

No. 19-71930

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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A COMMUNITY VOICE; CALIFORNIA COMMUNITIES AGAINST TOXICS;  
HEALTHY HOMES COLLABORATIVE; NEW JERSEY CITIZEN ACTION;  
NEW YORK CITY COALITION TO END LEAD POISONING; SIERRA CLUB;  
UNITED PARENTS AGAINST LEAD NATIONAL; and WE ACT FOR  
ENVIRONMENTAL JUSTICE,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and  
ANDREW R. WHEELER, as Administrator of the United States Environmental  
Protection Agency,

*Respondents.*

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

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**PETITIONERS' OPENING BRIEF**

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Dated: January 15, 2020

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners A Community Voice, California Communities Against Toxics, Healthy Homes Collaborative, New Jersey Citizen Action, New York City Coalition to End Lead Poisoning, Sierra Club, United Parents Against Lead National, and WE ACT for Environmental Justice submit that they have no parent corporations and no publicly issued stock shares or securities. No publicly held corporation holds stock in any of the petitioners.

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## **GLOSSARY OF ABBREVIATIONS**

APA	Administrative Procedure Act
BLL	Blood lead level
CAA	Clean Air Act
CCAT	California Communities Against Toxics
CDC	Centers for Disease Control and Prevention
CHPAC	Children’s Health Protection Advisory Committee
Clearance Study	HUD, Lead Hazard Control Clearance Survey (2015)
CPSC	Consumer Product Safety Commission
DLHS	Dust-lead hazard standards
EPA	United States Environmental Protection Agency
ER	Excerpts of Record
Final Rule	Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 84 Fed. Reg. 32,632 (July 9, 2019)
HHC	Healthy Homes Collaborative
HUD	United States Department of Housing and Urban Development
LBP	Lead-based paint
MA	Addendum to Petitioners’ Motion to Supplement the Record with Expert Declarations
NIEHS	National Institute of Environmental Health Sciences
PA	Petitioners’ Addendum of Declarations in Support of Standing
PHA	Residential Lead-Based Paint Hazard Reduction Act
Proposed Rule	Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 83 Fed. Reg. 30,889 (July 2, 2018)
SAB Panel	EPA Science Advisory Board Lead Review Panel
TSCA	Title IV of the Toxic Substances Control Act, as amended by the PHA
µg/dL	Micrograms per deciliter

5/40 Standards	5 $\mu\text{g}/\text{ft}^2$ dust on floors, 40 $\mu\text{g}/\text{ft}^2$ dust on windowsills
10/100 Standards	10 $\mu\text{g}/\text{ft}^2$ dust on floors, 100 $\mu\text{g}/\text{ft}^2$ dust on windowsills
2001 Hazard Standards	40 C.F.R. § 745.65 (2001) (prior to Jan. 6, 2020 amendments)
2009 Petition	Citizen Petition to EPA Regarding the Paint and Dust Lead Standards (2009)
2017 Writ	Writ of Mandamus, <i>A Community Voice</i> , 878 F.3d 779 (9th Cir. 2017)

## PRELIMINARY STATEMENT

At issue is the ongoing failure of the United States Environmental Protection Agency (“EPA”) to protect children and pregnant women from hazardous lead conditions. Petitioners<sup>1</sup> challenge a final rule in which EPA chose not to set lead-based paint (“LBP”) hazard standards at levels that identify what current science recognizes to be dangerous lead conditions, despite this Court’s writ of mandamus directing it to do so. EPA’s identification of what constitutes a LBP hazard—defined by the Residential Lead-Based Paint Hazard Reduction Act of 1992 (“PHA”)<sup>2</sup> as “any condition” that causes exposure to lead from dust, paint, or soil that “would result in adverse human health effects”<sup>3</sup>—determines whether residents are exposed to dangerous levels of lead. It also drives the extent to which LBP dangers in residences and child care facilities are cleaned up or abated. If EPA’s three LBP hazard standards—which cover lead in dust, soil, and paint—are

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<sup>1</sup> The petitioning organizations are: A Community Voice, California Communities Against Toxics (“CCAT”), Healthy Homes Collaborative (“HHC”), New Jersey Citizen Action, New York City Coalition to End Lead Poisoning, Sierra Club, United Parents Against Lead National, and WE ACT for Environmental Justice (collectively “Petitioners”).

<sup>2</sup> Title X of the Housing and Community Development of 1992, Pub. L. 102-550, 106 Stat. 3672 (Oct. 28, 1992) (codified at 42 U.S.C. § 4851 *et seq.* and 15 U.S.C. § 2681 *et seq.*), ER71-104.

<sup>3</sup> 15 U.S.C. § 2681(10).

set too high, the public will not be warned when they face lead dangers, and clean up or abatement of dangerous conditions will not be required or will be inadequate.

More than two years ago, this Court found that EPA unreasonably delayed in fulfilling its “ongoing duty” stemming from Title IV of the Toxic Substances Control Act, as amended by the PHA (“TSCA”), to eliminate LBP hazards by adopting standards that identify dangerous levels of lead and a corresponding clearance level. *A Cmty. Voice*, 878 F.3d 779, 784 (9th Cir. 2017) (“2017 Writ”), ER105-23.<sup>4</sup> Because of the “severe risks to children of lead-poisoning under EPA’s admittedly insufficient standards,” *id.* at 788, this Court issued a writ of mandamus, directing EPA to update its hazard standards within one year and ninety days of the 2017 Writ. *Id.*

In response, EPA issued *Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint*, 84 Fed. Reg. 32,632 (July 9, 2019) (“Final Rule”), ER1-17.<sup>5</sup> The Final Rule lowers the dust-lead hazard standards (“DLHS”), one of the three LBP hazard standards—though not to a level that comports with the plain

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<sup>4</sup> Although an unpublished version of the Court’s ruling is in the Excerpts of Record, Petitioners’ citation to the ruling will be to the published version.

<sup>5</sup> Petitioners use “ER” to refer to the Excerpts of Record, “PA” to refer to Petitioners’ Addendum of Declarations in Support of Standing, and “MA” to refer to the Addendum of Expert Declarations attached to the Motion to Supplement the Record with Expert Declarations.

terms of TSCA—and leaves the other two standards unchanged. It also fails to lower dust-lead clearance levels—the amount of lead that is permitted in dust after clean-up—to be consistent with the newly adopted DLHS. This means that a clean-up will be considered successful even if the level of dust-lead that remains constitutes a LBP hazard, undermining Congress’s purpose of identifying and eliminating such hazards. By failing to ensure that all three LBP hazard standards and the dust-lead clearance level are set at levels that identify dangerous lead conditions, the Final Rule flouts TSCA, the Administrative Procedure Act (“APA”), and the 2017 Writ. Accordingly, the same Petitioners that sought the writ of mandamus now seek review of the Final Rule.

As described below, the DLHS violate TSCA because, by EPA’s own admission, they are set at levels that fail to identify dangerous lead conditions, are based on factors such as “reliability” although TSCA directs EPA to consider only health, and even if costs were relevant, EPA’s analysis is not designed to identify true hazard standards and is based on flawed economic principles. Not only do the DLHS fail to protect children from lead, EPA effectively undermines any benefit of the Final Rule’s revisions by failing to update the dust-lead clearance levels to match the DLHS, meaning residences can be cleared after abatement even if the dust-lead levels exceed the newly adopted DLHS. The Final Rule also leaves children at risk of lead poisoning by failing to update the definition of LBP, despite

this Court's directive that doing so is required by TSCA and the APA; EPA's assertion that more study is needed is palpably false. Finally, the Final Rule runs afoul of the purposes of TSCA by not updating the soil-lead standards, given that many children are exposed to lead from outdoor play and soil-lead is a major contributor to lead inside homes.

For all these reasons, Petitioners now ask this Court to remand the Final Rule without vacatur with directions to EPA to expeditiously update the LBP hazard standards, the definition of LBP, and clearance levels so they identify any lead condition that has adverse health effects.

### **STATEMENT OF JURISDICTION**

Respondents EPA and Administrator Andrew Wheeler (together, "EPA") issued the Final Rule pursuant to their authority under TSCA Title IV. ER2. The U.S. Courts of Appeals have jurisdiction to review final rules under TSCA Title IV. 15 U.S.C. § 2618(a)(1)(B). Venue is proper here because Petitioners CCAT, HHC, and Sierra Club reside in California. PA11; 16; 21; 39.

The Final Rule was published on July 9, 2019. ER1. Petitioners filed a timely petition for review on August 1, 2019. Dkt. 1-5.



## STATEMENT OF ISSUES PRESENTED

1. Does the Final Rule violate TSCA because:
  - EPA failed to adopt DLHS, and failed to update its definition of LBP or soil-lead hazard standards, as TSCA requires, *A Cmty. Voice*, 878 F.3d at 784, such that the LBP hazard standards “identify,” 15 U.S.C. § 2683, “any condition that causes exposure to lead . . . that would result in adverse human health effects,” *id.* § 2681(10) (emphasis added), insofar as EPA’s current regulations standards leave “[un]identif[ied]” conditions that EPA admits cause exposures to lead that have “adverse human health effects”; and
  - EPA failed to lower the dust-lead clearance levels to be the same as, or lower than, the new DLHS, with the result that “abatement” activities may not “permanently eliminate lead-based paint hazards,” *id.* § 2681(1), as TSCA requires, thereby frustrating Congress’s goal of eliminating these hazards as “expeditiously as possible,” 42 U.S.C. § 4851a(1)?
2. Does the Final Rule violate the APA and the 2017 Writ by failing to update the dust-lead clearance level and the definition of LBP as this Court directed?
3. Is the Final Rule arbitrary and capricious insofar as:
  - EPA’s analysis of candidate DLHS was not designed to select an option that would identify conditions resulting in adverse health effects, as

required by TSCA, 15 U.S.C. § 2681(10); EPA impermissibly considered factors like reliability and achievability when adopting the DLHS; and EPA's consideration of these extra-statutory factors ignored evidence before the Agency and basic economic principles, *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"); and

- EPA exhibited an "unexplained inconsistency," *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016), by departing from its prior practice of amending all of the interrelated lead hazard and clearance standards in tandem; and
- EPA deemed it "sufficient . . . to merely recite the terms 'substantial uncertainty' as a justification," *State Farm*, 463 U.S. at 52, not to revise clearance levels, the definition of LBP, and the soil-lead standard despite ample evidence in the record demanding that these regulations be updated?

### **STATUTORY ADDENDUM**

Petitioners attach a separate Statutory Addendum to their Opening Brief.

9th Cir. R. 28-2.7.

## STATEMENT OF CASE

### **I. Exposure to Lead Poses Irreversible Dangers at Any Level of Exposure.**

Thousands of scientific studies have established the toxicity of lead to the human body, ER141; 220-24 (Table ES-1) (EPA's summary of lead's health effects). Low-level lead exposure, including exposure that results in blood lead levels ("BLL") below 5 micrograms of lead per deciliter of blood ("µg/dL"),<sup>6</sup> is a causal risk factor for diminished intellectual and academic abilities, higher rates of neurobehavioral disorders such as hyperactivity and attention deficits, and lower birth weight in children. ER230. No treatments effectively ameliorate the permanent developmental effects of lead toxicity. *Id.* In addition, lead exposure is a causal risk factor for hypertension and cardiovascular disease mortality, with a recent large-scale study finding that 400,000 deaths per year in the U.S. are attributable to lead exposure. ER250; 258. This study concluded that blood lead concentrations lower than 5 µg/dL are associated with mortality. ER259.

Large reservoirs of lead remain in the environment as legacies of its historical uses. For example, millions of U.S. homes still contain lead-based paint, and lead in soil surrounding homes can be present from many sources. ER138-39. Lead in household dust and soil are major sources of children's exposure. *Id.*;

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<sup>6</sup> BLL, expressed in µg/dL, is the most common index of lead exposure in epidemiologic studies. ER218a.

*see also* ER 271; 280; 283; 292-99. Ingestion of lead-based paint is the most common cause of clinical lead poisoning in children. ER139.

Lead exposure can begin before birth, as it easily passes across the placenta, and it can remain in the body for decades. *Id.* Individuals who suffer greater lead exposure as children achieve less educational and occupational success as adults. ER145; 308. In addition, multiple studies suggest that greater exposure during childhood places individuals at greater risk of violence and aggression, and even arrests. ER145.

Children living in communities of color shoulder a disproportionate share of the health burden caused by lead exposure. ER144. In addition, children from backgrounds of socioeconomic disadvantage suffer greater adverse educational impacts from lead exposure than do children from more advantaged backgrounds. *Id.*

## **II. The PHA Requires EPA to Promulgate LBP Hazard Standards that Identify Dangerous Levels of Lead.**

Congress adopted the PHA in response to its concern that “low-level lead poisoning is widespread among American children . . . with minority and low-income communities disproportionately affected,” thereby “caus[ing] intelligence quotient deficiencies, reading and learning disabilities, impaired hearing, reduced attention span, hyperactivity, and behavior problems.” 42 U.S.C. § 4851(1), (2).

Congress sought to “ensure that the national goal of eliminating [LBP] hazards in housing can be achieved as expeditiously as possible.” *Id.* § 4851(8).

One of EPA’s core duties under TSCA is to “[i]dentif[y] . . . dangerous levels of lead,” 15 U.S.C. § 2683 (title of section), so that the public is informed about lead hazards in their home, and clean-up resources can be focused on lead conditions that cause exposure that adversely impact health. It does this through regulations that set standards for what constitutes “LBP hazards,” which are defined as: “any condition that causes exposure to lead from . . . dust, . . . soil, [or] . . . paint . . . that would result in adverse human health effects as established by the [EPA] under this subchapter.” *Id.* § 2681(10).

### **III. EPA Set the 2001 Hazard Standards Based on CDC’s 1991 Level of Concern.**

To comply with TSCA’s mandate, EPA adopted regulations defining what constitutes a “dust-lead hazard,” “soil-lead hazard,” and “paint-lead hazard.” 40 C.F.R. § 745.65 (2001) (amended Jan. 6, 2020)<sup>7</sup> (“2001 Hazard Standards”), ER311. EPA’s hazard standards apply to residential dwellings and “child-

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<sup>7</sup> Congress directed EPA to adopt LBP hazard standards within 18 months of the PHA’s 1992 adoption. 15 U.S.C. § 2683. EPA finally did so in 2001, after a court order. *See Atlantic States Legal Found., Inc. v. Browner*, 1996 WL 6620, at \*1 (N.D.N.Y. Jan. 3, 1996).

occupied facilities,” which are buildings constructed prior to 1978 and visited regularly by a child six years of age or under. 40 C.F.R. § 745.223.

The 2001 Hazard Standards established dust and soil hazard levels based on the goal of avoiding the chance that a child’s BLL would exceed 10 µg/dL, which was the blood lead “level of concern” set in 1991 by the Centers for Disease Control and Prevention (“CDC”) and “was then believed to be the safe blood lead level.” *A Cmty. Voice*, 878 F.3d at 782 (citing ER320). Using the CDC’s 10 µg/dL level of concern as a benchmark, EPA defined a dust-lead hazard as “surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding 40 µg/ft<sup>2</sup> on floors or 250 µg/ft<sup>2</sup> on interior window sills” and set the soil-lead hazard as “soil on residential real property or on the property of a child-occupied facility that contains total lead equal to or exceeding 400 parts per million (µg/g) in a play area or average of 1,200 parts per million of bare soil in the rest of the yard based on soil samples.” ER343.

EPA adopted “dust clearance standards” that matched the DLHS. ER327; *see also* 40 C.F.R. § 745.223 (defining clearance levels as “values that indicate the maximum amount of lead permitted in dust on a surface following completion of an abatement activity”). In explaining the decision to set identical standards for hazard and clearance, EPA asserted that it “considers safety, for purposes of

clearance, to be a level of lead in dust that is [] associated with the risk level of concern,” and that utilizing the same levels is “as easy as possible to understand and implement.” Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30,302, 30,341 (June 3, 1998).<sup>8</sup>

EPA’s “paint-lead hazard standard” has two components: (a) what constitutes “LBP” and (b) what “condition[s]” of LBP result in health-harming lead exposure. 15 U.S.C. § 2681(10). When Congress adopted the PHA, it set an initial definition of LBP as “paint or surface coatings that contain lead in excess of 1.0 milligrams per centimeter squared or 0.5 percent by weight,” and it authorized EPA to set a lower level for housing other than for target housing.<sup>9</sup> *Id.* § 2681(9). Congress also clarified that hazardous conditions exist when LBP is “deteriorated or present” such that it causes exposure that would result in “adverse human health effects.” *Id.* § 2681(10). EPA’s 2001 Hazard Standards defined what constitutes a

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<sup>8</sup> EPA considered adopting a clearance level lower than the hazard standard to provide a margin of safety. It did not consider setting a clearance level higher than the hazard standard. 63 Fed. Reg. at 30,341.

<sup>9</sup> “Target housing” is pre-1978 housing, except housing for the elderly or persons with disabilities or any 0-bedroom dwelling (unless inhabited by a child younger than than six). 15 U.S.C. § 2681(17). For target housing, the Department of Housing and Urban Development (“HUD”), which also has a large role in implementing the PHA, is authorized to set lower levels for paint or surface coatings. *Id.*; 42 U.S.C. §§ 4822(c), 4851b(14). Neither EPA nor HUD has altered Congress’s definition of LBP. *See* 40 C.F.R. §§ 745.103, 745.223; 24 C.F.R. § 35.1000.

“paint-lead hazard,” *see* 40 C.F.R. §§ 745.103, 745.223, and EPA explained that “the purpose of identifying almost all deteriorated [LBP] as a paint lead hazard is to alert the public to the fact that all deteriorated [LBP] should be addressed.”

ER315.

#### **IV. EPA Granted the 2009 Petition to Modify the Outdated 2001 DLHS, Clearance Levels, and Definition of LBP.**

By 2007, it was well-accepted that the 2001 Hazard Standards were outdated and failed to identify “any condition” that caused exposure to dangerous levels of lead. That year, EPA’s Clean Air Scientific Advisory Committee informed EPA that its DLHS were “insufficiently protective of children’s health,” *A Cmty. Voice*, 878 F.3d at 782, and that it was no longer appropriate to tether the lead hazard standards to CDC’s 10 µg/dL BLL because new findings showed adverse health effects in children with lower BLLs. *Id.* Not only were EPA’s dust and soil standards based on the outdated view that a BLL of 10 µg/dL was safe, a 2009 study found an 11.5 percent chance that a child living in housing that met EPA’s standards would develop a BLL even higher than CDC’s outdated 10 µg/dL level of concern. ER897 (Table 6).

In light of the accumulating concerns with EPA’s 2001 Hazard Standards, in 2009, twelve organizations—including several of the Petitioners—submitted a petition for rulemaking to EPA under TSCA and the APA, asking EPA to “protect these children from the dangers of lead-based paint and leaded dust by lowering



the levels in the current standards.” ER346 (“2009 Petition”). The 2009 Petition asked EPA to: (a) lower the DLHS from 40 micrograms of lead per square foot of surface area ( $\mu\text{g}/\text{ft}^2$ ) to  $10 \mu\text{g}/\text{ft}^2$  or less for floors, and from  $250 \mu\text{g}/\text{ft}^2$  to  $100 \mu\text{g}/\text{ft}^2$  or less for windowsills, ER347; (b) lower EPA’s dust-lead clearance levels accordingly, *id.*; and (c) reduce the level of lead in paint that would define it as “LBP” from 0.5 percent by weight to 0.06 percent by weight, with a corresponding reduction in the 1.0 milligram per square centimeter standard, ER350-51. Each of these three requests was supported with data and careful reasoning. ER346-52. The 2009 Petition did not discuss the soil-lead hazard standard.

Later that year, EPA responded to the 2009 Petition, acknowledging that “[m]ore recent epidemiological studies indicate that the current hazard standards may not be sufficiently protective,” and therefore it was granting the request in full, agreeing “to begin an appropriate proceeding,” though without committing to a specific new level or date of promulgation. ER361. With respect to the definition of LBP in non-target housing, EPA stated that it “inten[ds] to initiate appropriate proceedings regarding the definition of lead-based paint.” ER362. With respect to the definition of LBP in target housing, for which EPA and HUD share responsibility, EPA stated that it intends to coordinate with HUD. ER361-62.

**V. EPA Failed to Act While the Evidence Mounted that Its Standards Were Leaving Children in Harm's Way.**

After granting the 2009 Petition, EPA formed a Science Advisory Board Lead Review Panel ("SAB Panel") and conducted a literature review which concluded that technology was developed and feasible for detecting lower levels of dust-lead. *A Cmty. Voice*, 878 F.3d at 783. EPA also coordinated with HUD to survey target housing to determine the feasibility of lower lead clearance levels. ER428-66 ("Clearance Study"). The Clearance Study determined that "lower lead clearance levels were in fact feasible." *A Cmty. Voice*, 878 F.3d at 783. During this period, EPA took no action to update the definition of LBP. ER470.

Despite initial steps, EPA's work to update the DLHS fizzled out. ER500-01. While EPA delayed, the evidence became clearer that its dust-lead and soil-lead hazard standards were dangerously outdated. Most notably, in 2012 the CDC stopped identifying a "blood level of concern" due to the "compelling evidence that low BLLs are associated with IQ deficits, attention-related behaviors, and poor academic achievement." ER2; 526. Given the "absence of an identified BLL without deleterious effects combined with the evidence that these effects appear to be irreversible," CDC abandoned the 10 µg/dL BLL of concern, which had been the benchmark for EPA's 2001 Hazard Standards. ER526; 319. Because the CDC determined that it could not establish a "safe" level of lead exposure, it moved away from setting a "level of concern" and instead established a statistical

“reference value” denoting the BLL at which 97.5 percent of children aged one to five have BLLs at or lower than this level, as measured by CDC’s biomonitoring program. ER529; 526. In 2012, CDC found this statistical level to be 5 µg/dL, and set the BLL reference value accordingly. ER2.

In addition, in 2012, the Children’s Health Protection Advisory Committee (“CHPAC”), a Federal Advisory Committee for EPA, urged EPA to make strengthening the LBP hazard standards for paint, dust, and soil one of its highest priorities in the efforts to reduce children’s BLLs. ER541-42. The CHPAC noted that “EPA has not updated its dust lead standard, despite reports from its [SAB] and well-documented evidence that the existing standards promulgated more than a decade ago do not protect children adequately.” ER542.

## **VI. This Court Ordered EPA to Act to Protect Children from Lead.**

After nearly seven years had passed since EPA granted the 2009 Petition, but without the agency proposing new standards, Petitioners filed a petition for writ of mandamus in this Court. ER471-516.

Over EPA’s opposition, the Court issued the 2017 Writ, finding that since EPA adopted the 2001 Hazard Standards, “scientific research has further advanced our understanding of the dangerousness of lead, yet the EPA’s standards have not changed.” *A Cmty. Voice*, 878 F.3d at 782. It also noted that “EPA does not appear to dispute . . . that, according to modern scientific understanding, neither

the dust-lead hazard standard nor the lead-based paint standard are sufficient to protect children.” *Id.* at 782, 784.

The Court rejected EPA’s contention that it had no duty to update the LBP hazard standards. First, the Court found that TSCA establishes an “ongoing duty” to modify the initial hazard standards when necessary to prevent lead poisoning and eliminate LBP hazards. *Id.* at 784; *see also id.* (“Congress did not want EPA to set initial standards and then walk away, but to engage in an ongoing process, accounting for new information, and to modify initial standards when necessary . . . .”). Second, the Court found that the 2009 Petition “is . . . a matter” that EPA must “conclude . . . within a reasonable time” within the meaning of 5 U.S.C § 555(b). *Id.* Therefore, EPA has a “clear duty to act” under the APA, *id.* at 785, which requires it to “fully respond to Petitioners’ rulemaking petition,” *id.* at 786.

The Court ruled that EPA’s delay was “unreasonable” because “there is a clear threat to human welfare,” and “[t]he children exposed to lead . . . due to the failure of EPA to act are severely prejudiced by EPA’s delay.” *Id.* at 787. Given these facts and the congressional “assert[ion] that the threat of lead poisoning must be eliminated expeditiously,” *id.*, the Court issued a writ of mandamus requiring EPA “to promulgate a rule updating the dust-lead hazard standards and the definition of lead-based paint.” *Id.* at 788; *see also* ER480.

## **VII. EPA Adopted the Inadequate Final Rule in Response to the 2017 Writ.**

### **A. The Proposed Rule**

Pursuant to the 2017 Writ, EPA proposed to lower the DLHS from 40  $\mu\text{g}/\text{ft}^2$  and 250  $\mu\text{g}/\text{ft}^2$  to 10  $\mu\text{g}/\text{ft}^2$  and 100  $\mu\text{g}/\text{ft}^2$  on floors and windowsills, respectively (the “10/100 Standards”). ER551 (“Proposed Rule”). These were the levels sought in the 2009 Petition before CDC’s decision to abandon the 10  $\mu\text{g}/\text{dL}$  BLL of concern. ER347; 557. The Proposed Rule proposed no change to the dust-lead clearance levels, no change to the definition of LBP, and no change to the soil-lead hazard standards.

### **B. Public comments**

Public comments on the proposal were extensive, with many urging EPA to adopt a DLHS lower than the proposed 10/100 Standards. ER565; 574; 579. Commenters noted that the 10/100 Standards are not health-based, ER564; 579-81, and that there is no practicability hurdle to adopting a lower DLHS. ER581.

Several states, as well as other commenters, asked EPA to lower the dust-lead clearance levels to correspond with the DLHS, noting that leaving the clearance levels higher than the hazard standards will allow children to remain in settings where lead levels are dangerously high—even after clean-up. ER566; 569; 573-74; 577-79; 592; 594; 596; 598.

Several states, as well as other commenters, also expressed concern that EPA had not updated the definition of LBP, and disagreed with EPA's contention that it lacked sufficient information to do so. ER565; 584-86; 595; 599.

Many commenters urged EPA to revise the soil-lead hazard standard. *See* ER566; 570; 587-88; 598; 613. They noted that the current soil-lead hazard standard, adopted in 2001, assumed that a BLL up to 10 µg/dL is safe—a premise belied by current science—and that soil is a key exposure pathway to lead. ER566; 570; 588; 602; 615.

### **C. The Final Rule**

On July 9, 2019, EPA issued the Final Rule without making any changes from the Proposed Rule. With respect to the DLHS, EPA stated that it had set the standards based on “potential for risk reduction,” achievability, laboratory ability, resources, and consistency. ER7-10. Regarding laboratory ability to measure dust-lead at levels lower than the newly adopted standards, EPA concluded—based on interviews with fourteen laboratories that conduct dust-wipe analysis and two accrediting bodies, all conducted after the Proposed Rule was published (ER8; 1295-1317)—that if the DLHS were lower than the proposed standard, some laboratories would have to switch to different analytical instruments, leading some to discontinue providing this service. ER10.

With respect to the dust-lead clearance standard, EPA indicated that it needed to conduct a variety of additional analyses, including an economic analysis, before updating the standard. ER3. It did not explain why the economic analysis prepared for the Final Rule, which considered the impacts of a changing the clearance standard, was insufficient. In response to comments criticizing the decision to leave the clearance standards unchanged, EPA stated that it “has initiated action on this issue under a separate rulemaking.” *Id.*

With respect to the definition of LBP, EPA claimed that significant data gaps preclude it from updating the definition, or even concluding whether an update is needed. ER12. EPA did not explain why the period since it granted the 2009 Petition had not been sufficient for developing this information.

With respect to the soil-lead hazard standard, EPA stated that revising the soil-lead standard is not within the scope of the rulemaking, was not required as part of the 2017 Writ, and would require additional analyses, including evaluation of costs. ER648. EPA provided no timetable for when it might conduct those analyses and revisit the 2001 soil-lead standards.

## **STANDARD OF REVIEW**

Under the APA, courts must “hold unlawful and set aside” agency action and conclusions “found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or “in excess of statutory jurisdiction,

authority, or limitations, or short of statutory right.” 5 U.S.C. § 706(2). In addition, reviewing courts “shall . . . compel agency action unlawfully withheld . . . .” *Id.* § 706(1).

When reviewing an agency’s interpretation of a statute, courts follow the test established in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See City of L.A. v. U.S. Dep’t of Commerce*, 307 F.3d 859, 868 (9th Cir. 2002). If Congress has spoken directly to the precise question at issue, the Court must give effect to Congress’s unambiguously expressed intent. *Chevron*, 467 U.S. at 842-43 & n.9; *Akhtar v. Burzynski*, 384 F.3d 1193, 1198 (9th Cir. 2004). If the statute is silent or ambiguous, a court will defer to an agency’s interpretation if that interpretation is reasonable. *Chevron*, 467 U.S. at 843 & n.9.

In addition, agency action is arbitrary and capricious where an agency “relie[s] on factors which Congress has not intended it to consider, entirely fail[s] to consider an important aspect of the problem, [or] offer[s] an explanation for its decision that runs counter to the evidence before the agency.” *State Farm*, 463 U.S. at 43. A court’s review of agency action, while “deferential,” must be “thorough, probing, [and] in-depth.” *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 415 F.3d 1078, 1093 (9th Cir. 2005) (citation omitted).



## SUMMARY OF ARGUMENT

1. Petitioners have standing to challenge the Final Rule because they and their members will be denied critical information regarding what levels of lead in dust, paint, and soil result in adverse health effects. *Fed. Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998). Petitioners also face a credible threat of harm because EPA’s failure to identify dangerous lead levels may expose them to unsafe living conditions. *Nat. Res. Def. Council, Inc. v. EPA*, 735 F.3d 873, 878-79 (9th Cir. 2013). Further, Petitioners have standing to challenge EPA’s failure to comply with the 2017 Writ. *Salazar v. Buono*, 559 U.S. 700, 712 (2010).
2. Congress instructed EPA to “identif[y]” what constitutes “lead-based paint hazards,” 15 U.S.C. § 2683, defined as “any condition that causes exposure to lead” that “would result in adverse human health effects,” *id.* § 2681(10). The Final Rule fails to give effect to Congress’s unambiguously expressed intent. *Chevron*, 467 U.S. at 842-43. *First*, the Final Rule violates TSCA by setting the DLHS *above* levels of dust-lead on floors and windowsills that EPA admits will “result in adverse human health effects.” 15 U.S.C. § 2681(10). In this way, the DLHS fail to “identify” all dangerous dust-lead conditions, as TSCA requires. *Second*, flouting TSCA’s plain language, *id.*, EPA considered non-health factors, such as achievability, when setting the DLHS. *Third*, EPA’s failure to lower the clearance standards in tandem with the DLHS means abatement

activities will not “permanently eliminate[]” LBP hazards, as required by TSCA. *Id.* §§ 2681(1), (10). In any event, even if TSCA’s language is ambiguous—which it is not—EPA’s Final Rule is not a “permissible construction” of the statute because the new DLHS tolerate exposure to harmful lead levels and the failure to update clearance levels nullifies the new DLHS. *Chevron*, 467 U.S. at 842-43. *Finally*, EPA violates the purpose and framework of TSCA by failing to update the definition of LBP or the soil-lead hazard standards, which are now nearly two decades old and outpaced by scientific studies that show the harms of even low levels of lead exposure.

3. EPA unlawfully defies the 2017 Writ, which ruled that EPA must “fully respond to” the 2009 Petition. *A Cmty. Voice*, 878 F.3d. at 786. EPA did not update the dust-lead clearance levels and the definition of LBP, in violation of the 2017 Writ and the APA. *Id.*

4. The Final Rule is arbitrary and capricious on several grounds. *First*, EPA’s process for evaluating candidate DLHS was premised on health benchmarks that do not identify all adverse health impacts, and EPA relied on impermissible factors in adopting the 10/100 Standards. Even if EPA could consider these impermissible factors, EPA drew flawed conclusions from *ad hoc* interviews with testing labs and overlooked key evidence in the record about clearing lead from windowsills. *Second*, by lowering the DLHS but leaving other hazard standards and clearance

levels unchanged, EPA irrationally failed to consider the interrelationship among sources of lead exposure, an approach departing from the Agency's past practice. *Third*, EPA's claim that it lacks sufficient information to identify harmful levels of one of the most widely studied toxicants deserves no deference and is a flagrant delay tactic at the expense of children's futures.

## **ARGUMENT**

### **I. Petitioners Have Standing.**

Petitioners have standing to challenge the Final Rule based on informational injury, increased risk of harm from lead exposure, and their interest in enforcing the 2017 Writ.

#### **A. Petitioners are injured by the Final Rule.**

##### **1. The Final Rule denies Petitioners information to which they are entitled under TSCA.**

Petitioners are injured because the Final Rule—including EPA's decisions not to update the dust-lead clearance level, the definition of LBP, or the soil-lead standard—denies them and their members critical information regarding what levels of lead in dust, paint, and soil will result in exposures that cause health harms. In addition, it denies them information about particular hazards in their own homes and homes they may seek to rent or buy. PA3-4; 6-8; 11-14; 17-19; 21-23; 27-28; 31, 35-36; 40-41; 45-46; 50-51; 54-55.

One of the core purposes of the PHA is “*to educate* the public concerning the hazards and sources of lead-based paint poisoning.” 42 U.S.C. § 4851a(7) (emphasis added). Congress found that “*an informed public*” is part of the “infrastructure . . . necessary to ensure that the national goal of eliminating lead-based paint hazards in housing can be achieved.” *Id.* § 4851(8) (emphasis added). TSCA therefore requires EPA to develop strategies for public education and disclosure regarding what constitutes a dangerous level of lead in target housing. *See* S. Rep. No. 102-332, at 107 (1992) (“[The PHA] is intended to greatly increase public awareness of the hazards posed by [LBP] to young children and pregnant women . . .”). For example, EPA must “sponsor public education and outreach to increase awareness of,” *inter alia*, “the health consequences of lead exposure resulting from lead-based paint hazards,” “risk assessment and inspection methods for lead-based paint hazards,” and “measures to reduce the risk of lead exposure from lead-based paint.” 15 U.S.C. § 2685(d)(1). Petitioners and their members would benefit from this education and outreach *if* EPA’s hazard standards correctly identified hazardous lead conditions.

TSCA also requires EPA to issue regulations requiring lessors and sellers of target housing to disclose information concerning LBP hazards prior to the sale or lease of all residential dwellings built before 1978. 42 U.S.C. § 4852d. This disclosure is tied to the hazard standards that EPA has set. In addition, all people

who are seeking to purchase or lease target housing must receive EPA’s LBP hazard information pamphlet, informing the public of EPA’s LBP hazard standards, before entering into a binding contract. *Id.* § 4852d(a)(1)(A).

States and cities also rely on EPA’s LBP hazard standards to inform when disclosures are required, including in Louisiana where petitioner A Community Voice is located. *See, e.g.*, La. Admin. Code. tit. 33, pt. III, § 2813(B), (C) (requiring disclosure when dust-lead is present in a child care facility or preschool above EPA’s DLHS). Under these laws, if EPA’s hazard standards are set too high, disclosure will not be mandated.

The denial of information regarding LBP hazards constitutes injury-in-fact. *Fed. Election Comm’n v. Akins*, 524 U.S. at 21; *Env’tl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019) (finding “no reason to doubt” that access to additional information required by TSCA Title I about chemicals will promote petitioners’ interests); *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016).

**2. The Final Rule puts Petitioners and their members at increased risk of exposure to hazardous lead conditions.**

Petitioners also have standing to challenge the Final Rule on behalf of their members under *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977). First, protecting their members from exposures to lead is central to Petitioners’ purposes. PA2-3; 11-13; 16-18; 26-28; 34-36; 39-41; 48-51. Second, adjudication does not require individual members’ participation. *See Hunt*, 432

U.S. at 342-43. Third, Petitioners' members would have standing to sue on their own behalf: EPA's under-protective DLHS and its decision not to update the other LBP hazard standards, including the definition of LBP, or the dust-lead clearance levels injures the members by increasing the risk they will suffer harm from exposure to lead. *See Nat. Res. Def. Council, Inc. v. EPA*, 735 F.3d at 878-79 (finding standing where organization showed "credible threat" that members' children would be exposed to pesticide); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 948 (9th Cir. 2002); *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001).

Petitioners' members face a credible threat that EPA's LBP hazard standards will not "identify" dangerous lead conditions. 15 U.S.C. §§ 2681(10), 2683. As a result, when their residences are inspected, they may not be informed of LBP hazards and will continue to live in unsafe conditions, falsely believing their home is LBP-free. In addition, if they rent or buy a new residence, the mandated lead disclosure may indicate that there are no LBP hazards even when true lead hazards are present. *See generally* PA7-8; 21-23; 30-31; 43-46; 53-55.

These are exactly the types of risks that the PHA is intended to minimize, *supra* Statement of Case II, which reinforces that these injuries give rise to standing. *Covington v. Jefferson Cty.*, 358 F.3d 626, 638 (9th Cir. 2004).

**3. Petitioners' injuries are traceable to the Final Rule and redressable.**

The cumulative, irreversible damage lead wreaks on the developing brains of children is undisputed. *See A Cmty. Voice*, 878 F.3d at 787; *supra* Statement of Case I. The Final Rule denies Petitioners and their members information about dangerous lead conditions, which they need to protect their families, and makes it less likely that hazardous lead conditions in their midst will be identified and eliminated. A favorable decision by this Court would redress these injuries. *See Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517-18 (9th Cir. 1992). Moreover, in the context of informational injury, the standards for redressability are relaxed. *Cottonwood Envtl. Law Ctr. v. U.S. Forest. Serv.*, 789 F.3d 1075, 1083 (9th Cir. 2015).

**4. Petitioners have standing to enforce the 2017 Writ.**

Petitioners also have standing to challenge the Final Rule based on EPA's failure to comply with the 2017 Writ, directing it to update out-dated LBP hazard standards and the definition of LBP. A party acquires a cognizable interest when it receives a favorable judgment. This interest confers standing on the party who seeks to enforce a final judgment. *Salazar*, 559 U.S. at 712 (recognizing a party who obtains a favorable judgment acquires a "judicially cognizable interest in ensuring compliance with that judgment" conferring standing to enforce). With the 2017 Writ, Petitioners obtained a final judgment requiring EPA to update LBP

hazard standards and the definition of LBP. *A Cmty. Voice*, 878 F.3d at 788. EPA failed to fully comply; consequently, Petitioners have standing here. *Salazar*, 559 U.S. at 712.

## **II. The Final Rule Violates TSCA.**

Congress has “directly spoken to the precise question at issue,” *Chevron*, 467 U.S. at 842. To meet TSCA’s goal of “eventually eliminat[ing] the risk of lead poisoning in children,” *A Cmty. Voice*, 878 F.3d at 782, EPA must “identif[y]” what constitutes “lead-based paint hazards,” 15 U.S.C. § 2683, meaning “any condition that causes exposure to lead” that “would result in adverse human health effects as established by [EPA].” *Id.* § 2681(10); *see also A Cmty. Voice*, 878 F.3d at 784 (“EPA was instructed to ‘identify’ *whatever might constitute* a ‘lead-based paint hazard’ . . . .”) (citations omitted) (emphasis added). This Court must “give effect to the unambiguously expressed intent of Congress,” *Chevron*, 467 U.S. at 842-43, as reflected in TSCA and the PHA.

For the reasons below, EPA’s Final Rule fails to meet the unambiguous requirements of the “language of [TSCA] itself.” *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979). Even if there were some ambiguity in TSCA’s language, which there is not, EPA’s interpretation—under which it has set new DLHS that tolerate exposure to harmful lead levels and failed to update the dust-lead clearance level, essentially nullifying the new DLHS—does not reflect a



“permissible construction” of TSCA. *Chevron*, 467 U.S. at 843. Likewise, EPA’s view that it can leave unchanged outdated LBP hazard standards and the outdated definition of LBP does not reflect “a reasonable interpretation” of its duties under TSCA. *Id.* at 844.

**A. The Final Rule’s DLHS do not comport with the plain terms of TSCA.**

The Final Rule adopts the 10/100 Standards as DLHS, but these standards do not “identif[y]” all “dangerous levels of lead.” 15 U.S.C. § 2683. Moreover, in selecting the 10/100 Standards, EPA focused on non-health-based considerations, ignoring that TSCA defines an “LBP hazard” using exclusively health-based criteria. EPA’s 10/100 Standards therefore cannot stand.

**1. EPA’s DLHS will not “identify” all dust-lead conditions that adversely affect human health.**

To satisfy TSCA, EPA’s DLHS would have to “identify” “any condition” where lead levels result in health-harming exposure, 15 U.S.C. §§ 2681(10), 2683, meaning the standards would pinpoint the dust-lead levels on floors and windowsills where lower levels do not have adverse health effects. *Id.* § 2681(10). But the DLHS EPA selected in the Final Rule violate TSCA’s plain terms because lead dust on floors and windowsills at concentrations *even lower* than the selected 10/100 Standards are, by EPA’s own analysis, “condition[s]” that “would result in adverse human health effects.” *Id.*

In developing the Final Rule, EPA compared the modeled health outcomes of seventeen candidate DLHS and concluded that all of the candidates, including standards *below* the 10/100 Standards, would result in adverse health effects.<sup>10</sup> *See* ER789 (Table 7-2). According to EPA’s analysis, using the lowest candidate standard analyzed—5 µg/ft<sup>2</sup> of dust on floors and 40 µg/ft<sup>2</sup> on windowsills (“5/40 Standards”)—more than 2.5 percent of children would likely develop a lifetime BLL above 5 µg/dL.<sup>11</sup> *Id.* EPA’s own analysis classifies this BLL as an adverse health effect. *Id.*<sup>12</sup>

Confirming that EPA’s new DLHS do not satisfy TSCA’s requirement to “identify” “any condition” involving LBP exposure that results in health harm,

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<sup>10</sup> As discussed in Argument IV.A.1, *infra*, all of the health benchmarks (or “comparison values”) that EPA used to measure the protectiveness of its candidate DLHS would allow significant risk of serious harm due to lead exposure, so EPA’s selection of these thresholds as health benchmarks is arbitrary and capricious.

<sup>11</sup> This is shown in Tables 7-1 and 7-2, available at ER788-90. Table 7-2 shows that EPA compared the modeled health outcomes of multiple “candidate hazard standards” against certain “comparison values.” ER789. Table 7-2 uses orange shading to indicate when the modeled health outcomes exceed the comparison value. *Id.* The BLL#2 comparison value is defined as the most exposed 2.5 percent of children having a lifetime BLL that exceeds 5 µg/dL. *See id.* (Table 7-1). In addition, Table 7-2 shows that most of the candidate standards EPA considered resulted in scenarios that exceed” the IQ#2 comparison value, defined as a greater than 25 percent probability of a lifetime IQ loss of more than two points. *Id.*

<sup>12</sup> EPA’s analysis notes that “lead exposure as low as 5 µg/dL ha[s] an adverse effect on infant mental and psychomotor development” and that “evidence . . . continues to accrue that commonly encountered BLLs, even those below 5 µg/dL . . . impair cognition in children.” ER746-47; *see also supra* Statement A.

EPA's own model shows that a child living in target housing that meets the 10/100 Standards will have a 25 to 32 percent probability of losing two or more IQ points from dust-lead. ER789 (Table 7-2). EPA's model further estimates that a child living in housing that meets the 10/100 Standards will have a 7.1 to 7.5 percent probability of having a total lifetime BLL above 5 µg/dL. *Id.* Other studies in the record estimate that the 10/100 Standards would result in even higher probabilities of elevated BLLs. ER897 (Table 6) (finding a 23.8 percent probability that the BLL of a child in a home with floor lead dust of 10 µg/ft<sup>2</sup> would exceed 5 µg/dL).

Therefore, contrary to TSCA's mandate that EPA identify the lowest level that results in adverse health effects, the Final Rule's DLHS will fail to identify hazardous dust-lead levels below the 10/100 Standards that, according to EPA's model, will lead to adverse health outcomes. This is unlawful. *See Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 530-31 (D.C. Cir. 2009) (finding EPA's adoption of a public-welfare air quality standard "contrary to the statute and therefore unlawful" when EPA's own analysis showed other candidate standards to be more protective of public welfare).

## **2. EPA violates the plain terms of TSCA by considering non-health based factors in setting the DLHS.**

Although TSCA defines a LBP hazard based entirely on lead conditions that will result in adverse health impacts, 15 U.S.C. § 2681(10), EPA asserts that it is "appropriate . . . to consider factors beyond health effects when selecting new

standards”—factors such as achievability and reliability. ER7. This reading of TSCA is belied by its plain terms, none of which allow EPA to consider factors aside from “health effects” when setting LBP hazard standards. *See* 15 U.S.C. § 2681(10); *id.* § 2683.

TSCA’s language is strikingly similar to language in the Clean Air Act (“CAA”) that requires EPA to set health-based standards and, as held by the Supreme Court, precludes EPA from considering non-health factors when doing so. In *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001) (Scalia, J.), the Supreme Court considered whether the CAA’s requirement that EPA must set air quality standards at levels “requisite to protect the public health” with “an adequate margin of safety” allowed EPA to consider costs when determining what levels of air pollution are hazardous. *Id.* at 465 (quoting 42 U.S.C. § 7409(b)(1)). Presented with this “absolute” language, the Court found it “fairly clear that this text does not permit the EPA to consider costs in setting the standards.” *Id.* The Court found further support for its position in the fact that “[o]ther provisions [of the CAA] explicitly permitted or required economic costs to be taken into account in *implementing* the air quality standards.” *Id.* at 467 (emphasis added).

So, too, in TSCA, Congress created a parallel structure in which EPA may consider *only* “health effects” when determining what levels of lead in dust, paint, or soil are hazardous to health. *See* 15 U.S.C. § 2681(10); *id.* § 2683. TSCA’s

provisions neither expressly allow EPA to consider non-health factors, nor use terms like “appropriate and necessary” that *may* allow consideration of these other factors. *See Michigan v. EPA*, 135 S. Ct. 2699, 2709 (2015); *cf. id.* at 2707 (noting “[t]here are undoubtedly settings in which the phrase ‘appropriate and necessary’ does not encompass” all other factors).<sup>13</sup>

And just like in the CAA, while TSCA directs EPA to consider factors like “reliability, effectiveness, and safety” in some contexts—such as when promulgating regulations for LBP activities to *implement* the LBP hazard standards, 15 U.S.C. § 2682(a)(1)—Congress conspicuously did not include these additional considerations in the provisions directing EPA to set LBP hazard standards in the first instance. *See Murray Energy Corp. v. EPA*, 936 F.3d 597, 622 (D.C. Cir. 2019). EPA therefore erred by considering factors like “achievability” and “reliab[ility]” when determining what levels of lead in dust

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<sup>13</sup> The term “as established by” in the definition of “LBP hazard,” 15 U.S.C. § 2681(10), does not give EPA license to consider factors other than health. Rather, it merely confirms that EPA is charged with setting LBP hazard standards. Any discretion involved in “establish[ing]” what level of lead in dust, paint, or soil is a hazard “may only be exercised within the bounds of the statutory definition [of LBP hazard] itself”—a definition that refers only to health considerations. *Safer Chems., Healthy Families v. EPA*, 943 F.3d 397, 425 (9th Cir. 2019) (citing *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007)).

present health hazards.<sup>14</sup> ER7; *see also Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 449 (D.C. Cir. 2018) (noting statutory standard of “no reasonable probability of adverse effects on health or the environment” did not allow consideration of costs, since “[t]here is no explicit mention of costs . . .; nor is there any flexible language such as ‘appropriate and necessary’”). At a minimum, EPA’s reliance on non-health factors does not reflect a “permissible construction” of TSCA. *Chevron*, 467 U.S. at 843.

**3. The Final Rule violates the language of TSCA by leaving in place outdated clearance levels.**

Although the Final Rule revises the DLHS (albeit insufficiently), it does not revise dust-lead clearance levels—the “values that indicate the maximum amount of lead permitted in dust on a surface following completion of an abatement activity,” 40 C.F.R. § 745.223—in violation of the plain terms of TSCA. Under TSCA, “abatement” includes “postabatement clearance testing activities,” 15 U.S.C. § 2681(1)(B), and is defined as “permanently eliminat[ing] lead-based paint hazards,” *id.* § 2681(1). Thus, to comply with TSCA, clearance testing must be designed to assess whether abatement has, in fact, “permanently eliminate[d],” *id.*,

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<sup>14</sup> EPA’s reliance on factors that Congress did not intend it to consider not only runs afoul of TSCA, but is also arbitrary and capricious. *See State Farm*, 463 U.S. at 43.

“any condition that causes exposure to lead . . . that would result in adverse human health effects.” *Id.* § 2681(10).

The Final Rule, however, makes it impossible to know if abatement has “eliminate[d]” LBP hazards. By leaving in place clearance levels that match the 2001 DLHS, lead risk assessors may declare a home “hazard-free” after abatement, even if the home contains what the Final Rule considers a dust-lead hazard—that is, dust-lead exceeding the 10/100 Standards. This is because risk assessors will only test whether abatement brought dust-lead levels down to the 2001 DLHS of 40 µg/ft<sup>2</sup> on floors and 250 µg/ft<sup>2</sup> on windowsills—lead levels the Final Rule recognizes as hazardous. This is antithetical to TSCA’s requirement that the clearance standards measure whether LBP hazards have been “permanently eliminate[d].” *Id.* § 2681(1).

At a minimum, EPA’s decision to leave the outdated dust-lead clearance levels in place does not reflect a “permissible construction” of TSCA, *Chevron*, 467 U.S. at 843, because it renders the newly adopted DLHS meaningless as homes will pass clearance even if post-abatement dust-lead is at levels considered hazardous under EPA’s 2001 DLHS.

The fact that EPA initiated a separate rulemaking to modify the clearance levels, *see* ER3, does not cure the defect in the Final Rule. While agencies may, in some cases, address problems incrementally, they cannot act (or fail to act) in a

manner that violates the underlying statute or ignores an important part of the problem—both of which EPA has done here. *See Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005). Moreover, piecemeal regulations are “least justified” where, as here, the approach “can have catastrophic effects on the public welfare.” *Nat’l Ass’n of Broadcasters v. F.C.C.*, 740 F.2d 1190, 1211 (D.C. Cir. 1984). Unless directed by this Court to establish dust-lead clearance levels that comport with the language and purpose of TSCA, EPA is free to either delay adoption of health-based clearance levels indefinitely, or potentially set new clearance levels that continues to be above the DLHS, in violation of TSCA.

**B. The Final Rule violates the purpose and statutory framework of TSCA.**

Congress was clear that the purpose of the PHA is to “prevent childhood lead poisoning” and “eliminate lead-based paint hazards in all housing as expeditiously as possible.” *A Cmty. Voice*, 878 F.3d at 784, *citing* 42 U.S.C. §§ 4851a(1), (3) (purposes section). In the 2017 Writ, this Court relied heavily on the purpose of the PHA and EPA’s duties under TSCA to find that the “statutory framework clearly indicates that Congress . . . want[ed] EPA . . . to modify initial standards when necessary.” *Id.* By adopting a Final Rule without updating certain LBP hazard standards and the definition of LBP, EPA violated its duty to modify outdated standards. Indeed, this Court held that “EPA is under a duty stemming



from the TSCA . . . to update lead-based paint and [DLHS] in light of the obvious need.” *Id.* at 786. EPA similarly runs afoul of the purpose and statutory framework of TSCA by failing to align the dust-lead clearance levels with the DLHS.

**1. EPA ignored its duty under TSCA to update the definition of LBP.**

In the 2017 Writ, this Court ruled that EPA must update the definition of LBP (sometimes referred to as the LBP standard). According to this Court: “the lead-based paint standard set out originally by Congress . . . appears to be too high to provide a sufficient level of safety.” *Id.* at 782. The Court further noted that “EPA does not appear to dispute the factual record developed by Petitioners showing that, according to modern scientific understanding, . . . the lead based paint standard [is not] sufficient to protect children.” *Id.* Therefore, this Court directly found an “obvious need, apparent to [the EPA]” to update the current definition of LBP. *Id.* at 785 (amendment in original) (citation omitted). The Court’s conclusion is confirmed by the Consumer Product Safety Commission (“CPSC”), which determined—based on conclusions from a National Academy of Sciences Report—that “available scientific information is insufficient to establish that a level of lead in paint above 0.06 percent . . . is safe.” Determination of Safe Level of Lead in Paint, 42 Fed. Reg. 9404, 9404 (Feb. 16, 1977).

Under EPA’s current paint-lead hazard standard, risk assessors would conclude there is *no hazard* if they find deteriorated or chewable paint containing lead—even paint with more than the 0.06 percent lead the CPSC found to be unsafe—so long as that paint has no more than 0.5 percent lead by weight. *See* 40 C.F.R. §§ 745.65(a), 745.103, 745.223(4). For EPA’s paint-lead hazard standard to identify *all* LBP that would pose adverse health effects, the definition of LBP must encompass paint with *any* measurable level of lead associated with health harms. ER313; 899 (reporting medical case of four year-old boy who developed very elevated BLLs after eating paint chips in home where the level of lead in paint was less than 0.5 percent by weight and thus technically “lead-free”).<sup>15</sup>

In some settings, such as child care centers, exposure to deteriorated paint rather than dust is the major source of children’s lead exposure. ER905-06. It is unacceptable that EPA continues to ignore the “obvious need” to update its “lead-based paint” definition. *A Cmty. Voice*, 878 F.3d. at 782, 785. This failure violates EPA’s duty under TSCA to maintain LBP standards at levels that identify “any condition” that will result in dangerous lead exposure. 15 U.S.C. § 2683.

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<sup>15</sup> EPA’s regulation defining the conditions constituting a “paint-lead hazard” is also unlawful and must be updated, including because of its treatment of chewable surfaces with LBP, which are only designated as hazards if “there is evidence of teeth marks,” 40 C.F.R. § 745.65, while TSCA’s purpose is to identify hazards to *prevent* exposure, not to identify them based on the *occurrence* of an exposure.

## **2. EPA ignored its duty to update the soil-lead standard.**

This Court's conclusion that Congress intended EPA to "account[] for new information, and . . . modify initial [LBP hazard] standards when necessary . . . to prevent childhood lead poisoning and eliminate lead-based paint hazards," *A Cmty. Voice*, 878 F.3d at 784, applies to the soil-lead standards, 40 C.F.R. § 745.65(c). EPA's decision not to modify these standards, which are as flawed and outdated as the 2001 DLHS that EPA updated in the Final Rule, violates TSCA.

Like the pre-Final Rule DLHS, EPA adopted the soil-lead hazard standards in 2001 based on the goal of achieving a 1 to 5 percent probability of a child's BLL exceeding 10 ug/dL, the CDC level of concern that was abandoned in 2012. *See* Statement of Case V, *supra*. In other words, the current soil-lead standards tolerate the probability that up to 5 percent of children will develop BLLs over 10 ug/dL, a level that is understood as dangerously high. *See* Statement of Case I, *supra*.

By leaving the soil standard unchanged, EPA is ignoring the significant evidence that lead in soil is a major contributor to childhood BLL. *See, e.g.*, ER613; 907; 965; 372-79; 1014. The likelihood that children will be exposed to dangerous lead levels under the existing soil-lead standard demonstrates that it is "necessary" to modify this standard "to prevent childhood lead poisoning." *A Cmty. Voice*, 878 F.3d at 784. Leaving the current standards in place perpetuates

LBP hazards, rather than eliminating them.<sup>16</sup> This ongoing endangerment of children violates TSCA.

**3. Failure to align clearance levels and DLHS undermines the purpose of TSCA.**

EPA’s failure to lower the clearance standard in tandem with the DLHS violates not only Congress’s language (*see* Argument II.A.3 *supra*), but also Congress’s purpose in amending TSCA through the PHA. Congress’s express intent was to “eliminate lead-based paint hazards in all housing as expeditiously as possible.” 42 U.S.C. § 4851a(1). But the Final Rule’s framework, in which lead abatement activities can end prematurely (as soon as lead levels no longer exceed the 2001 DLHS)—only to be required again in the future since lead hazards may remain—is not an “expeditious” way to eliminate these hazards. *Id.* In addition, the Final Rule frustrates Congress’s intent to “establish[] a workable framework for lead-based paint hazard evaluation and reduction and [to] end[] the current

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<sup>16</sup> Many Proposed Rule commenters urged modification of the soil-lead standard. *See* ER566; 570; 587-88; 598; 613. Although EPA is aware that lead-contaminated soil is harmful to children, ER4, EPA failed to meaningfully consider comments pointing out the inadequacy of the 2001 standards, instead brushing off the call for revisions as “outside the scope” of this rulemaking. ER648. Such conclusory statements do not satisfy EPA’s obligation to respond to significant issues raised by the public. *See Am. Mining Cong. v. EPA*, 907 F.2d 1179, 1189 (D.C. Cir. 1990) (finding agency’s responses to comments insufficient because they offered “only conclusory statements that do not respond to the petitioner’s challenges”).

confusion over reasonable standards of care” by creating a framework that is unworkable and confusing. *Id.* § 4851a(3); *cf.* Argument IV.B, *infra*. These flaws undermine the purpose of TSCA and cannot stand.

### **III. The Final Rule Violates EPA’s Duty to Conclude the 2009 Petition and Comply with the 2017 Writ.**

The Final Rule violates the APA and the 2017 Writ insofar as it does not update the clearance levels for dust-lead or the definition of LBP, actions sought in the 2009 Petition. ER346-52; 361-62. In granting the 2017 Writ, this Court characterized the 2009 Petition as “a matter” that EPA must “conclude . . . within a reasonable time” within the meaning of the APA. *A Cmty. Voice*, 878 F.3d. at 785 (citing 5 U.S.C § 555(b)). As a result, this Court ruled that EPA “is under a clear duty to act” by “fully respond[ing] to Petitioners’ petition.” *Id.* at 785-86. This Court directed EPA to promulgate a final rule fully responding to the 2009 Petition within one year and ninety days—twice as much time as Petitioners sought—so that EPA would “issue a well-conceived rule, and not merely a rule” and address “new issues [that] may arise during a notice and comment period that demand further study.” *Id.* at 788. In defiance of the APA and this Court’s 2017 Writ, EPA’s Final Rule responds only to one of the three requests named in the 2009 Petition, failing to update either the clearance levels for dust-lead or the definition of LBP.

There is no dispute that the 2009 Petition asked EPA to “lower its clearance levels for dust lead.” ER6 (noting “EPA received an administrative petition . . . requesting that EPA . . . lower the . . . dust-lead clearance levels”); *see also* ER350. Therefore, EPA’s duty to “fully respond to Petitioners’ rulemaking petition,” *A Cmty. Voice*, 878 F.3d at 786, requires it to modify the dust-lead clearance levels, particularly because the Final Rule modifies the DLHS. EPA now contends that updating clearance levels is not covered by the 2017 Writ. ER3. This is plainly inaccurate and contradicts what the agency acknowledged to be true. *See* ER6. This Court should, once again, direct EPA to fully respond to the 2009 Petition by updating the dust-lead clearance levels.

The 2009 Petition also asked EPA to “modify the definition of lead-based paint,” ER347, 350-52, and EPA’s letter granting the Petition stated that it would “initiate appropriate proceedings regarding the definition of lead-based paint in non-target housing.” ER362. Therefore, EPA’s duty to fully respond to the rulemaking petition includes revising the LBP definition, which EPA does not dispute. ER3 (revising the definition of LBP is an action “EPA agreed to undertake in response to the 2009 citizen petition”). Nonetheless, EPA failed to do so.

For its excuse, EPA argues that it “lacks sufficient information to conclude that the current definition requires revision.” ER12. This assertion directly

contradicts the 2017 Writ, which found that “now available information shows the insufficiency of [EPA’s] present standards”—a fact undisputed by EPA during the court proceeding—which in turn created an “obvious need” for EPA “to alter the initial standard[s].” *A Cmty. Voice*, 878 F.3d. at 784-85; *see also id.* at 782 (“EPA does not appear to dispute the factual record . . . showing that, according to modern scientific understanding, . . . the lead-based paint standard [is not] sufficient to protect children.”). Moreover, this Court gave EPA a full year to finalize its proposed rule precisely so EPA could address “new issues [that] may arise during a notice and comment period that demand further study.” *Id.* at 788.

Recognizing this contradiction, the Final Rule contests this Court’s finding that EPA had already determined that the LBP standard was outdated. ER6. Yet EPA never sought clarification or rehearing of the 2017 Writ, as would be expected if this Court had misconstrued EPA’s position on a key point in the case. Moreover, when EPA granted the 2009 Petition, it agreed to initiate proceedings regarding the LBP definition, indicating that it had already determined more than a decade ago that revision of the LBP definition was necessary. ER361-62.

This Court should enforce its jurisdiction and authority by compelling EPA to fully respond to the 2009 Petition by updating the dust-lead clearance levels and definition of LBP without delay. *See* 5 U.S.C. § 706(1) (“The reviewing court “shall . . . compel agency action unlawfully withheld. . . .”); *Norton v. S. Utah*

*Wilderness Alliance*, 542 U.S. 55, 63-64 (2004). The 2017 Writ was “specific and definite” about the actions EPA must take, and EPA cannot shirk compliance.

*Reno Air Racing Ass’n Inc., v. McCord*, 452 F.3d 1126, 1130 (9th Cir. 2006)

(holding that a party is in contempt when it fails to take reasonable steps within its power to comply with a “specific and definite court order”).

#### **IV. The Final Rule is Arbitrary and Capricious.**

The Final Rule is arbitrary and capricious on several grounds: (1) EPA’s adoption of the 10/100 DLHS is premised on faulty health benchmarks and flawed interviews with testing labs, and the agency overlooks key evidence in the record regarding windowsill standards; (2) EPA’s piecemeal approach to LBP hazard standard-setting fails to rationally consider the inter-relationship between sources of lead exposure and the agency’s past practice of regulating based on this relationship; and (3) EPA claims that it lacks sufficient information to revise the clearance levels, definition of LBP, and soil-lead hazard standard, while the record shows the contrary. *State Farm*, 463 U.S. at 43.

##### **A. EPA’s decision to adopt the 10/100 Standards for dust-lead is arbitrary and capricious.**

EPA’s adoption of the 10/100 Standards as the new DLHS is arbitrary and capricious for three main reasons. *First*, the health outcomes used to model candidate DLHS were not designed to determine the hazard standards required by TSCA, because all of EPA’s “health” benchmarks (which it calls



“comparison values”) result in adverse health impacts. *Second*, EPA reasons it cannot set the floor-dust standard at the levels required by TSCA because of uncertainty about whether labs can reliably test levels below the 10/100 Standards. Even assuming EPA has discretion to consider extra-statutory factors like reliability—which it does not, *see* Argument II.A.2 *supra*—EPA’s uncertainty here is based on flawed interviews with testing labs and an indifference to basic economic principles. *Third*, EPA claims it cannot further lower the windowsill-dust standard based on a misanalysis of a single study. This Court must not defer to EPA’s faulty reasoning. *See Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (“[N]o deference is owed to an agency action that is based on an agency’s purported expertise where the agency’s explanation for its action lacks any coherence.”).

**1. EPA used health benchmarks that are not designed to identify all DLHS that would result in adverse health effects.**

EPA models various health outcomes of candidate DLHS, but this analysis is arbitrary and capricious because EPA does not even ask the right question, and therefore its selection of DLHS was not based on “consideration of the relevant factors.” *State Farm*, 463 U.S. at 43. Rather than attempting to identify the line where lead-dust would not be dangerous, all of EPA’s health benchmarks would allow levels of lead in dust that result in adverse health impacts. EPA modeled

whether the increase in childhood BLL or loss in IQ points expected from seventeen candidate DLHS would exceed seven different “comparison values,” which EPA describes as “point[s] of reference or ‘measuring stick[s]’” to compare the health outcomes of a particular DLHS. ER788. But EPA’s “comparison values” shed no light on whether a candidate DLHS would fulfill EPA’s mandate under TSCA, because they are not health-protective and thus would not identify “any condition” that would result in “adverse health effects.” 15 U.S.C. § 2681(10). For example, a candidate DLHS would pass muster under EPA’s rubric if dust-lead exposure results in *half* of all children losing up to two IQ points, or if any given child has a 25 percent probability of losing *over* two IQ points. ER788-90. As for EPA’s comparison values based on BLL, the most health-protective of these still allow 97.5 percent of children to have BLLs up to 5 µg/dL, and would allow any given child to have a 10 percent probability of having a BLL that surpasses 5 µg/dL. *Id.*

The Final Rule’s selection of 5 µg/dL as a supposed health benchmark is particularly egregious given that *both* the CHPAC and the SAB Panel advised EPA to set the DLHS at a level that would result in a target childhood BLL of *no more than* 1 or 2.5 µg/dL. ER384; 544. The Final Rule fails to even mention, let alone explain, EPA’s rejection of the recommendations of its expert advisors, rendering the Rule arbitrary and capricious. *See Am. Farm Bureau Fed’n v. EPA*, 559 F.3d

512, 529 (D.C. Cir. 2009) (finding that EPA’s rejection of the relevant Scientific Advisory Committee’s recommendations “deprived the EPA’s decisionmaking of a reasoned basis”). Indeed, if anything, EPA should have used a health goal that was even *more* protective than the CHPAC and SAB Panel recommendations, since these recommendations were made before the CDC disavowed the notion of a safe level of blood lead in May 2012. ER529-31.

Similarly, the Final Rule fails to explain why EPA now believes it is acceptable for a child to have a 10 percent probability of having a BLL above 5 µg/dL, but when it adopted the 2001 Hazard Standards, EPA expressly *rejected* this 10 percent probability target as “excessively high” because “it is inconsistent with the statute to establish a hazard standard at which *significant numbers of children would need medical treatment.*” ER320 (emphasis added). EPA’s adoption of a health target it previously rejected as unacceptably harmful is arbitrary and capricious insofar as EPA neither recognized nor explained its changed position. *See Encino Motorcars*, 136 S. Ct. at 2126.

**2. The record does not support EPA’s supposition that constraints in the dust-wipe testing industry prevent further lowering of the floor DLHS.**

EPA justifies setting the DLHS at levels that do not comply with TSCA’s requirements by calling into question the “reliability” of lab dust-wipe sample

testing at lower DLHS levels. ER8-10. But EPA’s reasoning is based on flawed research and faulty logic.

EPA argues that lowering the DLHS below the 10/100 Standards may require some labs to bear costs or discontinue lead dust-wipe testing, which EPA predicts may result in a shortage of testing capacity. ER9; *see also* MA15-19. Though EPA focuses on the idea of “reliability,” its argument is essentially about costs: the potential for increased costs to laboratories or the regulated community. *See Honeywell Int’l Inc. v. EPA*, 374 F.3d 1363, 1372 (D.C. Cir. 2004) (finding EPA’s reasoning that focused on costs of compliance to be an “economic justification”). But the mere increase of some costs on some parties is not a barrier to rulemaking: indeed, the Final Rule adopted a DLHS that will itself increase costs on labs. *See* ER9 (“[over half of] laboratories that wish to maintain or obtain [accreditation] will need to take actions . . . as a result of this rulemaking”); ER1031-33 (listing measures that labs may need to take to meet the 10/100 Standards).

Nor do costs outweigh benefits at standards lower than the 10/100 Standards, as the Final Rule suggests. EPA’s own Economic Analysis, which assumes that all labs would purchase any necessary equipment to comply with a DLHS lower than the 10/100 Standards, finds that the lowest standards examined—the 5/40 Standards—would have the greatest social net benefit, no

matter how net benefits are calculated. ER1095-96; 1158-68; 1218-19. Even accounting for these costs to labs, EPA estimates that the 5/40 Standards could have an annual net benefit up to \$580 million *more* than the 10/100 Standards EPA adopted. ER1158.

EPA discounts these increased economic benefits from lower DLHS by declaring “uncertainties” about what percentage of labs would leave the dust-wipe testing business. ER983-84; 642. But the goal of EPA’s Economic Analysis is to quantify “net benefits to *society*,” not net benefits to particular labs. ER1019. The issue before EPA is whether all labs in the market can collectively meet the market’s demand, not whether any particular lab continues to provide testing services, and EPA points to no price ceiling or other constraint on the testing market that would lead to the long-term testing supply shortage that EPA prognosticates. MA5-9, 19-28.

And even assuming that the question of *how* the market meets testing demand—as opposed to *whether* it can—were relevant to this analysis, uncertainty about how demand is met is not a poison pill that taints all results deemed uncertain. Indeed, EPA’s Economic Analysis admits that “[t]here are many uncertainties underlying this economic analysis”—including uncertainties about the net benefits of the 10/100 Standards that EPA adopted. ER1210. EPA provides no explanation for why uncertainties about the predicted behaviors of

residents, landlords, risk assessors, and abatement professionals are *not* bars to analyzing the 10/100 Standards, but uncertainty about the behavior of laboratories *is* a bar for lower standards. *See id.* Nor does EPA explain why its economic model can account for uncertainties about the costs of lost IQ points and abatement professionals' travel time, ER1203-09, but cannot account for uncertainties about the business decisions of particular labs. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (J. Marshall, concurring) (holding that even if “economic predictions are difficult and fraught with uncertainty,” factual controversies must be resolved if “the statutory scheme clearly demands their resolution.”).

Moreover, any uncertainties about potential effects on the testing industry are uncertainties of EPA's own making due to its irrational and incomplete data gathering on lab testing capacity, and cannot be relied on as justification to refuse to set the DLHS at the levels TSCA demands. Interviews that EPA conducted with labs after receiving comments on the Proposed Rule provide the sole support for EPA's notion that some labs may discontinue lead dust-wipe testing. ER8-9. EPA irrationally limited the scope of these interviews by speaking with only 14 of the 103 accredited laboratories (13 percent) nationwide. ER8-9; 1028. In these interviews, only four labs said they were “unsure” whether they would purchase new equipment to comply with standards below the 10/100 Standards, and none of

the labs definitively indicated that they would discontinue testing dust-wipes altogether. ER9; 1291-1317; 1025-26. While the low percentage of labs interviewed is irrational on its own, EPA's approach is made worse by the fact that EPA chose to interview, among the 14 labs, facilities that do not even test for residential lead or test a mere 12 dust-wipes per year. MA5-9. In doing so, EPA failed to interview labs with a significant market share, *e.g.*, labs that test some 180,000 wipes per year, with capacity to spare. *Id.*; MA41-42. Nor does EPA explain why it gives weight to the view of the one laboratory that said increasing the dust-wipe area to meet the 5/40 Standards may pose challenges, rather than the views of other labs that the lower standard could easily be met without the need for new testing equipment. ER1291-1317; *see also* MA41-42.

EPA's claims of uncertainty are based neither on evidence nor logic, and therefore are little more than "sheer speculation" and not entitled to deference. *See Sorenson Commc'ns Inc. v. F.C.C.*, 755 F.3d 702, 708 (D.C. Cir. 2014) ("Though an agency's predictive judgments about the likely economic effects of a rule are entitled to deference, deference to such . . . judgment[s] must be based on some logic and evidence, not sheer speculation.") (citations and quotation marks omitted).

**3. The record does not support EPA’s assertion that lower dust-lead levels on windowsills are not achievable.**

EPA rejects setting the windowsill DLHS at levels required by TSCA because, according to EPA, such a level would be less “achievable” than the 10/100 Standards. ER8; 984. But EPA’s task is to set *hazard* standards, not achievability standards, *see supra* Argument II.A, and the record supports lowering windowsill DLHS in this rulemaking.

The one study on which EPA relies for the notion that “DLHS levels lower than 100 µg/ft<sup>2</sup> for windowsills (*e.g.*, 40 µg/ft<sup>2</sup>) may not be maintained over time,” ER8, does not support the Agency’s conclusion. That study considered partial control measures only, and expressly did *not* consider measures designed to fully abate lead hazards such as enclosure, encapsulation, or removal. *See* ER1320-21. This study thus sheds no light on the long-term achievability of more intensive treatments to lower windowsill dust-lead to levels that would not cause adverse health effects. *See Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 241 (D.C. Cir. 2008) (vacating rule because agency “offered no reasoned explanation for its dismissal of empirical data”). EPA’s rationale is therefore arbitrary and capricious.



**B. EPA’s piecemeal approach to LBP hazard standard-setting deviates from its past practice and fails to rationally consider the inter-relationship between sources of lead exposure .**

In the Final Rule, EPA departs from its established approach of setting all of the LBP hazard standards and clearance levels in tandem. *See* ER314 (explaining why EPA “considered candidate sets of standards for dust, [soil], and paint” together in setting the 2001 Hazard Standards). The Final Rule instead lowers the standard for dust while leaving the soil and paint standards at previous levels and tethered to outdated conceptions of what constitutes safe levels of exposure. Similarly, the Final Rule leaves clearance levels at 2001 levels. ER3. EPA offers no acknowledgment—let alone explanation—for its dramatic shift in approach. This is arbitrary and capricious. *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 690 (9th Cir. 2007) (finding agency decision that “departed from its two-decade-old precedent without supplying a reasoned analysis for its change of course. . . . was arbitrary and capricious”).

In 2001, EPA adopted a unified approach of setting hazard standards and clearance levels. Then, EPA tethered the dust and soil hazard standards to a single target BLL (albeit one shown in subsequent years to be inadequately protective). ER314; Statement of Case III, *supra*. Noting that it could not do the same for the paint standard because the agency “faced a data problem,” EPA set that standard based on the fact that “any amount of deteriorated paint” constitutes a hazard.

ER313. EPA's approach of considering the LBP hazard standards together made sense because each of the standards are interrelated: soil, contaminated by lead sloughing off exterior LBP, gets tracked into homes or blows in through windows. 61 Fed. Reg. 9066 ("Lead from exterior house paint can flake off or leach into the soil around the outside of a home, contaminating children's playing areas."); *see also* ER604; 1331; 376-79. Interior lead paint is itself harmful, and deteriorates and falls on surfaces children come in contact with on a regular basis. ER1013 ("In addition to being a source of direct exposure, lead-based paint can be a source of lead contamination in soil and dust."). Disconnecting the standards means that the less-protective standards undermine the effectiveness of the others.

Relatedly, once a lead hazard is detected and triggers abatement measures, an area must pass clearance levels to be deemed safe. ER327. Thus in 2001, EPA set clearance levels to match DLHS. ER317. EPA did so because it was "concerned that separate clearance and hazard standards would be difficult for property owners and other decision-makers to understand." *See* 63 Fed. Reg. at 30,341.

The Final Rule upends this approach by updating the DLHS based on new, though still inadequate, health benchmarks (*i.e.*, "comparison values"), while leaving the other standards and clearance levels decades behind. The result is an irrational system that EPA fails to acknowledge it created and fails to explain. And

the Final Rule fails to address why the confusion EPA once sought to avoid is seemingly acceptable now. While an agency is permitted to shift its approach, doing so “demand[s] that it display awareness that it is changing position.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Because EPA provided no explanation for abandoning its previous approach, it acted arbitrarily. *Id.*; *Encino Motorcars*, 136 S. Ct. at 2126.

**C. EPA’s attempt to justify its failure to revise the clearance level, definition of LBP, and soil standard based on the purported need for more information is arbitrary and capricious.**

EPA claims that it lacks sufficient information to revise the dust-lead clearance levels, definition of LBP, and soil-lead hazard standard. *See* ER3 (clearance); 1 (LBP); 648 (soil). The record shows the contrary. *State Farm*, 463 U.S. at 43.

There is no doubt that EPA possesses sufficient information—based on available science and feasibility studies—to lower the clearance levels concurrently with the DLHS. In 2015, a joint EPA and HUD survey indicated that lower clearance levels were, in fact, feasible. *See* ER556 (“Survey results showed that reductions in clearance levels to [the 10/100 Standards] were . . . technically achievable using existing cleaning practices.”); *see also* ER433. Based on that survey, HUD modified both its dust-lead “action levels” and “clearance action levels” to the 10/100 Standards for federal housing in 2017. ER1337-38. EPA

therefore is well aware that clearance of dust-lead down to levels of its DLHS is already occurring. *Id.*

In addition, EPA conducted a detailed cost-benefit analysis on changes to the clearance levels. ER1226 (Table A-4) (showing the highest net benefits from the lowest clearance levels). As such, no additional substantive research or studies are necessary to promulgate clearance standards that mirror the proposed DLHS, and EPA does not explain why the analyses it prepared for the Final Rule are insufficient. EPA's failure to update the clearance standards despite the strong evidence of their inadequacy is arbitrary and capricious, especially given the overall purpose of TSCA to protect children from lead poisoning. *Ass'n of Irrigated Residents v. EPA*, 686 F.3d 668, 677 (9th Cir. 2012).

It strains credulity for EPA to contend that “insufficient information exists to support . . . a change” in its definition of LBP, ER1, especially since it agreed to modify the definition when it granted the 2009 Petition *over a decade ago*, and in the intervening decade the evidence of lead's tragic effects has only mounted. Given that lead “is one of the most extensively studied environmental toxicants”—with nearly 29,000 peer reviewed studies on the health effects of lead exposure as of 2012 (ER1345)—EPA's assertion that it does not know enough about the relationship between lead paint and children's health deserves no deference. ER12 (contending EPA needs “to establish a statistically valid causal relationship

between concentrations of lead in paint . . . and dust-lead,” and to “quantify the direct ingestion of paint through consumption of paint chips or through teething on painted surfaces”); *Fox*, 684 F.3d at 75 (according no deference to incoherent agency explanation).

The record contains abundant evidence that LBP contributes to lead in dust, and that children ingest paint chips. *See, e.g.*, ER899; 909-11; 1347-48.

Moreover, if there were any gaps, EPA has had more than enough time to develop the information it believes is lacking.<sup>17</sup> In addition, TSCA charges CDC and the National Institute of Environmental Health Sciences (“NIEHS”) with studying lead exposure, including the contributions of LBP and dust from LBP. 15 U.S.C.

§ 2685(c). If EPA truly lacked needed information about how LBP affects children’s health, it could have asked CDC or NIEHS for assistance. *Id.* § 2685(a).

In sum, EPA’s assertion that additional study is needed to characterize the relationships between LBP and dust-lead, and between ingesting LBP chips and children’s BLLs, is arbitrary and capricious, and should not be credited as a valid excuse for inaction. *Fox*, 684 F.3d at 75.

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<sup>17</sup> EPA seems to blame public commenters for its supposed lack of information, noting that it requested data on the relationship between lead in different media and health effects, but did not receive any. ER12. Of course, the duty to identify LBP hazard standards is EPA’s, not the public’s.

Finally, because the current soil-lead hazard standard is based on the premise that it is acceptable for children to have BLLs as high as 10 µg/dL, *see* Statement of Case III, *supra*, which is now understood to be a dangerous level, *see* Statement of Case V, VI, *supra*, EPA knows that the current standard does not identify any condition that results in health-harming exposure. As noted in comments on the Proposed Rule, extensive peer-reviewed research published since 2001 makes clear that levels of lead exposure lower than 10 µg/dL are significant and harmful. ER588; 613. Further, studies in the record show a correlation between soil-lead and children’s BLLs. ER372-79. Indeed, EPA has recently updated its Exposure Factors Handbook, which notes that children may ingest significant quantities of soil and identifies recommended soil ingestion values to be used in risk assessment. ER270-73. EPA’s rationale that it needs further information is therefore unsupported.

It is not enough for EPA to simply invoke the idea of uncertainty to justify inaction and endless delay. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011); *Nat’l Ass’n of Broadcasters*, 740 F.2d at 1210 (“[A]n agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken.”); *United Steelworkers v. Marshall*, 647 F.2d 1189, 1266 (D.C. Cir. 1980) (holding that agency “cannot let [people] suffer while it awaits the Godot of scientific certainty”). Because EPA has all the information it

needs to update the dust-lead clearance levels, definition of LBP, and soil-lead standard, its failure to do so is arbitrary and capricious. *State Farm*, 463 U.S. at 43. Moreover, “EPA’s decision to do nothing is especially troublesome in light of [TSCA’s] overall purpose.” *Ass’n of Irrigated Residents*, 686 F.3d at 677.

## **CONCLUSION**

Petitioners respectfully request that this Court grant the petition for review and remand without vacatur with directions to EPA to revise its LBP hazard standards based solely on consideration of adverse health effects caused by dangerous lead levels and update its definition of LBP to reflect known hazards. In particular, Petitioners request EPA modify: its definitions of dust-lead, soil-lead, and paint-lead hazards codified at 40 C.F.R. sections 745.65 and 745.227(h); its corresponding clearance levels codified at 40 C.F.R. section 745.227(e)(8)(viii); and its definition of lead-based paint codified at 40 C.F.R. sections 745.223(4), 745.227(h), and 745.103(2), all within one year and ninety days of this Court’s order.

Remand without vacatur is appropriate here because while the 10/100 Standards are unlawful and do not adequately protect health, they are more health-protective than the outdated standards they replaced. *See Am. Farm Bureau Fed’n*, 559 F.3d at 528 (remanding without vacatur because “vacating a standard because

it may be insufficiently protective would sacrifice such protection as it now provides, making the best an enemy of the good”).

Dated: January 15, 2020

Respectfully submitted,

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## **STATEMENT OF RELATED CASES**

Petitioners are unaware of any related cases within the definition of Circuit Rule 28-2.6.

Dated: January 15, 2020

s/Jonathan J. Smith  
Jonathan J. Smith

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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