NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 17-1024 and consolidated case 17-1030

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

MEXICHEM FLUOR, INC., ET AL.,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

ON PETITION FOR REVIEW OF AN ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

INITIAL RESPONSE BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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RESPONDENT'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for Respondent United States Environmental Protection Agency submits this certificate as to parties, rulings, and related cases.

A. Parties and Amici

The parties in these consolidated cases are:

Petitioners: Mexichem Fluor, Inc., and Arkema, Inc.;

Respondent: The United States Environmental Protection Agency;

Intervenors for Respondent: Chemours Company FC, LLC; Honeywell International Inc.; Natural Resources Defense Council; and the Boeing Company.

B. Rulings Under Review

The agency action under review is EPA's final rule "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. 86,778-86,895 (Dec. 1, 2016) (codified at 40 C.F.R. Part 82, Subparts F and G) (the "2016 Rule").

C. Related Cases

Petitioners separately filed petitions in this Court, Case Nos. 15-1328 and 15-1329, challenging an earlier final rule issued in 2015 pursuant to Section 612 of the

Clean Air Act, "Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program," 80 Fed. Reg. 42,870-42,959 (July 20, 2015) (codified at 40 C.F.R. Part 82 Subpart G) (the "2015 Rule"). On August 8, 2017, the D.C. Circuit issued an opinion disposing of those petitions. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017). Respondent-Intervenors Honeywell, Chemours, and NRDC petitioned for rehearing and rehearing en banc, which petitions were denied on January 26, 2018. Petitions for certiorari have been filed by Honeywell and Chemours (No. 17-1703) and NRDC (No. 18-2).

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1994 Framework Rule	Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044 (Mar. 18, 1994)
2015 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)
2016 Rule	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)
CAA	Clean Air Act
EPA	United States Environmental Protection Agency
HFC	Hydrofluorocarbon

JURISDICTION

As explained below, under the Court's controlling decision in *Mexichem I*, the consolidated petitions for review were timely filed in this Court. 42 U.S.C. § 7607(b).

STATEMENT OF ISSUES

1. Whether the Court must, under *stare decisis* principles, abide by the controlling decision of the prior panel in *Mexichem I* and conclude that it has jurisdiction to review the 2016 Rule.

2. Whether Respondent-Intervenors are collaterally estopped from attacking the jurisdiction of the Court, where this case raises the same issue as to the timeliness of Petitioner's challenge to EPA's authority for the listing actions in the 2016 Rule as was resolved in *Mexichem I* for nearly identical listing actions in the 2015 Rule, the issue was actually litigated in *Mexichem I*, and the *Mexichem I* court made the findings necessary to establish jurisdiction.

3. Whether the Court should partially vacate the 2016 Rule to the same extent it vacated the 2015 Rule at issue in *Mexichem I*, due to *stare decisis*, collateral estoppel, or for the same reasons articulated in *Mexichem I*.

PERTINENT STATUTES AND REGULATIONS

All of the applicable statutes, etc., are contained in Petitioners' brief and statutory addendum.

STATEMENT OF THE CASE

On August 8, 2017, this Court issued a decision in *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017) ("*Mexichem I*"), in which the Court partially vacated an EPA rule entitled: "Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program," published at 80 Fed. Reg. 42,870 (July 20, 2015) (the "2015 Rule") (JA__). In the 2015 Rule, EPA changed the status of certain hydrofluorocarbons (also known as "HFCs") and hydrofluorocarbon blends under its framework for identifying safe alternatives for ozone-depleting substances. In the end-uses[1] that the 2015 Rule addressed, these substances had previously been listed as acceptable alternatives for substances that deplete the ozone layer. The 2015 Rule changed those listings. It designated the substances addressed by the rule as unacceptable alternatives (*i.e.*, prohibited) in those end-uses. Mexichem Fluor, Inc., and Arkema Inc. sought review on several grounds. As relevant here, they included that EPA exceeded its statutory authority because "Section 612 unambiguously covers only replacements of ozone-depleting substances and does not authorize 'replacements of replacements.'" Pet. Br. at 29, *Mexichem I*, 15-1328, Dkt. 1605947 (D.C. Cir. Mar. 28, 2016) (JA__).

The Court in *Mexichem I* agreed. It held that EPA had exceeded its statutory authority. EPA only had the authority to regulate the initial replacement of an ozone-

[1] "End-uses" are subsectors such as retail food refrigeration, vending machines, motor vehicle air conditioning systems, and rigid polyurethane appliance foam.

depleting substance with a non-ozone-depleting substance. *Mexichem I*, 866 F.3d at 458-59 ("After that transition has occurred, the replacement has been effectuated, and the manufacturer no longer makes a product that uses an ozone-depleting substance."). Finding that EPA's approach in the 2015 Rule represented a "new interpretation" of EPA's authority not authorized by 42 U.S.C. § 7671k(c), the Court partially vacated the 2015 Rule. *Id.* at 454-55, 462.

The same set of petitioners in *Mexichem I* challenge the rule at issue in this case (the "2016 Rule"). The 2016 Rule, entitled "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) (JA__), changed the listing of certain hydrofluorocarbons in different end-uses from acceptable to unacceptable. Petitioners have confined their challenge to the 2016 Rule to requesting remand and partial vacatur of this rule only to the extent that *Mexichem I* vacated the 2015 Rule. Because *Mexichem I* controls this case in all respects, EPA agrees that the Court should remand and partially vacate the 2016 Rule to the same extent.

Respondent-Intervenors NRDC, Honeywell, and Chemours, who also intervened in *Mexichem I*, are expected to oppose this relief, arguing that Petitioners' challenge is untimely because it is actually a challenge to a 1994 regulation and, therefore, the Court in *Mexichem I* lacked jurisdiction. They are likely to contend that

this Court lacks jurisdiction for the same reason. However, *Mexichem I* confronted and resolved the same jurisdictional question and controls here. Moreover, because this jurisdictional question was actually litigated and resolved against them, Respondent-Intervenors are estopped from collaterally attacking *Mexichem I*'s determination on this issue.

I. Statutory and Regulatory Background

A. Title VI of the Clean Air Act

Title VI of the CAA, 42 U.S.C. §§ 7671-7671q, implements the United States' obligations to phase out production and consumption of ozone-depleting substances as a party to the Montreal Protocol on Substances that Deplete the Ozone Layer, and contains numerous complementary measures. Of particular relevance here, Section 7671k(c) addresses alternatives to ozone-depleting substances. It directs EPA to promulgate regulations governing the replacement of ozone-depleting substances with alternatives.[2] 42 U.S.C. § 7671k(c). Specifically, Section 7671k(c) requires that EPA issue regulations providing that "it shall be unlawful to replace any [ozone-depleting] substance with any substitute substance which the Administrator determines may present adverse effects to human health or the environment" where other substitutes that "reduce[] the overall risk to human health and the environment" are "currently or potentially available." *Id.* EPA must publish lists of substitutes prohibited for specific

[2] "Substitute" and "alternative" mean the same thing in the Alternatives Program, and are used interchangeably. *See* 40 C.F.R. § 82.172.

uses and substitutes that are safe alternatives for specific uses. 42 U.S.C. § 7671k(c). Any person may petition EPA to amend the lists, and manufacturers must notify EPA before introducing potential alternatives into interstate commerce. *Id.* § 7671k(d), (e).

B. EPA's Significant New Alternatives Policy Program

In 1994, EPA promulgated regulations establishing the "Significant New Alternatives Policy" program ("Alternatives Program"),[3] a framework for carrying out EPA's statutory obligation to identify safe alternatives under Section 7671k. 40 C.F.R. pt. 82, subpt. G; Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044 (Mar. 18, 1994) (the "1994 Framework Rule"). Consistent with the statutory mandate, the objective of the Alternatives Program has always been to promote the use of alternatives that have lower risks relative to other substitutes for the same end-use. *See* 40 C.F.R. § 82.170(a).

EPA's implementation of the Alternatives Program is based on a "comparative risk framework." This framework evaluates alternatives by end-use. For each end-use, it restricts the use of alternatives that present relatively higher risks to human health or the environment as compared with other available alternatives for that same use. 1994 Framework Rule, 59 Fed. Reg. at 13,046 (JA__). EPA's comparative risk framework includes seven specific criteria for evaluating alternatives: "(i) Atmospheric effects and related health and environmental impacts; (ii) General population risks

[3] While EPA refers to this program as "SNAP," this brief uses "Alternatives Program" in an effort to minimize the use of acronyms.

from ambient exposure to compounds with direct toxicity and to increased ground-level ozone; (iii) Ecosystem risks; (iv) Occupational risks; (v) Consumer risks; (vi) Flammability; and (vii) Cost and availability of the substitute." 40 C.F.R. § 82.180(a)(7). Consistent with Section 7671k(c)'s requirement to publish lists of acceptable and unacceptable alternatives, EPA uses these criteria to classify alternatives as (i) acceptable, (ii) acceptable subject to use conditions, (iii) acceptable subject to narrowed use limits, (iv) unacceptable, or (v) pending. 40 C.F.R. § 82.180(b). EPA further explained in the 1994 Framework Rule that it viewed its authority under Section 7671k as including the ability to change the acceptability status of alternatives without receiving a petition or notification from an individual or manufacturer, based on new data regarding other alternatives or alternatives already reviewed. 59 Fed. Reg. at 13,047 (JA__).

In issuing the 1994 Framework Rule, EPA addressed public comments expressing concern that EPA might "remov[e] substitutes previously deemed acceptable as newer and more environmentally benign substitutes are developed." 59 Fed. Reg. at 13,048 (JA__). EPA responded that it understood Congress to "have intended to cover future use of existing substitutes." *Id.* (JA__). EPA reasoned that ozone-depleting substances "are 'replaced' within the meaning of section 612(c) each time a substitute is used, so that once EPA identifies an unacceptable substitute, any future use of such substitute is prohibited." *Id.* (JA__). EPA also addressed "whether there exists a point at which an alternative should no longer be considered" a

"substitute" for an ozone-depleting substance under Section 612. *Id.* at 13,052 (JA__). EPA responded that "as long as [ozone-depleting] chemicals are being used, any substitute designed to replace these chemicals is subject to review under section 612." *Id.* (JA__).

EPA also addressed the concept of so-called "second-generation" alternatives. These are non-ozone-depleting alternatives that might be developed to "replace" substances that were the original, "first-generation" replacements for ozone-depleting substances. EPA explained that a manufacturer of an alternative is not subject to the notification requirements under the Alternatives Program if the alternative would only be used in lieu of non-ozone-depleting substances. *Id.* at 13,052 (JA__). Despite EPA's response, some manufacturers of arguably "second-generation" substitutes have followed the notification procedures of the Alternatives Program.

After reviewing the pertinent regulatory history on these issues, the *Mexichem I* court found that in promulgating the 1994 Framework Rule and thereafter, EPA made statements indicating that the Agency disclaimed its authority to regulate the replacement of non-ozone-depleting first-generation substitutes. *See Mexichem I*, 866 F.3d at 458 ("For example, in 1994, EPA explained that Section 612(c) [42 U.S.C. § 7671k(c)] 'does not authorize EPA to review substitutes for substances that are not themselves' ozone-depleting substances." (quoting EPA's 1994 response to comments document); *see also id.* ("Two years later, EPA reiterated that interpretation: EPA explained that it 'does not regulate the legitimate substitution' of one substance for

another 'first generation non-ozone-depleting' substance." (quoting EPA Response to OZ Technology's Section 7671k(d) petition)). Prior to the 2015 Rule, EPA had never moved an alternative that was a non-ozone-depleting substance from the acceptable list to the unacceptable list.

II. Background to this Litigation

A. Hydrofluorocarbons

Hydrofluorocarbons have a variety of applications, including aerosols, refrigeration, automotive air conditioners, and foams. They do not deplete the ozone layer but they are greenhouse gases. *Mexichem I*, 866 F.3d at 455. Global warming potential is one of the "atmospheric effects," 40 C.F.R. § 82.180(a)(7), that EPA considers in assessing alternatives to ozone-depleting substances. Because of their global warming effects, EPA stated that the Agency considered hydrofluorocarbons to be "near-term" alternatives for ozone-depleting substances. 1994 Framework Rule, 59 Fed. Reg. at 13,071-72 (JA__).

B. The Rule Under Review

On April 18, 2016, EPA published its 2016 Proposed Rule. As pertinent here, EPA proposed to limit the use of certain hydrofluorocarbons and blends thereof in certain specific end-uses by changing their listing from acceptable to unacceptable

under the Alternatives Program.[4] 81 Fed. Reg. 22,810 (JA__). EPA reiterated its position that "a listing under the [Alternatives Program] could not convey permanence" and recognized that many new alternatives had been found to be acceptable for use in the end-uses under consideration. *Id.* at 22,819 (JA__). With this in mind, EPA conducted new comparative assessments of hydrofluorocarbons in certain end-uses with the benefit of an expanded amount and quality of information. *Id.* (JA__).

EPA further noted that it had issued the 2015 Rule under the same regulatory program. That rule, among other things, changed the listing status of certain hydrofluorocarbons and hydrofluorocarbon blends from acceptable to unacceptable in other end-uses. *Id.* (citing 80 Fed. Reg. 42,870) (JA__). In the 2015 Rule, EPA found that while in many respects the risks posed by these hydrofluorocarbons were comparable to those posed by other available alternatives, their relatively high global warming potential causes them to pose a greater overall risk to human health and the environment than other available alternatives. 2015 Rule, 80 Fed. Reg. at 42,872-73 (JA__).

EPA finalized the 2016 Rule on December 1, 2016. 81 Fed. Reg. 86,778 (Dec. 1, 2016) (JA__). In the 2016 Rule, EPA changed the listing status of the

[4] EPA also proposed other actions, *see* 81 Fed. Reg. at 22,810 (JA__), which are not subject to challenge in this case and are not material to the issues before the Court.

hydrofluorocarbons and hydrofluorocarbon blends it was reviewing from acceptable to unacceptable in the relevant end-uses. *See id.* at 86,779 (JA__).

C. *Mexichem I*

In *Mexichem I*, Petitioners challenged EPA's decision in the 2015 Rule to change the status of certain hydrofluorocarbons for specified end-uses from acceptable to unacceptable. *See Mexichem I*, 866 F.3d at 464. The Court in *Mexichem I* concluded that EPA had reasonably removed the hydrofluorocarbons in question from the list of acceptable substances for those end-uses. *See id.* at 462-64.

As noted above, however, hydrofluorocarbons are not, themselves, ozone-depleting substances. *Id.* at 453. As provided in the preamble to the 2015 Rule and in the response to comments, once the relevant hydrofluorocarbons were listed as unacceptable, no regulated party could continue to use those hydrofluorocarbons in the relevant end-uses. *See id.* at 457. This prohibition included even those product manufacturers who had already switched from an ozone-depleting substance to the relevant hydrofluorocarbons. *See id.* The Court found that EPA had taken an excessively broad view of its authority, and partially vacated the 2015 Rule "to the extent the Rule requires manufacturers to replace HFCs with a substitute substance," and remanded the 2015 Rule to EPA for further proceedings consistent with the Court's decision. *Id.* at 462.[5]

[5] As discussed below, the Court further clarified that although its opinion "focus[ed] primarily on product manufacturers in this case, our interpretation of Section

The Court's analysis of this issue focused on the meaning of the word "replace" in the portion of the statute that makes it "unlawful to replace" any ozone-depleting substance with a substitute that has been prohibited by EPA for that use. 42 U.S.C. § 7671k. After a review of the statute's structure, text, and legislative history, the Court concluded, utilizing the familiar analytical framework for statutory construction set forth in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), that the Agency only had the authority to regulate the initial replacement of an ozone-depleting substance with a non-ozone-depleting substance. *Mexichem I*, 866 F.3d at 458-59. "After that transition has occurred, the replacement has been effectuated, and the manufacturer no longer makes a product that uses an ozone-depleting substance." *Id.* at 459. The Court therefore held that EPA's broader understanding of its regulatory authority under Section 7671k(c)—which would have allowed the Agency to prohibit continued use of a substitute that does not directly deplete the ozone layer—"contravenes the statute and thus fails at *Chevron* step 1," but "even if we reach *Chevron* step 2, EPA's interpretation is unreasonable." *Id.* at 459.

Judge Wilkins, writing in dissent, concluded that "replace" in this context is not a singular event, and the replacement "takes place not at a specific point in time, not just once, and not by a single substitute," and that one substitute may even be "succeeded by a better substitute at some point in time." *Id.* at 466 (Wilkins, J.,

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612(c) applies to any regulated parties that must replace ozone-depleting substances within the timelines specified by Title VI." *Mexichem I*, 866 F.3d at 457 n.1.

dissenting). He reasoned that "[w]hile the majority's definition may be one way to interpret the statute . . . it is by no means the only way to construe the text." *Id.* at 465. In light of this fact and various other policy and legislative history considerations, he would have upheld the Agency's construction of the statute as reasonable under *Chevron*. *Id.* at 473.

In order to reach the statutory interpretation question, the court in *Mexichem I* first had to resolve the jurisdictional question of whether Petitioners' challenge was timely. Specifically, EPA argued that the 1994 Framework Rule envisioned that EPA might modify the listing of a substance to make it unacceptable for future use, and that Petitioners' argument that it was unlawful for EPA to do so in the 2015 Rule was actually an untimely challenge to the 1994 Framework Rule. EPA Br., *Mexichem I*, No. 15-1328, Dkt. 1628626 at 18 (D.C. Cir. Aug. 4, 2016) (quoting 1994 Framework Rule, 59 Fed. Reg. at 13,047, 13,049) (JA__). EPA explained that if the court in *Mexichem I* agreed that Petitioners' statutory authority challenge was directed toward an interpretation established by the 1994 Framework Rule, this challenge would be long outside the 60-day jurisdictional time limit established by the CAA. 42 U.S.C. § 7607(b); *Med. Waste Inst. and Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011). Petitioners vigorously contested this issue, explaining that their challenge was timely because it was not directed toward the 1994 Framework Rule; rather, their argument was that the 2015 Rule exceeded EPA's authority. Pet. Reply, *Mexichem I*, Dkt. 1628540 at 3-7 (D.C. Cir. Aug. 3, 2016) (JA__).

Mexichem I resolved the jurisdictional question in favor of Petitioners. It determined that the 2015 Rule represented a change in EPA's position regarding its statutory authority. The Court explained that "[f]or many years, EPA itself stated that it did not possess authority under Section 612(c) to require the replacement of non-ozone-depleting substances." *Mexichem I*, 866 F.3d at 458 (D.C. Cir. 2017). Thus, the Court found that "[a]t the time [of EPA's 1994 regulations], EPA indicated that once a manufacturer has replaced its ozone-depleting substances with a non-ozone-depleting substitute, Section 612(c) does not give EPA authority to require the manufacturer to later replace that substitute with a different substitute." *Id.* at 455 (emphasis added); *see also id.* at 453-54 ("[B]efore 2015, EPA itself maintained that Section 612 did *not* grant authority to require replacement of non-ozone-depleting substances such as HFCs.").

The Court stated that the 2015 Rule, by contrast, represented a "new interpretation" of EPA's authority under which "EPA *now* argues that it actually possesses such authority under the statute. *For the first time*, EPA has sought to order the replacement of a non-ozone-depleting substitute that had previously been deemed acceptable." *Id.* at 458 (emphasis added); *see also id.* ("EPA's *current* reading stretches the word 'replace' beyond its ordinary meaning." (emphasis added)); *id* at 459 ("Under EPA's *current* interpretation . . . ." (emphasis added)); *id.* at 454 ("*But in the 2015 Rule, for the first time* since Section 612 was enacted in 1990, EPA required manufacturers to replace non-ozone-depleting substances (HFCs) that had previously been deemed

acceptable by the agency." (emphasis added)). The Court thus partially "vacat[ed] the 2015 Rule." *Id.* at 464 (emphasis added).

Judge Wilkins, writing in dissent, did not contend that the Court lacked jurisdiction or that the panel majority was vacating the 1994 Framework Rule rather than the 2015 Rule. *See id.* at 464-73. He did, however, as part of his *Chevron* analysis explain that he "d[id] not read the administrative record in the same manner as the majority" as to whether EPA had clearly disclaimed its authority to regulate "second-generation" substitutes at the time of the 1994 Framework Rule or in its response to OZ Technology's Section 612(d) Petition to change the listing status of certain alternatives. *Id.* at 471-72.

Respondent-Intervenors Chemours and Honeywell, and separately NRDC, attempted to resurrect this issue in petitions for rehearing and rehearing *en banc*. They argued—among other things—that the Court did not address EPA's jurisdictional objection and, in fact, lacked jurisdiction. *See* Chemours & Honeywell Pet. for Rehearing and Rehearing *En Banc*, Mexichem *I*, No. 15-1328, Dkt. 1694148 at 8-10 (D.C. Cir. Sept. 22, 2017) (JA__); NRDC Pet. for Rehearing and Rehearing *En Banc*, Mexichem *I*, Dkt. 1694070 at 8-9 (D.C. Cir. Sept. 22, 2017) (JA__). The Court ordered Petitioners to respond, *Mexichem I*, Dkt. 1696602 at 1 (D.C. Cir., Oct. 3, 2017) (JA__), and Petitioners again argued that their petitions for review were timely, *see* Pet. Joint Resp., *Mexichem I*, Dkt. 1699774 at 14-15 (D.C. Cir. Oct. 18, 2017) (JA__). Despite being squarely presented with this supposedly unresolved issue, neither the

panel nor the full court agreed to rehear the case. *See Mexichem I*, Dkt. 1715054 (D.C. Cir. Jan. 26, 2018) (JA__); *id.*, Dkt. 1715057 (D.C. Cir. Jan. 26, 2018) (JA__).

Respondent-Intervenors have sought certiorari in *Mexichem I*. Neither petition for certiorari raises the Court's jurisdiction as a "question presented" to the Supreme Court for review. *See* Industry Intervenors' Petition, No. 17-1703 at i; NRDC Petition, No. 18-2 at i; *see also* Supreme Court Rule 14.1(a) (requiring a concise statement of the questions presented for review and providing that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court") (JA__).

SUMMARY OF ARGUMENT

Mexichem I controls this case in all respects, including jurisdiction. The parties there argued about whether Petitioners were challenging an interpretation of EPA's authority that was settled by the 1994 Framework Rule or whether the 2015 Rule reflected a new interpretation of that authority. In response, the majority in *Mexichem I* said no fewer than eleven times that Petitioners were challenging a new interpretation of EPA's authority in the 2015 Rule. According to the Court, this interpretation was contrary to EPA's prior disclaimers of authority to regulate the replacement of non-ozone-depleting substitutes, like hydrofluorocarbons, with second-generation substitutes. This determination was necessary to reach the merits in *Mexichem I* because it went to subject-matter jurisdiction.

Respondent-Intervenors have already had three opportunities to litigate this timeliness question. They should not be afforded a fourth. First, they had the opportunity to weigh in at the merits stage in *Mexichem I*, when Petitioners and EPA vociferously argued this question. They declined to do so. *Mexichem I* resolved this question by finding that Petitioners were challenging a "new interpretation" of EPA's authority articulated "for the first time" in the 2015 Rule. Second, they expressly raised this issue in their two separate petitions for rehearing and rehearing *en banc*, arguing that *Mexichem I* overlooked the parties' express briefing of the question of the court's jurisdiction. The Court denied rehearing. Third, they have alluded to the jurisdictional question in their petitions for *certiorari* and may yet attempt to raise it before the Supreme Court. Tellingly, however, they did not offer it as a "question presented" to that Court. The *Mexichem I* majority did not overlook an issue that was argued in five different briefs while also repeatedly articulating the precise findings necessary to resolve that question.

This Court is bound under basic principles of *stare decisis* by the Court's determination in *Mexichem I* that EPA had previously disclaimed its authority over second-generation substitutes for non-ozone-depleting substances and changed course in the 2015 Rule. Moreover, Respondent-Intervenors are collaterally estopped from arguing that Petitioners' challenge to EPA's statutory authority is actually a challenge to the 1994 Rule, and is therefore untimely. This issue was actually litigated in *Mexichem I*, adversely decided by the Court from the perspective of Respondent-

Intervenors, and was necessary to the Court's decision because it was the foundation of subject-matter jurisdiction. The same parties cannot re-litigate the same issue in a new case.

The Court should partially vacate the 2016 Rule to the same extent it vacated the 2015 Rule. The partial vacatur should reflect the clarification in footnote 1 of *Mexichem I* that the Court's interpretation of section 612 would apply to any regulated party required to replace an ozone-depleting substance.

STANDARD OF REVIEW

This Court is bound by the holding of a prior panel, including "those portions of the opinion necessary to that result," *Util. Air Regulatory Grp. v. EPA*, 885 F.3d 714, 720 (D.C. Cir. 2018); *Scomas of Sausalito, LLC v. NLRB*, 849 F.3d 1147, 1155 (D.C. Cir. 2017), even when it may disagree with those determinations, *see United States v. Kolter*, 71 F.3d 425, 430-31 (D.C. Cir. 1995). Collateral estoppel also "bars successive litigation of an issue of fact or law actually litigated and resolved that was essential to the prior judgment, even if the issue recurs in the context of a different claim." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015).

On the merits, the 2016 Rule can be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9). In interpreting statutory terms, the Court applies the familiar analysis of *Chevron*. The language of the statute controls where it reflects "the unambiguously expressed intent

of Congress," but where the statute is "silent or ambiguous with respect to the specific issue," the Court must defer to an agency's interpretation so long as it is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43.

ARGUMENT

I. This Petition Raises the Exact Same Issues and Materially Identical Facts as in *Mexichem I*.

This case is indistinguishable from *Mexichem I* in every pertinent respect. The 2016 Rule regulates the same class of chemicals (hydrofluorocarbons) under the same regulatory program (the Alternatives Program) as the 2015 Rule. EPA took the same action as to the hydrofluorocarbons at issue in the 2016 Rule as it did in the 2015 Rule, moving them from the acceptable list to the unacceptable list as to the pertinent end-uses. The cases even involve the same parties: Petitioners Arkema and Mexichem; Respondent EPA; and Respondent-Intervenors NRDC, Honeywell, and Chemours.[6]

The issues presented by this case are also identical. Petitioners have limited their challenge to the 2016 Rule to the same question of EPA's statutory authority the Court resolved in *Mexichem I*. Pet. Br. at 2 ("The 2016 Rule should be vacated to the same extent that the 2015 Rule was vacated in *Mexichem I*, and for the same reasons.").

[6] The Boeing Company, which is also a respondent-intervenor in this case, was not a party to *Mexichem I*. Boeing, however, has not participated in this case beyond intervening and supports EPA's request for partial vacatur, *see Mexichem v. EPA*, No. 17-1024, Dkt. 1741522 at 4 n.1 (July 19, 2018).

EPA also requests remand and partial vacatur of the 2016 Rule to the same extent as the 2015 Rule at issue in *Mexichem I*. *See infra* at 25-26.

In short, the only distinction between *Mexichem I* and this case is the particular end-uses for which hydrofluorocarbons are being regulated. This distinction-without-a-difference cannot have any bearing on the authority that Congress granted EPA under 42 U.S.C. § 7671k, how EPA interpreted this authority in 1994 versus 2015, or the Court's jurisdiction.

II. *Mexichem I* Resolved the Court's Jurisdiction and Controls this Case.

"It is as clear as clear can be that the *same issue* presented in a *later case* in the *same court* should lead to the *same result*." *FedEx Home Delivery v. NLRB*, 849 F.3d 1123, 1127 (D.C. Cir. 2017) (quotation marks omitted; emphasis in original); *United States v. Cardales-Luna*, 632 F.3d 731, 734 (1st Cir. 2011) ("[E]ven the narrowest conception of *stare decisis* demands that two panels faced with the same legal question and identical facts reach the same outcome."). This is "doubly so when the parties are the *same*." *FedEx Home Delivery*, 849 F.3d at 1127 (emphasis in original) (such cases are the "poster child" for application of the "law-of-the-circuit doctrine, which ensures stability, consistency, and evenhandedness in circuit law").

The principle of *stare decisis* applies with full force to jurisdictional determinations. *See, e.g.*, *Coll. Sports Council v. Dep't of Educ.*, 465 F.3d 20, 22-23 (D.C. Cir. 2006) (jurisdictional holding was *res judicata* for the parties that had participated in previous case and *stare decisis* as to all parties); *cf. Marshall v. Balt. & O. R. Co.*, 57 U.S.

(16 How.) 314, 325-26 (1854) ("There are no cases, where an adherence to the maxim of '*stare decisis*' is so absolutely necessary to the peace of society, as those which affect retroactively the jurisdiction of courts."). The Court is bound by the holdings of previous panels within the Circuit even where it believes the result in the previous case was debatable, or might outright disagree with it. *See Kolter*, 71 F.3d at 430-31 (D.C. Cir. 1995); *Ass'n of Civilian Technicians v. FLRA*, 756 F.2d 172, 176 (D.C. Cir. 1985).

Mexichem I controls this case in all respects, including jurisdiction. The jurisdictional dispute was briefed and the Court resolved it by concluding that it was reviewing a statutory interpretation that flowed from the 2015 Rule, not the 1994 Framework Rule. *See supra* at 12-14. This determination was sufficient, in itself, to resolve the jurisdictional question of whether Petitioners' challenge was timely under 42 U.S.C. § 7607(b).

To conclude that *Mexichem I* did not expressly resolve the Court's jurisdiction, the Court would first have to overlook the six separate instances in which *Mexichem I* stated that the statutory interpretation it was reviewing reflected a change of EPA's position in 2015. *See supra* at 12-13. Second, the Court would have to disregard the five instances in which the court in *Mexichem I* stated that EPA had previously disclaimed statutory authority to regulate the replacement of non-ozone-depleting substances in the mid-1990s. *See supra* at 7, 12. These statements resolve the jurisdictional question. Moreover, that question was the first dispute that *Mexichem I*

addressed, *see* 866 F.3d at 457-58, consistent with the rule that courts must resolve jurisdiction as an antecedent issue. *Kaplan v. Cent. Bank of the Islamic Republic of Iran*, Nos. 16-7142, 16-7122, 2018 U.S. App. LEXIS 20214, at *17 (D.C. Cir. July 20, 2018) (discussing the Supreme Court's rejection of "hypothetical jurisdiction" and the requirement that jurisdiction be resolved as an antecedent before addressing the merits).

Third, the Court would have to conclude that *Mexichem I* made these statements while simultaneously overlooking the jurisdictional argument, even though it was explicitly raised in both EPA's and Petitioners' merits briefs. *See supra* at 12. EPA's brief raised this jurisdictional timeliness argument at least three separate times. *See* EPA Br., *Mexichem I*, No. 15-1328, Dkt. 1628626 at 18-19, 29, 33 (D.C. Cir. Aug. 4, 2016) (JA__). Petitioners dedicated roughly ten percent of their reply brief (3.5 pages) to refuting EPA's timeliness argument. Pet. Br., *Mexichem I*, No. 15-1328, Dkt. 1628540 at 3-7 (D.C. Cir. Aug. 3, 2016) (JA__).

Fourth, the Court would need to conclude that when Respondent-Intervenors Chemours, Honeywell, and NRDC drew this purported oversight to the panel's attention in their petitions for rehearing, the issue again escaped the Court's attention. This would require the *Mexichem I* court to have overlooked the issue in another three briefs.

The *Mexichem I* court did not repeatedly overlook jurisdictional arguments that were raised in five different briefs at two separate stages of the proceeding. Rather, it

heard and rejected those arguments. If Movant-Intervenors disagree with that result, the place to renew the argument would have been before the Supreme Court in *Mexichem I*. They have, however, declined to offer the jurisdictional issue as a "question presented" to that Court. There is no basis to claim that *Mexichem I* does not have *stare decisis* effect or to collaterally attack the valid, final decision *Mexichem I*.[7]

III. Respondent Intervenors Are Collaterally Estopped from Contesting Jurisdiction in this Petition.

Even assuming that *Mexichem I*'s failure to expressly use the word "jurisdiction" undermines the application of *stare decisis* (it does not), the Court found that EPA's 2015 Rule reflected a change in its interpretation of its authority to regulate the replacement of non-ozone-depleting substances. Collateral estoppel thus independently precludes Respondent-Intervenors Honeywell, Chemours, and NRDC from re-litigating this determination in an attack on *Mexichem I*.[8]

The collateral estoppel doctrine, also known as issue preclusion, "bars successive litigation of an issue of fact or law actually litigated and resolved that was essential to the prior judgment, even if the issue recurs in the context of a different

[7] That EPA may revisit the 1994 Framework Rule as part of a remand comprehensively addressing the *Mexichem I* decision does not change the controlling nature of *Mexichem I* or provide a reason to refuse to apply that decision here. The mandate in *Mexichem I* has issued and this panel is bound by the court's conclusion.

[8] The United States is subject to different principles of collateral estoppel than private parties, *see, e.g.*, *United States v. Mendoza*, 464 U.S. 154, 162 (1984), but those considerations are inapplicable here, where collateral estoppel is not being applied to the United States.

claim." *Nat'l Ass'n of Home Builders*, 786 F.3d at 41 (quotation marks omitted). This doctrine protects against the expense and vexation attending multiple lawsuits, conserves judicial resources, and helps minimize the prospect of inconsistent decisions. *Id.* It is well established that collateral estoppel bars relitigation of threshold jurisdictional issues. *Id.* (quotation marks omitted); *see also Ins. Corp. of Ir. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 n.9, (1982) (under principles of *res judicata*, "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment"); *Durfee v. Duke*, 375 U.S. 106, 111-14 (1963); *Coll. Sports Council*, 465 F.3d at 22-23.

The Court's determination in *Mexichem I* that Petitioners were challenging a "new interpretation" of EPA's authority in the 2015 Rule, under which EPA "[f]or the first time . . . sought to order the replacement of a non-ozone-depleting substitute that had previously been deemed acceptable," *Mexichem I*, 866 F.3d at 458, meets all of the requirements for collateral estoppel. The question of whether Petitioners' challenge to EPA's authority stemmed from the 1994 Framework Rule or a recent rule effectuating listing changes—in that case the 2015 Rule—was litigated and resolved. *See supra* at 7, 12-14. This is the exact same question at issue here. *See supra* at 18-19.

Resolution of this question was necessary to the judgment in *Mexichem I* because it established the *Mexichem I* court's subject-matter jurisdiction—a required

predicate question in every case. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("Without jurisdiction the court cannot proceed at all in any cause; it may not assume jurisdiction for the purpose of deciding the merits of the case." (quotation marks omitted)); *see also Block v. Commissioners*, 99 U.S. 686, 693 (1878) ("[A] judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact *upon which it must necessarily have been founded*." (emphasis added)); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987) (questions of subject-matter jurisdiction and personal jurisdiction were "necessary" for court's decision). Finally, this case involves asserting preclusion against the same parties as in *Mexichem I*, making it a case of classic "mutual" collateral estoppel. *See Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986, 992 (4th Cir. 1987) (no factors warranting caution in applying collateral estoppel where mutuality is present).

All of the rationales underlying the application of collateral estoppel are at play here as well. Re-litigating the findings underlying the Court's subject-matter jurisdiction in *Mexichem I* would undermine the finality of *Mexichem I* and could lead to disparate results, uncertainty, and confusion in the regulated community if the Court were to reach a different resolution on the statutory interpretation issue that is central to both cases. Moreover, Respondent-Intervenors have already had three opportunities to raise this issue. Judicial efficiency counsels against allowing a fourth.

IV. The Court Should Vacate the 2016 Rule to the Same Extent It Vacated the 2015 Rule.

A. *Stare Decisis* and Issue Preclusion Require Application of *Mexichem I* on the Merits.

For similar reasons, both *stare decisis* and collateral estoppel require that this Court partially vacate the 2016 Rule to the same extent it vacated the 2015 Rule. The principle of *stare decisis* is "most compelling" in cases of statutory interpretation. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 198 (1991). As to collateral estoppel, Respondent-Intervenors are barred from relitigating the statutory interpretation issue decided in *Mexichem I* because the 2016 Rule raises the exact same issue, the issue was actually litigated, and was necessary to the Court's judgment in *Mexichem I*.

EPA requests that the Court partially vacate the 2016 Rule to the same extent that it partially vacated the 2015 Rule, *i.e.*, "to the extent it requires manufacturers to replace HFCs with a substitute substance," with the same clarification found in footnote 1 of *Mexichem I*. 866 F.3d at 457 n.1, 464. Footnote 1 of *Mexichem I* explained that "[a]lthough we focus primarily on product manufacturers in this case, our interpretation of Section 612(c) applies to any regulated parties that must replace ozone-depleting substances within the timelines specified by Title VI." *See, e.g.*, 42 U.S.C. §§ 7671c, 7671d." 866 F.3d 451, 457 n.1.

Footnote 1 clarifies the scope of the Court's holding in *Mexichem I*, indicating that its interpretation of section 612 applies to any regulated party. This is consistent

with the statute and regulatory scheme, neither of which draws a distinction between "manufacturers" and other users. *See* 42 U.S.C. § 7671k(c); 40 C.F.R. § 82.174 ("No *person* may *use* a substitute after the effective date of any rulemaking adding such substitute to the list of unacceptable substitutes." (emphasis added)). Similarly, nothing in the regulatory language promulgated as part of the 2015 Rule draws a distinction between product manufacturers and other users of substitutes. *See* 2015 Rule, 80 Fed. Reg. at 42,952-59 (JA__); *see also id.* 42,875-76 & n.16 (JA__). The same is true of the 2016 Rule. 2016 Rule, 81 Fed. Reg. at 86,783 & n.8 (JA__). Nor did Petitioners limit their challenge to the 2015 Rule as it applied to "manufacturers," instead advancing a general challenge to EPA's statutory authority. *See, e.g.*, Pet. Br., *Mexichem I*, No. 15-1328, Dkt. No. 1605947 at 29-38 (Mar. 28, 2016) (JA__). Petitioners' challenge to the 2016 Rule is similarly not so limited.

In short, when a substance is added to the "prohibited list," that prohibition is not limited to manufacturers, but applies to anyone using the product in an intermediate or end-use. The *Mexichem I* court extended its holding to other users through Footnote 1. The Court should partially vacate the 2016 Rule to the same extent as the 2015 Rule, including the clarification in Footnote 1. Failing to include this clarification would lead to inconsistent decisions in *Mexichem I* and this case.

B. The Court Should Reach the Same Result on the Merits as in *Mexichem I*.

If the Court declines to apply *stare decisis* or collateral estoppel as to the merits of the statutory interpretation question, it should still reach the same result as in *Mexichem I*, for the reasons expressed in that case. In *Mexichem I*, EPA argued before the D.C. Circuit that users replace an ozone-depleting substance within the meaning of section 612 each time they use a substitute. On this premise, EPA further argued that manufacturers and other users could, consistent with the statute, be prohibited from using certain hydrofluorocarbons in specific end-uses once they were listed as unacceptable for that specific end-use. EPA Br., *Mexichem I*, No. 15-1328, Dkt. 1628626 at 20-21 & n.8, 31-32 (Aug. 4, 2016). However, this Court rejected EPA's analysis in its thorough decision in *Mexichem I*. After *Mexichem I*, EPA revisited the issue. The Agency now believes that the interpretation in *Mexichem I* reflects the better understanding of the term "replace" in Section 612(c). 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. Thus, even if the Court were to re-visit the statutory questions presented in this case, it should reach the same conclusion as it did in *Mexichem I*.

CONCLUSION

The Court should remand and partially vacate the 2016 Rule to the same extent that it partially vacated the 2015 Rule, *i.e.*, "to the extent it requires manufacturers to

replace HFCs with a substitute substance," with the same clarification found in footnote 1 of *Mexichem I*.

Respectfully submitted,

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Dated: September 28, 2018

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CERTIFICATE OF COMPLIANCE

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

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,625 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed this 28th day of September 2018, through the ECF filing system and will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

s/ Benjamin R. Carlisle
BENJAMIN R. CARLISLE