Nos. 15-1328, 15-1329

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,

THE CHEMOURS COMPANY FC, LLC, HONEYWELL INTERNATIONAL INC., and NATURAL RESOURCES DEFENSE COUNCIL,

Intervenor-Respondents.

Petition for Review of Final Agency Action

MOTION FOR INVITATION TO FILE BRIEF OF STATES AS *AMICI CURIAE* IN SUPPORT OF INTERVENOR-RESPONDENTS' PETITIONS FOR REHEARING OR REHEARING *EN BANC*

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
SARAH MORRISON
ERIC KATZ
Supervising Deputy Attorneys General
MEGAN K. HEY, State Bar No. 232345
JULIA K. FORGIE, State Bar No. 304701
Deputy Attorneys General

Additional Counsel on next page

300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2000
Fax: (213) 897-2802
Email: Eric.Katz@doj.ca.gov
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra

Dated: September 27, 2017

GEORGE JEPSEN
Attorney General of Connecticut
MATTHEW I. LEVINE
JILL LACEDONIA
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250
Attorneys for the State of Connecticut

MATTHEW P. DENN
Attorney General of Delaware
Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, De 19801
(302) 577-8400
Attorney for the State of Delaware

LISA MADIGAN
Attorney General of Illinois
MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
Office of the Attorney General
69 W. Washington St., 18th Floor
Chicago, Illinois 60602
(312) 814-0660
Attorneys for the State of Illinois

BRIAN E. FROSH
Attorney General of Maryland
STEVEN M. SULLIVAN
Solicitor General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6427
Attorneys for the State of Maryland

MAX KIELEY
CHRISTINA BROWN
Assistant Attorneys General
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1244
Attorneys for the State of Minnesota, by and through its Minnesota Pollution Control Agency

ERIC SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MORGAN COSTELLO
Affirmative Section Chief,
Environmental Protection Bureau
JOSHUA TALLENT
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2456
Attorneys for the State of New York

ELLEN F. ROSENBLUM
Attorney General of Oregon
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
(503) 947-4593
Attorneys for the State of Oregon

JOSH SHAPIRO
Attorney General of Pennsylvania
STEVEN J. SANTARSIERO
MICHAEL J. FISCHER
Chief Deputy Attorneys General
ROBERT A. REILEY, Asst. Director
Dept. of Environmental Protection
Office of the Attorney General
Strawberry Square, 16th Floor
Harrisburg, PA 17120
(215) 560-2380
Attorneys for the Commonwealth of Pennsylvania

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3186
Attorneys for the State of Vermont

ROBERT W. FERGUSON
Attorney General of Washington
KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769
Attorneys for the State of Washington

The States of California, by and through the Attorney General and the California Air Resources Board (CARB), Connecticut, Delaware, Illinois, Maryland, New York, Oregon, Vermont, Washington, Minnesota, by and through its Minnesota Pollution Control Agency, and the Commonwealth of Pennsylvania (collectively, States) respectfully request an invitation from this Court pursuant to Federal Rule of Appellate Procedure 29(b)(2) and Circuit Rules 29(b) and 35(f) to file a brief as *amici curiae* in support of the petitions for rehearing or rehearing *en banc* filed by the Natural Resources Defense Council (NRDC), the Chemours Company FC, LLC, and Honeywell International, Inc. (collectively, Intervenors). *See, e.g., PHH Corp., et al. v. Consumer Financial Protection Bureau*, No. 15-1177 (D.C. Cir. Feb. 16, 2017) (granting similar request for invitation to file amicus brief in support of *en banc* petition). The States have not filed an earlier brief in this proceeding.

All parties have been notified of the filing of this Motion. Respondent, United States Environmental Protection Agency (EPA), and Intervenors consent to this Motion. Counsel for Petitioners Mexichem Fluor, Inc., and Arkema oppose this Motion on the ground that it is contrary to Circuit Rule 35(f). They stated that Petitioners may file a response after they have had an opportunity to review the Motion.

The panel's August 8, 2017 decision invalidated a material part of EPA's 2015 rule that prohibited the use of hydrofluorocarbons (HFCs) in certain equipment (2015 Rule). The States believe the panel's decision was in error because it relies on an unjustifiably narrow interpretation of Section 612 of the Clean Air Act, and it prevents EPA from effectuating its statutory mandate.

Rehearing is warranted because the panel decision contradicts existing administrative law jurisprudence regarding deference to reasonable agency interpretations. Fed. R. App. P. 35(b)(1)(A). Rehearing also is warranted because the case presents questions of exceptional importance given that the intent of the 2015 Rule was to phase out chemicals that increase the risks of global warming. Fed. R. App. P. 35(b)(1)(B). Both issues hold significant interest to the States.

The States are interested in preserving established administrative law regarding agency deference, on which the States rely when making regulatory decisions. Also, the States seek to protect their residents, environment, and economies from the risks of global warming. HFCs are extremely potent greenhouse gases that contribute greatly to global warming. Because it invalidated the 2015 Rule as to manufacturers already using HFCs, the panel's decision will result in increased emissions of HFCs and, therefore, increased global warming.

The 2015 Rule creates a regulatory floor that the States rely on as they develop greenhouse gas emission reduction strategies. States with HFC and greenhouse gas emission reduction mandates have plans to meet their targets that assume a decrease in HFC use consistent with the 2015 Rule. *See, e.g.,* Cal. Health & Safety Code § 39730.5(a); Wash. Rev. Code § 70.235.020; Or. Rev. Stat. § 468A.205; 10 V.S.A. § 578(a); Md. Ann. Code, En. Art. § 2-1204; Minn. Stat. § 216H.02; Conn. Gen. Stat. Ann. § 22a-200a. Without full implementation of the 2015 Rule, it will be far more difficult, if not impossible, for States to achieve their goals that reduce the climate change risks to their residents.

Without full implementation of the 2015 Rule, the States may need to create their own programs to reduce use of HFCs within their borders. This would be a time-consuming, costly process that would be difficult to administer and enforce, and likely will not achieve the substantial national emission reductions that would result from full implementation of the 2015 Rule.

Given these substantial concerns, the States' proposed amicus brief—the body of which is only 13 pages long and fewer than 2,600 words, adhering to Fed. R. App. P. 29(b)(4)—will be useful to the Court because it provides the Court with the States' unique perspective about the effects of the panel's decision. A copy of the brief is attached.

///

///

///

For the foregoing reasons, the States respectfully request that the Court invite them to file the accompanying brief as *amici curiae*.

Dated: September 27, 2017

Respectfully submitted (on behalf of and in addition to all Movants),

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

ERIC M. KATZ
SARAH E. MORRISON
Supervising Deputy Attorneys General
MEGAN K. HEY
JULIA K. FORGIE
Deputy Attorneys General
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN
Attorney General of Connecticut

/s/ Jill Lacedonia

MATTHEW I. LEVINE
JILL LACEDONIA
Assistant Attorneys General
Office of the Attorney General

FOR THE STATE OF DELAWARE

/s/ Matthew P. Denn

MATTHEW P. DENN
Attorney General of Delaware
Department of Justice

FOR THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

/s/ James P. Gignac

MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
Office of the Attorney General

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General of Maryland

/s/ Steven M. Sullivan

STEVEN M. SULLIVAN
Solicitor General

FOR THE STATE OF MINNESOTA, BY AND THROUGH ITS MINNESOTA POLLUTION CONTROL AGENCY

/s/ Max Kieley

MAX KIELEY
CHRISTINA BROWN
Assistant Attorneys General
Office of the Minnesota Attorney General

FOR THE STATE OF NEW YORK

ERIC SCHNEIDERMAN
Attorney General of New York

/s/ Joshua Tallent

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MORGAN COSTELLO
Affirmative Section Chief, Environmental Protection Bureau
JOSHUA TALLENT
Assistant Attorney General
Office of the Attorney General

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

/s/ Paul Garrahan

PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania

/s/ Steven J. Santarsiero

STEVEN J. SANTARSIERO
MICHAEL J. FISCHER
Chief Deputy Attorneys General
Office of the Attorney General
ROBERT A. REILEY, Asst. Director
Dept. of Environmental Protection

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Nicholas F. Persampieri

NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington

/s/ Katharine G. Shirey

KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(b)(4) and 32(g), I hereby certify that the foregoing Motion for Invitation to File Brief of States as *Amici Curiae* In Support of Intervenor-Respondents' Petitions for Rehearing or Rehearing *En Banc* contains 671 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and is therefore within the applicable word limit. This Motion also complies with the typeface and type-style requirements of Rule 32(a)(5) and (a)(6) because this document has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman size 14.

Dated: September 27, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

ERIC M. KATZ
JULIA K. FORGIE
MEGAN K. HEY
Deputy Attorneys General
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra

CERTIFICATE OF SERVICE

The undersigned certifies that on September 27, 2017, the foregoing Motion for Invitation to File Brief of States as *Amici Curiae* In Support of Intervenor-Respondents' Petitions for Rehearing or Rehearing *En Banc* was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

Dated: September 27, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

ERIC M. KATZ
SARAH E. MORRISON
Supervising Deputy Attorneys General
MEGAN K. HEY
JULIA K. FORGIE
Deputy Attorneys General
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra

ATTACHMENT

Nos. 15-1328, 15-1329

**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,

THE CHEMOURS COMPANY FC, LLC, HONEYWELL INTERNATIONAL INC., and NATURAL RESOURCES DEFENSE COUNCIL,

Intervenor-Respondents.

Petition for Review of Final Agency Action

BRIEF OF THE STATES OF CALIFORNIA, BY AND THROUGH THE ATTORNEY GENERAL AND CALIFORNIA AIR RESOURCES BOARD, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, NEW YORK, OREGON, VERMONT, WASHINGTON, MINNESOTA, BY AND THROUGH ITS MINNESOTA POLLUTION CONTROL AGENCY, AND THE COMMONWEALTH OF PENNSYLVANIA AS *AMICI CURIAE* IN SUPPORT OF INTERVENOR-RESPONDENTS' PETITIONS FOR REHEARING OR REHEARING *EN BANC*

XAVIER BECERRA
Attorney General of California
ROBERT BYRNE
SALLY MAGNANI
Senior Assistant Attorneys General
SARAH MORRISON
ERIC KATZ
Supervising Deputy Attorneys General
MEGAN K. HEY, State Bar No. 232345
JULIA K. FORGIE, State Bar No. 304701

Additional Counsel on next page

Deputy Attorneys General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2000
Fax: (213) 897-2802
Email: Eric.Katz@doj.ca.gov
Attorneys for the State of California,
by and through the California Air Resources Board,
and Attorney General Xavier Becerra

Dated: September 27, 2017

GEORGE JEPSEN
Attorney General of Connecticut
MATTHEW I. LEVINE
JILL LACEDONIA
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
(860) 808-5250
Attorneys for the State of Connecticut

MATTHEW P. DENN
Attorney General of Delaware
Department of Justice
Carvel State Building, 6th Floor
820 North French Street
Wilmington, De 19801
(302) 577-8400
Attorney for the State of Delaware

LISA MADIGAN
Attorney General of Illinois
MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
Office of the Attorney General
69 W. Washington St., 18th Floor
Chicago, Illinois 60602
(312) 814-0660
Attorneys for the State of Illinois

BRIAN E. FROSH
Attorney General of Maryland
STEVEN M. SULLIVAN
Solicitor General
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6427
Attorneys for the State of Maryland

MAX KIELEY
CHRISTINA BROWN
Assistant Attorneys General
Office of the Minnesota Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 757-1244
Attorneys for the State of Minnesota, by and through its Minnesota Pollution Control Agency

ERIC SCHNEIDERMAN
Attorney General of New York
BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MORGAN COSTELLO
Affirmative Section Chief, Environmental Protection Bureau
JOSHUA TALLENT
Assistant Attorney General
Office of the Attorney General
The Capitol
Albany, New York 12224
(518) 776-2456
Attorneys for the State of New York

ELLEN F. ROSENBLUM
Attorney General of Oregon
PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301-4096
(503) 947-4593
Attorneys for the State of Oregon

JOSH SHAPIRO
Attorney General of Pennsylvania
STEVEN J. SANTARSIERO
MICHAEL J. FISCHER
Chief Deputy Attorneys General
ROBERT A. REILEY, Asst. Director
Dept. of Environmental Protection
Office of the Attorney General
Strawberry Square, 16th Floor
Harrisburg, PA 17120
(215) 560-2380
Attorneys for the Commonwealth of Pennsylvania

THOMAS J. DONOVAN, JR.
Attorney General of Vermont
NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609
(802) 828-3186
Attorneys for the State of Vermont

ROBERT W. FERGUSON
Attorney General of Washington
KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6769
Attorneys for the State of Washington

COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases (Cir. Rule 28(a)(1))

A. Parties and Amici. Except for the signatories to this brief and any other *amici* who had not yet entered an appearance as of the filing of the petition for rehearing en banc, all parties, intervenors, and *amici* appearing before this Court are listed in the Petitions for Rehearing and the Parties' briefs in this case, No. 15-1328 (consolidated with No. 15-1329). A group of administrative law professors has also filed a motion to file a brief as *amici curiae* in support of the Petitions for Rehearing.

B. Rulings under Review. References to the ruling at issue appear in the Petitions for Rehearing and the Parties' briefs in this case, No. 15-1328 (consolidated with No. 15-1329).

///

///

///

///

///

///

///

C. Related Cases. References to any related cases appear in the Parties' original briefs in this case, No. 15-1328 (consolidated with No. 15-1329).

Dated: September 27, 2017

Respectfully submitted (on behalf of and in addition to all Amici),

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

ERIC M. KATZ
SARAH E. MORRISON
Supervising Deputy Attorneys General
MEGAN K. HEY
JULIA K. FORGIE
Deputy Attorneys General
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATUTES

FEDERAL REGISTER

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

* Authorities upon which we rely chiefly are marked with an asterisk.

GLOSSARY OF TERMS

CARB	California Air Resources Board
EPA	United States Environmental Protection Agency
HFC	Hydrofluorocarbon
SNAP	Significant New Alternatives Policy
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)

INTERESTS OF AMICI

Amici curiae are the states of California, by and through the Attorney General and the California Air Resources Board (CARB), Connecticut, Delaware, Illinois, Maryland, New York, Oregon, Vermont, Washington, Minnesota, by and through its Minnesota Pollution Control Agency, and the Commonwealth of Pennsylvania (collectively, Amici). Amici are interested in ensuring that courts preserve established deference to reasonable agency interpretations, and that this Court permits the United States Environmental Protection Agency (EPA) to effectuate its statutory mandate under Section 612 of the Clean Air Act (42 U.S.C. § 7671k) to replace ozone-depleting substances with less harmful alternatives. Amici are specifically interested in protecting their states from the risks climate change poses to human health and the environment by supporting EPA's regulation of greenhouse gases, including hydrofluorocarbons (HFCs). Some also rely on these federal HFC regulations to achieve their statewide HFC and greenhouse gas emission reduction mandates.

INTRODUCTION AND SUMMARY OF ARGUMENT

Decades ago, Congress enacted Section 612 of the Clean Air Act, which established a federal system for replacing ozone-depleting substances to the maximum extent practicable with alternatives that "reduce overall risks to human health and the environment." 42 U.S.C. § 7671k(a). As part of that system, Congress authorized EPA to develop an iterative process of designating each alternative as "safe" or "prohibited" and updating those designations as EPA gained new information and industry developed safer alternatives. *Id.*, § 7671k(c),(d).

Since 1994, EPA's Significant New Alternatives Policy Program ("SNAP Program") has implemented this mandate and effectively reduced production and consumption of ozone-depleting substances nationwide. *See* 80 Fed. Reg. 42,870, 42,879 (July 20, 2015). Over time, EPA has added alternatives to the "prohibited" list as it learned more about their environmental and health harms. *See, e.g.*, 64 Fed. Reg. 3865 (Jan. 26, 1999). Consistent with congressional intent, in 2015 EPA moved certain HFCs from the "safe" list to the "prohibited" list of alternatives (80 Fed. Reg. 42,870) ("2015 Rule").

The panel's erroneous decision to vacate the 2015 Rule "to the extent it requires manufacturers to replace HFCs" (Op. 3) warrants rehearing. Amici agree with Intervenors—the Natural Resources Defense Council, Chemours, and Honeywell International—and administrative law professors that the panel's analysis of Section 612 is unjustifiably narrow and upends years of established jurisprudence granting deference to reasonable agency interpretations. Amici also agree that the decision misinterprets Section 612 and undercuts EPA's mandate to replace ozone-depleting substances with alternatives that *reduce* harms to human health and the environment. *See* 42 U.S.C. § 7671k(a),(c).

Rather than repeat these points, this Brief explains how the panel's decision harms Amici. The decision injects uncertainty into the states' reliance on EPA's implementation of Section 612's mandate to reduce risks to human health and the environment. This decision has especially serious ramifications for Amici with respect to HFCs, which contribute disproportionately to climate change. By hampering EPA's ability to effectively limit the use of HFCs, the decision undermines efforts to address climate change. Consequently, states will face significant hurdles in reaching their emission reduction goals, and their residents will be exposed to greater risks from climate change. States that seek to act where EPA cannot because of the panel's decision will struggle to develop viable replacement regulations. Any proposed state regulations will be time-consuming and costly to develop and implement and likely less comprehensive than the 2015 Rule. Amici therefore support Intervenors' requests that the panel or full Court rehear this case and allow full implementation of EPA's 2015 Rule.

ARGUMENT

I. STATES RELY ON EPA'S SNAP PROGRAM TO ENSURE THAT OZONE-DEPLETING SUBSTANCES ARE REPLACED WITH SAFER SUBSTITUTES

For decades, states have benefited from and relied on EPA's determinations about the safety of alternatives to ozone-depleting substances. These determinations create a regulatory floor that protects the public from harmful substances. *See* 59 Fed. Reg. 13,044 (Mar. 18, 1994). EPA's ability to update its determinations based on new scientific assessment ensures that industry is producing and using safe alternatives nationwide. In reliance on this structure, states have and continue to build their own regulatory programs assuming the continued existence of this nationwide floor.

The panel's decision, however, upends states' historic reliance on EPA's action in this area by unjustifiably restricting EPA's authority under Section 612. In moving HFCs to its "prohibited" list, EPA has made a determination—which the panel found reasonable—that HFCs pose a risk to human health and the environment. Under the panel's position, EPA's safety determination—and list of "prohibited" alternatives—has little practical value because EPA cannot prevent continued use of substances it has found unsafe. For example, if EPA discovers, as it did in 1999 (64 Fed. Reg. 3865, 3867), that a previously approved non-ozone-depleting alternative causes kidney disease, EPA cannot require elimination of that alternative from new equipment—even *after* it places the substance on the "prohibited" list. States would no longer be able to rely on EPA's SNAP Program to effectively respond to new information and move industry toward safer alternatives. This would be true for any type of risk to human health and the environment, whether it be kidney disease (as in 1999) or, as particularly relevant here, climate change. By failing to properly defer to EPA, the panel's decision prevents EPA from evolving its lists consistent with its statutory mandate to *reduce* risks.

II. THE 2015 RULE IS CRUCIAL TO EFFECTIVELY LIMIT CLIMATE CHANGE AND DRIVE CLEAN INDUSTRY

EPA's 2015 Rule is a vital step to effectively address climate change. HFCs are *thousands of times* more potent for global warming than carbon dioxide, and are the fastest growing source of emissions in the United States and globally.[1] The 2015 Rule will significantly reduce HFC emissions—and therefore total greenhouse gas emissions—in future years.

The 2015 Rule is a crucial federal tool for reducing HFCs in the United States markets. The 2015 Rule also serves as the United States' primary mechanism for compliance with the global 2016 Kigali Amendment to the 1987 Montreal Protocol that phased out ozone-depleting substances.[2] The Kigali Amendment expands the Montreal Protocol by also requiring the phasedown of

---

[1] EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990–2015*, ES-3, 2-2–2-5 (2017), *available at* https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf.

[2] Kigali Amendment to the Montreal Protocol, *agreed* Oct. 15, 2016, *available at* http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/41453. The Amendment enters into force once ratified by 20 Parties to the Montreal Protocol; four countries have ratified it to date.

HFC production and consumption on specified timelines. If implemented, the Amendment is expected to cut the production of HFCs in developed countries by 70 percent by 2030.[3] Without the 2015 Rule, the United States is unlikely to meet its HFC reduction commitments, undermining global momentum to implement the Amendment. Consequently, the absence of a federal mandate to shift from HFCs nationwide will also reduce incentives for the global chemical industry to innovate away from HFCs. As a result, anticipated national and global industry shifts are unlikely to occur on the expected timelines, increasing climate change risks for decades.

III. THE LACK OF FEDERAL HFC REGULATIONS WILL UNDULY BURDEN STATES' EFFORTS TO ADDRESS CLIMATE CHANGE

A. Federal Control of HFCs Delivers Emission Reductions That Help States Meet their Emission Reduction Mandates and Address Climate Change

The 2015 Rule creates a regulatory floor that Amici rely on as they develop greenhouse gas emission reduction strategies. States with HFC and greenhouse gas emission reduction mandates have plans to meet their targets that assume a decrease in HFC use consistent with the 2015 Rule. Without the federal HFC controls, states likely will fail to achieve their goals that reduce the climate change risks to their residents.

[3] *Id.*

California, for instance, has relied on the 2015 Rule for achieving its legislative mandate to reduce HFC emissions 40 percent below 2013 levels by 2030. Cal. Health & Safety Code § 39730.5(a).[4] California's estimated HFC emissions in 2013 were equivalent to 16 million metric tons of carbon dioxide, and are expected to grow by 60 percent in the next two decades without state and national controls.[5] California estimates that the 2015 Rule and EPA's continued SNAP Program enforcement would account for nearly 50 percent of its required HFC reductions. Twenty-two percent of the state's required HFC reductions would be met through the direct emission reductions resulting from the 2015 Rule;

---

[4] *See also* CARB, *Short-Lived Climate Pollutant Reduction Strategy* (Mar. 2017) (hereinafter *SLCP Strategy*), *available at* https://www.arb.ca.gov/cc/shortlived/meetings/03142017/final_slcp_report.pdf. California also has a broader legislative mandate to reduce all greenhouse gas emissions to 40 percent below 1990 levels by 2030. Cal. Health & Safety Code § 38566.

[5] California's emissions estimates and projections are based on CARB, *SLCP Strategy* (2017); Glenn Gallagher, et al., *High-global Warming Potential F-gas Emissions in California: Comparison of Ambient-based versus Inventory-based Emission Estimates, and Implications of Estimate Refinements*, 48 ENVTL. SCI. & TECH. 1084 (2014), *available at* dx.doi.org/10.1021/es403447v; CARB, *California's High Global Warming Potential Gases Emission Inventory: Emission Inventory Methodology and Technical Support Document—2015 Edition*, 6–22, 34–36, 39–40, 44–45 (Apr. 2016) (hereinafter *High GWP Gases Emission Inventory*), *available at* https://www.arb.ca.gov/cc/inventory/slcp/slcp.htm; CARB, *California Greenhouse Gas Emissions for 2000 to 2015: Trends of Emissions and Other Indicators—2017 Edition*, 12 (June 6, 2017) (hereinafter *California Emissions Inventory*), *available at* https://www.arb.ca.gov/cc/inventory/data/data.htm.

another 25 percent would be satisfied by the global industry shift from HFCs that is anticipated from compliance with the Kigali Amendment, which, as noted above, depends on the 2015 Rule.[6] Without the 2015 Rule, it will be extremely difficult, if not impossible, for California to reach its 2030 HFC reduction goals; California will have to seek other mechanisms to achieve nearly 50 percent of its HFC reductions in place of the 2015 Rule.

Some states, including New York, Oregon, Vermont, Connecticut, Maryland, Minnesota, and Washington, among others, have greenhouse gas emission reduction targets, but have not specifically regulated HFCs in part because they rely on the presence of the federal rules. *See, e.g.*, Or. Rev. Stat. § 468A.205; 10 V.S.A. § 578(a); Conn. Gen. Stat. Ann. § 22a-200a; Md. Ann. Code, En. Art. § 2-1204; Minn. Stat. § 216H.02; Wash. Rev. Code § 70.235.020. For instance, New York aims to achieve emission reductions of 80 percent below 1990 levels by 2050. EXECUTIVE ORDER 24 (New York 2009). New York expects that, by 2050, HFCs will account for 25 percent of the state's greenhouse gas emissions. Without the 2015 Rule, HFCs will likely account for a much higher percent of total emissions, making New York's emission reduction targets more difficult to achieve. Many states have no state-specific emission reduction mandates, but benefit from the federal rules that help effectively limit greenhouse

[6] *See id.*

gas emissions and protect their residents from the harmful effects of climate change. Without effective control of HFCs at the national level, these states face greater climate risks.

B. Absent the HFC Reductions From the 2015 Rule, States Will Face Significant Burdens in Implementing State-Specific Regulations

The 2015 Rule leverages existing federal resources and a simple and ongoing administration of the SNAP Program to achieve emission reductions. If the panel's decision stands, states attempting to regulate HFCs in the absence of the 2015 Rule will face costly and time-consuming regulatory processes that will lead to a less comprehensive regulatory system. State-by-state regulations will not achieve the substantial national emission reductions that would result from the 2015 Rule.

1. States Will Face Costly Regulatory Burdens and Harmful Delays

State measures designed to take the place of the 2015 Rule will be time-consuming and costly to develop, implement, and enforce. Some states may lack the technical expertise to evaluate their HFC production and consumption and implement effective HFC reduction regulations. These states will need to develop technical capacity before beginning their rulemaking. All states will need additional staff for implementation and enforcement, which will stretch states' resources.

As states take regulatory action, delays will be inevitable. Building staff capacity and technical expertise is time consuming. Many states will need to seek legislative authority to control HFCs within their borders. Even in states like California that already have that authority, rulemaking may take years.

These regulatory delays will keep HFCs in equipment for decades. HFCs are produced for use in equipment with lifetimes of 15 to 20 years, or 30 to 50 years for some building insulation foams.[7] Because the 2015 Rule applies to new equipment and retrofits of old equipment, but not servicing, HFCs used in today's new (or retrofit) equipment will exist in the marketplace for at least the next 15 to 20 years.

The delay in eliminating HFCs from equipment will have irreversible climate consequences directly from HFC emissions and indirectly from energy inefficiency (equipment using non-HFC alternatives is more energy efficient[8]). For instance, in California, it is estimated that a one-year delay in implementing regulations to replace the 2015 Rule would result in an additional cumulative 24

[7] Gallagher, et al. (2014).

[8] *See, e.g.*, EIA, *Putting the Freeze on HFCs—2015 Supplement* (Apr. 2015), *available at* https://content.eia-global.org/posts/documents/000/000/353/original/Putting_the_Freeze_on_HFCs_2015_Supplement.pdf?1476391760.

million metric tons of greenhouse gas emissions through 2030,[9] which is equivalent to emissions from five million passenger vehicles driven for a year[10]. These delays are especially harmful in the next couple of years because old equipment containing ozone-depleting substances is being rapidly replaced;[11] whether those replacements are made with HFCs or non-HFCs will depend on this Court's review and decision. With even brief delays in banning certain HFCs from new equipment, the old equipment will be replaced with HFCs instead of less harmful alternatives. Consequently, the panel's decision will lock in those HFCs for the lifetime of that equipment, increasing emissions and hampering state efforts to meet emission reduction targets.

2. A Uniform Federal HFC Regulatory Floor Benefits States

As states respond to the panel's decision by developing their own HFC reduction measures, the resulting state-by-state system may not ensure a minimum uniform level of protection. States with stringent reduction requirements may border states with lenient or no regulations. With different requirements in each

---

[9] *See* Gallagher, et al. (2014); CARB, *High GWP Gases Emissions Inventory* (2016); CARB, *California Emissions Inventory* (2017).

[10] EPA, ENERGY AND THE ENVIRONMENT: GREENHOUSE GAS EQUIVALENCIES CALCULATOR, https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator (last visited Sept. 11, 2017).

[11] EPA, *The U.S. Phaseout of HCFCs: Projected Servicing Needs in the U.S. Air-Conditioning, Refrigeration, and Fire Suppression Sectors*, 24–25 (Oct. 2014), *available at* https://www.regulations.gov/document?D=EPA-HQ-OAR-2013-0263-0124.

state, there will be less incentive for industry to shift from HFC use nationwide. Diverse state standards also may reduce the overall climate benefits that would have accrued from a uniform federal regulatory system.

Further, states will be harmed by border smuggling of illegal HFCs. The 2015 Rule is intended to address products that move in international, national, and state markets. *See* 80 Fed. Reg. 42,870, 42,871–42,873. With limited resources, states that attempt to regulate HFCs within their borders will face heightened risks of smuggling and less capacity to prevent it. HFC-containing air conditioning units, for instance, may be brought into a regulated state after being purchased in an unregulated state. This would undermine the regulated state's efforts to reduce emissions, and would require costlier and more intensive enforcement to prevent such movement.

The SNAP Program provides a national uniform regulatory system that cost-effectively avoids these inefficiencies and disincentives. The 2015 Rule is within EPA's authority and promises to effectively reduce HFC use and climate risks throughout the United States.

CONCLUSION

Rehearing is necessary to ensure that the serious harms detailed above do not follow from the panel's erroneous decision. Amici respectfully request that the

Court grant Intervenors' petitions for rehearing and allow EPA to implement its statutory authority under Section 612 to phase out HFCs with the 2015 Rule.

Dated: September 27, 2017

Respectfully submitted (on behalf of and in addition to all *Amici*),

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

ERIC M. KATZ
SARAH E. MORRISON
Supervising Deputy Attorneys General
MEGAN K. HEY
JULIA K. FORGIE
Deputy Attorneys General
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra

FOR THE STATE OF CONNECTICUT

GEORGE JEPSEN
Attorney General of Connecticut

/s/ Jill Lacedonia

MATTHEW I. LEVINE
JILL LACEDONIA
Assistant Attorneys General
Office of the Attorney General

FOR THE STATE OF DELAWARE

/s/ Matthew P. Denn

MATTHEW P. DENN
Attorney General of Delaware
Department of Justice

FOR THE STATE OF ILLINOIS

LISA MADIGAN
Attorney General of Illinois

/s/ James P. Gignac

MATTHEW J. DUNN
GERALD T. KARR
JAMES P. GIGNAC
Assistant Attorneys General
Office of the Attorney General

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
Attorney General of Maryland

/s/ Steven M. Sullivan

STEVEN M. SULLIVAN
Solicitor General

FOR THE STATE OF MINNESOTA, BY AND THROUGH ITS MINNESOTA POLLUTION CONTROL AGENCY

/s/ Max Kieley

MAX KIELEY
CHRISTINA BROWN
Assistant Attorneys General
Office of the Minnesota Attorney General

FOR THE STATE OF NEW YORK

ERIC SCHNEIDERMAN
Attorney General of New York

/s/ Joshua Tallent

BARBARA D. UNDERWOOD
Solicitor General
STEVEN C. WU
Deputy Solicitor General
MORGAN COSTELLO
Affirmative Section Chief,
Environmental Protection Bureau
JOSHUA TALLENT
Assistant Attorney General
Office of the Attorney General

FOR THE STATE OF OREGON

ELLEN F. ROSENBLUM
Attorney General of Oregon

/s/ Paul Garrahan

PAUL GARRAHAN
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice

FOR THE COMMONWEALTH OF PENNSYLVANIA

JOSH SHAPIRO
Attorney General of Pennsylvania

/s/ Steven J. Santarsiero

STEVEN J. SANTARSIERO
MICHAEL J. FISCHER
Chief Deputy Attorneys General
Office of the Attorney General
ROBERT A. REILEY, Asst. Director
Dept. of Environmental Protection

FOR THE STATE OF VERMONT

THOMAS J. DONOVAN, JR.
Attorney General of Vermont

/s/ Nicholas F. Persampieri

NICHOLAS F. PERSAMPIERI
Assistant Attorney General
Office of the Attorney General

FOR THE STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General of Washington

/s/ Katharine G. Shirey

KATHARINE G. SHIREY
Assistant Attorney General
Office of the Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(b)(4) and 32(g), I hereby certify that the foregoing Brief of *Amici Curiae* in Support of Respondent-Intervenors' Petitions for Rehearing or Rehearing *En Banc* contains 13 pages and 2,592 words, as counted by a word processing system that includes headings, footnotes, quotations, and citations in the count, and is therefore within the applicable word limit. This Brief also complies with the typeface and type-style requirements of Rule 32(a)(5) and (a)(6) because this document has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman size 14.

Dated: September 27, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

ERIC M. KATZ
SARAH E. MORRISON
Supervising Deputy Attorneys General
MEGAN K. HEY
JULIA K. FORGIE
Deputy Attorneys General
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra

CERTIFICATE OF SERVICE

The undersigned certifies that on September 27, 2017, the foregoing Brief of *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.

Dated: September 27, 2017

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California

/s/ Eric M. Katz

ERIC M. KATZ
SARAH E. MORRISON
Supervising Deputy Attorneys General
MEGAN K. HEY
JULIA K. FORGIE
Deputy Attorneys General
Attorneys for the State of California, by and through the California Air Resources Board, and Attorney General Xavier Becerra