CASE NO. 15-1328

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

MEXICHEM FLUOR, INC.,
Petitioner

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent

THE CHEMOURS COMPANY FC, LLC, ET AL.,
Intervenors

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

BRIEF OF ADMINISTRATIVE LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT-INTERVENORS' PETITIONS FOR REHEARING OR REHEARING *EN BANC*

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Dated: September 22, 2017

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), the undersigned certifies as follows:

(A) Parties and Amici. The State of California intends to request leave to participate as *amicus curiae*. Other states may join California's motion and brief. Other than those states, and the professors filing this brief as *amici curiae*, all parties, intervenors, and *amici* appearing in this Court are listed in the Petitions for Rehearing and the Parties' briefs in this case, No. 15-1328.

(B) Ruling Under Review. References to the ruling at issue appear in the Petitions for Rehearing and the Parties' briefs in this case, No. 15-1328.

(C) Related Cases. References to any related cases appear in the Parties' original briefs in this case, No. 15-1328.

Respectfully submitted,

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RULE 35 STATEMENT, INTERESTS OF AMICI CURIAE, AND SUMMARY OF ARGUMENT

Amici listed at the beginning of this brief are administrative law scholars. *Amici* respectfully submit this brief in support of Respondent-Intervenors' Petitions for Panel Rehearing or Rehearing *en Banc*.[1]

Amici urge panel rehearing or rehearing *en banc* because the majority opinion in this case turns deference doctrine on its head, substituting the court's judgment for that of the Environmental Protection Agency (EPA) in a context in which Congress clearly intended EPA to have significant policymaking authority.

To begin with, the majority erred in relying on a single, narrow dictionary definition to restrict EPA's authority under Clean Air Act Section 612. That Section directs EPA to require the replacement of ozone-depleting chemicals with compounds that "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). A longstanding EPA regulation—not challenged here—governs the replacement process and establishes that "[n]o person" may use a substitute that EPA has deemed "unacceptable," provided the agency has identified a safer

[1] Pursuant to Fed. R. App. P. 29(a)(4), *amici* certify that no counsel for any party authored this brief in whole or in part; no party or their counsel contributed money intended to fund preparing and submitting this brief; and no person — other than *amici* and counsel — contributed money intended to prepare and submit this brief.

alternative. 40 C.F.R. § 82.174(d). The 2015 regulation challenged in this case shifted certain substitute compounds from EPA's list of acceptable substitutes to its list of unacceptable substitutes. 80 Fed. Reg. 42,870 (July 20, 2015).

As Judge Wilkins notes, "[t]he bar for deciding a case at *Chevron* step one" should be "high." Diss. Op. at 1. Yet the majority failed even to consider the protective purpose of Section 612 and the Clean Air Act. Instead, the majority plucked the word "replace" out of its statutory context, adopted the most restrictive dictionary definition of that word, and purported to find clear congressional intent to limit EPA's replacement authority—even though the supposed limit will prevent EPA from fulfilling its mandate to reduce health and environmental risks.

Second, the majority proceeded backward through the *Chevron* analysis, using the threat of agency overreach to guide its interpretation of statutory language. Properly applied, the *Chevron* step-two inquiry enables courts to ensure that an agency does not exploit statutory ambiguity to expand the agency's authority in unreasonable ways. To ensure proper judicial deference to agency expertise, however, a court must first assess whether there is a statutory gap that delegates authority to the implementing agency, and only then (if so) evaluate whether the agency's specific approach to filling that gap is reasonable. The inquiry does not work in reverse: the fact that an agency *could* fill a statutory gap by exercising its

authority in an unreasonable way, or for an unreasonable amount of time, does not justify concluding that no statutory gap exists. The majority, however, invoked the specter of "indefinite" and "boundless" EPA replacement authority, exercised for "100 years or more," Maj. Op. at 14-15, to suggest that Congress must have intended "replace" to have the restrictive meaning the majority preferred. That is, the majority reversed the inquiry, reasoning that because EPA could someday stretch its replacement authority beyond reasonable bounds, the governing statute should be read narrowly *today* to strip EPA of any such authority.

Because the majority's approach to *Chevron* undermines executive authority and conflicts with decisions of the Supreme Court and this Court, panel rehearing or rehearing *en banc* is warranted. Fed. R. App. P. 35(b)(1)(A).

ARGUMENT

The majority opinion badly distorts the familiar *Chevron* framework, *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), setting a precedent under which a cursory reading of the dictionary trumps other tools of statutory construction, and judges' preferred policy outcomes trump congressional intent and agency expertise. As this Court has explained, *Chevron's* so-called "step one" requires that "'the court, as well as the agency, … give effect to the unambiguously expressed intent of Congress.'" *Sierra Club v. EPA*, 551 F.3d 1019, 1026–27 (D.C. Cir. 2008) (quoting *Chevron*,

467 U.S., at 842–843). Assessing the clarity of Congress's intent, however, requires more than finding key words in the dictionary and adopting the first listed definition. The Court must also "examine the meaning of [those] words or phrases in context and … 'exhaust the traditional tools of statutory construction.'" *Id.* (quoting *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C. Cir. 2001)).

If that deeper inquiry reveals ambiguity in the statutory text, then under *Chevron* "step two," the ambiguity must be construed as a "delegation[] of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). *Chevron* therefore "requires a federal court to accept [the agency's reasonable] construction [of ambiguous statutory terms]…, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* (citing *Chevron*, 467 U.S., at 843-44).

The majority gave lip service to this standard but fell short in implementing it, in two key ways.

A. The Majority's Approach to *Chevron* Step One Elevated a Single Dictionary Definition above Statutory Purpose.

First, in evaluating the clarity of Congress's intent in Section 612, the majority paid little attention to the structure of the Clean Air Act, focusing instead on the "ordinary" meaning of the word "replace." Maj. op. at 13, 14. That simplistic

analysis ignores alternate meanings of the word and the protective purposes of Section 612 and the broader Act.

As the Petitions for Rehearing or Rehearing *en Banc* make clear, "replace" can be used in many ways, both in common parlance and in legal contexts. True, the word may mean "a new thing taking the place of the old," at a specified point in time. Maj. Op. at 14. Alternatively, however, replace can refer to an ongoing process, as when a manufacturer warranties to "repair or replace" a defective product. The implication of such a warranty is that the manufacturer will replace an irreparably defective product, *and will replace any irreparably defective replacements*, seriatim, until the warranty expires or for some other specified period. *See, e.g.*, *In re Seagate Tech. LLC Litig.*, 233 F. Supp. 3d 776, 782 (N.D. Cal. 2017) (holding that the failure of replacement computer drives was not a breach of the defendant's express warranty to "'replace' defective products 'without charge with a functionally equivalent replacement product,'" as long as the defendant "*provided a further replacement* upon request if the drive was still within warranty" (emphasis added)). In the warranty context, then, a commitment to "replace" implies a commitment to replace the original not once but repeatedly (if conditions are met).

Given that "replace" is ambiguous, suggesting either a single action or repeated actions, the majority should have looked to statutory context for clues about

Congress's intent. "Statutory language has meaning only in context." *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 545 U.S. 409, 415 (2005). When a term admits of multiple meanings, it is "necessarily ambiguous … standing alone"; each statutory section "must be analyzed to determine whether the context gives the term a further meaning that would resolve the issue in dispute." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343-44 (1997).

The Section 612 context suggests that Congress intended to grant EPA an ongoing replacement authority, or at least to vest EPA with discretion to proceed in the manner the agency determined appropriate. Like the replacement commitment in a warranty, the replacement authority in Section 612 serves an overarching purpose. The purpose of a warranty is to guarantee that the purchaser will have a working product for a specified period; a defective replacement thwarts that purpose. Likewise, the purpose of Section 612 is to ensure that the phase-out of ozone-depleting chemicals "reduce[s] overall risks to human health and the environment," 42 U.S.C. § 7671k(a); an unsafe substitute compound defeats *that* purpose. In each instance, a further replacement is necessary to effectuate the purpose of the program.

The overarching purpose of the Clean Air Act buttresses this conclusion. The Act aims "'to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its

population.'" *Chemical Mfrs. Ass'n v. EPA*, 217 F.3d 861, 866 (D.C. Cir. 2000) (quoting 42 U.S.C. § 7401(b)(1)). In this context, it is reasonable to read Section 612 as granting EPA authority to require serial replacement of replacement compounds that prove harmful to human health or the environment.

To recognize the error in—and danger of—the majority's opinion, however, one need not be convinced that the drafters of Section 612 intended to use "replace" in this warranty sense. The point is not that the intent of Section 612 is clear, but that the section admits of multiple interpretations. That statutory ambiguity serves as a delegation to EPA—*not* the court—to make the "difficult policy choices" necessary "to fill the statutory gap in reasonable fashion." *Brand X*, 545 U.S. at 980. The only question for the court, therefore, should have been the reasonableness of EPA's rule.

B. The Majority Progressed Backward Through the *Chevron* Inquiry, Relying on the Possibility of Unreasonable Agency Action to Conclude that Congress's Intent Is Clear.

The second key shortcoming in the majority's application of the *Chevron* standard is its reliance on the specter of "boundless … EPA[] authority," Maj. Op. at 15, to justify a narrow reading of Section 612. This amounts to a reversal of *Chevron* steps one and two—the majority, in effect, determined the clarity of Congress's line drawing based on the possibility that the agency could one day color outside those lines. That approach might be appropriate to avoid a nondelegation issue, *see, e.g.*, *Nat'l Cable Television Ass'n, Inc. v. U.S.*, 415 U.S. 336, 342 (1974)

(reading statutory terms narrowly "to avoid constitutional problems"), but when a court is reviewing an agency's exercise of properly delegated authority, the approach undermines deference principles. No longer is the presence of statutory ambiguity a grant of authority to an agency to fill the statutory gap; instead, such ambiguity serves as an invitation for the courts to adopt their preferred reading lest the agency someday overreach.

There is always a risk that EPA could overreach in implementing Section 612; that risk exists in most if not all administrative law cases. The proper approach to limiting that risk, however, is not prospectively to narrow the agency's delegated authority. Rather, courts must acknowledge that statutory ambiguity delegates authority to the implementing agency, *Brand X*, 545 U.S. at 980, and then proceed to the *Chevron* step-two analysis—and the arbitrariness analysis—to assess whether the agency's approach "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute.'" *Chevron*, 467 U.S. at 845. *See also Chemical Mfrs. Ass'n* 217 F.3d at 867 (vacating a rule because it was "unreasonable" for EPA "to impose costly obligations on regulated entities without regard to the … Act's purpose.").

In *this* case, EPA did not claim "boundless" Section 612 authority. As discussed in Part I, the agency's interpretation of "replace" is reasonable. Moreover,

as the dissent notes, Diss. Op. at 17-18, the phase-out of ozone-depleting substances is still ongoing. Finally, even the majority rejected the Petitioners' arbitrary and capricious challenges. Maj. Op. at 21-24. Thus, despite the risk that EPA could *someday* overreach its Section 612 authority, the majority should have deferred to EPA's reasonable exercise of its authority in *this* case.

CONCLUSION

Because the majority opinion does not give deference to EPA's reasonable exercise of its expertise and authority to interpret the ambiguous mandate of Section 612, panel rehearing or rehearing *en banc* is warranted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(b)(4), I hereby certify that the foregoing Brief of Administrative Law Professors as Amici Curiae in Support of Respondent-Intervenors' Petitions for Rehearing or Rehearing *en Banc* contains 9 pages and 1,967 words, not including the tables of contents and authorities and the certificate of compliance.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 22nd day of September, 2017, the foregoing Brief of Administrative Law Professors as Amici Curiae in Support of Respondent-Intervenors' Petitions for Rehearing or Rehearing *en Banc* was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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