No. 00-1125

In the Supreme Court of the United States

ALLIED LOCAL AND REGIONAL MANUFACTURERS CAUCUS, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly reviewed Environmental Protection Agency's interpretation of Section 183(e) of the Clean Air Act, 42 U.S.C. 7511b(e), under the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Whether the court of appeals properly found the regulation of the manufacture and sale of paint and other architectural coatings under Section 183(e) of the Clean Air Act to be within Congress's power under the Commerce Clause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 215 F.3d 61.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2000. A petition for rehearing was denied on October 13, 2000 (Pet. App. 39a). The petition for a writ of certiorari was filed on January 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners seek review of a decision of the court of appeals arising from an Environmental Protection Agency (EPA) rulemaking under the Clean Air Act, 42 U.S.C. 7401 *et seq.*

1. The Clean Air Act establishes a comprehensive federal program to protect and enhance the quality of the nation's air resources through, among other things, the establishment of National Ambient Air Quality Standards for harmful air pollutants. 42 U.S.C. 7408. Ground-level ozone, which causes a variety of detrimental effects on humans and the environment, including adverse health effects (such as labored breathing and pulmonary inflamation), agricultural crop losses, and damage to forests and ecosystems, is such a pollutant.

When Congress amended the Clean Air Act in 1990, it added various provisions aimed at mitigating the problem of ground-level ozone. In particular, Section 183(e) of the Act, 42 U.S.C. 7511b(e), directed EPA to regulate emissions of Volatile Organic Compounds (VOCs) from consumer and commercial products in order to help States achieve the National Ambient Air Quality Standard for ozone. VOCs are a key constituent in the formation of ground-level ozone. Section 183(e) directed EPA: (1) to conduct a study of VOC emissions from consumer and commercial products to determine their potential to contribute to nonattainment of the ozone standard, and to submit that information in a report to Congress, 42 U.S.C. 7511b(e)(2)(A); (2) to develop criteria for regulation of such products, 42 U.S.C. 7511b(e)(2)(A)(ii) and (B); (3) to use the criteria to list and prioritize categories of products for regulation, 42 U.S.C. 7511b(e)(3)(A); and (4) to promul-

gate a series of regulations, each focusing on reducing VOC emissions from a particular product category, 42 U.S.C. 7511b(e)(3)(A).[1]

EPA submitted the statutorily required study to Congress and published a preliminary list of product categories in March of 1995. Following a notice-and-comment rulemaking, EPA published its final listing determination and regulations under Section 183(e) for three product categories on September 11, 1998. In its final determination, EPA identified and confirmed the first three product categories, and explained the process and bases for its decision to regulate those categories. 63 Fed. Reg. 48,792 (1998). On that same date, EPA published final regulations specifying limits on the permissible VOC content for the first three product categories: automobile refinish coatings, 63 Fed. Reg. at 48,806; certain household consumer products, 63 Fed. Reg. at 48,819; and architectural coatings, 63 Fed. Reg. at 48,848.

2. Petitioners, a trade association and several individual manufacturers of paint, filed petitions for review of EPA's regulations in the Court of Appeals for the District of Columbia Circuit. Petitioners did not directly challenge the VOC limits set in the rules for the relevant product categories. Instead, they challenged the process by which EPA selected the three categories for the first round of regulation. The court of appeals denied the petitions. Pet. App. 1a-37a.

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[1] Under Section 183(e), EPA can also issue—instead of or along with regulations—Control Guidelines Techniques (CGTs) to guide States in regulating the use of specified products to reduce VOC emissions in non-attainment areas. 42 U.S.C. 7511b(e)(3)(C). This case does not involve the promulgation of CGTs.

Petitioners' challenge, the court of appeals explained, must be analyzed under the now-familiar two-step process of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. App. 7a. Under the first step, the court asks "whether Congress 'has directly spoken to the precise question at issue,' in which case" the court "'must give effect to the unambiguously expressed intent of Congress.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 842-843). "If 'the statute is silent or ambiguous with respect to the specific issue,'" the court explained, the court moves to *Chevron*'s second step, under which the court "must defer to the agency's interpretation so long as it is 'based on a permissible construction of the statute' * * * and is 'reasonable in light of the Act's text, legislative history, and purpose.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 843, and *Southern Cal. Edison Co.* v. *FERC*, 116 F.3d 507, 511 (D.C. Cir. 1997)). The court also noted that it has the power to set aside a final rule if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Ibid.*

Applying those standards, the court of appeals rejected petitioners' claim that EPA had failed to consider the extent to which various VOCs are "reactive," *i.e.*, the relative degree to which VOCs contribute to the formation of ground-level ozone. EPA, the court explained, not only had considered reactivity but in fact had established three categories of reactivity—negligibly reactive, reactive, and highly reactive. Pet. App. 8a. The court also rejected the claim that the statute requires EPA to determine the reactivity of each volatile compound individually, rather than by using broad categories. The statute, the court pointed out, merely directs EPA to study emissions of VOCs "from consumer and commercial products (or any com-

bination thereof) in order to . . . determine their potential to contribute to ozone levels." *Id.* at 10a (quoting 42 U.S.C. 7511b(e)(2)(A)). Congress's express reference to "any combination" of consumer and commercial products, and its direction that EPA determine "their" capacity (rather than "each's" capacity) to contribute to ozone, simply makes it "impossible to regard the statute as unambiguously expressing an intent that each VOC be analyzed individually." *Ibid.*

The court of appeals also rejected petitioners' claim that, under EPA's methodology, some compounds that should not be regulated might be regulated nonetheless. Pet. App. 14a-15a. That result, the court stated, is not likely given that EPA has expressly exempted from regulation those compounds determined to have negligible reactivity, and is especially unlikely given that pre-existing EPA regulations allow companies to apply to have compounds excluded from the definition of VOC. *Ibid.* The court also was not persuaded by the argument that, in a perfect regulatory scheme, architectural coatings would not have been among the first products regulated. "There is no serious argument that architectural coatings would not appear somewhere on even a perfect regulatory list, given their status as one of the largest sources of VOC emissions among consumer and commercial products." *Id.* at 15a. As to the precise ranking of architectural coatings as a priority, the court explained, deference to EPA's reasonable methodology is particularly appropriate. *Ibid.*

The court of appeals also rejected petitioners' claim that, under *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), Congress lacks Commerce Clause authority to regulate in this area. Pet. App. 33a-37a. The court of appeals observed that, in *Morrison*, this Court identified four

considerations that had led to the invalidation of the statute at issue in *Lopez*: that the statute had nothing to do with commerce or commercial activities; that the statute contained no express jurisdictional element requiring a nexus to interstate commerce; that Congress had made no findings about interstate effects; and the great degree of attenuation between the regulated activity and the effect on interstate commerce. *Id.* at 34a-37a.

Here, the court of appeals explained, each of those factors supports Congress's power to regulate. Unlike the statute at issue in *Lopez* (which prohibited possession of a gun near schools), and the statute in *Morrison* (which dealt with gender-motivated violence), Section 183(e) is directed at *commercial* activity, namely the manufacture, sale, processing, and distribution of "consumer or commercial products for sale or distribution in interstate commerce." Pet. App. 35a (quoting 42 U.S.C. 7511b(e)(1)(C)(i)). Second, Section 183(e) does require an interstate nexus; for national regulations like those at issue here, the statute limits EPA's authority to regulating manufacturers, processors, wholesale distributors and importers of products for sale or distribution "in interstate commerce." *Ibid.* Third, there are express findings—by Congress, by EPA, and by the courts—regarding the interstate impact of the regulated activity. *Ibid.*

Fourth, here there could be no claim that the relationship between the regulated activity and interstate commerce is "attenuated." Pet. App. 36a. "We ourselves," the court explained, "have noted the interstate nature of the 'ozone transport phenomenon,' and the way in which it may render any given state unable to achieve attainment because of ozone created hundreds of miles away." *Ibid.* "And the rulemaking record

sustains the proposition that the large majority of the products regulated by the rule are distributed nationally." *Ibid.* Finally, the court of appeals noted, this Court had "agree[d] with the lower federal courts that have uniformly found the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 36a-37a (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981)).

ARGUMENT

The decision of the court of appeals is correct, and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is not warranted.

1. Petitioners' first claim is that the court of appeals should not have reviewed EPA's rulemaking under the well-settled principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, petitioners argue, the court of appeals should have applied this Court's decisions in *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), and *Christensen* v. *Harris County*, 529 U.S. 576 (2000). Pet. 5-19. That contention is without merit.

a. In *Brown & Williamson*, this Court itself applied the traditional two-step approach under *Chevron* to determine the validity of the FDA's tobacco regulations. "Because this case involves an administrative agency's construction of a statute that it administers," the Court explained, "our analysis is governed by *Chevron*." 529 U.S. at 132. Applying the first step of *Chevron*, the Court determined that Congress had spoken to whether the FDA had authority regulate

tobacco. Carefully canvassing the political history of tobacco, the Court concluded that Congress's actions over the previous 35 years "preclude an interpretation of the" Food, Drug, and Cosmetic Act "that grants the FDA jurisdiction to regulate tobacco products." *Id.* at 155. The Court took careful note that, throughout most of its history, the FDA had disavowed any authority to regulate tobacco. The Court concluded that Congress, by passing a host of tobacco-specific laws following the FDA's disavowal, and by acting to preclude any agency from exercising regulatory control over tobacco, had "effectively ratified the FDA's previous position that it lacks jurisdiction to regulate tobacco." *Id.* at 156.

The Court in *Brown & Williamson* also observed that its inquiry into whether Congress had spoken directly to the issue was "shaped, at least in some measure, by the nature of the question presented." 529 U.S. at 159. In "extraordinary cases," the Court explained, "there may be reason to hesitate before concluding that Congress has intended" an "implicit delegation" of power to regulate a certain segment of the economy. *Ibid.* In the context of tobacco, the Court explained, the unique political history of the product, the distinct regulatory scheme governing it, Congress's repeated rejections of proposals to allow the FDA to regulate tobacco, and Congress's repeated actions to preclude regulation of tobacco, all provided reason to hesitate:

> Owing to its unique place in American history and society, tobacco has its own unique political history. Congress, for better or for worse, has created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to

> preclude any agency from exercising significant policymaking authority in the area. Given this history and the breadth of the authority that the FDA has asserted, we are obliged to defer not to the [FDA's] expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.

Id. at 159-160.

Brown & Williamson is inapposite, as the foregoing description attests. Here, there are no "extraordinary" circumstances casting doubt on the agency's authority to regulate. This is not a case in which the agency, for the previous 35 years, disavowed power to regulate a particular product. It is not a case in which Congress effectively ratified the agency's disavowal; in which Congress repeatedly rejected proposals that would have empowered the agency to regulate; or in which Congress adopted proposals that created a distinct regulatory regime for the product at issue, only to have the agency later change its view. Instead, this is a case in which Congress clearly and unequivocally delegated to EPA the power to study and then regulate consumer and commercial products—such as architectural coatings—that release VOCs. 42 U.S.C. 7511b(e)(3)(A). Whatever *Brown & Williamson* adds to the analysis to be performed under *Chevron* step one in "extraordinary cases" like *Brown & Williamson*, 529 U.S. at 159, it has no application here.

Consequently, petitioners' repeated claim that Congress "did not explicitly empower EPA to" use three reactivity categories, Pet. 15-16, or that there can be no "implicit delegation of power" to adopt the regulations at issue here, Pet. 17, are without merit. *Brown & Williamson* does not replace traditional *Chevron* defer-

ence with a plain-statement test or with a requirement that all regulatory decisions be the product of unambiguous statutory command.[2] To the contrary, *Brown & Williamson* preserved the rule that, "if Congress has not specifically addressed the question, a reviewing court must respect the agency's construction of the statute so long as it is permissible." 529 U.S. at 132. The court of appeals properly applied that approach when examining the validity of EPA's architectural coatings regulations, and nothing in *Brown & Williamson* undermines its judgment.

b. Petitioners' reliance on *Christensen* is likewise misplaced. In that case, this Court concluded that *Chevron* deference does not apply to agency statutory interpretations in opinion letters, policy statements, manuals, and enforcement guidelines that are not "arrived at after, for example, a formal adjudication or notice-and-comment rulemaking." 529 U.S. at 587. The Court expressly stated, however, that "the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation." *Ibid.* In the present case, petitioners are challenging regulations promulgated through notice-and-comment rulemaking. As a result, under *Christensen*, traditional *Chevron* deference is appropriate.

Seeking to avoid that result, petitioners argue that they, in effect, are challenging EPA's 1995 report to Congress. Although that report was required by statute, it was not, they argue, an agency rule or decision. Pet. 11. But the 1995 report to Congress, which did not create binding rules governing peti-

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[2] Cf. *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903 (2001) (rejecting similar contentions under the non-delegation doctrine).

tioners' conduct, was not itself reviewable final agency action; and petitioners, in any event, sought to invalidate EPA's 1998 determination and the resulting regulations. Because the 1998 agency actions that petitioners sought to invalidate were "arrived at after * * * notice-and-comment rulemaking"—and represent the agency's "interpretation contained in a regulation"—*Chevron* deference was appropriate under *Christensen*, 529 U.S. at 587.[3]

2. Petitioners also assert that EPA's regulation of the manufacture and sale of paint and other consumer and commercial products to reduce VOC emissions falls outside Congress's constitutional authority to regulate under the Commerce Clause. Petitioners do not dispute that, in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981), this Court stated that "the power conferred by the Commerce Clause" is "broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." Nonetheless, petitioners ask this Court to revisit that principle. In addition, petitioners contend that *Hodel* cannot justify regulation of the *manufacture* and *sale* of paints because the manufacture and sale do not themselves create pollution; only the *use* of paint, they argue, creates air pollution. Pet. 21.

Those arguments are without merit. Contrary to petitioners' claims (Pet. 21), this Court's recent Commerce Clause decisions cast no doubt on Congress's power to legislate in this area. Petitioner relies largely

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[3] The remainder of petitioners' *Brown & Williamson*- and *Christensen*-based arguments (Pet. 8-19) are wholly factbound, and we rely on the decision of the court of appeals rejecting them.

on *Jones* v. *United States*, 529 U.S. 848 (2000), *United States* v. *Morrison*, 529 U.S. 598 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995). Not one of those cases, however, involved the direct regulation of *commercial* activity. In *Morrison*, the activity at issue was gender-based violence, which Congress sought to regulate by providing a federal civil remedy for victims. In *Lopez*, the regulated activity was gun possession near schools; the statute made no effort to regulate the manufacture or sale of guns. And in *Jones*, the court held that arson of a home used as a private residence was not covered by a statute that prohibited arson of property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 529 U.S. at 853, 859 (quoting 18 U.S.C. 844(i) (1994 & Supp. IV 1998)); such arson, the Court reasoned, had "merely a passive, passing, or past connection to commerce." *Id.* at 855. Here, by contrast the regulated activity—the manufacture or importation of paint for sale or distribution by entities engaged in interstate commerce—is undeniably commercial in nature. That the regulated activity is itself commercial (*i.e.*, it is economic activity) is, of course, a critical factor when evaluating Congress's power under the *Commerce* Clause. See *Morrison*, 529 U.S. at 610-612; *Lopez*, 514 U.S. at 561.

Moreover, as the court of appeals pointed out (and petitioners do not dispute), ground-level ozone is a problem of interstate dimension, Pet. App. 36a, and the statute specifically requires a proper nexus to interstate commerce in any event. Section 7511b(e)(1)(C) permits regulation of those entities that are manufacturers, processors, importers or wholesale distributors of architectural coatings "for sale or distribution in interstate commerce," as well as those that supply such

entities with such products. 42 U.S.C. 7511b(e)(1)(C). Those entities that do not make, process, import or distribute the products for interstate sale or distribution (or supply the entities that do) are not covered. Pet. App. 35a.[4]

Petitioners also assert that EPA should not be permitted to regulate the *manufacture* and *sale* of paints because manufacture and sale do not create interstate pollution; only *using* paint, petitioners declare, has that effect. Pet. 21. It is hard to see how that has any bearing on the Commerce Clause issue. The manufacture and sale of the paints constitute commercial activity with a sufficient nexus to interstate commerce to permit federal regulation, whether or not the activity itself produces pollution. That is particularly true given that, as the court of appeals noted, most paints are manufactured and distributed nationwide. Pet. App. 36a. See *Lopez*, 514 U.S. at 558-559 ("Congress' com-

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[4] Petitioners' contention that EPA's regulations are broader than the statute (Pet. 24-25) is not properly presented. The court of appeals read EPA's regulations as consistent with the statute, and we see no reason to read them otherwise. In any event, because the manufacture, processing, and sale of paint is commercial activity, Congress may regulate that activity so long as it has the requisite effect on interstate commerce, *even if* the individual product at issue does not cross state lines. *Lopez*, 514 U.S. at 559 ("[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce," including "intrastate coal mining" and "restaurants utilizing substantial interstate supplies."); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). Here, EPA reasonably concluded that nationwide regulations are necessary to prevent the use of products from attainment areas in non-attainment areas, undermining the efforts to reduce VOC emissions in non-attainment areas. Pet. App. 22a-23a.

merce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce") (citation omitted); cf. *Wickard* v. *Filburn*, 317 U.S. 111 (1942) (regulation of wheat grown for consumption at home permissible because of effect on interstate commerce in the aggregate). Besides, petitioners' attempt to disassociate the manufacture and sale of the paint from its ozone-producing use is unpersuasive. The use of petitioners' products is an inevitable and intended consequence of their manufacture and sale. Nothing in the Constitution prohibits Congress from addressing the problem of ozone production by regulating the manufacture and trafficking in products that, when used as intended, generate that pollutant.

Alternatively, petitioners appear to argue that the Commerce Clause would not permit Congress to regulate the *use* of paint by individuals. That claim is not presented by this case. EPA's national architectural coatings regulations govern manufacturers, wholesale distributors, and importers of paint, not paint users. Pet. 21 ("The 'activities' regulated by EPA were those of manufacturing all paints for sale in the nation."). For the same reasons, there is no reason in this case to address petitioners' claim that Congress and EPA did not make sufficient findings to justify the regulation of paint usage, Pet. 21-22; that house painting is not a commercial activity, Pet. 27-28; or that house painting does not have a sufficient impact on interstate commerce.[5] Here, Congress authorized EPA to regulate

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[5] To a large degree, petitioners' challenge is not really aimed at the question of interstate commerce, but at the degree to which particular compounds (glycols) contribute to ozone formation. See

the manufacture of particular consumer and commercial products for sale and distribution—activities that are undeniably commercial and that have an unmistakable effect on interstate commerce—because of the effect on airborne pollutants. Nothing in *Lopez*, *Jones*, or *Morrison* casts doubt on Congress's power to do so. See *Lopez*, 514 U.S. at 560 ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."); *Morrison*, 529 U.S. at 608-609 (similar).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2001

Pet. 22 (arguing that glycols are not volatile). As the court of appeals explained, it is unlikely that EPA erred with respect to specific compounds and, in any event, EPA's regulations provide a mechanism by which erroneously included compounds can be exempted from regulation. Pet. App. 14a-15a.