* at 14,152.

In the Rescission Rule, EPA affirmed that sections 608(a) and 608(c) authorize it to regulate substitutes. EPA acknowledged it has “discretionary authority” to interpret and enforce the venting prohibition and de minimis exemption. *Id.* at 14,155. This authority allows EPA to issue requirements for substitutes that “address the potential for ... releases” prohibited by 608(c), i.e., refrigerant releases occurring “in the course of maintaining, servicing, repairing, or disposing of” equipment. *Id.* EPA likewise reaffirmed its authority to regulate substitutes “to fulfill the purposes set forth” in section 608(a)(3), i.e., to minimize the use and emission of ozone-depleting substances or maximize their recapture and recycling. *Id.* at 14,152.

Nonetheless, in 2020, EPA newly asserted that it lacked authority to extend leak-repair requirements to substitutes because it was unreasonable to interpret the

venting prohibition to encompass known leaks of substitute refrigerants. *Id.* at 14,155. EPA argued that its 2016 interpretation was illegal because such leaks “typically occur during the normal operation of the appliance, rather than ‘in the course of maintaining, servicing, repairing, or disposing of an appliance.’” *Id.* at 14,156 (quoting 42 U.S.C. § 7671g(c)(1)). EPA repudiated its 2016 conclusion that the word “maintain” in the venting prohibition could encompass a “broad range of activities” taken by owners, operators, and technicians to “preserv[e] equipment in normal working order.” *Id.* (citing 81 Fed. Reg. at 82,291). Instead, EPA determined in 2020 that refrigerant released “in the course of maintaining” equipment is limited to that which escapes during a technician’s servicing visit. Therefore, the agency concluded, it could not require repairs of equipment leaks discovered by technicians and reported to operators because those leaks continued after the technician’s departure, and were thus outside the venting prohibition’s scope.

EPA concluded this in direct contradiction to its past and current practice for ozone-depleting refrigerants. Since 1993 and continuing after the Rescission Rule, EPA’s regulations for ozone-depleting substances use the leak-repair requirements to define releases exempt from the same venting prohibition, indicating that EPA in that context views releases from leaking equipment absent repair as inside the prohibition’s scope. *See* 40 C.F.R. § 82.154(a)(2)(i).

In the Rescission Rule, EPA also reversed its prior conclusion that topping off equipment without repair violates the venting prohibition. 85 Fed. Reg. at 14,156. In

EPA's new view, releases caused by topping off fall outside the venting prohibition because the leaks occurred before and will continue after the servicing event when the technician added refrigerant. EPA acknowledged that topping off still constitutes illegal venting when a leak "is so visible, audible, or frequent that adding refrigerant to the appliance creates the practical certainty that the refrigerant will be released contemporaneously with the servicing event." *Id.* Nonetheless, EPA concluded that "the mere possibility of such an event does not justify" concluding that topping off without repair generally constitutes illegal venting. *Id.*

Finally, in the Rescission Rule, EPA repudiated its 2016 factual finding under section 608(a) that applying uniform leak-repair requirements to ozone-depleting and substitute refrigerants would further technicians' compliance with such requirements when servicing equipment containing ozone-depleting substances. *Id.* at 14,157. While EPA maintained its position that section 608(a) authorizes regulations for substitute refrigerants if those regulations would "reduce the use and emissions" of ozone-depleting substances, EPA abandoned its prior finding that extending leak-repair requirements to equipment containing substitute refrigerants would have this effect. *Id.* at 14,1567.

SUMMARY OF THE ARGUMENT

The Rescission Rule must be vacated because it is based on an erroneous legal conclusion. *See Prill v. Nat'l Labor Relations Bd.*, 755 F.2d 941, 947 (D.C. Cir. 1985). Contrary to EPA's contentions in 2020, the Clean Air Act did not compel the

Rescission Rule. EPA correctly concluded in 2016 that section 608 permits the agency to apply leak-repair requirements to substitute refrigerants.

EPA reasonably interpreted section 608(c) to authorize it to require repair of chronically leaky equipment to effectuate the venting prohibition and de minimis exemption. First, technicians who “top off” equipment that is short of refrigerant necessarily know the equipment is leaking and will continue to leak absent repairs. On these facts, EPA reasonably concluded in 2016 that refrigerant emissions contemporaneous with and after the topping off are prohibited releases “in the course of” maintaining and servicing the equipment.

Second, EPA reasonably interpreted “maintaining” equipment to encompass operators’ preservation of equipment in working order, not just technician’s work during periodic service visits. Ongoing, known leaks that continue absent appropriate repair thus occur in the course of maintaining equipment and fall within the venting prohibition.

Third, EPA’s refrigerant management regulations are designed to minimize emissions during equipment maintenance, service, repair, and disposal. Since 1993, EPA has sensibly used these regulations to define the actions equipment operators and technicians must take to avoid illegal venting of ozone-depleting substances under section 608(c). EPA’s 2016 choice to apply the same interpretation of illegal venting to substitute refrigerants was similarly reasonable.

Not only was EPA wrong in 2020 about the legality of the 2016 Rule, but the agency also lacked a legal or rational basis to reverse its interpretation of section 608(c) in the Rescission Rule. EPA failed to offer a reasonable explanation for rescinding the extension of the leak-repair provisions to substitutes while retaining the extension of all other aspects of the refrigerant management regulations. The Rescission Rule also inexplicably interprets the identical de minimis exemption inconsistently for ozone-depleting and substitute refrigerants. Treating like things differently without adequately distinguishing them is paradigmatically arbitrary.

Finally, the Rescission Rule is invalid because it relies on an arbitrary reversal of EPA's 2016 finding under section 608(a) that extending leak-repair requirements uniformly to all refrigerants would increase technicians' compliance with applicable requirements for ozone-depleting refrigerants and thereby reduce emissions of those substances. EPA's rejection of its prior well-reasoned finding impermissibly relies on sheer speculation and runs counter to the record.

STANDING

Petitioners have standing to challenge the Rescission Rule. *See NRDC v. Wheeler*, 955 F.3d 68, 77-78 (D.C. Cir. 2020) (finding NRDC and states had standing to challenge EPA action that would increase HFC emissions).

The Rescission Rule will harm State Petitioners in their proprietary capacities by exacerbating climate change-related threats to coastal and inland public property and infrastructure. As global warming causes sea-level rise and strengthens the most

powerful storms, the extent and magnitude of coastal flooding will increase. *See* Snyder Decl. ¶ 26. In New York, where sea levels have already risen some twelve inches over the last century, a wide range of public facilities, including dozens of state-owned coastal parks, are at increased risk from climate change-related flooding. *Id.* ¶¶ 26–27. And the increased frequency and severity of both coastal and inland flooding associated with worsening storms will continue to cause substantial damage to state roads and bridges, requiring extensive emergency response and reconstruction efforts. *Id.* ¶ 30. These proprietary harms, redressable through vacatur, constitute cognizable injuries to State Petitioners. *See Massachusetts v. EPA*, 549 U.S. 497, 519 (2007); *NRDC v. Wheeler*, 955 F.3d at 77; *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059–60 (D.C. Cir. 2018).

NRDC also has standing to sue on behalf of its members based on the three-part test set forth in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). First, NRDC’s members would have standing to challenge the Rescission Rule because they have suffered (1) a concrete and particularized injury-in-fact (2) caused by the Rule that is (3) redressable by a favorable judicial decision. *Clean Wisc. v. EPA*, 964 F.3d 1145, 1156 (D.C. Cir. 2020).

The Rescission Rule permits HFC emissions that worsen harms to NRDC members. By eliminating leak-repair requirements for substitutes, including HFCs, the Rule will increase annual HFC emissions equivalent to nearly three million metric tons of carbon dioxide—roughly equal to annual emissions from 650,000 cars. 85 Fed.

Reg. at 14,153; *see* EPA, Greenhouse Gas Equivalencies Calculator, <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator> (last visited Oct. 16, 2020). These increased emissions of potent greenhouse gases will contribute to climate change and worsen its effects. *See, e.g.*, 74 Fed. Reg. at 66,498-99; Knowlton Decl. ¶¶ 13-15; *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 453 (D.C. Cir. 2017) (“According to EPA, emissions of HFCs contribute to climate change.”). The effects include worsening sea-level rise and more intense hurricanes associated with increased rainfall, both leading to more flooding. *See* Soden Decl. ¶¶ 10-20; Kopp Decl. ¶¶ 14-15, 19, 22-24.

These effects of climate change are worsening and will continue to worsen harms to NRDC’s members. Members’ homes and properties have been flooded and damaged by severe storms and hurricanes made more intense by climate change, including Hurricane Harvey in Texas and Superstorm Sandy along New Jersey’s coast. *See* Jeffrey Decl. ¶¶ 6-7; Tower Decl. ¶¶ 7-11; Ndoye Decl. ¶¶ 8-12; Soden Decl. ¶¶ 15-16; Kopp Decl. ¶ 24. The effects of further climate change, including more damage from future flooding and extreme weather, threaten these members. *E.g.*, Jeffrey Decl. ¶¶ 2, 12-16; Ndoye Decl. ¶¶ 23-25.

Accordingly, there is a causal connection between the increased emissions resulting from the Rescission Rule and NRDC members’ injuries. *See NRDC v. Wheeler*, 955 F.3d at 77; *Massachusetts*, 549 U.S. at 523-25. Vacating the Rescission Rule would restore the leak-repair requirements for refrigeration equipment using HFCs,

thereby reducing emissions and remedying the discrete injury to NRDC's members from eliminating these requirements. *See NRDC v. Wheeler*, 955 F.3d at 77-78.

The second and third prongs of the *Hunt* test are also met here. Protecting NRDC's members from the most severe effects of climate change is central to NRDC's mission. Trujillo Decl. ¶¶ 6-7. And neither adjudication of the claims nor the relief requested requires individual members' participation in the lawsuit. *See Hunt*, 432 U.S. at 342-43.

STANDARD OF REVIEW

The Court must reverse an EPA rulemaking under the Clean Air Act if it is arbitrary, capricious, an abuse of discretion, or not in accordance with law. 42 U.S.C. § 7607(d)(9)(A). In making this determination, the Court applies the same standard as under the Administrative Procedure Act. *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 891 F.3d 1041, 1047 (D.C. Cir. 2018).

Agency action is arbitrary and cannot be sustained “where it is based not on the agency's own judgment but on an erroneous view of the law.” *Prill*, 755 F.2d at 947. Although courts uphold reasonable agency interpretations when Congress delegates authority to an agency to fill a statutory gap, *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-44 (1984), when an agency wrongly believes its statutory interpretation is “compelled by Congress,” vacatur of the agency's decision—not deference to its interpretation—is warranted. *Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002); *Sea-Land Serv., Inc. v. Dep't of Transp.*, 137 F.3d 640, 646-47 & n.3 (D.C. Cir. 1998).

An agency must also “examine the relevant data and articulate a satisfactory explanation” for changing its policy. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Agency action lacking a “reasoned explanation” for “disregarding facts and circumstances that underlay ... the prior policy,” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009), or reflecting an unexplained inconsistency, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), is arbitrary. An arbitrary interpretation receives no deference under *Chevron. Id.* at 2126.

ARGUMENT

- I. **The Rescission Rule rests on EPA’s erroneous conclusion that the Clean Air Act barred the agency’s prior interpretation of the venting prohibition**
 - A. **The Court cannot uphold the Rescission Rule because EPA has misjudged its range of permissible action under the statute**

Agency action is invalid when an agency fails to realize its range of permissible options for implementing a statute and mistakenly believes Congress mandated its action. *See, e.g., Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000); *Prill*, 755 F.2d at 956. Although courts defer to reasonable exercises of agency discretion, “that discretion must be exercised through the eyes of one who realizes she possesses it.” *Transitional Hosps.*, 222 F.3d at 1029. An agency that erroneously believes a statute compels a specific outcome has not “exercised its *own* judgment,” and its decision cannot be sustained. *Phillips Petroleum Co. v. FERC*, 792 F.2d 1165, 1169 (D.C. Cir. 1986); *see Prill*, 755 F.2d at 948. In such circumstances,

vacatur is warranted, and the Court “cannot” proceed to determine whether the agency’s proffered interpretation passes muster under *Chevron*. *Transitional Hosps.*, 222 F.3d at 1029; see *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (holding that an agency order “may not stand if the agency has misconceived the law”).

Whether an agency has misconceived the law is for the court to decide. For example, in *Transitional Hospitals*, the agency interpreted a provision of the Medicare statute to require a certain method (and prohibit others) for calculating whether a hospital qualified as a “long-term” care facility. 222 F.3d at 1020. The Court examined the provision and held that the statute was “neither so clear, nor so dictatorial” as the agency believed. *Id.* at 1024. Because the agency misperceived the range of reasonable methods it could employ for this determination, its action could not be sustained. *Id.* at 1025.

This principle controls here. EPA is clear in the Rescission Rule that it withdrew the leak-repair requirements because it believes its 2016 interpretation of section 608(c)’s venting prohibition is outside the range of permissible constructions, and thus illegal.⁴ *E.g.*, Response to Comments at 9, 29, EPA-HQ-OAR-2017-0629-

⁴ EPA also claims—erroneously—that the 2016 Rule exceeded its authority under section 608(a). 85 Fed. Reg. at 14,157. But EPA concedes that section 608(a) authorizes it to regulate substitutes to reduce emissions of ozone-depleting substances. *Id.* at 14,159. EPA reasonably exercised this authority in 2016 to require leak repair for equipment containing substitutes. EPA’s 2020 claim that it lacks such

0343 (JA___, ___) (“EPA does not believe it can legally maintain requirements based on an unreasonable interpretation of Section 608.”); *see supra* p. 13. Indeed, EPA insists its action is “not a change in policy,” 85 Fed. Reg. at 14,167, and that it “does not have discretion” to retain leak-repair requirements for substitutes, Response to Comments at 9 (JA___). EPA believes the Act mandated the Rescission Rule. 85 Fed. Reg. at 14,155.

EPA’s legal conclusion is mistaken. Section 608(c)’s prohibition on refrigerant releases occurring “in the course of” maintaining and servicing equipment is subject to a range of reasonable interpretations. As explained *infra*, EPA’s 2016 interpretation that known substantial refrigerant leaks occur in the course of maintaining and servicing equipment is within that range. Accordingly, the leak-repair requirements for substitute refrigerants reasonably implement the venting prohibition and EPA had authority to issue them.

B. In 2016, EPA reasonably implemented the venting prohibition by requiring leak repair for substitute refrigerants

Section 608(c)’s venting prohibition bars “knowingly releas[ing]” substitute refrigerants “in the course of maintaining, servicing, repairing, or disposing” of equipment. 42 U.S.C. § 7671g(c). Congress gave EPA authority to issue regulations as necessary to implement and enforce this prohibition, *see id.* § 7601(a)(1), including

authority is based only on an arbitrary reversal of its prior factual determination. *See infra* pp. 38-44.

regulations that interpret how the prohibition applies to substitutes, 85 Fed. Reg. at 14,152. But, as EPA recognizes, Congress “did not precisely delineate” the scope of that authority. 85 Fed. Reg. at 14,152, 14,154-55. Congress left EPA the task of interpreting the venting prohibition by defining which releases occur “in the course of” maintaining, servicing, and repairing equipment and which are exempted “[d]e minimis” releases associated with “good faith attempts” at recapturing, recycling, or disposal. *See id.*; 81 Fed. Reg. at 82,284. Congress thus delegated to EPA authority to “fill the statutory gap in a reasonable fashion.” *Nat’l Cable & Telecomm’n’s Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). EPA did so in the 2016 Rule.

1. Refrigerant releases caused by topping off leaky equipment occur in the course of servicing equipment

It is common practice for technicians to “top off” leaking equipment by adding refrigerant. Topping off results in known refrigerant releases: The very act of servicing a leaking system by topping it off reflects the technician’s knowledge that refrigerant is being and will continue to be released absent repair. *See* 81 Fed. Reg. at 82,285-86 (explaining that “when refrigerant must be added to an existing appliance, ... the owner or operator necessarily knows that the system has leaks”); 80 Fed. Reg. 69,458, 69,486 (Nov. 9, 2015) (proposed rule). A technician who tops off equipment absent repairs therefore knowingly releases refrigerant “in a manner which permits such substance to enter the environment” in violation of the venting prohibition, 42 U.S.C.

§ 7671g(c)(1), and EPA's 2016 interpretation to that effect was reasonable. 81 Fed. Reg. at 82,285.

In the Rescission Rule, EPA claims that these releases fall outside the venting prohibition because they do not “typically occur” “in the course of maintaining, servicing, repairing, or disposing of” equipment, i.e., because the refrigerant mostly escapes from equipment between technicians' service visits. 85 Fed. Reg. at 14,156. This argument fails for at least two reasons.

First, EPA does not contradict its 2016 finding that an operator topping off equipment “knows that the appliance is releasing refrigerant to the environment *as the appliance is being serviced*.” 80 Fed. Reg. at 69,486 (emphasis added). Topping off thus results in refrigerant releases “in the course” of the service procedure itself. *See* 40 C.F.R. § 82.157(b) (referring to adding refrigerant as a “service”). Indeed, EPA concedes in the Rescission Rule that the venting prohibition applies when a leak is “so visible, audible, or frequent that adding refrigerant to the appliance creates the practical certainty that the refrigerant will be released contemporaneously with the servicing event.” 85 Fed. Reg. at 14,156; *see id.* (conceding that “hearing hissing or noticing a ruptured line while continuing to add refrigerant ... would constitute a knowing release”). EPA offers no legal basis for distinguishing, however, between obvious leaks that are loud and obvious leaks that are quiet. In both scenarios, the technician knows the equipment is leaking refrigerant during the service procedure, which is the reason topping off is necessary in the first instance. Accordingly, in 2016,

EPA reasonably included leak repair in the precautions regulated entities must take to avoid prohibited knowing releases during equipment maintenance and servicing.

Second, the refrigerant releases from topping off that continue after the service procedure also directly result from the technician's servicing activity and thus constitute prohibited venting. That the releases may continue through a "slow leak" between servicing events makes no difference: the refrigerant could not have leaked if a technician hadn't added it. Indeed, topping off *increases* the releases that continue after the procedure, because the equipment now contains more refrigerant that can and will escape absent repair. The release is a direct and obvious impact of topping off and is thus caused by the technician "in the course" of servicing the equipment.

Rather than contest this intuitive premise, EPA now contends that some leaks may occur without the operator's knowledge or "before the servicing event." 85 Fed. Reg. at 14,156. That may be so. But in 2016, EPA reasonably focused on the leakage the technician and operator know will occur during and as a result of the servicing event if the leak goes unrepaired. Those refrigerant releases reasonably can be construed as occurring "in the course of" *servicing* (as well as *maintaining*, *see infra* pp. 28-30) the equipment. 42 U.S.C. § 7671g(c)(1).

In *County of Maui v. Hawaii Wildlife Fund*, the Supreme Court similarly applied a commonsense interpretation to the Clean Water Act's prohibition on the discharge "of any pollutant from a 'point source' to 'navigable waters,'" holding that it covers pollutants passing through groundwater when the addition "is the functional

equivalent of a direct discharge.” 140 S. Ct. 1462, 1468 (2020) (quoting 33 U.S.C. § 1362(12)). A contrary reading would have allowed polluters to escape regulation simply by moving a discharge pipe one yard back from the ocean “so that the pollution must travel through at least some groundwater before reaching the sea.” *Id.* at 1473. The Court explained that Congress did not intend this “massive loophole.” *Id.* at 1477. This Court should likewise reject the Rescission Rule’s cramped construction of “in the course of” servicing as comprising only releases escaping equipment while a technician is standing over it. *Cf. United States v. Velsicol Chem. Corp.*, 438 F. Supp. 945, 947 (W.D. Tenn. 1976) (where defendant discharged pollution into sewer system and “knows or should have known that the city sewers lead directly into the Mississippi River,” defendant discharged pollutants into “water[s] of the United States”).

Accordingly, the venting prohibition provides EPA ample authority to address refrigerant releases occurring while a technician is topping off equipment and as a direct result of that service procedure. At a minimum, EPA’s 2016 interpretation of the venting prohibition does not “clearly exceed[]” EPA’s “range of interpretive discretion.” *Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011).

2. Known refrigerant leaks occur in the course of maintaining equipment

In 2016, EPA reasonably read the statutory phrase “in the course of maintaining” to “include a broad range of activities involved in preserving equipment

in normal working order.” *See* 81 Fed. Reg. at 82,291. This interpretation tracks the ordinary meaning of “maintain” as “to keep in an existing state” of repair or efficiency or “to preserve from failure or decline.” *Maintain*, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/maintain> (last visited Oct. 14, 2020); *see also* *Maintain*, Black’s Law Dictionary (11th ed. 2019) (maintain can mean “[t]o care for (property) for purposes of operational productivity”). Understanding that “maintaining” equipment includes caring for equipment for purposes of operational productivity, EPA reasonably concluded that emissions occurring “in the course of maintaining” equipment include significant leaks continuing between technician visits.

This meaning sensibly makes operators—who are subject to the venting prohibition—responsible for ensuring their equipment does not have substantial leaks that result in large refrigerant emissions. *See* 42 U.S.C. §§ 7671g(c) (applying venting prohibition to “any person” maintaining equipment), 7602(e) (defining “person” broadly to include individuals and corporations); 81 Fed. Reg. at 82,291-92. As EPA acknowledges in the Rescission Rule, “few appliances are leak-free.” 85 Fed. Reg. at 14,156. Operators can preserve equipment in normal working order by, among other things, replacing leaked refrigerant as needed and repairing leaks. Thus, EPA reasonably implemented section 608(c) in 2016 by requiring operators to calculate leak rates and fix significant leaks to reduce releases “by any person maintaining” refrigeration equipment. 42 U.S.C. § 7671g(c)(2). EPA’s 2016 interpretation is

certainly among the reasonable options and is thus permissible. *See Humane Soc’y of United States v. Zinke*, 865 F.3d 585, 600 (D.C. Cir. 2017); *see also Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1081-82 (10th Cir. 1998) (finding regulatory provision referring to “repair and maintenance” ambiguous and deferring to agency interpretation).

To support its 2020 reversal, EPA now contends that “maintaining” cannot have this broad meaning because Congress would have included the term “use” in section 608(c), as it did in section 608(a), if it intended the venting prohibition to apply to releases occurring during what EPA calls the “normal operation” of equipment. 85 Fed. Reg. at 14,156. This argument ignores that Congress included the word “maintaining” in section 608(c), but not in section 608(a). *Compare* 42 U.S.C. § 7671g(c), *with id.* § 7671g(a). This textual difference must have meaning, and thus “maintaining” must include circumstances beyond “servicing” or “repairing.” *See Duncan v. Walker*, 533 U.S. 167, 174 (2001). Moreover, the Rescission Rule’s narrow interpretation of “maintaining” as limited to the repair and service activities performed by technicians cannot be squared with the text of section 608(c) itself: “[M]aintaining” appears in a disjunctive list with “servicing” and “repairing,” 42 U.S.C. § 7671g(c), and thus must be given an independent meaning from the other listed terms. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979).

3. EPA reasonably used a unified set of requirements to implement section 608's refrigerant emission reductions program

EPA has long chosen to implement section 608's emission reductions program through a unified set of “standards for the proper handling of [ozone-depleting] refrigerants during the maintenance, service, repair, or disposal of an appliance.” 81 Fed. Reg. at 82,283. The purpose of EPA's rules, including the leak-repair provisions now at 40 C.F.R. § 82.157, is to reduce refrigerant emissions to “the lowest achievable level.” 42 U.S.C. § 7671g(a)(3)(A); 81 Fed. Reg. at 82,283, 82,285. EPA recognized, however, that even when complying with these requirements, “some amount of refrigerant ... is inevitably released during the maintenance, servicing, repair, and disposal of” equipment. 81 Fed. Reg. at 82,284.

Accordingly, EPA has long concluded that emissions of ozone-depleting substances occurring despite compliance with the refrigerant management requirements—including the leak-repair rules—are appropriately “considered *de minimis*” and exempt from the venting prohibition. *See* 81 Fed. Reg. at 82,283. And, even after the Rescission Rule, EPA continues to incorporate the leak-repair requirements into the definition of exempted *de minimis* releases for equipment using ozone-depleting substances. *See* 40 C.F.R. § 82.154(a)(2)(i). This approach to defining *de minimis* releases—as releases occurring despite compliance with practices that will minimize emissions during equipment maintenance, service, repair, and disposal—was

a “reasonable policy choice” about how to implement section 608(c). *See Chevron*, 467 U.S. at 844-45.

Thus, it was eminently reasonable for EPA in 2016 to use compliance with the same requirements—including the leak-repair requirements—to define which substitute refrigerant emissions are de minimis and exempt from the identical venting prohibition. *See* 42 U.S.C. § 7671g(c), 81 Fed. Reg. at 82,284-85. That section 608(a) does not *mandate* the same standards for substitute refrigerants as for ozone-depleting substances does not indicate that Congress prohibited EPA from applying the same requirements to both. *Contra* 85 Fed. Reg. at 14,155. “[T]he contrast between Congress’s mandate in one context with its silence in another suggests not a prohibition but simply a decision *not to mandate* any solution in the second context, i.e., to leave the question to agency discretion.” *Cheney R.R. Co. v. I.C.C.*, 902 F.3d 66, 69 (D.C. Cir. 1990).

4. EPA’s 2016 interpretation of prohibited venting furthers section 608’s purpose

Considering statutory context and “the problem Congress sought to solve” further supports EPA’s reasonable interpretation of the venting prohibition in the 2016 Rule. *See PDK Labs., Inc. v. U.S. Drug Enforcement Agency*, 362 F.3d 786, 796 (D.C. Cir. 2004). Contrary to EPA’s suggestion that section 608’s sole purpose is to reduce emissions of ozone-depleting substances, 85 Fed. Reg. at 14,167, statutory text,

context, and legislative history confirm that Congress also intended to minimize environmental harms from substitute refrigerants.

That section 608(c)(2) expressly prohibits venting substitutes unless EPA finds that venting a particular substitute “does not pose a threat to the environment” shows Congress’s intent to curb emissions of harmful substitute refrigerants. 42 U.S.C. § 7671g(c)(2). In this way, section 608(c) works in harmony with other Title VI provisions designed to reduce emissions from harmful substitute refrigerants. *See id.* § 7671k(c); *id.* § 7671h(b)(1), (c) (restricting repair and servicing of motor vehicle air conditioners containing both ozone-depleting refrigerants and substitutes).

Legislative history confirms that Congress intended Title VI, in part, to minimize environmental harms from substitutes. Beginning with its earliest consideration of Title VI, Congress was aware that some substitutes contribute to climate change. *See, e.g., Stratospheric Ozone Depletion and Chlorofluorocarbons: Joint Hearing before Subcomms. on Env'tl. Prot. and Hazardous Wastes and Toxic Substances of the Senate Env't and Pub. Works Comm., 100th Cong. 8 (1987) (statement of Dr. Robert T. Watson, NASA).* Congress “supplement[ed] [Title VI’s] production phase-out” for ozone-depleting substances with the venting prohibition, thereby providing for significant emissions reductions, *see S. Rep. No. 101-228, at 386 (1989)*, and applied that prohibition to planet-warming substitutes. The Senate Managers reiterated that section 608(c) is “important ... because many of the substitutes being developed do not have ozone depleting properties but ... are ‘greenhouse gasses’” that will

exacerbate climate change. 101 Cong. Rec. 36,080 (1990) (Chafee-Baucus Statement of Senate Managers).

Interpreting the venting prohibition to require repair of known substantial leaks of substitute refrigerants directly serves this statutory purpose and prevents annual HFC emissions equivalent to three million metric tons of carbon dioxide. 85 Fed. Reg. at 14,153.

* * *

Because EPA may reasonably interpret section 608(c) to authorize the extension of leak-repair requirements to equipment using substitute refrigerants, EPA's contrary legal conclusion cannot provide a reasoned basis for rescinding the extension. *See, e.g., Arizona*, 281 F.3d at 254 (deference to agency's statutory interpretation is inappropriate where agency wrongly believes its interpretation is compelled by Congress); *Prill*, 755 F.2d at 947. The Court cannot uphold the Rescission Rule "as an exercise of the discretion that the agency disavows." *United States v. Ross*, 848 F.3d 1129, 1134 (D.C. Cir. 2017). Accordingly, the Court must vacate the rule. *See, e.g., Alarm Indus. Commc'ns Comm. v. FCC*, 131 F.3d 1066, 1072 (D.C. Cir. 1997).

II. EPA's new and inconsistently applied interpretation of its section 608(c) authority is arbitrary and unreasonable

Vacatur is warranted because the Rescission Rule relies on EPA's mistaken conclusion that the 2016 Rule was illegal, regardless of whether EPA could offer a new justification for the rescission on remand. *See Prill*, 755 F.2d at 948; *Regents*, 140 S. Ct. at 1909.

Even if the Court were to consider the permissibility of EPA's 2020 interpretation, that interpretation is arbitrary and must be rejected. EPA provides no reasoned explanation for its new conclusion that it cannot define the venting prohibition's de minimis exemption through the leak-repair requirements for substitute refrigerants. First, EPA attempts, but fails, to explain why the leak-repair requirements must be treated differently than the rest of the refrigerant management provisions the agency retained for substitute refrigerants. *See* 85 Fed. Reg. at 14,157-59. Second, EPA neglects to articulate any reason why leak repair can remain part of the de minimis definition for ozone-depleting refrigerants but is impermissible for substitutes. Third, EPA ignores an important aspect of the problem—whether its new interpretation will undermine section 608's goals by increasing greenhouse gas emissions. These failures render EPA's interpretation in the Rescission Rule arbitrary and therefore unreasonable under *Chevron* step two. *See Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165, 171 (D.C. Cir. 2015) (“[A] *Chevron* step-two argument and a claim that the agency has acted arbitrarily and capriciously ... overlap.”).

EPA concedes it has *some* authority to regulate substitutes under section 608(c) and continues to apply the rest of the refrigerant management regulations—in EPA’s terms, “the non-leak repair provisions”—“as appropriate measures to interpret, explain, and enforce the venting prohibition” for substitutes. 85 Fed. Reg. at 14,157. EPA must—but does not—adequately articulate why extending leak-repair requirements to substitutes is uniquely outside its authority. Agency action is arbitrary “when the agency offer[s] insufficient reasons for treating similar situations differently.” *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (quoting *Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)).

EPA attempts to distinguish leak repair from the other requirements it extended to substitutes by concluding the leak-repair requirements “apply to activities and releases that are too distinct from those identified in section 608(c).” 85 Fed. Reg. at 14,156. To the contrary, the leak-repair requirements apply to activities more closely related to “maintenance, service, [and] repair” than many requirements EPA retains. Leak-repair requirements govern technician obligations *in the course* of servicing equipment (calculating the leak rate) and repair (repairing substantially leaking equipment). *See* 40 C.F.R. § 82.157(b)-(c). Conversely, neither refrigerant sales nor technician training themselves occur *during* service or maintenance.

Leak repair is also at least as closely related to the “potential for releases to occur during appliance maintenance, service, repair, or disposal,” 85 Fed. Reg. at 14,157, as any of the other requirements. For example, EPA claims the ban on selling

ozone-depleting substances and substitutes to anyone but certified technicians, 40 C.F.R. § 82.154(c), and the technician certification requirements themselves, *id.* § 82.161, are connected to the venting prohibition because “unrestricted sales will enable untrained or undertrained technicians to obtain access to refrigerants that are likely to be used improperly in connection with servicing activities that will result in the venting of refrigerants.” 85 Fed. Reg. at 14,158 (quoting 58 Fed. Reg. at 28,698). Under this logic, the leak-repair requirements are even more closely connected to the venting prohibition: Declining to repair equipment leaks leads to actual, known releases both during servicing events and between them, *id.* at 14,156, while the sales restriction and technician certification address the likelihood of future releases. The suite of subpart F regulations are far more similar than they are distinct, and the Court should not defer to EPA’s interpretation that treats similar requirements differently without “adequately distinguish[ing] between” them. *Northpoint Tech., Ltd. v. FCC*, 412 F.3d 145, 155-56 (D.C. Cir. 2005).

Additionally, EPA entirely fails to explain why its reversed interpretation is required for substitutes, but not for ozone-depleting substances. For nearly 30 years, EPA has consistently incorporated leak-repair requirements into the regulation interpreting the venting prohibition’s de minimis exemption for ozone-depleting substances. *See* 58 Fed. Reg. at 28,713-15 (codifying 40 C.F.R. § 82.154(a)(1), which defines de minimis release as observing required practices in section 82.156, including section 82.156(i)’s leak-repair requirements); 80 Fed. Reg. at 69,486 (“EPA ...

intended that proper leak repair be a component of the required practices necessary to meet the de minimis exemption.”). In 2016, EPA reasonably extended the entire set of refrigerant management regulations to substitutes, having identified no rationale for defining the same de minimis exemption differently depending on the refrigerant. 81 Fed. Reg. at 82,283-85.

Now, EPA continues to incorporate the leak-repair requirements into section 82.154’s implementation of the venting prohibition, rescinding them only as to substitutes. 85 Fed. Reg. at 14,171; 40 C.F.R. § 82.154(a)(2)(i). EPA’s new selective reversal of interpretation is “premised in part on ... an unexplained departure from prior [agency] policy and practice” and is therefore “not a reasonable one.” *Northpoint Tech.*, 412 F.3d at 156. There is no reasoned basis to change the meaning of the venting prohibition and the definition of de minimis releases depending on the type of refrigerant used. The Rescission Rule’s interpretation is thus arbitrary and unreasonable under *Chevron* step two. *See Maryland v. EPA*, 958 F.3d 1185, 1201 (D.C. Cir. 2020) (per curiam).

Finally, EPA’s 2020 interpretation of venting unlawfully ignores “an important aspect of the problem,” namely the additional harm from substitute refrigerant emissions its interpretation permits. *See State Farm*, 463 U.S. at 43. EPA asserts that it properly ignored the Rescission Rule’s effect on emissions of greenhouse gases like HFCs, because section 608 does not seek to limit such emissions. 85 Fed. Reg. at 14,167. To the contrary, Congress also intended the venting prohibition to reduce

harms from substitute refrigerant emissions. *See supra* pp. 31-33. EPA's failure to even consider that its narrower interpretation will increase emissions of substitutes renders its decision arbitrary. *See Grace v. Barr*, 965 F.3d 883, 901-02 (D.C. Cir. 2020).

III. The Rescission Rule is invalid because it arbitrarily disregards EPA's prior finding that consistent refrigerant regulations will reduce emissions of ozone-depleting substances

A. Whether applying leak-repair requirements to substitute refrigerants will reduce emissions of ozone-depleting substances is a question of fact, not law

Section 608(a) authorizes EPA to issue regulations to reduce emissions of ozone-depleting substances "even if the regulations do not directly regulate [ozone-depleting substances]." 85 Fed. Reg. at 14,155. The provision expressly allows EPA to issue requirements "to use alternative substances" to ozone-depleting refrigerants and is silent about how EPA is to achieve Congress's direction to minimize emissions of ozone-depleting substances. 42 U.S.C. § 7671g(a)(3). This grant of authority in an EPA-administered statute gives the agency discretion to implement the provision "in a reasonable fashion." *Catawba Cty. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) (quoting *Brand X*, 545 U.S. at 980). EPA therefore concedes it has authority to extend refrigerant management requirements to substitutes if the requirements will further the objectives listed in section 608(a)(3). 85 Fed. Reg. at 14,152, 14,155.

In 2016, EPA found that fully consistent regulations for different refrigerants enhances compliance and thereby reduces emissions of ozone-depleting substances. 81 Fed. Reg. at 82,286. EPA's contention in 2020 that it lacks authority under section

608(a) to retain the leak-repair requirements for substitutes relies on a reversal of this factual finding—not a changed statutory interpretation. Thus, EPA’s changed position must be supported by “a reasoned explanation ... for disregarding” its 2016 determination. *Fox*, 556 U.S. at 515-16; see *Physicians for Soc. Responsibility v. Wheeler*, 956 F.3d 634, 646-47 (D.C. Cir. 2020). EPA fails to provide one.

EPA’s contention that a legal interpretation drove its determination that the leak-repair requirements exceeded its authority under section 608(a) does not withstand scrutiny. EPA attests that the Rescission Rule was “not a change in policy.” 85 Fed. Reg. at 14,167. EPA stated that “[e]ven if the facts and circumstances that underlay [the] extension [of leak repair requirements to substitute refrigerants], or were engendered by it, could ... provide a policy basis for” retaining the requirements, “EPA cannot do that because doing so exceeds its legal authority.”⁵ *Id.* These attempts to recast a factual reversal as a legal one ignore that EPA has not changed its interpretation of the scope of its authority under section 608(a)(3). See *id.* at 14,152, 14,155.

B. EPA failed to provide a reasoned explanation for disregarding its 2016 finding

EPA reasonably determined in 2016 that differing requirements for ozone-depleting and substitute refrigerants, with more rigorous requirements applicable only

⁵ To the extent EPA asserts that under *no factual circumstances* could it apply the leak-repair requirements to substitutes under 608(a), that is erroneous as a matter of law and is reversible error. See *supra* pp. 21-22, 38.

to the former, would increase the likelihood that technicians—whether due to human error, negligence, or cutting corners—would fail to apply the applicable requirements when servicing equipment containing ozone-depleting refrigerants. 81 Fed. Reg. at 82,288. EPA found that such failures would increase emissions and reduce recapture and recycling of ozone-depleting substances. *Id.* at 82,286. This determination was supported by the 2016 record. *E.g.*, Hudson Technologies Company Comments at 1, 3, EPA-HQ-OAR-2015-0453-0066 (JA____, ____); Chemours Company Comments at 1, 3, EPA-HQ-OAR-2015-0453-0107 (JA____, ____); NRDC and Institute for Governance and Sustainable Development Comments at 3, EPA-HQ-OAR-2015-0453-0121 (JA____).

EPA’s 2016 finding was also consistent with its abiding understanding of the effect of consistent refrigerant management requirements on promoting compliance and reducing emissions. In 1993, EPA understood that a consistent regime would “minimize confusion and maximize compliance.” 58 Fed. Reg. at 28,666 (extending refrigerant management regulations to class II substances); *see also* 63 Fed. Reg. 32,044, 32,070 (June 11, 1998) (proposed rule) (making similar findings about consistent leak-repair requirements and citing emphasis from “industry representatives” that exempting substitute refrigerants “could lead to confusion and skepticism regarding similar requirements for [ozone-depleting substances,] which would undermine implementation” of the requirements).

The Rescission Rule arbitrarily disregards EPA's 2016 finding. First, EPA's reversal "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43. The 2020 record further supports, not undermines, EPA's 2016 determination. As EPA notes in the Rescission Rule, "Multiple other commenters state that a single, uniform, and consistent management system for [ozone-depleting substances] and substitute refrigerants makes refrigerant management easier for technicians ... and increases the chances that technicians will not release [ozone-depleting] refrigerant." 85 Fed. Reg. at 14,164. For example, an industry representative commented that "[a] single set of refrigerant management rules for all non-exempt refrigerants, including HFCs and other alternatives, promotes compliance and aids enforcement. ... It provides consistency, reduces complexity, and minimizes loopholes." Dynatemp International Inc. Comments at 4-5, EPA-HQ-OAR-2017-0629-0265 (JA____-____); *see also* Massachusetts et al. Comments at 2, 10-12, EPA-HQ-OAR-2017-0629-0300 (JA____, ____-____); ESCO Institute Comments at 7-8, EPA-HQ-OAR-2017-0629-0134 (JA____-____). Moreover, as EPA highlighted in 2020, some comments specified that a consistent management regime must be "inclusive of the leak repair provisions." 85 Fed. Reg. at 14,164.

In the Rescission Rule, EPA cites no evidence contradicting its prior and long-held determination that consistent requirements across refrigerant types would promote overall regulatory compliance. Indeed, EPA has not repudiated its judgment that a consistent regulatory scheme generally reduces emissions of ozone-depleting

substances. *See* 85 Fed. Reg. at 41,159 (“After additional consideration, the EPA affirms the potential for ... inconsistent requirements to increase [ozone-depleting substance] emissions.”).

Rather, EPA’s only rationale for its about-face in 2020 is that reintroducing inconsistency in one area will not disturb the benefits of a consistent regime. *See id.* at 14,157. EPA supplies “no information to support [its changed] perception.” *NRDC v. EPA*, 966 F.2d 1292, 1306 (9th Cir. 1992). The only explanation EPA provides is a speculative and unsupported hypothesis that extending other refrigerant management requirements to substitutes might obviate the independent effect on emissions of ozone-depleting substances of consistent leak-repair requirements: “[S]ince the EPA is retaining the requirement that only a certified technician can open an appliance containing ... substitute refrigerant, it is unlikely that leaks in [covered equipment containing ozone-depleting refrigerants] would not be repaired because of a difference in the duty to repair between appliances containing [ozone-depleting substances] and those containing substitute refrigerants.” 85 Fed. Reg. at 14,157.

EPA’s assumption—that certified technicians will never be confused about which refrigerant equipment contains or negligently (or deliberately) apply the more relaxed protocols for substitutes to equipment containing ozone-depleting refrigerants—is unreasonable and contradicted by the record. *See Sorenson Comm’ns, Inc. v. FCC*, 755 F.3d 702, 708 (D.C. Cir. 2014) (emphasizing that courts will not defer to agency findings based on “sheer speculation” (quoting *Verizon v. FCC*, 740 F.3d

623, 663 (D.C. Cir. 2014))). It is unreasonable to assume that certification suffices to keep technicians from confusing these odorless, colorless, and functionally identical gases, or from cutting corners. *See, e.g.*, 85 Fed. Reg. at 14,165. Even certified technicians can “mistakenly believe[] that [equipment] contains a substitute refrigerant and fail[] to apply the proper procedures for [ozone-depleting substances].” 81 Fed. Reg. at 82,288; *see, e.g.*, Chemours Company Comments at 1 (JA___). This confirms that technician education cannot obviate the benefits of fully consistent regulations for reducing emissions of ozone-depleting substances. EPA’s claim that technicians will not be confused or make mistakes is “simply not supported by the record.” *See City. of Los Angeles*, 192 F.3d at 1021.

Moreover, in 2020, EPA confirmed that “mixed refrigerant is becoming increasingly prevalent,” and thus “[c]ross-contamination” of different refrigerants, “refrigerant mixing, and related releases of [ozone-depleting substances] can occur.” 85 Fed. Reg. at 14,164-65. This increases the potential for technician confusion and further supports the value of consistent leak-repair requirements to reduce emissions of ozone-depleting substances. As EPA explained in 2016, “when a regulated entity believes it is using a substitute refrigerant, and that substitute becomes contaminated with [ozone-depleting substances], the contamination may not be apparent to the user, and thus, the user may not be aware that the requirements for [ozone-depleting substances] apply ... lead[ing] to illegal venting of [ozone-depleting substances].” 81 Fed. Reg. at 82,286.

By failing to examine its “key assumption[]” that technician certification would suffice in place of a fully consistent regime, EPA fails to carry “its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule.” *Okl. Dep’t of Env’t. Quality v. EPA*, 740 F.3d 185, 192 (D.C. Cir. 2014) (quoting *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998)). The Rescission Rule thus must be vacated.

CONCLUSION

Petitioners respectfully request that the Court grant their petitions and vacate and remand the Rescission Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and the Court's order of August 17, 2020 because it contains 9,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

I further certify that this brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2020, the foregoing Initial Opening Brief of Petitioner Natural Resources Defense Council and State and Municipal Petitioners has been served on all registered counsel through the Court's electronic filing system.

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