

Nos. 18-2121, 18-2670

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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

Petitioners,

v.

UNITED STATE ENVIRONMENTAL PROTECTION AGENCY and
ANDREW R. WHEELER, in his official capacity as Acting Administrator of the
U.S. Environmental Protection Agency

Respondents.

On Administrative Appeal of Final Agency Action from the United States
Environmental Protection Agency

FINAL FORM REPLY BRIEF OF PETITIONER STATE OF VERMONT

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The State of Vermont hereby replies to Respondent EPA's Brief. EPA's exemptions from the Mercury Rule are contrary to TSCA's Lautenberg Amendments and are arbitrary and capricious for the following three reasons.

First, EPA wrongly suggests that Petitioners' are "attempt[ing] to substitute their policy preferences" for EPA's. EPA Br. 17, 30. That is incorrect. EPA ignores Congress' intent and purposes in passing the Lautenberg Amendments, which were to: (1) correct "the lack of data [which] has impacted our ability to reduce health risks from mercury exposure"; and (2) "prevent[] injuries and sav[e] lives, . . . protect[] vulnerable populations . . . that are disproportionately exposed to toxic chemicals . . . [and] get[] dangerous chemicals like lead, mercury, and asbestos out of our consumer products . . . and [our] environment."). 162 Cong. Rec. S3523, H3026). TSCA explicitly incorporates these important policy objectives. *See* 15 U.S.C. § 2601(b)(3) ("the primary purpose of [the TSCA] is to assure that . . . innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.").

Thus, these are *Congress'* policy preferences and they are the purposes of TSCA. Those must be kept in mind when reviewing TSCA's statutory mandate, which requires reporting from "*any* person who manufactures mercury or mercury-added products or *otherwise intentionally uses* mercury in a manufacturing process." 15 U.S.C. § 2607(b)(10)(D)(i) (emphasis added).

EPA failed to require such reporting. Vermont Br. 8-9. EPA's failure thus contradicts *Congress'* policy, not the states'. *See Nat'l Labor Rel. Bd. v. Brown*, 380 U.S. 278, 291–92 (1965) (Courts should not “rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.”).

Second, states have a strong interest to ensure that EPA complies with TSCA. *Compare* EPA Br. 31 (suggesting states are unaffected by EPA's exemptions). TSCA required EPA to “coordinate the reporting” of mercury uses with IMERC States. 15 U.S.C. § 2607(b)(10)(D)(ii). By leaving out a vast category of mercury use and products, EPA has frustrated states' abilities to identify mercury uses in their states. *See* Vermont Br. 26-27 (noting the inability of states to conduct compliance and enforcement at the same level of EPA).

This vast category of mercury data is critical to states. The Lautenberg Amendments were enacted to close that gap of data. 82 Fed. Reg. 49,574 (noting Congress' mandate and directive to provide for a “comprehensive inventory such that existing data gaps would be eliminated, where feasible.”). *See also* 162 Cong. Rec. S3522-23 (“there is not yet any good data on mercury supply and uses in the United States.”).

These gaps in data will leave states with less ability to enforce their mercury protections (Vermont Br. 26-27) and are further evidence that EPA's decision to

exempt mercury-added components is unreasonable. This is not a mere challenge to the “wisdom of EPA’s policy,” EPA Br. 31, but to the Mercury Rule’s rationality. *See Prometheus Radio Project v. F.C.C.*, 373 F.3d 372, 420–21 (3d Cir. 2004), *as amended* (June 3, 2016) (agency has not provided a “reasoned analysis” where it failed to consider “potential harms”). *See also Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001), *cert. denied* (recognizing that “Vermont’s interest in protecting human health and the environment from mercury poisoning is a legitimate and significant public goal” and holding that the goal of reducing the amount of mercury released into the environment is “inextricably intertwined with the goal of increasing consumer awareness of the presence of mercury in a variety of products.”). That goal is now undermined by EPA’s decision to omit the reporting of mercury that is intentionally added to products like watches, toys and automobile components.

Third and last, Vermont joins in the arguments put forth in the Reply Brief filed by co-Petitioner NRDC, and Vermont hereby adopts those arguments as its own.

Dated: May 22, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2019, I electronically filed the foregoing document with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the Court's CM/ECF system, which will send notification of said filing to all Counsel of Record.

Dated: May 22, 2019

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