

No. \_\_\_\_\_

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and  
GINA MCCARTHY, Administrator,

Respondents.

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**PETITION FOR WRIT OF MANDAMUS**

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**CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1**

Petitioners A Community Voice, California Communities Against Toxics, Healthy Homes Collaborative, New Jersey Citizen Action, New York City Coalition to End Lead Poisoning, Sierra Club, United Parents Against Lead National, and WE ACT for Environmental Justice have no parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respectfully submitted this 24th day of August, 2016.

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## **INTRODUCTION**

A Community Voice, California Communities Against Toxics, Healthy Homes Collaborative, New Jersey Citizen Action, New York City Coalition to End Lead Poisoning, Sierra Club, United Parents Against Lead National, and WE ACT for Environmental Justice (collectively “Petitioners”) respectfully petition this Court for a writ of mandamus requiring the Environmental Protection Agency (“EPA”) to promulgate a rule updating the dust-lead hazard standards and the definition of lead-based paint under the Toxic Substances Control Act (“TSCA”). In 2009, EPA granted a citizens’ petition requesting a rulemaking to update these standards and in doing so, agreed to initiate appropriate proceedings. Seven years later, the agency has yet to issue a rule, leaving hundreds of thousands of families across the country uninformed and exposed to the leaded dust and paint that may be present in their homes. Petitioners ask this Court to find that EPA has unreasonably delayed fulfilling its legal obligations and to compel EPA to conclude the rulemaking it initiated.

## **THE RELIEF SOUGHT**

Petitioners seek an order finding that EPA has unreasonably delayed in promulgating a rule to update the dust-lead hazard standard and the definition of lead-based paint under TSCA and directing EPA to promulgate a proposed rule within 90 days and to finalize the rule within six months.

## STATEMENT OF JURISDICTION

This Court has jurisdiction to review Petitioners' challenge to agency delay. *See* 28 U.S.C. § 1331; 5 U.S.C. § 702. The Administrative Procedure Act ("APA") provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Pursuant to the APA, a federal agency is obligated to "conclude a matter" presented to it "within a reasonable time," and "the reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed." *Id.* §§ 555(b), 706(1).

Pursuant to TSCA's judicial review provision, this Court would have exclusive jurisdiction to review any final rule issued by EPA under TSCA subchapter IV (Lead Exposure Reduction). *See* 15 U.S.C. § 2618(a).<sup>1</sup> Therefore, this Court has jurisdiction to determine if EPA's delay is unreasonable. *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("TRAC"). Moreover, this Court has authority to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651 (authorizing federal courts to issue all writs appropriate "in aid of their respective jurisdictions").

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<sup>1</sup> Petitioners California Communities Against Toxics, Healthy Homes Collaborative, and Sierra Club have their principal place of business in California.

## **THE ISSUE PRESENTED**

Whether EPA's seven-year delay in promulgating a rule to revise the dust-lead hazard standards and the definition of lead-based paint under TSCA, a rulemaking that the agency agreed to initiate in response to a 2009 citizens' petition, is an unreasonable delay warranting an order from this Court requiring EPA to conclude the rulemaking.

## **STATEMENT OF THE CASE**

### **I. THE DANGER POSED BY LEAD PAINT AND DUST**

Lead is a bioaccumulative heavy metal that can cause a range of significant adverse health effects in children and adults. Lead affects virtually every system in the human body. Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9,064 (Mar. 6, 1996). In adults, chronic exposure to low levels of lead can cause neurological problems, hypertension, cardiovascular disease, and damage to the male reproductive system. *See* Identification of Dangerous Levels of Lead, 63 Fed. Reg. 30,302, 30,304-05 (June 3, 1998); *see generally* Decl. of Bruce P. Lanphear, M.D., M.P.H. (Aug. 18, 2016) ("Lanphear Decl."); Decl. of Philip J. Landrigan, M.D., M.Sc. (Aug. 22, 2016) ("Landrigan Decl."). Exposure to lead before or during pregnancy can alter normal fetal development and result in miscarriages. 63 Fed. Reg. at 30,304. Children are especially vulnerable to the neurotoxic effects of lead. Even in small

amounts, lead can have serious and irreversible consequences for children, including diminished I.Q., learning disabilities, hyperactivity, impaired hearing, and attention-related behavioral problems. 42 U.S.C. § 4851(2); *see also* Lanphear Decl. ¶¶ 9-10; Landrigan Decl. ¶¶ 9, 14.

Blood lead level, expressed in micrograms of lead per deciliter of blood ( $\mu\text{g}/\text{dL}$ ), is an indicator of lead exposure. In the last half century, as the scientific literature has clarified the significant adverse effects associated with lead exposure, the Centers for Disease Control and Prevention (“CDC”) has repeatedly lowered the blood lead level considered elevated. Between 1960 and 1990, the blood lead level considered elevated was lowered from 60  $\mu\text{g}/\text{dL}$  to 10  $\mu\text{g}/\text{dL}$ .<sup>2</sup> In 2012, CDC eliminated any reference to a “level of concern” for lead exposure in light of the fact that no safe blood lead level has been identified, and established 5  $\mu\text{g}/\text{dL}$  as a reference level that should trigger a public health response.<sup>3</sup> Although CDC’s current “reference” blood lead level is set at 5  $\mu\text{g}/\text{dL}$ , it is a matter of scientific

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<sup>2</sup> CDC, *Lead Poisoning in Young Children* 2, 40 (2005), <http://www.cdc.gov/nceh/lead/publications/prevleadpoisoning.pdf>; *see also* Lanphear Decl. ¶ 11.

<sup>3</sup> *What Do Parents Need to Know to Protect Their Children?*, CDC (last updated Mar. 15, 2016), [https://www.cdc.gov/nceh/lead/acclpp/blood\\_lead\\_levels.htm](https://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm); *see also* Lanphear Decl. ¶ 11.

consensus, as EPA has acknowledged, that “there is no evidence of a threshold below which there are no harmful effects on cognition from [lead] exposure.”<sup>4</sup>

Children under the age of six in the United States are primarily exposed to lead through the ingestion of lead-contaminated dust and soil during normal hand-to-mouth activity. 63 Fed. Reg. at 30,305. Indeed the most common cause of lead poisoning in children in this country is the ingestion of household dust containing lead from deteriorating lead-based paint. 42 U.S.C. § 4851(4). Dust is contaminated by lead when lead-based paint deteriorates or is disturbed during renovation, repair, or abatement; or when lead is tracked or blown into the home from outside. 63 Fed. Reg. at 30,305. Children also are exposed to lead through ingestion of lead-based paint chips from flaking walls, windows, and doors. *Id.*

Housing stock constructed before 1980 contains more than 3 million tons of lead in the form of lead-based paint, with most homes constructed before 1950 containing substantial amounts of lead-based paint. 42 U.S.C. § 4851. It is estimated that approximately 64 million homes across the country may contain lead-based paint that may pose a hazard to the occupants if not managed properly. 61 Fed. Reg. at 9,066. In 1992, Congress found that “the health and development of children living in as many as 3,800,000 American homes is endangered by

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<sup>4</sup> EPA, *Integrated Science Assessment for Lead* lxxxviii (2013), [http://ofmpub.epa.gov/eims/eimscomm.getfile?p\\_download\\_id=518908](http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=518908) (emphasis added); *see also* Lanphear Decl. ¶ 12.

chipping or peeling lead paint, or excessive amounts of lead-contaminated dust in their homes.” 42 U.S.C. § 4851(5).

It is well understood, moreover, that lead exposure and poisoning disproportionately affect minority and low-income communities. *See id.* § 4851; *see also* Lanphear Decl. ¶¶ 22-26; Landrigan Decl. ¶ 18. Children in communities of color and low-income communities have a higher incidence of elevated blood lead levels. Identification of Dangerous Levels of Lead, 66 Fed. Reg. 1,206, 1,209 (Jan. 5, 2001) (codified at 40 C.F.R. Pt. 745). EPA has acknowledged that the progress in reducing lead exposure among young children over the last three decades “has not been realized equally across the United States and lead exposure remains one of the top childhood environmental health problems that impacts minority and/or low-[in]come populations.” EPA, Draft EJ 2020 Action Agenda 38 (May 2016), attached as Ex. 2 to Decl. of Tom Neltner (Aug. 22, 2016) (“Neltner Decl.”). EPA thus views disparities in lead exposure as a “continuing national environmental problem of concern to overburdened communities.” *Id.* at 4.

## **II. THE FEDERAL GOVERNMENT’S PRIORITY OF ELIMINATING CHILDHOOD LEAD POISONING**

Nearly a quarter of a century ago, Congress described “the national goal of eliminating lead-based paint hazards in housing” and called for the federal government to take a leadership role in ensuring that this goal “be achieved as

expeditiously as possible.” 42 U.S.C. § 4851(8). In 2000, the Presidential Task Force on Environmental Health Risks and Safety Risks to Children established the federal government’s goal of eliminating by the year 2010 (1) lead paint hazards in housing where children under six live and (2) elevated blood lead levels, then understood as blood lead levels exceeding 10 µg/dL.<sup>5</sup> Needless to say, that goal was not achieved.

As recently as 2015, EPA has acknowledged that “[l]ead poisoning is *the number one environmental health threat* in the U.S. for children ages 6 and younger.” Press Release, EPA, *EPA Lead Poisoning Prevention Week is Oct. 25-31 - Learn How to Protect Your Home and Family* (Oct. 23, 2015), attached as Ex. 1 to Neltner Decl. (emphasis added). In the preamble to its 2001 final rule establishing the dust-lead hazard standards, EPA noted that “[i]n light of the impacts on children and the nature of the health effects [of lead], EPA’s goal is to eliminate exposure to harmful levels of lead.” 66 Fed. Reg. at 1,207; *see also id.* (“Reducing exposure to lead has been an important issue for EPA for more than 2 decades.”). More recently, in its Draft Environmental Justice Strategic Plan for 2016-2020, EPA identified as a goal “[d]emonstrating progress on significant

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<sup>5</sup> President’s Task Force on Environmental Health Risks and Safety Risks to Children, *Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards* (2000), <http://www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf>.



national environmental justice challenges,” including “[w]ork[ing] to eliminate disparities in childhood blood lead levels.” Neltner Decl. Ex. 2 at iv.

### **III. EPA’S DUST-LEAD HAZARD STANDARDS AND DEFINITION OF LEAD-BASED PAINT**

#### **A. The Dust-Lead Hazard Standards**

Section 403 of TSCA requires EPA to promulgate regulations “which shall identify . . . lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil.” 15 U.S.C. § 2683. Although this provision required EPA to issue these regulations within 18 months of October 28, 1992, it was not until 2001 that EPA finalized a rule identifying lead-based paint hazards. *See* 66 Fed. Reg. at 1,206. The final rule established, among other things, standards for lead-based paint hazards in most pre-1978 housing and child-occupied facilities.<sup>6</sup> *Id.* at 1,206. Specifically, it identified a dust-lead hazard as:

surface dust in a residential dwelling or child-occupied facility that contains a mass-per-area concentration of lead equal to or exceeding

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<sup>6</sup> A child-occupied facility is defined as:

a building, or portion of a building, constructed prior to 1978, visited regularly by the same child, 6 years of age or under, on at least two different days within any week (Sunday through Saturday period), provided that each day's visit lasts at least 3 hours and the combined weekly visit lasts at least 6 hours, and the combined annual visits last at least 60 hours. Child-occupied facilities may include, but are not limited to, day-care centers, preschools and kindergarten classrooms.

40 C.F.R. § 745.223.

40  $\mu\text{g}/\text{ft}^2$  on floors or 250  $\mu\text{g}/\text{ft}^2$  on interior window sills based on wipe samples.

40 C.F.R. § 745.65(b). These standards were established on the basis of EPA's estimate that they would result in a one to five percent probability of a child developing a blood lead level of 10  $\mu\text{g}/\text{dL}$ .<sup>7</sup> 66 Fed. Reg. at 1,215.

### **1. The Significance of the Dust-Lead Hazard Standards**

The dust-lead hazard standards “are intended to identify dangerous levels of lead” and are “to be used prospectively . . . to identify properties that present risks to children before children are harmed.” 66 Fed. Reg. at 1,210-11. The standards are incorporated into risk assessment work practice standards and provide the basis for risk assessors to determine whether lead-based paint hazards are present in a home. 66 Fed. Reg. at 1,210; *see also* 40 C.F.R. § 745.227(h)(3) (specifying the circumstances under which a dust-lead hazard is present). The determination that a dust-lead hazard is present triggers the requirement that any lead inspection, risk assessment, and abatement be performed by personnel certified in accordance with EPA regulations. *See generally* 40 C.F.R. § 745.220; *see also* 66 Fed. Reg. at 1,210 (“By helping to determine when a hazard is present, the standards will help determine when a hazard control activity must be performed by certified personnel.”).

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<sup>7</sup> At the time of the 2001 rulemaking, CDC had identified a 10  $\mu\text{g}/\text{dL}$  blood lead level as the level of concern. 66 Fed. Reg. at 1,215.

The dust-lead hazard standards also are reflected in the clearance standards for lead abatement, which refer to “the maximum amount of lead permitted in dust on a surface following completion of an abatement activity.” 40 C.F.R. § 745.223. EPA’s regulations establish clearance standards that are the same as the dust-lead hazard standards. *See id.* § 745.227(e)(8)(viii); *see* 63 Fed. Reg. at 30,341.

Moreover, other federal agencies rely on and reference EPA’s dust-lead hazard standards. *See* 66 Fed. Reg. at 1,210 (“[The Department of Housing and Urban Development (“HUD”)], the Department of Defense (DoD), and other Federal agencies will use these standards in implementing or overseeing the evaluation and control of hazards in Federally-assisted housing and Federally-owned housing prior to disposition.”). HUD regulations, for instance, define dust-lead hazard as “surface dust that contains a dust-lead loading (area concentration of lead) *equal to or exceeding the levels promulgated by the EPA at 40 CFR 745.65 . . .*” 24 C.F.R. § 35.110 (emphasis added); *see also* 24 C.F.R. §§ 35.1320(b)(2), 35.1340(d) (specifying clearance levels that equate to the dust-lead hazard standards set by EPA). EPA’s dust-lead hazard standards thus directly influence the risk assessment and lead hazard control implemented in federally-owned and federally-assisted housing.

States and cities similarly rely on EPA’s dust-lead hazard standards in their own laws. Thirty-six states have dust-lead hazard standards that mirror EPA’s

standards.<sup>8</sup> Indeed, a number of states explicitly incorporate EPA standards into their own regulations. *See, e.g.*, N.J. Admin. Code § 8:51-1.4 (2016) (defining “lead contaminated dust” as “dust particles that contain lead in excess of the levels established by [EPA] pursuant to the Toxic Substances Control Act, Section 403, 40 C.F.R. 745.61 to 745.69”). The implications of city and state reliance on EPA’s dust-lead hazard standards are wide-ranging. In New Jersey, for instance, where a local board of health has identified lead-contaminated dust, it “shall ensure that defective paint . . . on floors, window sills and window wells are repaired and refinished with a non-lead coating material . . . .” N.J. Admin. Code 8:51-6.3. In Louisiana, the presence of lead levels in a child-occupied facility above the levels in EPA’s dust-lead hazard standards triggers disclosure to the state Department of Environmental Quality and to parents of the children enrolled at the facility. *See* La. Admin. Code. Tit. 33, pt. III, § 2813(B)-(C). In the District of Columbia, if city inspections of public buildings and publicly-operated residences “reveals the presence of lead-based paint hazards, as identified by [EPA] in 40 C.F.R. § 745.65(a) through (c),” the city is required to ensure that the condition is “repaired or controlled.” D.C. Code § 10-702.

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<sup>8</sup> Nat’l Conference of State Legislatures, *Standards for Lead-Based Paint Hazard Reduction* (last visited Aug. 23, 2016), <http://www.ncsl.org/Portals/1/Documents/environ/Standards-healthy-housing.pdf>.

## **2. The Inadequacy of the Existing Dust-Lead Hazard Standards**

There is no real dispute that EPA's dust-lead hazard standards are outdated and unprotective of human health, particularly children's health. In 2007, EPA's Clean Air Scientific Advisory Committee informed the agency that its dust-lead hazard standards were "insufficiently protective of children's health, as indicated by recent epidemiological studies." Neltner Decl. ¶ 8. Indeed, EPA itself has acknowledged that "the current hazard standards may not be sufficiently protective." Letter from Stephen A. Owens, EPA, to Rebecca Morley, Patrick MacRoy, and Tom Neltner (Oct. 22, 2009), attached as Ex. 4 to Neltner Decl.

The scientific literature supports a conclusion that the dust-lead hazard standards are not as protective as even EPA intended when it published the final rule in 2001—that is, it would lead to a far higher likelihood than the stated one to five percent probability of children living in pre-1978 homes developing blood lead levels of 10 µg/dL or higher. *See* Lanphear Decl. ¶¶ 29-38. In light of CDC's 2012 establishment of 5 µg/dL as the reference blood lead level, though, the dust-lead hazard standards are now definitively obsolete and even less protective.

A recent American Academy of Pediatrics statement noted that at EPA's current dust-lead hazard standard for floors of 40 µg/ft<sup>2</sup>, a full 50% of children were estimated to have a blood lead concentration of 5 µg/dL or higher. Lanphear Decl. ¶ 38; Lanphear Decl. Ex. 17 at 7. In other words, at the current dust-lead

hazard standards, half of children in families informed that their home does not contain a dust-lead hazard would nevertheless develop elevated blood lead levels, with the associated irreversible neurological impacts, as a result of leaded dust in the home. The American Academy of Pediatrics has concluded that EPA's dust-lead hazard standards are "obsolete," "remain too high to protect children," and merely "provide an illusion of safety." Lanphear Decl. Ex. 17 at 5, 7.

### **B. EPA's Definition of Lead-Based Paint**

Subtitle IV of TSCA, which was enacted in 1992, defines "lead-based paint" as:

paint or other surface coatings that contain lead *in excess of 1.0 milligrams per centimeter squared or 0.5 percent by weight* or (A) in the case of paint or other surface coatings on target housing, such lower level as may be established by the Secretary of Housing and Urban Development, . . . or (B) in the case of any other paint or surface coatings, *such other level as may be established by [EPA]*.

15 U.S.C. § 2681(9) (emphasis added). In the nearly quarter of a century since this provision was enacted,<sup>9</sup> EPA has not established a different level of lead in defining lead-based paint. *See* 40 C.F.R. §§ 745.103, 745.223. In a joint 1996

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<sup>9</sup> The Housing and Community Development Act of 1992, which incorporated this language into TSCA in turn relied on a statutory provision enacted in 1988, 42 U.S.C. § 4822(c) (enacted in P.L. 100-242) (Feb. 5, 1988), which established limits for lead in interior and exterior painted surfaces of housing that triggered disclosure to potential purchasers or tenants of the home. *See* H.R. Rep. 102-1017, 238, 1992 U.S.C.C.A.N. 3483 (House Report for Housing and Community Development Act of 1992). The current definition of lead-based paint relied upon by EPA and HUD thus actually traces back to 1988.

rulemaking, EPA and HUD chose to maintain TSCA’s statutory definition of lead-based paint and in doing so, provided no scientific rationale for choosing this definition, merely stating that the established definition “appears in section 401 of TSCA.” Proposed Requirements for Disclosure of Information Concerning Lead-Based Paint in Housing, 59 Fed. Reg. 54,984, 54,987 (Nov. 2, 1994).

### **1. The Inappropriateness of EPA’s Definition of Lead-Based Paint**

In stark contrast to EPA’s current definition of lead-based paint as “paint or other surface coatings that contain lead in excess of 1.0 milligrams per centimeter squared or *0.5 percent by weight*,” 40 C.F.R. §§ 745.103, 745.223 (emphasis added), in 1978, the Consumer Product Safety Commission (“CPSC”) banned the production and sale of lead-based paint for residential use that contained lead exceeding *0.06 percent by weight*. See 16 C.F.R. § 1303. This means that paint containing almost 10 times more than what has been banned by CPSC since 1978 as hazardous would *not* be considered “lead-based paint” under TSCA.<sup>10</sup>

The CPSC’s 1978 ban of paint with lead content exceeding 0.06 percent is determinative of the lack of safety of paint containing lead exceeding this threshold. In 1976, Congress directed CPSC to determine whether a level of lead in paint greater than 0.06 percent, but less than 0.5 percent, was safe. See 42

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<sup>10</sup> Notably, in 2009, Congress lowered the lead content in paint subject to the CPSC ban to 0.009 percent by weight. 16 C.F.R. § 1303.1(a).

U.S.C. § 4841 (Pub. L. 94-317, 90 Stat. 695, amending the Lead-Based Paint Poisoning Prevention Act). In a 1977 notice published in the Federal Register, CPSC announced its decision that “available scientific information is insufficient to establish that a level of lead in paint above 0.06 percent but not over 0.5 percent is safe.” Determination of Safe Level of Lead in Paint, 42 Fed. Reg. 9,404, 9,404 (Feb. 16, 1977).

In reaching this determination, CPSC pointed to a National Academy of Sciences (“NAS”) Report recommending “that the deliberate addition of lead to paint for residential buildings or other surfaces accessible to young children be immediately discontinued and that a level not to exceed 0.06 percent lead in the final dried product be set for regulatory purposes.” *Id.* at 9,405. CPSC further noted that:

The recommendations of the Department of Health, Education, and Welfare, including those of the Center for Disease Control, . . . (1) generally supported the recommendations in the NAS Report, (2) criticized the lead paint studies previously conducted by the Commission as support for establishing 0.5 percent, as being safe and (3) urged the Commission to adopt a level below 0.5 percent. They stated that they believed the 0.06 percent level to be achievable and enforceable. In addition, a representative of the American Academy of Pediatrics [and] medical experts . . . expressed opinions in support of the 0.06 percent lead level.

*Id.*

Ultimately, the CPSC concluded, based on these comments and testimony, that it “is unaware of any other data or information sufficient to establish the safety



of lead at a level over 0.06 percent” and consequently determined that “paint manufactured after June 22, 1977, containing more than 0.06 percent lead by weight . . . will be considered ‘lead-based paint’” for purposes of the Lead-Based Paint Poisoning Prevention Act. This definition of lead-based paint is the basis of the CPSC’s ban, effective 1978, of paint containing more than 0.06 percent lead as a hazardous product under the Consumer Product Safety Act. *See* 16 C.F.R. § 1303.1; *see also* Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 42 Fed. Reg. 44,193, 44,193 (Sept. 1, 1977).

## **2. The Implications of EPA’s Definition of Lead-Based Paint**

EPA’s definition of lead-based paint under TSCA has a number of implications, including for the renovation of homes and child-occupied facilities constructed before 1978 and for disclosures made to new tenants and homeowners.

First, with respect to all renovations performed for compensation in target housing and child-occupied facilities, the firm performing the renovation can rebut a presumption that lead-based paint is present by certifying that “lead-based paint was not present on the components affected by the renovation.” 40 C.F.R. § 745.86. This determination must be made using a test kit that is designed to test

*only to the regulated level. See id.* §§ 745.88(c)(2), 745.90(b)(6).<sup>11</sup> In effect, under EPA’s regulations, paint containing lead far in excess of what has long been banned for residential use would not be considered “lead-based paint.”

Contractors carrying out renovations therefore would not need to comply with work practice standards that would otherwise apply were lead-based paint deemed to be present. For instance, renovations in the absence of “lead-based paint” need not involve containment of the work area, proper cleanup, or other measures to minimize lead exposure to occupants, and could include practices such as open-flame burning and use of heat guns. *See* 40 C.F.R. § 745.85.

EPA’s definition of lead-based paint also has implications for lead inspection, risk assessment, and abatement. *See* 40 C.F.R. Pt. 745, Subpt. L. Inspection involves “a surface-by-surface investigation to determine *the presence of lead-based paint.*” *Id.* §745.223. Risk assessment is defined to include “an on-site investigation to determine the existence, nature, severity, and location of lead-

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<sup>11</sup> EPA regulations set forth criteria for test kits requiring that “[f]or paint containing lead below the regulated level, 1.0 mg/cm<sup>2</sup> or 0.5% by weight,” the kit have “a demonstrated probability (with 95% confidence) of a positive response less than or equal to 10% of the time”). 40 C.F.R. § 745.88(c)(2).

based paint hazards.” *Id.*<sup>12</sup> In short, the definition of “lead-based paint” plays a critical role in the outcome of a lead inspection and risk assessment. Defined as it is at a lead level nearly ten times the level that has been banned since 1978, EPA’s current regulatory definition results in lead inspections and risk assessments that identify no “lead-based paint” or “lead-based paint hazards” warranting abatement despite the fact that the inspected home may actually contain paint with harmfully high levels of lead.

Finally, EPA’s definition of lead-based paint has significant implications for disclosure under both EPA and HUD regulations. *See* 40 C.F.R. Pt. 745, Subpart F; 24 C.F.R. Pt. 35, Subpart A. Pursuant to these regulations, “a seller or lessor of target housing shall disclose to the purchaser or lessee the presence of any known lead-based paint and/or lead-based paint hazards in the target housing being sold or leased” as well as “any records or reports . . . pertaining to lead-based paint and/or lead-based paint hazards in the target housing being sold or leased.” 40 C.F.R. § 745.107(a); 24 C.F.R. § 35.88(a). Given EPA’s definition of lead-based paint and standards for a dust-lead hazard, it is possible for paint containing banned levels of lead and dust containing harmful levels of lead, to be present in a home but not be

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<sup>12</sup> A lead-based paint hazard refers to “hazardous lead-based paint, dust-lead hazard or soil-lead hazard as identified in § 745.65,” 40 C.F.R. § 745.63, which in turn defines “paint-lead hazard” to include, among other things, “any damaged or otherwise deteriorated *lead-based paint* on any impact surface . . .” and “[a]ny chewable *lead-based painted surface* on which there is evidence of teeth marks.” 40 C.F.R. § 745.65(a).

disclosed to the new seller or lessor. This lack of disclosure prevents the new owner or tenant from taking preventive actions to lower lead exposure in the home, and may result in situations where new owners undertake renovations and repairs without any protective work practices in place due to their ignorance about the presence of harmful lead-based paint in their homes.<sup>13</sup>

#### **IV. PETITIONERS' 2009 RULEMAKING PETITION AND EPA'S DELAY IN PROMULGATING A RULE**

On August 10, 2009, Petitioners Healthy Homes Collaborative, New Jersey Citizen Action, Sierra Club, and United Parents Against Lead, along with others, filed a petition with EPA, requesting that the Administrator lower the dust-lead hazard standards set forth in TSCA regulations from 40  $\mu\text{g}/\text{ft}^2$  to 10  $\mu\text{g}/\text{ft}^2$  or less for floors, and from 250  $\mu\text{g}/\text{ft}^2$  to 100  $\mu\text{g}/\text{ft}^2$  or less for window sills. The petition also requested that the Administrator modify the definition of lead-based paint in the TSCA regulations for previously applied paint in housing, child-occupied facilities, public building and commercial buildings to reduce the lead levels from 0.5 percent by weight (5,000 parts per million (“ppm”)) to 0.06 percent by weight

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<sup>13</sup> Moreover, based on the definition of lead-based paint, “lead-based paint free housing “is defined to mean “target housing that has been found to be free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight.” 40 C.F.R. § 745.103; 24 C.F.R. § 35.86. None of the mandated disclosure requirements apply to leases of target housing that have been found to be lead-based paint free. 40 C.F.R. § 745.101.

(600 ppm) with a corresponding reduction in the 1.0 milligram per square centimeter standard. Neltner Decl. ¶¶ 6-7; Neltner Decl. Ex. 3.

After receiving the petition, EPA opened docket EPA-HQ-OPPT-2009-0665 and issued a notice in the Federal Register on October 6, 2009, seeking public comment on the issues identified in the petition. Lead Dust Hazard Standards and Definition of Lead-Based Paint; TSCA Section 21 Petition; Notice of Receipt and Request for Comment, 74 Fed. Reg. 51,274 (Oct. 6, 2009). In the notice, EPA summarized Petitioners' request to lower the dust-lead hazard standards and modify the definition of lead-based paint. *Id.* After the close of the comment period, in an October 22, 2009 letter, EPA granted the request for a rulemaking under section 553(e) of the APA.

In this letter, EPA noted that “[l]ead poisoning prevention is a priority for EPA” and acknowledged that “[m]ore recent epidemiological studies indicate that the current hazard standards may not be sufficiently protective.” Neltner Decl. Ex. 4. EPA expressed its intent “to begin an appropriate proceeding” regarding both the dust-lead hazard standards and the definition of lead-based paint in non-target housing. *Id.*

Since 2009, however, Petitioners have not been aware of *any* progress made by EPA toward modifying the definition of lead-based paint. Despite its commitment “to initiate appropriate proceedings regarding the definition of lead-

based paint in non-target housing,” Neltner Decl. Ex. 4, EPA has, to date, not taken any steps, including opening a rulemaking docket, to proceed with this modification. *See* Neltner Decl. ¶ 21.

With respect to the revision of the dust-lead hazard standards, EPA, in its own words took “a first step in this process,” Neltner Decl. Ex. 7, in the first two years following its grant of Petitioners’ petition but progress now appears to have stalled and no proposed rule has yet to be issued. After granting the petition, EPA released a Proposed Approach for Developing Lead Dust Hazard Standards for Residences and sought consultative advice from the agency’s Science Advisory Board (“SAB”) on the proposal. Neltner Decl. ¶¶ 11-12. In August 2010, the SAB’s Lead Review Panel provided comments to EPA in a consultation report, *SAB Review of EPA’s Approach for Developing Lead Dust Hazard Standards for Residences (November 2010 Draft) and Approach for Developing Lead Dust Hazard Standards for Public and Commercial Buildings (November 2010 Draft)*, attached as Ex. 6 to Neltner Decl. In its cover letter to EPA, the panel noted that the general approach outlined by EPA was “well conceived, clearly described, logical, and reasonable” and “commend[ed] EPA for initiating a revision of the residential lead dust hazard that takes into account recent studies indicating adverse health effects of lead to children at relatively low levels of lead exposure.” *Id.* EPA subsequently revised its approach in a report dated November 5, 2010,

incorporating the SAB Lead Review Panel's comments. *See* Neltner Decl. ¶ 14. EPA again sought feedback from the SAB, which provided comments on EPA's revised approach on July 7, 2011. Neltner Decl. Ex. 7. In these comments, the SAB noted its support of EPA's overall modeling approaches. *Id.*

More than a year passed with no further evidence of progress. In an August 2012 letter in response to a letter from EPA's Children's Health Protection Advisory Committee urging the agency to develop "new, evidence-based health protective lead dust standards," EPA noted only that it was "actively working on re-evaluating the dust-lead hazard standards." Neltner Decl. ¶ 16. Now, seven years after EPA agreed to "begin an appropriate proceeding" to update its dust-lead hazard standards and modify its definition of lead-based paint, EPA has yet to release a proposed rule, much less issue a final rule, doing so.

Indeed, the Spring 2011 release of the Unified Agenda, which reports on regulations under development or review by federal entities, is the only Unified Agenda that has included the "Lead Dust Hazard Standards" rulemaking (Docket No. EPA-HQ-OPPT-2009-0665, RIN No. 2070-AJ82). *See* Neltner Decl. ¶¶ 17-18. In the Spring 2011 Unified Agenda, the notice of proposed rulemaking for the "Lead Dust Hazard Standards" rulemaking was slated for May 2012, but that notice was never issued and no subsequent Unified Agenda to date has included any reference to this rulemaking. *See id.*; Neltner Decl. Ex. 8.

## SUMMARY OF ARGUMENT

Seven years ago, EPA acknowledged that “[l]ead poisoning prevention is a priority for EPA,” conceded that its dust-lead hazard standards “may not be sufficiently protective,” and agreed to “begin an appropriate proceeding” to update both the dust-lead hazard standards and the definition of lead-based paint. Since that time, EPA has made no apparent progress on modifying the definition of lead-based paint, and after taking initial steps to revise the dust-lead hazard standards, has failed to produce a proposed or final rule. EPA’s delay and inaction occur in the face of scientific consensus about the irreversible and significant harms caused by low-level lead exposure. EPA’s delay in concluding the rulemaking it agreed to undertake in 2009 leaves children across the country, and particularly in low-income communities and communities of color, at risk of harm from leaded dust and paint in their homes and daycares.

The APA directs federal agencies to “within a reasonable time . . . conclude a matter presented to it.” 5 U.S.C. § 555(b). EPA’s failure to follow through on the proceedings it agreed to initiate when granting Petitioners’ 2009 petition constitutes agency action unreasonably delayed within the meaning of 5 U.S.C. § 706(1), warranting an order from this Court directing EPA to timely conclude the rulemaking.



## STANDING

Petitioners have standing to pursue this writ of mandamus. Healthy Homes Collaborative, New Jersey Citizen Action, Sierra Club, and United Parents Against Lead National, Inc. were among the organizations that filed the 2009 petition with EPA. Petitioners are organizations dedicated to reducing environmental health threats, including lead, and safeguarding the health of their communities. *See* Decl. of Beth Butler (July 26, 2016); Decl. of Matthew Chachere (Aug. 19, 2016); Decl. of Cecil Corbin-Mark (July 26, 2016); Decl. of Aaron Isherwood (Aug. 23, 2016); Decl. of Linda Kite (July 26, 2016); Decl. of Phyllis Salowe-Kaye (July 26, 2016); Decl. of Zakia Rafiq Shabazz (July 22, 2016); Decl. of Jane Williams (July 21, 2016). Petitioners have members who live in homes constructed before 1978 that likely contain leaded paint and dust and who are concerned about their own and their family's exposure to lead in their homes, which may go undetected and unabated under EPA's current lax standards. *See* Decl. of Debra Campbell (Aug. 8, 2016); Decl. of Stephanie Hoyle (Aug. 23, 2016); Decl. of Alexandra Sipiora (Aug. 16, 2016); Decl. of Robina Suwol (July 27, 2016); Decl. of Ann Vardeman (July 28, 2016).

EPA's failure to promulgate a rule to update the dust-lead hazard standards and definition of lead-based paint perpetuates the harms to Petitioners and their members. Petitioners' injuries would be redressed by a declaratory judgment that

EPA's failure to conclude the requested rulemaking in a reasonable time is unlawful, and by an order compelling EPA to promulgate a rule to revise the dust-lead hazard standards and the definition of lead-based paint.

## ARGUMENT

### **I. A WRIT OF MANDAMUS IS WARRANTED TO COMPEL EPA TO PROCEED WITH AND CONCLUDE THE RULEMAKING IT INITIATED**

This Court generally employs a three-part test to determine whether to grant mandamus relief, which requires that (1) the petitioner's claim is clear and certain; (2) the duty is so plainly prescribed as to be free from doubt, and (3) no other adequate remedy is available. *In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9<sup>th</sup> Cir. 2001) (quoting *Or. Natural Res. Council v. Harrell*, 52 F.3d 1499, 1508 (9<sup>th</sup> Cir. 1994)). However, where a petitioner alleges unreasonable delay under the APA, this Court applies the so-called *TRAC* factors established by the D.C. Circuit in *Telecomms. Research and Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("*TRAC*"); see *In re Cal. Power Exch. Corp.*, 245 F.3d at 1124-25 (adopting the *TRAC* factors); *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9<sup>th</sup> Cir. 1997).

The question here is whether EPA has unreasonably delayed in promulgating a rule to update the dust-lead hazard standards and the definition of lead-based paint. TSCA requires EPA to implement its mandate "in a reasonable and prudent

manner,” 15 U.S.C. § 2601, and in the Housing and Community Development Act of 1992, which added Subtitle IV (Lead Exposure Reduction) to TSCA, Congress found that the federal government “must take a leadership role in building the infrastructure . . . necessary to ensure that the national goal of eliminating lead-based paint hazards in housing can be achieved as expeditiously as possible.” Pub. L. 102-550, 106 Stat. 3672 (Oct. 28, 1992) (enacted at 42 U.S.C. § 4851). The APA further requires that federal agencies conclude matters presented to them “within a reasonable time,” 5 U.S.C. § 555(b). Thus, once EPA elected to initiate proceedings to update the dust-lead hazard standards and definition of lead-based paint, the APA imposed an obligation on the agency “to proceed with reasonable dispatch.” *Cutler v. Hayes*, 818 F.2d 879, 895 (D.C. Cir. 1987).

To determine whether an agency has unreasonably delayed agency action, this Court considers the six *TRAC* factors:

- (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 the delay; and

(6) the court need not “find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.”

*Independence Mining Co.*, 105 F.3d at 507 n.7 (quoting *TRAC*, 750 F.2d at 80).

As outlined below, consideration of the six *TRAC* factors plainly weighs in favor of a finding that EPA has unreasonably delayed in promulgating a rule to update the dust-lead hazard standards and definition of lead-based paint, warranting a mandamus issued by this Court.

**A. EPA’s Seven-Year Delay in Concluding the Rulemaking It Agreed to Undertake in Response to the 2009 Petition Is Excessive and Violates the Rule of Reason**

“The first and most important factor is that the time agencies take to make decisions must be governed by a rule of reason.” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (internal quotation marks omitted). There is no per se rule as to the amount of time that constitutes an unreasonable delay, but “a reasonable time for agency action is typically counted in weeks or months, not years.” *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004) (finding agency delay of six years “nothing less than egregious”); *see also In re Core Commc’ns*, 531 F.3d at 858 (finding agency’s six-year delay in articulating the legal basis for its interim rules “anything but reasonable”); *Brower v. Evans*, 257 F.3d 1058, 1067-70 (9th Cir. 2001) (finding a four-year delay in conducting

scientific studies of dolphins unreasonable); *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149-50 (D.C. Cir. 1992) (finding a six-year delay in rulemaking for cadmium exposure unreasonable); *Air Line Pilots Ass'n, Int'l v. Civil Aeronautics Bd.*, 750 F.2d 81, 86 (D.C. Cir. 1984) (finding a five-year delay in adjudicating claims for unemployment assistance unreasonable); *Pub. Citizen Health Research Grp. v. Auchter*, 702 F.2d 1150, 1157 (D.C. Cir. 1983) (finding a three-year delay from “announced intent to regulate to final rule” for workplace exposure standards for ethylene oxide “simply too long”).

In 2009, EPA granted Petitioners’ request to lower the dust-lead hazard standards and modify the definition of lead-based paint under TSCA. *See Neltner Decl. Exs. 3-4*. It committed “to begin[ning] an appropriate proceeding” to do so. *Id. Ex. 4*. There is no dispute that now, nearly seven years later, EPA has yet to issue a proposed rule, much less promulgate a final rule that would conclude that proceeding.<sup>14</sup> This seven-year delay from its granting of Petitioners’ request and announced intent to regulate to a final rule patently violates the rule of reason.

**B. Congress Has Specified the Need to Expediently Eliminate Lead-Based Paint Hazards in Housing**

The second *TRAC* factor, which involves consideration of any Congressional “indication of the speed with which it expects the agency to proceed,” favors a

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<sup>14</sup> Indeed, for the modification of the definition of lead-based paint in non-target housing, there is no evidence that EPA even began the appropriate proceeding by opening a rulemaking docket. *See Statement of Case Section IV, supra*.

finding of unreasonable delay. *TRAC*, 750 F.2d at 80 (“[W]here 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.”). This factor does not ask whether Congress established a firm deadline for the challenged inaction, in which case balancing under *TRAC* would not be permitted. See *Biodiversity Legal Found. v. Badgley*, 309 F.3d 1166, 1177 n.11 (9th Cir. 2002). Rather, this factor 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) (noting that courts should “look to see . . . whether the statutory scheme implicitly contemplates timely final action”) (superseded in part on other grounds). The court must also consider whether an agency’s delay undermines the goals of the statute. See *Cutler*, 818 F.2d at 897-98.

In enacting the Residential Lead-Based Paint Hazard Reduction Act of 1992, which added Title IV on Lead Exposure Reduction to TSCA,<sup>15</sup> Congress expressly conveyed its intent that the goals of the act be achieved expeditiously. In its findings, Congress described “the national goal of eliminating lead-based paint hazards in housing” and called for the federal government to take a leadership role in ensuring that this goal “be achieved *as expeditiously as possible*.” Housing and

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<sup>15</sup> The Residential Lead-Based Paint Hazard Reduction Act was Title X of the Housing and Community Development Act of 1992.

Community Development Act of 1992, Pub. L. 102-550 § 1003, 106 Stat. 3672 (Oct. 28, 1992) (enacted at 42 U.S.C. § 4851) (emphasis added). Congress indicated that the purposes of the Residential Lead-Based Paint Hazard Reduction Act include “develop[ing] a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing *as expeditiously as possible*,” “reorient[ing] the national approach to the presence of lead-based paint in housing to implement, *on a priority basis*, a broad program to evaluate and reduce lead-based paint hazards in the Nation’s housing stock,” “encourage[ing] effective action to prevent childhood lead poisoning by establishing a workable framework for lead-based paint hazard evaluation and reduction,” and “mobiliz[ing] national resources *expeditiously* . . . to develop the most promising, cost-effective methods for evaluating and reducing lead-based paint hazards.” P.L. 102-550 § 1003 (emphases added).

The statutory construct of the Residential Lead-Based Paint Hazard Reduction Act therefore plainly evinced Congress’s intent that lead-based paint hazards in housing be addressed in a timely and expeditious fashion. Judged “in the context of the statute which authorizes the agency’s action,” *Auchter*, 702 F.2d 1150, 1158 n.30 (D.C. Cir. 1983) (internal quotation marks omitted), therefore, EPA’s seven year failure to issue updated dust-lead hazard standards and modify the definition of lead-based paint—particularly when the agency acknowledged

that the existing standards “may not be sufficiently protective,” Neltner Decl. Ex. 4—is unreasonable. Moreover, EPA’s failure to update the obsolete and unprotective standards in a timely manner allows hazardous lead-based paint conditions to persist in the nation’s housing stock, directly frustrating the statutory goals of the Residential Lead-Based Paint Hazard Reduction Act. *See Cutler*, 818 F.2d at 897-98. The relevant statutory scheme thus supports an order from this Court compelling EPA to act expeditiously.

**C. The Health and Welfare of the Hundreds of Thousands of Children Exposed to Lead in Their Homes Support a Finding of Unreasonable Delay**

The third *TRAC* factor further weighs in favor of an order compelling agency action because “[d]elays that might be altogether reasonable in the sphere of economic regulation are less tolerable when human lives are at stake.” *Auchter*, 702 F.2d at 1157; *Cutler*, 818 F.2d at 898 (“The deference traditionally accorded an agency to develop its own schedule is sharply reduced when injury likely will result from unavoidable delay.”). As Senators Durbin and Menendez noted in their recent letter to EPA, “[w]ithout reliable, safe, and protective standards in place, we are incapable of protecting children from lead poisoning and its devastating consequences.” Letter from Richard Durbin and Robert Menendez, U.S. Senate, to Gina McCarthy, EPA (July 7, 2016), attached as Neltner Decl. Ex. 9.



In *Auchter*, the Occupational Safety and Health Administration agreed to proceed with rulemaking, recognizing that its workplace standard for exposure to ethylene oxide may not be sufficiently protective. 702 F.2d at 1157. The agency failed to issue the notice of proposed rulemaking for over a year, and estimated that the final rule would not be promulgated until fall 1984—a total of “three years from announced intent to regulate to final rule.” *Id.* at 1157. The court held that this delay was unreasonable in light of “ample evidence” of “a significant risk that some workers, who are currently being exposed to levels of [ethylene oxide] greater than the 10 ppm ‘average’ (yet within the 50 ppm standard), currently encounter a potentially grave danger to both their health and the health of their progeny.” *Id.* at 1157.

Here, similarly, there is no dispute that lead is a devastating poison with irreversible and significant harmful impacts on human health. *See generally* Lanphear Decl., Landrigan Decl. The American Academy of Pediatrics has noted that at EPA’s current dust-lead hazard standards, half of the children living in pre-1978 homes would have elevated blood lead levels as defined by the CDC. *See* Lanphear Decl. ¶ 38. These elevated blood lead levels have irreversible lifelong consequences and are associated with “intellectual delays, school failure, Attention Deficit-Hyperactivity Disorder, and antisocial behaviors, such as conduct disorder, delinquency, and criminal behavior.” *Id.* ¶ 11.

The lives of children are at stake. In this context, EPA’s seven-year delay in promulgating a rule updating the existing regulatory standards is egregious.<sup>16</sup> At some point, courts “must lean forward from the bench to let an agency know, in no uncertain terms, that enough is enough.” *Public Citizen Health Research Group v. Brock*, 823 F.2d 626 (D.C.Cir.1987). After seven years with no rule to update standards that are known to be unprotective, that time is now in this case.

**D. No Higher, Competing Priorities Justify EPA’s Seven-Year Delay**

In its response granting Petitioners’ 2009 petition, EPA explicitly noted that “[l]ead poisoning prevention is a priority.” Neltner Decl. ¶ 11. EPA has acknowledged, after all, that “[l]ead poisoning is the *number one environmental health threat* in the U.S. for children ages 6 and younger.” Neltner Decl. Ex. 1 (emphasis added). In its recently released draft action agenda for environmental justice, EPA identifies only three goals, one of which is to demonstrate progress on “significant national environmental justice challenges.” *See* Neltner Decl. Ex. 2 at

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<sup>16</sup> That EPA’s work largely involves human health does not weigh against an order compelling agency action, *see Sierra Club v. Thomas*, 828 F.2d at 798 (D.C. Cir. 1987), because here, EPA would be addressing risks uniquely felt by children. When Congress passed the Residential Lead-Based Paint Hazard Reduction Act, it recognized that “low-level lead poisoning is widespread among American children, afflicting as many as 3,000,000 children under age 6, with minority and low-income communities disproportionately affected.” P.L. 102-550 § 1002. Congress further recognized that “the ingestion of household dust containing lead from deteriorating or abraded lead-based paint is the most common cause of lead poisoning in children.” *Id.* Congress’s heightened care for children at risk from lead exposure in their own homes grants an imprimatur on expeditious action, regardless of EPA’s normal human health docket.

iii-iv. Addressing disparities in childhood blood lead levels tops the list under this identified goal. *Id.* at iv. In 2000, the Presidential Task Force on Environmental Health Risks and Safety Risks to Children established the federal government's goal of eliminating by the year 2010 (1) lead paint hazards in housing where children under six live and (2) elevated blood lead levels, then understood as blood lead levels exceeding 10 µg/dL.<sup>17</sup> That goal was never achieved. Today, the CDC identifies 5 µg/dL as an elevated blood level, and over half a million children still have such elevated blood lead levels. *See* Landrigan Decl. ¶ 11.

Justifications for agency delay “must always be balanced against the potential for harm.” *Cutler*, 818 F.2d at 898. The individual harm from lead poisoning is permanent and life-altering, and the collective societal harm from widespread lead poisoning, particularly of children, is vast. *See generally* Lanphear Decl.; *see also* Landrigan Decl. ¶ 12 (quantifying the economic losses attributable to lead exposure in a single birth cohort to \$43.4 billion per year). While children are exposed to lead from multiple sources, the most common cause of lead poisoning in children in the U.S. is the ingestion of household dust containing lead from deteriorating lead-based paint. *See* 42 U.S.C. § 4851(4).

Unlike in other cases where “putting [the plaintiff] at the head of the queue simply

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<sup>17</sup> President's Task Force on Environmental Health Risks and Safety Risks to Children, *Eliminating Childhood Lead Poisoning: A Federal Strategy Targeting Lead Paint Hazards* (2000), <http://www.cdc.gov/nceh/lead/about/fedstrategy2000.pdf>.

moves all others back one space and produces no net gain,” *In re Barr Labs., Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991), updating the dust-lead hazard standards and definition of lead-based paint is essential to any efforts to eliminate childhood lead exposure. *See* Lanphear Decl. ¶¶ 40-42. EPA’s timely action to update these standards is therefore critically important to any progress towards EPA’s stated goal of eliminating exposure to harmful levels of lead. 66 Fed. Reg. at 1,207.

**E. EPA’s Delay Prejudices Already Overburdened Environmental Justice Communities and Prevents Petitioners from Pursuing Administrative and Judicial Remedies**

The fifth *TRAC* factor—“the nature and extent of the interests prejudiced by the delay”—also weighs heavily in favor of an order compelling agency action in this case. *TRAC*, 750 F.2d at 80.

EPA has acknowledged not only that “[l]ead poisoning is the number one environmental health threat in the U.S. for children ages 6 and younger,” Neltner Decl. Ex. 1, but also that it is a “significant national environmental justice challenge.” *Id.* Ex. 2 at 37. The large racial and socioeconomic inequalities in the burden of childhood lead poisoning among U.S. children mean that low-income urban children, and predominantly African-American children, are particularly vulnerable to lead exposure. Lanphear Decl. ¶ 23. The lifelong damage inflicted by childhood lead poisoning, including intellectual deficits and delays, school failure, short attention spans, and predisposition to hyperactive and aggressive

behavior exacerbates the inequalities of opportunity already experienced by low-income communities and communities of color. Lanphear Decl. ¶ 9; Landrigan Decl. ¶¶ 9, 18. EPA’s continued delay in updating its regulatory standards to ensure more effective risk assessment, hazard abatement, and disclosure thus places most at jeopardy children from already overburdened and disadvantaged communities, and perpetuates stark societal inequities.

Moreover, EPA’s continued delay and failure to issue a proposed and final rule updating the standards leaves Petitioners “stuck in administrative limbo.” *In re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012). To date, EPA, after acknowledging the need to re-evaluate the current standards, has made either no progress in the case of modifying the definition of “lead-based paint” or taken only stalled steps towards actually revising the standards in the case of the dust-lead hazard standards. EPA’s failure to timely proceed with and conclude rulemaking prevents Petitioners from providing comment and input on a proposed rule and ultimately litigating a final rule that may be insufficiently protective. Instead, the agency’s continued stalling leaves Petitioners indefinitely waiting for the conclusion of the promised regulatory actions. In the meantime, children across the country continue to suffer the irreversible repercussions of exposure to lead in their own homes and daycares. The nature and extent of the interests prejudiced by EPA’s delay thus weigh in favor of mandamus relief.

## CONCLUSION

For all the reasons set forth above, Petitioners respectfully request that this Court (1) declare that EPA's delay in concluding the rulemaking requested of it is unreasonable and a violation of the APA; (2) order that EPA proceed with and conclude the rulemaking process by issuing a proposed rule within 90 days and finalizing the rule within six months; (3) retain jurisdiction of this matter for 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 24th day of August, 2016.

s/ Hannah Chang

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## STATEMENT OF RELATED CASES

The undersigned, counsel of record for Petitioners, are aware of no cases related to this petition pending before this court.

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## CERTIFICATE OF COMPLIANCE

This petition for writ of mandamus complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,730 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This petition for writ of mandamus 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 it has been prepared in a proportionally spaced typeface using Microsoft Word Times New Roman 14 point font.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I have this day electronically filed the foregoing document and all attachments 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 all attachments by dispatching them to a third-party commercial carrier for delivery within 3 calendar days to the following parties:

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## LIST OF DECLARATIONS AND ATTACHED EXHIBITS

### 1. Declaration of Tom Neltner

**Exhibit 1:** Press Release, EPA, *EPA Lead Poisoning Prevention Week is Oct. 25-31 - Learn How to Protect Your Home and Family* (Oct. 23, 2015)

**Exhibit 2:** EPA, *Draft EJ 2020 Action Agenda* (May 2016)

**Exhibit 3:** Citizen Petition to EPA Regarding the Paint and Dust Lead Standards (Aug. 10, 2009)

**Exhibit 4:** Letter from Stephen A. Owens, EPA, to Rebecca Morley, Patrick MacRoy, and Tom Neltner (Oct. 22, 2009)

**Exhibit 5:** EPA Science Advisory Board, EPA-SAB-10-011, Consultation on EPA's Proposed Approach for Developing Lead Dust Hazard Standards for Residential Buildings and Commercial and Public Buildings (Aug. 20, 2010)

**Exhibit 6:** EPA Science Advisory Board, EPA-SAB-11-008, Review of EPA's *Approach for Developing Lead Dust Hazard Standards for Residences (November 2010 Draft) and Approach for Developing Lead Dust Hazard Standards for Public and Commercial Buildings (November 2010 Draft)* (July 7, 2011)

**Exhibit 7:** Letter from Lisa P. Jackson, EPA, to Pamela Shubat, Children's Health Protection Advisory Committee (Aug. 23, 2012)

**Exhibit 8:** EPA, Spring 2011 Unified Regulatory Agenda [excerpt]

**Exhibit 9:** Letter from Richard Durbin and Robert Menendez, U.S. Senate, to Gina McCarthy, EPA (July 7, 2016)

### 2. Declaration of Bruce P. Lanphear, M.D., M.P.H.

**Exhibit 1:** Curriculum Vitae

**Exhibit 2:** Richard L. Canfield et al., *Intellectual Impairment in Children with Blood Lead Concentrations below 10 µg per Deciliter*, 348 New Eng. J. Med. 1517 (2003)

**Exhibit 3:** Bruce P. Lanphear et al., *Low-Level Environmental Lead Exposure and Children's Intellectual Function: An International Pooled Analysis*, 113 *Envtl. Health Persp.* 894 (2005)

**Exhibit 4:** Anne Evens et al., *The impact of low-level lead toxicity on school performance among children in the Chicago Public Schools: a population-based retrospective cohort study*, 14 *Envtl. Health* 21 (2015)

- Exhibit 5:** Tanya E. Froehlich et al., *Association of Tobacco and Lead Exposures with Attention-Deficit/Hyperactivity Disorder*, 124 *Pediatrics* e1054 (2009)
- Exhibit 6:** Joseph M. Braun et al., *Association of Environmental Toxicants and Conduct Disorder in U.S. Children: NHANES 2001-2004*, 116 *Envtl. Health Persp.* 956 (2008)
- Exhibit 7:** John Paul Wright et al., *Association of Prenatal and Childhood Blood Lead Concentrations with Criminal Arrests in Early Adulthood*, 5 *PLoS Med.* e101 (2008)
- Exhibit 8:** D. M. Fergusson et al., *Dentine lead levels in childhood and criminal behaviour in late adolescence and early adulthood*, 62 *J. Epidemiology & Community Health* 1045 (2008)
- Exhibit 9:** Bruce P. Lanphear et al., *Racial Differences in Urban Children's Environmental Exposures to Lead*, 86 *Am. J. Pub. Health* 1460 (1996)
- Exhibit 10:** Bruce P. Lanphear et al., *Environmental lead exposure during early childhood*, 140 *J. Pediatrics* 40 (2002)
- Exhibit 11:** Bruce P. Lanphear, *The Paradox of Lead Poisoning Prevention*, 281 *Sci.* 1617 (1998)
- Exhibit 12:** Bruce P. Lanphear et al., *Lead-Contaminated House Dust and Urban Children's Blood Lead Levels*, 86 *Am. J. Pub. Health* 1416 (1996).
- Exhibit 13:** Bruce P. Lanphear et al., *The Contribution of Lead-Contaminated House Dust and Residential Soil to Children's Blood Lead Levels*, 79 *Envtl. Res.* 51 (1998)
- Exhibit 14:** Bruce P. Lanphear et al., *Screening Housing to Prevent Lead Toxicity in Children*, 120 *Pub. Health Rep.* 305 (2005)
- Exhibit 15:** Lorraine Halinka Malcoe et al., *Lead Sources, Behaviors, and Socioeconomic Factors in Relation to Blood Lead of Native American and White Children: A Community-Based Assessment of a Former Mining Area*, 110 *Envtl. Health Persp.* 221 (2002)
- Exhibit 16:** Sherry L. Dixon et al., *Exposure of U.S. Children to Residential Dust Lead, 1999-2004: II. The Contribution of Lead Contaminated Dust to Children's Blood Lead Levels*, 117 *Envtl. Health Persp.* 468 (2009)
- Exhibit 17:** Am. Acad. of Pediatrics Council on Envtl. Health, *Policy Statement: Prevention of Childhood Lead Toxicity*, 138 *Pediatrics* e20161493 (2016)

3. **Declaration of Philip J. Landrigan, M.D., M.Sc.**
  - Exhibit 1:** Curriculum Vitae
  - Exhibit 2:** Philip Landrigan & David Bellinger, *How to Finally End Lead Poisoning in America*, Time Mag. (Apr. 11, 2016), <http://time.com/4286726/lead-poisoning-in-america/>
  - Exhibit 3:** Philip J. Landrigan et al., *Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities*, 110 *Envtl. Health Persp.* 721 (2002)
4. **Declaration of Beth Butler, A Community Voice**
5. **Declaration of Debra Campbell, A Community Voice**
6. **Declaration of Jane Williams, California Communities Against Toxics**
7. **Declaration of Robina Suwol, California Communities Against Toxics**
8. **Declaration of Linda Kite, Healthy Homes Collaborative**
9. **Declaration of Phyllis Salowe-Kaye, New Jersey Citizen Action**
10. **Declaration of Ann Vardeman, New Jersey Citizen Action**
11. **Declaration of Matthew J. Chachere, New York City Coalition to End Lead Poisoning**
12. **Declaration of Aaron Isherwood, Sierra Club**
13. **Declaration of Alexandra Sipiora, Sierra Club**
14. **Declaration of Zakia Rafiq Shabazz, United Parents Against Lead National**
15. **Declaration of Cecil Corbin-Mark, WE ACT for Environmental Justice**
16. **Declaration of Stephanie Hoyle, WE ACT for Environmental Justice**