Leading the Way: The Ninth Circuit Orders Reconsideration of Lead-Based Paint Hazard Regulations in A Community Voice v. Environmental Protection Agency

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LEADING THE WAY: THE NINTH CIRCUIT ORDERS
RECONSIDERATION OF LEAD-BASED PAINT
HAZARD REGULATIONS IN A COMMUNITY VOICE V.
ENVIRONMENTAL PROTECTION AGENCY

I. Health, Hazards, and History: An Introduction to Lead-Based Paint Policymaking

The persisting presence of lead in residential settings poses significant health risks, especially to children.¹ Lead is a highly toxic element with cumulative and permanent effects on the human body.² When lead enters the body through inhalation or ingestion, it accumulates in the blood and causes an elevated blood lead level (BLL).³ Sources of lead exposure include lead-based paint used on the interiors and exteriors of older homes, contaminated drinking water and soil, and air pollution.⁴ In the United States today, most lead poisoning results from exposure to deteriorating lead-based paint in pre-1978 home interiors.⁵ Children living in these homes not only inhale lead-contaminated dust particles but can unintentionally digest lead from paint chips due to their exploratory nature.⁶

¹. See generally Hope Kerpelman, Note, Let Them Eat Paint: Childhood Lead Poisoning as the Denial of Constitutional and Civil Rights, 51 COLUM. HUM. RTS. L. REV. 828, 835–37 (2020) (describing lead exposure and increased detriment to children under six years of age). As a neurotoxin, lead damages the nerves and nerve tissue; it can severely impact the health of young children even in small quantities. Id. (referencing scientific literature on permanent behavioral and neurological effects of lead poisoning on children’s developing nervous systems).


³. See id. at 2–3 (discussing presence of environmental lead, young children’s increased absorption rates of lead, and health impacts of higher concentrations of lead in blood).


⁶. See id. (noting children’s hand-to-mouth behaviors and accompanying high risk of unintentional lead ingestion).
Approximately thirty-one million homes built before the federal ban on lead-based paint still contain lead-based paint, and over three million of these homes have children under age six living in them. The Centers for Disease Control and Prevention (CDC) explicitly states that there is no such thing as a safe BLL in children because even low-level lead exposure results in adverse health effects. Studies reveal that childhood lead exposure can cause IQ deficiency, behavioral issues, poor academic performance, and neurological damage. A 2021 study that sampled over 1.5 million United States and European subjects linked childhood lead exposure to neuroticism, less mature personalities, disrupted cognitive functioning, and propensity for crime and delinquency in adulthood. Although prior research estimated that crime and delinquency linked to lead exposure costs the United States roughly 1.2 trillion dollars, authors of this study posited that actual societal impact and cost could be much greater and widespread. The hazards, risks, and negative implications of lead exposure disproportionately burden predominately Black, minority, and low-income communities nationwide. Today, Black children have the highest average BLLs in the country compared to White and

8. CDC Updates BLRV, CTNS. FOR DISEASE CONTROL & PREVENTION (Dec. 16, 2022) https://www.cdc.gov/nceh/lead/news/cdc-updates-blood-lead-reference-value.html# (noting how in October 2021, CDC lowered blood lead reference value, or BLRV, from 5.0 µg/dL to 3.5 µg/dL to identify more children with higher BLLs).
9. See Rossi et al., supra note 2, at 3 (listing adverse health impacts of lead on children, middle-aged men, and pregnant women).
11. See id. at 1–2 (hypothesizing societal costs of lead exposure may exceed 1.2 trillion because even low BLLs could negatively impact personality traits in general population).
12. See Yeter et al., supra note 4, at 2–3 (summarizing findings of previous scientific and sociological literature on lead exposure); see also Timothy Dignam, Rachel B. Kaufmann, Lauren LeStourgeon & Mary Jean Brown, Control of Lead Sources in the United States, 1970-2017: Public Health Progress and Current Challenges to Eliminating Lead Exposure, J. PUB. HEALTH MGMT. & PRAC., Jan./Feb. 2019, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6522252/pdf/nihms-1006171.pdf (indicating children from U.S. neighborhoods with higher minority, immigrant, and refugee populations are more easily exposed to lead; see generally Kerpelman, supra note 1, at 845–48 (discussing history, issues, and disparate impacts of lead exposure on people of color and impoverished communities).
Hispanic children. In fact, a 2020 study found that “Black race” to be the second strongest predictor for poor BLL outcomes during early childhood, behind residing in pre-1950 housing. Persisting lead paint hazards in older, poor, and inadequate housing disproportionately affect Black communities: Black children residing below the poverty line are significantly more likely to have elevated BLLs than White children residing below the poverty line. Discriminatory housing practices, substandard housing afforded to Black renters, and environmental injustices perpetuate these inequities. Additionally, lower post-remediation follow-up rates along with fewer pediatric screening services for Black children aggravate racial disparities and prolong the impacts of lead exposure. One recent study on the intergenerational impacts of lead exposure showed that Black children inherited a disparate risk of elevated BLLs from their mothers, starting in utero.

As the adverse effects of lead exposure surfaced in the latter part of the twentieth century, the United States initiated public health efforts aimed at eliminating lead in regular gasoline and consumer house paint. Fourteen years after the Consumer Product Safety Commission banned the use of lead-based paint in homes, Congress passed the 1992 Residential Lead-Based Paint Hazard Reduction Act (PHA). To address the dangers of lead in older housing, soil, and air after abatement measures, the PHA established disclosure

13. Yeter et al., supra note 4, at 2 (underscoring racial disparities in BLLs since 1976 and highest average BLLs found in Black children as of 2020).
14. Id. at 14 (detailing racial disparities found in analyses).
15. Id. at 3 (noting risk factors of childhood lead exposure in urban Black communities and stating higher likelihood of Black children with elevated BLLs than White peers).
16. See id. at 15–16 (discussing substandard housing, higher demolition rates, and delayed remediation and abatement as causing racial disparities in BLLs).
17. Id. at 15 (listing variables prolonging Black children’s elevated BLLs over 10 µg/dL after lead abatement measures).
18. Yeter et al., supra note 4, at 16 (referencing study observing intergenerational transmission of lead exposure risks from Black mothers to Black children).
19. See, e.g., id. at 2 (explaining United States’ efforts to phase out lead in gasoline and paint in 1970s).
requirements and grant programs. The PHA required the Environmental Protection Agency (EPA) to promulgate lead-based paint hazards regulations within eighteen months; however, the EPA did not finalize these until 2001. Despite expanding scientific knowledge on the dangers of low-level lead poisoning, the EPA failed to update its lead-based paint standards accordingly for over a decade. By 2009, it was evident that the EPA’s then-existing 2001 lead-based paint regulations were inadequate, as the agency relied on a concept of a “safe” BLL in children, contrary to modern data.

In 2021, concerned citizens and environmentalists achieved a significant win in A Community Voice v. United States Environmental Protection Agency, as the Court of Appeals for the Ninth Circuit sought to remedy the EPA’s years of regulatory inaction. Dissatisfied with the EPA’s delayed rulemaking, a coalition of non-profit, environmental justice, and public health organizations (Petitioners) collectively sued EPA initially in 2016, then took to the court a second time in 2021 and sought review of the EPA’s Final 2019 Rule (2019 Rule). In A Community Voice, the Ninth Circuit held that the EPA violated its statutory duty by insufficiently lowering dust-lead hazard standards (DLHS), leaving the lead-based paint definition unchanged, and for excluding soil-lead hazard standards from its 2019 Rule. The court also held that the EPA acted arbitrarily and capriciously by failing to sufficiently explain its reasons for not updating the lead-based paint definition. The Ninth Circuit ordered the EPA to update the

21. See Lead-Based Paint Regulations, HUD Exchange, https://www.hudexchange.info/programs/lead-based-paint/regulations/ (last visited Dec. 26, 2023) (summarizing legislative history of lead regulations and collaborative efforts between Department of Housing and Urban Development (HUD) and Environmental Protection Agency).

22. See A Cmty. Voice v. EPA, 997 F.3d 983, 986–87 (9th Cir. 2021) (recounting timeline of PHA’s enactment and subsequent finalization of regulations).

23. See id. at 987 (noting EPA’s inaction in publishing lead-based paint hazard standards, despite existence of updated scientific information).

24. See id. (characterizing 2001 standards as outdated and inadequate for addressing widespread low-level childhood lead poisoning).

25. 997 F.3d 983, 983–85 (9th Cir. 2021) (introducing issue pertaining to EPA’s inaction on updating lead regulations).

26. See id. at 985, 988 (describing case as step towards nation’s efforts to abate lead dangers in older housing, soil, and residue from prior abatement).


28. See A Cmty. Voice, 997 F.3d at 991–95 (elaborating reasons EPA violated its statutory duties under PHA).

29. Id. at 993 (finding EPA’s proffered justification arbitrary and capricious).
DLHS, lead-based paint definition, soil-lead hazard standards, and revise dust-lead clearance levels to effectuate Congress’s intent to eventually end lead poisoning in children.\textsuperscript{30} This Note analyzes the Ninth Circuit’s holding in \textit{A Community Voice} as well as the role of judicial review in remedying administrative inaction.\textsuperscript{31} Part II of this Note describes the procedural history of the case and the Petitioners’ and the EPA’s legal arguments.\textsuperscript{32} Part III provides pertinent background information on lead contamination rulemaking on the statutory, regulatory, and judicial levels.\textsuperscript{33} Part IV dissects the Ninth Circuit’s legal analysis.\textsuperscript{34} Part V contains a critical analysis of the court’s statutory interpretation.\textsuperscript{35} Finally, Part VI examines the environmental and societal implications of the case, especially on children and underserved communities.\textsuperscript{36}

\section*{II. Voicing Concerns on Inadequate Lead Regulations: The Facts of \textit{A Community Voice}}

In 2009, a coalition of citizens and environmental groups filed an administrative petition with the EPA requesting rulemaking to lower the DLHS and change the definition of lead-based paint by reducing the percent of lead by weight from 0.5 to 0.06 percent.\textsuperscript{37} The EPA granted the 2009 Petition yet took no rulemaking action for nearly eight years.\textsuperscript{38} The multiple Petitioners in \textit{A Community Voice} then filed a mandamus petition in 2016 in the Court of Appeals for the Ninth Circuit, seeking to compel the EPA to initiate rulemaking sought in the 2009 Petition and issue a final rule.\textsuperscript{39} In granting

\begin{itemize}
\item \textsuperscript{30} \textit{Id.} at 995 (remanding without vacating 2019 Rule and ordering EPA to promulgate new regulations in accordance with Ninth Circuit court’s opinion).
\item \textsuperscript{31} \textit{See generally id.} at 989–95 (exploring issues within this Note).
\item \textsuperscript{32} For a discussion of the relevant facts and procedural history of \textit{A Community Voice}, see \textit{infra} notes 37–52 and accompanying text.
\item \textsuperscript{33} For a discussion of the legal and legislative background of the Ninth Circuit’s decision in \textit{A Community Voice}, see \textit{infra} notes 53–91 and accompanying text.
\item \textsuperscript{34} For a discussion of the legal analysis of \textit{A Community Voice}, see \textit{infra} notes 92–140 and accompanying text.
\item \textsuperscript{35} For a critical analysis of the Ninth Circuit’s opinion in \textit{A Community Voice}, see \textit{infra} notes 141–206 and accompanying text.
\item \textsuperscript{36} For a discussion of the impacts of \textit{A Community Voice}, see \textit{infra} notes 207–22 and accompanying text.
\item \textsuperscript{37} \textit{See A Cmty. Voice v. EPA}, 997 F.3d 983, 985–87 (9th Cir. 2021) (noting several organizations filed petition for rulemaking with EPA).
\item \textsuperscript{38} \textit{See id.} at 987 (recalling EPA’s failure to modify any lead standards directly after 2009 Petition); \textit{see generally In re A Cmty. Voice}, 878 F.3d 779, 790 n.2 (9th Cir. 2017) (Smith, J., dissenting) (noting right to petition for rulemaking under Administrative Procedure Act § 553(e) and that EPA granted 2009 Petition in accordance with Act).
\item \textsuperscript{39} \textit{See In re A Cmty. Voice}, 878 F.3d at 783 (discussing mandamus petition filed in August 2016 which sought to compel EPA to issue final rule after years of allegedly unreasonable delay).
\end{itemize}
the mandamus petition, the Ninth Circuit had to decide two issues: whether the EPA had a duty to act on the 2009 Petition, and if so, whether its almost seven-year delay was unreasonable. The court held that the EPA failed to fulfill its ongoing duty to modify lead standards when necessary and that it failed to respond to rulemaking petitions in a reasonable amount of time under the Administrative Procedure Act (APA). Consequently, the court issued the Writ and ordered the EPA to promulgate a final rule that revised the DLHS and the lead-based paint definition within one year of the court’s decision becoming final. The 2019 Rule left all of the 2001 lead-based paint standards unchanged other than the DLHS, which were lowered from 40 µg/ft² of surface area to 10 µg/ft² for floors and from 250 µg/ft² of surface area to 100 µg/ft² for windowsills (10/100 Standards). Petitioners argued that this lowered standard was still insufficient to protect children’s health because the 10/100 Standards were originally proposed in the 2009 Petition and additional evidence in the ten years afterwards indicated a need for more stringent standards.

In challenging the 2019 Rule, Petitioners argued that the EPA violated the PHA, which was codified as Title IV of the Toxic Substances Control Act (TSCA IV). Petitioners contended that the EPA’s consideration of non-health factors in determining the DLHS was inconsistent with the agency’s statutory duty to set standards protective of human health; Petitioners also criticized the EPA’s unchanged lead-based paint definition in the 2019 Rule as arbitrary and capricious.

40. See id. at 781 (introducing two issues to determine whether to issue Writ).
41. See A Cnty. Voice, 997 F.3d at 987 (outlining Ninth Circuit’s previous opinion in 2017). When a statute does not prescribe a specific timeline for promulgation of a rule, the APA requires that an administrative agency, such as the EPA, complete rulemaking within a “reasonable” timeframe. See Kevin J. Hickey, Cong. Rsch. Serv., R45336, Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking 1–3 (2018) (explaining Congress’s tools and aggrieved persons’ methods to compel agency action under APA). Deference is typically awarded to agencies when interpreting reasonableness; courts will usually require an egregious delay before compelling an agency to issue a proposed or final rule. See id. (listing factors relevant in courts’ inquiries of reasonableness, such as length of delay, importance of regulation at issue, and interests potentially harmed by delay).
42. A Cnty. Voice, 997 F.3d at 987 (expounding upon requirements of Writ).
43. Id. at 985–87 (detailing extent of EPA’s rulemaking and unchanged lead regulations).
44. Id. at 987 (describing Petitioners’ arguments that DLHS remained inadequate).
45. Id. at 986 (outlining basis of Petitioners’ argument).
46. See id. (arguing that TSCA IV requires EPA to lower DLHS thresholds and consider only adverse health effects and that EPA’s failure to update lead-based paint definition and soil-lead hazard standards was unjustified).
In response, the EPA argued that although TSCA IV only explicitly requires identification of lead in relation to adverse human health effects, the agency also had discretion to set standards using non-health factors such as cost, efficacy, and feasibility.\(^{47}\) In addition, the EPA contended it did not change the definition of lead-based paint or the soil-lead hazards in the 2019 Rule because it lacked sufficient data to do so.\(^ {48}\) As a last resort, the EPA argued that setting standards according to health risks was impractical, claiming it needed to consider implementation costs because present scientific knowledge shows there is no safe level of lead in the blood.\(^{49}\)

The Ninth Circuit held that the 2019 Rule violated TSCA IV because neither the statute nor Congress authorized the EPA to look to factors other than adverse health effects when promulgating new standards.\(^ {50}\) Further, the court held that the EPA’s reliance on outdated information and failure to act despite sufficient data violated its statutory duty to update lead-based paint and soil-lead hazard standards and was arbitrary and capricious.\(^ {51}\) The court remanded, but did not vacate, the 2019 Rule, then ordered the EPA to reconsider the DLHS and update the lead-based paint definition, soil-lead hazards, and dust-lead clearance levels.\(^ {52}\)

### III. Lead Legislation & Leading Supreme Court Decisions: The Legal Background of A Community Voice

In the Toxic Substances Control Act of 1976 (TSCA), Congress delegated authority to the EPA to implement rules pertaining to testing, “manufacturing, processing, distribution in commerce, use[,] and disposal of chemicals and mixtures.”\(^ {53}\) Lead is one of six chemical substances that receive significant attention under the TSCA.\(^ {54}\) The TSCA gives the EPA an extensive arsenal of regulatory tools for chemicals that pose an unreasonable risk of injury to human

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47. See A Cmty. Voice, 997 F.3d at 986 (interpreting statutory language to award EPA discretion to set standards by looking to various factors).

48. See id. at 988 (discussing EPA’s position that it lacked sufficient data to engage in rulemaking).

49. See id. at 991–92 (rejecting argument that because lead is harmful in all amounts, EPA could look to extraneous factors).

50. See id. at 988 (finding in favor of Petitioners).

51. See id. (stating EPA’s reliance on inadequate information for nearly twenty years is arbitrary and capricious and violates statutory obligations).

52. See A Cmty. Voice, 997 F.3d at 988 (remanding 2019 Rule and ordering reconsideration of DLHS and dust-lead clearance levels).


54. See id. (identifying six substances that TSCA gives special attention).
or environmental health. Among these controls, the EPA has the authority to require risk of injury warnings to both distributors and consumers. By mandating such warnings, the EPA plays a critical role in safeguarding public health and the environment from potentially harmful chemical exposures.

A. The Residential Lead-Based Paint Hazard Reduction Act of 1992

Congress amended the TSCA through the PHA in 1992, instructing the EPA to promulgate hazard standards that define dangerous levels of lead. Congress’s purpose in amending the TSCA was to “eliminate lead-based paint hazards in all housing as expeditiously as possible.” The PHA drastically changed both the private and public housing industries by instituting mandatory disclosure requirements for all sellers and lessors while imposing a stringent regulatory framework upon federal facilities. In addition, the PHA mobilized the EPA to undertake public education and outreach efforts on state and federal levels.

Congress delegated responsibilities to other administrative agencies under the PHA, including the Department of Health and Human Services (HHS) and the Department of Housing and Urban Development (HUD). The PHA further directed the EPA and HUD to issue joint regulations regarding lead-based paint hazard disclosure requirements applicable to sellers and lessors of pre-1978 housing. Under the PHA, the EPA Administrator must set and update hazard levels to identify “any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil,

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56. Id. at 4 (listing multiple regulatory controls at EPA’s disposal).
57. See id. at 1 (summarizing key responsibilities of EPA under TSCA).
58. See 15 U.S.C. § 2683 (delegating authority to EPA to regulate and identify “lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil”); see also A Cnty. Voice, 977 F.3d at 988 (describing delegation of congressional authority to EPA under PHA, which amended TSCA); see also Toxic Substances Control Act, 15 U.S.C. §§ 2681–2692 (adding Title IV, Lead Exposure Reduction).
59. Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4851a(1) (stating several purposes of chapter).
60. See Schierow, supra note 55, at 9–10 (detailing PHA’s effect on lead-hazard detection and abatement services in private and federal sectors).
61. See id. at 10 (mandating that EPA establish renovation, education, certification, and detection programs for lead-based paint hazards and activities).
62. See id. at 10–11 (noting directive to HHS to research sources of childhood lead exposure, and PHA’s impact on HUD programs).
63. Toxic Substances Control Act (TSCA) and Federal Facilities, supra note 53 (specifying required disclosures of known lead-based paint hazards in “target housing” that sellers and lessors must supply to prospective purchasers and lessees).
lead-contaminated paint . . . that would result in adverse human health effects as established by the Administrator under this subchapter.”

Section 2687 of the statute authorizes the Administrator to amend regulations promulgated pursuant to TSCA IV “from time to time as necessary.”

B. Statutory Interpretation of TSCA IV

Other definitional provisions of TSCA IV reference harm to human health only and do not mention other factors such as economic feasibility. In A Community Voice, the Ninth Circuit grappled with issues of statutory interpretation within TSCA IV; more specifically, the Court explored what it deemed the “identification versus implementation dichotomy” in TSCA IV. Essentially, TSCA IV contains provisions that pertain to identifying and defining dangerous levels of lead, distinct from provisions that allow the Administrator to account for practical considerations such as efficacy when implementing lead standards.

The Supreme Court’s decision in Whitman v. American Trucking Associations, Inc dealt with the identification–implementation dichotomy in the context of the Clean Air Act (CAA). In Whitman, the Supreme Court held that Section 109(b)(1) of the CAA did not permit the EPA to consider non-health factors when setting clean air standards. Section 109(b)(1) directed the EPA to set National Ambient Air Quality Standards (NAAQS) which are “requisite to protect the public health” with an “adequate margin of safety.”

66. See, e.g., 15 U.S.C. § 2681(11) (defining lead-contaminated dust as lead-dust above threshold of levels established by EPA Administrator that poses threats of adverse health effects in pregnant women or children); see also A Cmty. Voice v. EPA, 997 F.3d 983, 990 (9th Cir. 2021) (identifying separate provisions of TSCA IV referencing harm to health but not economic or market factors).
67. See A Cmty. Voice, 977 F.3d at 990–92 (noting provisions of TSCA IV identify health hazards and implement standards separately).
68. See id. at 990 (citing separate provision that expressly authorizes EPA to account for reliability, efficacy, and safety).
69. 551 U.S. 457, 465–68 (2001) (analyzing whether statutory text of CAA Section 109 confers authority to EPA to consider costs when setting National Ambient Air Quality Standards (NAAQS)).
70. See id. at 467–68 (concluding language of Section 109 does not unambiguously give EPA discretion to decide whether implementation costs should be factored into setting NAAQS because other provisions expressly grant this authority).
71. Id. at 468–69 (holding that EPA does not have power to consider implementation costs).
72. Id. at 465, 468–69 (inferring that Congress would not leave inclusion of non-health factors up to agency’s discretion).
The majority opinion rejected the EPA’s argument that exclusion of practical considerations when setting NAAQS was too stringent because other provisions of the CAA explicitly authorize the EPA to consider costs during implementation. Implementation costs, the opinion insisted, are so “indirectly related to public health and so full of potential for canceling the conclusions drawn from direct health effects” that if Congress were to grant the EPA the power to consider them, it would have expressly mentioned so in Section 109. Another important takeaway of Whitman is that Congress does not “hide elephants in mouseholes”; in other words, courts should not infer broad delegations of statutory authority to agencies unless Congress speaks clearly.

C. The Administrative Procedure Act and Legal Remedies for Agency Inaction

The Administrative Procedure Act (APA) governs rulemaking by administrative agencies as well as judicial review of agency action. Section 702 of the APA entitles an individual to judicial review when that individual either suffers a “legal wrong because of agency action” or is “adversely affected or aggrieved by agency action” within the meaning of the statute at hand. Section 706(1) requires an aggrieved plaintiff seeking to compel agency action to show (1) that the agency action they seek to compel is discrete, and (2) that the agency action is compulsory. Discrete agency actions subject to judicial review include a “failure to act on a petition for rulemaking,” a “failure to undertake a required rulemaking,” and a “failure to issue a final rule.” Courts have found that satisfying the second requirement of Section 706(1), otherwise known as the

73. Id. at 467 (listing provisions that permit EPA Administrator to consider costs).
74. Whitman, 531 U.S. at 468–69 (concluding EPA cannot consider implementation costs because Congress omits any mention of them in CAA Sections 108 and 109).
76. See Kevin J. Hickey, Cong. Rsch. Surv., R45336, Agency Delay: Congressional and Judicial Means to Expedite Agency Rulemaking 1, 7 (2018) (summarizing APA’s rulemaking procedures and 5 U.S.C. § 702, which create private right of action to compel agency action “unlawfully withheld or unreasonably delayed”).
78. Hickey, supra note 76, at 8 (discussing elements litigants must demonstrate under 5 U.S.C. § 706(1)).
79. See id. (classifying types of discrete agency actions referenced in 5 U.S.C. § 706(1)).
nondiscretionary requirement, requires a statute or regulation to contain clear language that necessitates an agency to issue a specific rule or take some other discrete action.\textsuperscript{80}

Judicial review of an administrative agency’s inaction is only possible after the aggrieved individual files a rulemaking petition with the agency and the agency either rejects the petition or fails to respond within a reasonable time.\textsuperscript{81} Typically, courts defer to agency judgment when analyzing whether an agency’s delayed response time constitutes unreasonable delay.\textsuperscript{82} The Supreme Court’s \textit{Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance Co}\textsuperscript{83} decision is particularly relevant, given the Ninth Circuit’s reliance on its reasoning in \textit{A Community Voice}.\textsuperscript{84} The Ninth Circuit applied \textit{State Farm} both directly and indirectly through its reliance on environmental precedent in \textit{Greater Yellowstone Coalition, Inc. v. Servheen}.\textsuperscript{85} In \textit{State Farm}, the Court employed the arbitrary and capricious standard of review when examining the National Highway Traffic Safety Administration’s (NHTSA) decision to rescind a regulation.\textsuperscript{86} Under the arbitrary and capricious standard, reviewing should set aside agency rules that are irrational and without evidence-backed justification, consider irrelevant factors, and are not within the scope of Congress’s statutory grant of authority to the agency.\textsuperscript{87}

\textit{State Farm} helps courts determine what constitutes a sufficient explanation for deregulation or agency inaction.\textsuperscript{88} The \textit{State Farm}
Court held that uncertainty is no excuse for agency inaction; agencies must provide some explanation other than uncertainty when circumventing statutory duties. The Court recognized that sometimes, direct evidence from the administrative record may be lacking, and agencies must exercise their judgment to resolve regulatory issues despite uncertainties. The phrase “substantial uncertainty,” however, cannot be used as a broad justification for action or inaction; rather, the agency must explain the available evidence and show a “rational connection between the facts found and the choice made.”

IV. **Clean Up Your Act, EPA: Judicial Review of the 2019 Rule**

The Court of Appeals for the Ninth Circuit reviewed the EPA’s 2019 Rule under its exclusive jurisdiction to conduct judicial review of final rules granted by TSCA IV. The EPA’s two final agency actions in the 2019 Rule were the promulgation of the revised DLHS 10/100 Standards and the decision not to change “the current definition of [lead-based paint] because insufficient information exists to support such a change at this time.” The court then identified two key TSCA IV provisions subject to statutory interpretation that would establish the EPA’s statutory obligations. The first provision, Section 2683, instructs the EPA to “promulgate regulations which shall identify . . . lead-based paint hazards, lead-contaminated dust, and lead-contaminated soil” under the PHA. The second provision, Section 2681(10), defines “lead-based paint hazard” as any condition causing lead exposure from contaminated dust, soil, or paint “that would result in adverse human health effects as established by the Administrator under this subchapter.”

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89. *State Farm*, 463 U.S. at 52 (emphasizing that agencies cannot invoke “substantial uncertainty” and must instead demonstrate rational connection between evidence and agency’s choice).

90. *Id.* (clarifying that lack of evidence in administrative record to support agency’s conclusion does not always mean agency acted arbitrarily or capriciously).

91. *Id.* (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 158, 168 (1962)) (requiring agencies to offer reasonable explanation rather than recitation of “substantial uncertainty”).


93. Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 84 Fed. Reg. 32632, 32632 (July 9, 2019) (presenting EPA’s actions in this Rule); see also 15 U.S.C. § 2681(9) (defining lead-based paint by paint’s lead quantity or other surface coatings).

94. See A Cmty. Voice, 997 F.3d at 986 (noting two TSCA IV provisions and parties’ differing interpretations of EPA’s duties under provisions).

95. 15 U.S.C. § 2683 (mandating EPA Administrator to promulgate regulations that identify lead-based paint hazards according to PHA).

The Ninth Circuit confronted four issues relating to the EPA’s statutory interpretation of TSCA IV: (1) whether the EPA violated TSCA IV by considering non-health factors when promulgating new DLHS in the 2019 Rule, (2) whether the EPA’s failure to update the definition of lead-based paint in the 2019 Rule violated TSCA IV and whether its justification for inaction was arbitrary and capricious, (3) whether the EPA’s failure to update the soil-lead hazard standards violated TSCA IV, and (4) whether the EPA had to reconsider dust-lead clearance levels when it lowered the DLHS in the 2019 Rule.97 With respect to the first, second, and third issues, the court held that the EPA violated its statutory duties under TSCA IV because the current DLHS, lead-based paint definition, and soil-lead hazards did not identify every level of lead that leads to adverse human health effects.98 The court also held that the EPA’s justification for leaving the definition of lead-based paint unchanged in the 2019 Rule was arbitrary and capricious.99 Lastly, the court resolved the fourth issue by directing the EPA to readjust the dust-clearance levels in relation to the DLHS.100 Based on its resolution of these issues, the Ninth Circuit remanded the 2019 Rule without vacatur: a judicial remedy that preserved the DLHS but mandated the EPA to promulgate new lead-based paint hazard standards.101

A. Analysis of EPA’s Treatment of DLHS in 2019 Rule

The Ninth Circuit began its review by analyzing whether the EPA complied with its statutory duties under TSCA IV when it lowered the DLHS threshold levels in the 2019 Rule.102 The court observed that the DLHS serve to identify levels of lead-contaminated dust in residential dwellings which “pose a threat of adverse health effects in pregnant women or young children.”103 Although Petitioners and the EPA agreed that the 10/100 Standards in the 2019 Rule would inevitably harm children’s health, the EPA nevertheless

98. Id. at 986 (holding that all three lead-based paint hazards violate TSCA IV).
99. Id. (holding that EPA’s explanation for continually refusing to update lead-based paint definition is arbitrary and capricious).
100. Id. at 995 (identifying interrelationship between dust-lead clearance levels and DLHS and directing EPA to consider former in conjunction with latter).
101. Id. (remanding 2019 Rule without vacatur).
103. Id. at 989 (noting definition of lead-contaminated dust under TSCA IV and how DLHS identify dangerous concentrations of dust-lead on floors and windowsills).
argued TSCA IV Section 2681(10) afforded the Administrator broad discretion to consider factors other than health in setting levels.\textsuperscript{104}

The Ninth Circuit rejected the EPA’s interpretation of Section 2681(10), reasoning that neither Section 2681(10) nor other definitional provisions of lead-based paint hazards in Section 2681 mention factors other than harm to human health.\textsuperscript{105} In support of this, the court argued that because the language of Section 2683 instructs the Administrator to “identify” dangerous levels of lead, and Congress excluded terms referencing economic or efficacy considerations when defining lead-based paint hazards in Section 2681, the EPA could consider only hazards to health when setting the DLHS.\textsuperscript{106} In other words, the EPA’s duty arising under Sections 2683 and 2681(10) was solely to identify standards to protect human health.\textsuperscript{107}

Next, the court distinguished the identification of lead-based paint hazards to human health from implementing hazard standards.\textsuperscript{108} Observing that a separate provision, Section 2682(a)(1), expressly allows the Administrator to consider “reliability, effectiveness, and safety” when promulgating regulations about lead-based paint activities and certification, the court inferred that TSCA IV purposefully dealt with identification and implementation separately.\textsuperscript{109} Citing the Supreme Court’s reasoning in \textit{Whitman} as support, the Ninth Circuit concluded that TSCA IV’s identification-implementation dichotomy barred the EPA from considering costs or efficacy when setting the DLHS in the 2019 Rule.\textsuperscript{110}

The Ninth Circuit focused on the \textit{Whitman} Court’s interpretation of CAA Section 7409(b)(1), which instructed the EPA to set air quality standards at levels “the attainment and maintenance of which . . . are requisite to protect the public health” with “an adequate margin of safety.”\textsuperscript{111} The court drew parallels between the CAA and

\begin{footnotes}
\footnote{104. \textit{Id.} at 989–90 (claiming that § 2681(10) phrase “as established by the Administrator” modifies previous phrase “would result in adverse human health effects”). For a discussion of the dissent’s grammatical analysis of § 2681(10), see \textit{infra} notes 152-58 and accompanying text.}
\footnote{105. \textit{A Cnty. Voice}, 997 F.3d at 990 (noting absence of economic or market factors throughout definitional provisions of harm in § 2681).}
\footnote{106. \textit{Id.} at 990–92 (deducing that combination of § 2683 and definitions of hazards in § 2681 precluded EPA from considering non-health factors).}
\footnote{107. \textit{Id.} at 990 (reiterating EPA’s statutory duty).}
\footnote{108. \textit{Id.} (introducing identification-implementation analysis of TSCA IV).}
\footnote{109. \textit{Id.} (referencing § 2682(a)(1) to demonstrate how TSCA IV separates identification provisions from implementation provisions).}
\footnote{110. \textit{A Cnty. Voice}, 997 F.3d at 991 (citing \textit{Whitman v. Am. Trucking Ass’ns}, 531 U.S. 457, 468 (2001)) (using CAA identification provision and Supreme Court’s reasoning in \textit{Whitman} in analyzing EPA’s duties under TSCA IV).}
\footnote{111. \textit{Id.} (quoting 42 U.S.C. § 7409(b)(1)) (highlighting relevant health-related language of CAA provision construed in \textit{Whitman}).}
\end{footnotes}
TSCA IV, emphasizing Whitman’s holding that Section 7409(b)(1) does not give the EPA the power to factor implementation costs into setting clean air standards.\textsuperscript{112} Indeed, the court noted, other CAA provisions explicitly allowed the EPA to consider achievability and cost.\textsuperscript{113} Furthermore, the Ninth Circuit held that Congress did not clearly delegate authority to the EPA in TSCA IV, which would enable the EPA to consider extraneous factors in setting the DLHS at a level insufficient to protect health.\textsuperscript{114} Referencing the Whitman Court’s warning—Congress does not “hide elephants in mouseholes”—the Ninth Circuit reasoned that if the EPA could consider implementation costs when identifying hazards, Congress would have expressly said so in the statute.\textsuperscript{115} In mandating the EPA’s reconsideration of the DLHS rather than vacating it, the Ninth Circuit noted that the 10/100 Standards in the 2019 Rule constituted “some improvement.”\textsuperscript{116}

B. Analysis of EPA’s Decision to Leave Definition of Lead-Based Paint Unchanged in 2019 Rule

The Ninth Circuit also analyzed whether the EPA’s failure to update the lead-based paint definition in the 2019 Rule violated TSCA IV, and if so, whether the EPA’s explanation for not changing it since 1992 rendered the inaction arbitrary and capricious.\textsuperscript{117} When the Ninth Circuit issued the 2017 Writ, it held that the EPA’s lead-based paint definition was insufficient given modern science, that the need for rulemaking was urgent, and that the EPA had an “ongoing” statutory duty under TSCA IV Section 2687 to amend initial standards as necessary.\textsuperscript{118} Thus, the court ultimately held that by leaving the definition of lead-based paint unchanged in the 2019 Rule, the EPA violated its ongoing statutory duty under TSCA IV.\textsuperscript{119}

\textsuperscript{112}. See id. at 991 (differentiating between implementation and identification provisions in CAA).
\textsuperscript{113}. See id. (comparing identification-implementation dichotomy illustrated in Whitman with TSCA IV).
\textsuperscript{114}. See id. at 992 (concluding statute did not clearly authorize EPA to consider non-health factors when lowering DLHS in 2019 Rule).
\textsuperscript{115}. A Cnty. Voice, 997 F.3d at 992 (acknowledging EPA’s interpretation of its authority runs contrary to congressional intent and TSCA IV’s statutory language).
\textsuperscript{116}. Id. (ordering reconsideration of DLHS).
\textsuperscript{117}. Id. at 992-94 (analyzing EPA’s actions regarding lead-based paint definition).
\textsuperscript{118}. See 15 U.S.C. § 2687 (authorizing amendments of lead-based paint hazard standards by Administrator as necessary); see also A Cnty. Voice, 997 F.3d at 992-93 (citing In re A Cnty. Voice, 878 F.3d 779, 782, 785, 788, 792 (9th Cir. 2017)) (recalling Ninth Circuit’s grounds for issuing Writ in 2017).
\textsuperscript{119}. A Cnty. Voice, 997 F.3d at 993-94 (holding EPA violated TSCA IV by failing to modify initial standards when necessary to further Congress’s intent of eliminating lead-based paint hazards).
Relying on the Supreme Court’s *State Farm* opinion and circuit precedent in *Servheen*, the Ninth Circuit held that the EPA’s justification for inaction was arbitrary and capricious.\(^{120}\) Even so, the EPA supported its explanation for leaving the definition of lead-based paint as is by citing gaps in data and scientific uncertainty.\(^{121}\) Applying *State Farm*’s ruling that agencies cannot invoke “substantial uncertainty” to justify regulatory inaction or evasion of statutory duties, the court found no merit in the EPA’s justification.\(^{122}\) Moreover, the court cited *Servheen*, which applied *State Farm* to an environmental context, to support declaring the EPA’s inaction and lack of lead rulemaking arbitrary and capricious.\(^{123}\)

C. Analysis of EPA’s Decision to Leave Soil-Lead Hazard Standards Unchanged and Out of 2019 Rule

The Ninth Circuit next addressed the EPA’s inaction concerning the soil-lead hazard standards, which the EPA last updated in 2001.\(^ {124}\) The court cited two reasons the EPA’s decision to leave the soil-lead hazard standards intact violated TSCA IV: the EPA failed to (1) identify all levels of lead adverse to human health and (2) amend the standards when necessary.\(^ {125}\) In particular, the court pointed out that although “no safe level of lead in blood” exists, the EPA’s soil-lead hazard standards permitted up to five percent of children to develop a BLL above 10 µg/dL.\(^ {126}\) Because those current standards allowed children to develop a BLL harmful to their health, the court held that the existing soil-lead hazard standards violated TSCA IV.\(^ {127}\) The EPA’s principal justification for excluding the soil-lead hazard standards from the 2019 Rule was that the standards were not within the scope of the 2009 Petition for rulemaking; the

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\(^{120}\) *Id.* (applying Supreme Court and circuit precedent to conclude that EPA’s inaction was arbitrary and capricious).

\(^{121}\) *Id.* at 993 (claiming inaction due to gaps in scientific literature).

\(^{122}\) *Id.* (quoting Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983)) (noting Supreme Court’s contention that policymaking must account for some uncertainty, but that does not signify it is sufficient for agency to merely recite “substantial uncertainty” to justify its actions).

\(^{123}\) *Id.* (citing Greater Yellowstone Coal., Inc. v. Servheen, 665 F.3d 1015, 1019, 1028 (9th Cir. 2011)) (recalling U.S. Fish and Wildlife Services’ scientific uncertainty justification for delisting grizzly bears from “threatened” species list as arbitrary and capricious).

\(^{124}\) *A Cmty. Voice*, 997 F.3d at 994 (addressing current soil-lead hazard standards, which remained unchanged since 2001).

\(^{125}\) *Id.* (citing two ways EPA violated statutory duties).

\(^{126}\) *Id.* (identifying insufficiency of current soil-lead hazard standards to protect children’s health).

\(^{127}\) *Id.* (concluding that EPA’s failure to identify all levels of lead dangerous to health in soil-lead hazards violated TSCA IV).
EPA argued the Writ did not impose an obligation to reexamine the standards. 128 The court rejected this rationale—opting to apply its analysis of the EPA’s inaction regarding the lead-based paint definition—holding that the EPA’s failure to update the soil-lead hazard standards neglected its ongoing statutory duty under TSCA IV to amend and promulgate standards to protect human health. 129

D. Analysis of Dust-Lead Clearance Levels

Lastly, the Ninth Circuit concluded that when the EPA lowered the DLHS in the 2019 Rule, the agency also needed to reconsider the dust-lead clearance levels because of their interrelation. 130 Put differently, dust-lead clearance levels relate to abatement activities, of which TSCA IV Section 2682(a)(1) — an implementation rather than identification provision — requires the EPA to promulgate regulations governing those activities. 131 To emphasize the direct relationship between the two standards, the Ninth Circuit indicated that the EPA set the original 2001 DLHS and dust-lead clearance levels at identical values of 40 µg/ft² for floors and 250 µg/ft² for windowsills. 132 As a result, the court concluded that the EPA ignored the relationship between the two when it lowered the DLHS to the 10/100 Standards but left the dust-lead clearance levels at 40/250. 133 Further, the court recognized that because dust-lead clearance levels dealt with implementation, the EPA had more discretion to consider reliability and effectiveness. 134 Consequently, the court directed the EPA to reconsider the DLHS and dust-lead clearance levels in the same rulemaking proceeding. 135

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128. See id. (justifying agency inaction by referring to 2009 Petition’s scope).
129. A Cmty. Voice, 997 F.3d at 994 (finding EPA was statutorily obligated to update standards as necessary to further Congress’s intent of protecting human health).
130. Id. at 995 (highlighting interrelation of DLHS and dust-lead clearance levels required EPA to reconsider both in 2019 Rule).
131. Id. (explaining dust-lead clearance levels were abatement regulations and thus dealt with implementation).
132. Id. (mentioning initially identical DLHS and dust-lead clearance levels in 2001).
133. See id. (emphasizing correlation between two standards and 2019 Rule’s exclusion of dust-lead clearance levels).
134. A Cmty. Voice, 997 F.3d at 995 (clarifying EPA’s authority to use non-health factors in reconsidering dust-lead clearance levels).
135. Id. (ordering reconsideration of DLHS and dust-lead clearance levels in same proceeding).
E. Dissenting Opinion

The dissent in *A Community Voice* strongly disagreed with the majority’s holding and resolution of the four issues. The dissent critiqued that the majority “cherry-picked” and misconstrued TSCA IV, ignored statutory provisions in the TSCA that allowed the EPA to consider non-health factors, and erred in its judicial review. Looking at the statutory schemes of the TSCA and PHA holistically, the dissent charged that the EPA properly exercised its discretion when it considered factors other than health and addressed only the DLHS in the 2019 Rule. Notably, the dissenting opinion emphasized that 15 U.S.C. § 2601(c) in TSCA Subchapter I (TSCA I), which states the TSCA’s policies and goals, expressly authorizes the EPA to look to “environmental, economic, and social impact[s]” when taking any action under the TSCA. While the majority believed TSCA IV’s identification-implementation to be dispositive, the dissent argued that contextual “enabling statutes” such as Section 2601(c) afforded the EPA broad discretion in setting lead-based paint hazard standards.

V. Peeling Back the Layers: A Critical Analysis of the Ninth Circuit’s Reasoning in *A Community Voice*

In reviewing the 2019 Rule in *A Community Voice*, the Ninth Circuit provided a sound interpretation of the EPA’s statutory duties under TSCA IV and reached a conclusion consistent with Congress’s intent to identify lead-based paint hazards that function to protect children’s health.

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136. See id. at 995–1010 (Smith, J., dissenting) (writing at-length why petition for review of 2019 Rule should be denied and EPA’s actions upheld).

137. See id. at 996–1004, 1008–10 (Smith, J., dissenting) (charging majority’s narrow statutory interpretation of EPA’s duties “cherry-picked” TSCA IV and claiming applicable standard of review was ignored).

138. See id. at 999, 1010 (Smith, J., dissenting) (contending EPA has wide latitude to consider non-health factors and that revision of DLHS only did not violate TSCA IV).

139. See 15 U.S.C. § 2601(c) (stating Congress’s intent that EPA Administrator shall consider environmental, social, and social impact when taking action); see also *A Cmty. Voice*, 997 F.3d at 997, 999–1000 (Smith, J., dissenting) (calling attention to statutory language of TSCA in its entirety and referencing relevance of § 2601(c)).

140. See *A Cmty. Voice*, 997 F.3d at 998–1000 (Smith, J., dissenting) (reading statutory schemes of TSCA and PHA to provide EPA with discretion in identification of lead hazards); see also *Enabling Statute*, BALLOTPEDEA, https://ballotpedia.org/Enabling_statute (last visited Mar. 6, 2024) (defining enabling statute in administrative law context as legislation which establishes government agency’s powers).

based paint regulatory inaction, encouraged federal policymaking for the benefit of young children, and promoted the PHA’s primary goal: to eliminate lead-based paint hazards “in all housing as expeditiously as possible.” The majority opinion, however, missed an opportunity to expound upon its reasoning for certain statutory interpretations. While a court is not required to elaborate on why it selected one canon of statutory interpretation over another, the dissent’s robust analysis suggested that the majority could have considered another plausible interpretation of TSCA IV to bolster its reasoning.

In addition, the majority failed to engage in a discussion of the application of 15 U.S.C. § 2601(c). Further, the majority’s zeal to remedy the EPA’s delayed rulemaking may have misguided its interpretation that the EPA was statutorily obligated to revise the soil-lead hazard standards in the 2019 Rule. This conclusion remains in tension with the applicable standard of review proffered by the dissent, which suggested a high degree of judicial deference to administrative agency decisions.

A. The Ninth Circuit’s Analysis of TSCA IV Section 2681(10)

When interpreting Section 2681(10), the Ninth Circuit rejected the EPA’s reading of the statute on the grounds that a “natural reading” concluded otherwise and supported Petitioners’ interpretation instead. Recall that the EPA argued that “as established by how A Community Voice prompted EPA to “undertake a major shift in its approach” in regulating lead-based paint hazards).


143. See id. at 996, 998–99, 1005–006 (Smith, J., dissenting) (criticizing majority opinion for ignoring rules of statutory construction and drawing flawed comparisons to CAA). For a further discussion of the dissenting opinion in A Community Voice, see supra notes 136–40 and accompanying text.

144. See id. at 997–1010 (Smith, J., dissenting) (interpreting EPA’s statutory duties using overall scheme of TSCA, other legislative documents, and sister circuit cases).

145. See id. at 997, 999–1000 (Smith, J., dissenting) (noting majority’s disregard of TSCA I § 2601(c) and sister circuit that applied § 2601(c) to TSCA IV).

146. See id. at 1009–10 (Smith, J., dissenting) (implying that majority hastily concluded exclusion of soil-lead hazards from 2019 Rule violated TSCA IV).

147. See A Cmty. Voice, 997 F.3d at 1009–10 (Smith, J., dissenting) (citing Compassion Over Killing v. FDA, 849 F.3d 849, 854 (9th Cir. 2017)) (arguing EPA’s decision to not address soil-lead hazard standards was not arbitrary and capricious and ongoing duty was incorrect, thus review should have been limited to scope of 2009 Petition and “highly deferential” (quoting Massachusetts v. EPA, 549 U.S. 497, 527–28 (2007)); see also Shapiro, supra note 81, at 1816–19 (discussing extremely deferential judicial review and general refusal to attack agency inaction).

148. See A Cmty. Voice, 997 F.3d at 990 (concluding that § 2681(10) contained no directive to EPA to consider non-health factors).
the Administrator” modified the previous phrase, “would result in adverse human health effects.” Hence, the EPA claimed it had broad discretion to set the DLHS through consideration of non-health factors. The majority’s “natural reading,” on the other hand, reasoned that no such discretion existed due to the absence of non-health considerations in Section 2681(10) and other definitional provisions of lead-based paint hazards in TSCA IV. As the dissent indicated, however, this reading may have overlooked the “rule of last antecedent.”

The rule of last antecedent is a doctrine of statutory interpretation that states “a pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent.” Courts decide to apply the rule of last antecedent to the directly preceding phrase when a list of terms is followed by a limiting clause containing a modifier. Using the rule of last antecedent to interpret Section 2681(10), the phrase “as established by the Administrator” modifies the preceding phrase “that would result in adverse human health effects.” Thus, the EPA could exercise discretion when establishing lead-based paint hazards that cause harm to health under this interpretation. Similarly, Section 2681(12) defines lead-contaminated soil as “contain[ing] lead at or in excess of the levels determined to be hazardous to human health by the Administrator . . . .” Using the rule of last antecedent, “determined to be hazardous to human health by the Administrator” modifies “levels,”

149. For a summary of the EPA’s position and interpretation of § 2681(10), see supra note 104 and accompanying text.
150. See A Cmty. Voice, 997 F.3d at 989–90 (claiming § 2681(10) affords EPA broad discretion).
151. See id. at 990 (providing explanation for preferring Petitioners’ interpretation over EPA’s).
152. See id. at 1001–02 (Smith, J., dissenting) (discussing rule of last antecedent and applying to § 2681(10) to demonstrate that Congress intended EPA to use discretion and consider non-health factors). For a further discussion of the rule of last antecedent, see infra notes 153–63 and accompanying text.
154. See, e.g., Lockhart v. United States, 577 U.S. 347, 351 (2016) (articulating Supreme Court’s tendency to interpret statutes with limiting clause following list of terms or phrases using rule of last antecedent); see also A Cmty. Voice, 997 F.3d at 1001–02 (Smith, J., dissenting) (describing rule of last antecedent as application of modifier appearing at end of list to terms only directly before it).
156. Id. at 1002–03 (applying rule of last antecedent to conclude that Congress delegated EPA discretion to determine levels resulting in adverse human health effects).
yielding an interpretation that the EPA may decide soil-lead levels hazardous to health. 158

Canons of construction act as tools for courts, not binding rules, and despite the slightly misleading name, the rule of last antecedent is no exception. 159 In A Community Voice, instead of giving significant weight to syntax and the phrase “as established by the Administrator” in Section 2681(10), it appears that the majority chose to employ the equally plausible canon of expressio unius est exclusio alterius: express mention of one thing implies the exclusion of others. 160 Analyzing the statutory language under this canon, the majority reasonably concluded that the identification of lead-based paint hazards excluded considerations of feasibility and efficacy. 161 Because Congress mentioned only adverse health effects, the EPA did not have the discretion to set hazard standards based on other criteria. 162 Moreover, the majority’s decision to not apply the rule of last antecedent was a strategic one; the rule of last antecedent and other strict textualist approaches to statutory interpretation ignore policy considerations entirely. 163

Focusing on the administrative record — particularly the lack of rulemaking since 2001 — and the scientific evidence of lead’s harmful effects on children, the Ninth Circuit soundly concluded

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158. See A Cnty. Voice, 997 F.3d at 1002-03 (Smith, J., dissenting) (quoting 15 U.S.C. § 2681(12)) (showing last antecedent supports EPA’s argument regarding lead-contaminated soil levels).

159. See Canons of Construction, LEGAL INFO. INST., https://www.law.cornell.edu/wex/canons_of_construction (last visited Oct. 29, 2023) (advising that canons only guide textual interpretation and are not binding rules); see also VALERIE C. BRANNON, CONG. Rsch. Serv., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS AND TRENDS 29-30 (2023) (introducing rule of last antecedent as favored semantic canon of textualists and illustrating disputes that arise when courts decide which canon of construction to apply).

160. See Expressio Unius Est Exclusio Alterius, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining expressio unius est exclusio alterius); see also A Cnty. Voice, 997 F.3d at 1002-03 (Smith, J., dissenting) (exemplifying majority’s use of expressio unius est exclusio alterius).

161. See A Cnty. Voice, 997 F.3d at 990 (noting omission of non-health factors from provisions).

162. See generally Brannon, supra note 159, at 51-52 (supporting how under expressio unius est exclusio alterius, “items not mentioned” are deliberately excluded from consideration); see, e.g., 15 U.S.C. § 2681(10) (limiting definition of lead-based paint to any condition causing lead exposure from dust, soil, or paint “that would result in adverse human health effects”).

163. See generally Brannon, supra note 159, at 47-48 (explaining shortcomings of strict textualism and ways that policy considerations and practical consequences of certain statutory interpretations influence courts’ decisions). For a further discussion of the majority’s application of expressio unius est exclusio alterius, see supra notes 148-62 and accompanying text.
that the EPA’s inaction and interpretation of its own discretion violated TSCA IV.164

B. Applicability of TSCA I Section 2601(c) to Promulgation of DLHS in 2019 Rule

In holding that the EPA erred in promulgating the new DLHS by considering non-health factors, the Ninth Circuit may have overlooked the potential relevance of TSCA I Section 2601(c).165 Section 2601(c) prefaced Congress’s intent in enacting the TSCA that the “Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter.”166 A plain reading of Section 2601(c) indicates that it is not limited to TSCA I, for it applies to actions taken under this “chapter,” rather than the narrower “subchapter.”167 Sister circuits have applied Section 2601(c) throughout the TSCA; notably, the D.C. Circuit applied the provision to TSCA IV Section 2682.168 Although the majority excludes Section 2601(c) from its analysis, its interpretations of the identification-implementation dichotomy in TSCA IV, PHA’s stated purposes, and EPA statutory obligations were neither erroneous nor contrary to congressional intent.169 The Ninth Circuit’s holding that the EPA was required to identify a lower DLHS than the 10/100 Standards promulgated in the 2019 Rule is consistent with Congress’s expressed purposes in 42 U.S.C. § 4851a.170

164. See generally id. at 47 (suggesting majority in A Community Voice rejected EPA’s interpretation of § 2681(10) because it would unreasonably expand agency authority).

165. See A Cmty. Voice, 997 F.3d at 999–1001 (Smith, J., dissenting) (arguing that majority opinion ignored § 2601(c)’s application when discerning congressional intent without explanation).

166. 15 U.S.C. § 2601(c) (announcing Congress’s intent).

167. See A Cmty. Voice, 997 F.3d at 1000 (Smith, J., dissenting) (posing Congress did not intend to limit application of § 2601(c) to Title I subchapter only).

168. See Nat’l Ass’n of Home Builders v. EPA, 682 F.3d 1032, 1039 (D.C. Cir. 2012) (concluding that under § 2601(c) EPA could consider costs but was not required to conduct cost-benefit analysis).

169. See 42 U.S.C. § 4851a(1), (3), (7) (setting out several purposes). See generally A Cmty. Voice, 997 F.3d at 997 (Smith, J., dissenting) (posing TSCA IV’s statutory scheme permits EPA’s consideration of non-health factors for implementation of remedial measures).

170. See 42 U.S.C. § 4851a(6) (seeking to reduce threat of childhood lead poisoning in federally-owned housing); see also Env’t L. Inst., OPPORTUNITIES FOR ADVANCING ENVIRONMENTAL JUSTICE: AN ANALYSIS OF U.S. EPA STATUTORY AUTHORITIES 229 (2001) (reiterating lead poisoning’s serious threat to children of color and significance of EPA standard-setting which promotes environmental justice and reflects current scientific understandings of elevated BLLS).
As a type of “harm-based standard,” lead-based paint hazard standards like the DLHS identify a desired endpoint of environmental quality; implementation measures serve to achieve the endpoint. Several provisions of Section 4851a contain language that differentiates the EPA’s duty to identify lead paint hazards from its duty to implement effective methods to eliminate them. The purpose in Section 4851(a)(7), “to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards,” demonstrates this delineation. Repeated use of the phrase “evaluate and reduce” also suggests two distinct duties.

Thus, the EPA’s consideration of Section 2601(c) and other non-health factors would be proper in the promulgation of implementation regulations, but not for identifying and defining the levels at which lead in dust, paint, and soil become hazardous to health. Moreover, Congress did not aim to expand agency discretion in its promulgation of Section 2601(c); its primary purpose was to prompt the EPA to equitably distribute environmental benefits and consider the effects of TSCA actions on children, low-income communities, and communities of color. Consequently, by ordering revisitation of all lead-based paint hazard standards, the Ninth Circuit mandates that the EPA take action that aligns with the congressional purpose of Section 2601(c).

C. Scope of Judicial Review

Because the ferocity of judicial review under Section 706 of the APA varies among the courts of appeals, different approaches to the arbitrary and capricious standard of review result. In contrast to

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171. See Env’t L. Inst., supra note 170, at 9 (defining harm-based standards and how EPA uses identified levels to inform determination of particular control measures).

172. See, e.g., 42 U.S.C. § 4851a(3) (distinguishing evaluation from reduction).


174. See id. (using language suggestive of identification-implementation dichotomy).

175. See, e.g., 42 U.S.C. § 4851a(3),(6) (focusing primarily on reducing threat of childhood lead poisoning). For a further discussion of the delineation between identification and implementation, see supra notes 169-74.

176. See Env’t L. Inst., supra note 170, at 224 (emphasizing principal policies of TSCA, namely that social justice concerns guide EPA’s decisions).

177. See generally Ludwig, supra note 27 (highlighting necessity for revision of lead-based paint hazard standards and environmental justice).

courts’ highly deferential approach in the early twentieth century, modern arbitrariness review takes a “hard look” at the rationality behind agency decision-making.\textsuperscript{179} \textit{State Farm} solidified the hard look review’s application to informal rulemaking; however, the \textit{State Farm} Court never defined the criteria for a satisfactory explanation of an agency rule.\textsuperscript{180} Hard look review, then, invites inconsistency into judicial review by granting judges discretion to vary their level of scrutiny according to their ideologies.\textsuperscript{181}

In \textit{A Community Voice}, the Ninth Circuit gave a vague and incoherent analysis of the EPA’s exclusion of the soil-lead hazard standards from the 2019 Rule.\textsuperscript{182} The court did not review the EPA’s inaction and “scientific uncertainty” explanation under the arbitrary and capricious standard.\textsuperscript{183} Instead, the court hastily concluded that the EPA’s failure to update the soil-lead hazard standards for twenty years violated TSCA IV and that uncertainty did not permit the EPA’s inaction.\textsuperscript{184} This conclusion, however, does not comport with the arbitrary and capricious standard of review under APA Section 706(2)(A).\textsuperscript{185} Also under Section 706(2)(A), reviewing courts can set aside agency conclusions “not in accordance with law.”\textsuperscript{186} Perhaps the Ninth Circuit applied this standard of review when it held that the EPA violated TSCA IV; nevertheless,

\begin{itemize}
\item \textsuperscript{179} See \textit{id.} (describing \textit{State Farm} and hard look review approach to APA § 706 as more demanding than traditional highly deferential scope of review).
\item \textsuperscript{181} See \textit{id.} at 354–55 (positing Supreme Court’s lack of clarity causes varying approaches to hard look review by judges with their own “perceptions and inclinations”).
\item \textsuperscript{182} See \textit{A Cmty. Voice} v. EPA, 997 F.3d 983, 994 (9th Cir. 2021) (applying unclear standard of review).
\item \textsuperscript{183} See \textit{id.} at 994, 1009–10 (Smith, J., dissenting) (emphasizing that majority never concluded EPA acted arbitrarily and capriciously in excluding soil-lead hazard standards from 2019 Rule).
\item \textsuperscript{184} See \textit{id.} at 994 (holding that EPA violated TSCA IV by abandoning soil-lead hazard standards and failed to explain why “uncertainty justifies inaction”). For a further discussion of why the reasoning behind the court’s analysis of the soil-lead hazard standards was weak, see \textit{supra} notes 182–83 and accompanying text.
\item \textsuperscript{185} See \textit{id.} at 1009 (Smith, J., dissenting) (arguing majority used incorrect standard of review); see also Jared P. Cole, Cong. Rsch. Serv., R44699, \textit{An Introduction to Judicial Review of Federal Agency Action} 9, 12–13, 18–20 (2016) (listing avenues for reviewing courts to invalidate agency conclusions and detailing arbitrary and capricious standard of review).
\item \textsuperscript{186} 5 U.S.C. § 706(2)(A) (directing reviewing courts to hold unlawful and set aside agency conclusions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).
\end{itemize}
the majority never cited the APA in its analysis of the soil-lead hazard standards.\textsuperscript{187}

The 2009 Petition and the 2017 Writ did not mention the soil-lead hazard standards.\textsuperscript{188} As the dissent argued, the EPA has discretion to refuse to regulate outside the scope of the proposed rulemaking, and subsequent arbitrary and capricious review of the EPA’s refusal should be limited and highly deferential to the agency.\textsuperscript{189} Without explanation, the majority skipped an arbitrary and capricious analysis and accorded the EPA virtually no deference.\textsuperscript{190} Even with an ongoing duty to amend regulations, it does not necessarily follow that the 2019 Rule required the EPA to address the soil-lead hazard standards.\textsuperscript{191} By imposing this duty to revisit regulations outside the scope of rulemaking, the court ignored realistic limitations on the EPA’s capabilities in promulgating a final rule.\textsuperscript{192} The Ninth Circuit overlooked factors such as agency priority setting, the 2017 Writ’s time constraints, and the EPA’s possession of tacit expertise.\textsuperscript{193}

The EPA’s decision to exclude the soil-lead hazard standards from the 2019 Rule was an exercise of legitimate agency priority setting.\textsuperscript{194} Twenty years of inaction may warrant judicial interference, but the Ninth Circuit should have considered the merits of the EPA’s justification for inaction in more detail.\textsuperscript{195} As one scholar

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\textsuperscript{187.} See \textit{A Cmty. Voice}, 997 F.3d at 994 (failing to articulate standard of review); see also Cole, \textit{supra} note 185, at 12–13 (stating courts can invalidate agency actions that contradict agency’s statutory authority or meaning of governing statute).

\textsuperscript{188.} \textit{A Cmty. Voice}, 997 F.3d at 1009 (Smith, J., dissenting) (noting 2009 Petition did not request rulemaking for soil-lead hazard standards and 2017 Writ did not require rulemaking for soil-lead hazard standards).

\textsuperscript{189.} \textit{Id.} (Smith, J., dissenting) (citing \textit{Compassion Over Killing v. FDA}, 849 F.3d 849, 854 (9th Cir. 2017)) (arguing EPA properly excluded soil-lead hazard standards from 2019 Rule and that reviewing this decision is “extremely limited and highly deferential”).

\textsuperscript{190.} See \textit{id.} at 1009–10 (Smith, J., dissenting) (criticizing lack of reasoning and explanation in majority opinion).

\textsuperscript{191.} See \textit{id.} at 1009 (Smith, J., dissenting) (contending EPA was not required to address soil-lead hazard standards in 2019 Rule notwithstanding ongoing duty to update standards).

\textsuperscript{192.} See, e.g., Shapiro, \textit{supra} note 81, at 1827 (discussing “bureaucratic realities” and constraints that hinder agencies’ ability to achieve numerous congressional goals efficiently and simultaneously).

\textsuperscript{193.} See \textit{id.} (stating legitimate priority setting advances goals of statutory mandate and allows agencies to utilize limited resources efficiently); see also Gersen & Vermuele, \textit{supra} note 178, at 1390–91, 1396–98 (explaining pervasiveness of uncertainty in rulemaking, practical time and resource limits impacting agency reasoning, and agencies’ difficulty in communicating tacit expertise to reviewing courts).

\textsuperscript{194.} See Shapiro, \textit{supra} note 81, at 1827 (stating legitimate priority setting involves considerations of resource limitations and legal constraints).

\textsuperscript{195.} See \textit{id.} at 1829 (noting agencies’ entitlement to extreme deference in rulemaking inaction cases).
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notes, agencies with resource constraints may better serve the public by working on and advancing a limited number of rules instead of working on many and advancing none of them.196 Compliance with the 2017 Writ’s time constraints would have been frustrated if the EPA included the soil-lead hazard standards in the final rule.197

The Ninth Circuit also failed to acknowledge the EPA’s possession of tacit expertise in lead regulations.198 Administrative agencies with tacit expertise encounter substantial costs and difficulties in articulating complex regulatory problems to reviewing courts.199 This communication barrier causes agencies to substitute tacit reasoning with more easily articulated reasoning reflective of the limitations of the reviewers.200 Judges ignorant of issues presented by tacit expertise thus may falsely interpret an agency’s decision as unreasoned when it is in fact grounded in genuine expertise.201 Accordingly, the EPA’s scientific uncertainty-explanation may have been a distorted oversimplification of its true tacit reasoning for omitting the soil-lead hazard standards from the 2019 Rule, leading the court to find it inadequate.202

Despite employing an ambiguous standard of review and according the EPA little deference, the outcome of A Community Voice is

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196. Id. at 1827 (proposing that agencies with limited resources are more successful in protecting people and environment through quality over quantity approach).

197. See id. at 1830 (acknowledging that although agency’s refusal to regulate must be consistent with statutory obligations, reasonable priority setting enhances agency’s implementation of statutory mandate); see generally A Cmty. Voice v. EPA, 997 F.3d 983, 998 (9th Cir. 2021) (Smith, J., dissenting) (suggesting EPA acted in accordance with statutory duties in 2019 Rule by properly utilizing agency expertise and “considering barriers” to implementation).

198. See Gersen & Vermuele, supra note 178, at 1396–97 (exploring conflicts that arise from agency’s tacit expertise and consequences of judicial review that ignores those conflicts). Tacit expertise is specialized how-to knowledge not easily communicated to generalist observers or non-experts at an acceptable cost. Id. at 1396 (defining tacit expertise).

199. Id. at 1397 (assessing potential costs incurred when agency explains tacit reasons for decision-making).

200. Id. at 1398 (illustrating how tacit expertise affects agency’s proffered rationale).

201. Id. at 1398 (underscoring implications of judicial review oblivious to phenomenon of tacit expertise).

202. See A Cmty. Voice v. EPA, 997 F.3d 983, 994 (9th Cir. 2021) (criticizing EPA’s “scientific uncertainty” justification); see also id. at 1398 (positioning that tacit expertise distorts agencies’ true reasoning, resulting in reviewers “falsely” coding decisions as arbitrary). The Ninth Circuit did not conclude that the EPA’s justification was arbitrary; still, the tacit expertise phenomenon exemplifies the intricacies involved in agency decision-making and reason-giving that the majority could have acknowledged in its analysis. See id. at 994 (holding that EPA’s abandonment of soil-lead hazard standards violates TSCA IV); see also id. at 1397 (suggesting judicial review should be cognizant of “cases in which agencies possess tacit expertise and thus have reasons it is costly for them to give”).
justifiable given the severe risks of childhood lead poisoning and the EPA’s delayed response. The Ninth Circuit’s meaningful judicial oversight bolstered the EPA’s accountability, addressed a crucial public health issue, and initiated a rulemaking process that uses the best available science to protect children from the threat of lead poisoning. It is imperative that the EPA act given the catastrophic health effects, widespread nature, and disparate impacts of low-level childhood lead poisoning. The EPA’s prompt response during the risk assessment phase paves the way for increased momentum during the implementation phase.

VI. PAINTING A BETTER PICTURE OF TOMORROW: THE IMPACT OF THE NINTH CIRCUIT’S HOLDING

The Ninth Circuit’s decision in A Community Voice acted as a regulatory catalyst that compelled the EPA to commit to heightened protections against lead-based paint hazards. Less than twenty months after the court’s decision, the EPA published its comprehensive Strategy to Reduce Lead Exposures and Disparities in U.S. Communities (Lead Strategy). Notably, the Lead Strategy grapples with addressing racial and other social disparities stemming from lead exposure. While the EPA does not commit to specific timeframes for rulemaking in the Lead Strategy, each goal contains milestone dates to track the agency’s progress.

203. See generally 42 U.S.C. § 4851(4) (finding household lead ingestion is most common cause of childhood lead poisoning); see also Hickey, supra note 76, at 10–11 (discussing how unreasonableness of years, as opposed to months, of delayed rulemaking and significant danger to children’s health should compel EPA to act).

204. See generally Reconsideration of the Dust-Lead Hazard Standards and Dust-Lead Post-Abatement Clearance Levels, 88 Fed. Reg. at 50,445 (underscoring impact of A Community Voice on proposed regulation); see also Janine Weisman, Inconsistent EPA Regulations Increase Lead Poisoning Risk to Kids, Study Finds, BROWN UNIV. (Aug. 6, 2020), https://www.brown.edu/news/2020-08-06/lead (depicting how 2019 Rule still permitted forty-five percent higher risk of developing childhood lead poisoning than more stringent standards and scrutinizing EPA’s lenient DLHS and dust-lead clearance levels as unprotective).

205. For a discussion of the effects of childhood lead poisoning, see supra notes 2–18 and accompanying text.

206. See generally A Cmty. Voice, 997 F.3d at 995 (noting decreasing DLHS has low impact if corresponding clearance levels remain disproportionately low).

207. See, e.g., U.S. ENV’T PROT. AGENCY, 540R22006, EPA STRATEGY TO REDUCE LEAD EXPOSURES AND DISPARITIES IN U.S. COMMUNITIES 5 (2022) (pursuing comprehensive regulatory scheme advancing protection of children’s health and environmental justice).

208. Id. at 3–4 (announcing Lead Strategy).

209. Id. at 11 (stating EPA’s primary objectives).

210. Id. at 15, 17–18 (setting interim goals to and monitor EPA’s performance in implementing Lead Strategy).
In accordance with the Lead Strategy and the Ninth Circuit’s holding, the EPA proposed a groundbreaking rule on August 1, 2023, Reconsideration of the Dust-Lead Hazard Standards and Dust-Lead Post-Abatement Clearance Levels (Proposed Rule). The Proposed Rule states that *A Community Voice* led the EPA to change its approach to lead-based paint hazard control. Considering adverse health effects only, the EPA proposes changing the DLHS to any registrable amount greater than zero to reflect a radically more inclusive threshold that acknowledges there is no safe level of lead exposure. Further, the Proposed Rule details the EPA’s commitment to addressing the lead-based paint definition and soil-lead hazard standards in separate proceedings. Those rulemakings have no definitive timeline, but the EPA is currently soliciting public comment to obtain new information and insights.

From lead industry professionals’ standpoint, the Ninth’s Circuit’s decision in *A Community Voice* and the Proposed Rule are concerning because these professionals will be responsible for implementing the EPA’s stringent standards. One commenter with substantial expertise in lead hazard assessment and abatement characterizes the newly proposed DLHS and dust-lead clearance levels as “the most radical and severe drop in any cleanup criteria ever seen in the environmental business.” In this commenter’s view, the proposed standards resemble theoretical criterion rather than practicable and achievable levels. Risk assessors, laboratories, laboratories,

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212. *See id.* at 50,446 (shifting away from previous approach of 2019 Rule and proposing new DLHS by looking only to health effects).

213. *See id.* at 50,445 (acknowledging inclusiveness of greater-than-zero non-numeric value for DLHS).

214. *See id.* (justifying addressing lead-based paint definition and soil-lead hazard standards separately).


217. *See id.* (arguing impact of EPA’s proposed regulations on environmental business).

218. *See id.* (outlining problematic nature of proposed standards and inconsistent application in practice).
abatement experts, building owners, and contractors will struggle to reconcile unrealistically low standards with lead “background” sources from wind or rainfall that re-contaminate houses after clean-up. Dramatically lowered standards could induce a snowball effect of slower clearance rates at significantly higher costs per project, resulting in fewer home remediations. Thus, to adequately protect children and disadvantaged communities from lead poisoning, the EPA must harmonize lead-based paint hazard standards with implementation measures. While the Ninth Circuit’s decision marked a pivotal stride toward environmental justice, the EPA must continue this momentum, otherwise inaction could jeopardize the progress achieved.

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219. See id. (criticizing Ninth Circuit and EPA’s disregard of background sources that affect lead testing and cleanup)
220. See id. (discussing negative, unintended consequences of lowered standards and unaccounted for lead sources).
221. See Lowering Our Standards, supra note 216, (illustrating potential risks to children and vulnerable communities resulting from costly remedial measures).

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