18-2121 (L)

18-2670 (Con)

In the United States Court of Appeals
for the Second Circuit

Natural Resources Defense Council, Inc., and State Of Vermont,

Petitioners,

v.

United States Environmental Protection Agency, and Andrew R. Wheeler, in his 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

Brief of the States of Oregon, Connecticut, Hawaii, Massachusetts, Maine, Maryland, Minnesota (by and through its Minnesota Pollution Control Agency), New Jersey, Pennsylvania, Rhode Island, and Washington as *Amici Curiae* in Support of Petitioners

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INTEREST OF *AMICI*

The *amici* states submit this brief in support of the State of Vermont's and the Natural Resources Defense Council's petitions challenging certain exemptions from reporting requirements in the Mercury Rule, 83 Fed. Reg. 30,054 (2018). In our federal system, the states are "vested with the responsibility of protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330, 342 (2007). Exposure to mercury poses a serious public health concern, one that many states are actively addressing. According to the World Health Organization (WHO), "[e]xposure to mercury—even small amounts—may cause serious health problems, and is a threat to the development of the child in utero and early in life."[1] An organic form of mercury bioaccumulates in fish and shellfish, and people are exposed when they eat those animals. *Id.* The WHO considers mercury "one of the top ten chemicals or groups of chemicals of major public health concern." *Id.*

The *amici* states have a strong interest in ensuring that the federal mercury inventory—which is based in part on the reporting requirements in the Mercury Rule—is comprehensive and accurate, because such an inventory will help identify

[1] World Health Organization, *Mercury and Health, available at* http://www.who.int/news-room/fact-sheets/detail/mercury-and-health (last visited December 7, 2018).

ways to reduce the danger of mercury poisoning in a cost-effective manner. As explained in this brief, the Mercury Rule will not result in a comprehensive and accurate inventory. The unlawful exemptions the U.S. Environmental Protection Agency (EPA) included in the Mercury Rule will undermine the purpose and value of the inventory for the states. The *amici* states therefore submit this brief as of right under Fed. R. App. P. 29(a)(2).[2]

ARGUMENT

A. EPA unlawfully exempted from reporting manufacturers and importers of products with mercury-added components.

The Toxic Substances Control Act (TSCA) requires EPA to publish "an inventory of mercury use, supply and trade in the United States" every three years. 15 U.S.C. § 2607 (b)(10)(B). To assist EPA in preparing the required inventory, TSCA also mandates that "any person who manufactures mercury or mercury-added products or otherwise intentionally uses mercury in a manufacturing process" must periodically file reports with EPA. *Id.* § 2607(b)(10)(D)(i). The term "manufacture," for these purposes, includes "import." *Id.* § 2602(9). Thus, the statute requires *any* business that imports or manufactures "mercury-added products" to make periodic reports to EPA.

[2] Although this brief is focused on exemptions related to "components" of products, *amici* also support petitioners' challenge to the exemption for companies reporting under the Chemical Data Reporting Rule.

But in the Mercury Rule, EPA purported to exempt from that requirement two significant categories of importers and manufacturers: those who import products containing a component that is a mercury-added product, and those manufacturers who incorporate a component made by another entity into their finished products. 40 C.F.R. § 713.7(b)(2)–(3). (Although there are two categories here, we will refer to both collectively as the "components exemption.") Thus, for example, a business that imports mercury-containing batteries by themselves may be required to report, but a business that imports a toy containing the very same batteries would *not* be required to report.

As explained below, the components exemption conflicts with TSCA's text and purpose. This court should vacate the unlawful provisions of the Mercury Rule and require EPA to fulfill its statutory duty to compile a complete mercury inventory.

1. Under the plain language of TSCA, products containing mercury-added components are "mercury-added products."

EPA's exclusion of importers of "a product that contains a component that is a mercury-added product," 40 CFR § 713.7(b)(2), violates the clear language and intent of the statute. Any product to which, at some point, mercury has been added is a "mercury-added product"; the fact that the mercury happens to be in a component of an imported product does not change the fact that the product is "mercury-added." EPA can hardly create, as TSCA requires, an "inventory of

mercury use, supply and trade," 15 U.S.C. § 2607(b)(10)(B), if there is a loophole for components of imported products. Nor does the exemption advance the ultimate purpose of the statute, which is to protect public health. Mercury that is present in a *component* of an imported product poses the same risks to health and the environment as mercury that is otherwise present in the product. For example, to the extent there is concern about mercury leaking from batteries in toys and contaminating the environment, that concern is the same regardless whether the batteries were imported by themselves or as part of the assembled toys.

For similar reasons, the second part of the components exemption, which applies to manufacturers of "a product that contains a component that is a mercury-added product" where the manufacturer did not manufacture the component, 40 CFR § 713.7(b)(3), also violates the clear language of the statute. A manufacturer that incorporates a supplier's mercury-added component into its product is "a person who manufactures . . . mercury-added products." And the need to track the products in which the mercury ultimately appears, as part of the inventory, remains the same regardless whether the manufacturer made or purchased the mercury-added component. Therefore, as Petitioners Vermont and NRDC argue in greater detail, the entire components exemption violates the statute's plain language.[3]

[3] *See* Brief of Petitioner State of Vermont at 31-37; Brief of Petitioner Natural Resources Defense Council at 36-60.

2. The statutory catch-all provision does not justify the exemption.

EPA cannot justify the components exemption by reading TSCA's reporting requirement as applying only to persons who *intentionally* add mercury to their products. According to EPA, some importers and manufacturers are not "intentionally" using mercury because importers may not "know the mercury content . . . of the assembled products they import," 83 Fed. Reg. at 30,064, and manufacturers such as "a domestic auto manufacturer may not know that a component of the car contains mercury," *id.* at 30,065. But EPA's reading does not comport with the statutory language, which covers "*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).

In that provision, the qualifier "intentionally" in the phrase "or otherwise intentionally" does not apply to the first part of the clause "any person who manufactures mercury or mercury-added products." A word or phrase that modifies an add-on, catch-all clause generally does not apply to or limit the previously listed, specific examples of categories to which the statute applies. As the Supreme Court explained in *Barnhart v. Thomas*, 540 U.S. 20 (2003), reading the catch-all phrase more broadly would violate ordinary usage rules:

> Consider, for example, the case of parents who, before leaving their teenage son alone in the house for the weekend, warn him, "You will

> be punished if you throw a party or engage in any other activity that damages the house." If the son nevertheless throws a party and is caught, he should hardly be able to avoid punishment by arguing that the house was not damaged. The parents proscribed (1) a party, and (2) any other activity that damages the house.

Id. at 27.

Here, the reporting requirement applies to "any person who manufactures mercury or mercury-added products" *and* to any other person who "intentionally uses mercury in a manufacturing process." Just as the son in the Supreme Court's example cannot throw a party even if he does not damage the house, a "person who manufactures mercury or mercury-added products" must report, even if the person did not use mercury in the manufacturing process "intentionally."

The evident purpose of the "or otherwise additionally" phrase is not to *limit* the reporting obligations of manufacturers and importers of mercury-added products, but to *extend* the reporting requirement to additional entities—for instance, entities that use mercury in their manufacturing *processes* but whose finished *products* might not contain mercury. As the Supreme Court has written, "the conjunction 'or' . . . is almost always disjunctive, that is, the words it connects are to 'be given separate meanings.'" *United States v. Woods*, 571 U.S. 31, 45–46 (2013) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

Finally, EPA's exemption here extends even to importers and manufacturers who *do*, by any definition, "intentionally" use mercury-added components. An

importer who is well aware that the product it imported contains a mercury-added component, and a manufacturer who is well aware that the component it bought from a supplier is mercury-added, are exempt just like the importer or manufacturer who did not bother to ask if the components of its product contain mercury. Even using EPA's own tortured logic, it is patently unreasonable to extend the exemption that far.

3. EPA's other justifications for the components exemption are wholly unavailing.

EPA stated that for importers, its loophole was based in part on its consideration of "the degree to which certain importers would know the mercury content, if any, of the assembled products they import, as well as the additional breadth, and therefore burden, that including such imports . . . would entail." 83 Fed. Reg. at 30,064. But as explained in subsection 1 above, the plain language of the statute does not allow for an exemption to the reporting requirement for such importers. Thus, they are required to report if the products they import contain mercury and, consequently, have a duty to inquire as to whether those products contain mercury. As the Interstate Mercury Education and Reduction Clearinghouse (IMERC) explained in its comments on the proposed rule, that is not an undue burden considering the stakes: "If the company does not know what is in their product, how would anyone else know, and how would they know how

to inform their customers and waste handlers about the proper management of the product?"[4]

EPA defended the loophole as applied to manufacturers that use suppliers' mercury-added components by raising concerns that if both the manufacturer of the final product and the manufacturer of its mercury-added component are required to report, it will result in "double counting." 83 Fed. Reg. at 30,065. But a concern about double counting is not grounds to depart from the plain statutory language. And in any event, as IMERC has explained, it has been able to address the potential for double-counting by using straightforward administrative tools:

> IMERC has been addressing this issue for many years by conducting extensive QA/QC of the data that is submitted and limiting published data analysis to original equipment manufacturers (OEM). This process has not been a significant burden to IMERC.
>
> Ultimately, having information on the components and their uses provides much more information about the full use of mercury in products than would otherwise be available. In contrast, EPA could address the double-counting issue by including in their data collection a requirement that companies identify where their products' component parts come from. For example, this kind of requirement is managed through EPA's Toxic Release Inventory (TRI) data system.

IMERC Comments, *supra*, at pp. 3-4.

For all of these reasons, this Court should conclude that the exemptions in the Mercury Rule are inconsistent with the plain language of the statute.

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[4] Comments on Proposed Rule, *Mercury: Reporting Requirements for Toxic Substances Control Act Mercury Inventory*, Docket No. EPA-HQ-OPPT-2017-0421-0063 (hereinafter "IMERC Comments") at 4.

B. EPA's unlawful exemption will hamper the states' ability to regulate mercury to protect their residents and environment.

The unlawful exemption for importers and manufacturers of products with mercury-added components will have an adverse effect on the *amici* states, which are primarily responsible for protecting the health of their residents and environment. As EPA itself noted in this rulemaking, "[m]ercury is a persistent, bioaccumulative neurotoxicant and a major public health threat, particularly to children, women of childbearing age, and indigenous populations that rely heavily on fish and marine mammals as part of their diet."[5] Contamination of fish is so pervasive that all fifty states have mercury-related fish-consumption advisories in place.[6]

Accordingly, many states have taken steps to reduce the danger of mercury toxicity. For example, many have taken actions to address known sources of mercury discharges such as thermostats, batteries, and switches in automobiles.[7]

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[5] Economic Analysis for the Reporting Requirements for the TSCA Mercury Inventory at 1-1 (June 20, 2018), Docket No. EPA-HQ-OPPT-2017-0421-0100.

[6] EPA, 2011 NATIONAL LISTING OF FISH ADVISORIES 4 (2013), *available at* http://water.epa.gov/scitech/swguidance/fishshellfish/fishadvisories/loader.cfm?csModule=security/getfile&PageID=685927.

[7] *See, e.g.*, OR. REV. STAT. § 459.900 (thermostats), § 646A.560 (lamps), § 459.420 (batteries); ME. REV. STAT. tit. 38, § 1665-A (motor vehicles containing mercury switches), § 1665-B (mercury added thermostats), § 1661-C (6)(I) (thermometers), § 1661-C (9), (11), (12) (batteries); N.J. REV. STAT. § 13:1E-99.82-99.90 (mercury switches), § 13:1E99.59-99.81 (batteries); MASS. GEN. LAWS ch. 21H, § 6C (vehicle switches), § 6D (thermostats, barometers, etc.).

Many also have reporting requirements that help track what products contain mercury and how they are handled.[8]

But a comprehensive and accurate federal inventory, as TSCA requires, would provide enormous help to the states in their efforts. Among other things, it would identify products that are potential (or actual) sources of discharges that the states may not be currently aware of, and give the states additional information on the amount of mercury in each product. For example, just knowing that mercury batteries can be used in some electronic devices is not sufficient. States need to know which manufacturers are putting the batteries into which models. Otherwise, they will have incomplete data when it comes to consumer education or in enacting disposal bans or outright product bans. A complete inventory also would help the states identify violations of state laws, including failures to report to the state or locality information that is reported to EPA.

A complete inventory would also help states to reduce the threat of exposures to toxic mercury in a cost-effective manner by avoiding unnecessary expenses. For example, local governments are in some cases subject to permit requirements limiting the amount of mercury they can discharge from their stormwater and wastewater systems.[9] Under these requirements, local

[8] *See, e.g.*, 38 ME. REV. STAT. tit. 38, § 1661-A.

[9] The National Association of Clean Water Agencies reported in 2002 that "approximately 6% (253 of 4307) of the major publicly owned treatment works

governments could be forced to spend millions of dollars to upgrade their treatment systems (costs that, of course, are ultimately borne by rate-paying families and businesses). But if a state or local government can identify entities that are responsible for releasing mercury into local governments' water-treatment systems, it can, through regulation or technical assistance, work with those entities to reduce their releases, increasing the likelihood that local governments meet their permit requirements *without* undertaking costly system upgrades.[10]

Reporting on products with mercury-added components is just as important for all of these purposes as is reporting on any other products containing mercury. The components exemption therefore is incompatible with the purpose, as well as the text, of TSCA.

(POTWs) in the United States have NPDES permits with mercury effluent limits." *Mercury Source Control and Pollution Prevention Program Evaluation – Final Report*, Executive Summary at 1.

[10] For example, sewage treatment plants in the Great Lakes Basin subject to mercury discharge limits have worked extensively with discharging industries of all types to identify products associated with mercury discharges, implement non-mercury alternatives, and more effectively capture mercury at the source. Examples include dental amalgam; laboratory and healthcare reagents, instruments, and devices; manufacturing processes, products, and catalysts; and pH adjusting chemicals. *See, e.g.*, Western Lake Superior Sanitary District's (WLSSD's) booklet *Blueprint for Mercury Elimination* (2002), at 1 (describing WLSSD's NPDES permit limit for mercury), 16-19 (discussing WLSSD's work with dentists, a hospital, and a pulp and paper mill to reduce mercury waste), *available at* https://wlssd.com/wp-content/uploads/2014/12/Revised-Blueprint-for-Mercu.pdf.

EPA justified the exemption as applied to manufacturers that obtain mercury-added components from suppliers, and incorporate those components into their own finished products, in part by saying that "EPA would receive reports both on the manufacture of the component and the manufacture of the assembled product," 83 Fed. Reg. 30,065, and that "[e]ven without receiving reports from manufacturers of assembled products, EPA can glean information about types of mercury-added products from the reports of manufacturer / importers of mercury-added . . . components." *Id.*

But the plain language of the statute does not allow EPA to rely on its purported ability to use a roundabout process to "glean" such information. What TSCA requires—to ensure a comprehensive inventory that readily identifies the end product in which mercury is used—is reports from *all* manufacturers of mercury-added products, even those who are assembling such products from components. And the states need that *comprehensive* inventory to inform their efforts to prevent mercury poisoning.

As IMERC explained in its comments on the proposed rule, comprehensive reporting on all mercury-added products and components "helps State and local agencies and others understand which consumer products have mercury in them, track where the mercury is going, and how it is ultimately recovered/recycled." IMERC Comments at 3. That information provides a "full picture of the supply

chain" and supports "end-of-life management of mercury-added products." *Id.* To take one example, state reporting requirements revealed that mercury-added flame sensors were once used widely in gas ovens in recreational vehicles; "without this detail, there would be a significant information gap on the ultimate uses of mercury." *Id.*

IMERC also explained how state labeling laws require companies to determine whether their products contain mercury, regardless whether the company itself or a supplier manufactured the mercury-added component:

> The states of Connecticut, Louisiana, Maine, Massachusetts, Minnesota, New York, Rhode Island, Vermont, and Washington (lamps only) have mercury-added product labeling laws. The labeling laws apply to any product that contains mercury, a mercury compound, or a mercury component. A company that adds another manufacturer's mercury-added component to its own product needs to know whether that component contains mercury to comply with the labeling requirements. For example, if the product incorporates a mercury-added component within it, the label on the larger product must clearly identify the internal component (e.g., "the lamp in this product contains mercury").[11]

Id. at 4. The federal inventory that TSCA requires will make it easier for companies to comply with state labeling requirements and facilitate enforcement of

[11] *See, e.g.*, MASS. GEN. LAWS ch. 21H, § 6K ("No person shall sell a mercury-added product unless the product is labeled by the manufacturer pursuant to this section. The label . . . shall clearly inform the purchaser that mercury is present in the product . . . ."); R.I. GEN. Laws § 23-24.9-8 (stating that a "manufacturer may not sell . . . a mercury-added product unless the item is labeled pursuant to this subsection").

those requirements. The unlawful components exemption in the Mercury Rule undermines both efforts.[12]

CONCLUSION

This court should vacate the unlawful provisions of the Mercury Rule and remand the Mercury Rule to EPA with an order requiring the agency to compile a complete inventory in accordance with TSCA's requirements.

Dated: December 14, 2018

Respectfully submitted,

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[12] Petitioner State of Vermont provides an extensive analysis of the impact of the components exemption on states in its brief at pages 20-24 and 38-42.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2018, this brief was served via CM/CMF on all registered counsel and transmitted to the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,172 words, excluding the parts of the brief exempted by Rule 32(f); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman) using Microsoft Word 2016 (the same program used to calculate the word count).

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