

# 19-1042 (L)

19-1044 (CON) and 19-2329 (CON)

---

IN THE 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, and  
Halogenated Solvents Industry Alliance, Inc.,  
Petitioners,

v.

United States Environmental Protection Agency and 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 PUBLIC CITIZEN, INC., AMERICAN  
COLLEGE OF OCCUPATIONAL AND ENVIRONMENTAL  
MEDICINE, AMERICAN PUBLIC HEALTH ASSOCIATION,  
COUNCIL OF STATE AND TERRITORIAL EPIDEMIOLOGISTS,  
AND NATIONAL COUNCIL FOR OCCUPATIONAL SAFETY AND  
HEALTH SUPPORTING ENVIRONMENTAL PETITIONERS AND  
GRANT OF PETITION FOR REVIEW**

---

Nandan M. Joshi  
Allison M. Zieve  
Public Citizen Litigation Group  
1600 20th Street NW  
Washington, DC 20009  
(202) 588-1000

October 23, 2019

*Attorneys for Amici Curiae*

## **CORPORATE DISCLOSURE STATEMENT**

Public Citizen, Inc. is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

American College of Occupational and Environmental Medicine is a nonprofit membership organization whose members are physicians, medical students, or other persons working in the field of occupational or environmental medicine. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

American Public Health Association is a nonprofit membership organization whose members are public-health professionals. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

Council of State and Territorial Epidemiologists is a nonprofit membership organization whose members are epidemiologists who are practicing or have practiced before a government public-health authority, and students pursuing a degree in public health. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

National Council for Occupational Safety and Health is a nonprofit federation of local and statewide coalitions on occupational safety and health, which are private, nonprofit coalitions of labor unions, health and technical professionals, and others interested in promoting and advocating for worker health and safety. It has no parent corporation, and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT .....	i
TABLE OF AUTHORITIES .....	iv
INTEREST OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	5
ARGUMENT.....	7
CONCLUSION.....	19
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

## TABLE OF AUTHORITIES

### Statutes

15 U.S.C. § 2605(a).....	<i>passim</i>
15 U.S.C. § 2605(b)(4)(A).....	16
15 U.S.C. § 2605(i).....	19

### Federal Register Publications

Advance Notice of Proposed Rulemaking, Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program, 84 Fed. Reg. 11466 (Mar. 27, 2019) .....	8, 10, 17
Final Rule, Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a), 84 Fed. Reg. 11420 (Mar. 27, 2019).....	10, 11, 13
Proposed Rule, Methylene Chloride and N- Methylpyrrolidone; Regulation of Certain Uses Under TSCA Section 6(a), 82 Fed. Reg. 7464 (Jan. 19, 2017).....	<i>passim</i>

### Report

EPA, Office of Chemical Safety and Pollution Prevention, TSCA Work Plan Chemical Risk Assessment Methylene Chloride: Paint Stripping Use (Aug. 2014) .....	12, 13, 14, 15
---	----------------

### Article

Jamie Smith Hopkins, Common Solvent Keeps Killing Workers, Consumers, The Center for Public Integrity (Sept. 21, 2015) .....	13
--	----

## **INTEREST OF AMICI CURIAE<sup>1</sup>**

Amici curiae Public Citizen, Inc., American College of Occupational and Environmental Medicine, American Public Health Association, Council of State and Territorial Epidemiologists, and National Council for Occupational Safety and Health file this brief in support of petitioners Labor Council for Latin American Advancement, Natural Resources Defense Council, Vermont Public Interest Research Group, Safer Chemicals Healthy Families, Lauren Atkins, and Wendy Hartley (collectively, Environmental Petitioners).

Public Citizen, a consumer-advocacy organization with members and supporters nationwide, works before Congress, administrative agencies, and courts for the enactment and enforcement of laws protecting consumers, workers, and the public. Among other things, Public Citizen fights for openness and democratic accountability in government; for strong health, safety, and environmental protections; and for safe, effective, and affordable medicines and health care. In the underlying rulemaking proceeding in this case, Public Citizen submitted a statement signed by 5,500 people urging the

---

<sup>1</sup> All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party. No party or counsel for a party, and no person other than the amici curiae or their counsel, contributed money intended to fund the brief's preparation or submission.

Environmental Protection Agency (EPA) to ban commercial and consumer uses of methylene chloride. Public Citizen also submitted comments in response to EPA's advance notice of proposed rulemaking to urge EPA to ban the manufacture, processing, and distribution of methylene chloride for commercial paint and coating removal.

American College of Occupational and Environmental Medicine (ACOEM) is a membership organization composed of physicians, medical students, or other persons working in the field of occupational or environmental medicine. ACOEM was founded in 1916 and is the nation's largest medical society representing more than 4,000 occupational and environmental medicine physicians and other related health professionals who champion the health of workers, the safety of workplaces, and the quality of the environment. ACOEM actively engages in advocacy at state and national levels in support of policies that promote the health and safety of workers. ACOEM submitted comments in response to EPA's advance notice of proposed rulemaking to urge EPA to ban the manufacture, processing, and distribution of methylene chloride for commercial paint and coating removal.

American Public Health Association (APHA) is a nonprofit membership organization of public-health professionals that champions the

health of all people and communities. APHA strengthens the public-health profession, promotes best practices and shares the latest public-health research and information. APHA is the only organization that combines a nearly 150-year perspective, a broad-based member community, and the ability to influence federal policy to improve the public's health. APHA has long advocated for policies to protect and improve worker health and safety. APHA submitted comments, in collaboration with the association's Occupational Health and Safety and Environment Sections, in response to EPA's advance notice of proposed rulemaking to urge EPA to ban the manufacture, processing, and distribution of methylene chloride for commercial paint and coating removal.

Council of State and Territorial Epidemiologists (CSTE) is a membership organization of epidemiologists who are practicing or have practiced before a government public-health authority, and students pursuing a degree in public health. Founded in the 1950s, CSTE's mission is to use the power of epidemiology to improve the public's health by promoting effective use of epidemiologic data to guide public-health practice and improve health, and by advocating for resources and scientifically based policy.

National Council for Occupational Safety and Health (National COSH) is a federation of 22 local and statewide coalitions on occupational safety and health located in 15 states. Founded in 1972, National COSH is dedicated to promoting safe and healthy conditions for all working people through education, training, organizing, and advocacy. National COSH submitted comments in response to EPA's advance notice of proposed rulemaking opposing the agency's decision not to finalize its proposed ban on methylene chloride-based paint and coating removal products for commercial products in the rule under review.

Amici submit this brief because they are disturbed by EPA's decision not to finalize its proposed rule to restrict the use of methylene chloride in workplace environments. In its proposed rule, EPA recognized that the use of methylene chloride poses an unreasonable risk of injury to health, including the risk of death, to workers as well as consumers. The rulemaking record before EPA confirmed the health risks of methylene chloride to workers engaged in paint and coating removal. Indeed, in the final rule, EPA recognized that methylene chloride had caused three worker fatalities since the proposed rule was issued. Yet in the final rule, EPA took no action to protect workers from the chemical and offered no reasoned explanation for its failure to act. Recent research indicates that 87 percent of methylene

chloride fatalities have occurred in occupational settings, and 63 percent of fatalities involved the use of paint removers.<sup>2</sup> As organizations committed to protecting and improving worker health and safety, amici are concerned that EPA's failure to act will inevitably will lead to more unnecessary deaths and other adverse health effects for workers, in contravention of the goals of the Toxic Substances Control Act that EPA is charged with implementing.

### **SUMMARY OF ARGUMENT**

Under the Toxic Substances Control Act (TSCA), EPA has a responsibility to regulate chemicals that present an unreasonable risk of injury to health so that they “no longer present[] such risk.” 15 U.S.C. § 2605(a). With respect to the use of methylene chloride in paint and coating products used by workers, EPA failed to carry out its statutory responsibility.

In its proposed rule, EPA had proposed largely to ban commercial use of methylene chloride, and for good reason. As outlined in the proposed rule, EPA's own research and other record evidence confirmed that methylene

---

<sup>2</sup> Comments from Academics, Scientists and Clinicians on a Commercial Paint and Coating Removal Training, Certification and Limited Access Program for Methylene Chloride at 7 & App. A (May 28, 2019), filed in Advanced Notice of Proposed Rulemaking, Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program, EPA Dkt. No. EPA-HQ-OPPT-2018-0844, available at <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2018-0844-0037>.

chloride poses a significant risk of injury and death to both consumers and workers. Those risks arise both from short-term exposure to the chemical, as well as from years of occupational exposure. Short-term inhalation of methylene chloride can lead to incapacitation, coma, and death, while long-term exposure is associated with both cancer and hepatic effects. The record before the agency showed that workers were often exposed to levels of methylene chloride in workplace environments that exceeded applicable safety limits.

Despite this overwhelming record of the health effects of methylene chloride on workers—which EPA has never called into doubt—EPA’s final rule addresses only consumer use of methylene chloride in paint and coating removal. In doing so, EPA failed to offer a reasoned explanation for its decision not to act on its proposal to regulate commercial use of methylene chloride. The agency did not assert, for example, that it required additional information to determine whether methylene chloride poses an unreasonable risk to worker health. Instead, it issued an advance notice of proposed rulemaking—not even a proposed rule—to solicit comment on a topic (*i.e.*, training and certification programs) that EPA had previously teed up in its proposed rule. In effect, EPA has postponed its obligation to make the requisite unreasonable-risk finding under the TSCA for an indefinite

time to avoid triggering its TSCA responsibility to act so that methylene chloride “no longer presents such risk” to workers. 15 U.S.C. § 2605(a). EPA’s decision to proceed in that manner was arbitrary and contrary to the TSCA. This Court should grant the petitions for review.

### **ARGUMENT**

When EPA determines that the “manufacture, processing, distribution in commerce, use, or disposal of a chemical substance ... presents an unreasonable risk of injury to health or the environment,” section 6(a) of the Toxic Substances Control Act (TSCA) requires that the agency “by rule ... apply one or more” statutorily specified requirements “so that the chemical substance ... no longer presents such risk.” 15 U.S.C. § 2605(a). In its proposed rule on methylene chloride, EPA proposed to make a determination that “uses of methylene chloride ... in paint and coating removal present an unreasonable risk of injury to health.”<sup>3</sup> As EPA explained, the “health impacts of its use in paint and coating removal include death (due to asphyxiation), liver toxicity, kidney toxicity, reproductive toxicity, specific cognitive impacts, and cancers such as brain cancer, liver

---

<sup>3</sup> Proposed Rule, Methylene Chloride and N-Methylpyrrolidone; Regulation of Certain Uses Under TSCA Section 6(a), 82 Fed. Reg. 7464, 7465 (Jan. 19, 2017).

cancer, certain lung cancers, non-Hodgkin’s lymphoma, and multiple myeloma.” 82 Fed. Reg. at 7466. EPA documented the harm that exposure to methylene chloride has had on workers, *id.* at 7482–83, and observed that “[d]ue to their overrepresentation in the construction trades, Hispanic workers are disproportionately at risk of exposure to methylene chloride when used in paint and coating removal,” *id.* at 7476. EPA accordingly proposed to “prohibit the use of methylene chloride for commercial paint and coating removal in [certain] specified sectors.” *Id.* at 7465.

Two years later, the health risks to workers of using methylene chloride in paint and coating removal have not changed. But EPA’s position has. In the final rule, rather than act to protect workers from the health risks associated with exposure to methylene chloride, EPA did nothing to ensure that methylene chloride “no longer presents such risk.” 15 U.S.C. § 2605(a). In lieu of taking immediate action in *this* rulemaking, EPA issued an *advance* notice of proposed rulemaking, launching a new rulemaking process to consider whether to protect workers under the TSCA.<sup>4</sup> In light of the record before the agency documenting unreasonable risks to workers, EPA’s failure

---

<sup>4</sup> Advance Notice of Proposed Rulemaking, Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program, 84 Fed. Reg. 11466 (Mar. 27, 2019) (ANPRM).

to act was unreasonable and inconsistent with law. The dangers that methylene chloride poses to workers are real and serious. EPA had no reasonable basis for shirking its statutory responsibility to protect workers in its final rule.

1. In the proposed rule, EPA sought to address the health dangers of methylene chloride in both consumer and commercial applications. EPA proposed to prohibit “manufacturing, processing, and distributing” methylene chloride “for consumer paint and coating removal,” and, with limited exceptions, the “manufacturing, processing, and distributing” and the “use” of the chemical “for commercial paint and coating removal.” 82 Fed. Reg. at 7529. The agency explained that its proposal was “[b]ased on EPA’s analysis of worker and consumer populations’ exposures to methylene chloride ... in paint and coating removal,” which showed health effects from both “very short, acute exposure” and “years of occupational exposure.” *Id.* at 7465–66.

In the final rule, EPA confirmed that, if “a chemical substance presents an unreasonable risk of injury to health or the environment, without consideration of costs or other non-risk factors, including an unreasonable risk to a potentially exposed or susceptible subpopulation identified as relevant, under the conditions of use, EPA *must by rule* apply one or more

requirements to the extent necessary so that the chemical substance or mixture no longer presents such risk.”<sup>5</sup> EPA also confirmed that “the use of methylene chloride in *consumer* paint and coating removal presents an unreasonable risk of injury to health due to acute human lethality” and that “[e]ffects from acute exposure during use of methylene chloride in paint and coating removal may include neurological impacts such as dizziness, incapacitation, loss of consciousness, coma, and death.” *Id.* (emphasis added). Accordingly, with respect to consumers, EPA adopted a rule that would eliminate the risk by prohibiting methylene chloride for paint and coating removal. *Id.* at 11435.

With respect to *commercial* use of the chemical, however, the agency stated that, “[w]hile EPA proposed a determination of unreasonable risk from the use of methylene chloride in commercial paint and coating removal, EPA is not finalizing that determination in this rule.” *Id.* at 11420. Instead, EPA announced that it was issuing an ANPRM to address “questions related to a potential training, certification, and limited access program as an option for risk management for all of the commercial uses of methylene chloride in

---

<sup>5</sup> Final Rule, Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a), 84 Fed. Reg. 11420, 11421 (Mar. 27, 2019) (emphasis added).

paint and coating removal.” *Id.* EPA chose this path even though the proposed rule already had sought comment on “training and certification program for commercial paint and coating removers.” 82 Fed. Reg. at 7474.

EPA’s unexplained decision not to address in the final rule the dangers of methylene chloride to workers cannot be justified based on the record before the agency. For example, EPA explained in the final rule that it concluded that consumer use of methylene chloride should be banned because such use poses a risk of death. 84 Fed. Reg. at 11421. As EPA acknowledged, between 1976 and 2016, “exposure to methylene chloride during paint and coating removal” resulted in at least “49 fatalities”—a figure that “may be an underestimate.” *Id.* at 11422. Even in the two years this rulemaking was pending, the agency “learned of four additional fatalities due to methylene chloride in paint and coating removal.” *Id.* As discussed below, the record shows that the risk of death was as great for workers as for consumers.

In 2014, EPA’s Office of Chemical Safety and Pollution Prevention conducted a “risk assessment” of methylene chloride (also known as

dichloromethane or DCM).<sup>6</sup> The 2014 Risk Assessment “assessed acute and chronic risks for workers using paint strippers containing DCM,” 2014 Risk Assessment at 20, observing that “[o]ver 230,000 workers nationwide are directly exposed to DCM from DCM-based strippers,” not including workers “who are indirectly exposed,” *id.* at 24; *see also id.* at 45. The 2014 Risk Assessment noted that “DCM is rapidly absorbed through inhalation exposure,” *id.* at 78, and can lead to carboxyhemoglobin formation (*i.e.*, carbon monoxide poisoning) and central nervous system depression, *id.* at 79. Central nervous system depression is the principal cause of “[a]cute lethality in humans following inhalation exposure.” *Id.* The 2014 Risk Assessment identified 13 deaths that had occurred from the use of methylene chloride in professional bathtub refinishing. *Id.* at 187.

The proposed rule also recognized the risk of death to workers using methylene chloride. In identifying “risks from acute exposure to methylene chloride when used in paint and coating removal,” the proposed rule listed:

Acute risks of incapacitation, coma, or *death in workers* exposed to methylene chloride in paint removers when no respiratory protection is used. In some industries with high exposure scenarios, these risks of

---

<sup>6</sup> EPA, Office of Chemical Safety and Pollution Prevention, TSCA Work Plan Chemical Risk Assessment Methylene Chloride: Paint Stripping Use, (Aug. 2014) (2014 Risk Assessment), [https://www.epa.gov/sites/production/files/2015-09/documents/dcm\\_opptworkplanra\\_final.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/dcm_opptworkplanra_final.pdf).

incapacitation *or death* are present even when respiratory protection is used.

82 Fed. Reg. at 7471 (emphases added). And the agency explained that, “in some cases, two or more individuals have died during a single job when air concentrations quickly reached lethal levels, potentially in less than 10 minutes.” *Id.* at 7468; *see id.* at 7482–83 (providing additional examples of worker fatalities); *see also* Jamie Smith Hopkins, Common Solvent Keeps Killing Workers, Consumers, The Center for Public Integrity (Sept. 21, 2015), <https://publicintegrity.org/2015/09/21/17991/common-solvent-keeps-killing-workers-consumers>, *cited in* 82 Fed. Reg. at 7522.

The final rule did not call any of this information into question. And of the four deaths identified by EPA as occurring while this rulemaking was pending, three involved fatalities to workers. 84 Fed. Reg. at 11422. Yet EPA did nothing in the final rule to protect workers from the risk of death from acute exposure to methylene chloride.

A similar story can be told with respect to the non-lethal health risks of methylene chloride. The 2014 Risk Assessment identified several health effects to workers from both acute and chronic exposure to the chemical, including “acute risks for neurological effects for most workers using DCM-based paint strippers.” 2014 Risk Assessment at 25. “The organ most often affected in exposures to high levels of DCM is the brain,” the agency stated,

*id.* at 79, although “effects on lung, liver, and kidney have also been reported in humans following acute exposure,” 82 Fed. Reg. at 7468. The range of health concerns from non-lethal acute exposure to methylene chloride include “incapacitation, loss of consciousness, heart failure, and coma,” as well as “neurobehavioral deficits measured in psychomotor tasks.” *Id.*

The agency also had a wealth of information about the long-term risks to workers from methylene chloride use. In the proposed rule, EPA explained that “[c]hronic exposures to methylene chloride are associated with cancer and non-cancer hepatic effects.” *Id.* “Studies in humans provide evidence for an association between occupational exposure to DCM and increased risk for some specific cancers, including brain cancer, liver cancer, non-Hodgkin[‘s] lymphoma, and multiple myeloma.” 2014 Risk Assessment at 81 (references omitted). Thus, EPA’s 2014 Risk Assessment indicated “cancer risk concerns for workers exposed to DCM that are employed at various industries handling DCM-containing paint strippers,” especially for workers “with no respiratory protection for an extended period of time.” *Id.* at 119.

Non-cancer chronic effects of methylene chloride “are primarily hepatic; the liver is the most sensitive target for non-cancer toxicity.” 82 Fed. Reg. at 7468. Indeed, “[m]ost workers using DCM-based paint strippers showed non-cancer risks for liver effects.” 2014 Risk Assessment at 102.

Hepatic effects were present “with or without respiratory protection,” although the “greatest risk concern is for workers engaging in long-term use of the product (*i.e.*, 250 days/year for 40 years) with no respiratory protection.” *Id.* at 103; *see also* 82 Fed. Reg. at 7471–72 (describing non-cancer chronic risks).

EPA specifically observed that these acute and chronic risks were present in workplace environments: “For commercial users, the occupational scenarios in which acute risks for central nervous system effects were identified included nearly all occupational scenarios.” 82 Fed. Reg. at 7478. The agency also stated that several industries “are estimated to present exposure levels between 100 times to greater than 1,000 times more than those that are of concern.” *Id.* Likewise, with respect to cancer risks, EPA found an estimated “excess cancer risk greater than 1 in 1,000,000 for all of the commercial scenarios evaluated if exposed to paint and coating removal with methylene chloride for 250 days per year for 40 years with no respiratory protection.” *Id.* EPA also noted that, although the Occupational Safety and Health Administration has set a permissible exposure limit for methylene chloride at 25 part per million, workplace concentration levels have been measured to be between 72 and 2016 parts per million. *Id.* at 7477.

Workers who use methylene chloride for paint and coating removal thus face significant risk of both lethal and non-lethal acute health effects and, over time, an increased risk of cancer and hepatic effects. By failing to address commercial uses of methylene chloride in its final rule—instead using an ANPRM to put off action indefinitely—EPA has denied workers the protections of “the only regulatory authority able to prevent or reduce risks of methylene chloride ... across the range of uses and exposures of concern.” *Id.* at 7521.

**2.** In the final rule, EPA did not explain why it decided not to address the dangers of methylene chloride to workers. EPA did not say, for example, that it lacked insufficient data to determine whether methylene chloride “presents an unreasonable risk of injury to [the] health” of workers, 15 U.S.C. § 2605(a)—and any such statement could not be reconciled with the information in the administrative record or EPA’s decision to ban methylene chloride for consumer paint and coating removal purposes. And EPA did not say, for example, that it needed more information about the costs of imposing its proposed commercial ban—and any such statement would violate the TSCA, which prohibits EPA from considering “costs or other nonrisk factors” in making unreasonable-risk determinations. *Id.* § 2605(b)(4)(A).

In the final rule, EPA did say that, in lieu of action, it issued the ANPRM to solicit “questions related to a potential training, certification, and limited access program as an option for risk management for all of the commercial uses of methylene chloride in paint and coating removal.” 84 Fed. Reg. at 11421. But EPA had already solicited comment on that same subject in the proposed rule. Specifically, EPA noted that “a training and certification program for commercial paint and coating removers” was a “regulatory option,” and it sought “public comment on the feasibility of such a program and its potential to reduce risks of exposure to methylene chloride for workers and bystanders so that those risks are no longer unreasonable.” 82 Fed. Reg. at 7474. Thus, the question whether to adopt such a program *as a response to* a finding of unreasonable risk under the TSCA was teed up in the rulemaking. Indeed, in the ANPRM, EPA acknowledged that it “received public comment indicating interest” in such a program “to address unreasonable risks for commercial uses of methylene chloride.” 84 Fed. Reg. at 11467.

Notably, the ANPRM does not seek further information about the health risks of methylene chloride on workers. Rather, EPA stated that it is “issuing this ANPRM to solicit public input on training, certification, and limited access requirements that could address any unreasonable risks that

EPA *could potentially find* to be presented by methylene chloride in commercial paint and coating removal.” *Id.* (emphasis added). If EPA is not calling into question its own evaluation of the dangers of methylene chloride to workers—and it is not—then it has no basis for refusing to make the unreasonable-risk finding it had proposed to make in the proposed rule. Under the TSCA, an unreasonable-risk finding is a logically antecedent determination that triggers EPA’s obligation to act “by rule” to ensure that “the chemical substance or mixture no longer presents such risk.” 15 U.S.C. § 2605(a). EPA offers no basis for its apparent belief that it can avoid making that determination simply because it is unsure about how it should exercise the statutory duty that the determination will impose.

It took EPA more than two years after the 2014 Risk Assessment evaluated the health risks of methylene chloride to issue a proposed rule to address the problem. It took EPA another two years to issue a final rule that ignored the issue of worker safety altogether. Now, without casting doubt on any of the scientific or medical evidence that was before it in this rulemaking, EPA has issued an ANPRM—not even a new proposed rule—that puts off the issue of protecting workers indefinitely. EPA had a responsibility either to finalize its proposal to determine that methylene chloride presents an unreasonable risk of injury to the health of workers, or to explain a

determination that no such risk exists in a decision that would have been judicially reviewable. *See* 15 U.S.C. § 2605(i). EPA's failure to take either action was not faithful implementation of the TSCA, but a derogation of it.

### **CONCLUSION**

This Court should grant the petitions for review of the environmental petitioners.

October 23, 2019

Respectfully submitted,

/s/ Nandan M. Joshi

Nandan M. Joshi

Allison M. Zieve

Public Citizen Litigation Group

1600 20th Street NW

Washington, DC 20009

(202) 588-1000

*Counsel for Amici Curiae*

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief complies with the type-volume limitations of FRAP 32(a)(7)(B) and 29(d). The brief is composed in a 14-point proportional typeface, Georgia. As calculated by my word processing software (Microsoft Word), the brief (excluding those parts permitted to be excluded under the Federal Rules of Appellate Procedure and this Court's rules) contains 3859 words.

/s/ Nandan M. Joshi  
Nandan M. Joshi

## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit on October 23, 2019, by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Nandan M. Joshi  
Nandan M. Joshi