IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 18-2121 (L)

18-2670 (Con)

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND STATE OF VERMONT,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND ANDREW R. WHEELER, IN HIS CAPACITY AS ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

On Petition For Review of a Rule of the
U.S. Environmental Protection Agency

PAGE PROOF BRIEF OF U.S. ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

This case concerns a rule issued by the United States Environmental Protection Agency ("EPA" or "the Agency") requiring those who supply, use, and trade mercury and mercury-added products in the United States, to periodically report information on their products. Petitioners argue that EPA should require more entities to report under its rule and should require more information from reporting entities. But Congress granted EPA broad discretion to set those requirements. And EPA reasonably exercised that discretion to achieve its statutory obligations in an efficient and, as required by Congress, non-duplicative manner. The challenged rule should therefore be upheld and the petitions for review denied.

STATEMENT OF JURISDICTION

Petitioners the Natural Resources Defense Council ("NRDC") and the State of Vermont ("Vermont") challenge the final rule issued by Respondent EPA entitled "Reporting Requirements for the TSCA Mercury Inventory," 83 Fed. Reg. 30,054 (June 27, 2018). This Court has jurisdiction under section 19(a) of the Toxic Substances Control Act ("TSCA" or "the Act"), 15 U.S.C. § 2618(a)(1)(A).

STATEMENT OF THE ISSUES

Under TSCA, EPA must publish a triennial "inventory of mercury supply, use, and trade in the United States." *Id.* § 2607(b)(10)(B). "To assist" EPA in the production of that inventory, Congress required that "any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a

manufacturing process" shall report to EPA "at such time and including such information" as the Agency "determines by rule." *Id.* § 2607(b)(10)(D)(i). Acting pursuant to that highly deferential language, EPA issued the mercury inventory reporting rule that Petitioners now challenge.

This case presents three issues:

I. Given that EPA has broad discretion under TSCA to "determine[] by rule" what data to collect from manufacturers of mercury and mercury-added products, 15 U.S.C. § 2607(b)(10), that EPA *must* exercise its administrative judgment to avoid "duplicative" reporting requirements, *id.* § 2607(a)(5)(A); *see also* § 2607(b)(10)(D)(ii), and that Congress directed EPA to identify "manufacturing processes or products that intentionally add mercury," *id.* U.S.C. § 2607(b)(10)(C)(i), did EPA act consistently with the statute and reasonably in establishing reporting requirements that focus on the original insertion of mercury into mercury-added products, and that avoid redundant reporting?

II. Did EPA properly reject Petitioners' argument that TSCA *requires* potentially duplicative reporting by manufacturers of mercury and mercury-added products?

III. Did EPA act reasonably in eliminating overlapping reporting requirements for mercury manufacturers who must report under multiple programs, and

adequately explain both the rationale for its approach and its response to rulemaking comments?

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Lautenberg Act Amendments and TSCA section 8(b)(10)

"Congress enacted TSCA in 1976 with the express purpose of limiting the public health and environmental risks associated with exposure to and release of toxic chemical substances and mixtures." *Physicians Comm. for Responsible Med. v. Johnson*, 436 F.3d 326, 327–28 (2d Cir. 2006) (citing 15 U.S.C. § 2601). Congress amended TSCA in 2016 by passing the Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, 130 Stat. 448 ("Lautenberg Act Amendments").

Among other revisions, the Lautenberg Act Amendments added to TSCA the statutory provision at issue here: section 8(b)(10), 15 U.S.C. § 2607(b)(10). That section provides that by "April 1, 2017 and every 3 years thereafter, the [EPA] Administrator shall carry out and publish in the Federal Register an inventory of mercury supply, use, and trade in the United States." *Id.* § 2607(b)(10)(B).[1] "In

[1] The mercury inventory provisions at issue take up less than one of the Lautenberg Act Amendment's more than 65 pages. No House or Senate committee report discusses the mercury inventory. *See* H.R. Rep. No. 114-176 (2015); S. Rep. No. 114-67 (2015); H.R. Rep. No. 114-590 (2016). This is not to say that the mercury inventory provisions are unimportant, only that there is scant legislative history behind them, and that Petitioners have no basis to claim that the mercury inventory is "the core component" and "[t]he primary purpose" of the Lautenberg Act Amendments. Vt. Br. 5, 34.

carrying out" that inventory, the Administrator must, under § 2607(b)(10)(C), "identify any manufacturing processes or products that intentionally add mercury," and "recommend actions, including proposed revisions of Federal law or regulations, to achieve further reductions in mercury use." *Id.* § 2607(b)(10)(C)(i)–(ii). "To assist in the preparation" of the mercury inventory, § 2607(b)(10)(D)(i) states that:

> any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process shall make periodic reports to the Administrator, at such time and including such information as the Administrator shall determine by rule promulgated not later than 2 years after the date of enactment of this paragraph.

Id. § 2607(b)(10)(D)(i). TSCA defines the term "manufacture" to mean "import into the customs territory of the United States . . ., produce, or manufacture," 15 U.S.C. § 2602(9). So § 2607(b)(10)(D)(i) includes within its scope, producers, importers and other manufacturers. It does not, however, "apply to a person engaged in the generation, handling, or management of mercury-containing waste, unless that person manufactures or recovers mercury in the handling of that waste." *Id.* § 2607(b)(10)(D)(iii).

In implementing § 2607(b)(10)(D)(i), the Administrator must "avoid duplication" by "coordinat[ing] . . . reporting" with an existing mercury reporting and tracking program called "the Interstate Mercury Education and Reduction Clearinghouse," or IMERC. *Id.* § 2607(b)(10)(D)(ii). The Administrator must also,

"to the extent feasible," avoid "requiring reporting which is unnecessary or duplicative." *Id.* § 2607(a)(5)(A).

2. EPA's 2017 Mercury Inventory

Pursuant to 15 U.S.C. § 2607(b)(10)(B), EPA published its initial inventory of domestic mercury supply, use, and trade in March 2017. J.A. __ (Mercury – USA Inventory Report Supply, Use, and Trade) ("2017 Inventory"); *see also* J.A. __ (Mercury; Initial Inventory Report of Supply, Use, and Trade, 82 Fed. Reg. 15,522 (Mar. 29, 2017)). In compiling the 2017 Inventory, EPA relied on existing sources of mercury data, including IMERC and the TSCA Chemical Data Reporting rule. J.A. __ (2017 Inventory 4–9).

IMERC is a multi-state consortium managed by the Northeast Waste Management Officials' Association. Ten States—Connecticut, Maine, Massachusetts, New Hampshire, Louisiana, New York, North Carolina, Rhode Island, Vermont, and Washington (collectively, "IMERC States")—require persons who sell mercury-added products within their borders to submit reports to IMERC. J.A. __ (2017 Mercury Inventory at 6). Those reports must describe each mercury-added product sold in the state and must disclose the quantity of mercury contained therein. *Id.* IMERC also requires that mercury quantities be reported on a national level. So, for example, the manufacturer of a mercury-containing lamp that sells its product in Vermont must report to IMERC on the aggregate quantity of mercury in the lamps that it sells in the other 49 States too. IMERC maintains a publicly-accessible database of information

that it receives. *Id.* IMERC States use that database to implement other state laws, including product bans, labeling requirements, and waste disposal measures. Vt. Br. 38–39. EPA too relied, in part, on the IMERC database to compile the 2017 Inventory.

EPA also relied on information submitted under its Chemical Data Reporting (CDR) rule. Enacted under 15 U.S.C. § 2607(a), the CDR rule, 40 C.F.R. Part 711, requires persons who manufacture at least 2,500 pounds per year of elemental mercury, or at least 25,000 pounds per year of mercury compounds, to disclose to EPA on a quadrennial basis, the amount of mercury that they manufactured and exported (among other things) in each of the last four years. 40 C.F.R. § 711.15(b). Data from the three mercury manufacturers that reported under the CDR rule were included in the 2017 Inventory's estimate of mercury supply. J.A. __ (2017 Mercury Inventory 5, 9).

The IMERC database, CDR rule, and other existing sources of information gave EPA a basic understanding of domestic mercury supply, use, and trade. But the Agency concluded that its 2017 Mercury Inventory "lacked the specificity and level of detail required to develop a mercury inventory responsive to the requirements" of 15 U.S.C. § 2607(b)(10). JA __ (Mercury; Reporting Requirements for the TSCA Mercury Inventory, 82 Fed. Reg. 49,568 (Oct. 26, 2017) ("Proposed Rule)). So EPA exercised its authority under § 2607(b)(10)(D)(i) and issued the regulation that is the subject of this litigation: the mercury inventory reporting rule.

3. EPA's mercury inventory reporting rule

In general, the mercury inventory reporting rule, 40 C.F.R. Part 713, covers manufacturers of mercury or mercury-added products, and anyone who otherwise intentionally uses mercury in a manufacturing process. *See* 40 C.F.R. § 713.7. Persons subject to the rule must report certain information to EPA once every three years, including, in the case of manufacturers, the amount of mercury manufactured in a given reporting year. *See id.* § 713.9. There are, however, exceptions. This case concerns three.

First, under 40 C.F.R. § 713.7(b)(2),[2] importers of assembled products that contain mercury only because components within those products contain mercury, are not required to report. Someone who imports a watch that contains a mercury-added button cell battery, for example, would not be subject to the mercury inventory reporting rule. Importers of mercury-added components are subject to the rule, however, so an importer of watch batteries (as opposed to battery-containing watches) would have to report to EPA. *See id.* § 713.7. For convenience, 40 C.F.R. § 713.7(b)(2) is referred to throughout this brief as applying to "importers of assembled products" or "assembled product importers."

[2] "Any person who manufactures (including imports) a mercury-added product" must report "except . . . [a] person engaged only in the import of a product that contains a component that is a mercury-added product." 40 C.F.R. § 713.7(b)(2).

Second, 40 C.F.R. § 713.7(b)(3)[3] excepts from reporting requirements domestic manufacturers who combine mercury-added components to create more complex assembled products—"product assemblers," for short. This exception is itself subject to an exception: an assembler of mercury-added components must report if it imported or fabricated those components. To illustrate, a domestic watchmaker who inserts mercury-containing batteries into her products would not have to report under the rule, unless she manufactured or imported those batteries in the first instance.

Third, 40 C.F.R. § 713.9(a)[4] eliminates an overlap in reporting requirements for entities that are subject to the CDR rule and the mercury inventory reporting rule. Both the CDR rule and mercury inventory reporting rule require mercury manufacturers to report the quantity of mercury that they manufacture. Unlike the CDR rule, however, the mercury inventory reporting rule has no reporting threshold. *Compare id.* § 713.9(b) (mercury inventory reporting rule), *with id.* § 711.15(b) (CDR rule). So the universe of reporters subject to the mercury inventory reporting rule is

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[3] "Any person who manufactures (including imports) a mercury-added product" must report "except . . . [a] person engaged only in the manufacture (other than import) of a product that contains a component that is a mercury-added product who did not first manufacture (including import) the component that is a mercury-added product." 40 C.F.R. § 713.7(b)(3).

[4] "Persons who manufacture (including import) mercury in amounts greater than or equal to 2,500 pounds (lbs.) for elemental mercury or greater than or equal to 25,000 lbs. for mercury compounds for a specific reporting year must report, as applicable: (1) Amount of mercury stored (lbs.); and (2) Amount of mercury distributed in commerce (lbs.)." 40 C.F.R. § 713.9(a).

much broader than under the CDR rule. A handful of persons are subject to both programs. They are excused, under 40 C.F.R. § 713.9(a), from reporting the quantity of mercury that they manufacture under the mercury inventory reporting rule. Yet those CDR reporters are "not categorically exempt from the mercury inventory reporting requirements," and must still report other information, including the amount of mercury that they store or distribute in commerce. J.A. __ (Mercury; Reporting Requirements for the TSCA Mercury Inventory, 83 Fed. Reg. 30,054, 30,063 (June 27, 2018) ("Final Rule")); 40 C.F.R. § 713.9(a)(1)–(2).

B. Procedural History

EPA published a proposed version of the mercury inventory reporting rule in October 2017. JA __ (Proposed Rule, 82 Fed. Reg. 49,564). Following a notice-and-comment period, it issued a final rule on June 27, 2018. JA __ (Final Rule, 83 Fed. Reg. 30,054). That rule was deemed issued for purposes of judicial review on July 11, 2018. *See* 40 C.F.R. § 23.5.

NRDC and Vermont filed timely petitions for review of the mercury inventory reporting rule on July 19, 2018 and September 10, 2018, respectively. Both petitioners seek vacatur of 40 C.F.R. §§ 713.7(b)(2), (b)(3), and 713.9(a). At the request of the parties, the two petitions were consolidated on October 15, 2018.

Eleven States ("the Amici States") filed a joint amicus brief supporting Petitioners' arguments.

SUMMARY OF ARGUMENT

EPA designed its mercury inventory reporting rule to meet its statutory duties under 15 U.S.C. § 2607(b)(10), while complementing existing sources of information, and minimizing data collection and reporting burdens. This approach was logical. And it falls well within the broad discretion afforded EPA under TSCA. Petitioners ask this Court to vacate portions of the mercury inventory reporting rule. Their request is based on a distorted and selective reading of TSCA's requirements.

When read in full, the relevant provisions of TSCA expressly confer on EPA discretion to decide what information to collect under the mercury inventory reporting rule and when to collect it. EPA reasonably exercised this discretion by focusing reporting requirements on those manufacturers and importers that actually use mercury in a manufacturing process or who insert mercury into products in the first instance. Petitioners would have preferred that EPA adopt more sweeping reporting requirements. For example, they seek reporting by assembled product importers and by all product assemblers. But EPA acted reasonably and consistently with the statute in deciding not to do so. The Agency supported its decision with a reasoned rationale, one based on a sound interpretation of the statute's text, including the directive to avoid duplicative reporting, and on practical considerations of regulatory efficiency.

In finding fault with EPA's reasoning, Petitioners mischaracterize TSCA's purpose. They draw misleading analogies between the mercury inventory reporting

rule and inapposite regulatory programs to second-guess EPA's policy decisions. These arguments fail. At most, Petitioners demonstrate that EPA might have had authority to issue a different mercury inventory reporting rule. Nothing in TSCA supports Petitioners' contention that the statute unambiguously requires the result they advocate, however. Under the appropriate standard of review, an agency's regulation need not be "the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009). EPA's mercury inventory reporting rule more than satisfies this deferential standard.

Finally, EPA's decision to eliminate the overlap between the mercury inventory reporting rule and the CDR rule was logical, well explained, and neither arbitrary nor capricious. Contrary to Petitioners' claim, the mercury inventory reporting rule's treatment of CDR rule reporters was not based on an irrational cost-benefit analysis. Congress instead admonished EPA to avoid requiring duplicative reporting whenever "feasible." 15 U.S.C. § 2607(a)(5)(A). EPA also responded to NRDC's comments and adequately explained why it rejected NRDC's suggestion to amend the CDR rule by way of a separate rulemaking.

STANDARD OF REVIEW

Courts evaluate challenges to an agency's interpretation of a statute that it administers within the familiar two-step *Chevron* framework. At *Chevron* Step One, courts ask "whether Congress has directly spoken to the precise question at issue. If

the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron v. NRDC*, 467 U.S. 837, 842–43 (1984).

"If the statutory text is silent or ambiguous, however," courts will "proceed to *Chevron* Step Two, where the question for the court is whether the agency's answer is based on a permissible construction of the statute at issue." *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, 846 F.3d 492, 507 (2d Cir. 2017), *cert. denied sub nom. New York v. EPA*, 138 S. Ct. 1164 (2018), and *cert. denied sub nom. Riverkeeper, Inc. v. EPA*, 138 S. Ct. 1165 (2018) ("*Catskill Mountains*") (quoting *Chevron*, 467 U.S. at 843). "If it is," courts will defer to the agency's interpretation "so long as it is supported by a reasoned explanation, and so long as the construction is a reasonable policy choice for the agency to make." *Id.* (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 986 (2005)).

Courts use the *Chevron* framework to evaluate whether an agency's construction of a disputed statutory provision is permissible. *Id.* at 521. To evaluate the largely record-based question of whether an agency action is "arbitrary or capricious," 5 U.S.C. § 706(2)(A), courts use the standard set forth in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). *Id.* Under *State Farm*, courts will set aside a rule if the agency "entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence

before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." 463 U.S. at 43.

This Court has recently explained that while there is some similarity between the "reasonableness" inquiry under *Chevron* and the "arbitrary or capricious" inquiry under *State Farm*, the two standards are technically distinct. *Catskill Mountains*, 846 F.3d at 521. Both Petitioners suggest that elements of their statutory challenge to 40 C.F.R. § 713.7(b)(2) (which applies to assembled product importers) and (b)(3) (which applies to product assemblers) should be assessed under *State Farm* rather than *Chevron*. *See* Vt. Br. 37; NRDC Br. 54. But Petitioners' principal challenges to these provisions go to the reasonableness of EPA's interpretation of TSCA, not to whether the record bases for specific aspects of the rule are arbitrary or capricious. Accordingly, Petitioners' challenges to 40 C.F.R. § 713.7(b)(2) and (b)(3) "should be evaluated only under the *Chevron* framework, which does not incorporate the *State Farm* standard." *Catskill Mountains*, 846 F.3d at 521. Even if the Court were to examine Petitioners' challenges to 40 C.F.R. § 713.7(b)(2) and (b)(3) under the *State Farm* standard, the mercury inventory reporting rule should be upheld. The Agency clearly considered the appropriate factors and reasonably explained the basis for its action.

Finally, although not entirely clear, both Petitioners seem to characterize their challenges to 40 C.F.R. § 713.9(a) (which applies to CDR reports) as an arbitrary-or-capricious challenge under *State Farm*. *See* NRDC Br. 61 & n.13; Vt. Br. 37–38. EPA

does not contest this characterization. But for the reasons discussed herein, EPA's explanation of 40 C.F.R. § 713.9(a) easily satisfies either the *Chevron* or *State Farm* standard.

ARGUMENT

I. THE RULE'S APPROACH TO PRODUCT MANUFACTURERS, INCLUDING ASSEMBLED PRODUCT IMPORTERS AND PRODUCT ASSEMBLERS, IS CONSISTENT WITH TSCA.

Congress did not specifically define the requirements of the mercury inventory reporting rule that it called on EPA to issue. Instead, it expressly delegated authority to EPA to issue a rule to determine those details. *See* 15 U.S.C. § 2607(b)(10)(D)(i) (reporting shall be "at such time and include[e] such information as the Administrator shall determine by rule"). EPA's efforts to fill in such regulatory gaps pursuant to its statutory authority are entitled to deference under "step two" of *Chevron*. *See EPA v. EME Homer City Gen.*, 572 U.S. 489, 513 (2014). When EPA issued the mercury inventory reporting rule, it explained at length why the rule was both practical and consistent with relevant statutory provisions. *See* J.A.__ (Final Rule, 83 Fed. Reg. at 30,063–67). As discussed below, this explanation is more than sufficient to uphold the rule under *Chevron*. *See Catskill Mountains*, 846 F.3d at 524 (an agency's interpretation need only be "reasonable" and should be upheld if the Court can see "how and why [the agency] arrived at [its] interpretation" of the statute).

A. The Requirements of EPA's Inventory Reporting Rule Are Consistent With the General Statutory Focus on Reporting by Parties That Intentionally Use Mercury in Manufacturing Processes.

As noted above, Congress expressly conferred discretion on EPA to establish, by regulation, the specific details and contours of mercury reporting requirements as they apply to particular parties. As we will discuss in the sections below, EPA reasonably established such specific requirements for the two categories of mercury reporters primarily at issue here: assembled product importers and domestic assemblers of products with mercury-added components. Initially, however, it is important to understand that while Congress gave EPA discretion to fill in such details, Congress also quite clearly established that the overall focus of these reporting requirements was to be on the intentional use of mercury and mercury compounds in manufacturing processes. The reasonableness of the specific choices EPA made with respect to importers and assemblers are particularly apparent when viewed against this clear statutory background.

To begin with, Congress required that EPA's inventory address the supply, use, and trade of "mercury," which it defined as "elemental mercury" or "a mercury compound." 15 U.S.C. § 2607(b)(10)(A). Thus, the inventory to be published is not, as Petitioners' sweeping arguments might suggest, expressly intended to capture all mercury-added products in the economy. Instead, it is specifically about "elemental mercury [or] mercury compound[s]" in "supply, use, and trade." *Id.* §§ 2607(b)(10)(A), (B).

Further, within the universe of mercury uses in the economy, Congress clearly expected reporting requirements for the inventory to be focused mainly on those parties that "intentionally" use mercury in manufacturing processes or products. More specifically, in its direction to EPA, Congress stated that "in carrying out the inventory" the agency "shall identify any manufacturing processes or products that intentionally add mercury." 15 U.S.C. § 2607(b)(10)(C)(i). Similarly, in its direction to manufacturers, Congress provided that "any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process shall make periodic reports to the Administrator" pursuant to EPA's reporting regulations. *Id.* § 2607(b)(10)(D)(i).

TSCA's text evinces a clear congressional focus on the intentional, commercial use or addition of elemental mercury and mercury compounds in manufacturing processes and products. There is room in this statutory direction for EPA to fill in certain details, such as exactly who must report under a rule issued pursuant to U.S.C. § 2607(b)(10)(D)(i). As EPA rightly noted, "[i]n identifying products where mercury is intentionally added, the Agency interprets the statute as giving it discretion over what information it may require to be reported, including from certain manufacturers and types of products." 83 Fed. Reg. at 30,065. This is the type of gap-filling delegation of authority that, as explained below, EPA reasonably exercised with respect to importers and domestic assemblers of products with mercury-containing components.

Yet Petitioners ultimately challenge more than just the reasonableness of EPA's elucidation of interstitial details. Their arguments reflect an expansive view of the mercury inventory and corresponding mercury reporting obligations that goes far beyond that envisioned by the text of the statute. For example, NRDC contends that it is of no moment "whether or not mercury is added to a component or to the final product" because "[i]n either event, the mercury will pose the same threat to human health and the environment: risking contamination of the air, soil, water, wildlife, or a human body." NRDC Br. 46.

But Congress did not direct EPA to construct an inventory, and require corresponding reporting, for *any* use of mercury that might be deemed to pose health and environmental effects. Nor did Congress mandate that EPA create an inventory of, and reporting requirements for, every product that simply *contains* mercury. Instead Congress directed that the inventory and reporting obligations be focused on the intentional addition or use of mercury in manufacturing processes. Petitioners' attempt to substitute their policy preferences for the more narrow direction provided by Congress is inconsistent with numerous familiar principles of statutory construction. *See, e.g.*, *Sandifer* v. *United States Steel Corp.*, 571 U.S. 220, 227 (2014) (quoting *Perrin* v. *United States*, 444 U.S. 37, 42 (1979)) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'"); *King v. Burwell*, 135 S. Ct. 2480, 2492 (2015) ("[W]e 'must do our best, bearing in mind the fundamental canon

of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014)).

As is discussed in more detail below, EPA acted consistently with the statute in declining Petitioners' invitation to require reporting that goes well beyond the scope of that required by Congress. EPA reasonably excluded from reporting obligations domestic manufacturers that incorporate mercury-added components (rather than elemental mercury or mercury-compounds) in their finished products. EPA also reasonably designed the reporting requirements for product importers to focus on those importers that are closest in the supply chain to the foreign manufacturers that actually add elemental mercury and mercury compounds to products in the first instance. Thus, the mercury inventory reporting rule applies only to importers of mercury-added components, rather than importers of assembled products that contain mercury only because a component in that product contains mercury.

B. EPA Supported Its Treatment of Mercury-Added Product Manufacturers with a Reasoned Rationale That is Well-Grounded in the Statute.

Congress did *not* direct EPA to create a comprehensive reporting regime for identifying and tracking *all* mercury-added products. Instead, Congress told EPA to "identify any manufacturing processes or products that intentionally add mercury" and to "recommend actions . . . to achieve further reductions in mercury use." 15 U.S.C. § 2607(b)(10)(C)(i)–(ii). EPA understood that "baseline direction" to establish

the inventory's "ultimate purpose." J.A. __ (Final Rule, 83 Fed. Reg. 30,064–65). An inventory sufficient to achieve that purpose, the Agency reasoned, would be statutorily appropriate. *Id.*

In the first of two statutory mandates governing EPA's "carrying out the inventory," 15 U.S.C. § 2607(b)(10)(C), Congress only directed EPA to identify manufacturing processes and products that *intentionally add mercury*. So EPA explained that it was focusing its reporting requirements on those "intentional acts that introduce mercury" into products and processes. J.A. __ (*Id.* at 30,063). To that end, the Agency constructed its reporting rule to primarily, although not exclusively, target those who actually use mercury (rather than mercury-added components) in a manufacturing processes, or who intentionally add mercury (rather than mercury-added components) into products. J.A. __ (*Id.* at 30,063–65).

To recommend mercury-reducing policies—the second requirement in 15 U.S.C. § 2607(b)(10)(C)—EPA explained that it would not need to know about every instance of mercury use. J.A. __ (*Id.* at 30,065–66). It would be appropriate, EPA found, to understand *categories* of mercury usage. *Id.* The Agency therefore read TSCA to "only require identification of the types" of mercury-added products in domestic supply, use, and trade. J.A. __ (*Id.* at 30,065).[5] It was with that

[5] As discussed at length below, *infra* pp. 39–40, EPA's understanding of 15 U.S.C. § 2607(b)(10)(C) to call for the identification of "types" of mercury-added products was consistent with the provision's plain language and statutory context.

understanding that EPA designed the reporting requirements for manufacturers of mercury-added products.

Under 40 C.F.R. §§ 713.9, 713.13(c)(3), and 713.13(d)(3), anyone who manufactures (or imports) a mercury-added component is required to report both the quantity of mercury in those components, and the North American Industrial Classification System, or NAICS, codes of the entities that purchase or receive those components. EPA will use those NAICS codes to determine, for example, whether mercury-added lamps were used in, say, lighting fixtures, light trucks, motorcycles, or motor homes. J.A. __ (Final Rule, 83 Fed. Reg. at 30,065); *see also* J.A. __ (*id.* at 30,055) (listing different NAICS codes).[6] Equipped with that "contextual information," EPA found that it would be able to identify the universe of domestically assembled mercury-added product types. J.A. __ (*Id.* at 30,064–65).

From the universe of domestically-assembled product types, EPA reasoned that it could infer the types of mercury-added products that are assembled overseas and imported into the United States. *Id.* To round out its understanding of imported assembled product types, EPA explained that it would draw on the IMERC database. This includes information on imported assembled products sold by entities that do business in IMERC States. *Id.* Between these two sources of information, EPA

[6] Contrary to NRDC's argument, NAICS codes will also allow EPA to "determine, for example, whether batteries are ending up in watches or, instead, in children's toys." NRDC Br. 60; *see* J.A. __ (Final Rule, 83 Fed. Reg. at 30,055) (listing unique NAICS codes for watch manufacturers and toy manufacturers).

determined that it would be able to identify, with sufficient precision to recommend actions to achieve further reductions in mercury use, the types of both domestic and imported mercury-added products. *Id.* It concluded, therefore, that "at this stage," requiring separate reporting from assembled product importers and domestic product assemblers would not be essential to the performance of its obligations under 15 U.S.C. § 2607(b)(10)(B) and (C). JA __ (*Id.* at 30,065–66).

Congress's mandate to avoid "duplicative" reporting wherever "feasible," 15 U.S.C. § 2607(a)(5)(A), also shaped EPA's reporting requirements for domestic product assemblers. Because manufacturers (including importers) of mercury-added components are required to report under the mercury inventory reporting rule, EPA noted that the inventory will reflect the aggregated quantity of mercury in all domestically-manufactured assembled products. JA __ (Final Rule, 83 Fed. Reg. at 30,064).[7] To require separate reporting from the domestic manufacturers who insert those components into assembled products—i.e., domestic product assemblers—would therefore "result in double counting" that could "negatively affect" the inventory's reliability. *Id.* That double-counting problem would be compounded in

[7] The mercury inventory reporting rule will not capture data on quantities of mercury in imported assembled products. This does not, however, render the rule unreasonable. As EPA explained, it will use the data on quantities of mercury in domestically manufactured products, the contextual information on component use, and the IMERC dataset to fulfill its obligations to identify any manufacturing processes or products that intentionally add mercury and to recommend actions to reduce mercury use. The rule, in other words, will enable EPA to do what Congress directed it to do.

complex supply chains where a mercury-containing component "may be incorporated into several iterations of other components before being used in a final assembled product." *Id.* Instead of requiring entities to report multiple times on the same quantity of mercury as it moves through a supply chain and then scrubbing the redundant data on the back end, EPA decided to concentrate its data collection efforts "on the initial introduction" of mercury-added components into the stream of domestic commerce. J.A. __ (*Id.* at 30,067). It therefore limited the reporting rule's scope under 40 C.F.R. § 713.7(b)(3) to "persons who *first* manufacture . . . mercury-added products." *Id.*; *see also* 40 C.F.R. § 713.7(b)(3).

Concerns about compliance burdens informed EPA's decision to excuse, through 40 C.F.R. § 713.7(b)(2), assembled product importers from reporting under the rule. The class of assembled product importers is quite broad. As EPA noted, it includes importers of inexpensive consumer goods, like "toys" or "novelty items" who may not even know that their products contain components that contain mercury. *See* J.A. __(Proposed Rule, 82 Fed. Reg. 49,574–75).[8] Having found that it could implement 15 U.S.C. § 2607(b)(10) without requiring importers of mercury-added products to report, EPA concluded that requiring assembled product importers

[8] The product categories of "toys" and "novelty items" include "items intended for use as practical jokes, figurines, adornments, . . . games, cards, ornaments, yard statues . . ., candles, jewelry, [and] holiday decorations." J.A. __ (Status Report on Select Products, Processes and Technologies Utilizing Mercury 39).

to report anyway—on pain of civil or criminal penalties for noncompliance—would impose an "undue burden."[9]

C. EPA's Reporting Rules for Manufacturers of Mercury-Added Products Are Reasonable.

According to Petitioners, EPA acted unreasonably by not seeking more information from manufacturers of mercury-added products. This is so, Petitioners say, for three reasons. First, in Petitioners' view, EPA's treatment of assembled product importers and product assemblers runs counter to TSCA's information-gathering purpose. NRDC Br. 53, 56–57; Vt. Br. 24. Second, Petitioners contend that EPA erred by exaggerating the harms that more exhaustive reporting requirements would entail. NRDC Br. 47–49, 58; Vt. Br. 37; Amici Br. 8. And last, Petitioners argue that EPA failed to adequately consider the downsides of its chosen approach. NRDC Br. 59–60; Vt. Br. 18–19; 38–42; Amici Br. 11. None of these arguments succeed.

1. EPA's treatment of assembled product importers and product assemblers was consistent with TSCA's statutory purpose.

Petitioners ask this Court to set aside the mercury inventory reporting rule as contrary to TSCA's purpose, which, they claim, is to fill informational gaps in EPA's

[9] Persons covered under the mercury inventory reporting rule will spend an average of $7,900 collecting and submitting information during the first reporting cycle, and around $5,600 for each subsequent reporting cycle. J.A. __ (Proposed Rule, 82 Fed. Reg. at 49,567). And anyone who must report under the rule is subject to civil penalties of up to $37,500 per day, or criminal prosecution for noncompliance. 40 C.F.R. § 713.1(c); 15 U.S.C. § 2615(a)(1).

understanding of mercury use. EPA's rule cannot be squared with that purpose, Petitioners say, because it demands something less than complete information on mercury use in assembled products. NRDC Br. 53; Vt. Br. 24. NRDC also argues that 40 C.F.R. § 713.7(b)(2) and (b)(3) are inconsistent with TSCA's general statement of "Policy," which calls for the "development of adequate information" about "chemical substances," and provides that "the development of such information should be the responsibility of those who manufacture" or "process such chemical substances." NRDC Br. 56–57 (quoting 15 U.S.C. § 2601(b)(1)).

Petitioners' first argument assumes too much. While EPA agrees that Congress intended the mercury inventory to fill certain knowledge gaps, it does not follow that EPA must fill all such gaps through the mercury inventory reporting rule. Congress instead directed EPA to prioritize its data collection efforts by gathering "such information" at "such time" as the Administrator chooses. 15 U.S.C. § 2607(b)(10)(D)(i). Stated differently, Congress was content to let EPA decide which gaps to fill and when—so long as the Agency could carry out and publish the inventory and, in the process, "identify any manufacturing processes or products that intentionally add mercury" and "recommend actions . . . to achieve further reductions in mercury use." *Id.* § 2607(b)(10)(C). EPA crafted reporting requirements for manufacturers of mercury-added products to fulfill those statutory obligations and so acted within its discretion. That EPA might have required more manufacturers to report does not render the mercury inventory rule unreasonable. Indeed, it is a basic

principle of administrative law that regulations "are not arbitrary just because they fail to regulate everything that could be thought to pose any sort of problem." *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995). Petitioners thus cannot prevail simply by noting that EPA opted not to collect more information under the mercury inventory reporting rule.

NRDC's appeal to TSCA's policy statement is similarly unpersuasive because "no law pursues its purpose at all costs." *Catskill Mountain*, 846 F.3d at 514 (quoting *Rapanos v. United States*, 547 U.S. 715, 752 (2006)). Instead, "the ordinary meaning of [the statutory] language accurately expresses the legislative purpose." *Marx v. General Revenue Corp.*, 568 U.S. 371, 376 (2013) (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). Those adages apply with particular force to TSCA, which calls on EPA to "consider . . . economic, and social impact[s]," as it pursues the Act's environmental aims. 15 U.S.C. § 2601(c). TSCA's call for information from manufacturers is thus tempered by its demand that EPA reconcile competing policy objectives in a "reasonable and prudent" manner when implementing the statute. *Id.* By creating a rule that complements, rather than duplicates, existing sources of data, and that minimizes reporting burdens where possible, EPA heeded Congress's direction.

2. EPA reasonably weighed reporting and data collection challenges when designing its rule.

Petitioners next find fault with EPA's reporting rule because, they say, EPA overstates the hardship that more exhaustive reporting requirements would occasion. According to Petitioners, concerns about double-counting could never justify the exception at 40 C.F.R. § 713.7(b)(3) because "IMERC easily accounts for such double-counting." NRDC Br. 58; Amici Br. 8. Similarly, NRDC argues that compliance burdens could never justify the exception at 40 C.F.R. § 713.7(b)(2) because, in another regulatory context, EPA required certain manufacturers to report on the use of specific mercury-added components in assembled products. NRDC Br. 47–49. Finally, Vermont argues that EPA could not justify the exception at 40 C.F.R. § 713.7(b)(2) as avoiding an undue burden on assembled product importers without making formal factual findings to support its conclusion. Vt. Br. 37.

The first of these arguments rests on a false equivalence between IMERC and EPA. The former is a single-purpose entity. The latter is a federal agency with myriad responsibilities under TSCA generally, and the Lautenberg Act Amendments, specifically. The IMERC database was designed to help implement State initiatives aimed at labeling or banning mercury-added products. The TSCA mercury inventory, by contrast, extends beyond product sales to mercury supply, use and trade, more broadly. And unlike IMERC, the inventory was not intended to support a specific set of policy initiatives, but rather to enable EPA to recommend further mercury-

reducing actions. IMERC found its goals were best served by collecting data on quantities of mercury in assembled products. Under a different set of resource constraints, with differing policy considerations, and facing a congressional mandate to avoid duplicative reporting, EPA reached a different conclusion. Because EPA "is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities," its decision is entitled to deference. *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985). A superficial comparison between the mercury inventory reporting rule and the IMERC requirements thus cannot defeat the rationale that EPA offered to support 40 C.F.R. § 713.7(b)(3).

Likewise unpersuasive is NRDC's claim that EPA's past treatment of certain manufacturers forecloses its treatment of assembled product importers here. In pressing that claim, NRDC conflates the mercury inventory reporting rule with Significant New Use Rules, or SNURs. NRDC Br. 47–49. In relevant part, EPA issues SNURs like the one NRDC references, after determining that a chemical on the TSCA inventory of existing chemicals is no longer employed for a specific use. *See* 15 U.S.C. § 2604(a)(2); 40 C.F.R. Pt. 721. Once an obsolete chemical use is subject to a SNUR, anyone wishing to resurrect that use must first notify EPA. 15 U.S.C. § 2604(a)(1)(B); 40 C.F.R. § 721.25. In the example cited by NRDC, EPA found that automobile manufacturers no longer installed mercury-added switches in new vehicles. Mercury Switches in Motor Vehicles; Significant New Use Rule, 72 Fed. Reg. 56,903 (Oct. 5, 2007). It therefore issued a SNUR governing mercury use in

three types of switches previously found in new cars and trucks. *Id.* The notification requirements under that SNUR extend not only to those who would use mercury to fabricate the specified switches, but also, as NRDC points out, to importers of automobiles that contain mercury-added switches. *Id.* at 56,905.

According to NRDC, if the burdens of notification did not excuse automobile importers from the vehicle switch SNUR, then the burdens of reporting cannot excuse assembled product importers from the mercury inventory reporting rule. NRDC Br. 49. This analogy is unavailing.

To start, the two rules derive from different Congressional mandates that serve very different purposes. EPA issued the vehicle switch SNUR so that it would know of, and have an opportunity to restrict or prevent, the resumption of three specific obsolete mercury uses. To achieve that narrow aim, the Agency found that motor vehicle importers should be subject to the rule's notification requirements. Mercury Switches in Motor Vehicles; Proposed Significant New Use Rule, 71 Fed. Reg. 39,035, 39,043 (July 11, 2006). The mercury inventory reporting rule, on the other hand, is designed to survey mercury supply, use, and trade at a national level; identify "products that intentionally add mercury"; and allow EPA to recommend mercury-reducing actions. 15 U.S.C. § 2607(b)(10)(B), (C). EPA found that it could achieve those broad aims without requiring assembled product importers to report under the rule. J.A. __ (Final Rule, 83 Fed. Reg. at 30,065–66). Moreover, EPA's vehicle switch SNUR merely targets three presumptively obsolete mercury-added components. Its

notification requirements are thus unlikely to arise at all, and if they do, will apply only to a small sub-set of assembled product importers. The mercury inventory reporting rule, by contrast, requires reporting on a triennial basis and, if Petitioners had their way, would target all mercury-added products. Given these differences, the potential burdens on assembled product importers under the two rules are simply not comparable.

In sum, the mercury inventory reporting rule's potential burdens weigh more heavily and apply more broadly than the notification requirements of the vehicle switch SNUR. And EPA found that those burdens could be avoided while still achieving the mercury inventory rule's objective. That EPA excepted assembled product importers from reporting requirements under the mercury inventory reporting rule, but not from notification requirements under the vehicle switch SNUR, is thus a distinction without any legal relevance.

Finally, Vermont exaggerates EPA's obligations at *Chevron* Step Two when it argues that EPA had to assemble "evidence or data showing that" importers of assembled products "are in need of a lighter burden." Vt. Br. 37. Under *Chevron*, "agencies are not obligated to conduct detailed . . . cost-benefit analyses when interpreting a statute"; they "may interpret an ambiguous statutory provision by making judgments about the way the real world works." *Catskill Mountain*, 846 F.3d at 523 (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990)). EPA did just that. It found that it could fulfill its duties under TSCA without

requiring reporting from importers of assembled products. J.A. __ (Final Rule, 83 Fed. Reg. 30,065–66). And it found that compliance burdens would weigh on assembled product importers, particularly entities expected to have limited or no knowledge of the mercury contents of their product components. *Id.* With that understanding, and in the absence of any contrary statutory command, EPA read 15 U.S.C. § 2607(b)(10)(D)(i) not to compel reporting from assembled product importers. EPA was not required by statute to support its conclusion with a precise accounting of costs and benefits and so was not required, under *Chevron*, to support the interpretation reflected in 40 C.F.R. § 713.7(b)(2) with "formal factual findings." *Catskill Mountain*, 846 F.3d at 523. Vermont's argument therefore fails.

3. Petitioners' policy preferences are inapposite where, as here, EPA's policy choices are reasonable.

In their last set of arguments against EPA's treatment of mercury-added product manufacturers, Petitioners contend that the Agency failed to adequately consider certain downsides of 40 C.F.R. § 713.7(b)(2) and (b)(3). According to Vermont, 40 C.F.R. § 713.7(b)(2) and (b)(3) might prevent IMERC States from enforcing certain state laws because "[m]anufacturers will only report the information required by EPA, especially national industries like automobiles." Vt. Br. 19. But Vermont never explains why EPA's rule will cause previously compliant "national industries" to suddenly stop following more stringent state reporting laws. So the

basis for its concern is unclear.[10] Vermont also describes the harms that will follow from EPA's rule in decidedly speculative terms. Based on its allegation that EPA's rule will somehow cause incomplete reporting to IMERC, Vermont says that its "ability to enforce" product bans, labeling requirements, and disposal regulations "may now be," *id.* at 18, "could be," *id.* at 38, or "could now potentially be" undermined, *id.* at 39. These tentative assertions do not carry Vermont's argument across the plausibility threshold. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding that plausibility requires "more than a sheer possibility"). But even if they did, Vermont has merely challenged "the wisdom of [EPA]'s policy," not the reasonableness of its statutory interpretation. *Chevron,* 467 U.S. at 866. Under *Chevron*, such a "challenge must fail." *Id.*

Vermont and the Amici States (collectively, "the States") also argue that the mercury inventory reporting rule is unreasonable because 40 C.F.R. § 713.7(b)(2) and (b)(3) will deprive them of information that they would have used to identify sources of air and water pollution. Vt. Br. 41–42; Amici Br. 11. Assuming that EPA's inventory could help the States to monitor or reduce air and water pollution as they claim, Congress did not direct EPA to design a reporting rule to achieve that

[10] Vermont does not argue that the mercury inventory reporting rule preempts state reporting laws. Indeed, Vermont and the IMERC States wrote in a comment letter that "EPA's proposal does not pre-empt the States' laws." J.A. __ (Comment submitted by Chuck Schwer, Vermont Department of Environmental, Conservation (VT DEC), et al. 2). EPA agrees.

objective. The mercury inventory reporting rule's purpose is to assist EPA in the creation of its mercury inventory. 15 U.S.C. § 2607(b)(10)(D)(i). That inventory, in turn, is to enable EPA (not the States) to identify mercury-added products and recommend measures to further reduce mercury use. *Id.* § 2607(b)(10)(C). The States have identified a benefit that Congress did not direct EPA's reporting rule to achieve. It is, at most, an ancillary benefit, and not one to which EPA was required to give controlling weight.

NRDC, for its part, argues that 40 C.F.R. § 713.7(b)(2) and (b)(3) constitute unreasonable policy choices because EPA will be unable to identify every type of mercury-added assembled product unless it requires reporting from assembled product importers and domestic product assemblers. NRDC Br. 59–60. That argument presupposes that some mercury-containing product types are unknown to IMERC and to the wider regulatory community of which EPA is a member, and will not be identified by the NAICS codes that EPA will collect from manufacturers (including importers) of mercury-added components. NRDC does not suggest what those product types might be, however, and instead merely speculates about a possibility. EPA effectively dismissed the possibility of unknown product types as an insufficient justification for collecting data from all assembled product importers and product assemblers. *See* JA __ (Final Rule, 83 Fed. Reg. at 30,065–66). Because Congress expressly did not require an inventory of all mercury-containing products,

but delegated discretionary policymaking authority to EPA, EPA's judgment, not NRDC's, should receive deference from the Court.

D. TSCA Does Not Require the Approach Favored by Petitioners.

Despite the reasoned statutory and policy arguments that EPA offered to support its rule, Petitioners still claim that TSCA compels the Agency to follow their preferred approach. Specifically, Petitioners argue that the statute inflexibly requires that EPA collect from all manufacturers of mercury-added products, certain information, including all quantities of mercury in their wares. NRDC Br. 6–7; *see also* Vt. Br. 2.[11]

At *Chevron* Step One, courts ask "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. As explained below, Petitioners cannot meet this standard because Congress simply did not directly require the reporting approach that they favor.

Petitioners rely largely on 15 U.S.C. § 2607(b)(10)(D)(i), which, they say, compels EPA to "require reporting from 'any person who manufactures mercury or mercury-added products.'" NRDC Br. 40 (selectively quoting 15 U.S.C.

[11] NRDC and the Amici States also strenuously argue that the phrase "mercury-added product" is unambiguous. NRDC Br. 36–39, 45–53; Amici Br. 3–4. In so doing, they attack a strawman. EPA's view is, and always has been, that TSCA affords it discretion in choosing what information to collect under the mercury inventory reporting rule, and from whom to collect that information. As explained at length above, those claims of discretion do not rest on any purported ambiguity in the phrase "mercury-added product." *See supra* pp. 15–16. NRDC and the Amici's comments to the contrary misconstrue the Agency's position in the record.

§ 2607(b)(10)(D)(i)); *see also* Vt. Br. 34. But Congress did not in fact direct EPA to require any specific reporting from all "manufacture[r]s [of] mercury or mercury-added products." 15 U.S.C. § 2607(b)(10)(D)(i). Instead, it directed any such manufacturer to "make periodic reports" of "such information" and at "such times" that EPA may ultimately decide is necessary by rule. *Id.* To accept Petitioners' reading of the statute, then, is to accept that Congress, by placing an obligation on manufacturers to comply with EPA's discretionary regulations, actually meant to place an implied obligation on EPA to require reporting from all manufacturers, without exception. That is not what Congress said.

If Congress had actually wanted to require EPA to collect information from *all* manufacturers of mercury or mercury-added products, without discretion to require less, then Congress would have so commanded. Indeed, elsewhere in TSCA section 8, Congress demonstrated that it knew how to give such an order when it meant to. 15 U.S.C. § 2607(b)(4)(B)(ii) provides that EPA, in issuing rules under § 2607(b)(4)(A), "*shall require any* manufacturer or processor" meeting certain criteria, "to submit a notice" to the Administrator. *Id.* § 2607(b)(4)(B)(ii) (emphasis added). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius* v. *Cloer*, 569 U.S. 369, 378 (2013) (quoting *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997)).

Because no similar directive compels the Agency to require reporting from any manufacturer of mercury-added products without exception, Petitioners' interpretation of § 2607(b)(10)(D)(i) is not compelled by the provision's plain text.

Nor is Petitioners' the best, let alone the only possible, interpretation of § 2607(b)(10)(D)(i). Rather than defining from whom EPA *must* collect information, § 2607(b)(10)(D)(i) is more naturally read as defining from whom EPA *may* collect information. The provision, in other words, delineates the outer limits of EPA's authority to issue a mercury inventory reporting rule. But it does not prescribe how EPA exercises that authority. Because this interpretation avoids reading into § 2607(b)(10)(D)(i) a command to EPA that isn't clearly expressed, it hews closer to the statutory text than does the strained interpretation urged by Petitioners. It also aligns with § 2607(b)(10)(D)(i)'s purpose, which Congress explained, is "[t]o assist" EPA in preparing the mercury inventory. *Id.* Given that aim, where EPA reasonably concludes that the collection of information from certain potential reporters would not assist in its preparation of the inventory, there would be no sense in forcing the Agency to collect the information anyway.

Reading § 2607(b)(10)(D)(i) to only define the bounds of EPA's information-gathering authority also accords with other provisions in TSCA. Section 2607(a)(5)(A), for example, requires EPA to avoid requiring duplicative or unnecessary reporting, "to the extent feasible." *Id.* § 2607(a)(5)(A). Similarly, § 2607(b)(10)(D)(ii) directs EPA "[t]o avoid duplication" by "coordinat[ing] the

reporting under this subparagraph with [IMERC]." *Id.* § 2607(b)(10)(D)(ii). In short, both provisions call on EPA to use its administrative judgment to minimize compliance burdens. That call for the exercise of agency discretion is, at the very least, in tension with Petitioners' prescriptive and inflexible reading of § 2607(b)(10)(D)(i). If, for example, EPA determined that IMERC's requirements mirrored those of the mercury inventory reporting rule, then, under § 2607(b)(10)(D)(ii), it should consider exempting IMERC reporters from reporting under the mercury inventory reporting rule. Petitioners' construction of § 2607(b)(10)(D)(i) would not allow this. Reading § 2607(b)(10)(D)(i) as only providing the limits of EPA's information-gathering authority, on the other hand, gives the Agency room to exercise the policymaking authority that Congress delegated to it.

The States' lengthy disquisition on the phrase "*any* person who manufacturers mercury or mercury-added products, *or* otherwise intentionally uses mercury in a manufacturing process" does not defeat, and indeed, is wholly compatible with, an understanding of § 2607(b)(10)(D)(i) as setting the scope of EPA's discretionary rulemaking authority. Amici Br. 6 (quoting 15 U.S.C. § 2607(b)(10)(D)(i); *see also* Vt. Br. 35–36 (same). If the States are right and the "qualifier 'intentionally,'" as used in § 2607(b)(10)(D)(i), "does not apply" to the clause "any person who manufactures mercury or mercury-added product," then they have established only that EPA *could* require reporting from every intentional or unintentional manufacturer of mercury-

added products. Amici Br. 5. The States, in other words, have succeeded, at most, in sketching the outer bounds of EPA's authority. But there is nothing in their exegesis of the "conjunction 'or'" to suggest that EPA must exercise that authority maximally.[12] Amici Br. 6 (quoting *United States v. Woods*, 571 U.S. 31, 45–46 (2013)); *see also* Vt. Br. 35–36 (discussing *Barnhart v. Thomas*, 540 U.S. 20, 27 (2003)).

Contrary to Petitioners' claim, moreover, reading § 2607(b)(10)(D)(i) to define the scope of EPA's authority is not inconsistent with § 2607(b)(10)(D)(iii). That latter provision excepts from the mercury inventory reporting rule, certain "person[s] engaged in the generation, handling, or management of mercury-containing waste." *id.* § 2607(b)(10)(D)(iii). Petitioners therefore contend that "Congress did not intend the reporting provision to admit of other exceptions." NRDC Br. 41; *see also* Vt. Br. 30. "The force of any negative implication, however, depends on context." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (quoting *Marx v. General Revenue Corp.*, 568 U.S. at 381). And in "an administrative setting" like this one, "where Congress is presumed to have left to reasonable agency discretion questions that it has not directly

[12] The States' discussion of § 2607(b)(10)(D)(i) misses the mark for two additional reasons. First, it completely ignores § 2607(b)(10)(C)'s reference to manufacturing processes and products that "intentionally add" mercury. EPA cited that provision in explaining why it was primarily (although not exclusively) concerned with intentional additions of mercury to products and manufacturing processes. *See supra* pp. 18–19. Second, the States erroneously presume that EPA thought it could only require reporting from those "who intentionally add mercury to their products." Amici Br. 6; Vt. Br. 35. In fact, EPA requires importers of mercury-containing components to report under the rule, regardless of whether those importers fabricated—and thus added mercury—to their products at all. *See* 40 C.F.R. § 713.7(b)(2)–(3).

resolved," the "canon of *expressio unius est exclusio alterius* is an especially feeble helper." *Waterkeeper All. v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017) (quoting *Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990)). After all, just because "Congress thought to write certain exceptions into the statutes doesn't necessarily mean it meant to bar all others." *Id.* No provision of TSCA unambiguously requires that EPA collect information from every manufacturer of mercury or mercury-added products. Inferences drawn from Congress's partial exception for certain waste managers cannot provide a clear statutory command that Congress has not issued.

Petitioners' selective reliance on the dictionary definition of "inventory" is similarly misplaced. NRDC Br. 41–44; Vt. Br. 30. Because Merriam-Webster says that an inventory is "an itemized list of current assets," NRDC Br. 42, or a "complete list of the things that are in place," Vt. Br. 30, Petitioners claim that EPA must collect "substantial detail, including quantities," from manufacturers of mercury or mercury-added products, NRDC Br. 42.

The most glaring problem with this argument is that Merriam-Webster also defines "inventory" as a "survey" or "summary," suggesting that something less than "substantial detail" will suffice. Merriam-Webster's Dictionary, "Inventory," https://www.merriam-webster.com/dictionary/inventory; *see also Inventory*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1961) (same). Elsewhere in TSCA section 8, moreover, Congress defined "inventory" without reference to "quantities" of the things in the inventory. Section 2607(b)(1), for instance, describes an inventory

consisting only of "a list of chemical substances." 15 U.S.C. § 2607(b)(1). And where Congress wanted EPA to collect data on quantities of mercury, it made plain its intent: § 2611(c)(7)(E)(i), which bans the export of certain mercury compounds, calls on EPA to "submit to Congress a report that," *inter alia*, "describes *volumes* and sources of mercury compounds" covered by the export ban. *Id.* § 2611(c)(7)(E)(i) (emphasis added). Indeed, the very notion that one can divine from the word "inventory" a clear statutory command that EPA collect certain specific information, is at odds with TSCA's plain text. The Act affords EPA broad discretion to collect "such information," "at such time," "as the Administrator shall determine." *Id.* § 2607(b)(10)(D)(i).

EPA's discretion to choose what information it collects is not limited by § 2607(b)(10)(C)(i) in the manner that NRDC claims. Under that provision, EPA must use the mercury inventory to "identify any manufacturing processes or products that intentionally add mercury." *Id.* § 2607(b)(10)(C)(i). NRDC understands that text to require EPA to collect information sufficient to catalogue *each* mercury-added product in the stream of domestic commerce. NRDC Br. 42–43. But this reading is not compelled by Congress's use of the word "product."

As commonly understood, "product" could refer either to "individual product" as NRDC suggests, or "type of product," as EPA understood. *See supra* p. 19. If asked, for example, to "identify products" on a desk, one might answer "one red pen,

two blue pens, three black pens, an old, dog-eared notebook, and a new notebook." Or one might simply say "pens and notebooks."

TSCA's text favors the latter approach. The statute requires EPA to "identify" both "products" and "manufacturing processes." 15 U.S.C. § 2607(b)(10)(C)(i). The phrase "manufacturing processes" suggests industrial operations or treatments—use of mercury as a catalyst in chlorine production, for example—but not the specific site of those operations or treatments. Had Congress intended the latter construction, it would have directed EPA to identify "plants" or "pieces of manufacturing equipment" used to intentionally add mercury. Instead it chose "manufacturing processes," a phrase that implies a type, not an instance, of mercury use. Reading "product" to mean "type of product" thus gives § 2607(b)(10)(C)(i) an internal consistency of scale.

That reading also avoids imposing on EPA and the regulated community a resource-intensive undertaking that isn't plainly compelled by statute. The IMERC database, of which Congress was plainly aware, lists mercury-added products by make and model. If Congress wanted EPA to create a national version of the IMERC database, then it could have said so. It did not, and the Court should not read into TSCA an implied command to create an exhaustive list of every mercury-added product in the United States economy. *See Yates v. United States*, 135 S. Ct. 1074, 1085 (2015) (plurality opinion) ("[W]e rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to avoid ascribing to one word a meaning so broad

that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress.") (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995)).

Lacking any clear congressional directive on what information EPA must collect under the mercury inventory reporting rule, NRDC falls back on an analogy for what it—not Congress—describes as the purpose of TSCA's mercury inventory provisions. NRDC Br. 45. "If Congress mandated that fast-food restaurants label all 'sodium-added products' on their menus, to better inform consumers," NRDC postulates, then Congress cannot have intended that those restaurants would "exclude bacon cheeseburgers from the 'sodium-added products' list merely because sodium was added to the burger's component parts." *Id.* at 45–46. By the same token, NRDC says, 15 U.S.C. § 2607(b)(10)(D)(i) must be read to require reporting on all mercury-added products, including assembled products. *Id.* at 46.

If Congress had mandated that EPA label all mercury-added products, then NRDC's analogy might be apt. But Congress did nothing of the sort. Rather than dictate a product-labeling scheme, or any other mercury-reducing policy measure, Congress simply called on EPA to "recommend actions . . . to achieve further reductions in mercury use." 15 U.S.C. § 2607(b)(10)(C)(ii). That nebulous requirement, and the ambiguous command to "identify any manufacturing processes or products that intentionally add mercury," are the closest things in TSCA to a statement of congressional intent about the required scope of the mercury inventory or mercury inventory reporting rule.

Neither the directive to identify products, nor the directive to recommend mercury-reducing policies, requires EPA to collect any particular type of information from every manufacturer of mercury or mercury-added products. Indeed, the only time that Congress spoke directly to EPA's information-gathering obligations, it deferred to EPA to collect "such information" and at "such time" as the Administrator saw fit. 15 U.S.C. § 2607(b)(10)(D)(i). That express delegation of discretion only strengthens *Chevron*'s background presumption: that Congress intended that EPA would resolve TSCA's many ambiguities. The Court should therefore reject Petitioners' strained attempt to argue that the result they favor is required under *Chevron*'s first step, and instead, for all the reasons discussed above, uphold this aspect of the rule as a reasonable construction of the statute under *Chevron*'s second step.

II. EPA'S TREATMENT OF CDR RULE REPORTERS WAS LOGICAL, WELL-EXPLAINED, AND NEITHER ARBITRARY NOR CAPRICIOUS.

EPA designed 40 C.F.R. § 713.9(a) in keeping with Congress's mandate to avoid "unnecessary or duplicative" reporting, "to the extent feasible," in its administration of TSCA section 8. 15 U.S.C. § 2607(a)(5)(A). Requiring entities to report the same kind of information under the CDR rule and mercury inventory reporting rule would mean "duplication in the collection, calculation, verification, review, certification . . ., and maintenance of records," EPA found. J.A. __ (Final Rule, 83 Fed. Reg. 30,063). And avoiding that duplication would be feasible because,

according to EPA, the CDR rule, IMERC, and the mercury inventory reporting rule would yield "a totality of available data" sufficient to "to observe long-term trends in mercury supply, use, and trade." *Id.*

In reaching this conclusion, EPA acknowledged that the CDR rule and the mercury inventory reporting rule are on different reporting and publication schedules: once every four years for the CDR, once every three for the inventory. J.A. __ (Response to Comments 14). But EPA determined that data under the two programs would still be "comparable" and that the differing publication schedules would therefore not prevent it from compiling an inventory sufficient to "identify any manufacturing processes or products that intentionally add mercury," and "recommend actions . . . to achieve further reductions in mercury use." 15 U.S.C. § 2607(b)(10)(C)(i)–(ii).

As discussed below, this approach was logical, entirely consistent with the statute, and well explained. Accordingly, it was not arbitrary, capricious, an abuse of discretion, or contrary to law. *See* 5 U.S.C. § 706(2)(A). EPA's treatment of CDR reporters, codified at 40 C.F.R. § 713.9(a) therefore should be upheld.[13]

[13] As discussed in our Standard of Review section, *supra* pp. 11–14, the dividing lines between Petitioners' statutory challenges and record-based challenges are not always entirely clear, although they have characterized their challenges on the CDR reporting issues as the latter rather than the former. EPA does not contest this characterization. To the extent that the legal aspects of Petitioners' challenges on the CDR reporting issues are construed as challenges to EPA's construction of the statute, however, EPA's approach should be upheld as a reasonable construction of the statute under *Chevron* for the reasons stated herein.

A. EPA's Decision to Avoid Duplicative Reporting Requirements in the Mercury Inventory Reporting Rule Was Reasonable.

NRDC concedes, as it must, that TSCA grants EPA discretion to fashion reporting requirements that avoid duplicative or unnecessary reporting to the extent feasible. NRDC Br. 60. But it argues that EPA's treatment of CDR reporters was an abuse of that discretion because it renders infeasible EPA's implementation of 15 U.S.C. § 2607(b)(10).

NRDC first contends that the "CDR Exception is contrary to TSCA's requirement that 'any person' who manufactures mercury must submit information for the mercury inventory," because it "exempts from [that] requirement[] those persons who submit reports through the separate CDR program." NRDC Br. 60–62. This argument fails, however, because CDR rule reporters *are not exempted* from reporting under the mercury inventory reporting rule. *See* 40 C.F.R. § 713.9(a). Indeed, NRDC itself acknowledges that point just a few pages later. "To be sure," it says, "CDR Reporters must still report, under the [Mercury Inventory] Reporting Rule, the amounts of mercury they 'store' and 'distribute' in commerce." NRDC Br. 67.

NRDC next argues that differences between the CDR and mercury inventory publication schedules will leave EPA "unable to quantify the difference between domestic mercury supply and demand," NRDC Br. 62, or "collect up-to-date data on

a three-year cycle" as "Congress required," *id.* at 65. Congress did not actually require EPA to perform either of those tasks, however. An "inventory" could be, as NRDC suggests, a kind of balance sheet reflecting deposits and withdrawals of quantities of mercury in the United States economy. But based on plain meaning and statutory context, that is not the only reasonable interpretation of the word. *See supra* p. 38–39. Nor was EPA obliged to collect (rather than publish) information on a three-year cycle. NRDC's argument to the contrary is flatly inconsistent with TSCA's plain text, which delegates to EPA the discretion to collect information "at such time" as the Administrator chooses. 15 U.S.C. § 2607(b)(10)(D)(i).

And even if EPA were required to "quantify the difference between domestic mercury supply and demand," the data reported to the CDR program would enable it to do so. As NRDC acknowledged in its comment letter (but left unsaid in its brief), CDR reporters must provide data on the amount of mercury that they manufacture not just in a given quadrennial reporting year, but for every year since the last reporting year. J.A. __ (Comment submitted by David J. Lennett, Senior Attorney, NRDC ("NRDC Comment") 4, 6). So, for example, in 2020, the next CDR publication year, EPA will receive data from CDR reporters on quantities of mercury that they manufactured in 2019, 2018, 2017, and 2016. 40 C.F.R. § 711.15(b)(3)(i)(C)(iii). Even if EPA's next inventory does not include the latest CDR data, by the time of that inventory's publication EPA will have in its possession current data from CDR reporters that it could use to "determin[e] the existence of

and reasons for potential ongoing data gaps," as NRDC urges. NRDC Br. 64. NRDC's claim that CDR data is "all but useless" is therefore meritless. *Id.* at 63.

B. EPA Fully and Appropriately Explained Its Approach, and Adequately Responded to Comments.

NRDC also posits two challenges under *State Farm* to the adequacy of EPA's record explanations. First, NRDC claims that EPA's treatment of CDR reporters rested on a flawed cost-benefit analysis. *See id.* at 67–68 (arguing that 40 C.F.R. § 713.9(a) "prevents EPA from obtaining critical information" but only saves CDR reporters around $2,000 per reporting cycle). According to NRDC, EPA also failed to adequately respond to NRDC's suggestion that the overlap between the CDR and mercury inventory reporting rules should be eliminated by "flipping the exemption"—that is, by amending the CDR rule to exempt mercury manufacturers. *Id.* at 69–70. Neither claim succeeds.

NRDC's cost-benefit argument fails for either of two reasons. First, EPA's reliance on CDR data will not deprive it of "critical information" because, for the reasons noted above, the CDR rule will provide EPA precisely the same information it would have received under the mercury inventory reporting rule. Second, contrary to NRDC's claim, EPA did not use a cost-benefit analysis to justify its treatment of CDR reporters. Rather, it relied on 15 U.S.C. § 2607(a)(5)(A). J.A. __ (Final Rule, 83 Fed. Reg. 30,063). That provision is not based on a weighing of costs and benefits. Instead, it provides that, if feasible, "the Administrator *shall . . . not require reporting which*

is. . . duplicative." 15 U.S.C. § 2607(a)(5)(A) (emphasis added). EPA concluded that the CDR and mercury inventory reporting requirements were, in fact, duplicative, and that the duplicative elements of the mercury inventory reporting rule could be eliminated without compromising EPA's ability to perform its duties under the Act. J.A. __ (Final Rule, 83 Fed. Reg. 30,063). Having made those predicate findings, EPA was obliged, under § 2607(a)(5)(A), to follow through by appropriately tailoring the inventory reporting rule. The size of any resulting cost savings is irrelevant to the question of whether the reporting is duplicative and could be feasibly eliminated, and so it did not weigh in EPA's analysis.

NRDC's second record-based argument fares no better. In suggesting that EPA "flip[] the exemptions" by amending the CDR rule, NRDC presumed that information submitted under the inventory reporting rule data would be substantially better than CDR data. J.A. __ (NRDC Comment 6). EPA responded by disagreeing with NRDC's presumption. J.A. __ (Response to Comments 14). Because the two data sets were "comparable," and would allow the Agency to monitor "trends in mercury supply," EPA explained, there was no need to initiate an entirely separate rulemaking to amend the CDR rule. *Id.*

NRDC now says that it was entitled to a more extensive explanation, but under the circumstances, it's hard to see why. NRDC demonstrated in its comment letter that it understood the mechanics of CDR and mercury inventory reporting processes. J.A. __ (NRDC Comments 4, 6). It thus knew (or should have known) that both

programs would yield data on quantities of mercury manufactured by CDR reporters in 2018 and that the CDR rule would also yield data for calendar years 2016, 2017, and 2019. 40 C.F.R. § 711.15(b)(3)(i)(C)(iii). EPA could therefore reasonably assume that NRDC would understand why the Agency viewed the data sets as "comparable" and sufficient to assess "trends in mercury supply." J.A. __ (Response to Comments 14). And even if EPA can be faulted for not connecting the dots for NRDC, that alone should not prove fatal. A response to comment is sufficient so long as the Court can see "what major issues of policy were ventilated and why the agency reacted to them as it did." *Huntco Pawn Holdings, LLC v. United States Dep't of Def.*, 240 F. Supp. 3d 206, 219 (D.D.C. 2016) (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 335 (D.C. Cir. 1968)). That requirement "is not particularly demanding," and EPA clearly met it here. *Ass'n of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012). NRDC's challenge to 40 C.F.R. § 713.9(a) on the grounds that EPA did not adequately respond to comments therefore fails.

CONCLUSION

For the reasons described above, the petitions for review should be denied.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this brief complies with the type-volume limitations of Second Circuit Rule 32.1(a)(4) because it uses Garamond, a proportionally spaced typeface, and because it contains 11,729 words, excluding parts of the document exempted by Rule 32(f).

Dated: April 17, 2019

/s/ *Andrew S. Coghlan*
Andrew S. Coghlan

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/*Andrew S. Coghlan*
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