ORAL ARGUMENT NOT SCHEDULED
Case No. 21-1019
(consolidated with Nos. 21-1020, 21-1076)

United States Court of Appeals
for the District of Columbia Circuit

NEWBURGH CLEAN WATER PROJECT, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ON PETITION FOR REVIEW OF FINAL ACTION OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

INITIAL OPENING BRIEF OF STATE PETITIONERS

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Dated: August 8, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties

Petitioners

The following parties appear in these cases as petitioners:

In case no. 21-1019, filed January 15, 2021, Newburgh Clean Water Project, NAACP, Sierra Club, and United Parents Against Lead.

In case no. 21-1020, filed January 15, 2021, Natural Resources Defense Council.

In case no. 21-1076, filed March 1, 2021, the State of New York, State of California, State of Illinois, State of Maryland, State of Minnesota, State of New Jersey, State of Oregon, Commonwealth of Pennsylvania, State of Wisconsin, and the District of Columbia.

Respondents

The United States Environmental Protection Agency ("EPA") and Michael S. Regan, EPA Administrator, are respondents in these consolidated cases.

Intervenors

American Water Works Association has intervened for respondents.

B. Ruling Under Review

State Petitioners seek review of the following final action by EPA: A rule entitled "National Primary Drinking Water Regulations: Lead and Copper Rule Revisions," published at 86 Fed. Reg. 4,198 (Jan. 15, 2021).

C. Related Cases

The rule at issue has not been previously reviewed in this or any other court.

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GLOSSARY

Community Petitioners	Newburgh Clean Water Project, NAACP, Sierra Club, United Parents Against Lead, and Natural Resources Defense Council.
EPA	U.S. Environmental Protection Agency
Executive Order 12,898	Executive Order 12,898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7,629 (Feb. 16, 1994)
JA	Joint Appendix
Lead and Copper Rule (or 1991 Rule)	"Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper," 56 Fed. Reg. 26,460 (June 7, 1991)
Rule	"National Primary Drinking Water Regulations: Lead and Copper Rule Revisions," 86 Fed. Reg. 4,198 (Jan. 15, 2021)
State Petitioners	New York, California, Illinois, Maryland, Minnesota, New Jersey, Oregon, Pennsylvania, Wisconsin, and the District of Columbia

PRELIMINARY STATEMENT

Lead pipes that connect homes and other buildings to the public water distribution system present substantial and well-known health risks to the individuals who drink the water that travels through those lead service lines. Lead that leaches from pipes into drinking water can cause brain and nervous-system damage in fetuses and children, and can cause cancer and other harms in adults. Minority and low-income populations[1] face disproportionate exposure to lead in drinking water because they are more likely to live in the approximately 6.3 to 9.3 million homes with lead service lines.

The Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* ("Act"), requires the Environmental Protection Agency to establish regulations to protect America's drinking water from the health hazards of lead contamination. EPA must update these regulations at least every six years to ensure protection from lead to the greatest extent feasible. To preclude EPA's updates from "backsliding," the Act requires that each

[1] This brief uses the terms "minority and low-income populations" to refer to communities of color and those lacking in financial resources, respectively, because Executive Order 12,898 uses those terms.

revision maintain or provide greater health protection than the prior regulation. 42 U.S.C. § 300g-1(b)(9).

In 1991, EPA promulgated the "Lead and Copper Rule" ("1991 Rule") to control lead in drinking water by, among other things, requiring annual replacement of 7% of a water system's lead service lines when that system's water contains too much lead. 56 Fed. Reg. 26,460, 26,552 (June 7, 1991). Replacing lead service lines is necessary to protect human health because other controls, such as treating pipes to prevent corrosion, do not adequately reduce the risks of lead leaching into drinking water. In 2021, EPA's "Lead and Copper Rule Revisions," 86 Fed. Reg. 4,198 (Jan. 15, 2021) ("Rule"), revised the lead drinking water regulations.

Here, State Petitioners challenge the Rule as unlawful and arbitrary and capricious in violation of the Act and Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq*. The Rule violates the Act's anti-backsliding provision. First, the Rule eliminates the prior rule's requirement that small water systems annually replace 7% of their total lead service lines if the water in their systems contains too much lead. Second, for larger water systems, the Rule reduces the mandatory rate at which those systems must replace their lead service lines from 7% to

3% per year. These revisions unlawfully reduce the critical health protections that were provided by the 1991 Rule, in contravention of the Act's anti-backsliding mandate.

EPA also failed under the APA to adequately explain how the Rule will not cause disproportionate harms on minority and low-income populations, as required to do under Executive Order 12,898. In light of the undisputed evidence in the record that minority and low-income populations often cannot afford to replace the privately-owned portions of lead service lines and often reside in rental housing where the landlord refuses to pay for such replacement, EPA's conclusion was arbitrary and capricious.

JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction under section 1448(a)(1) of the Act, 42 U.S.C. § 300j-7(a)(1), and section 10 of the APA, 5 U.S.C. §§ 701-706, to review any challenge to EPA's promulgation of national primary drinking water regulations. Here, State Petitioners challenge the Rule, which revised the regulations for lead in drinking water. State Petitioners filed a timely petition for review. *See* 42 U.S.C. § 300j-7(a).

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions and legislative history excerpts are contained in the Addendum at the end of this brief.

ISSUES PRESENTED

1. Whether EPA acted arbitrarily, capriciously, or not in accordance with law, including in violation of the Safe Drinking Water Act and APA, where the Rule "backslides" by reducing the health protections provided by the 1991 Rule's lead service line replacement requirements.

2. Whether EPA acted arbitrarily, capriciously, or not in accordance with law, in violation of the APA, in concluding that the Rule does not have disproportionately high and adverse health effects on minority or low-income populations.

STATEMENT OF THE CASE

A. The Safe Drinking Water Act Requires EPA to Establish Regulations that Protect Public Health from Drinking Water Contaminants

In 1974, Congress recognized the substantial threat that unsafe drinking water poses to America's residents and passed the Act to limit exposures to harmful contaminants in drinking water. Safe Drinking Water Act of 1974, Pub. L. No. 93-523, 88 Stat. 1660; H.R. Rep. 93-1185

at 1 (1974) (Act's purpose is "to assure that the water supply systems serving the public meet minimum national standards for protection of public health"). The Act requires that EPA, among other things, establish maximum contaminant level goals and primary drinking water regulations for contaminants that "may have any adverse effect on the health of persons" and that are known or anticipated to occur in public water systems. 42 U.S.C. § 300f.

Congress mandated that EPA review these drinking water standards at least every six years and strengthen them as necessary to ensure protection of public health to the greatest extent feasible. *Id.* § 300g-1(b)(9). Each revision to drinking water regulations must be at least as protective as the former regulation. *Id.* This "anti-backsliding" provision provides that "each revision [of a national primary drinking water regulation] shall maintain, or provide for greater, protection of the health of persons." *Id.*

To establish maximum contaminant level goals and primary drinking water regulations, EPA first must identify contaminants that pose a threat to public health. Next, EPA must determine a maximum contaminant level goal for each such contaminant, which is "the level at

which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety." *Id.* § 300g-1(b)(4)(A); *see id.* § 300g-1(a)(3).

For most contaminants that threaten public health, EPA must establish a maximum contaminant level, an enforceable standard that is the maximum permissible level that is "as close to the maximum contaminant level goal as is feasible." 42 U.S.C. § 300g-1(b)(4)(B). "[T]he purpose of the [maximum contaminant level] is to protect the public, as much as feasible, from the adverse health effects of drinking contaminated water." *City of Waukesha v. EPA*, 320 F.3d 228, 243 (D.C. Cir. 2003). "Feasible" means "feasible with the use of the best technology, treatment techniques and other means which . . . are available (taking cost into consideration)." 42 U.S.C. § 300g-1(b)(4)(D).

If EPA finds that it is "not economically or technologically feasible" to determine the level of the contaminant in water, it may instead promulgate a treatment-based rule. *Id.* § 300g-1(b)(7)(A). In such instance, EPA must adopt treatment techniques that will "prevent known or anticipated adverse effects on the health of persons to the extent feasible." *Id.* "A treatment technique is an enforceable procedure

or level of technological performance which public water systems must follow to ensure control of a contaminant."[2] The Act uses the same definition of "feasible" for treatment techniques as it does for maximum contaminant levels. 42 U.S.C. § 300g-1(b)(4)(D). Nothing in the Act "allows EPA to choose a treatment technique other than the most stringent feasible." *City of Portland, Or. v. EPA*, 507 F.3d 706, 712 (D.C. Cir. 2007).

Lead was commonly used in plumbing until 1986, when Congress amended the Act to limit the use of lead pipes, solder, and flux in public water systems or plumbing in facilities providing drinking water. *See* 86 Fed. Reg. at 4,199; 42 U.S.C. § 300g-6(a)(1). The 1986 amendments also required EPA to develop maximum contaminant level goals and national primary drinking water regulations for controlling lead in drinking water. 56 Fed. Reg. at 26,463.

B. The Serious Health Effects of Lead

Lead in drinking water is a public health issue of paramount importance. 86 Fed. Reg. 14,063, 14,064 (Mar. 12, 2021). Lead can enter

[2] EPA, *How EPA Regulates Drinking Water Contaminants*, https://www.epa.gov/sdwa/how-epa-regulates-drinking-water-contaminants.

drinking water by leaching from lead service lines and other plumbing materials made of lead.[3] *Id.* at 4,199, 4,227. No amount of lead is safe for consumption. *Id.* at 4,208. Even low levels of lead in blood pose serious health risks for children and adults. *Id.* at 4,199.

The serious adverse effects of lead on children and adults are well known. *Id.* at 4,205. Exposure to lead can damage the brain and nervous system, especially in developing fetuses, infants, and young children. *Id.* This exposure can lower intelligence quotient (IQ) and result in attention disorders in children. *Id.* Lead exposure can also cause adverse cardiovascular, renal, reproductive, immunological, and neurological effects in adults, as well as cancer. *Id.* at 4,206.

Drinking water is a significant source of lead exposure today. EPA estimates that drinking water can make up at least 20% of a person's total exposure to lead. *Id.* at 4,205, 14,064. "Infants who consume mostly formula mixed with tap water can, depending on the level of lead in the

[3] In general, pipes that run from the water main to the curb are owned by the water system, while pipes that run from the curb to the home are typically owned by the private landowner. 86 Fed. Reg. at 4,200.

water system and other sources of lead in the home, receive 40% to 60% of their lead exposure from drinking water." *Id.* at 4,205.

Lead service lines are the primary cause of lead in drinking water. *Id.* at 71,575. There are approximately 6.3 to 9.3 million homes nationwide served by lead service lines. *Id.* at 4,199. Millions of children also face exposure to lead in drinking water at schools and childcare facilities. (JA___);[4] (JA___).[5]

Minority and low-income populations are more likely to live in older housing with lead service lines and are disproportionately exposed to the risks of lead in drinking water delivered by community water systems.[6] (JA___);[7] 86 Fed. Reg. 71,574, 71,575 (Dec. 17, 2021). For example, in Detroit, children in minority and low-income households disproportionately live in the oldest housing units. (JA___).[8] This disparate exposure may be exacerbated because these households often

[4] GAO Report on Lead Testing of School Drinking Water, EPA-HQ-OW-2017-0300-1806 at 7-8.

[5] Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at 3-80.

[6] A "community water system" is a "public water system that (A) serves at least 15 service connections used by year-round residents of the area served by the system; or (B) regularly serves at least 25 year-round residents." 86 Fed. Reg. at 4,205.

[7] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 19.

[8] *Id.* at 10.

have fewer resources to pay to remove or remediate the privately-owned portions of lead service lines and often live in rental housing where the landowner refuses to pay for replacement. 86 Fed. Reg. 31,939, 31,942 (June 16, 2021), 71,575; (JA___);[9] (JA___).[10]

Due to various disparities, including the quality of housing, community economic status, and access to medical care, minority and low-income populations are also disproportionately affected by lead from other sources. (JA___);[11] 86 Fed. Reg. at 71,575. For example, children in these populations more frequently live near lead-emitting industries and in areas with lead-contaminated soils. (JA___).[12] Additionally, non-Hispanic black people are more than twice as likely as non-Hispanic whites to live in housing with deteriorating lead-based paint. *Id.*

C. The 1991 Lead and Copper Rule

In 1991, EPA promulgated the Lead and Copper Rule, which established maximum contaminant level goals and drinking water regulations for controlling lead and copper. 56 Fed. Reg. at 26,460. The

[9] EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

[10] Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

[11] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 7.

[12] *Id.*

1991 Rule established a maximum contaminant level goal of zero for lead—*i.e.*, the goal was to have no lead in drinking water. *Id.* at 26,467. EPA reasoned that no amount of lead was safe; that a substantial portion of young children, who are most susceptible to the dangers of lead, already had unacceptable levels of lead in their blood; and that there was evidence that lead can cause cancer. *Id.* at 26,467.

EPA determined at that time that it was not feasible to ascertain the level of lead in drinking water and therefore did not establish a maximum contaminant level for lead. Instead, EPA promulgated a treatment-technique rule. *See* 42 U.S.C. § 300g-1(b)(7)(A). EPA's treatment-technique requirements included lead service line replacement, corrosion control treatment to minimize the corrosion of lead pipes, source water treatment, and public education about the dangers of lead in water. 56 Fed. Reg. at 26,460.

EPA found that corrosion control—which insulates the interior of lead pipes—is often insufficient to reduce lead levels in drinking water long term, and that replacement of lead service lines thus remains critical to reducing exposure to lead-contaminated water. As EPA explained, corrosion control protections can degrade over time and their

effectiveness can vary based on the age of lead pipes and other factors. *Id.* at 26,505. Thus, although "corrosion control will reduce the leaching of lead from lead service lines in many cases, . . . high lead levels will persist in some cases and service lines will need to be replaced." *Id.* at 26,507.

Accordingly, EPA required public water systems (regardless of size) to replace lead service lines. EPA required systems to replace lead service lines if the lead in the drinking water exceeded an "action level" set at 15 micrograms of lead per Liter (µg/L) after corrosion control treatment. Such systems were required to annually replace at least 7% of total lead service lines in their distribution system after the lead action level was first exceeded. 56 Fed. Reg. at 26,507; 86 Fed. Reg. at 4,203. EPA forecasted that the 1991 Rule would result in the replacement of 2.7 to 4.5 million lead service lines out of an estimated 10.3 million lead service lines nationally, or roughly 26% to 43% of the total number of lead service lines over a 15-year period. (JA___).[13]

EPA rejected a longer schedule for replacement because it would not "be appropriate to allow systems to replace lines as part of normal

[13] Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at C-1.

maintenance since this could take as long as 50 years before all the problem lead lines are replaced in some systems." 56 Fed. Reg. at 26,507. EPA found it "necessary to accelerate the rate at which systems would otherwise replace lead service lines in order to ensure that public health will be adequately protected." *Id.*

D. The Rule

In January 2021, EPA promulgated the Rule challenged here, as part of the Act's required periodic review process. 86 Fed. Reg. at 4,206. The Rule included revisions to the following areas: lead service line replacement, corrosion control treatment, tap water sampling for lead, consumer awareness, and public education. *Id.* at 4,201.

As to lead service line replacement, the Rule's changes failed to maintain or increase the preexisting protections against lead contamination. First, the Rule eliminated the requirement that small water systems—which represent 91% of community water systems (JA___)[14]—conduct mandatory lead service line replacement. 86 Fed. Reg. at 4,204. Instead, the Rule allows small systems that exceed the action level to choose between corrosion control treatment, point-of-use

[14] Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 19.

devices to filter tap water, or lead service line replacement, subject to state agency approval. *Id.*[15]

Second, for larger community water systems that exceed the action level of 15 µg/L and must conduct lead service line replacement, EPA reduced the mandatory minimum replacement rate from 7% of the system's lines per year to 3% per year. 86 Fed. Reg. at 4,203. Under the 1991 Rule, with the mandatory 7% replacement rate, EPA required lead service lines to be replaced within 15 years. 56 Fed. Reg. at 26,508. The Rule, by contrast, "is intended to eliminate [lead service lines] within approximately 33 years of exceeding the action level." 84 Fed. Reg. 61,684, 61,699 (Nov. 13, 2019).

Although EPA has stated that replacing 100% of lead service lines "is an urgently needed action to protect all Americans from the most significant source of lead in drinking water systems," 86 Fed. Reg. at 71,574, under the Rule, most systems would be required to replace only a small portion of the lead service lines in their distribution systems, *id.* at 71,578. EPA projected that only 339,000 to 555,000 lead service lines

[15] A fourth compliance option, replacing lead-bearing plumbing, is available to small water systems with no lead service lines. *See* 86 Fed. Reg. at 4,221; 40 C.F.R. § 141.93(a)(4).

(out of 6.3 to 9.3 million lead service lines nationally) would be replaced over the 35-year period of analysis for the rulemaking. (JA___);[16] 86 Fed. Reg. at 71,578. EPA estimated that the Rule would thus result in replacement of only about *5%* of lead service lines nationally over a *35-year period*. *Id.* at 71,577.

E. EPA's Environmental Justice Analysis for the Rule

EPA conducted an environmental justice analysis of the Rule pursuant to Executive Order 12,898. EPA defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." (JA___).[17] EPA further defines "fair treatment" to mean that "no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies." *Id.*

[16] Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at Exhibit C.1.

[17] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 1.

EPA's environmental justice analysis found that the Rule's lead service line replacement revisions would not address the disproportionately high risks of lead exposure that low-income populations face from the cost of replacing the privately-owned portions of lead service lines—which can be thousands of dollars. (JA___);[18] (JA___).[19] EPA did not consider the additional lead-exposure risks that minority and low-income populations face from living in rental housing, where landlords are less likely than home-owning residents to pay the substantial cost to replace privately-owned lead service lines. *See* (JA___);[20] (JA___).[21]

Despite these environmental justice concerns, EPA concluded that the Rule does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, or indigenous peoples. 86 Fed. Reg. at 4,276.

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[18] EPA estimates that full lead service line replacement "can be expensive at an average cost of $4,700, ranging from $1,200 to $12,300 per line replaced." (JA___); EPA Strategies to Achieve Full Lead Service Line Replacement, EPA-HQ-OW-2017-0300-0010 at 4.

[19] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at Exhibit ES-1.

[20] EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

[21] Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

F. This Proceeding

In January and March 2021, Community Petitioners and State Petitioners, respectively, filed petitions challenging the Rule. This Court consolidated the proceedings.

In March 2021, EPA delayed the Rule's effective date from March 16, 2021 to June 17, 2021, 86 Fed. Reg. 14,003 (Mar. 12, 2021), and simultaneously proposed to further delay the effective date and compliance date for nine months. *Id.* at 14,063-64. In June 2021, EPA further delayed the Rule's effective date to December 16, 2021, and delayed its compliance date to October 16, 2024. *Id.* at 31,939-40.

In December 2021, EPA announced that it would let the Rule take effect as scheduled on December 16, 2021. *Id.* at 71,574. EPA also found that "there are significant opportunities to further improve upon [the Rule] to achieve increased protection of communities from lead exposure through drinking water." *Id.* at 71,577.

Community and State Petitioners had agreed to hold the consolidated cases in abeyance while EPA decided whether to revise or rescind the Rule. After the Rule took effect, Petitioners requested that the Court terminate the abeyance and enter case management deadlines.

In May 2022, the Court entered an order establishing a briefing format and schedule.

STANDARD OF REVIEW

Under the APA, a "reviewing court shall . . . hold unlawful and set aside" an agency action found to be contrary to law or arbitrary and capricious. 5 U.S.C. § 706(2)(A). A rule is arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (quotations and citation omitted). A petitioner may challenge an agency's environmental justice analysis as arbitrary and capricious under the APA. *See Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021); *Cmtys Against Runway Expansion v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004).

To interpret statutory provisions, a court applies traditional tools of statutory construction to discern whether Congress has spoken directly to the question at issue. *Merck & Co., Inc. v. United States Dep't of Health & Human Servs.*, 962 F.3d 531, 535 (D.C. Cir. 2020). If "Congress

has directly spoken to the precise question at issue . . . that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *New York v. EPA*, 443 F.3d 880, 884 (D.C. Cir. 2006) (citation and quotation marks omitted).

SUMMARY OF ARGUMENT

I. The Safe Drinking Water Act's anti-backsliding provision, 42 U.S.C. § 300g-1(b)(9), requires that each revision to the Lead and Copper Rule "maintain, or provide greater, health protection of persons." Lead service line replacement is essential to protecting public health from lead in drinking water. Accordingly, EPA's revisions to preexisting lead service line replacement requirements may not reduce the health protections that those requirements provided.

But the Rule's lead service line replacement provisions unlawfully allow backsliding in two ways. First, the Rule eliminates the 1991 Rule's mandate that small water systems replace their lead service lines when the water in their systems exceeds the lead action level. Small systems may now choose options that mitigate—but do not remove—the threat. Even small systems that choose replacement are no longer required—as

under the 1991 Rule—to use corrosion control treatment until line replacement occurs.

Second, for larger water systems that exceed the lead action level, the Rule reduces the annual mandatory minimum rate of lead service line replacement from 7% to 3% of the system's total lead service lines. EPA's assertion that the anti-backsliding analysis should be based on the implementation of the Rule as a whole contravenes the plain language of the anti-backsliding provision, which requires "each" revision to maintain or enhance health protections. *See* 42 U.S.C. § 300g-1(b)(9). Moreover, EPA's argument that the Rule's lead service line replacement provision itself is more protective is incorrect because it is based on unfounded assumptions about the degree of mandatory replacements larger systems will conduct under the respective rules.

Each of these revisions prolong human exposure to lead in drinking water compared to the 1991 Rule, and thus do not maintain or provide greater health protection—in violation of the anti-backsliding provision.

II. In violation of the APA, EPA failed to support its conclusion that the Rule will not disproportionately harm minority and low-income populations within the meaning of Executive Order 12,898. Replacement

of privately-owned portions of lead service lines under the Rule generally will be available only where the homeowner pays thousands of dollars to replace that portion of the line. But minority and low-income populations, who face greater lead exposure, are less likely to be able to pay for the replacement of privately-owned service lines and more likely to live in rental housing where the landlord refuses to pay for replacement of privately-owned service lines. EPA failed to explain how the Rule's lead service line replacement provision will not exacerbate these disparate impacts. And EPA failed to address viable alternatives that it could have used to address the disproportionate lead exposure that minority and low-income populations suffer.

STANDING

State Petitioners have Article III standing to challenge the Rule. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Rule will cause at least two types of injuries to State Petitioners, each of which is traceable to the Rule and would be redressed by vacatur of the challenged aspects of the Rule.

A. Proprietary Injury

First, the Rule will likely cause State Petitioners direct injuries to their proprietary interests. It is well established that States suffer an

injury sufficient to establish standing when they expend resources "to mitigate and recover from harms that could have been prevented" absent the challenged regulatory action. *Air Alliance Houston v. EPA*, 906 F.3d 1049, 1059-60 (D.C. Cir. 2018) ("'[T]here is no difficulty in recognizing [a state's] standing to protect proprietary interests[.]'" (quotation and citation omitted)).

Here, State Petitioners will bear increased costs to address the harms caused by lead in drinking water. As discussed in the Declaration of Jodi Feld, EPA's failure to make the Rule sufficiently protective will result in State Petitioners incurring financial costs to address harms from our residents' continued exposure to lead in drinking water. These include increased costs for medical treatment (Medicaid) and special education programming for children who suffer from high lead levels. *See* Feld Decl., ¶¶ 16-32. In addition, states and local governments incur costs when they are forced to respond to crises caused by lead contamination in drinking water from lead service lines. *Id.*, ¶¶ 33-35. Vacating the challenged provisions would reinstate the 1991 Rule's more protective lead service line provisions, which would in turn decrease lead exposure harms and these attendant costs.

B. Injury to Quasi-Sovereign Interests

Second, EPA's decision to weaken the Lead and Copper Rule will also result in concrete harms to the health and safety of our residents who drink water delivered by lead service lines. There are estimated to be hundreds of thousands of lead service lines in our States from which lead can leach into the drinking water supply. *See* 86 Fed. Reg. at 4,199. Given that no amount of lead is safe for consumption, lead in drinking water will likely harm the health and safety of our residents. 86 Fed. Reg. at 4,208. Vacating the challenged provisions of the Rule would reinstate the more protective provisions of the 1991 Rule, decreasing lead exposure harms. State Petitioners have standing to assert their quasi-sovereign interests in protecting their residents and their environments from such harms. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 519-21 (2007); *Hanford Challenge v. Moniz*, 218 F. Supp.3d 1171, 1182 (E.D. Wash. 2016).

ARGUMENT

I. EPA VIOLATED THE ANTI-BACKSLIDING PROVISION OF THE SAFE DRINKING WATER ACT

A. The Rule's Lead Service Line Replacement Regulations Violate the Statute's Anti-Backsliding Provision.

Under the Act's anti-backsliding provision, "[a]ny revision of a national primary drinking water regulation shall be promulgated in accordance with this section, except that each revision shall maintain, or provide greater, protection of the health of persons." 42 U.S.C. § 300g-1(b)(9). This provision prohibits EPA from rolling back any of its preexisting regulatory protections for primary drinking water. *See City of Waukesha*, 320 F.3d at 232. Here, EPA violated the anti-backsliding provision by instituting revisions to the lead service line replacement requirements that substantially reduce the health protections provided by the 1991 Rule's lead service line replacement requirements.

1. The Elimination of a Lead Replacement Requirement for Small Water Systems Fails to Maintain or Improve Health Protections.

EPA violated the statute's anti-backsliding provision by effectively eliminating mandatory lead service line replacement for small public drinking water supply systems. Under the 1991 Rule, water systems

serving fewer than 10,000 customers were required to replace at least 7% of the total number of their lead service lines each year if their water exceeded an action level of 15 µg/L. 56 Fed. Reg. at 26,552 (former 40 C.F.R. § 141.84(b) (1991)). But the Rule eliminated this replacement requirement by adding a "small system flexibility" provision, 40 C.F.R. § 141.93. Now, small water systems can choose not to replace *any* of their lead service lines even if their water continues to contain amounts of lead that exceed EPA's action level. 86 Fed. Reg. at 4,204. Reducing the annual replacement rate from 7% to 0% plainly does not maintain or enhance the health protections that were provided by the previous rule's mandatory lead service line replacement requirement.

Rather than maintain or enhance the 1991 Rule's mandatory replacement requirement, the Rule allows small water systems that exceed the action level to instead choose other approaches, including corrosion control treatment or point-of-use devices (filters). 40 C.F.R. § 141.93(a)(2), (3). But EPA did not demonstrate that these choices are adequate substitutes for lead service line replacement. To the contrary, corrosion control treatment and point-of-use devices do not permanently remove the risk of lead entering the drinking water supply. And despite

indicating that replacements would still occur, EPA offered no evidence that small water systems would voluntarily choose to replace lead service lines—let alone that they would do so at the same annual rate that was required under the 1991 Rule. Indeed, EPA's revisions are intended to provide small water systems with "flexibility" *not* to conduct lead service line replacement. 86 Fed. Reg. at 4,270. Although small water system compliance choices are subject to state agency approval, the extent of state discretion is unclear in the Rule and, in any event, is not the equivalent of federally-mandated lead service line replacement for purposes of the backsliding analysis.

Furthermore, the Rule is less protective even if a small water system voluntarily elects to conduct lead service line replacement. Under the 1991 Rule, a water system that continued to exceed the action level was *required* to maintain corrosion control treatment while conducting lead service line replacement. 56 Fed. Reg. at 26,478. But now the small water system can forgo corrosion control despite continuing to exceed the action level—while taking up to 15 years to replace its lead service lines, 86 Fed. Reg at 4,308. This lack of corrosion control could cause lead levels to increase dramatically during the many years it takes for lead service

lines to be replaced. (JA___).[22] By turning mandates from the 1991 Rule into a suite of options for small water systems in the Rule, EPA violated the Act's anti-backsliding provision.

2. The Reduction of the Mandatory Replacement Rate from 7% to 3% Also Violates the Anti-Backsliding Provision.

EPA further violated the statute's anti-backsliding provision by reducing the mandatory lead service line replacement rate that applies to larger community water systems. Under the 1991 Rule, larger systems that exceeded the action level of 15 µg/L were required to replace 7% of the lead service lines in their systems each year. 56 Fed. Reg. at 26,507. But the Rule reduces that annual rate from 7% to 3%. *See* 86 Fed. Reg. at 4,203; 40 C.F.R. § 141.84(g). This reduction unlawfully decreases the health protections provided because the lower mandatory replacement rate means that systems can replace fewer lead service lines each year—thereby allowing more lead pipes to remain in place and endanger human health. Indeed, EPA acknowledged in the proposed rule that the 3% replacement rate for water systems required to conduct lead service line replacement would extend the time for replacement from 15 years under

[22] American Water Comment, EPA-HQ-OW-2017-0300-1139 at 19.

the 1991 Rule to "approximately 33 years of exceeding the action level." 84 Fed. Reg. at 61,699; *see* 56 Fed. Reg. at 26,508.

The improper backsliding effect of the Rule's lower replacement rate is also demonstrated by the stark contrast between the number of lead service lines predicted to be removed under the 1991 Rule and the number of lines predicted to be removed under the Rule. EPA estimated that under the 1991 Rule, water systems would replace approximately 2.7 to 4.5 million lead service lines out of an estimated total of 10.3 million lead service lines during a 15-year period. (JA___).[23] That reduction represented a roughly 26 to 43% decrease in the total number of lead service lines nationally. By contrast, under the Rule, EPA projects that systems will replace approximately 339,000 to 555,000 lead service lines out of an estimated total of 6.3 to 9.3 million lead service lines—only about 5% of the total number of lead service lines nationally—over a 35-year period. (JA___).[24] The lead service line replacement revisions

[23] 1991 Regulatory Impact Analysis, EPA-HQ-OW-2017-0300-0193 at 4-30. The total number of lead service lines (10.3 million) was calculated by multiplying the number of systems with lead pipes by the number of connections per system, and then adding the product for each system size category. *Id.* at 4-28, Exhibits 4-5 and 4-6.

[24] Economic Analysis, EPA-HQ-OW-2017-0300-1768 at C-1.

violate the anti-backsliding provision by prolonging human exposure to lead in drinking water compared to the 1991 Rule.

B. EPA Has Not Demonstrated that the Rule's Lead Service Line Replacement Revisions Maintain or Provide for Greater Protection of Public Health.

There is no merit to EPA's assertion that the Rule's lead service line replacement requirements comport with the Act's anti-backsliding provision. According to EPA, the backsliding analysis for a treatment technique rule, as opposed to a maximum contaminant level, should be based on an assessment of the health protections that result from the rule "as a whole, rather than a comparison of the numerical benchmarks within the treatment technique rule." *See* 86 Fed. Reg. at 4,216. The agency contends that, in any event, the Rule "results in a greater rate of removal" of lead service lines. *Id.* Both arguments are erroneous.

First, the anti-backsliding provision precludes EPA from using other parts of the Rule to justify the revisions that plainly reduce health protections for drinking water. EPA attempts to argue against backsliding concerning the 7% to 3% mandatory reduction for larger systems by, for example, pointing to the Rule's public education provisions concerning lead risks. *See* 86 Fed. Reg. at 4,217; *see also*

(JA___).[25] But under the plain language of the Act, the anti-backsliding provision applies to *each separate revision* contained in the Rule, including each revision to the lead service line replacement requirements. 42 U.S.C. § 300g-1(b)(9). Indeed, EPA acknowledges that removal of lead service lines is essential to protecting public health from the dangers of lead in drinking water, and the replacement requirements thus cannot be eliminated or reduced without running afoul of the anti-backsliding provision. *See* 56 Fed. Reg. 26,507; (JA___);[26] (JA___).[27]

The anti-backsliding provision's standalone application to the lead service line replacement requirements is clear from the Act's ordinary meaning, which applies the anti-backsliding rule to "*each* revision." 42 U.S.C. § 300g-1(b)(9). The term "each" means that every individual item in a group—here, every revision within the Rule—is to be regarded or treated separately. *See* "Each," Oxford English Dictionary, https://www.oed.com/view/Entry/58924 ("each" is "[u]sed to give the same

[25] Response to Comments, EPA-HQ-OW-2017-0300-1622 at 204 (citing the Rule's lead service line inventory, tap water sampling, and public notification provisions in response to argument that small system flexibility regulation was backsliding).

[26] EPA Strategies to Achieve Full Lead Service Line Replacement, EPA-HQ-OW-2017-0300-0010 at 4.

[27] Natural Resources Defense Council Comment Letter, EPA-HQ-OW-2017-0300-1546 at 11.

sense in relation to individual members of an identifiable set"). Moreover, the anti-backsliding provision's application to "[a]ny revision" further connotes a broad meaning that includes every revision contained in the Rule. *See New York*, 443 F.3d at 884-85 ("read naturally, the word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind'" (additional quotations and citation omitted)). And nothing in the statute's anti-backsliding provision differentiates between maximum contaminant levels and treatment techniques, let alone suggests that the anti-backsliding analysis for treatment-technique rules is based on the "whole rule" rather than each revision.

Interpreting the Act's anti-backsliding mandate to require that each revision maintain or enhance health protections accords with this Court's precedent construing anti-backsliding provisions in other environmental statutes. For example, in *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 900 (D.C. Cir. 2006), the Court determined that EPA's revocation of control requirements implementing its previous ozone standard violated the Clean Air Act's anti-backsliding provision, 42 U.S.C. § 7502(e). Although it was undisputed that the new 8-hour ozone standard was more protective overall than the previous 1-hour

standard, the Court concluded that EPA could not repeal the previous standard's control requirements (such as mandatory penalties for failing to attain the previous 1-hour standard) given the anti-backsliding language requiring "controls which are not less stringent" than under the prior rule. *See id.* at 900-05. *South Coast*'s strict approach to protecting public health by prohibiting backsliding should similarly apply here, particularly given the expansive wording in the Act's anti-backsliding mandate discussed above. *See also NRDC v. EPA*, 643 F.3d 311, 322 (D.C. Cir. 2011) (Clean Air Act anti-backsliding is "one-way ratchet" that requires attainment of controls "EPA has subsequently replaced").

The practical implications of EPA's "whole rule" theory further demonstrate that it conflicts with the anti-backsliding mandate. Under EPA's view, it may reduce the concrete and permanent health protections that result from lead service line replacement so long as it simultaneously enhances some other part of the Lead and Copper Rule, such as requirements regarding public education, corrosion control, or additional water monitoring—even when such other requirements provide only temporary or aspirational protections against lead leaching into drinking water. It is not plausible that Congress intended to allow

EPA to weaken a critical health-protecting component of a primary drinking water regulation by pointing to other changes.

Second, when compared to the 1991 Rule's lead service line replacement requirements, the Rule's replacement provisions violate the anti-backsliding mandate. As discussed above, Point I.A.2, *supra*, the Rule lengthens the time period for replacement and reduces the number of lines replaced compared to the 1991 Rule. EPA's arguments to the contrary are wrong.

For example, EPA overstates the number of lead service lines that will be replaced under the Rule. Although EPA estimates that the Rule will result in the replacement of 339,000 to 555,000 lead service lines nationwide, a majority of those replacements—46% to 59% of the total number of lines—are based on EPA's unfounded assumptions about *voluntary* replacements. (JA___).[28] Specifically, EPA assumes that 105,838 to 138,923 lead service lines, or 25% to 31% of the total number of lines EPA estimates will be replaced under the Rule, will be replaced under a "goal-based" program for medium and larger water systems that

[28] Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at C-1.

exceed a trigger level of 10 µg/L. (JA___).[29] Under this program, water systems exceeding a trigger level can comply with the Rule by setting their own aspirational goals for lead service line replacement with state approval. 86 Fed. Reg. at 4,200. There is no support for EPA's assumption that these goal-based plans will lead to these levels of lead service line replacements given that systems are not required to meet any mandatory minimum lead service line replacement rate under their plans. *Id.*

EPA's estimate of the number of replacements that will occur under the Rule is further overstated because it includes an assumption that 94,815 to 114,279 lead service lines (21% to 28% of the total lines EPA estimates will be replaced under the Rule), will come from "customer initiated" replacements. *Id.* The Rule provides that if a customer replaces the customer-owned portion of a lead service line, the water system must replace the water system-owned portion. 86 Fed. Reg. at 4,253. But EPA offers no support for its conclusion that approximately one quarter of customers will initiate replacement of their own lead service lines. In fact, and as discussed further in the next section, Point

[29] Economic Analysis Appendices, EPA-HQ-OW-2017-0300-1768 at C-1.

II.A, *infra*, EPA concludes that low-income populations, who are more likely to live in homes with lead service lines, may be less likely to undertake voluntary lead service line replacement due to limited access to information and inability to afford lead service line replacement. (JA___).[30]

EPA's contention that the Rule will maintain or enhance health protections compared to the 1991 Rule is further undermined by EPA's understatement of the number of lead service lines that were required to be replaced under the 1991 Rule. EPA now assumes that the 1991 Rule's 7% replacement rate would have resulted in only 8,770 to 126,292 lead service lines being replaced over 35 years. (JA___).[31] Contrary to that assumption, EPA previously estimated that the 1991 Rule would result in the replacement of approximately 2.7 to 4.5 million lead service lines. EPA does not provide any explanation for how it derived its drastically reduced estimate of only 8,770 to 126,292 lead service lines for purposes of the Rule. *See Hispanic Affairs Project v. Acosta*, 901 F.3d 378, 389 (D.C. Cir. 2018) ("Agencies always bear the 'affirmative burden' of

[30] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 15.

[31] *Id.* at C-1.

'examin[ing] a key assumption' when 'promulgating and explaining a non-arbitrary, non-capricious rule.'" (citation omitted)).

EPA also overstates the health benefits that result from the Rule closing loopholes that existed in the 1991 Rule's lead service replacement requirements. EPA notes that the Rule no longer allows water systems to comply with lead service replacement requirements by undertaking partial replacement of their lead service lines or by submitting lead test results below the action level.[32] *See* 86 Fed. Reg. at 4,216-17. According to EPA, because these loopholes resulted in few water systems conducting lead service line replacement, closing those loopholes makes the Rule more health protective than the 1991 Rule. *Id.* at 4,216-17.

But EPA fails to grapple with the fact that water systems' failure to achieve the 7% lead service line replacement rate was not necessarily caused by these loopholes but was instead likely driven by widespread violations of the 1991 Rule. A report published by the Natural Resources Defense Council, which analyzed data obtained from EPA's Safe

[32] "Partial lead service line replacement" means "replacement of any portion of a lead service line or galvanized service line requiring replacement . . . that leaves in service any length of lead service line or galvanized service line requiring replacement upon completion of the work." 86 Fed. Reg. at 4,281. Partial lead service line replacements are permitted under certain circumstances but do not count towards the mandatory or goal-based lead service line replacement rate. *Id.*

Drinking Water Information System database, found that 5,363 community water systems across the United States had a total of 8,093 violations of the 1991 Rule in 2015 alone. (JA___).[33] These violations include failures to properly monitor, report, or treat water contaminated with lead. *Id.* Of the 5,363 community water systems with violations in 2015, 233 systems reported 303 health-based violations that affected nearly 600,000 people. *Id.* And 1,110 of the community water systems—serving approximately 3.9 million people across the country—had water lead levels exceeding EPA's 15 µg/L action level. *Id.* There is no reason to believe that there would not be similar violations under the new Rule. Thus, EPA's closing of certain loopholes does not justify the Rule's significant reduction in the percentage of lead service lines that must be replaced.

Finally, in addition to the anti-backsliding provision, the Act provides that a treatment technique approach must protect the public from exposure to lead in drinking water to the maximum extent feasible. 42 U.S.C. § 300g-1(b)(7)(A). State Petitioners incorporate by reference the Community Petitioners' arguments in their opening brief, which

[33] Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 3.

demonstrate that the Rule arbitrarily fails to prevent adverse health effects to the extent feasible, as required by the Act.

II. EPA ACTED ARBITRARILY AND CAPRICIOUSLY IN CONCLUDING THAT THE RULE WILL NOT DISPROPORTIONATELY HARM MINORITY AND LOW-INCOME POPULATIONS.

Under Executive Order 12,898, EPA must advance environmental justice by both "identifying" and "addressing" disproportionately high and adverse health or environmental effects of its programs, policies, and activities on minority and low-income populations. 59 Fed. Reg. at 7,629; 86 Fed. Reg. at 4,276. Here, EPA failed to adequately identify *or* address the disproportionate harms the Rule will impose on minority and low-income populations. EPA's conclusion that the Rule does not have such disproportionate effects was arbitrary and capricious. *See Vecinos*, 6 F.4th at 1330 (agency's failure to reasonably explain in its environmental justice analysis how pipeline project would not adversely affect communities outside two-mile radius of project was arbitrary and capricious).

A. EPA Failed to Provide a Rational Explanation for Its Conclusion.

First, EPA failed to adequately identify the disproportionate effects that the Rule imposes on minority and low-income individuals who face

greater lead exposure, but may not be able to afford replacement of a privately-owned lead service line, or live in rental housing where the landlord refuses to pay for such replacement. EPA has acknowledged that lead service line replacements are integral to protecting the public from lead in drinking water. *See*, *e.g.*, 56 Fed. Reg. at 26,507; (JA___).[34] But EPA's environmental justice analysis does not grapple with the fact that lead service line replacement of privately-owned lead service lines is generally available only to homeowners who pay, or renters whose landlords pay, thousands of dollars to replace the privately-owned portion of the lead service line.

For example, EPA recognizes in passing that the Rule's reliance on "household-level changes that depend on ability-to-pay will leave low-income households with disproportionately higher health risk" because lead service line replacement may not be affordable for low-income households. 86 Fed. Reg. at 4,276; (JA___).[35] But EPA never evaluated the nature or extent of this anticipated disparity in the Rule's health

[34] EPA Strategies to Achieve Full Lead Service Line Replacement, EPA-HQ-OW-2017-0300-0010 at 4.

[35] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 14, Exhibit ES-1, Exhibit 4-1.

effects on these populations. *See Vecinos*, 6 F.4th at 1330-31 ("[w]hen conducting an environmental justice analysis, an agency's delineation of the area potentially affected by the project must be 'reasonable and adequately explained,' and include 'a rational connection between the facts found and the decision made" (citations omitted)).

Indeed, EPA failed to determine the number of minority and low-income households that may be unable to afford lead service line replacements under the Rule. Nor did EPA estimate the number of minority and low-income individuals who are renters and whose landlords are likely to refuse to pay for lead service line replacements, even though EPA was made aware of and previously acknowledged the significance of these issues. *See* (JA___);[36] (JA___);[37] (JA___).[38] And EPA failed to quantify the adverse health effects on minority and low-income households from their disproportionate inability to afford or access lead service line replacement, taking into consideration their pre-existing disparities in lead exposure.

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[36] Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 11-13.

[37] EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

[38] Lead and Copper Rule Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

Second, EPA failed to adequately address—by considering measures to minimize, mitigate, or avoid—the disproportionate effects that the Rule imposes on minority and low-income individuals who may not be able to afford lead service line replacement, or who live in rental housing where the landlord refuses to pay for lead service line replacement. (JA___);[39] (JA___);[40] (JA___);[41] (JA___).[42] The importance of mitigation measures has been widely recognized by other agencies. *See*, *e.g.*, FEMA, *Executive Order 12,898*: Environmental Justice, https://www.fema.gov/fact-sheet/executive-order-12898-environmental-justice ("If FEMA determines that the proposed project could cause disproportionately high and adverse effects for low-income or minority populations, FEMA must consider measures to minimize, mitigate, or avoid those impacts."); U.S. Dep't of Transp., *Environmental Justice Strategy*, https://www.transportation.gov/civil-rights/civil-rights-awareness-enforcement/environmental-justice-strategy (Executive

[39] Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 11-13.

[40] Environmental Defense Fund Comment Letter, EPA-HQ-OW-2017-0300-1084 at 18-21.

[41] EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

[42] Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

Order 12,898 requires the department "[t]o avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations"); Council on Environmental Quality, *Environmental Justice*: Guidance under the National Environmental Policy Act, at 16 (1997), https://www.epa.gov/sites/ default/files/2015-02/documents/ej_guidance_nepa_ceq1297.pdf ("Throughout the process of public participation, agencies should elicit the views of the affected populations on measures to mitigate a disproportionately high and adverse human health or environmental effect" on minority and low-income populations and "should carefully consider community views in developing and implementing mitigation strategies."). Indeed EPA recognized that addressing these disproportionate effects was critical to the success of a revised Lead and Copper Rule. (JA___);[43] (JA___);[44](JA___).[45]

[43] Attorneys General Comment Letter, EPA-HQ-OW-2017-0300-1468 at 11-13.

[44] EPA White Paper, EPA-HQ-OW-2017-0300-0145 at 10.

[45] Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18.

EPA's assertion that any disparate impacts on minority and low-income populations will be addressed by other elements of the Rule (such as corrosion control treatment and point of use filters) is not supported by the rulemaking record. *See* Point I.B, *supra*. Leaving lead service lines in place creates risk that lead can leach from pipes in the future. (JA___).[46] Corrosion control treatment and point of use filters do not eliminate the risk of lead in drinking water and are only a stopgap to lead service line replacement. *Id.* Moreover, EPA's assertion is undermined by its recognition that blood lead levels "will remain slightly higher for customers who have partial or full [lead service lines] compared to customers who do not have a [lead service line]." *Id.*

EPA's assertion that federal and state programs may be used to fund lead service line replacement programs, including the cost of lead service line replacement for customer-owned portion of lead service lines, also fails to satisfy its responsibility to address the disparities that minority and low-income populations face in accessing lead service line replacement. *See* 86 Fed. Reg. at 4,276. EPA has not adequately explained how these programs will minimize, mitigate, or avoid the

[46] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 19.

disparate impacts on minority and low-income populations who cannot afford lead service line replacement or live in rental housing where the landlord refuses to replace lead service lines. Indeed, EPA failed to explain how minority and low-income populations will be able to access these funding programs, including whether these populations have the experience and capacity to develop competitive funding applications (JA___),[47] and whether these programs are available to renters.

Furthermore, EPA's addition of a requirement for water systems to describe in their lead service line replacement plan how they intend to accommodate customers that want lead service line replacement but are unable to pay for it does not fulfill EPA's affirmative obligation under Executive Order 12,898 to take measures to address the disproportionate effects that the Rule imposes on minority and low-income individuals. (JA___).[48] This provision is aspirational. There is no assurance that water systems will in fact accommodate customers who are unable to pay for replacement.

[47] Green & Healthy Homes Initiative Comment Letter, EPA-HQ-OW-2017-0300-1400 at 6-7.

[48] Response to Comments, EPA-HQ-OW-2017-0300-1622 at 463.

B. EPA Failed to Consider Viable Alternatives to Address the Rule's Disproportionate Effects on Minority and Low-Income Populations.

EPA also acted arbitrarily and capriciously by not providing a reasonable explanation for its failure to consider viable alternatives that would address the Rule's disproportionately high and adverse effects on minority and low-income populations. *State Farm*, 463 U.S. at 43; *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013) (agency must consider and explain its rejection of reasonably available alternatives). For example, EPA could have secured the "meaningful involvement" of potentially affected minority or low-income populations—involvement that the agency has stated is a key aspect of EPA's environmental justice definition. (JA___).[49] But EPA held no public meetings about the Rule between its proposal and promulgation. Nor did EPA meet during this period with populations that are disproportionately harmed by lead exposure.

EPA further failed to explain why the Rule does not prioritize lead service line replacement in neighborhoods at higher risk of lead poisoning. The Lead and Copper Rule Working Group to the National

[49] Environmental Justice Report, EPA-HQ-OW-2017-0300-0008 at 1.

Drinking Water Advisory Council, for example, advised that "making environmental justice a priority can be achieved through . . . setting priorities for which neighborhoods are targeted first for [lead service line replacement] to ensure equal treatment of low income neighborhoods." (JA___).[50] In addition, the Government Accountability Office determined that EPA could develop guidance about methods for identifying high-risk locations, and thus help public water systems test water samples from locations at greater risk of having lead service lines and identify areas with vulnerable populations. U.S. Government Accountability Office, *EPA Could Use Available Data to Better Identify Neighborhoods at Risk of Lead Exposure* (Dec. 2020), https://www.gao.gov/products/gao-21-78. EPA's failure to address these methods for focusing lead service line replacement efforts on populations disproportionately affected by lead in drinking water was arbitrary and capricious. *See Public Citizen v. Steed*, 733 F.2d 93, 103-05 (D.C. Cir. 1983) (finding agency's suspension of

[50] Lead and Copper Working Group Report, EPA-HQ-OW-2017-0300-0062 at 18. The National Drinking Water Advisory Council unanimously endorsed the working group's report in full. (JA___); National Drinking Water Advisory Council Letter to EPA, EPA-HQ-OW-2017-0300-0126 at 2.

program arbitrary and capricious where it failed to explain why available alternatives in the record were not pursued to address the problem).

EPA also could have required community water systems to demonstrate that their implementation of the Rule will not result in significant disproportionate impacts on minority and low-income residents. (JA___).[51] For example, EPA could have required community water systems to prioritize minority and low-income populations for lead service line replacement or to offer incentives for property owners in those neighborhoods to replace the consumer-owned lead service lines. *Id.*

Finally, EPA could have improved access to the federal and state funding programs for minority and low-income populations, such as by helping these populations build their capacity to better compete for and access water infrastructure funding. Or EPA could have evaluated additional mechanisms to equitably fund lead service line replacement, including the use of ratepayer funds. *Id.* EPA's failure even to consider

[51] Environmental Defense Fund Comment Letter, EPA-HQ-OW-2017-0300-1084 at 20.

these reasonable alternatives was arbitrary and capricious. *State Farm*, 463 U.S. at 43.

CONCLUSION

For the reasons set forth above, the Petition should be granted, the challenged aspects of the Rule should be vacated, and the Rule should be remanded to the agency to revise its environmental justice analysis and promulgate a rule consistent with law.

Dated: New York, New York
August 8, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

The undersigned attorney, Sarah K. Kam, hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and this Court's briefing schedule order dated May 23, 2022. According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 8,983 words. Because Community Petitioners are filing an opening brief of less than 9,000 words, the combined word amount of the two briefs is less than 18,000 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook.

/s/ Sarah K. Kam

Sarah K. Kam

CERTIFICATE OF SERVICE

I certify that on August 8, 2022, the foregoing Initial Opening Brief of State Petitioners was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

/s/ Sarah K. Kam

Sarah K. Kam