

No. _____

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

IN RE ECOLOGY CENTER, INC.,
CENTER FOR ENVIRONMENTAL HEALTH,
UNITED PARENTS AGAINST LEAD & OTHER ENVIRONMENTAL
HAZARDS, and
SIERRA CLUB,

Petitioners.

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, and MICHAEL REGAN, in
his official capacity as ADMINISTRATOR of the U.S. ENVIRONMENTAL
PROTECTION AGENCY,

Respondents.

PETITION FOR WRIT OF MANDAMUS

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FRAP 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioners Ecology Center, Inc., Center for Environmental Health, United Parents Against Lead & Other Environmental Hazards, and Sierra Club, state that they are nonprofit organizations, have no parent corporations, and no publicly held corporation owns 10 percent or more of their stock.

Respectfully submitted this 22nd day of August, 2023.

s/Lakendra S. Barajas _____

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INTRODUCTION

Petitioners Ecology Center, Inc. (the “Ecology Center”), Center for Environmental Health, United Parents Against Lead & Other Environmental Hazards f/k/a United Parents Against Lead National, Inc. (“UPAL”), and Sierra Club respectfully petition this Court for a writ of mandamus directing Respondents, the U.S. Environmental Protection Agency (“EPA”) and its Administrator Michael Regan, to conclude a rulemaking under the Toxic Substances Control Act (“TSCA”) regulating lead wheel weights within six months.

In August 2009, EPA granted a TSCA petition filed by Petitioners and allied individuals and organizations requesting EPA establish regulations prohibiting the manufacture, processing, and distribution in commerce of lead wheel balancing weights. Ecology Ctr. et al., Citizen Petition Under TSCA to Prohibit the Production and Use of Lead Wheel Weights in the United States (May 28, 2009) (“2009 Petition”) [A001].¹ In its grant of the 2009 Petition, EPA committed to prompt action and highlighted its ongoing effort to reduce lead exposures. Letter from Stephen A. Owens, EPA, to Jeff Gearhart, Ecology Ctr., & Tom Neltner, Sierra Club (Aug. 26, 2009) (the “2009 Response”) [A005]. Yet nearly fourteen years later, EPA has failed

¹ Select documents and the declarations cited in this petition are provided in the accompanying Appendix of Select Cited Documents and Declarations. The Bates numbers in the Appendix corresponding to the first page of the cited document are included in brackets at the end of the full citation in this petition, *e.g.*, [A001].

to conclude a rulemaking on lead wheel weights, and all action toward that end appears to have completely stalled a decade ago.

This egregious delay has left Petitioners' members and supporters, and their children, unnecessarily exposed to a highly toxic chemical for which exposure at any level can cause irreversible harm. Interstate transit of vehicles with easily dislodged lead wheel weights makes this harm widespread and curbs the effectiveness of the limited number of state laws regulating lead wheel weights. Further, communities of color and low-wealth communities are disproportionately harmed by lead, and the exposure to lead from lead wheel weights adds to their cumulative lead burdens. EPA must act now to eliminate this source of lead exposure. Because EPA appears unwilling to fulfill its legal obligation without court intervention, Petitioners ask this Court to compel EPA to expeditiously conclude a rulemaking on lead wheel weights.

RELIEF SOUGHT

Petitioners seek a writ of mandamus directing EPA to conclude a TSCA rulemaking for lead wheel weights within six months of the Court's issuance of a writ.

STATEMENT OF JURISDICTION

This Court has jurisdiction to compel EPA to complete the rulemaking it pledged to undertake. 28 U.S.C. § 1651(a); 5 U.S.C. § 706(1). The Administrative Procedure Act ("APA") provides that a federal agency must "conclude a matter

presented to it” “within a reasonable time,” 5 U.S.C. § 555(b), and that a “reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706; *see also id.* § 702.

“Any court that would have jurisdiction to review a final rule has jurisdiction to determine if an agency’s delay is unreasonable,” *In re A Cmty. Voice*, 878 F.3d 779, 783–84 (9th Cir. 2017) (citing *Telecommc’ns. Rsch. & Action Ctr. v. FCC* (“*TRAC*”), 750 F.2d 70, 75 (D.C. Cir. 1984)), and this Court has jurisdiction to review a final rule issued by EPA under section 6 of TSCA, *see* 15 U.S.C. § 2618(a). This Court thus has jurisdiction to determine if EPA’s delay is unreasonable. And because the All Writs Act empowers federal courts to “issue all writs necessary or appropriate in aid of their respective jurisdictions,” 28 U.S.C. § 1651(a), this Court has the authority to issue a writ of mandamus directing EPA to act. *See In re Pesticide Action Network N. Am.* (“*In re PANNA*”), 798 F.3d 809, 813 (9th Cir. 2015). Venue is proper here because Petitioners Center for Environmental Health and Sierra Club have their principal places of business in California. *See* 15 U.S.C. § 2618(a)(1)(A).

STANDING

Petitioners have standing to pursue this writ of mandamus. Ecology Center, Center for Environmental Health, UPAL, and Sierra Club were among the organizations that filed the 2009 Petition. Petitioners are organizations dedicated to

reducing exposure to lead and other toxic chemicals and safeguarding the health of their communities. *See* Decl. of Jeff Gearhart [A430]; Decl. of Kaya Allan Sugerman [A451]; Decl. of Zakia Rafiq Shabazz [A478]; Decl. of Sonya Lunder [A493]. Petitioners have members and/or supporters who have been and continue to be harmed by lead exposure and who would benefit from restrictions on lead wheel weights. *See* Decl. of Melissa Cooper Sargent [A442]; Decl. of Gabriel Cardenas [A461]; Decl. of Andrea Braswell [A470]; Decl. of Charlotte Scott [A485]; Decl. of Doris Cellarius [A501]; Decl. of Christy McGillivray [A509].

EPA's delay in regulating the manufacture, processing, and distribution in commerce of lead wheel weights harms Petitioners and their members and supporters. For almost fourteen years, Petitioners' members and supporters have been exposed to lead from wheel weights while waiting in vain for EPA to conclude the rulemaking it pledged to undertake and regulate this source of lead exposure. These injuries could be redressed by an order from this Court compelling EPA to conclude the rulemaking. *See Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1226–29 (9th Cir. 2008) (discussing standing requirements for parties alleging procedural-rights violations). If EPA prohibits the manufacture, processing, and distribution in commerce of lead wheel weights, as the granted 2009 Petition requested, Petitioners' members and supporters would not face ongoing lead exposures from the use of lead wheel weights. And if EPA ignores its obligations

under TSCA to eliminate the unreasonable risks posed by lead wheel weights and takes final agency action that does not address this exposure source, Petitioners could challenge that action in court.

ISSUE PRESENTED

Whether EPA’s nearly fourteen-year delay in regulating lead wheel weights under TSCA—a rulemaking that EPA agreed to initiate in response to a 2009 citizens’ petition—is unreasonable, warranting the issuance of a writ of mandamus from this Court requiring EPA to conclude the rulemaking expeditiously.

BACKGROUND

I. THE DANGER POSED BY LEAD AND LEAD WHEEL WEIGHTS

A. Lead Is a Dangerous Toxic Chemical That Can Cause Irreversible Health Harms at Low Levels of Exposure

Lead is a toxic heavy metal for which there is no safe level of exposure. *See* EPA, *Integrated Science Assessment for Lead*, at lxxxviii (2013) (“Lead ISA”) [A106]; Reconsideration of the Dust-Lead Hazard Standards and Dust-Lead Post-Abatement Clearance Levels, 88 Fed. Reg. 50,444, 50,455 (proposed Aug. 1, 2023) [A135] (“[T]here is no evidence of a threshold below which there are no harmful health effects from lead exposure.”). Lead affects virtually every organ system. Lead ISA at lxxxiii—lxxxvii; Agency for Toxic Substances & Disease Registry, *Toxicological Profile for Lead 4* (2020) (“ATSDR Tox. Profile”) [A175]. Lead exposure is associated with serious health effects, including an increased risk of

cancer; higher blood pressure; lower cognitive function; harm to the nervous, cardiovascular, immune, and reproductive systems; adverse kidney and blood effects; and adverse neurobehavioral effects, including anxiety and depression. *See* Lead ISA at lxxxiii—lxxxvii; *see also* 88 Fed. Reg. at 50,448. Lead is also a probable human carcinogen. *See* ATSDR Tox. Profile at 8–9, 248; 88 Fed. Reg. at 50,448.

Lead harms human health even at very low levels: At extremely low blood-lead levels, adults face increased risks of cardiovascular disease, and children can suffer neurodevelopmental harm with irreversible effects. Lead ISA at xciii, 1-68, 1-76. And lead is a bioaccumulative toxicant, meaning that it accumulates in the body, where it can be retained for decades. ATSDR Tox. Profile at 4, 12. “As lead exposure increases, the range and severity of symptoms and effects also increase.” *Lead Poisoning*, Page in *Health Topics*, WHO (last visited Aug. 22, 2023) [A187].

Children are at particularly high risk of harm from exposure to lead. Due to their age-appropriate behaviors, such as increased hand-to-mouth contact and poor handwashing, children typically ingest more lead than adults, including lead deposited on the ground, floor, and in soil. Lead ISA at 1-11, 1-78, 5-6. Children’s bodies absorb ingested lead more easily than those of adults, *id.* at 3-37, and more of the lead that enters the body gains access to the brains of children than of adults, *see id.* at 3-80, 4-237. Indeed, as EPA recognizes, “[l]ead exposure has the potential to impact individuals of all ages, but it is especially harmful to young children

because the developing brain can be particularly sensitive to environmental contaminants.” 88 Fed. Reg. at 50,446. Lead exposure can start at the earliest life stages: Lead stored in a pregnant person’s bones can release into their blood during pregnancy and expose the fetus, ATSDR Tox. Profile at 292–93, 296–97, and breastfed infants can be exposed to lead through breast milk during crucial development windows, *id.* at 297–98; *see also* Lead ISA at 3-29, 4-589 to -590, 5-9.

Black children and children living in low-wealth households are especially at risk of harm from additional lead exposure because of existing racial and socioeconomic disparities in exposure and because they “have persistently been found to have higher blood lead levels” than children from other backgrounds. EPA, *Strategy to Reduce Lead Exposures and Disparities in U.S. Communities* 5 (2022) (“Lead Strategy”) [A189]; *see also id.* at 3, 5. Since lead accumulates in the body and higher lead levels are associated with a broader range and increased severity of symptoms, additional sources of lead exposure can exacerbate the harms experienced by children of color and children living in low-wealth households. *See* ATSDR Tox. Profile at 12; *Lead Poisoning*, WHO.

Lead also harms fish and wildlife. *See* Lead ISA at 1-39 (“Commonly observed effects of [lead] on terrestrial organisms include decreased survival, reproduction, and growth, as well as effects on development [and] behavior”); *id.* at 1-44 to -47 (reviewing the harmful effects of lead on freshwater organisms and

explaining that evidence supports “that waterborne [lead] is highly toxic to freshwater plants, invertebrates and vertebrates”). Terrestrial organisms can be exposed to lead through soil, *id.* at 1-42, and aquatic organisms can be exposed from contaminated water or by ingesting lead-contaminated food or sediment, *id.* at 1-43.

B. Lead Wheel Weights Are a Widespread and Ongoing Source of Exposure to Lead

One way lead enters the environment—and ultimately people’s bodies—is through the use and detachment of lead wheel weights. Wheel weights are pieces of metal that attach to automobile wheel rims to balance tires while driving. Despite the dangers associated with lead exposure, lead wheel weights are still in use across the United States. *See* Lead ISA at 2-17. During normal driving conditions, wheel weights often “fail”—they become loose and fall off of rims—allowing lead to enter the environment. *See id.*; *see also* EPA, Peer Draft Report of *Approach for Estimating Changes in Blood Lead Levels from Lead Wheel Weights* 13 (2011) (“Estimating Changes”) [A330] (“Lead wheel weights can be dislodged and then lost from vehicles, thus releasing lead into the environment.”); Jack Caravanos et al., *An Exterior and Interior Leaded Dust Deposition Survey in New York City: Results of a 2-Year Study*, 100 *Env’t Rsch.* 159, 163 (2006) [A251] (explaining that lead from wheel weight failure is “continuous, significant, and widespread”). Millions of pounds of lead per year are estimated to be released into the environment from lead wheel weights. *See* Estimating Changes at 13 (reviewing estimates between three

and four million pounds each year); *cf. National Lead Free Wheel Weight Initiative*, EPA (last updated Feb. 22, 2016)² [A257] (estimating that over 12.5 million pounds of lead from wheel weights are “uncontrolled or unmanaged in the environment” each year and 1.6 million pounds are “lost” each year when wheel weights fall off).

When lead wheel weights fall off, they land on road surfaces, where they can be ground into dust by passing traffic. *See* Estimating Changes at 13. This lead dust can then contaminate surrounding streets, soil, and waterways. *See* 2009 Petition at 3; Env’t Council of the States, Resolution 08-9, *Phasing Out the Sale and Installation of Lead Wheel Weights 2* (last updated Mar. 30, 2023) (“ECOS Resolution”) [A259]; Lead ISA at 2-17; Robert A. Root, *Lead Loading of Urban Streets by Motor Vehicle Wheel Weights*, 108 *Env’t Health Persps.* 937 (2000) [A262]. This dust can also migrate into indoor environments, *see* Caravanos et al. at 5; Estimating Changes at 10. People can be exposed to lead from wheel weights by inhaling or ingesting lead dust or by drinking contaminated water. *See* Estimating Changes at 10. In addition to facing exposures to lead dust, children can also be exposed to lead from wheel weights by picking up and playing with lead wheel weights that are not fully abraded. *See* 2009 Petition at 3. This is particularly concerning given the potential for children to ingest lead and lead-contaminated soil

² Available at:

<https://archive.epa.gov/epawaste/hazard/wastemin/web/html/nlffwwi.html>.

during age-appropriate hand-to-mouth behaviors. Lead wheel weights can also contaminate waste streams when they are collected during street cleaning and sent to a landfill for disposal or if they end up in auto-shredder residue (end-of-life vehicle waste). *See Lead and Mercury-Added Wheel Weights*, N.Y. Dep’t of Env’t Conservation (last visited Aug. 21, 2023) [A266]. And lead wheel weights along roads can pollute soil, waterbodies, and groundwater, poisoning fish and wildlife. *See Maine’s Lead & Mercury Wheel Weight Ban*, Me. Dep’t of Env’t Protection (last visited Aug. 21, 2023) [A269].

Lead wheel weights are still sold and distributed in the United States, and forty-one states still have no prohibition on their use, manufacture, or installation. *See* ECOS Resolution at 2; *Balancing Weights*, Perfect Equip., (last visited Aug. 22, 2023)³ (“High-quality zinc and steel, as well as lead, are the basic materials for our adhesive weights and adhesive weight rolls for rims.”); Product Page for Perfect Equip. Wheel Weights, Grainger (last visited Aug. 22, 2023)⁴ (showing lead wheel weights available for sale domestically in most states). Lead is not a required component of wheel weights, even though it is still widely used—in 2015, the Ecology Center estimated “that approximately 50% of the market continues to use

³ Available at: <https://www.perfectequipment.com/us/products/balancing-weights>.

⁴ Available at: <https://www.grainger.com/category/fleet-vehicle-maintenance/tire-maintenance/tire-wheel-performance/wheel-balancing?brandName=PERFECT+EQUIPMENT&filters=brandName>.

the lead product, despite viable, lead-free alternatives being extensively used.” Letter from Jeff Gearhart, Ecology Ctr., to Wendy Cleland-Hamnett et al., EPA (May 27, 2015) (“May 2015 Letter”) [A328]; *cf.* ECOS Resolution at 2 (“[L]ead-free wheel weights with cost and performance superior or equal to that of lead wheel weights are readily available in the U.S. and world markets.”).

II. TSCA’S LEGAL FRAMEWORK

Section 21 of TSCA permits “[a]ny person” to “petition [EPA] to initiate a proceeding for the issuance . . . of a rule” under certain sections—including section 6—of TSCA. 15 U.S.C. § 2620(a). Within ninety days of a petition’s filing, EPA must either grant or deny the petition, and if EPA grants it, it “shall promptly commence an appropriate proceeding in accordance with” the relevant TSCA provision. *Id.* § 2620(b)(3).

Section 6 of TSCA requires EPA to regulate a chemical that poses an unreasonable risk of injury to health or the environment. *See* 15 U.S.C. § 2605. When EPA granted the 2009 Petition, section 6(a) provided that if EPA found a reasonable basis to conclude that a chemical’s manufacture, processing, distribution, use, or disposal presents or will present an unreasonable risk of injury to health or the environment, EPA must use “the least burdensome requirements” to protect against such risk. *See* 15 U.S.C. § 2605(a) (2009) (amended 2016). When TSCA was amended in 2016, the mandate to choose the “least burdensome requirements” to

regulate risk was removed. Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, § 6, 130 Stat. 448, 460 (2016). Now, EPA must eliminate unreasonable risks presented by a chemical, and while it must consider “the reasonably ascertainably economic consequences” of a rule in doing so, it is not obligated to choose the least burdensome regulatory option. 15 U.S.C. § 2605(c)(2)(A)(iv); *see also id.* § 2605(a), (c). One regulatory option available to EPA under section 6 is to “prohibit[] . . . the manufacture, processing, or distribution in commerce of [a] substance” for “a particular use.” *Id.* § 2605(a)(2)(A).

III. EPA’S DELAY

Almost two decades ago, in May 2005, the Ecology Center first petitioned EPA under section 21 of TSCA “to establish regulations prohibiting the manufacture, processing, distribution in commerce, use, and improper disposal of lead wheel balancing weights.” Ecology Ctr., Citizen Petition Under TSCA to Prohibit the Production and Use of Lead Wheel Weights in the United States 1 (May 13, 2005) (“2005 Petition”) [A006]. The 2005 Petition explained that lead wheel weights play a significant role in the release of lead into the environment and provided EPA with evidence of these releases. *Id.* at 2, 5. It estimated that, each year, lead wheel weight failure causes as much as 1,631 metric tons—over three million pounds—of lead to be deposited on roads in the United States. *Id.* at 2–6. The 2005 Petition requested regulation pursuant to section 6 of TSCA. *Id.* at 9.

EPA denied the 2005 Petition, asserting that it did not have enough information about human or environmental exposures to adequately assess the risks posed by lead wheel weights. *See* TSCA Section 21 Petition; Response to Citizen’s Petition, 70 Fed. Reg. 51,061, 51,063 (Aug. 29, 2005) [A102]. It noted, however, that it was “concerned about the potential contribution of lead wheel weights and other products that contain lead to elevated blood lead levels in children” and that it would continue to study the issue, explaining that it was “developing an approach to prioritize for further analysis and action the variety of products containing lead, that would be subject to TSCA and/or voluntary initiatives, including lead wheel weights.” *Id.* Despite its stated concern, EPA did not use its TSCA authority to regulate lead wheel weights.

In May 2009, Petitioners and others submitted another petition under section 21 of TSCA, again requesting that EPA “establish regulations prohibiting the manufacture, processing, and distribution in commerce of lead wheel balancing weights.” 2009 Petition at 1. The 2009 Petition incorporated the 2005 Petition by reference and provided additional evidence that lead wheel weights falling into roadways is a significant source of lead exposure. *See id.* at 1, 3. It also pointed to EPA’s own acknowledgements that, each year, over one million pounds of lead is “lost when wheel weights fall off during normal driving conditions such as hitting a pot hole.” *Id.* at 3.

On August 26, 2009, after opening a docket and receiving public comment, EPA granted the petition. In so doing, EPA explained that it “will promptly commence an appropriate proceeding under TSCA” and “anticipates commencing this proceeding through either an Advance Notice of Proposed Rulemaking or a Proposed Rule.” 2009 Response. However, despite granting the petition, EPA has never issued an Advance Notice of Proposed Rulemaking or proposed a rule to address the concerns raised in the petitions, much less concluded a rulemaking concerning lead wheel weights.

EPA has failed to do so despite its own recognition that any level of lead in a person’s bloodstream can cause serious health harms and that lead wheel weights expose individuals to lead and can increase the level of lead in their blood. In 2011, EPA prepared a peer review draft report in which EPA investigated human exposures to lead wheel weights in two scenarios. *See Estimating Changes*. There, EPA explained that lead wheel weights “can be lost from cars and can enter the environment, leading to potential exposures to children and adults who inhale or ingest roadway particles containing wheel weight lead or who drink contaminated water.” *Id.* at 10. It estimated that lead wheel weights would result in an increase in blood lead levels for children and adults, with greater increases in children and people living in urban environments. *See id.* at 63–66. Despite this finding, EPA did not take action to ban lead wheel weights.

Over the past decade, all fifty states' environmental agencies through the Environmental Council of the States ("ECOS"), and environmental and health organizations, have continued to urge EPA to finalize action on lead wheel weights, to no avail. *See* ECOS Resolution at 3 (requesting EPA to "move forward in an expedited manner on its 2009 granted petition and notice under TSCA to initiate regulatory action to address lead hazards associated with the manufacture, processing, and distribution in commerce of lead wheel balancing weights in the United States"); *id.* at 1 (showing resolution was initially approved in 2008 and revised five times thereafter). In 2015, the Ecology Center wrote to EPA to inquire about the status of EPA's proceeding in response to the granted 2009 Petition. *See* May 2015 Letter. The letter pointed out that "[p]rogress to address this significant ongoing release of lead to the environment has been effectively halted by EPA's lack of action on this rulemaking." *Id.* A month later, the Ecology Center and its counsel Earthjustice submitted a Freedom of Information Act request, seeking information about EPA's decision to grant the 2009 Petition and subsequent actions taken in response to that grant. *See* Decl. of Eve C. Gartner [A324] ¶ 4.

In 2016, the Ecology Center, several of its partners, several U.S.-based wheel weight manufacturers, and other stakeholders met with EPA to discuss EPA's delay in regulating lead wheel weights. In a letter sent after that meeting, Petitioner Ecology Center reiterated its concerns about the delay. *See* Letter from Jeff Gearhart,

Ecology Ctr., to Jeffrey Morris et al., EPA (June 15, 2016) [A423]. It explained that a ban on lead wheel weights would fit within an amended TSCA and once again outlined why a ban would protect human health and the environment from toxic exposures to lead. *See id.* After TSCA was amended, EPA responded to the letter by stating that it “is reviewing the new law to determine next steps,” including how to evaluate and address potential risks from ongoing lead uses like lead wheel weights. *See* Letter from Jeffery T. Morris, EPA, to Eve C. Gartner, Earthjustice (July 11, 2016) [A428]. Since then, EPA has not publicly identified any “next steps” that it plans to take in response to its grant of the 2009 Petition, much less acted to regulate lead wheel weights.

Indeed, any progress that may have been made on EPA’s “appropriate proceeding under TSCA,” 2009 Response, appears to have stopped entirely more than a decade ago. In Regulatory Agenda entries in 2010 and 2011, EPA identified moving timetables for issuing a Notice of Proposed Rulemaking in response to the 2009 Petition—first May of 2011, then March of 2012, then June of 2012, then October of 2012—before the lead wheel weights matter disappeared completely from the Regulatory Agenda. In each of those entries, EPA acknowledged that “[l]ead is highly toxic, especially to young children,” cite

d a U.S. Geological Survey study that approximately 2,000 tons—four million pounds—of lead wheel weights were lost to the environment in a single year, and

stated that, despite voluntary actions by domestic automobile manufacturers, lead wheel weights “continue to be [a] predominant product in the tire replacement market.” OMB, RIN 2070-AJ64, Spring Unified Agenda Notice for Lead Wheel Weights (2010) [A272]; OMB, RIN 2070-AJ64, Fall Unified Agenda Notice for Lead Wheel Weights (2010) [A273]; OMB, RIN 2070-AJ64, Spring Unified Agenda Notice for Lead Wheel Weights (2011) [A274]; OMB, RIN 2070-AJ64, Fall Unified Agenda Notice for Lead Wheel Weights (2011) [A275].

For nearly fourteen years, despite repeated pleas from stakeholders, EPA has failed to conclude the rulemaking it committed to initiate. As a result of EPA’s inaction, individuals across the country continue to be exposed to lead from lead wheel weights, putting them at risk of irreversible health harms.

ARGUMENT

Mandamus relief is “warranted in those rare instances when the agency’s delay is ‘egregious.’” *In re PANNA*, 798 F.3d at 813 (citation omitted). In deciding whether an agency’s delay is “sufficiently egregious” to warrant mandamus relief, this Court considers the six factors set forth in *TRAC*, 750 F.2d at 79–80. *In re Nat. Res. Def. Council, Inc* (“*In re NRDC*”), 956 F.3d 1134, 1138 (9th Cir. 2020). However, “an agency cannot unreasonably delay that which it is not required to do,” so before applying the *TRAC* factors, the Court considers whether the agency is under a duty to act. *In re A Cmty. Voice*, 878 F.3d at 784.

EPA has an obligation under the APA to conclude the rulemaking requested in the 2009 Petition “within a reasonable time,” and it has failed to do so. 5 U.S.C. § 555(b). EPA’s nearly fourteen-year delay in fully responding to the request for regulation of lead wheel weights is well outside the bounds of reason, particularly given the significant danger to human health and welfare posed by lead exposure. Once again, “EPA ha[s] unreasonably delayed its response to serious dangers to human health,” and this Court should grant the Petition for Writ of Mandamus. *In re NRDC*, 956 F.3d at 1138 (reviewing the “three occasions over the [prior] five years” that the Court granted petitions for writ of mandamus in the face of EPA’s unreasonable delays).

I. EPA HAS A DUTY TO CONCLUDE A RULEMAKING ON LEAD WHEEL WEIGHTS

The APA provides that an agency “shall” “conclude a matter presented to it” “within a reasonable time.” 5 U.S.C. § 555(b). As this Court has explained, this directive “has been interpreted to mean that an agency has a duty to fully respond to matters that are presented to it under its internal processes.” *In re A Cmty. Voice*, 878 F.3d at 784. That is, “[t]o ‘conclude [the] matter,’ EPA must enter a final decision subject to judicial review, and they must do so ‘within a reasonable time.’” *Id.* at 785 (alteration in original) (quoting 5 U.S.C. § 555(b)); *see also Pub. Citizen Health Rsch. Grp. v. Comm’r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984).

EPA has not concluded the requested rulemaking “within a reasonable time,” 5 U.S.C. § 555(b), and has thus abdicated its duty under the APA. In the nearly fourteen years since EPA granted the 2009 Petition, EPA has entered no final decision, nor has it even proposed a rule. As this Court has explained in the context of another petition seeking EPA action on lead exposure, “[h]aving chosen to grant the petition for rulemaking, EPA came under a duty to conclude a rulemaking proceeding within a reasonable time.” *In re A Cmty. Voice*, 878 F.3d at 785.

II. A WRIT OF MANDAMUS IS WARRANTED TO COMPEL EPA TO PROCEED WITH AND CONCLUDE THE RULEMAKING IT PLEDGED TO UNDERTAKE

This Court evaluates whether an agency delay is unreasonable and mandamus is warranted by considering the six *TRAC* factors. *See In re A Cmty. Voice*, 878 F.3d at 786. Those factors are:

(1) the time agencies take to make decisions must be governed by a “rule of reason”; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is ‘unreasonably delayed.’”

TRAC, 750 F.2d at 80 (citations omitted). Because EPA’s nearly fourteen-year delay is well outside the bounds of what is reasonable, puts human health at risk, prejudices individuals who continue to be exposed to this source of lead in the face of EPA’s inaction, and cannot be justified by competing priorities, the Petition for Writ of Mandamus should be granted.

A. EPA’s Nearly Fourteen-Year Delay in Concluding the Rulemaking It Agreed to Undertake Is Excessive and Violates the Rule of Reason

The first factor—the “most important” of the *TRAC* factors—weighs strongly in favor of Petitioners because EPA’s nearly fourteen-year delay violates the rule of reason. *In re A Cmty. Voice*, 878 F.3d at 786; *see also In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008). Under this factor, a court considers “whether the time for agency action has been reasonable.” *In re NRDC*, 956 F.3d at 1139. “Repeatedly, courts in this and other circuits have concluded that ‘a reasonable time for agency action is typically counted in weeks or months, not years.’” *Id.* (quoting *In re A Cmty. Voice*, 878 F.3d at 787). Indeed, delays much shorter than the nearly fourteen-year delay here have been found to be unreasonable. *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (holding that “six-year-plus delay is nothing less than egregious”); *In re Int’l Chem. Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (considering a rulemaking that “will have taken over six years,” and stating that “we do not see how any further delay . . . —resulting

in continued exposure of workers to dangerous levels of cadmium—could be excusable”); *cf. In re A Cmty. Voice*, 878 F.3d at 787 (“Critically, EPA fails to identify a single case where a court has upheld an eight year delay as reasonable, let alone a fourteen year delay . . .”).

On multiple occasions over the past decade, this Court has held that EPA’s years-long delays in addressing public-health threats warrant mandamus relief. In *In re PANNA*, this Court held that EPA’s delay of eight years and lack of a “concrete timeline” to resolve an administrative petition to revoke the approval of a dangerous pesticide “stretched the ‘rule of reason’ beyond its limits.” 798 F.3d at 814. Two years later, in *In re A Community Voice*, the Court again found that a delay that was “into its eighth year” with no “‘concrete timetable’ for final action” favored issuance of a writ. 878 F.3d at 787. And most recently, in *In re NRDC*, the Court once again concluded that EPA’s years-long delay—whether the Court calculated it as three years or ten years—in resolving a petition to cancel a pesticide registration “‘stretched the ‘rule of reason’ beyond its limits’” and “‘tip[ped] sharply in favor’ of mandamus relief.” 956 F.3d at 1140 (quoting *In re PANNA*, 798 F.3d at 814).

In 2009, faced with a petition that set forth the dangers of lead wheel weights, EPA committed to commencing an appropriate proceeding to regulate that source of lead. Nearly fourteen years later, EPA has still not even proposed a rule, much less concluded the proceeding. This delay—like the delays in *In re PANNA*, *In re A*

Community Voice, and *In re NRDC*—patently violates the rule of reason, and this factor weighs in favor of mandamus relief.

B. Congress Intended for EPA to Proceed Expeditiously Under TSCA to Address Toxic Chemical Exposures

Congress made clear that it expected EPA to act expeditiously under TSCA to address unreasonable risks posed by chemical substances. The second *TRAC* factor, which considers any congressional “indication of the speed with which it expects the agency to proceed” in determining whether the rule of reason is violated, *TRAC*, 750 F.2d at 80, thus favors a finding of unreasonable delay. This factor does not ask whether Congress established a firm deadline for the challenged inaction. *See Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). Rather, it involves consideration of whether the statutory scheme evinces a congressional intent that the agency act expeditiously. *See Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987).

TSCA expressly states that “[i]t is the intent of Congress that the Administrator [of the EPA] shall carry out this chapter in a reasonable and prudent manner.” 15 U.S.C. § 2601(c). The rest of TSCA provides context for this directive—EPA must evaluate chemicals and manage unreasonable risks expeditiously. For example, Congress provided EPA, at most, four years from the time EPA determines a chemical poses an unreasonable risk to adopt section 6 rules

that eliminate such risk.⁵

Section 21 itself contemplates swift action in response to a citizens' petition. Within ninety days of a petition's filing, EPA must either grant or deny the petition. *Id.* § 2620(b)(3). If EPA grants the petition, it must "promptly commence an appropriate proceeding." *Id.* The requirement to "promptly" begin a proceeding indicates that Congress anticipated that EPA would act expeditiously to address the concerns raised in a petition that it granted.

Indeed, TSCA's legislative history indicates that section 21 was conceived as a tool to ensure EPA is responsive to the risks posed by toxic chemicals. As the D.C. Circuit has explained, citing a floor statement from TSCA's initial passage in 1976, "[c]itizen participation," including by section 21 petitions, "is broadly permitted to 'ensure that bureaucratic lethargy does not prevent the appropriate administration of this vital authority.'" *Env't Def. Fund v. Reilly*, 909 F.2d 1497, 1499 (D.C. Cir. 1990) (quoting 122 Cong. Rec. 32,857 (1976) (statement of Sen. Tunney)). A Senate Committee Report from 1976 reinforced the view that prompt action in response to

⁵ Once EPA starts the process of evaluating whether an existing chemical poses an unreasonable risk, it must complete that process "as soon as practicable," but at most within three years. 15 U.S.C. § 2605(b)(4)(G). The statute allows this process to be extended but only by a maximum of six months. *Id.* If EPA evaluates a chemical and determines that it poses an unreasonable risk, section 6 provides that within one year of that risk evaluation being published, EPA must propose a risk management rule, and within two years, EPA must finalize the risk management rule. *Id.* § 2605(c)(1)(A)–(B). In certain circumstances, EPA can extend these deadlines but only by a combined maximum of two years. *Id.* § 2605(c)(1)(C).

section 21 petitions was expected, stating that “[t]he responsiveness of government is a critical concern and the citizens’ petition provision will help to protect against lax administration of [TSCA].” S. Rep. 94-698, at 13 (1976). Congress’ intent would be thwarted if EPA were allowed to delay acting pursuant to granted section 21 petitions for years on end.

C. The Health and Welfare of Individuals Exposed to Lead from Lead Wheel Weights Support a Finding of Unreasonable Delay

Both the third and fifth *TRAC* factors support a determination that EPA’s delay in regulating a significant source of exposure to lead is so egregious that mandamus relief is necessary. The third factor counsels that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.” *TRAC*, 750 F.2d at 80. In many contexts, including this one, this factor overlaps with the fifth factor, which requires consideration of “the nature and extent of the interests prejudiced by delay.” *Id.*; see also *In re United Mine Workers of Am. Int’l. Union*, 190 F.3d 545, 552 n.6 (D.C. Cir. 1999); *In re NRDC*, 956 F.3d at 1141–42 (analyzing the third and fifth factors together and finding both favored the issuance of a writ where children exposed to a toxic pesticide were “severely prejudiced by EPA’s delay” (citation omitted)).

These factors underscore the unreasonableness of EPA’s delay. Lead has devastating health effects for adults and children. Lead harms adults across body systems, and each year, an estimated 400,000 deaths—including hundreds of

thousands of cardiovascular disease-related deaths—in the U.S. are attributable to lead exposure. *See* Bruce P. Lanphear et al., *Low-Level Lead Exposure and Mortality in US Adults: A Population-Based Cohort Study*, 3 *Lancet Pub. Health* E177, E178 (2018) [A276]. Children can suffer from irreversible cognitive harm from lead exposure. *See* Lead ISA at lxxxvii. EPA’s own scientific assessment on lead concluded that “it is clear that [lead] exposure in childhood presents a risk [and] there is no evidence of a threshold below which there are no harmful effects on cognition from [lead] exposure.” *Id.* at lxxxviii. As this Court pointed out, “EPA itself has acknowledged that ‘[l]ead poisoning is the number one environmental health threat in the U.S. for children ages 6 and younger.’” *In re A Cmty. Voice*, 878 F.3d at 787 (alteration in original); *see also* EPA, *Protecting Children from Lead Exposures* 3 (2018) [A284] (“Despite the overall decline of blood lead levels over time, lead exposure remains a significant public health concern for some children because of persistent lead hazards in their environment.”); 88 Fed. Reg. at 50,446 (“Lead exposure . . . is especially harmful to young children . . .”). And here, as in another case where this Court found EPA’s delay to be unreasonable, “millions of young children potentially face significant risks to their neurodevelopment from further exposure.” *In re NRDC*, 956 F.3d at 1142.

EPA has acknowledged that there is no safe level of lead. 88 Fed. Reg. at 50,455. And, according to EPA’s own estimate, each year, over a million pounds of

this no-threshold toxicant enter the environment because of lead wheel weight failure. *National Lead Free Wheel Weight Initiative*, EPA. In this case, “there is a clear threat to human welfare,” *In re A Cmty. Voice*, 878 F.3d at 787, and a writ of mandamus is warranted. *See In re PANNA*, 798 F.3d at 814 (“In view of EPA’s own assessment of the dangers to human health posed by this pesticide, we have little difficulty concluding it should be compelled to act quickly to resolve the administrative petition.”).

Moreover, individuals who face harm from lead exposure from unregulated lead wheel weights “are severely prejudiced by EPA’s delay.” *In re A Cmty. Voice*, 878 F.3d at 787 (“The children exposed to lead poisoning due to the failure of EPA to act are severely prejudiced by EPA’s delay, and the fifth factor thus favors issuance of the writ.”); *see also In re NRDC*, 956 F.3d at 1142. Communities of color and individuals living in low-wealth communities already face disproportionately high levels of lead exposure, putting them at an especially high risk of harm from the toxic effects of lead. Lead Strategy at 11. And research suggests that people of color and lower-wealth groups are more likely to live in areas with high road and traffic densities than white and affluent populations. Nancy Tian et al., *Evaluating Socioeconomic and Racial Differences in Traffic-Related Metrics in the United States Using a GIS Approach*, 23 J. Exposure Sci. & Env’t Epidemiology 215, 218 (2013) [A316]. This unregulated source of lead—a source that is especially prevalent

in urban environments—adds to the lead exposures faced by overburdened communities.

EPA’s delay in concluding the rulemaking also prejudices Petitioners by leaving them “stuck in administrative limbo” and unable to seek judicial review of any final action. *In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012). As this Court explained only three years ago in remarkably similar circumstances: “For more than a decade, the EPA has frustrated [petitioners’] ability to seek judicial review by withholding final agency action, all the while endangering the wellbeing of millions of children and ignoring its ‘core mission’ of ‘protecting human health and the environment.’” *In re NRDC*, 956 F.3d at 1142–43 (citation omitted).

Each day that passes without regulation permits more lead to enter the environment and people’s bodies, contributing to this disparity and to the multiple health harms that individuals experience as a result of exposure to this cumulative, no-threshold toxicant. “The stakes to human health and the interests prejudiced by delay are indisputable,” *In re NRDC*, 956 F.3d at 1142, and the third and fifth *TRAC* factors support the issuance of a writ.

D. EPA’s Delay Is Not Justified by Higher, Competing Priorities

The fourth *TRAC* factor directs courts to “consider the effect of expediting delayed action on agency activities of a higher or competing priority.” *TRAC*, 750

F.2d at 80. Because the Agency itself has said that addressing sources of lead exposure is a priority, *see infra*, it cannot point to its general workload as justification for delay. *Cf. In re NRDC*, 956 F.3d at 1141 (rejecting EPA argument that it should get a “free pass” on several *TRAC* factors because “all of its activities to some extent touch on human health, such that prioritization of one goal will necessarily detract from competing priorities,” where EPA had acknowledged that the chemical at issue in that case “poses a serious risk to human health and welfare—specifically, to the neurodevelopment of children”). This factor thus supports a grant of mandamus relief.

Over the past few years, and over multiple presidential administrations, EPA has repeatedly explained that it views reducing lead exposure as a priority and is committed to doing so. *See, e.g., Protecting Children from Lead Exposures* at 3 (“EPA is committed to reducing lead exposures from multiple sources . . . , especially among children who are the most vulnerable to the effects of lead.”); *id.* at 4 (“EPA continues to make children’s health a top priority and is committed to protecting children from lead exposures in their environments.”); *A Public Health Approach to Addressing Lead*, EPA (last updated July 15, 2021)⁶ (“[I]t remains a public health priority to continue reducing lead exposure, especially in highly-exposed communities.”). It reiterated this commitment earlier this month, when it stated that

⁶ Available at: <https://www.epa.gov/lead/public-health-approach-addressing-lead>.

“reducing childhood lead exposure is a priority for both EPA and the Federal Government.” 88 Fed. Reg. at 50,446.

Just last year, in its *EPA Strategy to Reduce Lead Exposures and Disparities in U.S. Communities*, EPA recognized that “[l]ead exposure can have devastating impacts to human health and can be especially harmful to developing children,” Lead Strategy at 3, and that reducing lead exposure is an environmental justice imperative, given the “significant disparities” in lead exposure that remain along racial, ethnic, and socioeconomic lines, *id.* at 5. To that end, EPA is “determined to take ambitious actions that follow the science and advance justice and equity to rid communities of harmful lead exposure and the resulting toxic effects.” *Id.* at 6.

EPA itself has thus made clear that reducing lead exposure is a priority. And yet it is ignoring a source of lead exposure that it committed to addressing almost fourteen years ago. EPA cannot excuse its failure to regulate lead wheel weights by pointing to other obligations. *See In re NRDC*, 956 F.3d at 1141–42 (rejecting EPA’s contention that its review of other pesticides prevented prioritizing action on pesticide known to be dangerous to children as “not an ‘acceptable justification for the considerable human health interests prejudiced by the delay’” (quoting *In re PANNA*, 798 F.3d at 814)). This factor favors granting the petition.

CONCLUSION

Nearly fourteen years ago, EPA granted Petitioners' request to regulate lead wheel weights. And for nearly fourteen years, Petitioners' members and supporters have waited in vain for EPA to finally conclude that rulemaking and to eliminate an ongoing source of lead—a toxic substance for which there is no safe level—in their neighborhoods and homes. “There is a point when the court must ‘let the agency know, in no uncertain terms, that enough is enough’” *In re Int’l Chem. Workers Union*, 958 F.2d at 1150 (citation omitted). That point has come; EPA must be directed to conclude the rulemaking it promised to initiate in 2009.

Petitioners respectfully request that this Court (1) find that EPA's delay in concluding the rulemaking it promised to initiate in response to the 2009 Petition is unreasonable and a violation of the APA; (2) order that EPA proceed with and conclude the rulemaking process within six months of the Court's order, by taking final agency action subject to judicial review in that time, with such deadline subject to modification only upon a showing of good cause by EPA; (3) retain jurisdiction of this matter for the purposes of enforcing the Court's order; (4) award Petitioners their reasonable fees, costs, and expenses, including attorneys' fees associated with this litigation; and (5) grant Petitioners such further and additional relief as the Court deems just and proper.

Respectfully submitted this 22nd day of August, 2023.

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CERTIFICATE OF COMPLIANCE

This Petition for Writ of Mandamus complies with the type-volume limitation of Ninth Circuit Rule 21-2(c) because it does not exceed 30 pages, excluding the parts exempted by Federal Rule of Appellate Procedure and 32(f) and required by Federal Rule of Appellate Procedure 21(a)(2)(C).

This Petition for Writ of Mandamus complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14-point font.

Respectfully submitted this 22nd day of August, 2023.

s/Lakendra S. Barajas _____

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing documents and accompanying Appendix of Select Cited Documents and Declarations with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that I have served the foregoing document and accompanying appendix by dispatching them to a third-party commercial carrier for delivery within three calendar days to the following parties:

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