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 SUR-REPLY BRIEF FOR RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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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

SUMMARY OF ARGUMENT

Respondent-Intervenors are foreclosed from re-litigating whether the Court in *Mexichem I* had jurisdiction. The Court in *Mexichem I* was squarely presented with the question of the timeliness of Petitioners' challenge to the 2015 Rule in multiple briefs and it is undisputed that the Court made findings that resolve that question. Because they established the Court's jurisdiction, these findings were necessary holdings, and not dicta as Respondent-Intervenors argue. And, of course, Respondent-Intervenors themselves had—and took—the opportunity to challenge these conclusions in petitions for reconsideration advancing their argument that the Court overlooked the question of its jurisdiction. These arguments were not successful. Because the Court in *Mexichem I* established that it had jurisdiction, and the issues in this case are identical, *Mexichem I* controls.

Respondent-Intervenors' only counterargument is that the Court abdicated its duty to establish its jurisdiction because it did not use the word "jurisdiction" or specifically cite 42 U.S.C. § 7607(b) in making these findings. But there are no strict requirements that a court use such language in addressing jurisdictional questions and the absence of such language does not undermine the binding effect of the *Mexichem I* decision. Nor is it plausible that the Court twice overlooked a jurisdictional issue that the parties repeatedly briefed, while articulating the exact findings resolving this issue no fewer than eleven times. Because *Mexichem I* said, unambiguously and repeatedly, that the 2015 Rule represented a change in EPA's approach from the 1994

Framework Rule, the Court is bound by this decision and Respondent-Intervenors are estopped from advocating that the Court reach a different, inconsistent conclusion.

ARGUMENT

I. The Court Did Not Abdicate Its Duty to Establish Jurisdiction in *Mexichem I*.

EPA's opening brief in this case established that the parties thoroughly litigated in *Mexichem I* the jurisdictional issue that Respondent-Intervenors now ask the Court to revisit. EPA Br. at 12, 14-15, 21. Respondents-Intervenors' attempt to gloss over the briefing in *Mexichem I*, claiming that jurisdiction was raised in "a few pages," is unpersuasive. RI Br. at 24. Simply put, it is implausible that the Court overlooked a jurisdictional issue that the parties squarely and repeatedly presented, particularly given that the Court made the precise findings necessary to resolve that dispute.

Respondent-Intervenors' position that the Court lacks jurisdiction is almost entirely duplicative of the arguments advanced in *Mexichem I*, underscoring just how thoroughly that issue was briefed in that case. For instance, just as Respondent-Intervenors do here, NRDC directed the Court in *Mexichem I* to the petitions for review filed in response to the 1994 Framework Rule. *Compare* RI Br. at 5-6 *with* NRDC Pet. for Panel Rehearing and Rehearing *En Banc*, Mexichem *I*, Dkt. 1694070 at 8-9 (D.C. Cir. Sept. 22, 2017) ("NRDC Pet.") (JA__). Likewise, Chemours and Honeywell cited the text of the 1994 Framework Rule in arguing that in 1994 EPA interpreted its authority to extend to banning a substance without regard to whether

the substitute was already in use. *Compare* RI Br. at 6-7 *with* 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) ("Chemours Pet.") (JA__). Just as Respondent-Intervenors now cite the 1994 Framework Rule as affirming EPA's authority to change the listing status of substitutes for ozone-depleting substances, so too did EPA in *Mexichem I*. *Compare* RI Br. at 7 *with* EPA's Final Br. at 18-19, *Mexichem I*, No. 15-1328, Dkt. 1628626 (D.C. Cir. Aug. 4, 2016). In their petitions for rehearing, Respondent-Intervenors also made the same arguments that they now reiterate that the 1994 Framework Rule codified EPA's interpretation at 40 C.F.R. § 82.174(d). *Compare* RI Br. at 8-9 *with* NRDC Pet. at 8 (JA__); Chemours Pet. at 8-9 (JA__). And, then and now, the Court heard the same argument about EPA permitting "grandfathering" of substances already in use. *Compare* RI Br. at 8-9, 17-18 *with* Chemours Pet. at 9-10 (JA__).

In sum, jurisdiction was raised in briefing on the merits and the petitions for rehearing, and Respondent-Intervenors had every opportunity to do so in their petitions for certiorari. Respondent-Intervenors now ask the Court for a *fourth* bite at the apple. They advance—at greater length, but without significant differences—the same theory and same evidence as in *Mexichem I* in an effort to escape the unfavorable decision in that case. Their briefing confirms, however, that the Court in *Mexichem I* was presented with an ample record and detailed briefing on the jurisdictional dispute. This dispute could not plausibly have escaped the Court's attention, and the decision

in *Mexichem I* demonstrates that, in fact, the Court resolved it. *See* EPA Br. at 13-14 (summarizing *Mexichem I*'s repeated findings regarding EPA's change in approach).

II. *Mexichem I*'s Conclusion that the 2015 Rule Represented a New Interpretation of EPA's Authority Is Binding on this Court as *Stare Decisis*.

Although Respondent-Intervenors attempt to escape the Court's decision in *Mexichem I*, they have no avenue to do so. As just explained, they cannot (and, therefore, do not) dispute that the exact same jurisdictional issue they raise here was repeatedly raised in *Mexichem I*. Nor do they dispute that the Court's holdings on jurisdictional issues are subject to *stare decisis*, or that the Court's determination on whether EPA changed its position is a basis for collateral estoppel, so long as it was necessary for the Court's decision. *See* EPA Br. at 19-20, 22-23; RI Br. at 24-25. And, of course, the Court's express and repeated conclusions in *Mexichem I* that EPA was advancing a "new interpretation" of its authority, *Mexichem I*, 866 F.3d at 458; *see also* EPA Br. at 13-14, foreclose Respondent-Intervenors from arguing that the Court did not find that EPA changed its position in the 2015 Rule—*i.e.*, the exact findings necessary to resolve the jurisdictional question. *See, e.g.*, RI Br. at 15 (acknowledging the "panel majority's statements about a purported change in EPA's position between its 1994 Rule and its 2015 Rule" and arguing that those statements were "wrong" and dicta); *id.* at 23; *id.* at 26-29 (arguing at length that the Court misread the record in reaching this conclusion).

Respondent-Intervenors, therefore, explore the last path left available to them, arguing that *Mexichem I*'s explicit findings necessary to resolve the Court's jurisdiction were "dicta" not "holdings." RI Br. at 21-22. But this, too, is a dead end.

Under all of the definitions of "holding" and "dicta" cited by Respondent-Intervenors, the Court's statements in *Mexichem I* would qualify as a binding holding. Jurisdiction was a necessary predicate for the Court to reach the merits in *Mexichem I*. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). Likewise, the Court's conclusion that EPA changed its position was a sufficient basis to answer this question and conclude that the Court, in fact, had jurisdiction. Thus, this conclusion was a "holding" because it resolved a "determination of a matter of law pivotal to [the Court's] decision." RI Br. at 21 (quoting BLACK'S LAW DICTIONARY, *Holding* (10th ed. 2014). It was "necessary to decide the question" of jurisdiction rather than simply "by way of illustration of the case at hand," *id.* (quoting *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969)),[1] or "a remark, an aside . . . that is not necessarily essential to the decision," *id.* (quoting *United States v. Crawley*, 837 F.2d 291, 292-93 (7th Cir. 1988)).

[1] In fact, *Cross v. Harris*, 418 F.2d 1095, 1105 n.64 (D.C. Cir. 1969), was articulating a *more expansive* view of what is a "holding" than simply "whether the point in question had to be decided in order that the court's mandate could issue." It did so because the dissent was urging a *narrower* conception of what constitutes a holding under which the Court's construction of "mentally ill" would have been dicta. *Id.* at 1107 (Burger, J., dissenting). *Mexichem I*'s findings qualify as a holding under either approach.

More recent cases than those cited by Respondent-Intervenors confirm that *Mexichem I* binds this Court. Because it goes to jurisdiction, *Mexichem I*'s conclusion that EPA adopted a new interpretation in the 2015 Rule was "integral to [the Court's] ultimate disposition of the case, and thus constitutes binding precedent." *Aamer v. Obama*, 742 F.3d 1023, 1033 (D.C. Cir. 2014) (explaining that other portions of the Court's decision would have been unnecessary if the Court lacked habeas jurisdiction over the inmate's claims); *see also Am. Meat Inst. v. United States Dep't of Agric.*, 760 F.3d 18, 35-36 (D.C. Cir. 2014) ("Given its repeated and emphatic reliance on the limited applicability of the *Zauderer* standard—to language involving deception—the *R.J. Reynolds* majority plainly considered the inapplicability of *Zauderer* as 'integral' and 'necessary' to its decision, that is to say, a 'holding.'" (quoting *Aamer*, 742 F.3d at 1033)).

Respondent-Intervenors' contrary view is that the Court said, *eleven times*, that Petitioners were challenging a new interpretation of EPA's authority in the 2015 Rule, *see* EPA Op. Br. at 21-21, but did so for no reason at all. *See* RI Br. at 23 & n.2 (arguing that the *Mexichem I* majority was just pointing out inconsistencies in EPA's interpretations of Section 612, which had no bearing on either jurisdiction or statutory interpretation). In support, Respondent-Intervenors offer little more than their opinion that the Court should have drafted its decision differently—that the Court should have used "[t]he word 'jurisdiction,'" cited 42 U.S.C. § 7607(b)(1), or perhaps changed the organization of its opinion. RI Br. at 22-23. But the Court is not

required to adopt Respondent-Intervenors' preferred drafting approach for its decisions to have binding precedential effect.

Indeed, Respondent-Intervenors' position borders on absurdity. In their view, a judicial decision that expressly stated in the background section "the Plaintiff is from New York and the Defendant is from New Jersey" and issued a million-dollar judgment, but said nothing more on jurisdiction, would not have established that diversity of citizenship existed. After all, "[t]he word 'jurisdiction' does not appear anywhere in the decision" and it did not cite 28 U.S.C. § 1332. RI Br. at 22. There is no such requirement that the Court invoke the word "jurisdiction" like a talisman.[2] It is sufficient that the Court made repeated and explicit findings that resolved the jurisdictional question, particularly given that the parties thoroughly briefed the issue.

Moreover, these facts distinguish the cases on which Respondent-Intervenors rely in arguing that *Mexichem I* does not bind the Court. RI Br. at 24-25. In *American Portland Cement Alliance v. EPA*, the Court explained that the mere fact that two prior

[2] Numerous cases have held that courts may even make *implicit* holdings, including on jurisdictional issues, that bind the court in subsequent cases. *See, e.g.*, *United States v. Wolfname*, 835 F.3d 1214, 1218 (10th Cir. 2016); *Safir v. Kreps*, 551 F.2d 447, 450 (D.C. Cir. 1977) (explaining that, even though a prior decision "read literally . . . affords standing only to Sapphire," the court did not adopt that "limited construction" and thus that the prior decision established standing for other entities; holding in addition that "implicit in th[at] grant of standing" was a "further grant of standing"); *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 72 F.3d 1556, 1561 (11th Cir. 1996) (explaining that a prior decision involved "a holding, albeit an implicit one, that is binding upon this panel"); *G. A. Thompson & Co. v. Partridge*, 636 F.2d 945, 961-62 (5th Cir. 1981). Here, the case for *stare decisis* is far stronger because *Mexichem I*'s holding is not merely implicit—the Court made *explicit* findings that resolve the jurisdictional question.

decisions reached the merits of the parties' dispute did not bind it to do the same given that nothing in those decisions established the Court's jurisdiction. *See* 101 F.3d 772, 775-76 (D.C. Cir. 1996) (explaining that these cases did not control because they simply "assumed" jurisdiction and "[t]hat the court has taken jurisdiction in the past does not affect the [jurisdictional] analysis"). Likewise, in *Arizona Christian School Tuition Org. v. Winn*, the Supreme Court explained that it was not bound by decisions that overlooked the question of standing entirely, leaving that issue "unstated and unexamined." 563 U.S. 125, 144-45 (2011) (the jurisdictional defect in the relevant cases was neither "noted nor discussed"). Similarly, the Supreme Court found in *Lewis v. Casey* that it was "quite impossible" that a prior case established precedent on standing where that issue "was neither challenged nor discussed in that case." 518 U.S. 343, 352 n.2 (1996).

Respondent-Intervenors' cases thus stand for the uncontroversial proposition that courts are not bound to find they have jurisdiction simply because a previous decision, which conducted no analysis and made not findings that would establish jurisdiction, reached the merits. The situation here is different. The *Mexichem I* Court both "[ ]examined" whether EPA changed its approach in the 2015 Rule and "[ ]stated" its conclusion on that point repeatedly, *Ariz. Christian Sch. Tuition Org.*, 563 U.S. at 145, thereby resolving the timeliness question that the parties and intervenors briefed. Moreover, this is not a situation where the Court is being asked to infer some *general* jurisdictional principle from the merits disposition of a prior case. Instead, this

is a case where the disposition of *Mexichem I* necessarily resolved the same *specific* jurisdictional issue at issue here, *i.e.*, the interplay between the 1994 Framework Rule, on the one hand, and the 2015/2016 rules, on the other.

In sum, Respondent-Intervenors' attempt to convince the Court that its findings in *Mexichem I* that established its jurisdiction are dicta is unfounded. The Court should hold that *stare decisis* requires that it adopt the same conclusions as in *Mexichem I*.

III. Respondent-Intervenors Are Collaterally Estopped from Re-litigating Whether the 2015 Rule Represented a Change in EPA's Interpretation of Its Authority.

For similar reasons, Respondent-Intervenors are collaterally estopped from re-litigating whether EPA changed its interpretation of its authority to regulate the replacement of non-ozone-depleting substances in the 2015 Rule. There is no dispute that the Court "actually" determined this issue, and Respondent-Intervenors have no response to the fact that this determination was "necessar[y]" to establish (and necessarily established) jurisdiction. RI Br. at 25.

Moreover, *Mexichem I* does not support Respondent-Intervenors' suggestion that the question of whether EPA changed its interpretation in the 2015 Rule was irrelevant to the Court's statutory interpretation. At a minimum, Respondent-Intervenors concede that the *Mexichem I* majority incorporated this determination in "analysis addressing the proper interpretation of Section 612(c)." *Id.* at 23 (noting that this "discussion deals with the merits"); *see, e.g.*, *Mexichem I*, 866 F.3d at 459

(concluding that EPA had "stretched the word 'replace' beyond its ordinary meaning and that "EPA itself had long recognized" the ordinary meaning of replace). Indeed, even Judge Wilkins, writing in dissent, found the issue of whether EPA changed its approach significant, and tellingly did not suggest that this determination was dicta. Rather, he considered this question in detail as part of his analysis of the second step in the *Chevron* framework. *See Mexichem I*, 866 F.3d at 471 (Wilkins, J., dissenting).[3]

IV. The Court Should Reject Respondent-Intervenors' Request that This Court Reach Inconsistent Results.

Respondents-Intervenors ask this Court to ignore *Mexichem I* to reach a result that is doubly inconsistent with that case. First, they ask the Court to contradict itself on whether EPA's articulation of its authority in the 2015 Rule was new or flowed from the 1994 Framework Rule. Second, they ask the Court to create an inconsistent regulatory regime as to the 2015 Rule versus the 2016 Rule—the former partially vacated as going beyond the statutory mandate and the latter remaining fully in place despite relying on the same statutory interpretation as the 2015 Rule.

Respondent-Intervenors suggest that "EPA continues to maintain that its legal interpretation of Section 612 was consistent and unchanged from 1994 through the

[3] Respondent-Intervenors first claim that the Court's discussion of EPA's change in approach could not be relevant to jurisdiction because it was in the section that "deals with the merits." *See* RI Br. at 23. In their next breath, however, they claim that the Court did not consider this issue important to the merits *either*. *Id.* at 23 n.2. Respondent-Intervenors cannot have it both ways. To the contrary, the Court's finding on EPA's change in position was important to *both* jurisdiction and the merits.

2015 and 2016 Rules." RI Br. at 20. Although EPA believed at the time of briefing that it had the better argument on jurisdiction in *Mexichem I*, the Court in that case later held to the contrary and found jurisdiction. What counts is what the Court decided, not what EPA initially argued, and not whether Respondent-Intervenors think the issue should have been decided differently. *Mexichem I* is binding on the Court in this case.

The mandate has issued in *Mexichem I* and Respondent-Intervenors have fully exhausted their opportunities for review. Rather than condone their request that the Court reach divergent results in these cases—which are materially indistinguishable on their facts—the Court should reject Respondent-Intervenors' arguments and vacate and remand the 2016 Rule to the same extent as the 2015 Rule.

V. Respondent-Intervenors Do Not Dispute That, if the Court Has Jurisdiction, It Must Reach the Same Result as in *Mexichem I*.

Respondent-Intervenors do not dispute the scope of the Court's holding in *Mexichem I*, *see* EPA Br. at 25-26, and have therefore waived any such argument. The Court should 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.

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: December 12, 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 set by this Court's September 4, 2018, order because it contains 2,993 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 12th day of December 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