Docket No. 19-71930

In the

United States Court of Appeals

For the

Ninth Circuit

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.

U.S. ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency,

Respondents.

On Petition for Review of a Final Rule of the United States Environmental Protection Agency
No. EPA-HQ-OPPT-2018-0166

BRIEF OF NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, WINDOW & DOOR MANUFACTURERS ASSOCIATION, NATIONAL MULTIFAMILY HOUSING COUNCIL, AND NATIONAL APARTMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND ANDREW R. WHEELER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *Amici Curiae* National Association of Home Builders of the United States, Window & Door Manufacturers Association, National Multifamily Housing Council, and National Apartment Association certify that *Amici* do not have a parent corporation and that no publicly held corporation owns 10 percent or more of *Amici*'s respective stock.

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STATEMENT OF THE ISSUES

1. Whether EPA's decision not to change the definition of "lead-based paint" was arbitrary and capricious.

INTEREST OF *AMICI CURIAE*

The National Association of Home Builders of the United States ("NAHB") is a federation of more than 700 state and local home builder associations nationwide. The organization's membership includes over 140,000 firms engaged in land development, single and multifamily construction, remodeling, multifamily ownership, building material trades, and commercial and light industrial construction projects. The overwhelming majority of NAHB's members are classified as "small businesses," as defined by the U.S. Small Business Administration, and NAHB members collectively employ over 3.4 million people nationwide. The forty-four percent of NAHB builder members who cite remodeling as their primary or secondary line of business are most likely to be impacted by lead-based paint concerns.

With origins dating back to 1927, the Window & Door Manufacturers Association ("WDMA") defines the standards of excellence in the residential and commercial window, door, and skylight industry and advances these standards among industry members while providing resources, education, and professional programs designed to advance industry businesses and provide greater value for

their customers. WDMA actively represents its members' interests in the development and promulgation of federal regulations implemented by the Environmental Protection Agency, Department of Housing and Urban Development, and other federal agencies.

Based in Washington, D.C., the National Multifamily Housing Council ("NMHC") is a national nonprofit association that represents the leadership of the apartment industry. NMHC's members engage in all aspects of the apartment industry, including ownership, development, management, and finance, who help create thriving communities by providing apartment homes for 40 million Americans, contributing $3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information, and promotes the desirability of apartment living. Over one-third of American households rent, and nearly 20 million U.S. households live in an apartment home (buildings with five or more units).

The National Apartment Association ("NAA") is a trade association for owners and managers of rental housing. The NAA is comprised of 150 state and local affiliated apartment associations. The NAA encompasses over 81,000 members representing more than 9.6 million rental homes throughout the United States, Canada, and the United Kingdom. As part of its business, the NAA creates

and disseminates educational, operations, and advocacy services for its members. In doing so, the NAA advocates for fair governmental treatment of rental housing businesses nationwide, including advocating the interests of the rental housing business community at large in legal cases of national concern such as those presented in this case.

NAHB, WDMA, NMHC, and NAA (collectively "*Amici*") are firmly committed to providing healthy homes for residents and strong protections for workers. While separate from the requirements of the "Lead; Renovation, Repair, and Painting Program" ("Lead RRP") rule, EPA's final rule at issue in this litigation is an important component of the overall lead-paint program implemented by EPA. *Amici* have been actively engaged in EPA's lead-based paint program since its inception and have been advocates for and supporters of reasonable worker training, lead safe work practice, and firm certification requirements. The program impacts many of *Amici*'s members as they conduct renovation, remodeling, and repair activities in residential properties built before 1978. Throughout the program's development and implementation, *Amici* facilitated stakeholder engagement and provided ongoing input to EPA.

STATEMENT OF AUTHORITY TO FILE

Amici have prepared this Brief in Support of the Respondents. For purposes of Rule 29(a)(2) of the Federal Rules of Appellate Procedure, all parties have consented to the filing of this Brief.

This Brief was not authored, in whole or in part, by counsel for any Party, nor did any Party, counsel for any Party, or any person other than *Amici*, their counsel, or their members contribute money intended to fund this Brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal agencies are expected to follow the letter and spirit of the laws that have been enacted by Congress and entrusted to the Executive Branch to implement. Applying reasonable statutory interpretations and adopting practical policies are the hallmarks of sound federal agency action. Upon completion of a final rule, a reviewing court may be asked to analyze the applicable statutory authority and administrative record to determine whether a federal agency was faithful to the law and the facts before it when conducting the rulemaking.

In the instant case, the Court must decide whether the U.S. Environmental Protection Agency ("EPA" or "Agency") acted arbitrarily and capriciously when it concluded that the definition of "lead-based paint" did not merit revising in light of its statutory mandates and the factual record. *Amici* submit that the Court should

find that EPA complied with the law and acted reasonably in light of the information available to the Agency because (1) Congress intended EPA to be practical in applying its statutory authority and (2) the rulemaking record did not provide EPA with sufficient information to make any change to the definition of "lead-based paint." Indeed, to redefine "lead-based paint," EPA would have needed (1) data demonstrating the relationship between lead in paint and exposure to dust-lead, (2) evidence confirming that testing technology is capable of meeting a revised definition, and (3) a scientifically sound approach to estimate direct paint consumption and resulting lead exposure. EPA lacked—and public commenters, including Petitioners, failed to satisfy—any of these requirements.

When passing the Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, §§ 1001-61, 106 Stat. 3672 ("Act"), which amended the Toxic Substances Control Act of 1976, Pub. L. No. 94-469, 90 Stat. 2003 ("TSCA"), Congress wanted to address lead-based paint hazards in residential homes by taking "flexible, targeted approaches" and "establishing realistic, cost-effective procedures." S. Rep. No. 102-332, at 108, 112 (1992). The goal, which Congress repeatedly stated, was "to create a ***cost-effective, workable system*** for reducing lead poisoning risks in housing." *Id.* at 2 (emphasis added). Congress also acknowledged that "[t]he definition of lead-based paint would be narrowed by

raising the threshold for lead content in paint to target resources to the most serious risks." *Id.* at 113.

In the Act, Congress chose to define "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 . . . such other level as may be established by the Administrator." 15 U.S.C. § 2681(9). Thus, Congress opted to focus on the levels of lead that were most problematic—and not on paint merely containing any amounts of lead. *See* Presidential Statement on Signing Housing and Community Development Act of 1992, 28 Weekly Comp. Pres. Doc. 2186 (Nov. 2, 1992) ("This bill would focus inspection and hazard reduction efforts . . . where the incidence of lead paint is greatest.").

In enacting a "more workable framework for reducing hazards," Congress "target[ed] federal efforts to the reduction and elimination of *actual, not potential hazards*." S. Rep. No. 102-332, at 111 (emphasis added). Furthermore, Congress chose to define a "lead-based paint hazard," under TSCA Section 401, as "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil, lead-contaminated paint that is deteriorated or present in accessible surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects as established by the Administrator under this subchapter." 15 U.S.C. § 2681(10). This meant that, according to Congress, the

mere presence of lead-based paint by itself was not a hazard; rather, what posed a hazard was damaged or deteriorated lead-painted surfaces. *See* S. Rep. No. 102-332, at 109 ("Since exposure to lead is primarily caused by ingesting paint dust or chips, deteriorating leaded paint presents the most serious health risks.").[1]

Pursuant to Section 403 of TSCA, Congress authorized EPA to promulgate regulations that "identify . . . lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil" for purposes of TSCA Title IV and the Act. 15 U.S.C. § 2683. Congress recognized that the Act was "laying the foundation for more cost-effective and widespread activities for reducing lead-based paint hazards," which would later be implemented by regulation. S. Rep. No. 102-332, at 111.

Petitioners warp the statutory text to contradict Congress's goal of creating a cost-effective, workable system. *Cf.* Pet'rs' Br. 28–36 (arguing that TSCA "directly" supports Petitioners' position). Section 403 does not require the EPA to identify "any and all" lead-based paint hazards, as Petitioners suggest. *Compare* Pet'rs' Br. 29 ("To satisfy TSCA, EPA's DLHS would have to 'identify' 'any condition' where lead levels result in health-harming exposure."), *with* 15 U.S.C. § 2683 ("[T]he Administrator shall promulgate regulations which shall identify, for purposes of this subchapter and the [Act], lead-based paint hazards, lead-

[1] *Amici* are unable to identify any research studies that support the premise that the lead concentration in paint is correlated with the presence of lead hazards per se.

contaminated dust, and lead-contaminated soil."). Indeed, if Petitioners' argument were correct, then the presidential signing statement would have used sweeping language, rather than note that the Act will "focus inspection and hazard reduction efforts . . . ***where the incidence of lead paint is greatest***." Presidential Statement on Signing Housing and Community Development Act of 1992, 28 Weekly Comp. Pres. Doc. 2186 (Nov. 2, 1992) (emphasis added).

Therefore, since its inception, the Act has always driven EPA's actions toward abating those hazards that pose the greatest risk to Americans. That is why EPA originally adopted the Act's definition of "lead-based paint" as "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. EPA's final rule, at issue in this litigation, continues this focus on abating the most serious hazards and thus leaves unchanged Congress's definition of "lead-based paint." Petitioners, however, want that definition amended so that more paint is deemed "lead-based paint" by lowering the threshold for the lead levels. EPA has not done so because, in part, EPA lacks sufficient information to support the achievability and feasibility of a lower threshold. If EPA were to adopt an unworkable definition of "lead-based paint," it would not only ignore Congress's mandate but also likely reduce available resources and delay action to address the homes with the greatest potential for lead exposure.

As mentioned above, *Amici* concur that EPA lacks sufficient information in three regards and that, as a result of this information deficit, EPA's definition of "lead-based paint" should be affirmed. *First*, EPA lacks sufficient information regarding the relationship between lead in paint and exposure to dust-lead, especially when considering the many other sources of lead exposure. *Second*, EPA lacks sufficient information on how amending the definition of "lead-based paint" would affect existing lead-detection technology capabilities, especially considering that the existing technologies are calibrated based on the current definition of "lead-based paint." *Third*, EPA lacks sufficient information on the amount of accidental or intentional direct paint consumption. *Amici* further urge the Court to exercise restraint in its decision, given that the definition of "lead-based paint" is used in other regulatory regimes as well, and given that any amendments to the definition of "lead-based paint" should be crafted by EPA, with the benefit of EPA's knowledge and technical expertise and within the context of these other programs.

ARGUMENT

Amici urge the Court to affirm EPA's decision to retain the current definition of "lead-based paint." EPA lacks sufficient information to justify amending the definition, and any such amendment would affect other regulatory regimes and could have unintended consequences.

I. EPA Lacks Information on the Relationship Between the Concentration of Lead in Paint and Exposure to Dust-Lead, Taking into Account Other Environmental Conditions that Contribute to that Exposure.

Amici support efforts to provide healthy homes and protect children from lead exposure, but federal agencies, including EPA, must take appropriate and reasonable measures to do so only when the science and data in the record support such agency actions. Because intact lead-based paint has never been determined by Congress to be a hazard itself, EPA would have needed sufficient information on the correlation between the concentration of lead in paint and exposure to dust-lead to justify revising the definition for "lead-based paint." Moreover, EPA would have needed to know the effect of other environmental sources on lead in household dust-lead because lead-based paint is just one potential contributor.[2] As discussed below, EPA still lacks the necessary information to establish the predicate to make this revision.

Amici agree with EPA that the Agency needs "to further explore the availability and application of statistical modeling approaches that establish robust linkages between the concentration of lead in paint below the current definition and dust-lead on floors before EPA could develop a technically supportable proposal to revise the definition of "lead-based paint" based on this route of exposure." Review of the Dust-Lead Hazard Standards and the Definition of Lead-

[2] *See infra* notes 3–8 and accompanying text.

Based Paint, 84 Fed. Reg. 32,632, 32,643 (July 9, 2019). Because EPA's literature review was unable to find sufficient information to estimate concentrations of lead in household dust from paint concentrations below 0.8% by weight, and public comments did not fill this data gap, there is significant uncertainty associated with estimating dust-lead loadings for levels of lead in paint significantly lower than levels in the current definition. *See id.* ("EPA looked to the literature to establish statistically valid associations between low concentrations of [lead-based paint] and lead in dust, but was unable to find sufficient information to estimate concentrations of lead in household dust from paint concentrations below 0.8% by weight."). Indeed, one of the studies on which Petitioners now rely as evidence that lead-based paint contributes to lead in dust, Pet'rs' Br. 57 (citing ER1347–48), explicitly warns that, due to insufficient data, "the effect of soil lead hazards on interior dust independent of lead-based paint cannot be evaluated." ER1354.

Before revising the definition of "lead-based paint," EPA would need to conduct laboratory or field studies to confirm and quantify the causal relationship between lead-based paint and dust-lead at lower concentrations of lead in paint. These data and information are necessary for EPA to develop an approach to estimate dust-lead from lower concentrations of lead in paint so that EPA can estimate incremental blood lead changes and associated health effects as described in the existing dust-lead approach.

EPA's analysis cannot stop there. Because lead-based paint is only one cause of dust-lead and due to lead's ubiquity, other routes of exposure need to be considered too. Indeed, the lead concentration in house dust is not attributable to just the presence of deteriorated or damaged lead-based paint, but also many other directly correlated factors: soil and area of exposed soil; house age and house material; distance from roads, road type, and street dust; renovation, remodeling, and abatement; distance from commercial garages and smelting/mining operations; dust-fall rates and suspended particles indoors; carpet wear and presence of a fireplace; and certain parental occupations and hobbies. *See* EPA, Final Report: Sampling House Dust for Lead: Basic Concepts and Literature Review, EPA 747-R-95-007 (Sept. 1995) (identifying factors), at 4-6, 4-7;[3] *see also* ER910 (cited in Petitioners' Brief at page 57 and recognizing that "dust ***and soil*** may be the most significant pathways for lead exposure" (emphasis added)).

Numerous scientific studies have examined exposure risk from other sources of lead besides lead-based paint that impact lead levels in dust and lead levels in children.[4] For example, the continued influence of leaded gasoline and vehicular

[3] Available at https://www.epa.gov/sites/production/files/documents/r95-007.pdf.

[4] *See generally* H. W. Mielke et al., *The Continuing Impact of Lead Dust on Children's Blood Lead: Comparison of Public and Private Properties in New Orleans*, 111 Envtl. Res. 1,164 (2011); H. W. Mielke et al., *Lead Concentrations in Inner-City Soils as a Factor in the Child Lead Problem*, 73 Am. J. Pub. Health 1,366 (1983); C. M. Taylor et al., *Effects of Low-Level Prenatal Lead Exposure on*

traffic on children's exposure is widely recognized as a major cause of lead in dust.[5] Many health, mental, and behavioral impacts that are statistically attributed to lead exposure from paint—such as anemia, miscarriages, anxiety, or hyperactivity—are also attributable to lead exposure from air emissions that inevitably occur in urban environments. *See Rocky Mtn. Farmers Union v. Corey*, 730 F.3d 1070, 1090 (9th Cir. 2013) ("California, if it is to have any chance to curtail GHG emissions, must be able to consider all factors that cause those emissions when it assesses alternative fuels."); *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1040 (9th Cir. 2010) ("[I]n light of the many other potential avenues of achieving bighorn sheep conservation identified by the Service itself, the Service must provide enough evidence and explanation in the record to assure this court that it fully considered those avenues and nevertheless rationally concluded that new water structures are, in fact, necessary.").

One study that evaluated lead hazard control in target housing funded by the U.S. Department of Housing and Urban Development (HUD) (at 6 years post-intervention treatment) found that friction impact surfaces and paint on doors and

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Child IQ at 4 and 8 Years in a UK Birth Cohort Study, Neurotoxicology, Sept. 2017, at 162; P. J. Wolfe et al., *Costs of IQ Loss from Leaded Aviation Gasoline Emissions*, 50 Envtl. Sci. & Tech. 9,026 (2016).

[5] H. W. Mielke et al., *Lead Legacy from Vehicle Traffic in Eight California Urbanized Areas: Continuing Influence of Lead Dust on Children's Health*, 408 Sci. of Total Env't 3,965 (2010).

windows are not significantly related to the floor dust-lead loadings.[6] Instead, the study determined that blow-in and track-in of dust brings lead into a dwelling.[7] The study further found that exterior environmental sources—*e.g.*, soil lead, exterior dust lead, ambient street lead, and air—are the likely sources of floor dust lead loading.[8] These findings support the need for EPA to focus on exterior lead hazards when taking lead hazard control actions.

EPA should not neglect consideration of other environmental sources that expose children to significant levels of lead. *Cf. Rocky Mtn.*, 730 F.3d at 1090 ("California, if it is to have any chance to curtail GHG emissions, must be able to consider all factors that cause those emissions when it assesses alternative fuels."). Sound public policy should drive regulators to focus on the likely sources and pathways leading to exposure, in addition to practical and efficient solutions that reduce exposures and associated health risks. The extensive presence of lead in soil and street dust (from all sources of lead) also creates observable levels of

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[6] Jonathan Wilson et al., *Evaluation of HUD-Funded Lead Hazard Control Treatments at 6 Years Post-Intervention*, 102 Envtl. Res. 237, 248 (2006) (concluding that "[t]he level of treatment had little effect on floor dust lead loadings").

[7] The National Center for Healthy Housing, Study of HUDs Risk Assessment Methodology in Three U.S. Communities: Final Report (June 2006), at 56, http://nchharchive.org/LinkClick.aspx?fileticket=HZUenslvU/0=&tabid=217.

[8] *Id.*

lead in children. For example, these external sources contribute to lead exposure in playgrounds and schoolyards.

Therefore, the definition of "lead-based paint" cannot be crafted absent an evaluation of all sources and pathways for lead exposure. EPA would need a comprehensive assessment of the lead dust pathway before making any changes to the definition of "lead-based paint," as the justification for further control has no scientific basis to presume that paint offers the sole contribution or even the most likely contribution to lead-dust with ensuring exposure.

Moreover, the lack of data was a reasonable consideration for EPA during its evaluation of the current "lead-based paint" definition. The goal of the Act, as Congress repeatedly stated, was "to create a cost-effective, workable system for reducing lead poisoning risks in housing." S. Rep. No. 102-332, at 2. In the absence of proven and robust linkages between the concentration of lead in paint below the current definition and dust-lead on floors, changing the "lead-based paint" definition would not serve Congress's purpose of creating a cost-effective and workable system for reducing lead poisoning risks, and may even undermine it.

II. Lead-Based Paint-Testing Technologies May Not Be Capable of Meeting a Revised Definition of "Lead-Based Paint."

EPA appropriately and reasonably considered whether testing technology for lead-based paint could meet any revisions to the definition of "lead-based paint."

Had EPA failed to take this factor into account, unintended consequences that contradict the purposes of the Act could have resulted and those who are most vulnerable to lead exposure could have been left unprotected. To wit, if the testing devices cannot be properly calibrated to the definition of "lead-based paint," then the testing that is currently occurring will cease. If that testing were to stop, then lead abatement efforts would be seriously disrupted. Petitioners, if successful here, would unintentionally risk subverting their own purported goals and the mandate of Congress. *See Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1294 (9th Cir. 1977) (requiring EPA to consider the "technological feasibility" of its standards and demanding the agency make "a finding that sulfur burners are technologically capable of curing the problems").

Lead-based paint testing technologies have been developed and calibrated to detect lead-based paint levels that are consistent with the current definition. Without knowing if these testing technologies might still be reliable at significantly lower concentrations of lead-based paint, it is uncertain whether these existing testing tools could remain viable or available. Prudently, EPA's 2018 proposal sought comment on the technological feasibility for revising the definition of "lead-based paint." To find out, EPA needed to perform a comprehensive evaluation of the existing lead-based paint testing tools. As EPA correctly noted, "the mere knowledge that some of the testing technology may detect lead levels

that are lower than the current definition is inadequate to support" a revised "lead-based paint" definition.[9]

Neither the Petitioners nor other commenters provided EPA with any *substantive* information in response to the agency's specific request. Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 84 Fed. Reg. 32,632, 32,644 (July 9, 2019); Review of the Dust-Lead Hazard Standards and The Definition of Lead-Based Paint Response to Public Comments, *supra* note 9, at 15–17. Petitioners appear to acknowledge this deficiency in the record by arguing that "the duty to identify [lead-based paint] hazard standards is EPA's, not the public's." Pet'rs' Br. at 57. The only information that Petitioners can identify in the record are general comments that lead-based paint can contribute to lead in dust and that children might eat paint chips—points that are neither in contention nor relevant. *Id*. Tellingly, Petitioners failed to provide EPA with any substantive data that would inform and merit a change in the definition of "lead-based paint."

Specifically, EPA continues to need more information on whether portable field technologies—which are used in EPA's lead programs to determine the presence of lead-based paint—would perform reliably at significantly lower

[9] EPA, Review of the Dust-Lead Hazard Standards and The Definition of Lead-Based Paint (RIN 2070-AJ82) Response to Public Comments (June 2019), at 17, https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0571.

concentrations of lead in paint. Industry uses X-Ray Fluorescence ("XRF") analyzers for inspections and risk assessments, and they are used to determine the presence of lead-based paint as part of renovation, repair, and painting activities. Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 84 Fed. Reg. 32,632, 32,644 (July 9, 2019). Amending the definition of "lead-based paint" would impact the efficacy of both of these technologies.

For example, XRF analyzers and their corresponding performance characteristic sheets ("PCS") were developed to be calibrated with the current definition of "lead-based paint." *Id.* XRF testing would likely not be technically feasible if EPA amended the current definition of "lead-based paint" to adopt a definition of 600 ppm (as suggested in the August 10, 2009 citizen petition by multiple Petitioners, including Sierra Club and Healthy Homes Collaborative, ER347). The inability of the XRF technology to comply with a revised standard could force the environmental sampling community and property owners to use completely different methods of detecting lead in paint. Indeed, industry could be pushed backwards into relying on paint chip analysis, which has been a disfavored approach for decades due to several factors: high costs, lengthy procedures, and the potential for sampling contamination.[10]

[10] U.S. Dep't of Housing & Urban Dev., Guidelines for the Evaluation and Control of Lead-Based Paint Hazards in Housing 7-13, 7-46 (2d ed. 2012).

Likewise, the reliability of EPA-recognized lead test kits, which are used for the Lead RRP program, was evaluated using the current definition of "lead-based paint." Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 84 Fed. Reg. 32,632, 32,644 (July 9, 2019). This evaluation occurred through EPA's Environmental Technology Verification ("ETV") Program or by the National Institution of Standards and Technology. *Id.* ETV, a public-private partnership between EPA and certain testing and evaluation organizations, ended operations in early 2014, *id.*, so EPA would need further time to get a program up and running that could retest the lead test kits based on a new definition of "lead-based paint." In the interim, there would be an unavoidable test kit shortage. *Amici* have long been vocal stakeholders on issues regarding the lack of an affordable and reliable test kit that can easily be used to determine the presence of lead-based paint and meets all the existing regulatory requirements, and any change to the "lead-based paint" definition will only exacerbate those problems.

Thus, in consideration of any potential revised definition of "lead-based paint," EPA would need to fully understand the repercussions of such a revision on these portable field technologies in order to ensure the technological feasibility of any new revision. The methods EPA would need to employ to do so would involve complex processes that include evaluating the potential ability of XRF analyzers to detect lead-based paint at lower levels than the current definition,

recalibrating PCS for each available model of XRF analyzer, and reevaluating lead test kits under controlled conditions in a laboratory. Otherwise, if the "lead-based paint" definition were updated prior to the completion of these evaluations, or if any lead-based paint testing tool were proven unreliable at significantly lower concentrations of lead-based paint, the efficacy of the programs could be severely hampered, undermining the statutory mandate to reduce childhood lead exposure.

III. EPA Lacks Sufficient Information on the Exposure from Direct Paint Consumption.

Petitioners' apparent fallback argument—that EPA needs to revise the definition of "lead-based paint" because children are exposed to lead by direct ingestion of paint—similarly fails in the absence of sufficient information to support their position. *See* Pet'rs' Br. 8 (arguing that ingestion of lead-based paint is the most common cause of lead poisoning in children). Before EPA can revise the "lead-based paint" definition in response to this argument, the agency would first need to devise an approach to estimate the amount of direct paint consumption by children and the resulting lead exposure. EPA would then need to share any proposed approach with both the public for comment and the scientific community for peer review. As EPA correctly observed, current epidemiological studies are not scientifically reliable because they (1) generally depend on recollected

instances to classify whether a child has ever been known to consume paint chips and (2) focus on paint above the current definition of "lead-based paint."[11]

In the leadup to the final rule, EPA conducted a thorough analysis of the existing literature regarding direct paint ingestion.[12] EPA also collaborated with HUD to identify available data sources and used a model developed for the 2014 Public and Commercial Building, Renovation, Repair, and Painting analysis, which applies a mass-balance, mechanistic approach to link lead released during renovations to dust-lead loadings.[13] The literature was inconclusive with respect to "[t]he duration and frequency of direct ingestion exposure" because "neither paint chip ingestion characteristics nor availability of paint chips were quantified" in the studies.[14] Instead, studies would typically ask parents whether their child "[p]uts

[11] EPA, Definition of Lead-Based Paint Considerations, EPA-HQ-OPPT-2018-0166-0447 (May 2019), at 19, https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0447 ("Evidence of previous paint ingestion is generally determined either by caretaker interviews or through direct radiographic evidence (e.g. paint chips are visible on x-ray.").

[12] *See generally id.*

[13] *Id.* at 4-5.

[14] *Id.* at 20.

paint chip in mouth" or "[c]hews on window sill."[15] When studies attempted to identify this information through objective means (typically by radiograph) instead of the more subjective method of retrospective behavioral questionnaires, their patient population was found not to be statistically representative since it only included a small number of individuals with particularly severe lead levels.[16] For instance, Petitioners rely on one so-called study—little more than an anecdote—that is based on observations of only a single child. Pet'rs' Br. 57 (citing ER899); ER899 (describing one Canadian child).

EPA further cautioned that the existing studies may well "overestimate ingestion for lower levels of lead in paint and should not be the sole source of information on which to rely to make a determination of whether to revise the definition of ['lead-based paint']."[17] EPA's conclusion was based on a HUD

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[15] *Id.* at 21 (citing Bruce P. Lanphear et al., *Racial Differences in Urban Children's Environmental Exposures to Lead*, 86 Am. J. Pub. Health 1,460 (1996)); *see also* B. Keller et al., *Epidemiologic Characteristics of Children with Blood Lead Levels ≥45 µg/dL*, 180 J. Pediatrics 229 (2017); Bruce P. Lanphear et al., *Lead-Contaminated House Dust and Urban Children's Blood Lead Levels*, 86 Am. J. Pub. Health 1,416 (1996).

[16] *See, e.g.*, M. McElvaine et al., *Prevalence of Radiographic Evidence of Paint Chip Ingestion Among Children with Moderate to Severe Lead Poisoning, St. Louis, Missouri, 1989 Through 1990*, 89 Pediatrics 740 (1992) (deriving results from a sample of 90 children with moderate to high blood-lead levels).

[17] EPA, Definition of Lead-Based Paint Considerations, EPA-HQ-OPPT-2018-0166-0447 (May 2019), at 20, https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0166-0447.

study, which found that children may preferentially chew surfaces with higher amounts of lead.[18] In that HUD study, researchers observed an average of 4.0 teeth marks per 10,000 surfaces with paint-lead greater than or equal to 1.0 mg/cm^2, whereas, for surfaces with less than 1.0 mg/cm^2 lead, the rate was 1.5 teeth marks/10,000 surfaces.[19] Thus, studies that are focused on children who ingest lead-based paint with high lead levels cannot be extrapolated to children who ingest lead-based paint with lower lead levels, as children appear less likely to ingest lead-based paint with lower lead levels.

Without quantitative estimates on paint ingestion by children over time, EPA cannot quantify the extent of actual exposure to lead in paint via this potential pathway. In light of the many sources of lead in the environment that can contribute to elevated blood-lead levels, EPA needs to understand this issue quantitatively before it can legally and scientifically justify revising the definition of "lead-based paint." *See Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 533 (9th Cir. 2015) ("vacat[ing] the EPA's unconditional registration of sulfoxaflor and remand[ing] for the EPA to obtain further studies and data regarding the effects of sulfoxaflor on bees").

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[18] *Id.* (citing S. Chen et al., *Prevalence and Location of Teeth Marks Observed on Painted Surfaces in an Evaluation of the HUD Lead Hazard Control Grant Program*, 17 Applied Occupational & Envtl. Hygiene 628 (2002)).

[19] Chen, *supra* note 18.

IV. Amending the "Lead-Based Paint" Definition Affects Other Regulatory Regimes.

Changing the definition of "lead-based paint" would impact virtually every lead paint law and regulation in place today: EPA's Lead RRP Regulations (40 C.F.R. Part 745, Subpart E); EPA's Work Practice Standards for Lead-Based Paint Activities (40 C.F.R. Part 745, Subpart L); HUD's Disclosure Rule (24 C.F.R. Part 35, Subpart A); HUD's Notification, Evaluation and Reduction of Lead-Based Paint Hazards Program (24 C.F.R. Part 35, Subparts B through R); and various other agency loan programs incorporating HUD's definition (e.*g.,* Department of Agriculture's Multi-Family Loans and Grants (7 C.F.R. Part 3560) and the Treasury Department's Capital Magnet Fund (12 C.F.R. Part 1807)). In addition, the current federal "lead-based paint" definition is reflected in numerous state regulations (*e.g.,* Cal. Code Regs. tit. 17, § 35033; 105 Mass. Code Regs. 460.020). Any change would significantly impact work practice standards, inspector, risk assessor, and worker training and certification programs, approved methods and instruments to detect lead paint, renovation, repair, and remodeling activities on residential properties, disclosure and notification requirements, and construction.

The definition of "lead-based paint" is incorporated throughout EPA's lead-based paint regulations, and application of this definition is central to how EPA's lead-based paint program functions. *See, e.g.*, 40 C.F.R. § 745.83 (incorporating the definitions from 40 C.F.R. § 745.103, including the "lead-based paint"

definition, for the Lead RRP rule). The definition of "lead-based paint" applies not only to EPA's Lead-Based Paint Activities and Disclosure programs, but it is also the definition renovators must consider when evaluating the applicability of EPA's Lead RRP rule. The Lead RRP rule, located at 40 C.F.R. Part 745, Subpart E, covers myriad construction jobs, such as renovations, repairs, remodeling, demolition, painting, window replacement, plumbing, electrical work, and heating and air-conditioning work. *See* 40 C.F.R. § 745.82. The rule establishes requirements for firms and individuals performing work that might disturb lead-based paint and potentially create lead hazards. *See* 40 C.F.R. § 745.85.

Specifically, the Lead RRP rule applies to anyone who is paid to perform work that disturbs lead paint in pre-1978 target housing and child-occupied facilities, including general contractors, maintenance workers, handymen, painters, carpenters, plumbers, electricians, and most specialty tradesmen. *See* 40 C.F.R. § 745.82. These individuals might be working for residential property owners, schools, daycare providers, non-profits groups, or governmental agencies. Given the gamut of people affected by the RRP rule, EPA must carefully consider both the feasibility and health effects of any specific proposed change to the definition of "lead-based paint."

The Court and EPA need to consider carefully how amending the "lead-based paint" definition would affect the country in practice. Once the necessary

information and data are gathered, EPA must conduct thorough analyses, as any revision would not only affect the immediate regulations at issue, but would also impact the implementation of programs whose activities are regulated via reference to the "lead-based paint" definition. As it stands now, there is insufficient information to support a change to the existing definition of "lead-based paint." The practicalities and ramifications of doing so have largely not been studied.

V. If the Court Finds Any Changes Needed, the Appropriate Remedy Would Be to Remand to EPA for Further Proceedings.

Even if the Court were to find that the record was sufficient for EPA to consider, or make, a change to the "lead-based paint" definition, the appropriate remedy would be for the Court to remand to EPA for further proceedings. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."). Remand is especially appropriate when there are concerns regarding "the technical feasibility of the proposed EPA standards." *Bunker Hill*, 572 F.2d at 1304. Petitioners even acknowledge that the appropriate remedy is "to remand the Final Rule without vacatur." Pet'rs' Br. 4.

For all the reasons described above, changing the lead regulations would have disruptive consequences that cannot be ignored. This lawsuit has the potential to significantly disrupt the industry, and, notwithstanding the best of intentions, could well cause more harm to children than good. To the extent remand is ordered, the Court should allow EPA ample discretion to use its wealth of experience and knowledge as it engages in its rulemaking.

CONCLUSION

For the foregoing reasons, NAHB and NMHC respectfully urge the Court to affirm EPA's definition of "lead-based paint."

Respectfully submitted this 22nd day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic mail this 22nd day of June, 2020, upon:

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