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Christina Rossetti

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MERRIAM-WEBSTER'S UNEXPECTED IMPACT ON THE
ENVIRONMENT: AN ANALYSIS OF JUSTICE KAVANAUGH'S
MEXICHEM FLUOR, INC. V. EPA

I. JUSTICE KAVANAUGH, WEBSTER, AND THE ENVIRONMENT

Merriam-Webster: a name synonymous with the word “dictionary.”¹ While individuals primarily use dictionaries in everyday life, courts sometimes employ them to resolve statutory disputes.² Dictionaries can help elucidate the meaning of statutory language when congressional intent is unclear.³ In the environmental context, the United States Court of Appeals for the District of Columbia Circuit heavily relied on Merriam-Webster in *Mexichem Fluor, Inc. v. EPA*,⁴ and this reliance led the court to conclude the EPA did not have the authority to ban hydrofluorocarbon (HFC) use in certain circumstances under Section 612 of the Clean Air Act (CAA).⁵

For most of the twentieth century, the world focused on the dangers of ozone-depleting substances.⁶ Unfortunately, this focus may have prevented a deeper look into other dangerous substances lurking in the air, like greenhouse gases.⁷ HFCs are potent greenhouse gases that remain in the atmosphere for a long time, which partly allows them to “trap thousands of times more heat in our

1. See WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definitions of hundreds of thousands of words).

2. See Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES (Jun. 13, 2011), <https://www.nytimes.com/2011/06/14/us/14bar.html> (discussing prevalent dictionary use in court rulings).

3. See Liptak, *supra* note 2 (revealing courts from 2000 to 2010 employed dictionaries in 225 opinions).

4. 866 F.3d 451, 458-60 (D.C. Cir. 2017) (considering definition of “replace”).

5. See *id.* at 458-59 (emphasizing EPA did not properly interpret “replace” which rendered their interpretation of Section 612 implausible).

6. See, e.g., 42 U.S.C. § 7671k (2012) (implementing plan to address ozone depletion only); Jennifer Fisher & Stephen Wilson, *Explainer: Hydrofluorocarbons Saved the Ozone Layer, so Why Are We Banning Them?*, THE CONVERSATION (Nov. 1, 2017), <http://theconversation.com/explainer-hydrofluorocarbons-saved-the-ozone-layer-so-why-are-we-banning-them-86672> (explaining reliance on greenhouse gases to replace ozone-depleting substances before knowing these gases were dangerous).

7. See 42 U.S.C. § 7671k (focusing on eradicating ozone-depleting substances usage and listing greenhouse gases as safe substitutes to ozone-depleting substances); see also Fisher & Wilson, *supra* note 6 (contrasting improvement in decreasing ozone-depleting substances with HFC's detrimental effect).

atmosphere than an equivalent amount of CO₂.⁸ They also contribute to heat waves, severe natural disasters, poor air quality, and an increase of waterborne or foodborne pathogens, all of which detrimentally impact the environment and human health.⁹ While the ozone layer is on the path to reparation, a variety of products, including aerosols, air conditioners, and refrigerators, rely heavily on HFCs.¹⁰ Prohibiting HFC use would reduce these risks and provide manufacturers with the opportunity to employ more efficient alternatives.¹¹

In 2009, recognizing the serious danger posed by HFCs, the Environmental Protection Agency (EPA) adopted a new regulation which concluded greenhouse gases, including HFCs, “endanger both the public health and the public welfare of current and future generations.”¹² Former President Barack H. Obama typically supported the EPA’s actions against climate change.¹³ In 2013, President Obama formulated a Climate Change Action Plan, encouraging a reduction of HFC use and giving the EPA authority to act accordingly.¹⁴

8. Fisher & Wilson, *supra* note 6 (discussing why HFCs are one of most dangerous greenhouse gases).

9. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act [hereinafter EPA Findings], 74 Fed. Reg. 66,496, 497 (Dec. 15, 2009) (to be codified at 40 C.F.R. Ch. 1) (reviewing findings on dangers of greenhouse gases).

10. *See* Andrew Klekociuk & Paul Krummel, *After 30 Years of the Montreal Protocol, the Ozone Layer is Gradually Healing*, THE CONVERSATION (Sep. 14, 2017), <https://theconversation.com/after-30-years-of-the-montreal-protocol-the-ozone-layer-is-gradually-healing-84051> (discussing improvement in ozone layer repair); *see also* Fisher & Wilson, *supra* note 6 (explaining HFCs’ role as replacement to CFCs and HFCs’ functions).

11. *See* Kristin Igusky, *Reducing HFCs in the US Would Benefit Consumers and the Climate*, WORLD RESOURCES INST. (Mar. 3, 2015), <http://www.wri.org/blog/2015/03/reducing-hfcs-us-would-benefit-consumers-and-climate> (citing research indicating large corporations like Ben & Jerry’s improved efficiency by using less environmentally impactful alternatives to HFCs).

12. EPA Findings, 74 Fed. Reg. at 66,496 (summarizing implications of findings regarding greenhouse gases). The EPA discussed research indicating greenhouse gases impact “food production and agriculture, forestry, water resources, sea level rise and coastal areas, energy, infrastructure, and settlements, and ecosystems and wildlife.” *Id.* at 66,498 (describing areas greenhouse gases impact).

13. *See* Gregory Korte, *Here are 10 Obama Environmental Policies Trump Wants to Scrap*, USA TODAY (Mar. 28, 2017), <https://www.usatoday.com/story/news/politics/2017/03/28/the-obama-environmental-regulations-trump-wants-scrap/99729650/> (discussing Obama’s regulations supporting environment and Trump’s plans to stop these efforts). Among former President Obama’s considerations for these regulations was greenhouse gases’ impact. *See id.* (describing factors Obama considered for each environmental regulation).

14. *See* Executive Office of the President, *The President’s Climate Action Plan*, OBAMA WHITE HOUSE 10 (June 2013), <https://obamawhitehouse.archives.gov/sites/default/files/image/president27climateactionplan.pdf> (encouraging EPA

Unlike former President Obama, President Donald J. Trump generally has not supported environmental regulation.¹⁵ In the CAA context, President Trump has taken steps to decrease air pollution restraints in order to increase manufacturing.¹⁶ Against this backdrop, President Trump recently nominated a judge to take the place of retiring Supreme Court Justice, Anthony Kennedy.¹⁷ He chose D.C. Circuit Judge Brett M. Kavanaugh, who appears to be a more conservative judge than Justice Kennedy.¹⁸ The Senate narrowly appointed Justice Kavanaugh to the Supreme Court on October 6, 2018.¹⁹

This Note examines Justice Kavanaugh's decision in *Mexichem Fluor*, its impact on the environment and the law, and its implications for the future makeup of the Supreme Court.²⁰ Section II describes the facts giving rise to *Mexichem Fluor*.²¹ Section III pro-

to find alternatives to greenhouse gases through Significant New Alternatives Policy Program).

15. See Michael Greshko et al., *A Running List of How President Trump is Changing Environmental Policy*, NAT'L GEOGRAPHIC (Mar. 12, 2019), <https://news.nationalgeographic.com/2017/03/how-trump-is-changing-science-environment/> (listing Trump's changes that are affecting environment). The environmental changes include dismantling Obama's plans to preserve the environment and other regulations restricting air pollution. *Id.* (describing Trump's undermining of Obama's fuel economy goals specifically).

16. See Ledyard King, *President Trump Directs EPA to Ease Air Quality Rules He Says Suffocates Industry*, USA TODAY (Apr. 16, 2018), <https://www.usatoday.com/story/news/politics/2018/04/16/president-trump-directs-epa-ease-air-quality-rules-he-says-suffocates-industry/512898002/> (describing Trump's focus on deregulation and commentators' concerns that this focus will detrimentally affect environment).

17. See Amy Howe, *Trump Nominates Kavanaugh to Supreme Court*, SCOTUSBLOG (July 9, 2018), <http://www.scotusblog.com/2018/07/trump-nominates-kavanaugh-to-supreme-court/> (discussing Trump's recent Supreme Court nomination in light of Justice Kennedy's retirement).

18. See *id.* (comparing Kavanaugh's conservative tendencies with his speech indicating willingness to be bipartisan).

19. See William Conlon, *A Quick Look at Brett Kavanaugh, The New Supreme Court Justice*, NATIONAL PUBLIC RADIO (Oct. 7, 2018), <https://www.npr.org/2018/10/07/654893306/a-quick-look-at-brett-kavanaugh-the-new-supreme-court-justice> (discussing Justice Kavanaugh's appointment); see also Andy Kroll, *Brett Kavanaugh Narrowly Confirmed by Senate in Historic, Controversial Vote*, ROLLING STONE (Oct. 6, 2018), <https://www.rollingstone.com/politics/politics-news/brett-kavanaugh-confirmed-supreme-court-733860/> (describing long term impact of Kavanaugh's approval now that Supreme Court has conservative majority).

20. For further discussion of the court's holding, see *infra* notes 105-42 and accompanying text. For further discussion of the holding's impact, see *infra* notes 195-243 and accompanying text. For clarity, Justice Kavanaugh was a D.C. Circuit judge at the time of the *Mexichem Fluor* opinion, but he will be referred to as Justice throughout this Note to reflect his Supreme Court appointment.

21. For further discussion on the facts of *Mexichem Fluor*, see *infra* notes 26-38 and accompanying text.

vides a legal framework and background of the issues in this case.²² Section IV provides a legal analysis of the D.C. Circuit's majority and dissenting opinions.²³ Section V provides a critique of the court's analysis and reasoning.²⁴ Finally, Section VI concludes with a discussion of the decision's impact in multiple contexts.²⁵

II. THE SITUATION WHERE WEBSTER CAME TO THE RESCUE

Mexichem Fluor and Arkema are two manufacturers that used HFCs in a variety of products because they relied on HFCs' classification as a safe alternative to ozone-depleting substances under Section 612 of the CAA.²⁶ In 2015, the EPA announced a new rule removing HFCs' title as a safe substitute, meaning companies needed to find other EPA-approved substances in manufacturing their products.²⁷ Mexichem Fluor brought suit challenging this removal on two grounds.²⁸ First, Mexichem Fluor argued the EPA lacked statutory authority to make this change, as the EPA did not have CAA authorization to regulate safe substitutes like HFCs once manufacturers ceased use of ozone-depleting substances.²⁹ Second, Mexichem Fluor asserted the EPA's decision to remove HFCs from the safe substitute list was arbitrary and capricious because the EPA cited no explanation for the change.³⁰ Based on new information, the EPA argued it had the authority under Section 612 of the CAA to change HFCs' characterization as a safe substitute.³¹

Both parties agreed the EPA had the authority to remove HFCs from the safe substitute list under the CAA, and the EPA could pre-

22. For further discussion of the legal background of the case, see *infra* notes 39-104 and accompanying text.

23. For further discussion of the court's legal analysis of the issues presented in *Mexichem Fluor*, see *infra* notes 105-142 and accompanying text.

24. For a critique of the court's legal analysis and reasoning, see *infra* notes 143-194 and accompanying text.

25. For further discussion of the potential impact from *Mexichem Fluor*, see *infra* notes 195-243 and accompanying text.

26. See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 453, 456 (D.C. Cir. 2017) (noting parties' admission that HFCs are non-ozone-depleting substances and were previously safe substitutes).

27. See *id.* at 453, 456 (explaining 2013 Presidential Order's influence on 2015 rule and impact on companies).

28. See *id.* (stating Mexichem Fluor's two arguments).

29. See *id.* at 456 (emphasizing HFCs' status as non-ozone-depleting substance). Procedurally, two cases with the same arguments were consolidated to form *Mexichem Fluor*. See *id.* (noting procedural history).

30. See *id.* (explaining Mexichem Fluor argued EPA failed to address all parts of issue).

31. See *Mexichem Fluor*, 866 F.3d at 453 (discussing EPA's argument based on Section 612 of CAA).

vent companies that are still relying on ozone-depleting substances from replacing these substances with HFCs.³² The issue was ultimately narrow, asking only whether the EPA could mandate manufacturers who relied on HFCs' safe alternative classification to stop using HFCs as replacements for ozone-depleting substances.³³

The D.C. Circuit, which has exclusive jurisdiction over this issue, analyzed whether the EPA had statutory authority under Section 612 of the CAA to prohibit HFCs' use despite their previous designation as safe alternatives to ozone-depleting substances.³⁴ The Court additionally discussed whether EPA's general removal of HFCs from the safe substitute list was arbitrary and capricious.³⁵ In a split decision, Justice Kavanaugh wrote for the majority and held the EPA lacked statutory authority to require manufacturers to replace HFCs with safer substances, even though the EPA's reasoning for the initial removal of HFCs from the safe substitute list was not arbitrary and capricious.³⁶ Although he vacated any portions of the 2015 rule requiring the replacement of HFCs, Justice Kavanaugh remanded the case so the EPA could pursue this action on retroactive disapproval grounds.³⁷ Judge Wilkins dissented, arguing the congressional intent of Section 612 was unclear, which indicated deference should have been given to the EPA's interpretation.³⁸

III. THE ORIGINS OF WEBSTER'S ROLE

The CAA, worldwide agreements, and separation of powers principles created the perfect storm that gave rise to *Mexichem Fluor*'s facts.³⁹ This section first examines the statute at issue, Section 612 of the CAA, and its context on both a national and global

32. *See id.* at 457-58 (stating undisputed facts to help frame issue).

33. *See id.* at 458 (emphasizing issue is solely in regard to manufacturers that already replaced all ozone-depleting substances).

34. *See* 42 U.S.C. § 7607(b) (2012) (providing D.C. Circuit with special jurisdiction over specific air issues); *see also Mexichem Fluor*, 866 F.3d at 458 (explaining issues relating to separation of powers).

35. *See Mexichem Fluor*, 866 F.3d at 462 (holding EPA's actions neither arbitrary nor capricious and vacating for lack of statutory authority).

36. *Id.* at 454, 464 (describing Justice Kavanaugh's holding).

37. *See id.* at 462 (stating reasons for remand and necessary components to succeeding under retroactive disapproval theory).

38. *See id.* at 464-65 (summarizing Judge Wilkins' reason for dissenting).

39. For further discussion of the CAA, see *infra* notes 42-61 and accompanying text. For further discussion of worldwide agreements, see *infra* notes 62-68 and accompanying text. For further discussion of separation of powers, see *infra* notes 69-92 and accompanying text.

level.⁴⁰ Next, this section will examine more specifically key statutory interpretation and deference principles.⁴¹

A. Air (n.): “the mixture of invisible odorless tasteless gases . . . that surrounds the earth.”⁴²

The CAA addresses increasing amounts of air pollution due to the expansion of United States’ populations in cities.⁴³ Section 612, at issue in *Mexichem Fluor* and referred to as the Significant New Alternatives Policy (SNAP), specifically alleviates the impact of dangerous substances on the air by prohibiting the use of those substances.⁴⁴ Although the word “ozone” does not appear in this section of the CAA, Section 612 falls under a subchapter dedicated to ozone protection and focuses on ozone-depleting substances.⁴⁵ Section 612 sought to “replace” ozone-depleting substances with safer alternatives for the environment.⁴⁶

To achieve this goal, Section 612 calls for the use of federal resources to research safe alternatives to ozone-depleting substances.⁴⁷ All alternative substances must “reduce the overall risk to human health and the environment; and [be] currently or potentially available.”⁴⁸ Finally, Section 612 allows for a right to add or remove a substance from the safe substitute list, provided that the petitioner demonstrates adequate reasons and support for this action.⁴⁹

The CAA’s legislative history reveals the senate bill encouraged the substitution of a variety of substances that affect climate change,

40. For further discussion of the CAA and its context, see *infra* notes 42-61 and accompanying text.

41. For further discussion of statutory interpretation principles, see *infra* notes 69-92 and accompanying text.

42. *Air*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “air”).

43. See 42 U.S.C. § 7401 (2012) (discussing CAA’s purpose).

44. See 42 U.S.C. § 7671k (2012) (outlining SNAP policy and procedure); see also *id.* § 7401 (conveying goal to enhance environmental protection).

45. See § 7671k (prohibiting class I and class II substances); see also 42 U.S.C. § 7671a (2012) (defining class I and class II substances as ozone-depleting substances).

46. See § 7671k (defining policy for removing class I and class II substances). This policy intended to remove ozone-depleting substances “to the maximum extent practicable.” *Id.* (stating policy’s goal).

47. See § 7671k(b)(1) (discussing federal research programs dedicated to finding safe alternatives).

48. § 7671k(c) (stating alternative substances’ requirements).

49. See 42 U.S.C. § 7671k(d) (2012) (explaining petition requirements).

not just ozone-depleting substances.⁵⁰ The conference committee chose to adopt the house bill instead, which focused only on substances that depleted the ozone layer.⁵¹ Neither the senate nor the house bill discussed the protocol for replacing a substitute that was previously deemed “safe.”⁵²

In 1994, the EPA formulated a regulation to address Section 612's implementation.⁵³ In discussing this regulation, the EPA stated this section “does not authorize EPA to review substitutes for substances that are not themselves' ozone-depleting substances.”⁵⁴ In contrast, the EPA stated “class I and class II substances are ‘replaced’ within the meaning of Section 612(c) each time a substitute is used, so that once EPA identifies an unacceptable substitute, any future use of such substitute is prohibited.”⁵⁵ In 2009, the EPA determined HFCs were dangerous greenhouse gases, even though they were listed as safe substitutes to ozone-depleting substances.⁵⁶

The EPA created a new rule in 2015 after determining greenhouse gases were not safe substitutes to ozone-depleting substances.⁵⁷ In this rule, the EPA stated it would no longer permit HFCs as safe substitutes, and companies currently relying on HFCs needed to cease using them by certain dates, depending on the product and HFC type.⁵⁸ The agency justified this new rule by find-

50. See S. 1630, 101st Cong., Tit. VII (as passed by Senate, Apr. 3, 1990) (emphasizing desire for global climate protection).

51. See S. 1630, 101st Cong., Tit. VII (as passed by the House, May 23, 1990) (outlining ozone-depleting substances requirements later adopted in CAA Section 612); see also S. 1630, 101st Cong. (filed in House, Oct. 26, 1990) (Conf. Rep.) (adopting house bill's requirements for ozone-depleting substances).

52. See S. 1630, 101st Cong., Tit. VII (as passed by Senate, Apr. 3, 1990) (neglecting to provide detail for replacing prior safe substitutes); see also S. 1630, 101st Cong., Tit. VII (as passed by the House, May 23, 1990) (omitting information on replacement of previously accepted alternatives).

53. See Protection of Stratospheric Ozone, 59 Fed. Reg. 13,044, 13,044 (Mar. 18, 1994) (discussing implementation of SNAP program).

54. Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 458 (D.C. Cir. 2017) (citing EPA Response to Comments on 1994 Significant New Alternatives Policy Rule, J.A. 50) (recognizing EPA's prior comments were consistent with only ozone-depleting substances interpretation).

55. Protection of Stratospheric Ozone, 59 Fed. Reg. at 13,048 (Mar. 18, 1994) (responding to comments regarding substitutes for already approved substances).

56. For further discussion of the 2009 findings and the impact of greenhouse gases on the environment, see *supra* note 12 and accompanying text.

57. See Protection of Stratospheric Ozone: Change of Listing Status for Certain Substitutes Under the Significant New Alternatives Policy Program [hereinafter 2015 Rule], 80 Fed. Reg. 42,870, 42,870 (July 20, 2015) (to be codified in 40 C.F.R. Part 82) (stating rule's purpose in providing new substances). The new substances were to “pose lower risk overall to human health and the environment.” *Id.* (explaining rule was to replace depleting substances with safer alternatives).

58. See *id.* at 42,923 (listing prohibited HFCs and end use dates).

ing that HFCs damaged the environment and air more than easily available alternatives.⁵⁹ The EPA acknowledged this rule affected a wide variety of industries.⁶⁰ The agency also recognized the transition could be costly, but stated it could only consider substitute costs, not transition costs, in accordance with the CAA.⁶¹

B. Agreement (n.): “harmony of opinion, action, or character”⁶²

The Montreal Protocol, an agreement among the United Nations to regulate ozone-depleting substances was influential in Section 612’s formulation.⁶³ Under this arrangement, countries agreed to replace chlorofluorocarbons (CFCs) and other ozone-depleting substances with safer substitutes.⁶⁴ As a result of this agreement, the amount of ozone-depleting substances has been reduced, and “the ozone layer is expected to be fully healed near the middle of the 21st century.”⁶⁵

In 2016, countries’ delegates amended the Montreal Protocol to include the Kigali Amendment after research revealed HFCs’ detrimental effects.⁶⁶ The Amendment not only included phasing out HFCs’ use, but also required wealthier countries to assist finan-

59. *See id.* at 42,871 (describing comparative approach and stating no safe alternative determination was intended to be static). “Most of the other alternatives that EPA identified as having lower risk than those for which we proposed to change the status have zero ODP or have negligible impact on stratospheric ozone.” *Id.* at 42,923 (stating alternatives are safer than HFCs).

60. *See id.* at 42,873 (noting new rule’s effect on industries from plumbing and air conditioning to motor vehicle manufacturing to food).

61. *See id.* at 42,897 (responding to comments concerning transition costs).

62. *Agreement*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “agreement”).

63. *See* *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 454 (D.C. Cir. 2017) (citing Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, S. Treaty Doc. No. 100–10, 1522 U.N.T.S. 29) (discussing requirement to decrease use of substances depleting ozone layer); *see also* *Ozone Protection under Title VI of the Clean Air Act*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/ozone-layer-protection/ozone-protection-under-title-vi-clean-air-act> (last visited Dec. 14, 2018) (describing CAA’s subsection that addressed ozone depletion’s purpose was to adhere to Montreal Protocol).

64. *See International Treaties and Cooperation about the Protection of the Stratospheric Ozone Layer*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/ozone-layer-protection/international-treaties-and-cooperation> (last visited Dec. 14, 2018) (describing world commitment under Montreal Protocol to decrease ozone-depleting substance use to protect environment).

65. *See id.* (noting reduction requirements of ozone-depleting substances and their impact on the environment).

66. *See The Kigali Amendment to the Montreal Protocol: Another Global Commitment to Stop Climate Change*, UNITED NATIONS ENV’T PROGRAMME (Dec. 8, 2016), <https://www.unenvironment.org/news-and-stories/news/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate> (describing HFC use and discovering decreased use could reduce global warming by .5 degrees Celsius).

cially poorer nations in this transition and prohibited countries from trading HFCs to those that have not yet ratified the Amendment.⁶⁷ Per this Amendment, the United States must halt HFCs' use and replace HFCs with safer substitutes by 2019.⁶⁸

C. Separation (n.): "the act or process of separating"⁶⁹

As part of our constitutional system's foundation, courts do not make the law, but instead, interpret it.⁷⁰ Even if Congress, the lawmakers, ineffectively addresses a pressing issue, courts still do not have the authority to create the law.⁷¹ This principle extends to government agencies, as Congress cannot delegate lawmaking power to agencies without an intelligible principle.⁷² When Congress' delegation and statutory intent is unambiguous, little interpretation is necessary.⁷³ A problem arises when congressional authority is unclear.⁷⁴

To address this situation, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷⁵ provided a two-part framework for understanding the authority delegated by Congress.⁷⁶ If congressional intent is unambiguous, then the agency must follow that intent, and the court has no further role.⁷⁷ If congressional intent is ambiguous, the court cannot provide its own interpreta-

67. *See id.* (discussing Kigali Amendment's requirements). Even companies that create HFCs are part of this agreement, demonstrating their commitment to protecting Earth. *Id.* (indicating chemical industries' dedication to Kigali Amendment).

68. *See id.* (noting different phase out dates for each country). The United States' phase out date is one of the earliest because the United States is one of the richest countries. *Id.* (mandating most other countries to reduce by 2024).

69. *Separation*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of "separation").

70. *See* *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (outlining fundamental separation of powers principles). "It is emphatically the province and duty of the judicial department to say what the law is." *Id.* (describing court's role in relation to other branches of government).

71. *See e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (Breyer, J., concurring) (noting need for congressional authorization to create military commissions); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (noting only Congress makes laws).

72. *See* *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (explaining circumstances in which Congress can delegate power).

73. *See* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (explaining unambiguous statutory intent is to be followed).

74. *See id.* (discussing how court must analyze issues further if congressional intent is not clear).

75. 467 U.S. 837 (1984) (analyzing EPA's interpretation of statute).

76. *See id.* at 843 (outlining two steps).

77. *See id.* (stating first step is always determining whether Congress specifically addressed issue).

tion, but instead must give deference to the agency's interpretation so long as it is "based on a permissible construction of the statute."⁷⁸ Under this second part of the framework, an agency's interpretation is not afforded deference only when it contradicts congressional intent.⁷⁹ Legislative history helps to define an ambiguous statute when the history is clear, but if the history is conflicting, then it does little to resolve statutory ambiguities.⁸⁰

In *Utility Air Regulatory Group v. EPA*⁸¹ and *Center for Biological Diversity v. EPA*,⁸² the courts applied *Chevron's* framework in the environmental context.⁸³ In *Utility Air Regulatory Group*, the Supreme Court determined the EPA did not have statutory authority to regulate greenhouse gases under part two of the *Chevron* framework and noted the importance of interpreting a statute within its entire framework.⁸⁴ In *Center for Biological Diversity*, the D.C. Circuit found the EPA met *Chevron* part two because the EPA's interpretation was reasonable, and it was not the court's role to construct its own interpretation.⁸⁵

78. *Id.* at 843-44 (explaining courts should interpret congressional silence to mean Congress left issue up to agency's authority); see also *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (discussing deference under *Chevron*). Courts should remember that "[c]ongress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington*, 569 U.S. at 296 (emphasizing congressional silence's significance). To determine whether an agency's interpretation is "based on permissible construction of the statute," the Court noted it should consider legislative and statutory history in addition to whether the accommodation was reasonable. *Chevron*, 466 U.S. at 843-45 (listing court's considerations).

79. See *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 233 (1986) (noting only exception to general rule of deference to agency).

80. See *Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 269 (D.C. Cir. 2001) (discussing legislative history's role).

81. 573 U.S. 302 (2014) (analyzing case based on *Chevron*).

82. 749 F.3d 1079 (D.C. Cir. 2014) (discussing *Chevron* principles in environmental case).

83. See *Util. Air Regulatory Grp. v. EPA*, 573 U.S. at 324-25 (applying *Chevron* to greenhouse gas emission case); see also *Center for Biological Diversity v. EPA*, 749 F.3d at 1087 (determining EPA's decision to wait for more research to promulgate joint air rule met *Chevron's* second step).

84. See *Util. Air Regulatory Grp.*, 573 U.S. at 321 (explaining EPA's interpretation failed *Chevron* step two due to its inconsistency with statute's context). In this case, the EPA used their authority under the CAA "to regulate greenhouse gas emissions from new motor vehicles." *Id.* at 2436 (stating facts of case at issue). The Court held this action was not within the statutory authority of the EPA because it increased "EPA's regulatory authority without clear congressional authorization" and overused government resources. *Id.* at 2444 (explaining reasoning for holding based on *Chevron*).

85. See *Center for Biological Diversity*, 749 F.3d at 1089 (discussing CAA gave EPA authority to reject promulgation based on uncertain research).

Cases have recently questioned statutory interpretation principles and *Chevron's* framework.⁸⁶ In *Michigan v. EPA*,⁸⁷ writing for the majority, Justice Scalia favored a strict interpretation of statutes under *Chevron*.⁸⁸ Justice Thomas sought to completely abandon deference to agencies, because he believed it deprived judges of their decision making role and allowed agencies to overstep Congress.⁸⁹ On the opposite side, Justice Kagan proposed a more liberal construction of *Chevron*, advocating for more deference and policymaking authority to agencies.⁹⁰ This view is supported by the environment's rapidly detrimental changes, which the Constitution's framers likely did not anticipate.⁹¹ While a strict interpretation was the majority's view, courts are reaching different

86. See Samuel B. Boxerman & Katharine Falahee Newman, *D.C. Circuit Once Again Reminds EPA Which Governmental Branch Enacts Laws*, 38 No. 9 Westlaw J. Envtl. 1, 3 (Nov. 2017) (describing courts' conflict in all contexts over proper *Chevron* interpretation); see also Elizabeth Slattery, *Who Will Regulate the Regulators? Administrative Agencies, the Separation of Powers, and Chevron Deference*, THE HERITAGE FOUNDATION (May 7, 2015), <https://www.heritage.org/courts/report/who-will-regulate-the-regulators-administrative-agencies-the-separation-powers-and> (discussing lack of clarity in *Chevron's* application and Supreme Court's need to create clearer guidelines).

87. 135 S. Ct. 2699 (2015) (considering environmental statutes' interpretation).

88. See *id.* at 2708 (cautioning against providing too much deference to EPA). Justice Scalia stated *Chevron* "does not license interpretive gerrymanders under which an agency keeps parts of statutory context it likes while throwing away parts it does not." *Id.* (highlighting limits to agency's powers).

89. See *id.* at 2712-13 (favoring stricter interpretation of intent). Justice Thomas wrote, "Statutory ambiguity thus becomes an implicit delegation of rule-making authority, and that authority is used not to find the best meaning of the text, but to formulate legally binding rules to fill in gaps based on policy judgments made by the agency rather than Congress." *Id.* at 2713 (discussing dangers of providing agencies with too much authority).

90. See *id.* at 2718 (Kagan, J., dissenting) (advocating for more deference to agencies); see also Philip A. Wallach, *Michigan v. EPA: Competing Conceptions of Deference Due to Administrative Agencies*, BROOKINGS (June 29, 2015), <https://www.brookings.edu/blog/planetpolicy/2015/06/29/michigan-v-epa-competing-conceptions-of-deference-due-to-administrative-agencies-2/> (summarizing justices' viewpoints in *Michigan v. EPA*). Justice Kagan believed deference is given because of the "technical and complex arena" agencies navigate to create rules. See *Michigan*, 135 S. Ct. at 2718 (describing agency's better understanding of issues it is tasked to resolve). Considering these complexities, Justice Kagan argued courts lack the ability to properly interpret the EPA's role. See *id.* (illustrating court's lack of insight compared to that of agencies).

91. See Brad Plumer, *How Brett Kavanaugh Could Reshape Environmental Law From the Supreme Court*, N.Y. TIMES (July 10, 2018), <https://www.nytimes.com/2018/07/10/climate/kavanaugh-environment-supreme-court.html> (discussing early laws' lack of anticipation of current environmental issues).

conclusions based on the same statutes due to *Chevron*'s unclear application.⁹²

D. Retroactive (adj.): "extending in scope or effect to a prior time . . ."⁹³

Under retroactive disapproval theory, a federal agency can modify its own rule after consulting new information.⁹⁴ There is a presumption against this theory, unless one of two options are present: an agency must either inherently possess authority to revise prior determinations and do so in a timely manner, or it must possess statutory authority for this action.⁹⁵ If Congress expressly provides a way to revise an error, then inherent authority does not apply.⁹⁶ The agency must also provide a reasonable and compelling explanation for the need to revise.⁹⁷ It does not have to demonstrate that the change is better than the previous determination, but the agency still must show sufficient reasons for rectification.⁹⁸ Additionally, an agency cannot punish anyone who relied on the prior determination and must give fair notice of the change to these people or entities.⁹⁹

92. See Slattery, *supra* note 86 (stating courts interpret same words differently and reach different results under *Chevron*).

93. *Retroactive*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of "retroactive").

94. See, e.g., *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (applying retroactive disapproval theory to immigration case and discussing presumption against theory's application); *Ivy Sports Medicine, LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (applying retroactive disapproval theory).

95. See *Ivy Sports Medicine*, 767 F.3d at 86 (discussing agency's inherent authority). This court stated the "power to reconsider is inherent in the power to decide." *Id.* (stating agency's reconsideration power).

96. See *id.* (explaining Congress' express ability to rectify supersedes any inherent authority).

97. See *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (emphasizing need for good reasons for change).

98. See *id.* (stating agency must "believe" new version is better than prior determination).

99. See *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156 (2012) (outlining principle that agencies cannot hold those who relied on prior rule liable after rule changed).

- E. Arbitrary (adj.): “existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will”¹⁰⁰

The arbitrary and capricious standard is deferential to government agencies and only requires a reasonable rule.¹⁰¹ The United States Supreme Court recognized that “an agency must be given ample latitude to ‘adapt their rules and policies to the demands of changing circumstances.’”¹⁰² Courts should consider whether the agency contemplated factors reflecting Congress’ intent and whether it addressed all aspects of the issue.¹⁰³ Additionally, courts should determine if the agency provided evidence of a plausible reason for its view.¹⁰⁴

IV. PUTTING WEBSTER TO THE TEST: APPLYING WEBSTER’S DEFINITION OF “REPLACE” TO EPA’S 2015 RULE

While Justice Kavanaugh and Judge Wilkins agreed that the EPA’s decision to remove HFCs was not arbitrary and capricious, they reached different conclusions based on their interpretation of “replace.”¹⁰⁵ Justice Kavanaugh took a strict approach to interpreting Section 612, basing his conclusion largely on the framework of the CAA.¹⁰⁶ Judge Wilkins took a more liberal approach, finding the definition of “replace” to be at least ambiguous, which warranted agency deference.¹⁰⁷

100. *Arbitrary*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “arbitrary”).

101. *See* Motor Vehicle Manuf. Assoc. of the United States, Inc. v. State Farm Mutual Auto. Ins. Co. (*State Farm*), 463 U.S. 29, 42 (1983) (stating standard allows agencies to adapt their rules based on new circumstances); *see also* Communities for a Better Env’t v. EPA, 748 F.3d 333, 335-36 (D.C. Cir. 2014) (explaining general standard for arbitrary and capricious).

102. *State Farm*, 463 U.S. at 42 (noting agency’s ability to change rules with good reason).

103. *See id.* at 43 (listing factors courts should consider when evaluating arbitrary and capricious standard).

104. *See id.* (stating plausible reasoning is arbitrary and capricious factor).

105. *See* Mexichem Fluor, Inc. v. EPA, 866 F.3d 451, 458, 465-66 (D.C. Cir. 2017) (addressing different interpretations of “replace”).

106. *See id.* at 459 (discussing statutory framework).

107. *See id.* at 465-74 (explaining Judge Wilkins’ reasoning).

A. Majority (n.): “the quality or state of being greater”¹⁰⁸

Justice Kavanaugh, writing on behalf of the majority, began this opinion by examining whether the EPA had statutory authority to create their 2015 rule under the CAA.¹⁰⁹ After broadly recounting the history of the CAA, Justice Kavanaugh narrowed the analysis to Section 612 specifically.¹¹⁰ Justice Kavanaugh emphasized the narrow nature of this issue and that the EPA previously indicated in both 1994 and 1996 that it lacked the authority to require replacement of non-ozone-depleting substances.¹¹¹

1. *Interpretation of The Clean Air Act*

After emphasizing these points, Justice Kavanaugh analyzed the CAA’s language, which boiled down to the definition of the word “replace.”¹¹² Section 612 prohibited replacement of ozone-depleting substances with substances on the prohibited list.¹¹³ The court faced two possible interpretations of “replace”: it could either be an ongoing process where a manufacturer continued to replace ozone-depleting substances every time it used a substitute, or replacement could be a one-time occurrence, completed once a manufacturer initially employed a substitute.¹¹⁴ Through an analysis largely based on dictionaries’ definitions of “replace,” Justice Kavanaugh supported the latter interpretation.¹¹⁵

Citing various dictionaries, including Webster’s Dictionary, American Heritage, and Oxford, Justice Kavanaugh determined “replace” meant to “take the place of” and was a one-time occurrence.¹¹⁶ Appealing to every-day word usage, Justice Kavanaugh

108. *Majority*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “majority”).

109. *See Mexichem Fluor*, 866 F.3d at 456 (stating need to examine CAA first).

110. *See id.* at 454-55 (discussing CAA’s and Section 612’s history and purpose). For further discussion regarding the background of the CAA, see *supra* notes 43-61 and accompanying text.

111. *See Mexichem Fluor*, 866 F.3d at 458 (describing EPA’s original comments on Section 612 stating it only had authority to regulate ozone-depleting substances).

112. *See id.* at 458-59 (discussing meanings and interpretations of “replace”).

113. *See id.* at 458 (restating Section 612’s key language).

114. *See id.* at 458-59 (stating EPA’s argument that replacement was “never ending” and ongoing process).

115. *See id.* at 458-59 (concluding EPA’s interpretation was inconsistent with congressional intent). Justice Kavanaugh stated the EPA’s interpretation “stretches the word replace beyond its ordinary meaning.” *Id.* (discussing impracticality of EPA’s interpretation).

116. *See Mexichem Fluor*, 866 F.3d at 458-59 (citing dictionaries’ definitions of “replace”).

analogized replacement of ozone-depleting substances to replacement of a president, explaining a new president only replaced the former president once, not continually each day.¹¹⁷ Policy considerations further supported this argument, because interpreting “replace” as continuous would implausibly give the EPA unlimited authority to prohibit substances.¹¹⁸

Based on these findings, Justice Kavanaugh determined Section 612's language unambiguously demonstrated the EPA's lack of authority to continually regulate substances, which meant the EPA's challenge failed the first part of *Chevron's* analysis.¹¹⁹ Legislative history also supported this determination, because Congress adopted the House's narrower interpretation, which applied the statute only to ozone-depleting substances.¹²⁰ Justice Kavanaugh briefly explained even if the statute did not fail under this part of *Chevron*, it would inevitably fail under the second part as unreasonable.¹²¹ Justice Kavanaugh conceded “[a]lthough we understand and respect EPA's overarching effort to fill that legislative void and regulate HFCs, EPA may act only as authorized by Congress.”¹²² He reasoned, based on precedent, that good intent did not overcome an agency's inability to make law.¹²³

2. Alternatives

After demonstrating the EPA lacked statutory authority to create the 2015 rule, Justice Kavanaugh noted other ways in which the EPA could regulate HFCs.¹²⁴ Justice Kavanaugh provided these options because “Congress has not yet enacted general climate change legislation.”¹²⁵ The EPA could still prevent manufacturers relying on ozone-depleting substances from using HFCs as substitutes, reg-

117. *See id.* at 459 (analogizing situation to President Obama's replacement of President Bush to demonstrate replacement only occurs one time).

118. *See id.* (emphasizing 2015 rule gave EPA too much authority). Justice Kavanaugh stated, “[B]oundless interpretation of EPA's authority under Section 612(c) borders on the absurd.” *Id.* (describing unlimited regulation power's implausibility).

119. *See id.* at 459 (summarizing majority's conclusion based on interpretation of “replace”).

120. *See id.* (explaining Congress chose House's version of CAA, instead of Senate's version that broadly proposed regulation of all substances).

121. *See Mexichem Fluor*, 866 F.3d at 459 (discussing EPA's unreasonable interpretation of Section 612).

122. *Id.* at 460 (understanding EPA's intentions, but nevertheless emphasizing it is not agency's role to make law).

123. *See id.* at 469 (employing *Util. Air Regulatory Grp.* as example for this principle and citing constitutional law precedent like *Hamdan* and *Youngstown*).

124. *See id.* at 460 (describing other ways to prevent HFC use).

125. *Id.* (emphasizing lack of congressional action in this area).

ulate HFCs through the Toxic Substances Control Act, and require any company currently relying on ozone-depleting substances to replace those substances.¹²⁶ Additionally, Justice Kavanaugh stressed the opportunity to pursue this case on remand under the retroactive disapproval theory.¹²⁷ He explained the EPA could succeed if it demonstrated its authority to retroactively disapprove the basis for the change, and its compliance with due process.¹²⁸

3. *Arbitrary and Capricious*

Despite Mexichem Fluor's vehement objections, the D.C. Circuit held the EPA's reasoning for removing HFCs from the safe substitute list was not arbitrary and capricious.¹²⁹ According to Justice Kavanaugh, the EPA provided ample evidence that HFCs detrimentally affected the environment, were less safe than alternatives, and had a detrimental "collective global impact."¹³⁰ In relation to the costliness of replacing HFCs, Justice Kavanaugh stated it was reasonable for the EPA not to pay transition costs, because the agency provided additional time to comply with the new rule.¹³¹ Justice Kavanaugh concluded that even though the EPA's actions were not arbitrary and capricious, they still were not justified given the lack of statutory authority.¹³²

B. Dissent (n.): "to withhold assent or approval"¹³³

Judge Wilkins dissented primarily due to his disagreement about the statute's ambiguity.¹³⁴ He adopted the EPA's continuous

126. See *Mexichem Fluor*, 866 F.3d at 460 (addressing Section 612 is not only way for EPA to regulate HFCs).

127. See *id.* (describing retroactive disapproval theory).

128. See *id.* at 461-62 (outlining steps EPA would need to meet to demonstrate retroactive disapproval ability). Justice Kavanaugh stated that meeting these steps would not automatically guarantee success. See *id.* (stating only possibility of success).

129. See *id.* 462-64 (refuting each argument Mexichem Fluor raised in relation to arbitrary and capricious standard).

130. See *id.* (discussing dangers of HFCs and why their prohibition was reasonable goal).

131. See *Mexichem Fluor*, 866 F.3d at 464 (rejecting Mexichem Fluor's argument regarding transition costs because of "extra time to comply").

132. See *id.* (summarizing holding).

133. *Dissent*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of "dissent").

134. See *Mexichem Fluor*, 866 F.3d at 464-65 (stating "replace" is open to many different meanings which makes statute unclear). Judge Wilkins emphasized "[t]he bar for deciding a case at *Chevron* step one is high, requiring clear and unambiguous congressional intent." *Id.* at 464 (stating *Chevron*'s high bar under part one to demonstrate that high bar was not met in *Mexichem Fluor*).

replacement argument after examining the statutory scheme.¹³⁵ Judge Wilkins determined “replace” meant to provide a “substitute for,” which was more consistent with Section 612’s purpose and was an alternative definition in the dictionaries the majority cited.¹³⁶ Section 612 called for replacement of ozone-depleting substances with “alternative manufacturing processes that reduce overall risks to human health and the environment,” but the majority limited EPA’s ability to do this by preventing EPA from forbidding HFCs.¹³⁷ Judge Wilkins stated, “Congress undoubtedly knew how to instruct EPA to develop a list of acceptable and unacceptable substitutes by a certain date and then stop there,” and because Congress instead was ambiguous, it implied that agencies were given discretion.¹³⁸ Additionally, legislative history never addressed this precise issue.¹³⁹

After finding *Chevron* part one was met, Judge Wilkins deferentially analyzed the reasonableness of the EPA’s interpretation.¹⁴⁰ Judge Wilkins concluded the EPA’s construction was reasonable for the same reasons he believed the EPA’s interpretation passed *Che-*

135. *See id.* at 465-66 (noting “replace” is not defined anywhere in statute). Judge Wilkins also noted the majority opinion does not address retailers and Section 612 is “written in the passive voice and without identifying a particular target of the regulation . . .” *Id.* at 466 (distinguishing retailers’ replacement from manufacturers’ replacement). Countering Justice Kavanaugh’s president analogy, Judge Wilkins provided the analogy of replacing older medicines or other classes of substances. *See id.* at 466 (providing examples of substances Section 612 applies to that are not replaced just once). In Judge Wilkins’ view, when new, more advanced classes of substances arrive, these substances continually replace each other. *See id.* (explaining reasoning for continual replacement theory).

136. *Id.* at 467 (noting Section 612 uses “substitute” and “alternative” in its text and title).

137. *Id.* at 467-68 (explaining majority’s ruling did not allow EPA to reduce danger to humans and environment to “maximum extent practicable”).

138. *Id.* at 469 (citing *City of Arlington*, 569 U.S. 290 (2013)) (emphasizing principle that congressional silence is intentional and meant to convey discretion to agency).

139. *See Mexichem Fluor*, 866 F.3d at 469 (explaining legislative history did not provide “sufficient clarity” that EPA’s interpretation was against Congress’ goals). Judge Wilkins stated even though the EPA released an earlier statement indicating they did not have the authority to create the 2015 rule, the EPA’s interpretation of a statute is not necessarily the same as Congress’ interpretation. *See id.* at 469 (demonstrating EPA’s prior statements’ little importance in Section 612’s interpretation).

140. *See id.* at 470 (noting “considerable weight” should be given to EPA’s interpretation).

ron part one.¹⁴¹ On this basis, Judge Wilkins opined that the 2015 rule should have been upheld.¹⁴²

V. SHOULD WEBSTER HAVE BEEN INVOLVED?

Both Justice Kavanaugh and Judge Wilkins agreed the EPA's removal of HFCs from the safe substitute list was not arbitrary and capricious, and prior case law supports their conclusion.¹⁴³ Additionally, while Judge Wilkins did not address the retroactive disapproval theory, Justice Kavanaugh relied on precedent in recommending this theory to the EPA.¹⁴⁴ While the majority's decision might hurt the environment, Justice Kavanaugh's opinion upheld fundamental constitutional principles and adhered to precedent.¹⁴⁵ Judge Wilkins' dissenting opinion, though well-intentioned, slightly overstepped the bounds of statutory interpretation.¹⁴⁶ Due to a slow-moving Congress, this brings judges and Americans to an unfortunate choice: tradition or environmental protection.¹⁴⁷

141. *See id.* at 471 (stating EPA's definition of "replace" was reasonable). Judge Wilkins noted the EPA's authority to regulate is not indefinite, because once ozone-depleting substances are no longer in use, the EPA's authority is void. *See id.* at 472 (noting entities were still using ozone-depleting substances).

142. *See id.* at 473 (summarizing dissenting opinion).

143. *See State Farm*, 463 U.S. 29, 43 (1983) (supporting Judge Wilkins and Justice Kavanaugh's decision because they considered relevant factors). The EPA considered all parts of the issue and relevant factors, offered a valid explanation for the rule, and came to a plausible conclusion. *See Mexichem Fluor*, 866 F.3d at 462-64 (describing why removing HFCs from safe substitute list was not arbitrary and capricious).

144. For further discussion of the retroactive disapproval theory, see *supra* notes 94-99 and accompanying text.

145. For further discussion of fundamental constitutional principles, namely separation of powers, see *supra* notes 69-92 and accompanying text.

146. For further discussion of why Justice Kavanaugh believed Judge Wilkins' interpretation seemed to stretch the statute, see *supra* notes 112-118 and accompanying text.

147. *See* Dana Nuccitelli, *Kavanaugh's Views on EPA's Climate Authority are Dangerous and Wrong*, THE GUARDIAN (Sep. 10, 2018), <https://www.theguardian.com/environment/climate-consensus-97-per-cent/2018/sep/10/kavanaughs-views-on-epas-climate-authority-are-dangerous-and-wrong> (explaining implications of strict constitutionalist views). While Justice Kavanaugh correctly stated that Congress should create new laws, waiting for Congress to act leaves the environment without protection from new threats. *Id.* (highlighting strict interpretation's negative effect on environment).

A. Framework (n.): “a basic conceptional structure (as of ideas)”¹⁴⁸

Both Justice Kavanaugh and Judge Wilkins provided valid interpretations of the word “replace,” as supported by esteemed dictionaries and common experience.¹⁴⁹ “Replace” seems ambiguous given its two acceptable meanings, but Justice Kavanaugh’s argument that the statute was proposed to regulate ozone-depleting substances is compelling.¹⁵⁰ *Utility Air Regulatory Group* emphasized the importance of interpreting statutory intent by looking at the entire statutory framework.¹⁵¹ Justice Kavanaugh not only adhered to statutory interpretation principles, but also to Supreme Court precedent by emphasizing the purpose of the statute as a whole was to replace ozone-depleting substances.¹⁵²

Additionally, while Judge Wilkins’ argument that HFCs do not “reduce[] the overall risk to human health and the environment” is persuasive, nothing in the statute specifically suggests the EPA holds authority to regulate safe substitutes once manufacturers have ceased reliance on ozone-depleting substances.¹⁵³ The process of removing substances from the safe substitute list discussed in the statute makes no mention of this authority.¹⁵⁴ While congressional silence can be interpreted to leave discretion to an agency, clear legislative history and the context of this statute justifies Justice Kavanaugh’s interpretation.¹⁵⁵

Despite ultimately reaching the accurate interpretation of clear statutory intent, Justice Kavanaugh’s brief statement that the EPA’s interpretation would still be unreasonable under *Chevron* part two

148. *Framework*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “framework”).

149. See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 456, 466 (D.C. Cir. 2017) (providing both Justice Kavanaugh’s and Judge Wilkins’ definitions of “replace”).

150. See 42 U.S.C. § 7671k (describing act’s purpose to prevent ozone-depleting substances’ usage).

151. See *Util. Air. Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) (discussing key *Chevron* principles).

152. See *id.* (applying *Chevron* principles Justice Kavanaugh relied on). For further discussion of CAA’s purpose, see *supra* notes 43-46 and accompanying text.

153. See *Mexichem Fluor*, 866 F.3d at 454 (stating Judge Wilkins’ argument on HFCs); see also 42 U.S.C. § 7671k (2012) (detailing language in CAA’s Section 612).

154. See § 7671k(d) (discussing petition process).

155. See *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013) (noting if legislative history is unclear, then discretion is inferred). *But see* *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 271 F.3d 262, 269 (D.C. Cir. 2001) (discussing importance of clear legislative history in interpretation); *Util. Air Regulatory Grp.*, 573 U.S. at 324-25 (discussing EPA’s lack of authority without strong authorization evidence).

appears to contradict key *Chevron* principles.¹⁵⁶ Because intent was clear, reasonableness was not at issue in this case.¹⁵⁷ There was ultimately no need to interpret part two of *Chevron*'s framework, which means Justice Kavanaugh's interpretation of reasonableness does not change his valid conclusion.¹⁵⁸

B. History (n.): "a chronological record of significant events . . . often including an explanation of their causes"¹⁵⁹

Although intent is clear from the statutory framework, the CAA's legislative history further supports Justice Kavanaugh's argument.¹⁶⁰ Judge Wilkins is correct that the legislative history does not speak to the precise question at issue in *Mexichem Fluor*, but Judge Wilkins under-emphasized the legislature's focus on regulating only ozone-depleting substances.¹⁶¹ Narrowly focusing on Section 612's legislative history is favorable to Judge Wilkins because the EPA's statements cited by Justice Kavanaugh only slightly supports his view.¹⁶² While the EPA stated that it did have the authority to regulate non-ozone-depleting substances, it also stated "replace" was a continual process.¹⁶³ Regardless of these conflicting viewpoints, Judge Wilkins weakened this evidence by correctly

156. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984) (explaining reasonableness prong); see also *Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 223 (1986) (discussing general rule of deference). Courts give deference to an agency's interpretation so long as the interpretation is "permissible," which is a low standard. See *Chevron*, 467 U.S. at 843 (demonstrating low bar for second *Chevron* prong). If intent was unclear here, then the EPA's interpretation was reasonable because HFCs' regulation achieves the Act's overall goal of reducing dangerous substances in the environment, and the EPA is in a better position than the court to determine reasonable steps to achieve this goal. See 42 U.S.C. § 7401 (2012) (noting statute's purpose); see also *Michigan v. EPA*, 135 S. Ct. 2699, 2718 (2015) (Kagan, J., dissenting) (emphasizing agency is in better position to interpret its role when intent is ambiguous).

157. See *Chevron*, 467 U.S. at 843 (indicating no need to interpret reasonableness if *Chevron* part one is met).

158. For further discussion of the clear statutory intent in *Mexichem Fluor*, see *supra* notes 112-123 and accompanying text.

159. *History*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of "history").

160. For further discussion of the CAA's legislative history, see *supra* notes 50-52 and accompanying text.

161. See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 465 (D.C. Cir. 2017) (describing Judge Wilkins' view on legislative history); see also S. 1630, 101st Cong. (filed in House, Oct. 26, 1990) (Conf. Rep.) (noting Congress' intentional narrowing of CAA to only address ozone-depleting substances).

162. For further discussion of EPA's comments regarding Section 612, see *supra* notes 53-55 and accompanying text.

163. For further discussion of the EPA's statements, see *supra* notes 53-55 and accompanying text.

pointing out that the EPA's interpretation is not necessarily correlated with Congress' view.¹⁶⁴ What matters is congressional intent, which unambiguously granted the EPA the exclusive authority to regulate ozone-depleting substances based on the CAA's legislative history.¹⁶⁵

In a global context, the Montreal Protocol was influential in Section 612's creation.¹⁶⁶ This Protocol only regulated ozone-depleting substances.¹⁶⁷ The Kigali Amendment, which sought to regulate HFCs, was formed in 2016, years after Section 612's adoption.¹⁶⁸ This context further supports Justice Kavanaugh's view because when Section 612 was formed, the focus was only on curtailing ozone-depleting substances' use.¹⁶⁹

C. Power (n.): "ability to act or produce an effect"¹⁷⁰

Taking a textualist view, Justice Kavanaugh's interpretation is "correct" based on the separation of powers.¹⁷¹ If agencies receive too much authority, they can essentially make laws without bicameralism and presentment, which violates fundamental parts of American democracy.¹⁷² "When agencies strive to find ambiguity in clarity, they bypass these [constitutional] safeguards and exceed the bounds of their authority."¹⁷³ Justice Kavanaugh prevented this by adhering to unambiguous congressional intent instead of stretching the statute's reading to make it ambiguous.¹⁷⁴ He also adhered

164. For further discussion of Judge Wilkins' view of EPA's comments, see *supra* note 139 and accompanying text.

165. For further discussion of EPA's authority to regulate ozone-depleting substances, see *supra* notes 50-51 and accompanying text.

166. For further discussion of Montreal Protocol's purpose, see *supra* notes 63-65 and accompanying text.

167. For further discussion of the Kigali Amendment, see *supra* notes 66-68 and accompanying text.

168. For further discussion of the Kigali Amendment's context, see *supra* notes 66-68 and accompanying text.

169. See *1990 Clean Air Act Amendment Summary: Title VI*, EPA, <https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary-title-vi> (last visited Dec. 14, 2018) (describing 1990 CAA Amendment's sole focus on ozone-depleting substances).

170. *Power*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of "power").

171. For further discussion of separation of powers, see *supra* notes 69-74 and accompanying text.

172. See Susannah Landes Foster, *When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency*, 96 GEO. L.J. 1347, 1360 (Apr. 2008) (discussing problem with agency overstepping authority).

173. *Id.* at 1360 (reviewing statutory interpretation under *Chevron*).

174. See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017) (implementing separation of powers principles).

to landmark separation of powers cases like *Marbury v. Madison*,¹⁷⁵ *Youngstown Sheet & Tube Co. v. Sawyer*,¹⁷⁶ and *Hamdan v. Rumsfeld*,¹⁷⁷ which emphasize the Court's lack of lawmaking power.¹⁷⁸

The Supreme Court case *Michigan v. EPA* presents strong arguments both for and against applying strict statutory interpretations to environmental agencies.¹⁷⁹ Ultimately, the majority took a textualist view, which means Justice Kavanaugh's interpretation is consistent with this Supreme Court precedent.¹⁸⁰ Strict interpretation, while slowing progress in the environmental context, ensures all agencies do not abuse their power by taking on Congress' role.¹⁸¹

While it is correct that the environment is changing, Justice Kavanaugh indicated these changes reflect a need for a transformation in Congress, not in traditional constitutional principles.¹⁸² The current congressional makeup transformed the meaning of "partisan" to an "us vs. them" mentality.¹⁸³ A more active Congress regularly updating environmental laws prevents the impossible choice between tradition and environmental protection.¹⁸⁴ Courts

175. 5 U.S. 137 (1803) (applying separation of powers principles to determine court's role).

176. 343 U.S. 579 (1952) (deciding executive's power in war context).

177. 548 U.S. 557 (2006) (discussing separation of powers principles).

178. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 636 (2006) (applying separation of powers to military actions); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (describing court's incapability to make law); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (emphasizing courts can only interpret law).

179. For further discussion of the arguments for and against applying strict statutory interpretations to environmental agencies, *see supra* notes 87-92 and accompanying text.

180. *See Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (holding EPA exceeded authority based on strict constitutionalist view).

181. *See Foster, supra* note 172 at 1367 (acknowledging benefits of stricter interpretation of agency's role). "[A]gencies should face some constraint in their interpretation, short of judicial review, because agencies, like courts, are not as democratically accountable and are not constrained by the same constitutional safeguards when they make law as is Congress." *Id.* (explaining lack of elections for agencies indicates they might not adequately represent population's views).

182. *See Plumer, supra* note 91 (discussing congressional inaction in environmental context).

183. *See Jay Cost, Why Congress Can't Manage to Get Anything Done*, N.Y. POST (Apr. 22, 2018), <https://nypost.com/2018/04/22/why-congress-cant-manage-to-get-anything-done/> (attributing general lack of congressional action to "low partisanship," which loses sight of broader goals to win small battles). "Members of Congress are too hung up on low partisanship – thwarting basic functions of government for the sake of scoring an edge in the next election." *Id.* (discussing inability to achieve common goals based on "us vs. them" mentality).

184. *See Maya K. Van Rossum, Trump Won't Protect the Environment – Congress Must*, THE HILL (June 9, 2017), <https://thehill.com/blogs/pundits-blog/energy-environment/337148-trump-wont-protect-the-environment-congress-must> (discussing Congress' ability to affect climate change in spite of Trump's inaction); *see also* Michael J. Coren, *What It Will Take To Get Republicans and Democrats to Agree on*

cannot rescue the environment without the help of these laws.¹⁸⁵ Demonstrating sympathy, Justice Kavanaugh accurately pointed out ways in which the EPA could regulate HFCs and presented the EPA with the opportunities to win this case on remand.¹⁸⁶

D. Dictionary (n.): “A reference source in print or electronic form containing words”¹⁸⁷

Justice Kavanaugh’s dictionary use is supported by judicial opinions since the origin of the court system.¹⁸⁸ The definition of the word “replace” used by the majority is “correct” based on Merriam-Webster, but regardless of the “correct” interpretation, boiling down a dangerous environmental hazard to one word in a statute does not seem like the best way to resolve environmental issues.¹⁸⁹ Like the subheadings of this Note, words hold deeper meanings than their dictionary definitions, and resting major environmental decisions on interpreting a single word could delay important environmental initiatives.¹⁹⁰

Because Congress has not formulated environmental laws since the 1990’s, Justice Kavanaugh’s interpretation style cannot take the sole blame for this issue.¹⁹¹ “[B]ecause [Justice Kavanaugh] considers global warming to be charged with a ‘huge policy imperative,’ he [is] skeptical that the Environment Protection Agency (or the

Global Warming, QUARTZ (May 27, 2018), <https://qz.com/1290377/what-it-will-take-to-get-republicans-are-democrats-to-agree-on-climate-change/> (depicting graphically earlier bipartisan notions to protect environment and Congress’ current partisan emphasis, which negatively impacts environment).

185. For further discussion of separation of powers, see *supra* notes 69-92 and accompanying text.

186. See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d. 451, 461 (D.C. Cir. 2017) (providing different congressionally approved methods to achieve similar results).

187. See *Dictionary*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “dictionary”).

188. See Liptak, *supra* note 2 (discussing dictionary use’s prevalence in court opinions).

189. See Nuccitelli, *supra* note 147 (describing strict statutory interpretation’s impact on environment because of congressional inaction).

190. See Liptak, *supra* note 2 (explaining dictionary definitions are not always consistent with congressional intent). “It [is] easy to stack the deck by finding a definition that does or does not highlight a nuance that you’re interested in.” *Id.* (indicating possibility of finding dictionary definition for any viewpoint).

191. See Plumer, *supra* note 91 (discussing lack of congressional environmental action since 1990s). Richard Lazarus, a Harvard Law School Professor, stated, “Congress stopped making clean air laws after 1990, so the E.P.A. has to work with increasingly tenuous statutory language.” *Id.* (illustrating need to stretch older laws to fit changing environmental circumstances).

executive branch) should be fighting it alone.”¹⁹² Justice Kavanaugh properly put Congress on notice to choose their words carefully when drafting statutes and to create laws in the environmental context.¹⁹³ There would be no need to consult dictionaries and rest major decisions on these interpretations if Congress laid out new regulations addressing environmental problems that were not contemplated in the 1990’s.¹⁹⁴

VI. MERRIAM-WEBSTER’S FAR-REACHING IMPACT

One Merriam-Webster definition could impact the environment and the law.¹⁹⁵ The way in which the definition was employed in *Mexichem Fluor* also helps to predict the future of the Supreme Court with Justice Kavanaugh on the bench and the fate of *Chevron*’s framework.¹⁹⁶ *Mexichem Fluor* is more than one narrow decision, as it reflects a greater controversy over agency authority and the future of the environment.¹⁹⁷

A. Environment (n.): “the circumstances, objects, or conditions by which one is surrounded”¹⁹⁸

The D.C. Circuit’s holding could negatively impact the environment due to HFCs’ harm to human health, role in increasing

192. Robinson Meyer, *Brett Kavanaugh: ‘The Earth is Warming’*, THE ATLANTIC (July 11, 2018), <https://www.theatlantic.com/science/archive/2018/07/what-would-kavanaugh-mean-for-the-environment/564830/> (noting Justice Kavanaugh’s hesitancy toward liberal interpretation of executive branch agency’s powers).

193. *See id.* (discussing importance of congressional action in environmental law); *see generally* Amber Phillips, *Congress’s Long History of Doing Nothing on Climate Change, in 6 Acts*, THE WASH. POST (Dec. 1, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/01/congresss-long-history-of-inaction-on-climate-change-in-6-parts/?noredirect=con&utm_term=.955b47fa41e1 (outlining Congress’ unsuccessful attempts to address climate change).

194. *See* Plumer, *supra* note 91 (emphasizing difficult task to apply older environmental laws to newly arising environmental issues); *see also* *Congress and Climate Change*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/congress-and-climate-change/> (last visited Dec. 14, 2018) (noting Congress’ reliance on 1970 CAA to address climate change even though this issue was likely not known to this Act’s framers).

195. *See* *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 458-59 (D.C. Cir. 2017) (explaining importance of word “replace”).

196. For further discussion of Justice Kavanaugh’s impact on the Supreme Court, *see infra* notes 214-223. For further discussion of the controversy surrounding *Chevron*’s framework, *see supra* notes 86-92.

197. For further discussion of *Mexichem Fluor*’s impact on agency authority, *see infra* notes 232-243. For further discussion of this case’s impact on the environment, *see infra* notes 198-213.

198. *See Environment*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “environment”).

natural disasters, and contribution to global warming.¹⁹⁹ The United States placed twenty-seventh overall in environmental protection and showed notable weakness in preventing greenhouse gas emissions.²⁰⁰ As one of the first countries required to phase out HFCs under the Kigali Amendment, the United States should be leading in environmental protection in this area.²⁰¹ *Mexichem Fluor's* continued allowance of HFCs' use does not help to improve the United States' standing.²⁰²

In addition to the United States relatively poor environmental progress, analysts predict a worldwide increase in HFC demand as poorer countries develop.²⁰³ This expected increase is likely due to a surge in demand for air conditioners and refrigerators in poorer countries.²⁰⁴ The United States should cut back on using HFCs, given this expected increase, but *Mexichem Fluor* thwarts this effort.²⁰⁵

Some circumstances will ameliorate the potentially negative impacts of *Mexichem Fluor*.²⁰⁶ Most importantly, the Kigali Amendment specifically commits the United States to decreasing HFC use.²⁰⁷ Although President Trump has not supported many environmental efforts, the administration seems to support the Kigali Amendment.²⁰⁸ Big companies also implore President Trump to

199. For further discussion of HFCs' harmful effects, see *supra* notes 8-9 and accompanying text.

200. See 2018 *EPI Report*, ENVTL. PERFORMANCE INDEX, <https://epi.envirocenter.yale.edu/2018/report/category/hlt> (last visited Dec. 14, 2018) (describing study of 180 countries and highlighting United States' comparatively weak performance).

201. See *The Kigali Amendment to the Montreal Protocol: Another Global Commitment to Stop Climate Change*, *supra* note 66 (stating Kigali Amendment requires HFCs be phased out by 2019).

202. See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017) (allowing continued use of HFCs).

203. See Stratospheric Protection Division, *Benefits of Addressing HFCs under the Montreal Protocol*, U.S. ENVTL. PROTECTION AGENCY (July 2016), https://www.epa.gov/sites/production/files/2016-07/documents/benefits_of_addressing_hfcs_under_the_montreal_protocol_2016.pdf (describing poorer countries need for products that generally contain HFCs).

204. See *id.* (discussing refrigeration's reliance on HFCs).

205. See *Mexichem Fluor*, 866 F.3d at 464 (allowing continued HFC use in certain circumstances).

206. See *The Kigali Amendment to the Montreal Protocol: Another Global Commitment to Stop Climate Change*, *supra* note 66 (discussing Kigali Amendment to reduce HFC use).

207. See *id.* (outlining Kigali Amendment's goals).

208. See *US Notifies UN of Paris Climate Deal Pullout*, BBC NEWS (Aug. 5, 2017), <https://www.bbc.com/news/world-us-canada-40829987> (discussing Trump's pull-out of Paris Accord which in part attempts to limit greenhouse gas emissions). *But see* American Bar Association, *Chapter 26: Climate Change, Sustainable Development*,

remain a part of the Kigali Amendment, as the Amendment will create thirty-three thousand job opportunities by 2027 if ratified.²⁰⁹

Additionally, many companies shifted from HFC use before this ruling in anticipation of required HFC replacement.²¹⁰ Further, California is still implementing portions of the SNAP policy into a new state program designed to combat HFCs, and one commentator predicted the other eleven states that supported the EPA's rule will follow in California's footsteps.²¹¹ Addressing *Mexichem Fluor* and the importance of state environmental regulations, Senator Lara of California stated, "This federal court decision on super-polluting refrigerants is the latest sign that California cannot look to the federal government for help in reaching our clean air goals."²¹² *Mexichem Fluor* thus inspired state courts to take action in the environmental context.²¹³

and Ecosystems, 2017 ABA ENV'T ENERGY, & RESOURCES L.: YEAR IN REV. 321, 323 (2017) (discussing Trump's commitment to Kigali Amendment); *see generally* Amanda Reilly, *Trump Admin Mounts Defense of Obama's HFC Crackdown*, E&E NEWS (Feb. 17, 2017), <https://www.eenews.net/stories/1060050272/print> (noting Trump administration's support for Obama's plans to decrease HFC use).

209. *See* Justin Worland, *Big Business Wants to Stop Trump from Leaving This Other Climate Deal*, TIME (May 3, 2018), <http://time.com/5264800/donald-trump-kigali-amendment-hfcs/> (noting jobs will increase as part of Kigali Amendment).

210. *See* Ron Rajecki, *HFC Ban Off Again as Court Denies Petition for Review*, THE NEWS (Feb. 12, 2018), <https://www.achrnews.com/articles/136469-hfc-ban-off-again-as-court-denies-petition-for-review> (discussing *Mexichem Fluor*'s holding in light of recent attempts to reduce HFCs); *see also* *US Court of Appeals Decision Regarding the EPA SNAP Rule*, HEATCRAFT (2017), <http://www.heatcraft.com/news/2017/decision-regarding-epa-snap-rule-aug-2017/> (requiring manufacturers' continued compliance with EPA's 2015 rule despite *Mexichem Fluor*'s holding).

211. *See* Michael Garry, *California Reacts to Court Ruling on HFCs*, R744.COM (Feb. 5, 2018), http://www.r744.com/articles/8097/carb_reacts_to_court_ruling_on_hfcs (discussing California's disappointment in court's decision in *Mexichem Fluor* and work toward implementing state regulation to address HFCs); *see also* Michael Garry, *Honeywell to Appeal SNAP Case to Supreme Court*, HYDROCARBONS21 (Feb. 7, 2018), http://hydrocarbons21.com/articles/8101/honeywell_to_appeal_snap_case_to_supreme_court (noting eleven states supported EPA's position and could adopt state regulation to ameliorate *Mexichem Fluor*'s impact).

212. Michael Garry, *California Reacts to Court Ruling on HFCs*, R744.COM (Feb. 5, 2018), http://www.r744.com/articles/8097/carb_reacts_to_court_ruling_on_hfcs (quoting Senator Lara and other California officials expressing their disappointment in *Mexichem Fluor*'s decision).

213. *See id.* (stating *Mexichem Fluor* served as impetus for states to act).

B. Supreme Court (n.): “the highest judicial tribunal in a political unit”²¹⁴

Justice Kavanaugh’s opinion not only affects the environment, but also predicts the Supreme Court’s future.²¹⁵ As demonstrated in *Mexichem Fluor*, Justice Kavanaugh strictly interprets the Constitution and will likely overrule environmental regulations due to a lack of explicit congressional authorization.²¹⁶ Despite this viewpoint, Justice Kavanaugh expressed empathy with the EPA in *Mexichem Fluor*, and this empathy manifested itself in some of the Justice Kavanaugh’s prior decisions that favored the EPA.²¹⁷ While some commentators expressed concern regarding Justice Kavanaugh’s strict interpretation, it does not seem that he is “single-mindedly hostile toward environmental lawmaking.”²¹⁸ In a confirmation hearing, Justice Kavanaugh stated, “I’m not a skeptic of regulation at all. I’m a skeptic of unauthorized regulation, illegal regulation that is outside the bounds of what the laws passed by the Congress have said.”²¹⁹ While it is likely that Justice Kavanaugh is a strong conservative against a more liberal interpretation of environmental statutes, his approval does not paint an entirely grim picture of the environment because the record reveals occasional votes in favor of the EPA.²²⁰

What is perhaps most important is that Justice Kavanaugh was nominated to replace Justice Kennedy, a notorious swing vote on the Supreme Court.²²¹ The addition of Justice Kavanaugh’s mainly

214. *Supreme Court*, WEBSTER’S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of “Supreme Court”).

215. See Conlon, *supra* note 19 (informing about Justice Kavanaugh’s confirmation to Supreme Court).

216. See Plumer, *supra* note 91 (discussing Justice Kavanaugh’s prior cases demonstrating strict statutory interpretation). In previous decisions, Justice Kavanaugh emphasized the importance of congressional authorizations in environmental cases. See *id.* (explaining Justice Kavanaugh’s decisions generally stress congressional action). In one instance, the Supreme Court overturned Justice Kavanaugh’s decision by a six to two vote where some conservative justices favored a liberal interpretation. See *id.* (recounting case that overturned Justice Kavanaugh’s decision).

217. See *id.* (detailing Justice Kavanaugh’s prior decisions in favor of EPA).

218. *Id.* (quoting Harvard Law Professor Richard J. Lazarus).

219. See Ellen M. Gillmer, *Kavanaugh Defends His Environmental Record*, E&E NEWS (Sept. 5, 2018), <https://www.eenews.net/stories/1060095913> (demonstrating Justice Kavanaugh’s focus on separation of powers).

220. See *id.* (noting Justice Kavanaugh’s departure from Obama’s adoption of older environmental laws to address new environmental issues).

221. See Meyer, *supra* note 192 (emphasizing importance of Justice Kennedy’s swing vote). “Kennedy voted in the majority in every environmental case in front of the court except one” *Id.* (discussing Justice Kennedy’s rulings in environmental cases).

conservative views indicate Justice Kennedy's role as swing vote will likely be left unfulfilled, resulting in a consistent conservative majority.²²² Justice Kavanaugh's potential impact on the Supreme Court in the environmental context comes down to Congress: if Congress enacts more environmental laws, Justice Kavanaugh will likely rule in favor of the EPA.²²³

C. Future (adj.): "that is to be"²²⁴

On January 26, 2018, the D.C. Circuit denied the EPA's petition for rehearing, and Judge Wilkins again dissented.²²⁵ Three manufacturers who intervened to defend the 2015 rule in *Mexichem Fluor* then petitioned for certiorari to the Supreme Court.²²⁶ On October 9, 2018, the Supreme Court denied certiorari.²²⁷ Due to this denial and because the D.C. Circuit has exclusive jurisdiction over this issue, it "can never be litigated again in any court of appeals."²²⁸

In light of *Mexichem Fluor*'s permanent decision, the EPA rescinded its entire 2015 rule.²²⁹ The EPA indicated that it agreed with *Mexichem Fluor*'s holding and altered its policies to be more

222. *See id.* (noting Chief Justice John Roberts will likely hold the swing vote instead of Justice Kavanaugh).

223. For further discussion of Justice Kavanaugh's willingness to rule in favor of the EPA when congressional intent is clear, see *supra* note 176 and accompanying text.

224. *Future*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of "future").

225. *See Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 464 (D.C. Cir. 2017) (rehearing en banc denied) (denying rehearing of *Mexichem Fluor*).

226. *See generally Honeywell Int'l, Inc. v. Mexichem Fluor*, 139 S.Ct. 322 (2018), *petition for cert. filed*, (No. 17-1703) (discussing reason for applying for certiorari). Honeywell International and Chemours, who wrote separately from the other petitioner, Natural Resources Defense Council, spent over one billion dollars investing in alternatives to HFCs. *See id.* at 4. (describing reasoning for petition). They claimed this investment was valueless because of *Mexichem Fluor*'s holding. *See id.* (claiming proper reliance on statutory interpretation principles in deciding to make this investment).

227. *See Nat. Res. Def. Council v. Mexichem Fluor, Inc.*, 139 S.Ct. 322 (2018), *cert. denied*, (No. 18-2) (discussing reasons for denying certiorari).

228. Reply Brief for Petitioner at 1-2, *Nat. Res. Def. Council v. Mexichem Fluor, Inc.*, 2018 WL 3210813, at *1 (2018) (describing D.C. Circuit's special sole jurisdiction over this issue).

229. *See Protection of Stratospheric Ozone: Notification of Guidance and a Stakeholder Meeting Concerning the Significant New Alternatives Policy (SNAP) Program*, 83 Fed. Reg. 18,433, 18,443-44 [hereinafter EPA's Revocation of 2015 rule] (Apr. 27, 2018) (to be codified at 40 C.F.R. pt. 82) (stating EPA's new HFC policy after *Mexichem Fluor*).

consistent with this holding.²³⁰ The EPA stated it would not apply HFCs to the 2015 Rule but would revisit this determination based on stakeholders' responses.²³¹

Based on this complete revocation, eleven states are suing the EPA.²³² The spearhead of this suit, New York Attorney General Barbara Underwood, "accused the EPA under President Donald Trump of trying 'to gut critical climate protection rules through the backdoor' by revoking the 2015 limits rather than going through a public review process."²³³ These states assert the EPA should have provided public opportunity for comment before abandoning the entire rule, especially since *Mexichem Fluor* only vacated the rule in part.²³⁴ If these allegations are correct, it could undermine the United States' achievement of the Kigali Amendment's goals.²³⁵

D. Law (n.): "a binding custom or practice of a community"²³⁶

Mexichem Fluor signals to future cases in the D.C. Circuit that clear delegation of authority is necessary to survive a *Chevron* analysis, a high and difficult burden for the EPA to meet.²³⁷ It will likely be unacceptable to rely on older statutes to address new environmental problems.²³⁸ Other circuits may approach this differently and interpret older laws' intent more liberally, but *Mexichem Fluor* generated pressure on Congress to expand environmental protec-

230. See *id.* at 84,443 (expressing agreement with court's decision and altering rule to support *Mexichem Fluor*'s holding).

231. See *id.* at 18,443-44 (explaining and applying *Mexichem Fluor*'s ruling). The EPA admitted there was no language in the 1994 rule that specifically and narrowly permitted their 2015 rule, which is consistent with *Mexichem Fluor*. See *id.* (applying *Mexichem Fluor* to new rule).

232. See Jonathan Stempel, *U.S. States Sue EPA, Pruitt for Rolling Back Climate Change Rule*, REUTERS (June 27, 2018), <https://www.reuters.com/article/us-usa-climatechange-lawsuit/u-s-states-sue-epa-pruitt-for-rolling-back-climate-change-rule-id-USKBN1JN2UO> (discussing eleven lawsuits over EPA's revocation of 2015 rule).

233. See *id.* (explaining reasoning for states' suits against EPA).

234. See Jon Fingas, *11 State Sue EPA Over Attempt to Reverse Ban on Ozone-harming HFCs*, ENGADGET (June 27, 2018), <https://www.engadget.com/2018/06/27/states-sue-epa-over-hfc-rollback/> (stating *Mexichem Fluor* did not overrule 2015 rule banning replacement of ozone-hostile substances with HFCs).

235. See Marianne Lavelle, *11 States Sue EPA's Scott Pruitt Over Climate Super-Pollutants*, INSIDE CLIMATE NEWS (June 28, 2018), <https://insideclimatenews.org/news/27062018/hfcs-global-warming-climate-pollution-lawsuit-trump-epa-regulations-kigali-amendment> (discussing lawsuits' implications on Kigali Amendment and overall environmental protection).

236. *Law*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d. ed. 1993) (providing definition of "law").

237. See *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460-61 (D.C. Cir. 2017) (applying strict interpretation of CAA's intent).

238. See Plumer, *supra* note 91 (stating no new environmental laws have been passed since 1990s).

tion laws.²³⁹ Additionally, this case demonstrates the impact of *Chevron's* ambiguity, as judges define words and interpret deference differently.²⁴⁰ The Supreme Court needs to address *Chevron's* application more clearly to promote uniformity in its application.²⁴¹ Congress also needs to be clearer in its delegation to agencies.²⁴² In sum, *Mexichem Fluor* not only impacts future cases and the environment, but also foreshadows an era of environmental conservatism, given the Supreme Court's new makeup with Justice Kavanaugh on the bench.²⁴³

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239. See Slattery, *supra* note 86 (discussing different results based on liberal or strict interpretation style in *Massachusetts v. EPA*); see also *Mexichem Fluor*, 866 F.3d at 460 (emphasizing Congress' lack of environmental laws addressing climate change).

240. See Slattery, *supra* note 86 (discussing several cases' different results under same statute because of *Chevron* confusion). This problem extends beyond just environmental cases. See *id.* (recounting other cases that *Chevron's* confusion impacted). Demonstrating this principle, Slattery provided the example that "two appellate courts disagreed about the definition of an 'applicant' under the Equal Credit Opportunity Act." *Id.* (providing specific example of how one word can affect case holdings because of *Chevron's* confusion).

241. See *id.* (emphasizing need for Supreme Court to address *Chevron* more clearly). In noting the importance of the court's role in regulating agencies, Slattery posed the question, "If the courts will not, who will regulate the regulators?" *Id.* (noting Court's role of keeping agencies' power in check).

242. See Nicholas R. Bednar & Kristin E. Hickman, *Chevron's Inevitability*, 85 GEO. WASH. L. REV. 1392, 1453-56 (Sept. 2017) (attributing *Chevron's* confusion to Congress' poor delegation instead of to deference standard).

243. For further discussion of the impact in these areas, see *supra* notes 195-243 and accompanying text.

* J.D. Candidate, 2020, Villanova University Charles Widger School of Law; B.S., Psychology, minor in Spanish, 2017, St. Joseph's University. I would like to thank my family for their constant love and support. I would also like to thank the members of the *Villanova Environmental Law Journal* for their guidance throughout the writing process.