NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 20-1150 and consolidated cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

Petition for Review of Actions of Environmental Protection Agency

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PAGE PROOF BRIEF FOR RESPONDENTS U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.

JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
BENJAMIN CARLISLE
REDDING CATES
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7411
Washington, D.C. 20044
(202) 514-9771 (Carlisle)
Benjamin.Carlisle@usdoj.gov
(202) 514-2617 (Cates)
Redding.Cates@usdoj.gov

Of Counsel:

Melina Williams
Office of General Counsel
Environmental Protection Agency

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The parties and intervenors to Case Nos. 20-1150 and 20-1151 are correctly identified in Petitioners' opening brief. Case Nos. 17-1016 and 17-1017 have now been voluntarily dismissed.

B. Ruling Under Review

The ruling under review is the final action by EPA entitled "Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes," 85 Fed. Reg. 14,150, (March 11, 2020).

C. Related Cases

By order dated August 17, 2020, the Court severed certain issues raised in Case Nos. 17-1016 and 17-1017; those issues were assigned to Case No. 20-1309 and have been held in abeyance pending further order of the Court.

/s/ *Benjamin Carlisle*
BENJAMIN CARLISLE

Counsel for EPA

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1993 Rule	"Protection of Stratospheric Ozone; Refrigerant Recycling," 58 Fed. Reg. 28,660 (May 14, 1993).
2016 Rule	"Protection of Stratospheric Ozone: Update to the Refrigerant Management Requirements Under the Clean Air Act," 81 Fed. Reg. 82,272 (Nov. 18, 2016)
2018 Proposed Rule	"Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes" 83 Fed. Reg. 49,332 (Oct. 1, 2018)
2020 Rule	"Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes," 85 Fed. Reg. 14,150 (March 11, 2020)
CAA	Clean Air Act
EPA	Environmental Protection Agency

INTRODUCTION

Petitioners challenge EPA's interpretation of its Clean Air Act authority to regulate the substitutes developed for ozone-depleting refrigerants. Section 7671g(c)(2), subject to certain exceptions, prohibits the knowing release of such substitute refrigerants "in the course of" four specific, congressionally enumerated activities. They are: "maintaining, servicing, repairing, or disposing of" an appliance. Congress notably chose *not* to prohibit such releases during the normal "use" of an appliance. Nor does the provision contain a sweeping catch-all. EPA has thus reasonably concluded that Congress granted EPA limited authority over the substitutes for ozone-depleting refrigerants in 42 U.S.C. § 7671g(c).

Petitioners also rely on Section 7671g(a). Notably, unlike Section 7671g(c), Section 7671g(a)(2) *does* expressly authorize regulation of "use" of ozone-depleting substances. This includes their use during normal appliance operation. It does not, however, mention regulation of the *substitutes*. Section 7671g(a)(3) authorizes regulations that reduce the emission of *ozone-depleting* substances and maximize their recapture and recycling. Thus, EPA construes Section 7671g(a) to similarly represent a deliberate choice by Congress. It, too, provides limited authority to regulate substitutes for ozone-depleting refrigerants. As pertinent here, EPA could extend its leak repair regulations to regulate *substitutes* under this provision only if those regulations would demonstrably serve the ozone-depleting substance related purposes set forth in the statutory text.

In 2016, EPA extended certain of its regulations to require leak repair in appliances containing only substitute refrigerant. In 2020, EPA corrected course, walking back aspects of that action. Petitioners now advocate that EPA return to the approach taken in 2016. But EPA has reasonably concluded that Section 7671g does not authorize it to regulate leaks in those appliances, which typically lead to releases of only substitutes during normal use. EPA determined that Section 7671g(c) does not authorize these regulations. Ordinary-use releases of substitutes do not occur "in the course of maintaining, servicing, repairing, or disposing of an appliance." Nor does Section 7671g(a) help Petitioners. Repairing leaks in appliances containing *only substitutes* does not reduce emissions of *ozone-depleting chemicals*. The Court should deny the petitions.

STATEMENT OF JURISDICTION

(A) EPA had jurisdiction under 42 U.S.C. § 7671g. 85 Fed. Reg. 14,150, 14,159 (March 11, 2020) ("2020 Rule").

(B) This Court has jurisdiction under 42 U.S.C. § 7607(b)(1) because EPA took final action under 42 U.S.C. § 7671g.

(C) That action was taken on March 11, 2020. 2020 Rule at 14,157. Petitioners timely filed their petition for review on Monday, May 11, 2020. *See* 42 U.S.C. § 7607(b)(1); Fed. R. App. P. 26(a)(1)(C).

(D) The petition is from agency action reviewable under § 7607(b)(1).

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations not contained in the Petitioner's brief are set forth in the addendum.

STATEMENT OF THE ISSUES

1. Whether EPA reasonably concluded that Section 7671g(c) does not authorize EPA to expand leak repair requirements to appliances containing only substitute refrigerants (and not any ozone-depleting substances), because releases from leaks generally occur during normal use of appliances and not "in the course of maintaining, servicing, repairing, or disposing" of them.

2. Whether EPA reasonably determined that extending leak repair requirements to appliances containing only substitute refrigerants—and no ozone-depleting substances—would not further Section 7671g(a)'s goals relating to ozone-depleting substances.

STATEMENT OF THE CASE

A. Statutory background

"The stratospheric ozone layer protects life on Earth from the sun's harmful ultraviolet (UV) radiation." 81 Fed. Reg. 82,272, 82,274 (Nov. 18, 2016) ("2016 Rule"). Ozone-depleting substances are chemicals that damage the stratospheric ozone layer. *See id.* at 82,275-76. Title VI of the CAA, 42 U.S.C. §§ 7671-7671q, enacted in the 1990 Amendments to the CAA, includes provisions that implement the United States' obligations under the Montreal Protocol on Substances that Deplete

the Ozone Layer to phase out production and consumption of ozone-depleting substances, as well as additional provisions that complement this phase-out.[1] Section 608 of the CAA, 42 U.S.C. § 7671g, provides for a national "recycling and emission reduction program."

In 42 U.S.C. § 7671g(a)(2), Congress directed that EPA "promulgate regulations establishing standards and requirements regarding the use and disposal" of ozone-depleting substances, including during the service, repair, or disposal of appliances and industrial process refrigeration. *See* 2020 Rule at 14,165 (explaining that "including" in Section 7671g(a)(2) reflects that regulated "use and disposal" can occur during activities other than service, repair or disposal of an appliance). EPA's regulations under Section 7671g(a) "shall include requirements that (A) reduce the use and emission of [ozone-depleting substances] to the lowest achievable level and (B) maximize the recapture and recycling of [ozone-depleting substances]." *Id.* § 7671g(a)(3).

Section 7671g(c)(1) makes it "unlawful for any person, in the course of *maintaining, servicing, repairing, or disposing of* an appliance or industrial process refrigeration, to knowingly vent or otherwise knowingly release or dispose of any [ozone-depleting substances] used as a refrigerant" in a manner which permits it to

[1] Title VI uses the terms "class I" and "class II" to refer to different groups of ozone-depleting substances. *See* 42 U.S.C. § 7671a. In these rules, EPA frequently referred to class I and class II substances, in the aggregate, as ozone-depleting substances.

enter the environment. 42 U.S.C. § 7671g(c)(1) (emphasis added). Frequently called the "venting prohibition," Section 7671g(c)(1) includes an exemption for "*de minimis* releases associated with good faith attempts to recapture and recycle or safely dispose of any such substance." *Id.*

Congress also extended the "venting prohibition" to substitutes for ozone-depleting substances. *See id.* § 7671g(c)(2); 2020 Rule at 14,150. For substitutes, there is also an exemption if EPA determines that the venting, releasing, or disposing of such a substitute does not threaten the environment. 42 U.S.C. § 7671g(c)(2); *see also* 40 C.F.R. § 82.154(a) (listing exempt substitutes).[2]

B. Regulatory background

EPA established the national refrigerant management program pursuant to Section 7671g in 1993, codified at 40 C.F.R. part 82, subpart F ("subpart F regulations"). 2016 Rule at 82,275.

Before the 2016 Rule amended the program, the subpart F regulations required "that persons servicing, maintaining, repairing, or disposing of air conditioning and refrigeration equipment observe certain service practices that reduce emissions of ozone-depleting refrigerant." 2016 Rule at 82,273; *see also id.* at 82,275. Among other things, these regulations:

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[2] As relevant here, both the 2016 and 2020 Rules address EPA's regulation of "non-exempt" substitutes. *See, e.g.*, 2020 Rule 14,150 n.4. For simplicity's sake, this brief uses the more general term "substitute" to refer to non-exempt substitutes.

- restricted the servicing of regulated appliances and the sale of refrigerant to certified technicians;

- specified refrigerant evacuation levels before opening an appliance;

- required the use of certified refrigerant recovery and/or recycling equipment;

- required that refrigerant be removed from appliances prior to disposal;

- required that appliances have a servicing aperture or process stub to facilitate refrigerant recovery;

- required that refrigerant reclaimers be certified in order to reclaim and sell used refrigerant; and

- established standards for technician certification programs, recovery equipment, and quality of reclaimed refrigerant.

Id. at 82,273. They also required the timely repair of equipment containing 50 or more pounds of ozone-depleting refrigerant, if it was leaking refrigerant at rates above certain thresholds. *Id.*; *see also id.* at 82,275, 82,280, 82,313; 40 C.F.R. § 82.157 (current codification of the leak repair requirements). Until the 2016 Rule, all of these subpart F regulations applied only to equipment containing ozone-depleting refrigerant.[3]

[3] Before the 2016 Rule, the only subpart F requirements that applied to substitutes were the venting prohibition and certain exemptions to that prohibition. 2020 Rule at 14,151 & n.5.

1. The 2016 Rule

In the 2016 Rule, EPA extended the subpart F regulations to apply to substitute refrigerants, except for those substitutes that EPA has exempted from Section 7671g(c)'s venting prohibition. *Id.* at 82,280; *see also id.* at 82,275-76, 82,283.[4]

EPA explained that Section 7671g(a) is silent with respect to whether EPA should promulgate regulations governing substitutes. *See id.* at 82,283-84. It further explained that Section 7671g(c)(2) subjects substitutes to a "venting prohibition" and "*de minimis* exemption" parallel to those that apply to ozone-depleting substances. *See id.* EPA determined that this reflected an ambiguity in Section 7671g regarding regulation of substitutes. *See id.* EPA construed this ambiguity as authorizing it to extend fully its subpart F regulations to substitutes, including those regulations' leak-repair requirements now codified in 40 C.F.R. § 82.157. *See* 2016 Rule at 82,285-86. EPA claimed that extending the subpart F regulations to substitutes was appropriate to interpret, explain, and enforce the scope of the *de minimis* exemption to the venting prohibition under Section 7671g(c)(2) as to such substitutes. *See id.* at 82,285.

In doing so, EPA reversed its long-held position on the venting prohibition's scope. *See id.* Historically, EPA's position was that "topping off" appliances with additional refrigerant during servicing—leading to emissions of refrigerant during the

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[4] The 2016 Rule also made certain other changes to the subpart F regulations, including to the substance of the leak repair requirements, some of which made that requirement more stringent. *See* 2016 Rule Section IV.F. The 2016 Rule is not subject to review in this litigation.

subsequent *use* of the appliance—did not generally constitute knowingly venting or releasing refrigerant subject to Section 7671g(c). *See* 58 Fed. Reg. 28,660, 28,672 (May 14, 1993).

EPA's new interpretation asserted that when an owner or operator "top[s] off" equipment, they "necessarily know that the system has leaks" and that subsequent leaks may allow refrigerant to enter the environment. 2016 Rule at 82,285. EPA then interpreted Section 7671g(c) such that if a person adds refrigerant to an appliance that is known to be leaking in excess of a threshold rate, that person also violates the venting prohibition, unless the applicable practices referenced in § 82.154(a)(2) are followed, including the leak repair requirements. *Id.* In response to comments that Section 7671g(c) is limited to prohibiting releases "in the course of maintaining, servicing, repairing, or disposing" of an appliance and does not authorize EPA to so broadly regulate the normal operation of such equipment, EPA stated that the word "maintaining" includes "a broad range of activities involved in preserving equipment in normal working order." *Id.* at 82,291.

EPA also determined in the 2016 Rule that extending the subpart F regulations to substitutes was independently appropriate under Section 7671g(a), because such regulations would reduce emissions of ozone-depleting substances. EPA concluded that a consistent regulatory regime governing both ozone-depleting substances and substitutes could serve Section 7671g(a)(3)'s direction that EPA's regulations minimize ozone-depleting substance use and emission while maximizing "the

recapture and recycling of such substances." 42 U.S.C. § 7671g(a)(3); *see* 2016 Rule at 82,286, 82,288. However, in reaching this conclusion, EPA considered the subpart F regulations only in the aggregate, without granular analysis of the effects of extending any particular such regulations. Thus, EPA did not consider whether extending *each one* of the subpart F requirements to substitutes would serve the objectives of Section 7671g(a)(3). *See id.* at 82,286, 82,288. EPA did not conclude that extending the leak-repair provisions, in particular, to substitutes would help minimize ozone-depleting substance use and emission or maximize recapture and recycling of ozone-depleting substances. *See id.*; *see also* 2020 Rule at 14,157.

2. The 2020 Rule

NEDA/CAP and Air Permitting Forum sought judicial review of the 2016 Rule in this Court, Case Nos. 17-1016 and 17-1017. 2020 Rule at 14,151.[5] Air Permitting Forum also sought administrative reconsideration of the 2016 Rule, raising issues including EPA's authority to extend subpart F regulations to substitutes. *Id.* EPA reviewed the 2016 Rule, focusing on this statutory authority issue, and ultimately issued the 2020 Rule. *Id.* at 14,152.

In the 2020 Rule, EPA continued to interpret Section 7671g as ambiguous with regard to the scope of its authority to establish refrigerant management regulations for substitutes. *Id.* at 14,154; *see also id.* 14,160-61. It then concluded that Sections

[5] These petitions were voluntarily dismissed, although certain issues were severed into Case No. 20-1309, which remains pending.

7671g(a) and (c) could support extension of *some* of the subpart F regulations to substitutes. *See id.* at 14,154-55.

However, in contrast to its 2016 Rule, EPA concluded that it had less authority to regulate substitutes than ozone-depleting substances. *Id.* EPA explained that if "Congress had intended to convey authority to the EPA to promulgate the same, full set of refrigerant management requirements for substitutes as for ozone-depleting substances, it is reasonable to expect that Congress would have expressly included substitutes in sections [7671g](a)(1) or (2), as it did for section [7671g(c)]—but it did not." *Id.*

EPA determined that the 2016 Rule's extension of the leak repair provisions of subpart F, 40 C.F.R. § 82.157, to substitutes exceeded its statutory authority. *Id.* at 14,155. First, applying Section 7671g(c), EPA explained that refrigerant releases from leaks typically occur during normal operation of an appliance, *not* during the course of the four activities (maintaining, servicing, repairing, or disposing of an appliance) subject to the venting prohibition. 2020 Rule at 14,156, 14,162. EPA concluded that its leak repair regulations apply to activities and releases that are too distinct from those identified in Section 7671g(c) to provide EPA with the authority under Section 7671g(c) to extend them to substitute refrigerants. *Id.* at 14,156. Second, applying Section 7671g(a), EPA concluded that an independent duty to repair leaks in equipment using only substitutes was unlikely to impact ozone-depleting substance emissions, recapture, or recycling, so long as the other requirements under subpart F

remain in effect for such equipment. *Id.* at 14,157. EPA therefore limited "the applicability of the leak repair provisions in § 82.157 to appliances that use [ozone-depleting] refrigerants or a blend containing [ozone-depleting] refrigerants." *Id.* at 14,152.

SUMMARY OF ARGUMENT

In the 2016 Rule, EPA concluded that Section 7671g(c) authorized EPA's regulation of releases of substitutes occurring during ordinary use of appliances, not just releases occurring "in the course of" "maintaining, servicing, disposing or repairing of an appliance." The 2020 Rule reasonably rescinded this interpretation and returned to EPA's long-standing interpretation, which better adheres to the text of Section 7671g(c). Petitioners' principal arguments fail because they subvert the statutory text in favor of Petitioners' policy preferences. Petitioners make no showing that the 2020 Rule was unreasonable, as required to overturn EPA's statutory interpretation.

Petitioners' fallback arguments also lack merit. EPA's decision to maintain the 2016 Rule's extension of other subpart F requirements to substitutes—requirements which *do* address releases occurring during the four activities specified in Section 7671g(c)—does not conflict with EPA's conclusion that it lacked authority to so extend the leak repair requirements. EPA also permissibly limited the scope of the 2020 Rule to addressing its regulation of substitutes. It was not required to revisit its

longstanding regulations governing ozone-depleting substances, and those regulations are not under review here.

EPA also reasonably determined that it lacked authority under Section 7671g(a) for the 2016 Rule's extension of the leak repair requirements to appliances containing only substitutes because doing so was unlikely to affect ozone-depleting substance emissions, recapture, or recycling. The 2016 Rule erred in this respect because it discussed extending the relevant subpart F regulations en masse to substitutes, without recognizing the lack of incremental effects on ozone-depleting substances from extending the leak repair requirements. Rather than engage with EPA's explanation for changing its position, Petitioners ignore it. Similarly, their speculation regarding potential technician confusion as to whether an appliance contains ozone-depleting substances ignores the other subpart F regulations, which still apply to appliances containing ozone-depleting and substitute refrigerants and minimize such confusion. They also assume that regulated parties will disregard their obligations under existing regulations.

STANDARD OF REVIEW

The Court may reverse EPA's action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or in excess of EPA's "statutory jurisdiction, authority, or limitations." 42 U.S.C. §§ 7607(d)(1)(E), (d)(9)(A), (C). This standard is narrow, and the Court does not substitute its judgment for EPA's. *Bluewater Network v. EPA*, 370 F.3d 1, 11 (D.C. Cir. 2004). Courts will sustain an

agency decision so long as the agency's path may "reasonably be discerned." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974).

Under this deferential standard of review, an agency need not base its every action on empirical data and "may be 'entitled to conduct . . . a general analysis based on informed conjecture.'" *American Fuel & Petrochemical Manufacturers v. EPA*, 937 F.3d 559, 581 (D.C. Cir. 2019) (quoting *Chamber of Commerce v. SEC*, 412 F.3d 133, 142 (D.C. Cir. 2005); alterations in original). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its regulatory choices must be upheld. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

Questions of statutory interpretation are governed by the two-step test in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984). Under step one, the Court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, the inquiry ends. *Id.* at 842–43. If the statute is silent or ambiguous, step two requires the Court to uphold the agency's reasonable interpretation of the statute. *Id.* at 843 & n.11.

ARGUMENT

In the 2020 Rule, EPA reasonably concluded that it lacked statutory authority to maintain the 2016 Rule's extension of the leak repair provisions of subpart F, 40 C.F.R. § 82.157, to substitutes. It therefore revoked that extension and limited "the applicability of the leak repair provisions in § 82.157 to appliances that use [ozone-

depleting] refrigerants or a blend containing [ozone-depleting] refrigerants." 2020 Rule at 14,152.

I. EPA reasonably concluded that it lacked authority to extend the leak repair requirements to substitutes under Section 7671g(c).

A. EPA reasonably interpreted Section 7671g as providing less regulatory authority for substitutes than for ozone-depleting substances.

As noted above, EPA concluded—and Petitioners do not dispute—that Section 7671g is ambiguous with regard to authority it gives EPA to regulate substitutes. 2020 Rule at 14,154; *see also* 2016 Rule at 82,283; *see supra* at 7 (discussing the ambiguity in the statutory text). In short, Section 7671g(a) authorizes regulations related to the "'use and disposal' of [ozone-depleting substances] 'including use and disposal during service, repair, or disposal' of appliances." 2020 Rule at 14,153 (quoting 42 U.S.C. § 7671g(a)); *see also* 42 U.S.C. § 7671g(a)(3) (requirements for EPA regulation of "such substances," i.e., ozone depleting substances).[6] Section 7671g(c) expressly addresses substitutes. But it is drafted more narrowly. It prohibits just "knowing releases [of ozone-depleting substances and substitutes] 'in the course of maintaining, servicing, repairing, or disposing' of appliances." *Id.* at 14,155 (quoting 42 U.S.C. § 7671g(c)); *see also Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) (such

[6] These regulations may include certain requirements relating to "alternative substances" (substitutes). 42 U.S.C. § 7671g(a)(3). As EPA explained, this authority is not applicable to extending the leak repair requirements to substitutes. 2020 Rule at 14,153 n.9.

choices are presumptively intentional). EPA can remedy that ambiguity through regulation. *See* 2020 Rule at 14,155.

In statutory interpretation, the "beginning point is the relevant statutory text." *United States v. Quality Stores, Inc.*, 572 U.S. 141, 145 (2014). Where a statute is ambiguous, EPA may change its approach by explaining that its interpretation is more consistent with the statutory text than an alternative interpretation. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 175 (2007); *accord* 2020 Rule at 14,167 (citing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2127 (2016)).

In the 2020 Rule, EPA concluded that the distinctions between subsections 7671g(a) and 7671g(c) reflect that the former authorizes regulation of a broader range of activities. *See id.* 14,155, 14,165-66. Subsection (a) explicitly authorizes regulation of the "use" of ozone-depleting substances whereas subsection (c) is limited to prohibiting knowing releases of ozone-depleting substances or substitutes occurring "in the course" of four enumerated activities. Moreover, if "Congress had intended to convey authority to the EPA to promulgate the same, full set of refrigerant management requirements for substitutes as for [ozone-depleting substances], it is reasonable to expect that Congress would have expressly included substitutes in sections [7671g](a)(1) or (2), as it did for section [7671g](c)—but it did not." *Id.*

Section 7671g(c)(2) addresses releases that occur in the course of "maintaining, servicing, repairing, or disposing of an appliance." 42 U.S.C. § 7671g(c). EPA reasonably concluded that refrigerant releases from leaks, however, do not meet this

limitation because they "typically occur during the normal operation of the appliance," rather than in the course of these four congressionally enumerated activities. 2020 Rule at 14,156. This approach is consistent with EPA's original 1993 regulations implementing the venting prohibition, which did "not prohibit 'topping off' systems, which leads to emissions of refrigerant *during the use* of equipment." 58 Fed. Reg. 28,673 (emphasis added).

Congress' choice to limit the scope of the Section 7671g(c) venting prohibition to address only knowing releases in the course of four enumerated activities and exclude "use" is presumptively intentional. This is particularly true given that Section 7671g(a) captures "use" of an appliance but Section 7671g(c) does not. Courts usually presume differences in language like this convey differences in meaning. *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018).

Read in the context of Congress's decision not to subject releases during "use" of an appliance to the venting prohibition, the four activities specified in Section 7671g(c) also share the same character. They reflect discrete interventions an actor performs on an appliance at a specific time distinct from its normal operation. *See* 42 U.S.C. § 7671g(c); 2020 Rule at 14,162 (the four activities "are all forms of transitive verbs that express an action by an actor ('any person') on an object"). This is no less true for "maintaining" an appliance as the other three activities specified in Section 7671g(c). Here, "maintaining" an appliance reflects the *action* of keeping it in working order, not simply its normal use during day-to-day operations. *See* 2020 Rule at 14,162

(citing dictionary definitions). This conclusion is buttressed by well-established canons of construction that require that a "string of statutory terms" should be interpreted similarly, particularly where, as here, the terms are "cohesive." *Graham County Soil & Water Conservation District v. U.S. ex rel. Wilson,* 559 U.S. 280, 289 n.7 (2010) (citing *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303 (1961)). "Maintaining" is used in conjunction with "servicing, repairing, or disposing," terms that describe discrete interventions separate and apart from normal operations. *See California Independent System Operator Corp. v. FERC*, 372 F.3d 395, 400 (D.C. Cir. 2004) ("[A]mbiguity is a creature not of definitional possibilities but of statutory context.").

Moreover, Section 7671g(c) covers releases "in the course of" one of these four activities. Thus, the venting prohibition does not apply to releases from leaks that occur *before* or *after* the maintenance, servicing, repair, or disposal event. 2020 Rule at 14,156. Even if the addition of refrigerant occurs during an activity listed in Section 7671g(c), the releases from operational leaks addressed by the leak repair requirements are typically separate in time from those activities. *See id.* at 14,162. EPA has "always understood that few appliances are leak-free, which further supports the notion that leaks commonly occur *during the normal operation* of an appliance, rather than during appliance maintenance, service, repair, or disposal." *Id.* at 14,156 (emphasis added).

It was, therefore, reasonable for EPA to interpret Section 7671g(c) not to cover releases from leaks occurring independently and temporally distinct from the four congressionally enumerated activities. The 2020 Rule thus reflects a well-supported

conclusion that EPA lacks authority to extend the leak repair requirements to substitutes and a proper decision to rescind the 2016 Rule's extension of those requirements to substitutes.

B. The Court should defer to EPA's reasonable construction of Section 7671g(c), under *Chevron* step two.

In the 2020 Rule, EPA explained the deficiencies in its prior interpretation—found in the 2016 Rule—that Section 7671g(c) authorized it to extend the leak repair requirements to substitutes. If the Court concludes that it must resolve whether the 2016 Rule's interpretation on this point was unreasonable, and therefore foreclosed by the statute, it should find that it was, for essentially the same reasons set forth below.

The Court, however, need not go so far because EPA's interpretation of Section 7671g(c) can be sustained on narrower grounds, under *Chevron* step two. *See City of Arlington v. FCC*, 569 U.S. 290, 296-97 (2013) (*Chevron* step two deference applies to agencies' reasonable interpretations of their statutory authority). Because EPA's conclusion that it lacks regulatory authority to extend the leak requirements to substitutes is *a* reasonable interpretation of Section 7671g(c), EPA should prevail even if this is not *the only* reasonable reading of its statutory authority.

EPA concluded that the 2016 Rule's extension of the leak repair requirements to substitutes was unreasonable. The 2016 interpretation was badly out of step with the statutory text. This conclusion also reflects EPA's judgment that its historic approach—which respected these statutory limits—is a better, reasonable

interpretation. EPA receives deference to this reasonable interpretation under *Chevron* step two.

Moreover, EPA did, in fact, exercise its judgment to find this was a reasonable interpretation in the face of the ambiguity in Section 7671g. *See, e.g.*, 2020 Rule at 14,156 ("The EPA is accordingly returning to the agency's reasonable interpretation of 608(c) with respect to leaks . . . ."); *id.* at 14,167 (explaining that EPA has provided an "adequate rationale" for its regulatory change, which is based on a "reasoned explanation of its current interpretation of its legal authority"); *id.* at 14,154 (agency may "exercis[e] its discretion" to change its interpretation); *cf. id.* at 14,155 (explaining that "EPA has concluded" and "EPA now reads" the statute as providing a narrower grant of authority). The 2020 Rule reflected EPA's reasonable return to its "historic interpretation" that, as compared to the 2016 Rule interpretation, "better focuses" on knowing releases that occur during the activities listed in Section 7671g(c). *Id.* at 14,162; *see also Continental Air Lines, Inc. v. Dep't of Transportation*, 843 F.2d 1444, 1446-47, 1453 & n.6 (D.C. Cir. 1988).

Petitioners therefore err in relying on cases like *Prill v. NLRB*, 755 F.2d 941, 947 (D.C. Cir. 1985), and *Transitional Hospitals Corp. of Louisiana, Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000), to argue that the 2020 Rule should be vacated because EPA has "misconceiv[ed] the law" and failed to exercise its own judgment. Petitioners' Brief at 21-23. Petitioners likewise misconstrue EPA's statements that it "does not have discretion" to issue regulations that it has concluded would "exceed[ ]

its statutory authority." 2020 Rule Response to Comments, EPA-HQ-OAR-2017-0629-0343 at 9 (JA__); Petitioners' Brief at 23. Once EPA has adopted a narrow view of its authority, it lacks discretion to promulgate regulations that exceed this authority regardless of whether EPA's determination of its limited scope of authority is the *only* reasonable reading of the statutory text or simply *a* reasonable reading of the statutory text. Similarly, EPA's reasonable interpretation of Section 7671g(c) that it lacks authority to extend the leak repair requirements does not entail a policy change as to, e.g., EPA's views on the emissions effects of that extension. *See* Petitioners' Brief at 23; 2020 Rule at 14,167 (responding to arguments that EPA had not adequately explained its change in approach as to "harmful emissions" increases); *see also infra* at Argument I.C.3.

C. Petitioners' attempts to advance an alternative view of the statute are unpersuasive and do not show EPA's interpretation is unreasonable.

Petitioners' arguments on Section 7671g(c) all suffer from the same flaw: Petitioners attempt to retool a provision that EPA reasonably concluded is directed to knowing releases occurring "in the course" of four congressionally enumerated activities as a vehicle to address releases during normal use. Contrast this with 42 U.S.C. § 7671g(a), where Congress directed that EPA's regulations may sweep more broadly to address "use and disposal," but *only* as they affect ozone-depleting substances. Far from a "cramped construction," Petitioners' Brief at 27, the 2020 Rule reflects a faithful reading of the statutory text.

1. Petitioners cannot rely on "servicing" to recast Section 7671g(c) to address releases occurring during ordinary use.

The text and context of Section 7671g(c) demonstrate that it is reasonably read as not directed toward preventing releases that occur during the normal use of an appliance. Despite this, Petitioners attempt to take the possibility that a release from a leak may occur during the servicing event itself to grant sweeping authorization for EPA to address releases from leaks that typically occur during an appliance's ordinary use.

That argument proves too much. Extending the leak repair requirements to substitutes would stretch far more broadly than preventing the small subset of releases that, because they occur during the servicing event itself, may be covered by the venting prohibition. 40 C.F.R. § 82.157 requires the repair of leaks causing releases that occur primarily during normal appliance operation, outside of and independent from the four specified activities, and irrespective of whether there is a knowing release during the servicing event itself. *See also* 2020 Rule at 14,156 ("refrigerant releases from such leaks typically occur during the normal operation of the appliance" rather than the four activities).

In fact, Petitioners' argument misconstrues the leak repair provision. 40 C.F.R. § 82.157 is not directed toward the small subset of releases from leaks occurring "in the course of" the servicing event when refrigerant is "topped off." It contains no requirement to repair or prevent leaks during that servicing event. Rather, it requires

activities, e.g., repairs within 30 days and periodic leak inspections, that are directed toward forestalling subsequent releases, after the servicing event, that may occur *in the future* during ordinary use. *See* 40 C.F.R. § 82.157(d), (g).

Petitioners also conflate knowledge of an appliance's refrigerant level with knowledge of a leak actively occurring during servicing. Section 7671g(c) prohibits only knowing releases in the course of "maintaining, servicing, repairing, or disposing" of an appliance. 42 U.S.C. § 7671g(c). But, absent observable evidence of a contemporaneous leak, a technician who merely adds refrigerant to a machine does not necessarily know that the appliance is actively leaking at that time. *See* 2020 Rule at 14,156, 14,161-62. Releases from leaks typically occur before or after a servicing event and, in these cases, the owner "may not be aware of the release until it affects equipment performance." *Id.* at 14,156. And even if a leak were to occur contemporaneously when a technician tops off an appliance with additional refrigerant during a servicing event, whether any such release is a knowing release would depend on the particular situation. *See id.* at 14,156, 14,161-62. In some instances, the leak may be intermittent or otherwise may not be constantly occurring. Alternatively, it may have been repaired before the servicing event, but the refrigerant was not topped off during that repair.

EPA specifically considered situations where a technician has evidence of a contemporaneous leak that would give rise to actual knowledge of a release during the servicing event itself—for example, where the technician hears hissing or sees a

ruptured line while adding refrigerant. *See id.* at 14,156, 14,162. But EPA did not "have any information to suggest that these situations are common enough to sustain an extension of the leak repair requirements to equipment using solely substitute refrigerants under the text of section [7671g(c)]." 2020 Rule at 14,161-62; *see id.* at 14,156.

Petitioners' interpretation elides the text of Section 7671g(c), in favor of establishing a regulatory regime that addresses releases during the ordinary use of the appliance. EPA's contrary interpretation of its authority—one that pays attention to these aspects of the statutory text—was reasonable.

Indeed, Petitioners' second argument gives away the game. Here, they hedge their position by arguing that "the refrigerant releases from topping off that continue *after the service procedure* also directly result from the technician's servicing activity." Petitioners' Brief at 26 (emphasis added). In doing so, Petitioners tacitly admit that although future releases "after the service procedure" might possibly "result" from topping off a leaking appliance in a broad, causal sense, these post-hoc releases do not occur "in the course of" topping off ("servicing") the appliance, as the statutory text requires. If Congress had meant to expand Section 7671g(c) as Petitioners prefer, it easily could have said so by prohibiting knowing releases "in the course of or resulting from" the four specified activities.

Easier still, Congress could have included "use" in the list of verbs in Section 7671g(c). *See* 42 U.S.C. § 7671g(a). Petitioners nowhere grapple with how their

interpretation devolves into regulating releases that occur in the normal "use" of the appliance, in derogation of Congress's selection of specific and narrow classes of activities subject to the venting prohibition.

County of Maui v. Hawaii Wildlife Fund, 140 S. Ct. 1462, 1473, 1477 (2020), does not aid Petitioners. On Petitioners' own reading of that case, the Supreme Court there confronted an interpretation that would have allowed polluters to skirt liability for point-source discharges by dumping pollution "one yard back from the ocean." Petitioners' Brief at 27. Here, by contrast, the 2020 Rule creates no such loophole but simply faithfully recognizes what Congress provided in statutory text, as EPA first acknowledged in 1993.

2. "Maintaining" an appliance is not equivalent to normal use, as Petitioners' argument requires.

Petitioners' next argument construes "maintaining" in Section 7671g(c)'s venting prohibition to encompass "emissions occurring . . . between technician visits." Petitioners' Brief at 28. As they would have it, the venting provision covers releases that occur not just during the act of "maintenance" but also between such events. This amounts to regulating releases at any time, including the appliance's normal use, not just during the four activities in Section 7671g(c).

As discussed above, however, *see supra* at 16-17, "maintaining" is appropriately read as a discrete action, performed by a person on an appliance at a discrete time. Petitioners' dictionary definitions tend to support the conclusion that "maintaining"

an appliance is an action distinct from normal use. *See* Petitioners' Brief at 28 ("to *keep* in an existing state of repair or efficiency," "to *preserve* from failure or decline," "to *care for* (property) for purposes of operational productivity" (emphasis added, alterations and quotation marks omitted)). Petitioners' own examples of what constitutes "maintaining" an appliance also illustrate this point. "[R]eplacing leaked refrigerant as needed and repairing leaks," *id.* at 28, are affirmative and concrete steps to keep the appliance in working order, not simply an aspect of the appliance's normal, day-to-day operation.[7]

Although Petitioners recognize that Congress refused to provide that releases during an appliance's "use" violate the venting prohibition, *see id.* at 29, at no point do they explain how their interpretation can square with this decision. Instead, they offer two other textual arguments, neither of which has substance. *See id.*

Their first argument—that "maintaining" is used in Section 7671g(c) but not Section 7671g(a)—is a red herring. "Maintaining" an appliance can be distinct from "servicing" and "repairing" an appliance without radically expanding that term to cover the ordinary "use" of the appliance. For example, one might "maintain" a car

[7] That these are examples of "maintaining" an appliance does not grant EPA regulatory authority to require leak repair. The relevant question here is whether EPA has authority to compel that such maintenance (leak repair) occur in the first place. If releases from a leak occurring during an appliance's normal operation does not violate the venting prohibition because releases from such leaks occur outside of any of the four activities, EPA lacked authority under Section 7671g(c) for the 2016 Rule's decision to require maintenance or repair to address such leaks.

by having it regularly washed, but visit a mechanic for "servicing" or "repair" of its brakes—all of which are distinct from simply driving the car (ordinary "use"). Defining the precise gradation between "maintaining" an appliance versus "servicing" and "repairing" in particular the context of Section 7671g is a task best left to EPA, should these distinctions prove relevant in some other case, and one that this Court need not undertake. Here, it is sufficient to conclude that "maintaining" cannot stretch as far as Petitioners advocate.

Second, in arguing that "maintaining" must be given undue breadth in order to distinguish it from "repair" or "servicing," Petitioners ignore well-established canons of construction. "Maintaining" should, in fact, be given a similar meaning to "servicing, repairing, and disposing" of an appliance, all of which are discrete actions distinct from normal use. *See Graham County,* 559 U.S. at 289 n.7; *United States v. Williams*, 553 U.S. 285, 294 (2008) (permissible statutory meaning of "promotes" and "presents" narrowed by context of surrounding words); *Jarecki*, 367 U.S. at 307.[8]

Finally, Petitioners' argument that their approach "sensibly makes operators—who are subject to the venting prohibition—responsible for ensuring their equipment

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[8] *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) is inapposite, because—among other things—that case did not address a list of similar statutory terms but simply a disjunctive between "business or property." Moreover, respondents were advancing a strained construction of the statutory language. *See id.* As to Petitioners' reliance on *Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1081 (10th Cir. 1998), nothing in that case suggests that any ambiguity in "repair or maintenance" would extend to regulation of normal use.

does not have substantial leaks," Petitioners' Brief at 28, is circular. The issue before the Court is whether EPA had authority to impose regulatory requirements on releases occurring outside of the four activities specified in Section 7671g(c) to interpret, explain, or enforce the venting prohibition. EPA reasonably concluded that it did not, and Petitioners' arguments therefore fail.

3. EPA's reasonable interpretation of its authority is entitled to deference, notwithstanding Petitioners' appeals to the benefits of uniform regulation and the statutory purpose.

Petitioners ask the Court to second-guess EPA's reasonable interpretation of Section 7671g(c) by extolling the 2016 Rule's furtherance of unified regulatory requirements for ozone-depleting substances and substitutes. Petitioners' Brief at 30-31. But EPA reasonably concluded that the 2020 Rule's approach to EPA's authority more closely adhered to the statutory text than the 2016 Rule or Petitioners' approach, which sidestep important textual indicia reflecting EPA's limited authority to regulate leak repair. *See Long Island Care at Home*, 551 U.S. at 175 (agency may justify changed approach by explaining why its new approach is more consistent with statutory text); *accord* 2020 Rule at 14,167. Because EPA's conclusion in the 2020 Rule regarding its Section 7671g(c) authority is reasonable, it receives deference under *Chevron* step two, and the benefits of an alternative approach—including those stemming from regulatory uniformity—are not a basis to overturn the 2020 Rule.

Indeed, consistent with this conclusion and contrary to Petitioners' suggestion, EPA has not historically treated uniformity between regulation of ozone-depleting substances and substitutes as the sole or overriding driver of its regulatory approach. Until 2016, EPA had sought to create and enforce unified requirements for the use and disposal of ozone-depleting substances without similarly applying that unified regime to substitutes. *See supra* at 5-6; 2016 Rule at 82,275-26 (summarizing regulatory history). During this same period, EPA maintained the 1993 interpretation that "topping off" a leaking appliance generally would not violate the venting prohibition in Section 7671g(c), even though it promulgated leak repair requirements for appliances containing ozone-depleting substances. Treating ozone-depleting substances and substitutes differently is borne out by the text of Section 7671g, which distinguishes between these types of refrigerants.

Similarly, while EPA considers the benefits that may stem from uniform regulation of ozone-depleting substances and substitutes in the context of the other, non-leak repair requirements of subpart F, s*ee, e.g.,* 2020 Rule at 14,159, these requirements address releases in the course of the four congressionally specified activities. *See id.* at 14,158; 2020 Rule Response to Comments, EPA-HQ-OAR-2017-0629-0343 at 8, 70-73 (JA__). These other requirements thus fall in the heartland of EPA's regulatory authority under Section 7671g(c), whereas EPA reasonably concluded that the leak repair requirements fall outside of that authority.

Petitioners argue that the broader language in Section 7671g(a) governing ozone-depleting substances as compared to that in Section 7671g(c), which applies to substitutes, "does not indicate that Congress prohibited EPA from applying the same requirements to both." Here Petitioners simply ignore that Congress wrote subsection (c) more narrowly than subsection (a). The 2020 Rule honors the differences between subsections (a) and (c) that reflect EPA's more limited authority to regulate substitutes than ozone-depleting substances.

Finally, Petitioners seek to prop up the 2016 Rule by claiming that it advances the statute's purpose. As explained above, a reasonable (indeed, the better) reading of the statutory text is that Section 7671g(c) is not so directed. This is because releases from such leaks are not in the course of the four specified activities. Thus, the 2020 Rule is grounded in the statute's purpose because "it better focuses the regulations on knowing releases that occur during the activities listed." 2020 Rule at 14, 162. In contrast, the 2016 Rule used a less faithful interpretation to regulate substitutes beyond the purpose of that provision.

Petitioners' citation to the legislative history, Petitioners' Brief at 32, adds nothing to the legislative purpose revealed in the statutory text. Section 7671g(c)(2) reflects concern with the releases of substitutes. But EPA reasonably concluded that it cabins this concern by means of Section 7671g(c)'s textual limitations on the venting prohibition. The 2020 Rule adheres more faithfully to these statutory

limitations than the 2016 Rule, and therefore, as explained above, EPA reasonably returned to its less-expansive interpretation.

II. The 2020 Rule's interpretation of Section 7671g(c) is consistent with the statutory text and is not arbitrary and capricious.

The Court need not reach Petitioners' claim that it was inconsistent for EPA to rely on Section 7671g(c) to extend the sales restriction and certification requirements of subpart F, but not do so for the leak repair requirements. Petitioners' Brief at 35-37. EPA has independent authority under Section 7671g(a) to extend the non-leak repair subpart F requirements to substitutes. *See* 2020 Rule at 14,159-60. Thus, EPA's extension of the non-leak repair requirements to substitutes is not arbitrary notwithstanding any arguments on the scope of EPA's authority under Section 7671g(c).

Regardless, Petitioners are wrong. *See* 2020 Rule at 14,157-58. Unlike the leak repair requirements, *see supra* at Argument I, both the sales restriction and technician certification requirements, 40 C.F.R. §§ 82.154(a)(2)(i), 82.154 (c)-(d), 82.161, curtail releases during the four activities specified in Section 7671g(c). The certification requirement ensures that only those who have been properly trained on how to minimize refrigerant releases during these four activities are authorized to open appliances. *See* 2020 Rule at 14,158; 2020 Rule Response to Comments, EPA-HQ-OAR-2017-0629-0343 at 8 (JA__) ("Response to Comments"). The sales restriction similarly ensures, with limited exceptions, that only technicians properly trained to

minimize venting or releases during these four activities can purchase refrigerants necessary to conduct these activities. *See* 2020 Rule at 14,158; *see also* Response to Comments at 8, 70-73 (JA__). By contrast, EPA reasonably found that the leak repair requirements do not address releases in the course of these four activities. *See* 2020 Rule at 14,157-58 (noting that as early as 1993, EPA explained that "topping off" of leaking equipment generally leads to emissions during use of the equipment, rather than in the course of the four enumerated activities in Section 7671g(c)); *id.* at 14,155-56.

Petitioners attack a strawman in arguing that the leak repair requirements address "actual, known releases" whereas the sales restriction and certification requirement "address the likelihood of future releases." Petitioners' Brief at 36. EPA's reasonable reading of its regulatory authority under Section 7671g(c) is that this authority turns on whether the regulation in question addresses the potential for release that occurs in the course of the four activities regulated by that provision. It reasonably found that the sales restriction and certification requirement are geared toward addressing such releases but the leak repair requirements are not. And the relative likelihood that leaks are causing releases of substitutes *outside* of these four activities is immaterial for issuing regulations that address the venting prohibition. *See, e.g.*, 2020 Rule at 14,157.

Petitioners' next argument that EPA did not explain "why its reversed interpretation is required for substitutes, but not for ozone-depleting substances,"

Petitioners' Brief at 36-37, is not properly before the Court. Before the 2016 Rule, EPA incorporated the requirement to repair leaks of appliances containing ozone-depleting substances into the *de minimis* exemption. *See* 58 Fed. Reg. at 28,714-15, 28,716; 40 C.F.R. §§ 82.154, 82.156(i) (2016) (codifying this requirement). The 2016 Rule did not change this status quo. Rather, as relevant here, that rule updated and extended the leak repair provision, which it recodified in 40 C.F.R. § 82.157, to appliances containing only substitutes. *See* 2016 Rule at 82,352; *id.* at 82,351 (revised definition of "refrigerant").

Petitions for review of the 2016 Rule were then filed, as was an administrative petition challenging, among other elements of the 2016 Rule, EPA's authority to so extend the subpart F regulations. 2020 Rule at 14,151. EPA therefore narrowly proposed to reexamine its authority for that extension. *See* 2018 Proposed Rule, 83 Fed. Reg. 49,332, 49,332 (Oct. 1, 2018). It declined to propose "any changes to the refrigerant management program as it relates to requirements for ozone-depleting refrigerants or appliances containing or using any amount of [ozone-depleting substances]." *Id.* at 49,334. "Consistent with the proposal" the final 2020 Rule addressed only regulation of substitutes and did "not change any of the regulatory requirements for [ozone-depleting substances]." 2020 Rule at 14,152; *see id.* at 14,171 (amendments to 40 C.F.R. §§ 82.154(a)(2)(i), 82.157(a)); Response to Comments at 11 (JA__).

This approach was permissible. *See, e.g.*, *Mobil Oil Exploration & Producing Southeast Inc. v. United Distribution Cos.*, 498 U.S. 211, 231, (1991) ("[A]n agency need not solve every problem before it in the same proceeding."); *AFPM*, 937 F.3d at 585-87 (where EPA did not solicit comments on revising a regulation, it did not reopen that regulation); *West Virginia v. EPA*, 362 F.3d 861, 872 (D.C. Cir. 2004) (similar). In the 2020 Rule, EPA was reconsidering a limited issue: whether regulatory changes that it made in 2016 with respect to *substitutes* exceeded the agency's authority. Any suggestion that it should have changed its longstanding incorporation of leak repair requirement *for ozone-depleting substances* into 40 C.F.R. § 82.154(a)(2) was beyond the scope of the rulemaking and is not subject to challenge here.

In addition, the purported inconsistency Petitioners identify provides no basis to vacate or remand the 2020 Rule. Standing on its own, 40 C.F.R. § 82.157 requires the repair of leaks in covered appliances containing ozone-depleting substances, as has been the case since 1993. It applies with full force independent of its incorporation in 40 C.F.R. § 82.154's codification of the *de minimis* exemption. *See* Response to Comments at 11 (JA__). Similarly, nothing in Petitioners' argument demonstrates that EPA's reading of Section 7671g(c) in the 2020 Rule is unreasonable—indeed, it

remains the better reading of that provision.[9] Petitioners have latched onto an alleged inconsistency that is of no consequence.

Finally, where EPA concluded it *had* authority to extend the subpart F regulations to substitutes, it retained those requirements in the 2020 Rule. But EPA reasonably interpreted Section 7671g(c) as not authorizing the 2016 Rule's extension of 40 C.F.R. § 82.157 to substitutes under Section 7671g(c), based on the statutory text. Because that reading of the text is reasonable, EPA's conclusion that it lacks such authority must be sustained. This is true regardless of any putative environmental benefits of a different approach and notwithstanding that Congress authorized EPA to issue *other* regulations for such substitutes. *See* 2020 Rule at 14,163, 14,167.

III. EPA reasonably determined that Section 7671g(a) does not provide it authority to extend the leak repair provisions to substitutes.

In invoking Section 7671g(a) to extend the subpart F regulations, the 2016 Rule generally discussed the prospect that "[a]pplying consistent requirements to all non-exempt refrigerants will reduce complexity and increase clarity for the regulated community and promote compliance with those requirements for [ozone-depleting] refrigerants." *Id.* at 82,286; *see also id.* at 82,288. EPA's reliance on Section 7671g(a) was based on an interpretation that extending those requirements to substitutes would

[9] For similar reasons, *Maryland v. EPA*, 958 F.3d 1185, 1200-01 (D.C. Cir. 2020) (per curiam), which held a statutory interpretation untenable based on its practical effects, has no bearing here.

help fulfill the purposes of 42 U.S.C. § 7671g(a) related to ozone-depleting substances. *See* 2016 Rule at 82,288.[10]

Under this analysis, EPA has no authority to extend its leak repair regulations to substitutes unless doing so fulfills the ozone-depleting substance related purposes of 42 U.S.C. § 7671g(a). *See* 2016 Rule at 82,288; 2020 Rule at 14,157; *cf. supra* at 14 n.6 (Section 7671g(a)(3) provides EPA certain authority relating to substitutes which does not support extending the leak repair requirements to substitutes). Petitioners do not meaningfully dispute this point. Nor do they claim EPA has any other basis to extend its leak repair regulations to substitutes under Section 7671g(a), in the absence of impacts on ozone-depleting substances.

However, in the 2016 Rule EPA did not analyze the specific question of whether extending the leak repair requirements alone to appliances containing only substitutes would help minimize emissions or maximize recycling and recapture of ozone-depleting substances. *See id.* at 82,286, 82,288; 2016 Technical Support Document at 59, EPA-HQ-OAR-2017-0629-0326 (JA__) (analysis of quantified aggregate ozone-depleting substances reductions from all of the regulatory changes to the leak repair and inspection requirements in the 2016 Rule, not just the extension to

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[10] EPA agrees that whether the leak repair requirements serve the purposes of Section 7671g(a) relating to ozone-depleting substances is not a pure legal question, *see* Petitioners' Brief at 38-39, although it is a threshold question upon which EPA's authority to regulate is contingent. But this point favors EPA, as the Court should defer to EPA's reasonable determinations in areas of the agency's expertise. *See supra* at Standard of Review.

substitutes). EPA particularly did not consider this question in light of EPA's extension of the *other* subpart F requirements it was considering to substitutes. *See id.*; *see also* 2020 Rule at 14,157 (2016 Rule analysis was made "generally and without distinction to support extending all of the subpart F requirements to non-exempt substitute refrigerants").

In the 2020 Rule, EPA conducted the more granular analysis omitted in the 2016 Rule. As to the other (non-leak repair) requirements of subpart F, EPA explained in detail how their extension to substitutes would serve the purposes of Section 7671g(a) of avoiding ozone-depleting substance releases and maximizing ozone-depleting substance recapture and recycling. *See* 2020 Rule at 14,159-60. By contrast, "extension only of the leak repair requirements is unlikely to directly affect [ozone-depleting substance] emissions or the recapture and recycling of [ozone-depleting substances]." *Id.* at 14,157; *see also id.* at 14,153. In part, this is because covered equipment that contains any fraction of ozone-depleting substances, including a mixture of ozone-depleting substances and substitutes, is already independently subject to the leak repair provision. *See* 40 C.F.R. §§ 82.152, 82.157(a); 2016 Rule at 82,288. An owner or operator who fails to repair leaks in covered equipment containing any fraction of ozone-depleting substances would, therefore, violate the leak repair requirements regardless of whether they also applied to equipment containing only substitutes. By contrast, if equipment contains only

substitutes, it cannot be leaking ozone-depleting substances and there are no ozone-depleting substances to recapture or recycle. *See* 2020 Rule at 14,157.

The mandate to repair leaks in certain appliances containing ozone-depleting substances has been in force since 1993 and is well known to owners, operators, and certified technicians alike. *Id.* Furthermore, only certified technicians are authorized to open an appliance containing any refrigerant, whether ozone-depleting substance or a substitute. *See id.* It is therefore unlikely that "a difference in the duty to repair between appliances containing [ozone-depleting substances] and those containing substitute refrigerants" would cause leaks in appliances containing ozone-depleting substances subject to Section 82.157 to go unrepaired, in violation of existing regulatory requirements. *Id.*; *see* 2020 Technical Support Document at 3, EPA-HQ-OAR-2017-0629-0340 ("No change in annual [ozone-depleting substance] emissions is anticipated") (JA__); *id.* at 12, 13 (JA__, __). Similarly, because there are no ozone-depleting substances in appliances containing only substitutes, extending the leak repair requirements to these appliances will not "reduce cross-contamination, refrigerant mixing, or related releases from an [ozone-depleting substance] appliance." 2020 Rule at 14,157.

EPA thus reasonably explained why it concluded that the leak repair requirements are too attenuated from the goals of Section 7671g(a), which addresses only ozone-depleting substances, to authorize extension of those requirements to appliances containing only substitutes. *See id.*; *see also FCC v. Fox Television Stations, Inc.*,

556 U.S. 502, 515 (2009) (agencies may change approach so long as the change is permissible under the statute and adequately explained); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (*Chevron* allows agencies discretion to change their interpretations). EPA could not rely on its authority related to ozone-depleting substances to regulate appliances containing only an entirely *different* class of chemicals (substitutes), where effects on ozone-depleting substances are unlikely to occur. Nor could it "bundle" a regulation that it concluded exceeded its statutory authority in with those for which it has such authority.

Petitioners ignore EPA's explanation that the 2016 Rule's analysis was not particularized and did not explain how the extension of the leak repair requirements to appliances containing only substitutes would serve the goals of Section 7671g(a) related to ozone-depleting substances. The record thus fatally contradicts their attempt to invent a conflict between the 2016 and 2020 Rules. *See* Petitioners' Brief at 39-41. No such conflict exists. The same error pervades Petitioners' reliance on certain comments on the 2016 Rule, which failed to address how the extension of the leak repair requirements would particularly impact ozone-depleting substances. *See* Petitioners' Brief at 40; Hudson Tech. Comments at 1, 3, EPA-HQ-OAR-2015-0453-0066 (JA___, ___); Chemours Company Comments at 1-3, EPA-HQ-OAR-2015-

0453-0107 (JA___, ___); NRDC Comments at 3, EPA-HQ-OAR-2015-0453-0121 (JA___).[11]

Petitioners' citations to the record in the 2020 Rule are similarly misplaced. *See* Petitioners' Brief at 41. Principally, Petitioners quote the Dynatemp Comments at 4-5, EPA-HQ-OAR-2017-0629-0265 (JA___-___), for the broad proposition that regulatory consistency may carry certain benefits. This simply does not address whether extending the leak repair requirements to appliances containing only substitutes would serve the ozone-depleting substance goals of Section 7671g(a)(3). *See also* ESCO Institute Comments at 7-8, EPA-HQ-OAR-2017-0629-0134 (JA___-___) (similar); *cf.* Massachusetts *et al.* Comments at 2, 10-12, EPA-HQ-OAR-2017-0629-0300 (JA___, ___-___) (citing generalized statements in the 2016 Rule that extending the subpart F requirements, without individualized analysis, would carry benefits as to ozone-depleting substances).[12]

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[11] These 2016 Rule comments are also extra-record. The 2020 Rule and 2016 Rule were the result of distinct rulemakings, with distinct records. *See, e.g.*, Notice of Filing Certified Index at 6, 19, Case No. 17-1016, Doc. 1856793 (Aug. 17, 2020) (separate indices for each record, docketed as distinct attachments). That fact is not affected by the consolidation of judicial review of the 2016 Rule and 2020 Rule, or the dismissal of Case Nos. 17-1016 and 17-1017.

[12] Similarly, that EPA decided in the 1993 Rule to simultaneously regulate the two different types of ozone-depleting substances (class I versus class II) under Section 7671g(a), *see* 58 Fed. Reg. at 28,666, has no bearing on whether extending the leak repair provision to substitutes will reduce ozone-depleting substance emissions. The portion of the 1998 proposed rule that Petitioners cite is only just that: a proposal, which EPA decided not to finalize at that time. *See* 2016 Rule at 82,285.

Petitioners' failure to engage with EPA's explanation is telling given that the 2018 proposed rule discussed this question at length and specifically solicited comments on the issue. *See, e.g.*, 2018 Proposed Rule at 49,339-40. Other interested parties commented that repairing leaks in an appliance containing a substitute "will not reduce the use or emission of [ozone-depleting substances] nor maximize the recapture and recycling of [ozone-depleting substances]." 2020 Rule at 14,163; *see also* Response to Comments at 16-18 (JA__); UARG Comment at 2, EPA-HQ-OAR-2017-0629-0308 (JA__); Dep't of Def. Comments, Att. A at 1, EPA-HQ-OAR-2017-0629-0267 (JA__).

Petitioners also disregard the record in arguing that EPA did not adequately consider the possibility of uncertainty as to whether a leaking appliance contains ozone-depleting substances. Petitioners' Brief at 42-44. In claiming that refrigerant mixing and cross-contamination may increase the potential for technician confusion, Petitioners' Brief at 43, Petitioners ignore that EPA retained the extension of the non-leak repair subpart F requirements that address these concerns. *See* 2020 Rule at 14,157, 14,159-60, 14,164; Response to Comments at 24, 70 (JA__, __); PHCC Comment at 2, EPA-HQ-OAR-0629-0312 (JA__).

For example, certified technicians have multiple avenues to identify whether an appliance contains ozone-depleting substances. These include the refrigerant label, "consulting the owner/operator who is responsible for maintaining records for an [ozone-depleting substance] appliance, consulting the equipment manufacturer, or

testing the refrigerant." Response to Comments at 67 (JA__) (these avenues make it unlikely that extending the leak repair requirement to also apply to appliances containing only substitutes would affect ozone-depleting substance releases); *see also* 40 C.F.R. § 82.157(l)(2) (recordkeeping provision, applicable to covered equipment containing any fraction of ozone-depleting substance, including the requirement to document "the amount and type of refrigerant added to" the appliance during maintenance, repair, and servicing); Response to Comments at 18, 70-71 (JA__, ___) (sales restriction and certification requirement avoids mixing and ensures that only properly trained individuals work on appliances containing refrigerants, reducing the possibility of misidentification).[13]

In fact, Petitioners' argument fundamentally hinges on an assumption of noncompliance with *existing* leak repair requirements for ozone-depleting substances. A regulated party who fails to repair a leak of covered equipment containing any fraction of ozone-depleting substance is already violating the leak repair requirements, irrespective of whether they are extended to appliances containing only substitutes,

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[13] Petitioners rely on empty rhetoric that some refrigerants are "odorless, colorless, and functionally identical" in specific applications, Petitioners' Brief at 43, ignoring that the record reflects the various avenues for certified technicians to identify refrigerants. They also claim that the 2016 Rule found that "certified technicians can 'mistakenly believe[] that [equipment] contains a substitute refrigerant,'" *id.* (quoting 2016 Rule at 82,288), but disregard that extending the technician certification and other, non-leak repair requirements respond to exactly this concern. *See* 2016 Rule at 82,288). Petitioners' citation to the Chemours Comment, EPA-HQ-OAR-2015-0453-0107, similarly ignores this point.

and risks significant penalties. *See supra* at 36-37; *cf.* 42 U.S.C. § 7413(b)(2), (c)(1), (d) (civil, criminal, and administrative penalties); 40 C.F.R. § 82.161(a)(3) (revocation of certification). Correct identification of a refrigerant is also required to comply with the other aspects of the subpart F regulations, such as ensuring the proper handling of different kinds of refrigerants when servicing an appliance or reclaiming refrigerants. *See, e.g.*, 2020 Rule at 14,159; 40 C.F.R. § 82.156(a) (requirements to evacuate refrigerant to proper levels before servicing, which would require identification of the refrigerant to avoid mixing); *id.* § 82.154(b)(2) (requirement to use equipment certified for the type of refrigerant and appliance at issue). Finally, certified technicians should be aware of the risks of mixing refrigerants and accordingly should take pains to avoid such contamination, as it can be dangerous to the technician and the equipment, in addition to causing ozone-depleting substance releases. *See* 2020 Rule at 14,164; Response to Comments at 58-59 (JA__).

In short, EPA reasonably concluded that creating an independent duty to repair leaks in appliances containing no ozone-depleting substances was unlikely to serve the ozone-depleting substance goals of Section 7671g(a). Petitioners fail to make any showing that refrigerant misidentification will occur with any frequency, particularly given the extension of the other subpart F regulations to substitutes. And Petitioners must further assume not only that certified technicians cannot or will not identify the refrigerant at issue, but also that regulated parties will elect to risk noncompliance with

well-known existing regulations. Petitioners have not shown that EPA's determination on its Section 7671g(a) authority was unreasonable.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

/s/Benjamin Carlisle
JONATHAN D. BRIGHTBILL
Principal Deputy Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
BENJAMIN CARLISLE
Senior Attorney
REDDING CATES
Trial Attorney
NY Bar # 4734612 (Carlisle)
CA Bar # 269055 (Cates)
Environment and Natural Resources Division
U.S. Department of Justice

Of Counsel:

Melina Williams
Office of General Counsel
Environmental Protection Agency

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the type-volume limitation of the Court's order of November 30, 2020, because it contains 9,997 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

2. I further 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.

/s/ *Benjamin Carlisle*
BENJAMIN CARLISLE