ORAL ARGUMENT NOT YET SCHEDULED
No. 17-1024

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

MEXICHEM FLUOR, INC.,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

HONEYWELL INTERNATIONAL, INC., ET AL.,

Intervenors.

JOINT PAGE-PROOF REPLY BRIEF OF PETITIONERS MEXICHEM FLUOR, INC. AND ARKEMA INC.

On Petition for Review from the United States Environmental Protection Agency

Consolidated with No. 17-1030

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GLOSSARY

EPA	Environmental Protection Agency
HFC	Hydrofluorocarbon
NRDC	Natural Resources Defense Council
SNAP	Significant New Alternatives Policy

INTRODUCTION AND SUMMARY OF ARGUMENT

Our opening brief made two basic points: first, that under *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), *cert. denied*, 139 S. Ct. 322 (2018) ("*Mexichem I*"), the 2016 Rule is invalid insofar as it requires HFCs to be replaced; and second, that the Court has jurisdiction. Intervenors do not dispute the first point. As to the second point, the Court has jurisdiction for three independent reasons: *stare decisis*; collateral estoppel; and the failure of intervenors' jurisdictional objection on the merits. Any one of these alone requires a decision in favor of petitioners and EPA. Intervenors' responses, to the extent they have any, are unpersuasive.

First, *Mexichem I* controls on the question of jurisdiction as a matter of *stare decisis*. Intervenors argue that there was no "holding" on jurisdiction. Br. 21. By intervenors' own definitions of the term, however, there assuredly *was* a holding on that subject, because the question whether the Court had authority to act was self-evidently "necessary," "pivotal," and "essential" to its decision. *Id.* (internal quotation marks omitted). Intervenors also contend that the fact that the jurisdictional question was raised in the briefs and debated at argument does not

mean that the Court decided it. This idea—that, despite being presented with a jurisdictional objection, the Court granted relief and issued 44 pages of opinions without having a view one way or the other on whether it had jurisdiction—cannot possibly be correct. The Court's denial of rehearing petitions raising the jurisdictional issue confirms this. Intervenors' authorities do not support their position, because the principle for which those cases are cited—that a decision lacks precedential effect unless the jurisdictional question is expressly discussed—applies only when, unlike in this case, a jurisdictional objection was not presented to the court. We made this point in our opening brief; intervenors answer it with silence. Intervenors also have nothing to say about the irony in arguing that an issue so obviously meritless as not to require discussion can be relitigated because it was not previously discussed.

Second, *Mexichem I* controls on the question of jurisdiction as a matter of collateral estoppel. Intervenors' sole response is that this Court did not actually and necessarily determine the jurisdictional issue in *Mexichem I* because the Court's statements that EPA had changed its position were "dicta," which were not necessary to any judicial determination and therefore cannot have collateral estoppel effect.

Br. 25. This is a *non sequitur*. Our assertion of collateral estoppel does not depend upon the Court's statements about EPA's change of position on the merits question (*i.e.*, the agency's statutory authority). It depends on the fact that the same jurisdictional objection was raised in *Mexichem I* and was necessarily rejected when petitioners were granted relief. At least as far as collateral estoppel is concerned, intervenors do not contend otherwise. That concession alone resolves this case.

Third, intervenors' jurisdictional argument fails on the merits. The argument rests on the premise that EPA first adopted the interpretation that petitioners challenge, not in the 2015 Rule at issue in *Mexichem I*, but in the initial 1994 SNAP rule. Here, too, intervenors are attempting to relitigate *Mexichem I*, which squarely rejected that theory. Intervenors' brief in this case reads like a petition for rehearing in that case, arguing as it does that the Court "misread[]" the administrative record in *Mexichem I* and that the decision therefore is "wrong," "erroneous[]," and "groundless" in that respect. Br. 15, 23, 29. This Court has already denied rehearing in *Mexichem I*, and the Supreme Court has now denied certiorari, so this attack comes far too late. In any event, this Court's understanding of the regulatory history was correct. Inter-

venors either ignore or try to explain away language in the 1994 rule and regulations that undermines their position. And the statements that supposedly support intervenors' theory are entirely consistent with this Court's conclusion in *Mexichem I* that, in 1994, no one believed that EPA could use the SNAP program to ban non-ozone-depleting substances that already had replaced ozone-depleting substances. Separate and apart from everything we have just said, the clock did not begin to tick in 1994 because any challenge of this kind that petitioners might have attempted to bring at that time would have been speculative and therefore unripe.

For any and all of these reasons, the Court has jurisdiction and it should grant petitioners and EPA the relief they seek: partial vacatur of the 2016 Rule in light of *Mexichem I*.

ARGUMENT

A. *Mexichem I* Controls On The Question Of Jurisdiction As A Matter Of *Stare Decisis*

The very same jurisdictional objection that intervenors are raising in this case was briefed and argued in *Mexichem I*. Because this Court granted the petitions for review in relevant part in *Mexichem I*, it nec-

essarily rejected the jurisdictional objection. Its decision on that issue controls here. *See* Pet'r Br. 24-26.

Intervenors' first response to this point is that the Court "is bound only by the *holdings* from prior cases" and that the Court in *Mexichem I* "never issued a holding regarding its jurisdiction." Br. 21-22. As intervenors acknowledge, however, a "holding" is something that is "necessary," "pivotal," or "essential" to a court's decision. Br. 21 (internal quotation marks omitted). At least when the issue is raised (as it was here), and when the petitioning parties are granted relief (as they were here), there can be no issue that is more necessary, pivotal, and essential to a judicial decision than whether the Court has authority to act. Which means that the Court's determination that it had jurisdiction in *Mexichem I* easily satisfies intervenors' own definition of a "holding."

Intervenors also insist that "the fact that the jurisdictional argument was raised in briefs, or even mentioned at oral argument, does not mean the court actually addressed it in resolving the case." Br. 24. To conclude that the Court decided the issue, intervenors maintain, is pure "conjecture." *Id.* It is not conjecture. Nearly six months after being presented with the jurisdictional objection in briefs and at argument, the

Court granted relief to petitioners in two opinions totaling 44 pages. Intervenors' position reduces to the idea that the Court devoted all that time and energy to its decision in petitioners' favor without having a definitive view one way or the other on whether it had jurisdiction to act. That is inconceivable.

The jurisdictional objection not only was presented to the Court before it issued its decision in *Mexichem I* but was raised by intervenors in their petitions for rehearing. Intervenors point out that "a summary denial of rehearing is not a merits decision and does not have preclusive effect." Br. 24. We have never maintained that it is, or does. What we have said (Pet'r Br. 24) is that the denial of rehearing confirms that jurisdiction was not "overlooked or misapprehended" by the Court (Fed. R. App. P. 40(a)(2))—which further proves that the Court in fact decided the issue. Intervenors offer no response to this point.

The authorities cited by intervenors (Br. 24-25) do not support their position. Those cases make clear that an unexplained jurisdictional decision lacks precedential force only when—unlike here—no jurisdictional objection was presented to the court. We made this point in our opening brief (at 24-25), but intervenors ignore it.

Intervenors do quote another case, *Lewis v. Casey*, 518 U.S. 343 (1996), for the proposition that "'the existence of unaddressed jurisdictional defects has no precedential effect.'" Br. 25 (quoting 518 U.S. at 352 n.2). But they omit the first half of that sentence, which is that jurisdiction "was neither challenged nor discussed in [the prior] case." 518 U.S. at 352 n.2. That is not true here.

Intervenors also quote the statement in *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007), that "[i]t is hard to suppose" that the majority in a prior case "definitively rejected [certain] arguments without explaining why." Br. 22 (quoting 550 U.S. at 340). In that prior case, however, the question at issue "was not properly before the Court." 550 U.S. at 340. That is not true here either.

In concluding this section, we reiterate the irony in intervenors' position. *See* Pet'r Br. 26. The probable reason that neither the majority nor the dissent discussed the jurisdictional objection in *Mexichem I* is that it was deemed too insubstantial to warrant comment. Now intervenors are seeking to use that very insubstantiality to relitigate the same issue the Court decided against them just a little more than a

year ago in a case with the same parties. The Court should not allow that stratagem.

B. *Mexichem I* Controls On The Question Of Jurisdiction As A Matter Of Collateral Estoppel

Because both the issue and *the parties* in the two cases are the same, this Court's resolution of the jurisdictional question in *Mexichem I* is not only *stare decisis* but collateral estoppel. *See* Pet'r Br. 26-28. Surprisingly, intervenors devote just a paragraph of their 13-page Argument to collateral estoppel. Br. 25. They do not dispute that the jurisdictional issue they raise in this case was contested by the parties and submitted for judicial determination in *Mexichem I*; and they do not contend that preclusion would be unfair to them. They offer just a single argument against application of collateral estoppel: that this Court did not "actually and necessarily determine[]" the jurisdictional issue in *Mexichem I* because, they say, the Court's "statements that EPA had changed its position" were "dicta," which "by definition" are "not necessary to any judicial determination" and accordingly "cannot have collateral estoppel effect." *Id.* (internal quotation marks omitted).

This is a puzzling theory, to say the least, because it is a response to an argument we do not make. As our opening brief made clear (at 27-

28), our assertion of collateral estoppel does not depend upon any statements in *Mexichem I* about EPA's change of position on whether the agency can use the SNAP program to ban chemicals that have replaced ozone-depleting substances. It depends on the fact that intervenors' jurisdictional claim was raised in *Mexichem I* and necessarily rejected when petitioners were granted relief in that case.

In this connection, it bears emphasis that the fact that "the court was not explicit" in finding that it had jurisdiction is "irrelevant to [the] preclusive effect" of its decision; what matters is that "the court necessarily decided the question." *Sec. Indus. Ass'n v. Bd. Of Governors of Fed. Reserve Sys.*, 900 F.2d 360, 365 (D.C. Cir. 1990). Put differently, "issue preclusion is applicable if resolution of [an] issue was necessary to the judgment" in the prior case, "even when [the] opinion is silent on [that] issue." *Id.* (citing *Am. Iron & Steel Inst. v. EPA*, 886 F.2d 390, 397 (D.C. Cir. 1989)). Indeed, "'a judgment bars relitigation of an issue necessary to the judgment'" even "'in the absence of *any* opinion.'" *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Am. Iron & Steel Inst.*, 886 F.2d at 397). It should go without saying that, although the Court's opinion in *Mexichem I* may not have explicit-

ly addressed the contested issue, the existence of jurisdiction to decide the case was necessary to the Court's judgment granting relief to petitioners. *See* Pet'r Br. 27 (citing cases holding that collateral estoppel applies to jurisdictional issues); EPA Br. 23 (same). For that reason, "the outcome of the case * * * necessarily constituted a rejection of the [jurisdictional] claim[]." *Am. Iron & Steel Inst.*, 886 F.2d at 397.

Intervenors have no answer to this point, which we made in our opening brief (at 28). Indeed, they do not even *attempt* to answer it. Combined with the irrelevancy of the one argument they do make, this refusal to engage amounts to an admission that intervenors are indeed collaterally estopped from reasserting their jurisdictional objection. By itself this requires that their request for dismissal be denied and that the petitions for review be granted in relevant part.

C. Intervenors' Jurisdictional Argument Fails On The Merits

The Court would have jurisdiction even if its decision in *Mexichem I* were not preclusive. The petitions for review were filed within 60 days of the 2016 Rule's publication in the *Federal Register* and are therefore timely. Contrary to intervenors' assertion, petitioners are not challenging the 1994 SNAP rule. Our claim is that the 2016 Rule exceeds EPA's

statutory authority by banning non-ozone-depleting substances that already have replaced ozone-depleting substances—a claim we could not have brought in 1994. *See* Pet'r Br. 28-31.

1. Intervenors' argument rests on the premise that EPA first adopted the interpretation that petitioners challenge, not in the 2015 Rule at issue in *Mexichem I*, but in the initial 1994 SNAP rule. *Mexichem I* categorically rejected that theory. *See* Pet'r Br. 30-31. Intervenors acknowledge as much; they simply contend that this Court "misread[]" the administrative record in *Mexichem I* and that its decision accordingly is "wrong," "erroneous[]," and "groundless" in this respect. Br. 15, 23, 29; *see also* Br. 26 ("[n]either passage" from the record cited in *Mexichem I* "actually supports the panel majority's conclusion about EPA's position in the 1994 Rule or since"). But this Court denied intervenors' petitions for rehearing in *Mexichem I*, and the Supreme Court denied their petitions for certiorari (*Honeywell Int'l Inc. v. Mexichem Fluor, Inc.*, 139 S. Ct. 322 (2018); *Natural Res. Def. Council v. Mexichem Fluor, Inc.*, 139 S. Ct. 322 (2018)). Intervenors have had ample opportunity to challenge *Mexichem I* on direct review in that case; they cannot collaterally attack it in this one.

Intervenors also say that this Court's unequivocal rejection of their theory in *Mexichem I* is "*dictum*." Br. 26. That is not correct. The Court's carefully considered explication of the regulatory history is akin to a finding of fact. And however one characterizes it, the Court's understanding of the administrative record, set forth in multiple places in a published opinion, is at the very least entitled to considerable weight.

2. The Court's understanding in any event is correct. In the preamble to the 1994 rule, EPA made clear that the SNAP program "only appl[ies] to substitutes for class I or class II compounds" and "addresses only those substitutes or alternatives actually replacing the class I and II compounds." Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044, (Mar. 18, 1994). The "key," EPA explained, is what the substance is "designed to replace." *Id.* at 13,052. The "Agency believe[d]" that, as long as "class I or class II chemicals are being used," SNAP covers "any substitute designed to replace these chemicals." *Id.* The bans in the 2015 and 2016 Rules cover HFCs that are *not* designed to replace ozone-depleting substances that are still being used. Intervenors ignore all of this language.

Consistent with the view expressed in the preamble to the 1994 rule, the SNAP regulations define a "substitute or alternative" as a substance "intended for use as a replacement for a class I or class II compound." 40 C.F.R. § 82.172. The bans in the 2015 and 2016 Rules cover HFCs that are *not* intended for such use and therefore are not "substitutes." Intervenors ignore this provision as well. They ignore it despite the argument in our opening brief (at 29-30) that the regulations' definition of "substitute" refutes one of intervenors' principal contentions: that 40 C.F.R. § 82.174(d), which provides that "[n]o person may use a substitute after the effective date of a rulemaking adding such substitute to the list of unacceptable substitutes," required petitioners to file their petitions for review in 1994. *See* Br. 5, 8, 9-10, 17, 19.

Intervenors instead focus on the words "no person," claiming that it proves that the regulatory prohibition does not "distinguish" between "an entity that is still using an ozone-depleting substance and an entity that had already switched to a non-ozone-depleting substitute." Br. 19. But that distinction is inherent in the definition of "substitute" quoted above. "No person" may use a substance that is intended to replace an

ozone-depleting substance; but *any* person may use a substance that is *not* intended for that purpose (unless some other law prohibits its use).

As to similar statements in the regulatory history that are cited in *Mexichem I* (*see* 866 F.3d at 455, 458), intervenors maintain that they demonstrate the agency's belief that "EPA retained full regulatory authority" under the SNAP program over "first-generation substitute[s]," including the "continuing authority" to "prohibit the[ir] use." Br. 28. That is incorrect. Like the language quoted above, those statements reflect only the view that the agency has authority to decide what "first-generation substitutes" can replace ozone-depleting substances as they are phased out; it does not reflect the view that EPA has authority to direct that first-generation substitutes be replaced with second-generation substitutes decades later. To the contrary, the statements show that the agency believed that it does *not* have such "full" and "continuing" regulatory authority over first-generation substitutes, as this Court correctly concluded in *Mexichem I*.

The language in the administrative record on which intervenors rely (Br. 17-18) is consistent with the Court's conclusion in *Mexichem I* that EPA changed its position when it directed the replacement of re-

placements for ozone-depleting substances that were already in use. The fact that an "acceptable listing" can be "revoked" based upon "the availability of a new, lower-risk alternative" (59 Fed. Reg. at 13,063), for example, does not mean that the revocation applies to those who already have switched from ozone-depleting substances. The same is true of the fact that the regulations allow "[p]etitions to delete a substitute from the acceptable list and add it to the unacceptable list." 40 C.F.R. § 82.184(b)(3). De-listing simply means that a substance no longer can serve as a replacement for ozone-depleting substances that are still in use. *See Mexichem I*, 866 F.3d at 460. EPA also can use the SNAP program to ban substitutes that already have replaced ozone-depleting substances if the substitutes themselves are ozone-depleting. *See id.*[1]

Intervenors claim that, "[d]espite having switched sides in this litigation, EPA continues to maintain that its legal interpretation of Section 612 was consistent and unchanged from 1994 through the 2015 and

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[1] Intervenors cannot deny that, so understood, a SNAP de-listing can have real consequences. According to intervenor NRDC's own brief in the related case challenging EPA's guidance on the *Mexichem I* decision, "more than 300,000 commercial refrigeration systems" across the United States "still use ozone-depleting chemicals" even today. Brief of Petitioner NRDC at 12, *NRDC v. Wheeler*, No. 18-1172 (D.C. Cir. Nov. 7, 2018).

2016 Rules." Br. 20. It is odd, to put it mildly, for intervenors to rely upon a brief that takes the position that the Court has jurisdiction in this case—and that takes that position in large measure because *Mexichem I* concluded that the agency's 2015 interpretation was a new one. In any event, EPA's brief does not say what intervenors say it says. The brief merely recites language from the 1994 SNAP rule before saying this: "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." EPA Br. 7. EPA expresses no disagreement with the Court's finding. The agency then goes on to say—as this Court did in *Mexichem I* (*see* 866 F.3d at 458 n.3)—that, "[p]rior 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." *Id.* at 8.[2]

[2] This statement is correct, by the way, even as to the sulfur hexafluoride and hexafluoropropylene determinations that intervenors highlight in their brief (at 9, 19). Neither use previously had been approved by the agency, which made an initial determination in the rules at issue to place the substances on the "unacceptable" list. *See* Protection of Strat-

Medical Waste Institute & Energy Recovery Council v. EPA, 645 F.3d 420 (D.C. Cir. 2011), which is cited in intervenors' brief (at 16-17), does not support their position. In that case, this Court concluded that EPA had employed "the same pollutant-by-pollutant approach" to "set the [emissions] standards" for waste incinerators in its initial rule in 1997 and that a challenge to the use of this "longstanding practice" in the agency's 2009 rule was therefore time-barred. 645 F.3d at 427. In *this* case, EPA did *not* employ the "same approach" to banning substances in its initial rule in 1994, and the "practice" it used in the 2015 Rule was *not* a "longstanding" one. As in *Sierra Club v. EPA*, 705 F.3d 458, 466 (D.C. Cir. 2013), this Court's "holding in *Medical Waste Institute*" therefore "does not apply in this case." *See* Pet'r Br. 29-30.

3. There is yet another reason why intervenors' jurisdictional objection fails on the merits: the claim made here would not have been ripe in 1994. Intervenors maintain that petitioners "are really contesting a regulation adopted in the 1994 Rule." Br. 17. That "regulation"

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ospheric Ozone: Listing of Substitutes for Ozone-Depleting Substances, 61 Fed. Reg. 54,030, 54,030 (Oct. 16, 1996); Protection of Stratospheric Ozone: Listing Hexafluoropropylene (HFP) and HFP-Containing Blends as Unacceptable Refrigerants Under EPA's Significant New Alternatives Policy (SNAP) Program, 64 Fed. Reg. 3,864, 3,867 (Jan. 26, 1999).

appears to be 40 C.F.R. § 82.174(d), which provides that "[n]o person may use a substitute after the effective date of a rulemaking adding such substitute to the list of unacceptable substitutes." According to intervenors, petitioners should have filed a petition for review in 1994 seeking a ruling that, to the extent that EPA might attempt to apply this regulation in the future to preclude the use of "unacceptable substitutes" even by those who already have switched to non-ozone-depleting substances, that application of the regulation would be unlawful. If petitioners had filed such a challenge in 1994, it would have been dismissed as premature.

In particular, had petitioners challenged the regulation on this ground in 1994, "the court would have lacked jurisdiction under Article III of the Constitution," because "their alleged injuries were [then] only speculative." *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 131 (D.C. Cir. 2012), *rev'd in part on other grounds*, 573 U.S. 302 (2014). "At that time," petitioners "could have shown only the possibility that [they] would be injured" if "EPA were someday to * * * adopt a rule" banning products it had just approved, and prohibiting their use even by those who were no longer using ozone-depleting substances. *Id.* Such

a challenge "ceased to be speculative," and therefore "ripened," only when "EPA promulgated the [2015] Rule," thereby creating a "'substantial probability' of injury to [petitioners]." *Id.* Any challenge in 1994 would have been particularly speculative given the agency's statement in the preamble to the rule that it "expects future changes to the SNAP lists to be minor" and that "[t]he principal changes [it] expects to make in the future are to add new substitutes * * * to the lists, rather than to change a substitute's acceptability." 59 Fed. Reg. at 13,047.

In short, there would have been no "pressing concern that compel[led the Court] to decide this matter at th[at] time." *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1385 (D.C. Cir. 1996). Petitioners' claim would "not [have] demand[ed] immediate relief" in 1994 because "the primary injury" to them, if any, was "not a present hardship resulting from the regulations themselves, but rather a future injury that may result from [rules] that are [issued] under the regulations." *Id.* (internal quotation marks omitted). "[U]ntil [a] claim ripens, the statutory

time bar has not begun to run" (*id.*), and petitioners' claim was not ripe until 2015.[3]

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[3] As intervenors point out (at 8-9, 19-20), there was a petition for review of the 1994 SNAP rule filed in this Court by an industry association that included predecessors of both petitioners and of both industry intervenors. The petition was administratively terminated, without prejudice, before any briefs in the case had been filed. *Alliance for Responsible CFC Policy, Inc. v. EPA*, No. 94-1396 (D.C. Cir. Feb. 5, 2002). There is no indication that the association in that case was intending to raise the claim that petitioners raised in *Mexichem I* (and raise here); and because there was no decision from this Court in the case, there was no indication that any such challenge would have been deemed ripe.

CONCLUSION

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

December 12, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(g) and D.C. Cir. R. 32(e)(2)(C), I hereby certify that this brief complies with the type-volume limitation of this Court's order of September 4, 2018 because the brief contains 4,105 words, excluding the parts exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

December 12, 2018

/s/ Dan Himmelfarb
Dan Himmelfarb

CERTIFICATE OF SERVICE

I hereby certify that, on December 12, 2018, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

December 12, 2018

/s/ Dan Himmelfarb
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