19-1042(L)

19-1044(CON), 19-2329(CON)

United States Court of Appeals for the Second Circuit

LABOR COUNCIL FOR LATIN AMERICAN ADVANCEMENT, NATURAL RESOURCES DEFENSE COUNCIL, INC., VERMONT PUBLIC INTEREST RESEARCH GROUP, SAFER CHEMICALS HEALTHY FAMILIES, LAUREN ATKINS, WENDY HARTLEY, HALOGENATED SOLVENTS INDUSTRY ALLIANCE, INC.,

Petitioners,

v.

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

Respondents.

On Petition for Review of a Rule of the
United States Environmental Protection Agency

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, CONNECTICUT, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW JERSEY, OREGON, VERMONT, AND WASHINGTON IN SUPPORT OF PETITIONERS IN NOS. 19-1042, 19-1044

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INTRODUCTION AND INTERESTS OF AMICI

The amici States of New York, Connecticut, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Vermont, and Washington file this brief in support of the environmental petitioners'[1] challenge to a final rule issued by the Environmental Protection Agency (EPA) that leaves residents of the amici States exposed to the severe and imminent health risks posed by the commercial use of paint and coating removers containing methylene chloride. Inhalation of fumes containing methylene chloride can cause death within minutes, and long-term exposure can cause cancer, liver failure, kidney failure, and a variety of other long-term health effects. Amici States bear many of the costs associated with methylene chloride's public health effects, and amici States have enacted measures that mitigate those harmful effects. Strong federal action is a necessary complement to such state efforts, as

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[1] The environmental petitioners are the Labor Council for Latin American Advancement, the Natural Resources Defense Council, Inc., the Vermont Public Interest Research Group, Safer Chemicals Healthy Families, Lauren Atkins, and Wendy Hartley. Their suit has been consolidated with a suit brought by various industry groups who are challenging the final rule on different grounds that amici do not support.

Congress contemplated when enacting the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq*.

Under TSCA, EPA is required to regulate the distribution and use of chemical substances, like methylene chloride, that pose unreasonable risks to human health. In 2017, following a robust risk assessment, EPA proposed a rule banning the manufacture and distribution of paint and coating removers containing methylene chloride for all consumer and many commercial applications. But in 2019, EPA reversed course and finalized the rule only with respect to consumer users, allowing tens of thousands of commercial users to continue using these products unabated. In so doing, EPA failed to fulfill its obligations to address unreasonable risks to human health and to consider the severe public health costs of its inaction. *See* 15 U.S.C. § 2605(a); 5 U.S.C. § 706.

Each year, tens of thousands of workers—many of whom reside in or work in amici States—are exposed to methylene chloride in paint and coating removers across a variety of industries including building construction and specialty contracting. In amici States, foreign-born workers are disproportionately overrepresented in these industries, which tend to feature informal work arrangements characterized by low

pay, minimal benefits, and minimal safety training and equipment. Many of these workers have limited English proficiency, which makes safety warnings and training less effective. All of these factors leave those workers in amici States disproportionately vulnerable to the severe health risks of methylene chloride exposure.

The use of methylene chloride products in residential home renovation and construction also threatens the residents and other occupants of multi-unit housing in amici States. Methylene chloride can travel through the air and remain at lethal levels for hours, jeopardizing people who are present in residences in which methylene chloride is used or in neighboring residences, including children, caregivers, and other domestic workers.

Absent this Court's intervention, workers, bystanders, and the States themselves will continue to suffer the severe and imminent harms of methylene chloride exposure from paint and coating removers.

BACKGROUND

A. The Severe and Imminent Health Risks That Methylene Chloride Presents to Users and Bystanders

Methylene chloride is a highly toxic solvent that is used as an ingredient in a variety of commercial and consumer products, including paint strippers and other coating removers. *See* Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a), 84 Fed. Reg. 11,420, 11,422 (Mar. 27, 2019) (codified at 40 C.F.R. pt. 751) ("Final Rule").[2] When paint and coating removers are applied to surfaces, methylene chloride quickly evaporates and creates strong fumes. *See id.* at 11,426. When inhaled, those fumes pose serious and potentially fatal health risks. *See id.*[3]

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[2] *See also* EPA, Office of Chemical Safety & Pollution Prevention, *TSCA Work Plan Chemical Risk Assessment: Methylene Chloride: Paint Stripping Use* 28 (Aug. 2014) (Internet) ("*Risk Assessment*"); U.S. Dep't of Health & Human Servs., Agency for Toxic Substances & Disease Registry, *Toxicological Profile for Methylene Chloride* 1 (Sept. 2000) (Internet) ("*Toxicological Profile*"). For sources available on the Internet, full URLs appear in the Table of Authorities. All websites were last visited on October 22, 2019.

[3] *See also Toxicological Profile*, *supra* at 1, 5-6.

In the short term, inhalation of methylene chloride decreases the availability of oxygen in the blood and depresses central nervous system functions, which can lead to a loss of consciousness, respiratory depression, coma, heart failure, and death. *See id.* at 11,422.[4] Air concentrations of methylene chloride can reach lethal levels in everyday settings. For example, in 2014, a twenty-year-old worker in New York died from acute methylene chloride exposure while helping his father refinish a bathtub in a hotel bathroom. *See* Methylene Chloride and N-Methylpyrrolidone; Regulation of Certain Uses Under TSCA Section 6(a), 82 Fed. Reg. 7464, 7482 (proposed Jan. 19, 2017) ("Proposed Rule"). And because of methylene chloride's high toxicity, the acute health effects can occur rapidly—sometimes in less than ten minutes. *See id.* at 7468.

Many of the deaths attributable to methylene chloride are misidentified or not reported, but EPA has identified at least 40 fatalities between 1976 and 2017 that were caused by paint and coating removers containing methylene chloride. *See id.* at 7468, 7482, 7485. In New York,

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[4] *See also Risk Assessment*, *supra* at 79; *Toxicological Profile*, *supra* at 5, 15-28.

at least four workers have died from acute methylene chloride exposure during paint stripping and finish removal since 1980.[5] There have been at least three such deaths in both Maryland and Massachusetts during the same time period.[6] And in Oregon, in 2013, a worker succumbed to toxic methylene chloride fumes while resurfacing a bathtub in a client's home.[7]

Even at lower concentrations, exposure to paint- and coating-removal products containing methylene chloride poses serious long-term health risks. Methylene chloride has been linked to cancers of the brain, liver, and lungs, as well as non-Hodgkin's lymphoma and multiple myeloma. *See* Proposed Rule, 82 Fed. Reg. at 7466. In addition, long-term exposure to methylene chloride can lead to liver and kidney disease, decreased fertility, and other adverse health effects. *See id.* at 7471-72, 7478, 7484-85. These harmful health effects have occurred even when safety equipment is used to minimize exposure. *See id.* at 7471.

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[5] *See* Jamie Smith Hopkins, *Common Solvent Keeps Killing Workers, Consumers*, Public Integrity (Sept. 21, 2015) (Internet).

[6] *See* Safer Chemicals, Healthy Families, *U.S. Deaths From Methylene Chloride* (Internet).

[7] *See* Oregon Dep't of Consumer & Bus. Servs., Occupational Safety & Health Admin., *Hazard Alert: Methylene Chloride—Bathroom Fixture Refinishing* 1 (Aug. 2013) (Internet).

Because of methylene chloride's propensity to evaporate and create toxic vapors, the health risks are not limited to direct users of products containing methylene chloride. Even those who simply work in the vicinity of someone using methylene chloride are at risk for both the acute and long-term health effects of methylene chloride exposure.[8] *See id.* at 7471, 7476, 7482-83, 7494. In one incident in South Carolina, two workers went to check on a third colleague who had been using a paint remover containing methylene chloride. All three workers died from acute methylene chloride exposure, and three emergency responders required hospitalization. *See id.* at 7482-83.

When methylene chloride is used in a residence, others occupying the same residence—including children, caregivers, and other domestic workers—may be exposed to harmful levels of that chemical.[9] *See id.* at 7467, 7471, 7476-77. Likewise, occupants of adjacent apartments and hotel rooms may be exposed to toxic methylene chloride vapors and suffer adverse health effects due to methylene chloride fumes that originated in other units. *See id.* at 7476-77.

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[8] *See Risk Assessment*, *supra* at 88-89, 92.

[9] *See Risk Assessment*, *supra* at 88, 109, 120.

B. The Failure of the Environmental Protection Agency (EPA) to Address the Recognized Risks Associated with Commercial Uses of Paint and Coating Removers Containing Methylene Chloride

TSCA was enacted to enable EPA to gather data about the health and environmental effects of potentially toxic substances, and to regulate chemical substances that pose an unreasonable risk to human health or the environment. *See* 15 U.S.C. § 2601(b). Under TSCA § 6(a), if EPA determines that a chemical "presents an unreasonable risk of injury to health or the environment," EPA "shall by rule" limit the manufacture, processing, distribution, use, and disposal of the substance "to the extent necessary so that the chemical substance or mixture no longer presents such risk." *Id.* § 2605(a).

In 2012, EPA identified methylene chloride as a priority chemical for risk analysis under TSCA based on the high risk of exposure and on evidence that methylene chloride poses serious risks to human health. *See* Final Rule, 84 Fed. Reg. at 11,423.[10] In 2014, EPA completed a peer-reviewed assessment of the health risks posed by paint- and coating-

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[10] *See also Risk Assessment*, *supra* at 28; EPA, *TSCA Work Plan Chemicals* (June 2012) (Internet).

removal products containing methylene chloride, which account for approximately 25% of all methylene chloride use. *See* Proposed Rule, 82 Fed. Reg. at 7468.[11]

Based on the findings of the 2014 risk assessment, EPA issued the Proposed Rule, which would have prohibited the manufacture, processing, and distribution of paint and coating removers containing methylene chloride for all consumer and many commercial uses. *See id.* at 7464-65. The Proposed Rule determined that exposure to methylene chloride in paint and coating removal presents "an unreasonable risk to human health." *Id.* at 7465-66. The risks include "death (due to asphyxiation), liver toxicity, kidney toxicity, reproductive toxicity, specific cognitive impacts, and cancers such as brain cancer, liver cancer, certain lung cancers, non-Hodgkin's lymphoma, and multiple myeloma." *Id.* at 7466.

EPA estimated that large numbers of people are exposed each year to methylene chloride from paint and coating removal. For commercial uses, EPA estimated that at least 17,600 workers directly use methylene chloride in paint stripping and coating removal each year for commercial purposes.

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[11] *See also Risk Assessment*, *supra* at 28.

See id. at 7475. That number does not include workers who do not directly use products containing methylene chloride but are nonetheless exposed because they work in the same vicinity.[12] EPA found such occupational bystanders, like direct users themselves, face both acute and chronic health risks from methylene chloride exposure. *See id.* at 7476.

EPA found that another 1.3 million consumers annually are exposed to methylene chloride through the use of paint and coating removers. *See id.* at 7476. Although EPA did not estimate the number of residential bystanders who are indirectly exposed to methylene chloride from consumer uses, it concluded that such bystanders are also vulnerable to the acute and chronic health effects of methylene chloride exposure even if they are "not in the room where the paint and coating removal occurred." *Id.* at 7478. Residential bystanders in adjacent apartments and hotel rooms can also be exposed to toxic methylene chloride vapors originating in another unit. *See id.* at 7476-77. And because methylene

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[12] *Cf.* EPA, Office of Pollution, Prevention & Toxics, *Final Rule—Economic Analysis of Regulation of Methylene Chloride, Paint and Coating Remover Under TSCA Section 6(a)*, at 2-4–2-25 (Mar. 11, 2019) (Internet) (explaining how EPA estimated the number of exposed workers for the Final Rule).

chloride vapors can remain in the air at toxic levels for hours, the risks to these bystanders can persist for several hours after a paint or coating remover has been applied. *See* Proposed Rule, 82 Fed. Reg. at 7476.

In 2019, EPA issued the Final Rule. The Final Rule did not reconsider any of the evidence discussed in the Proposed Rule establishing the acute and long-term health risks posed by methylene chloride to both consumers and workers. Nor did the Final Rule discuss any new evidence suggesting that methylene chloride exposure does not pose such risks. Nonetheless, the Final Rule prohibits only the manufacture, processing, and distribution of methylene chloride for "consumer paint and coating removal," 40 C.F.R. § 751.105(a), meaning "paint and coating removal performed by any natural person who uses a paint and coating removal product for any personal use without receiving remuneration or other form of payment," *id.* § 751.103. The Final Rule imposes no restrictions on the acquisition or use of such products by "commercial or industrial end users," *id.* § 751.103: i.e., persons who receive compensation for paint or coating removal—a category including self-employed workers and larger industrial businesses.

Simultaneous with the Final Rule, EPA announced an advance notice of proposed rulemaking (ANPRM) for a potential training, certification, and limited access regime applying to commercial users of paint and coating removers containing methylene chloride. *See* Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program, 84 Fed. Reg. 11,466 (Mar. 27, 2019). EPA has not yet issued a proposed rule for such a program, much less completed the requisite notice and comment period.

ARGUMENT

The continued commercial use of methylene chloride in paint and coating removers raises acute public health concerns for workers and apartment-dwellers in amici States, which have "substantial" state interests "in protecting the health and well-being of [their] citizens." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 742 (1983) (quotation marks omitted).

Amici States have taken action that addresses some of the harmful effects of methylene chloride, but action by the EPA is a necessary complement to those measures. TSCA § 6(a) empowers and requires EPA to regulate toxic chemicals like methylene chloride that pose "unreasonable

risk" to human health. 15 U.S.C. § 2605(a). The Final Rule's failure to regulate commercial uses of methylene chloride products therefore violates TSCA. *See* Proof Opening Brief for Petitioners Labor Council for Latin American Advancement et al. (Br.) at 30-37. Further, by failing to explain EPA's inaction with respect to commercial uses of methylene chloride, and by failing to consider the costs of that inaction to workers and bystanders, the Final Rule violates the Administrative Procedure Act (APA). See *infra* at 30-34.

POINT I

EPA'S FAILURE TO REGULATE COMMERCIAL USES OF PAINT AND COATING REMOVERS CONTAINING METHYLENE CHLORIDE HARMS AMICI STATES AND THEIR RESIDENTS

As EPA determined in the Proposed Rule, overwhelming scientific evidence establishes that exposure to paint and coating removers containing methylene chloride presents severe and imminent health risks to direct users and bystanders, regardless of whether the users are consumers or workers. Nonetheless, the Final Rule takes no action to prevent the continued use of methylene chloride by commercial users. Because of EPA's reversal, a substantial number of workers and bystanders will continue to suffer the adverse health effects of methylene chloride

exposure, and many of the costs of those public health consequences will fall on amici States.

A. Paint and Coating Removers Containing Methylene Chloride Pose Severe Health Risks to Workers and Occupational Bystanders in Amici States.

Workers are exposed to methylene chloride through paint- and coating-removal products used in a variety of industries, including construction, automotive refinishing, art restoration and conservation, and aircraft and marine repair. *See* Proposed Rule, 82 Fed. Reg. at 7475.[13] These are important industries in amici States and they employ significant numbers of our workers.

For example, New York's construction industry—which includes both building construction and specialty trade contractors—employed over 314,000 individuals as of 2014.[14] Approximately 49% of those involved in building construction and 19% of those involved in private contracting perform carpentry, construction labor, and painting tasks—the types of

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[13] *See also Risk Assessment*, *supra* at 39-40.

[14] *See* New York State Bureau of Labor, Div. of Research & Statistics, *Significant Industries: A Report on Workforce Development* 2, 6 (2015) (Internet) ("*Significant Industries*").

work that most frequently involve paint and coating removal.[15] Thus, as many as 86,000 construction workers in New York regularly engage in work that may expose them to paint- and coating-removal products that contain methylene chloride.[16]

In Massachusetts, more than 128,000 workers (not including self-employed persons) were employed in construction and extraction occupations as of 2018. Approximately 34% of that population—over 43,000 workers—performed carpentry, construction labor, and painting tasks, potentially exposing those workers to methylene chloride in paint and coating removers.[17] In Maryland, approximately 118,520 workers were employed in the construction industry as of 2018, with

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[15] *See Significant Industries*, *supra* at 2, 6-8 (statistics on New York's construction industry workforce); *see also* North Am.'s Bldg. Trades Unions, Comments on the Environmental Protection Agency's Advance Notice of Proposed Rulemaking: Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program 1 (May 28, 2019) (Internet) (identifying the jobs within the construction industry that most frequently engage in paint and coating removal).

[16] *See Significant Industries*, *supra* at 6-8 (estimate based on multiplying the total percentage of workers in relevant jobs by the total number of workers in building construction and specialty contracting).

[17] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *May 2018 State Occupational Employment and Wage Estimates: Massachusetts* (2018) (Internet).

approximately 14,980 carpenters and 4,350 painters.[18] As many as 7,850 New Jersey residents work as painters and thus are likely to regularly use paint and coating removers, while an additional 153,600 residents work in construction and may also be regularly exposed to paint and coating removers.[19] And according to Oregon's Organization of Safety & Health Administration, approximately 5,724 workers in the construction industry regularly engage in paint and coating removal work that may expose such individuals to methylene chloride.

Many workers in the construction industry—including painters, carpenters, and laborers—are hired on a temporary basis, self-employed, or employed by small, non-union employers, like private contractors and subcontractors.[20] The residential construction industry in New York City,

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[18] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *May 2018 State Occupational Employment and Wage Estimates: Maryland* (2018) (Internet).

[19] *See* U.S. Dep't of Labor, Bureau of Labor Statistics, *May 2018 State Occupational Employment and Wage Estimates: New Jersey* (2018) (Internet) (total workers with occupation codes 47-2141, 51-9121, 51-9122, 51-9123); New Jersey Dep't of Labor & Workforce Dev., *Industry and Occupation Employment Projections 2026: New Jersey 2016-2026* (2018) (Internet).

[20] *See* Center for Constr. Research & Training, *The Construction Chart Book: The U.S. Construction Industry and Its Workers* §§ 21-22

in particular, relies heavily on day laborers, who work on an hourly, daily, or project basis.[21] Estimates suggest that as of 2009, there were more than 10,000 day laborers in the New York City metropolitan area, and a majority worked as construction laborers and painters.[22]

These numbers are significant because temporary workers, independent contractors, and employees of small employers face a number of working conditions that leave them particularly vulnerable to the health hazards of methylene chloride exposure. For example, such workers are less likely to receive safety training and protective equipment,

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(6th ed. 2018) (Internet); *see also* Annette Bernhardt, Siobhán McGrath, & James DeFilippis, *Brennan Center for Justice Report, Unregulated Work in the Global City: Employment and Labor Law Violations in New York City* 22-23, 73 (2007) (Internet) (discussing trends in private contracting and subcontracting and the decline of union membership within New York City's construction industry).

[21] *See* Bernhardt et al., *supra* at 73-74 (describing jobs driving demand for temporary work in construction industry); Center for Popular Democracy, *Fatal Inequality: Workplace Safety Eludes Construction Workers of Color in New York State* 11 (Oct. 2013) (Internet) (same); *see also* Abel Valenzuela Jr. & Edwin Meléndez, *Day Labor in New York: Findings from the NYDL Survey* ii, 9 (2003) (Internet) (same).

[22] *See* Abel Valenzuela Jr. et al., *On the Corner: Day Labor in the United States* 9 (Jan. 2006) (Internet); Valenzuela & Meléndez, *supra* at 9; *see also* Center for Popular Democracy, *supra* at 11 (noting that day laborers are routinely assigned to jobs exposing them to occupational hazards).

which can diminish some of the health risks associated with using products containing methylene chloride.[23] Such workers are also less likely to be aware of or have access to grievance procedures to demand safety procedures or to file complaints about safety violations.[24] And such workers also tend to receive lower earnings and fewer benefits, which leaves workers less able to afford the costs associated with the health effects of methylene chloride exposure, including the costs of emergency and long-term medical care and extended work absences due to illness.[25]

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[23] *See* U.S. Gov't Accountability Office (GAO), *Contingent Workforce: Size, Characteristics, Earnings, and Benefits* 5, 25 (2015) (Internet); Center for Constr. Research & Training, *supra* § 21; New York Comm. for Occupational Safety & Health, *It's No Accident: Examining New York's Workplace Deaths and the Construction Industry* 14, 16 (2014) (Internet); Bernhardt et al., *supra* at 74.

[24] *See* Center for Popular Democracy, *supra* at 11; *see also Hearing Before the N.Y.C. Temporary Comm'n on Day Labor Job Ctrs.* (June 28, 2006) (statement of Siobhán McGrath, Policy Research Associate, Brennan Center for Justice at New York University School of Law) (Internet) (noting that day laborers often lack the ability to discuss safety issues and "bring concerns to their employers").

[25] *See* GAO, *supra* at 5, 23; U.S. Dep't of Labor, Bureau of Labor Statistics, *Spotlight on Statistics: Workers in Alternative Employment Arrangements*, slide 11 (Nov. 2018) (Internet); Center for Constr. Research & Training, *supra* § 22.

The relevant literature has determined that the risks are particularly acute for foreign-born and Hispanic workers, who are disproportionately overrepresented in the industries that most frequently engage in paint and coating removal. Approximately 28% of construction workers in the United States are foreign born. *See* Proposed Rule, 82 Fed. Reg. at 7476. Of that population, the majority of workers were born in Latin American countries.[26] In New York State, as of 2017, approximately 42% of workers in the State's construction industry were foreign born.[27] And according to recent estimates, foreign-born workers make up 59% of the construction industry in New York City.[28] As EPA determined in the Proposed Rule, because Hispanic and foreign-born workers "are disproportionately over-represented in construction trades, in which methylene chloride is used for paint and coating removal," these populations "are disproportionately at risk to the range of adverse health effects" caused by methylene chloride exposure. Proposed Rule, 82 Fed. Reg. at 7485 (citation omitted).

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[26] *See* Center for Constr. Research & Training, *supra* § 15.

[27] *See* U.S. Census Bureau, American Community Survey (Internet) (estimate based on one-year estimates for occupation codes 6200-6765).

[28] *See* New York State Office of the Comptroller, *New York City Employment Trends* 8 (April 2019) (Internet).

Hispanic and foreign-born workers also labor under conditions that make them particularly vulnerable to the acute health risks of methylene chloride exposure in paint and coating removal; indeed, the annual fatality rate for Hispanic workers is regularly higher than for other workers.[29] Hispanic and foreign-born workers are more likely to work off the books, as day laborers, or for small employers. They thus tend to receive less safety training, less protective equipment, lower pay, and fewer benefits.[30] See also *supra* at 17-18.

Foreign-born and Hispanic workers are also more likely than other workers to speak a language other than English as their primary language, and thus to have limited English proficiency. *See* Proposed Rule, 82 Fed. Reg. at 7476. According to a recent study, approximately

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[29] *See* Center for Constr. Research & Training, *supra* § 41 (noting that the workplace fatality rate was 9% higher for Hispanic workers than for white, non-Hispanic workers between 2012 and 2015); U.S. Dep't of Health & Human Servs., Nat'l Inst. for Occupational Safety & Health (NIOSH), *Overlapping Vulnerabilities in the Occupational Safety and Health of Young Workers in Small Construction Firms* 8 (May 2015) (Internet) (estimating that the fatality rate for foreign-born workers is 4.0 deaths per 100,000 individuals, as compared to 3.7 per 100,000 for all workers).

[30] *See also, e.g.*, NIOSH, *supra* at 18-19; Center for Popular Democracy, *supra* at 9; Valenzuela et al., *supra* at 9-13; Valenzuela & Meléndez, *supra* at ii, 9.

40% of foreign-born Hispanic construction workers reported that they could not speak English well, while another 21% reported that they could not speak English at all.[31] These workers may face difficulty understanding warnings about potential exposure to methylene chloride at a jobsite. They also may have difficulty understanding technical safety training about how to reduce the health risks associated with methylene chloride, even if such training is provided. *See id.*[32]

B. Commercial Uses of Methylene Chloride in Paint and Coating Removers Pose Significant Health Risks to Public Bystanders in Amici States.

Commercial users are not the only persons who face public health risks from the continued commercial uses of paint- and coating-removal products containing methylene chloride. Paint and coating removal work in residential settings also exposes other occupants of a home to the health risks of methylene chloride. *See* Proposed Rule, 82 Fed. Reg. at 7475. Because methylene chloride fumes can remain in the air at lethal

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[31] *See* Center for Constr. Research & Training, *supra* § 17.

[32] *See also, e.g.*, NIOSH, *supra* at 10 ("[L]anguage differences among immigrant workers, their supervisors, and coworkers are one of the most frequently cited barriers to safety.").

concentrations for hours after a product has been used (see *supra* at 11), other occupants of a unit where renovation work is being conducted can be exposed to the fumes and can face "acute risks of central nervous system impacts." *Id.* at 7476; *see also id.* at 7467, 7471, 7477. Those at risk include residents, visitors, and other workers in the home, such as cleaners and caregivers. As EPA determined in the Proposed Rule, these residential bystanders face acute health risks "even if they are excluded from the areas in which work is conducted." *Id.* at 7477.[33]

The risks of methylene chloride exposure extend further too. When methylene chloride products are being used in residences and hotel rooms, persons in adjacent units also face acute health risks. *See id.*[34] As EPA recognized in the Proposed Rule, such persons may be at even

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[33] *See also Risk Assessment*, *supra* at 56, 64-65.

[34] *See also, e.g.*, Robin E. Dodson et al., *Chemical Exposures in Recently Renovated Low-Income Housing: Influence of Building Materials and Occupant Activities*, 109 Env't Int'l 114, 118 (2017) (finding elevated air concentrations of methylene chloride based on airflow in a multi-unit apartment).

greater risk because they are less likely to be informed of a renovation project and given the opportunity to avoid exposure.[35] *See id.*

The risks of bystander exposure pose acute concerns for New York and the other amici States, which have substantial numbers of densely populated multi-unit buildings. For example, over 8.8 million New Yorkers—approximately 46% of the State's total population—live in buildings with more than one unit. In New York City alone, nearly 80% of the population—over 6.5 million residents—live in multi-unit housing.[36] In New Jersey, over 2.7 million residents—approximately 31% of the State's population—live in multi-unit housing.[37]

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[35] In New York City, for example, tenants are required to provide other building occupants with notice of renovation projects for which they receive a work permit, but the notice need not specify if toxic chemicals will be used. *See* Administrative Code of City of N.Y. § 28-104.8.4.3.

[36] *See* U.S. Census Bureau, *American Community Survey, Total Population in Occupied Housing Units By Tenure By Units in Structure (New York)* (2018) (Internet) (based on 2018 data for one-year tenure in multi-unit housing).

[37] *See* U.S. Census Bureau, *American Community Survey, Total Population in Occupied Housing Units By Tenure By Units in Structure (New Jersey)* (2018) (Internet) (based on 2018 data for one-year tenure in multi-unit housing).

High rates of construction and renovation work only compound these concerns. In 2018, the New York City Department of Buildings issued 8,085 permits for new building construction in the City, and an additional 9,175 permits for major building alterations.[38] Although not all of these projects will entail the use of paint and coating removers in multi-unit housing, residential occupants will be at acute risk from the many adverse effects of methylene chloride exposure when it is used in such projects.

C. The Public Health Costs of Methylene Chloride Exposure Fall on Amici States.

The acute and chronic health risks of methylene chloride exposure have significant effects on the individuals exposed to methylene chloride, as well as the families and communities of those who become ill or die due to methylene chloride exposure. *See* Proposed Rule, 82 Fed. Reg. at 7483. These public health effects also impose substantial costs on the amici States.

Work-related illnesses can generate substantial healthcare costs in the form of emergency room visits, long-term care expenses, and

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[38] New York City Dep't of Bldgs., *NYC Construction Dashboard* (2018) (Internet).

medications, among other things.[39] Studies show that many of these costs will not be covered by workers' compensation or other forms of private insurance, and will instead be borne by the States through Medicare, Social Security Disability Insurance, and other programs.[40] Because many workers who regularly engage in paint and coating removal are day laborers, independent contractors, or employees of small businesses (see *supra* at 16-17), these workers are less likely to be covered by workers' compensation and private health insurance, or to receive retirement benefits.[41] See *supra* at 17-18. Moreover, many of the chronic illnesses caused by methylene chloride—such as cancer, liver disease, and kidney disease (see *supra* at 6)—may not manifest until long after workers would

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[39] *See, e.g.*, J. Paul Leigh, *Economic Burden of Injury and Illness in the United States*, 89 Milbank Q. 728, 731 (2011); Paul A. Schulte, *Characterizing the Burden of Occupational Injury and Disease*, 47 J. Occupational & Envtl. Med. 607, 616 (2005).

[40] *See* Leigh, *supra* at 749; Schulte, *supra* at 615.

[41] *See, e.g.*, GAO, *supra* at 5-6, 23-25.

be able to claim private benefits in any event.[42] The costs of caring for many of these individuals will therefore fall on amici States.

Occupational illnesses caused by methylene chloride exposure also harm amici States by decreasing worker productivity. Extended work absences due to illness result in lost wages and diminished economic output by private employers, lowering tax revenue for the amici States.[43]

POINT II

FEDERAL ACTION ON COMMERCIAL USES OF METHYLENE CHLORIDE IN PAINT AND COATING REMOVERS IS A NECESSARY COMPLEMENT TO AMICI STATES' EFFORTS

In light of the significant public health risks of methylene chloride, amici States have enacted measures that address to some degree the harmful effects of methylene chloride exposure. For example, New York has prohibited in-state sales of a variety of products that contain methylene chloride, including certain adhesives, adhesive removers, electrical cleaners, footwear or leather care products, and graffiti removers. *See* 6

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[42] *See* J. Paul Leigh, Shagufta Yasmeen, & Ted R. Miller, *Medical Costs of Fourteen Occupational Illnesses in the United States in 1999*, 29 Scandinavian J. Work Envtl. Health 304, 306 (2003).

[43] *See* Leigh, *supra* at 731; Schulte, *supra* at 616.

N.Y.C.R.R. § 235-3.1(g)(3), (*l*)(1), (m)(1). The State has also restricted the use of methylene chloride in plumbing and sewage cleaners, thereby reducing the presence of that chemical in New York's waters. *See* N.Y. Environmental Conservation Law §§ 39-0103, 39-0105(1)-(2).

Maryland's protective measures have included banning the sale, supply, offer for sale, or manufacture of a variety of products containing methylene chloride, including adhesive removers, electric cleaners, construction panel and floor covering adhesives, and graffiti removers. *See* Md. Code Regs. §§ 26.11.32.08–26.11.32.09. Maryland has also restricted the concentration of methylene chloride allowed in any flammable multi-purpose solvent or paint thinner. *See id.* § 26.11.32.05-1. And Maryland has introduced monitoring measures that require the manufacturers of consumer products containing methylene chloride to report the name of the product and the total volume of in-State sales. *See id.* § 26.11.32.14(c).

Under the Massachusetts Toxics Use Reduction Act, Mass. Gen. Laws ch. 21I (the "Massachusetts Act"), certain chemical users in the Commonwealth are required to report annually on their use of toxic chemicals and conduct toxics use reduction planning every two years.

Methylene chloride is on the Massachusetts Act's hazardous chemicals list and is subject to the statute's requirements.[44] Moreover, the Massachusetts Toxics Use Reduction Institute and the Massachusetts Office of Technical Assistance and Technology, its partner agency, work with Massachusetts businesses and communities to reduce their use of toxic solvents, including methylene chloride.

New Jersey prohibits the in-state sale, distribution, supply, and manufacture of a variety of products that contain methylene chloride. *See* N.J. Admin. Code § 7:27-24.4(n). Additionally, methylene chloride is listed in the "Special Health Hazard Substance List" for purposes of the New Jersey Worker and Community Right to Know Act, which means that employers must periodically report to the State about their use and storage of methylene chloride. *See id.* § 8:59-9.1 & app. A.

And Vermont regulates emissions of methylene chloride as a hazardous air contaminant. *See* Vt. Code R. § 16.3-100:5-261(1)(a) & apps. B & C. Vermont has also designated methylene chloride as a

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[44] *See* Massachusetts Exec. Office of Energy & Envtl. Affairs, *Designation of TURA Higher and Lower Hazard Substances in Massachusetts* (Jan. 2017) (Internet).

chemical of high concern to children, which means that manufacturers of children's products containing methylene chloride must report certain information about the products to the State. *See* Vt. Stat. Ann. tit. 18, §§ 1773, 1775; Vt. Code R. § 12-5-54:6.0.

Although the amici States have taken a variety of steps that protect their residents from the harmful health consequences of methylene chloride exposure, EPA's authority under TSCA is an important complement to those efforts.[45] Under TSCA § 6(a), EPA is required to issue rules restricting the use, manufacture, and distribution of a chemical when it concludes that the substance "presents an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605(a). Given EPA's findings regarding the severe and imminent health hazards posed by the continuing commercial use of paint and coating removers—which the Final Rule does not dispute—TSCA required EPA to address the health risks posed

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[45] Although States have many tools to regulate the use of toxic substances, federal law may in some circumstances constrain what States can do to address the public health costs of methylene chloride exposure, including as to occupational safety when the Occupational Safety and Health Administration has acted under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, and as to the known risks of toxic chemical exposure once EPA has acted under TSCA, *see* 15 U.S.C. § 2617(a)(1)(B)(ii).

by paint and coating removers containing methylene chloride for commercial as well as consumer uses. *See* Br. at 30-37.

POINT III

THE FINAL RULE IGNORES THE RISKS OF FEDERAL INACTION

Under the APA, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (quotation marks omitted); *see also* 5 U.S.C. § 706(2)(A). The Final Rule fails to satisfy these requirements. Among other things, EPA provided no explanation for its decision to abandon the portion of the Proposed Rule that would prohibit the manufacture, distribution, and use of paint and coating removers containing methylene chloride for many commercial uses. Nor did EPA apparently consider the imminent adverse public health consequences of its reversal. *See also* Br. at 41-45.

In the Proposed Rule, EPA determined that the relevant scientific evidence established that methylene chloride in paint and coating removers poses unreasonable risks to workers and bystanders, including death, cancer, liver disease, and kidney disease, among other adverse

health effects. *See* Proposed Rule, 82 Fed. Reg. at 7464-66, 7475-78. Based on that determination, it proposed to prohibit the manufacture and distribution of paint and coating removers containing methylene chloride for consumer and many commercial purposes. Although EPA was not necessarily obligated to adopt the Proposed Rule, it was not free to change course "for no reason whatsoever." *Williams Nat. Gas Co. v. FERC*, 872 F.2d 438, 446 (D.C. Cir. 1989). Because "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that [the] action was based," *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943), EPA must "provide an explanation that will enable the court to evaluate [its] rationale at the time of decision," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990). Here, EPA fell short of its obligation.

In the Final Rule, EPA did not dispute any of the underlying evidence establishing that commercial paint and coating removal creates unreasonable health risks for workers or bystanders. Nor did it provide any other explanation for its inaction. Rather, it affirmed the necessity of the consumer ban based on the evidence in EPA's 2014 risk assessment, *see* Final Rule, 84 Fed. Reg. at 11,421—an assessment that

also concluded that most commercial uses of methylene chloride pose lethal and imminent risks to workers and bystanders.[46] In similar circumstances where an agency has abandoned a proposed rule without explanation, courts have held the agency's actions arbitrary and capricious. *See, e.g.*, *International Union, United Mine Workers of Am. v. United States Dep't of Labor*, 358 F.3d 40, 43-44 (D.C. Cir. 2004); *Williams Nat. Gas Co.*, 872 F.2d at 446.

EPA's decision to solicit comments on the ANPRM does not satisfy the agency's obligation to provide a reasoned justification because EPA did not seek to justify its inaction on the ground that it was still weighing other regulatory options. It merely stated (a) that it was "exercising its discretion" to "not finaliz[e]" the Proposed Rule for commercial uses, and (b) that it was also seeking comment on an ANPRM regarding a certification and training program for commercial paint stripping and coating removers. *See* Final Rule, 84 Fed. Reg. at 11,424. Moreover, even if consideration of alternatives could provide a reasonable basis for inaction in some other case, EPA here failed to explain its abandonment of

[46] *See also Risk Assessment*, *supra* at 28.

its prior finding that a certification and training program would not adequately address the health risks of methylene chloride exposure, and that such a program therefore suffered from "significant limitation." Proposed Rule, 82 Fed. Reg. at 7474.

The Final Rule is arbitrary and capricious for at least one other reason: EPA failed to consider an "important aspect of the problem" when it issued the Final Rule, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983)—namely the imminent and certain harm that will come to workers, bystanders, and the amici States while EPA completes the rulemaking process on the ANPRM. *See also* Br. at 48-50. Although EPA announced the ANPRM in March 2019, it has yet to issue a proposed rule, much less complete the notice and comment period necessary to finalize a certification and training program. Thus, EPA will likely take years to complete the regulatory process—if it ever does—during which time workers and bystanders are almost certain to die and suffer from the severe health effects of methylene chloride exposure. Indeed, between the issuance of the Proposed and Final Rules, there were at least four additional deaths attributable to paint strippers or coating removers containing methylene chloride. *See* Final Rule, 84

Fed. Reg. at 11,422. In failing to consider the certain and imminent harms to workers and bystanders while it contemplates other regulatory options, EPA failed to consider a necessary aspect of the problem and therefore violated its obligations under the APA.

CONCLUSION

This Court should grant the environmental petitioners' petition and remand the Final Rule to EPA with instructions to issue a revised rule that is consistent with the agency's obligations under TSCA and the APA.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Megan Chu, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,569 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7), Rule 29, and accompanying local rules.

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