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BACKGROUND

Newark residents are facing a drinking water crisis, with hundreds of homes reporting lead levels that pose a serious threat to public health. *See* Ex. 1, Drinking Water Watch Results. In each of the past four consecutive six-month monitoring periods, Newark exceeded the 15 parts per billion (ppb) action level set by the Environmental Protection Agency (EPA), with a dramatic increase to 47.9 ppb at the 90th percentile¹ in the most recent period.² *See* Ex. 2, Drinking Water Watch Summary.

Newark's water lead levels are not borderline; they are more than *triple* the action level, and are the second-highest of any system serving more than 100,000 people across the country, *see* Panditharatne Decl. ¶ 4, far exceeding concentrations reported in some other cities that have battled lead-contaminated drinking water, *see* Giammar Decl. ¶ 35. For example, a two-

¹ For each monitoring period, a water system must calculate whether more than 10% of the samples collected have a lead concentration greater than 15 ppb. *See* 40 C.F.R. § 141.80(c)(1). A 90th percentile of 47.9 means that 10% of samples had a concentration of 47.9 ppb or greater.

² Newark has reported the following action level exceedances: 27 ppb (January to June 2017); 26.7 ppb (July to December 2017); 17.8 ppb (January to June 2018); 47.9 ppb (July to December 2018). *See* Ex. 2, Drinking Water Watch Summary. The State issued notices of non-compliance for each of these periods, citing action level exceedances, as well as violations of the Lead and Copper Rule. Ex. 3, July 11, 2017, Notice of Non-Compliance; Ex. 4, Jan. 23, 2018, Notice of Non-Compliance; Ex. 5, July 16, 2018, Notice of Non-Compliance; Ex. 6, Jan. 24, 2019, Notice of Non-Compliance.

month 2015 study of elevated lead levels in drinking water in Flint, Michigan, reported 16.7% of samples above 15 ppb and a 90th percentile level of 25.2 ppb.³ See Ex. 7, Flint Water Study at 5. In contrast, 44% of Newark's most recent samples were above 15 ppb, Panditharatne Decl. ¶¶ 2, 3, with a 90th percentile level of 47.9 ppb, see Ex. 2, Drinking Water Watch Summary. In Flint, the court ordered preliminary relief that was more expansive than the relief Plaintiffs seek here. See *Concerned Pastors for Soc. Action v. Khouri*, 217 F. Supp. 3d 960, 980-81 (E.D. Mich. 2016).

Newark's astronomical lead levels are the result of Newark's failure to comply with the Safe Drinking Water Act (the Act), 42 U.S.C. §§ 300f to 300j-27, and its regulation for controlling lead, the Lead and Copper Rule (the Rule), 40 C.F.R. §§ 141.80-141.91. The Rule contains requirements for monitoring, 40 C.F.R. § 141.86; treatment, *id.* §§ 141.81-141.82; reporting, *id.* § 141.90; and other mandates that are designed to ensure that systems avoid the skyrocketing lead levels Newark residents now face.

³ Plaintiffs acknowledge that it is difficult to draw comparisons between sampling in two different cities, where different methodologies may have been used. Samples taken by researchers during the Flint Water Study were not limited to homes that are most likely to show lead. At the same time, many of the results reported by Newark are customer requests, which are similarly not limited to the highest-risk homes.

Lead concentrations at these levels do not appear out of nowhere.

Giammar Decl. ¶¶ 61, 62. They occur when a system is not adequately treating its water to prevent corrosion of lead pipes. *Id.* ¶ 16-18, 20-23, 30, 36, 63.

Defendants admit that is exactly what has happened in Newark. *See infra*

II.C.2. And Newark's elevated lead levels are not surprising, given its history of poor management and deteriorating critical equipment. *See infra* II.C.

Recognizing the immediate threat of harm, Plaintiffs moved for a preliminary injunction, asking this Court, *inter alia*, to order the City to provide an alternative, safe drinking water source for a subset of Newark's most vulnerable residents. *See* ECF Nos. 19-1, 55. Newark then announced plans to provide water filters to those residents in the Pequannock service area (PSA) who live in homes with lead service lines or lead plumbing.⁴ *See* ECF Nos. 53, 54; Ex. 8, Filter Program Notice, Oct. 22, 2018. In the months that followed, however, it has become clear that Newark's haphazard approach to providing filters falls far short of the comprehensive program that is necessary, leaving thousands who drink the City's ill-treated lead-contaminated water to suffer irreparable harm. Through this motion, Plaintiffs ask this Court to order

⁴ Although regulated as a single water system, Newark residents receive water from two treatment plants: the Pequannock and Wanaque. The bounds of the two service areas are not clearly delineated. Giammar Decl. ¶ 42.

Newark to provide an alternative source of safe water for the City's most vulnerable residents until the system's water is safe to drink.

LEGAL STANDARD

In the Third Circuit, courts consider two primary factors when considering whether to grant a preliminary injunction: “(1) a reasonable probability of eventual success in the litigation, and (2) that [movant] will be irreparably injured . . . if relief is not granted.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 176 (3d Cir. 2017) (quoting *Del. River Port Auth. v. Transam. Trailer Transp., Inc.*, 501 F.2d 917, 919-20 (3d Cir. 1974)). If those “gateway” factors are met, the court must also consider: “(3) the possibility of harm to other interested persons from the grant or denial of the injunction, and (4) the public interest.” *Reilly*, 858 F.3d at 176, 179. Courts “balance those four factors so long as the party seeking the injunction meets the threshold on the first two.” *Id.* at 176. The Third Circuit employs a sliding scale approach, such that “the more net harm an injunction can prevent, the weaker the plaintiff's claim on the merits can be while still supporting some preliminary relief.” *Id.* at 179 (citing *Hoosier Energy Rural Elec. Co-op., Inc. v. John Hancock Life Ins. Co.*, 582 F.3d 721, 725 (7th Cir. 2009)).

A mandatory injunction is appropriate when “the status quo . . . if allowed to continue or proceed unchecked . . . will inflict serious irreparable

injury,” and “the traditional balancing process tips decidedly in favor of plaintiff.” *United States v. Price*, 688 F.2d 204, 212-13 (3d Cir. 1982). There could be no greater case for a mandatory injunction than here, where thousands of Newark residents are exposed to toxic drinking water.

ARGUMENT

I. Newark residents are suffering irreparable harm, and will continue to suffer irreparable harm, absent an injunction

Given the elevated levels of lead in Newark’s drinking water, the well-established connection between lead in drinking water and adverse health effects, and the substantial deficiencies with the City’s filter program, Plaintiffs and others who live and work in Newark are “more likely than not” to suffer irreparable injury in the absence of an injunction. *Reilly*, 858 F.3d at 179. Lack of access to safe drinking water (a “fundamental element[] of life”⁵) constitutes irreparable harm. *See Concerned Pastors*, 217 F. Supp. 3d at 970 (all people “need daily access to . . . safe drinking water”).

Injuries to the environment, like the public health injuries at issue here, are “especially difficult to remedy and [are] usually irreparable.” *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446, 499 (D.N.J. 2001) (subsequent history omitted); *see also Amoco Prod. Co. v. Vill. of Gambell*,

⁵ H.R. Rep. No. 93-1185 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6454, 6457.

480 U.S. 531, 545 (1987). The irreparable injury from potential exposure to unsafe water is compounded by the uncertainty, anxiety, and financial hardship of repeatedly seeking out alternative safe drinking water sources. *See, e.g., Verville v. Int’l Ass’n of Machinists & Aerospace Workers*, 520 F.2d 615, 620 (6th Cir. 1975); *see also Johnson v. Wetzel*, 209 F. Supp. 3d 766, 781 (M.D. Pa. 2016).⁶ Injunctive relief is necessary to prevent these ongoing harms.

A. Newark’s rising lead levels pose a threat of irreparable harm

1. The harmful effects of exposure to lead⁷

As EPA has found, there is no safe level of lead in blood. Lanphear Decl. ¶ 13; *see also* Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper, 56 Fed. Reg. 26,460, 26,467 (Jun. 7, 1991). Lead has toxic effects on multiple organ systems down

⁶ Plaintiffs need not show that harm from lead exposure occurs immediately or that it will affect all Newark residents. As the Supreme Court observed in the context of the Eighth Amendment: “We would think that a prison inmate also could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.” *Helling v. McKinney*, 509 U.S. 25, 33 (1993). If exposure to unsafe drinking water would constitute cruel and unusual punishment, it certainly meets the less demanding standard here.

⁷ The Court has instructed Plaintiffs to refrain from addressing the well-established harm from exposure to lead, and instead focus on the City’s demand that Plaintiffs show a link between residents’ specific drinking patterns and elevated blood lead levels. Plaintiffs therefore only briefly discuss the harms from lead exposure as necessary context.

to the lowest measurable levels.⁸ Lanphear Decl. ¶¶ 45-46.

Numerous peer-reviewed studies show severe harm (including neurodegenerative, cardiovascular, and renal damage) at blood lead levels as low as 1 to 2 micrograms per deciliter ($\mu\text{g}/\text{dL}$). *Id.* ¶ 45; Griffiths Decl. ¶ 20. Reduction of IQ and attention-related behaviors have been shown at the lowest measurable levels of lead in blood, including at 3-4 $\mu\text{g}/\text{dL}$. Lanphear Decl. ¶ 45; Griffiths Decl. ¶ 20. The effects of lead are exacerbated in communities, such as Newark, with high rates of health conditions associated with poverty. *See* Lanphear Decl. ¶ 20; Ex. 12, Census.gov: Newark. Lead impairments of cognition and behavior are cumulative, Lanphear Decl. ¶¶ 20, 41, 48, another reason why irreparable harm is “more likely than not” in Newark, where water levels have been elevated for years and reported results have recently increased dramatically. *Id.* ¶¶ 11, 13, 19, 33, 48.⁹

⁸ *See also* Ex. 9, Philip J. Landrigan, *Lead and the Heart: An Ancient Metal’s Contribution to Modern Disease*, 3 *Lancet Pub. Health* e156 (2018). In fetuses, infants, and children, exposure to lead can cause lowered IQ scores, Attention Deficit and Hyperactivity Disorder (ADHD), dyslexia, and developmental delays, as well as other learning and behavioral challenges, including aggressive behavior. *See* Ex. 10, World Health Org., *Childhood Lead Poisoning* 22 (2010); Ex. 11, Philip Landrigan & David Bellinger, *How to Finally End Lead Poisoning in America*, *Time* (Apr. 11, 2016).

⁹ The City has previously argued that because the action level is not a health-based standard, one cannot argue that the amount of lead in Newark’s water—well above the action level—will harm human health. This reasoning is backwards. The 15 ppb action level is not health-based because even levels *below* that level are unsafe. *See* Lanphear Decl. ¶ 13 n.4.

2. There is an established link between elevated lead levels in drinking water and negative health effects

In 1991, EPA concluded that there is a “quantitatively consistent relationship between blood lead and lead in drinking water for infants, children, and adults.” 56 Fed. Reg. at 26,470. That finding has been re-confirmed in many studies taking a variety of approaches. Lanphear Decl. ¶¶ 11, 21-41; Griffiths Decl. ¶¶ 23-30; Hanna-Attisha Decl. ¶¶ 12, 9-17.

The City has argued that a causal connection between the sky-high levels of lead in Newark’s water and health harms cannot be established absent a Newark-specific study that measures specific ingestion patterns and exposure from other sources, such as soil and dust, and then isolates the precise effect of lead in water on Newark residents’ blood. This argument is without merit for multiple reasons:

First, EPA’s 1991 finding and later studies demonstrate the specific link between lead in water and adverse health consequences. Many of these studies account for ingestion and exposure patterns, as well as the presence of other sources of lead. For example, a 2010 study involved the collection of blood and environmental samples (water, dust, and paint), where five water samples were taken both before and after flushing.¹⁰ The study found that even a 1 ppb

¹⁰ Newark has suggested that Plaintiffs cannot show harm because lead levels have been measured by “first draw” samples rather than sampling taken

increase in lead in water would result in a 35% increase in blood lead *after only 150 days of exposure*.¹¹ Lanphear Decl. ¶¶ 22-24. Similarly, another study found that an increase in lead in water from 0.5 ppb to 15 ppb was associated with a greater than 10% increase in the number of children with blood lead over 10 µg/dL. *Id.* ¶ 28. And in still another study that took into account blood, dust, and soil samples, while lead-contaminated house dust was the major source of lead intake during early childhood, children whose tap water contained more than 5 ppb lead had 20% higher blood lead levels. *Id.* ¶ 30-32.¹²

over time. That assertion is faulty because (1) the first-draw protocol is what the EPA requires and reflects what many residents will do (drink water from the tap without flushing); (2) many studies showing the harm from drinking lead-contaminated water use varying approaches, some with first-draw samples, and others with sequential or other sampling; (3) sequential sampling from homes in Newark taken by the City's consultant show "that first-draw samples are not likely to capture the highest lead sample," *see* Ex. 13, LCR Compliance Study at 6-5 (Oct. 10, 2018), and may actually understate the risks to residents. *See* Lanphear Decl. ¶ 23 n.14; *see* Giammar Decl. ¶ 25.

¹¹ Any assertion that irreparable harm is not likely because treatment will be optimized soon, or because filters are being distributed to some homes, is without merit. Given its multiple past and recent failings, and the complexity associated with optimizing treatment, Newark is highly unlikely to solve the lead problem in the near future. *See* Giammar Decl. ¶¶ 54-57. And there are widespread problems with the filter program, subjecting Newark residents to some of the highest water lead levels reported in recent years. *See infra* I.B. Substantial harm can occur from elevated lead levels in a short period of time, even at water lead levels far lower than those in Newark. Lanphear Decl. ¶ 24.

¹² The precise percentage impact of increased water lead levels on blood lead levels may vary, depending on baseline blood lead levels, seasonal variations, the age of children, the length of exposure, and other lead exposures. While we cannot quantify the exact blood lead levels that would be expected from continued exposure to Newark's water, it is beyond dispute that

A study in Washington, D.C., showed the incidence of blood lead levels above 10 µg/dL for children aged 1.3 years or younger increased more than 4 times, comparing when lead in water was below 15 ppb to when lead in water ranged from 40-60 ppb at the 90th percentile. *Id.* ¶ 34. Fetal deaths increased significantly during Washington D.C.'s spike in water lead levels. *Id.* ¶ 35.

While a very few studies—typically where water lead concentrations were low—did not find a correlation between water and blood lead levels, the vast majority of studies, including those with the most robust methodologies, have found that water lead levels contribute to elevated blood lead *and more generally to negative health outcomes*. *Id.* ¶¶ 40-41; *see also id.* ¶¶ 21-39. In light of EPA's findings, the overwhelming majority of studies finding a link, and the fact that Newark's water lead levels are far higher than in most studies, there is no question that harm to Newark's residents is likely. *See id.* ¶¶ 10-11, 21, 29, 41, 42, 44; Griffiths Decl. ¶¶ 23-29; Hanna-Attisha Decl. ¶¶ 9-12, 17, 21-26.

A Newark-specific study is not necessary to reach the uncontroversial conclusion that ongoing harm to Newark residents' health is likely, any more

the elevated lead levels are more likely than not to harm human health. Lanphear Decl. ¶ 29.

than one would need a Newark-specific study that nicotine and opioids pose severe health risks. The link is well established. Lanphear Decl. ¶ 42.¹³

Second, the risk to health from elevated lead in water is known not only from epidemiological studies, but from basic medical and scientific knowledge of how lead in liquid form is absorbed by the body. Infants, for example, are especially vulnerable to lead-contaminated drinking water because their primary interaction with their environment is what they drink. *Id.* ¶¶ 15, 41. Infants who are not yet crawling are much less likely to ingest lead through dust and soil. *Id.* ¶ 15. For infants consuming formula, tap water may account for more than eighty-five percent of their total lead exposure. *Id.* Infants can absorb forty to fifty percent of water-soluble lead they ingest. Young children also have a greater risk of exposure from lead-contaminated water because, pound for pound, they drink more water than older children and adults. *Id.*

Third, while blood lead levels do not tell the whole story and may understate harm to the population at large, *id.* ¶¶ 17-18, in 2016¹⁴ nearly one-

¹³ Nor is it necessary for purposes of this case to allocate harm from lead in water as compared to dust or soil. This is not a tort case in which monetary damages must be apportioned among multiple tortfeasors such as the City and manufacturers of lead paint. Plaintiffs are requesting injunctive relief and need show only a likelihood of continuing harm from lead in water.

¹⁴ See Lanphear Decl. ¶ 43. New Jersey has not released final data for 2017 or any data for 2018. Plaintiffs requested blood lead data through OPRA, but have not received records even though the statutory timeframe has elapsed. In addition, the State has withheld blood lead data in discovery. See ECF No.

quarter of Newark children screened under six years old tested with 3-4 µg/dL, and 5.3% of Newark children aged 6 to 26 months had blood lead levels higher than 5 µg/dL. *See* Ex. 14, Advocates for Children N.J., Childhood Lead Exposure in Newark 7 (2018); Ex. 15, N.J. Dep't of Health, Childhood Lead Exposure in New Jersey: Annual Report 16 (2016). As compared to 2016, the preliminary data for 2017 show an increase in the percentage of Newark children with blood lead levels above the threshold where harm to human health has been established. Ex. 16, N.J. Dep't of Health, 2017 Preliminary Blood Lead Data. Adverse health effects at these and even lower levels are well established. Lanphear Decl. ¶¶ 45-46; Griffiths Decl. ¶¶ 18-22.¹⁵

As noted above, blood lead levels do not begin to tell the whole story of adverse impacts on health. For one, blood lead levels are often not measured for those most vulnerable—infants under six months old. Lanphear Decl. ¶ 17. And blood lead levels can understate the harm to human health because lead

138, at 5. Defendants should not be permitted to introduce any evidence relating to blood lead levels that relies on non-public data, given that information was not produced prior to the motion deadline and that Defendants objected to discovery beyond filter-program implementation.

¹⁵ That blood lead levels in Newark have decreased in recent years (prior to 2017) is to be expected given other environmental reforms, but as the Newark-specific blood lead levels cited above show, many Newark children had blood lead levels above those where there is established harm to human health. Lanphear Decl. ¶¶ 44-45. Multiple studies that have confirmed the link between lead in water and harm to health were conducted in recent years—when other sources of lead have been lower. *See id.* ¶¶ 22-35, 37.

moves rapidly from the bloodstream to bones. *Id.*; Hanna-Attisha Decl. ¶ 10.

In addition, studies confirm that lead in water adversely affects human health, even without measuring blood lead levels. Lanphear Decl. ¶¶ 15, 35, 41.

3. Defendants have admitted that Newark’s water lead levels constitute a public health crisis

While the City may attempt to cloud the issues by demanding multi-variate, regression-level quantification of the harm posed by the lead in Newark’s drinking water (even though the preliminary injunction standard requires nothing of the sort), Newark has elsewhere recognized that its recent, extraordinarily high lead levels represent a public health crisis. Although Newark officials outwardly denied for nearly two years that its residents faced risks from lead in their tap water, *infra* I.D., they declared a state of emergency behind closed doors in October 2018, concluding that “immediate actions” were needed “to protect the health, safety and welfare of the City of Newark’s 285,000 residents.” Ex. 17, Emergency Declaration (Oct. 5, 2018). Only recently has Newark acknowledged the crisis publicly, writing to President Trump to bring to his attention to:

a true emergency that puts millions of our citizens at risk: The decaying infrastructure of our water systems which has created a crisis in Newark *Dangerously high levels of lead are entering homes and our children’s blood . . . [and] any level of lead can damage the developing brains of young children.*

Ex. 18, Letter from Mayor Baraka to President Trump (Jan. 15, 2019)

(emphasis added). And the State recently conceded in a letter to EPA that there is an “urgent public health and safety need to assess the corrosion conditions in [Newark’s] drinking water system.” Ex. 19, Letter from McCabe to Wheeler (Jan. 18, 2019). These admissions alone establish irreparable harm.

B. Newark’s filter program leaves residents vulnerable to the devastating effects of lead

Newark’s filter program is woefully inadequate to protect residents from the City’s lead-contaminated water. In addition to the many individual residents who have submitted declarations reporting issues obtaining, installing, and operating filters, Plaintiffs’ consultant visited over 100 homes to identify whether other residents were effectively able to install and operate filters obtained from the City. *See* Long Decl. ¶¶ 4-5. Plaintiffs discovered that some residents are unaware that the water is not safe and, as a result, have not taken the proactive steps the City’s program requires to secure safe water. Other residents have picked up filters, but because they have not received sufficient installation, operation, or maintenance guidance, they are not operating them in a health-protective way.

These problems are not isolated. The *nature* of the problems—the complexity of installing, operating, and maintaining filters properly, and the huge backlog of unfulfilled requests for sampling, among other problems—demonstrates that the harm to Newark’s residents is widespread. A more

robust alternative water supply program—which places the onus to provide safe water on Newark, not individual residents—is needed to protect public health. Anything less promotes a false sense of security that is likely to increase the risk of exposure to lead through drinking water for many Newark residents.

1. Filters and replacement cartridges are inaccessible for many Newark residents

Newark's program places the burden of securing safe water on individual families, many of whom struggle to work multiple jobs, maintain housing, put food on the table for their children, and read written materials. As a result, some residents are not aware that there is a water crisis that requires them to take action to protect themselves and their families. *See* Jordan Decl. ¶¶ 21, 23; Moussab Decl. ¶ 20. Of the eligible residents who are aware of the water crisis and know that filters are available, some have been deterred by the process of obtaining one from the City. *Id.*; Vazquez Decl. ¶ 3; Panditharatne Decl. ¶¶ 18-20. This lack of knowledge is not surprising in light of City officials' unrelenting efforts to downplay the crisis, *see infra* I.D., curtailing the effectiveness of the limited public outreach the City has conducted. Families who do not know they need to take steps to protect themselves, or who are overburdened with the challenges of everyday life, are left in the dark under the

City's program.¹⁶

But even those residents who have taken steps to obtain a filter from the City have not received the resources necessary to prevent lead exposure. Residents report that recreation centers—where the City says residents may pick up filters—are closed, *see* S. Thomas Decl. ¶ 7, or do not have trained staff to distribute filters, *see id.* ¶ 4; Burroughs Decl. ¶¶ 7-8. Residents with mobility impairments have had difficulty accessing the City's distribution centers. James Decl. ¶ 3. Still others were told that they were not eligible to receive a filter, but were not told why, even though they appear to meet the City's criteria for the filter program. *See* Burroughs Decl. ¶¶ 7-8; Panditharatne Decl. ¶¶ 18-20. One mother whose home tested at 27.1 ppb was denied a filter because, according to the City, she had already received a filter. *See* S. Thomas Decl. ¶ 4. She had not. *Id.* Another resident reported that her address was ineligible, even though it was not, and the building was listed as having received 15 filters. Panditharatne Decl. ¶ 20.

¹⁶ Even if residents who insist on receiving a filter will get one, regardless of whether they are eligible, *see* Ex. 20, Stewart Dep. Tr. 107:22-109:4, that protects only residents who possess the ability to fiercely advocate for themselves; those who face communication barriers, do not know of this unwritten policy, or who are simply nonconfrontational, will remain unprotected. *See* Vazquez Decl. ¶ 7.

Of the residents who were able to receive a filter from the City, many were not provided with replacement cartridges, do not know where to get them, and/or have not been able to obtain them. Long Decl. ¶ 10 (34 of 48 residents receiving filters from the City did not get replacement cartridges, and 18 did not know where to get more); Vivas Decl. ¶ 8; Melo Decl. ¶ 12; James Decl. ¶ 7; Johnson Decl. ¶ 6. For example, when Sabre Burroughs asked for replacement cartridges, she was told that the City was not providing them to residents. Burroughs Decl. ¶ 8. Weeks later, Ms. Burroughs made a second trip to a distribution center to try to get replacement cartridges but was again denied. *Id.* ¶ 13. Only on her third attempt was Ms. Burroughs able to obtain one package of three replacement cartridges which, based on her original filter's one-month life, will last her for only three months. *Id.* ¶ 15. Many residents will not be as persistent as Ms. Burroughs was in demanding water resources from Newark.¹⁷ *See* Vivas Decl. ¶¶ 5, 8; R. Thomas Decl. ¶ 4; James Decl. ¶¶ 13-14. Nor should they have to be.

¹⁷ Requiring multiple, in-person trips to distribution centers is not feasible for many residents, especially those with disabilities or limited mobility when some of the centers are not easily wheelchair accessible. *See* James Decl. ¶ 3.

2. Residents who have received filters are not able to use them in a health-protective way because the City has not provided installation, operation, or maintenance guidance

As a policy, Newark will not provide any installation, operation, or maintenance instruction, beyond the manufacturer's complex instructions included in the filter's box, unless a resident is disabled or elderly. *See* Ex. 20, Stewart Dep. Tr. 156:1-17; Ex. 21, Newark's Resp. to Pls.' Third Set of Pre-Inj. Discovery Requests No. 25. And while Newark claimed that American Water Works Association would provide installation and maintenance workshops, four months have elapsed since Newark began distributing filters, and the promised workshops have not occurred, nor have materials been produced. *Id.*

A filter sitting in a box will not protect anyone from lead. Yet many still are, either because the City's filters are not compatible with residents' faucets, or because they need help with installation. *See* Brown-Coleman Decl. ¶¶ 2-3; Melo Decl. ¶ 11; Vivas Decl. ¶¶ 6-7; Burroughs Decl. ¶¶ 10-12; Long Decl. ¶ 11 (reporting that 20 of 48 residents receiving filters either did not or could not install them properly). For example, the filter Gail Brown-Coleman received would not fit on her faucet and, despite repeated requests, the City has not provided her with any alternative or assisted her with installation. *See* Brown-Coleman Decl. ¶¶ 3, 12. When Ms. Burroughs could not figure out how to use the adaptors to install the filter onto her sink's faucet, a neighbor

used brute force to affix the filter. *See* Burroughs Decl. ¶ 11. Ms. Burroughs's filter remained loose, *id.*, and other residents have reported filters that fall off, *see* Vivas Decl. ¶ 7, as well as leaking housing connections, Long Decl. ¶ 11. Loose or leaking filters will not protect against exposure, but residents believing they are protected will continue to rely on them, heightening exposure risks. *See id.*

Of the residents who have overcome installation challenges, many have been operating the filters in a way that does not provide protection. For example, some residents inadvertently operate filters in bypass mode, allowing water to pass through without filtering. *See id.* ¶ 13. An alarming proportion of residents contacted were not aware that running hot water through their filters can destroy the filters or limit their useful lives. *See id.* ¶ 14. Some residents were not told that their filter's cartridge needed to be replaced or when to replace it. *See* Johnson Decl. ¶ 6; Vivas Decl. ¶ 8. More than one-quarter of the residents visited with filters installed were operating them with expired cartridges, providing no protection from lead. Long Decl. ¶ 12. Three such residents live in homes with lead levels well over 300 ppb, and three others had lead readings above the 15 ppb lead action level. Panditharatne Decl. ¶ 20.

Some residents who reported difficulties with filters have been instructed by City staff to boil their water to protect against lead exposure, *see* Brown-

Coleman Decl. ¶ 12, or did not know that boiling water does not eliminate lead and may even increase dangers, Long Decl. ¶ 15; Johnson Decl. ¶ 12. Ill-informed instruction from City staff also puts residents at risk.

3. Newark’s filter program does not account for literacy and language barriers, leaving thousands in harm’s way

Newark’s filter program also fails to address literacy issues, which present a significant barrier to many residents’ ability to properly install, use, and maintain filters. Belzer Decl. ¶ 26. At least 50% of adult Newark residents have a reading level at or below the elementary school level. *Id.* ¶ 12. The National Institute for Literacy reports that 52% of Newark adults 17 years or older are categorized as “functionally illiterate.” *Id.* ¶ 9.

The filter manufacturer’s instructions—the only form of instructions Newark has provided to residents—are too complex for many residents to comprehend and follow. *Id.* ¶¶ 18-24, 26; *see also* Long Decl. ¶ 12-16 (many residents did not follow the instructions that came with the filters); Ex. 20, Stewart Dep. Tr. 156: 4-14; Ex. 21, Newark’s Resp. to Pls.’ Interrogatory No. 25. When assessed through a readability assessment tool, the filter instructions, as a whole, reflect a 9th to 10th grade readability level. Belzer Decl. ¶ 18. Some sections reflect 11th and 12th grade readability levels, exceeding many Newark residents’ capabilities. *Id.* Small font, ambiguous words like “washer” and “threaded,” and a confusing order of presentation also make it difficult for

many residents to understand and follow the instructions. *Id.* ¶ 22. More than 50% of Newark's adults are likely to experience significant difficulty comprehending these instructions. *Id.* ¶ 26.

Newark also has a diverse population, with nearly half of residents speaking a language other than English at home. *See id.* ¶ 12. Yet, the manufacturer's instructions, as well as Newark's website announcing the availability of filters, are provided only in English. *See* Ex. 22, PUR Filtration Manual; Ex. 23, Filter Deployment Program. Recordings of the limited public events Newark has posted on social media have been conducted only in English. Panditharatne Decl. ¶ 23. Families that do not speak or read English well may not know that filters are available and, even if they do, may not understand how to get a filter or be installing and operating them properly. *See* Vazquez Decl. ¶ 2; Melo Decl. ¶ 10. Without translation into Spanish and Portuguese of all written and oral materials regarding the filter program, thousands of residents will remain at risk.¹⁸ *See* Vazquez Decl. ¶¶ 3, 11.

4. The geographic scope of the filter program must include blended areas of the Wanaque service area

Under Newark's program, residents in the Wanaque service area (WSA)

¹⁸ Additionally, the City's public notice states that filters may be picked up from recreation centers only during the weeks of October 15 and October 22, 2018, and does not inform residents about whether filters will be available after those weeks. *See* Ex. 8, Filter Program Notice at 5.

are not eligible to receive a filter, unless they can convince Newark to test their water, a task that has proven most difficult. *See* Lee Decl. ¶ 7; R. Thomas Decl. ¶ 3; Moussab Decl. ¶¶ 16, 18; *infra* I.C. In refusing to provide filters to most residents in the blended areas of the WSA and by repeatedly assuring residents that their water is safe, Newark has left many vulnerable to the harmful effects of lead.

While this Court was not initially persuaded that WSA residents face harm, newly released evidence confirms that irreparable harm is likely to occur in the blended areas of the WSA absent an injunction. *See* Ex. 24, CDM Smith, Lead & Copper Rule Compliance Study, Wanaque Gradient (“WSA Report”) (Feb. 1, 2019); Giammar Decl. ¶¶ 42-53; Griffiths Decl. ¶¶ 25-29. The WSA Report confirms that orthophosphate—the chemical used to prevent corrosion of lead pipes in the WSA—is too diluted, and in some cases undetectable, in the areas where Pequannock water blends into the WSA. *See* Ex. 24, WSA Report, at 4-27; Giammar Decl. ¶¶ 48-50. As a result, orthophosphate concentrations in the blended portions of the WSA consistently fall far below the amount recommended by EPA, and that proposed by Newark, to adequately control corrosion. *See id.* ¶¶ 43-47; Ex. 76, Letter from K. Adeem to J. Mattle 10 (Nov. 8, 2018); Ex. 25, EPA Optimal Corrosion Control Treatment Evaluation 46 (indicating target orthophosphate concentration of

1.0-1.2 mg/L); Ex. 26, 2015 Optimal WQP Rec. (proposing 0.5 mg/L minimum); Ex. 27, 2016 Optimal WQP Rec. (same). Dilution is likely occurring because section gates and valves between the two service areas are open—whether intentionally or inadvertent—allowing water to flow from the PSA to the WSA.¹⁹ See Ex. 24, WSA Report, at 3-3; Ex. 28, H2M Assocs., Comp. Tech. Assistance for the Pequannock Water Treatment Plant, Excerpt at 3-41 (May 2016). Based on the water quality parameter monitoring, the flow from the PSA to the WSA is not intermittent; rather, it has been ongoing for years. Giammar Decl. ¶ 48.

The sequential sampling results from the newly released WSA Report confirm these problems. Of the seven homes that were sampled sequentially, three showed extremely high levels of lead, reaching maximums of 185 ppb, 52.4 ppb, and 58.2 ppb, respectively. Ex. 24, WSA Report, at 4-4, 4-10, 4-12. The data show that at least two of these homes likely received water from the PSA. Giammar ¶¶ 52, 53. These results are consistent with elevated results from the WSA reported between 2014 and 2018, and further demonstrate that

¹⁹ Newark claimed in discovery that gates and valves have been repaired, but has not produced documentation of such repairs. The WSA Report from this month confirms that the City is still investigating whether there are “leaking or malfunctioning valves within the system.” See Ex. 24, WSA Report, at 3-3. The report confirmed that, for two of the seven sites investigated, blending appeared to be occurring “at the time of the sampling.” *Id.* at 4-11, 4-23.

corrosion control is failing in the blended portion of the WSA. *See* Ex. 29, 2014 Water Quality Report; Ex. 30, Which Newark schools have elevated lead levels?; Ex. 31, Elevated Results in WSA; Giammar Decl. ¶¶ 49-52. Homes in the WSA that consistently receive water with low levels of orthophosphate will have lead concentrations that are similar to the elevated levels in the PSA. Giammar Decl. ¶¶ 50-51. Residents who consume lead in water at these high concentrations face serious health risks. Griffiths Decl. ¶¶ 25-29.

This Court should consider evidence of extremely high lead levels in nearly half the homes subject to recent sequential sampling, combined with the WSA's diluted orthophosphate levels.²⁰ These data confirm the lack of corrosion control, and the ongoing health risk to residents who drink water in the blended portion of the WSA.²¹ Giammar Decl. ¶¶ 49-50; Griffiths Decl. ¶¶ 25-29.

²⁰ That evidence establishes the risk of harm. The issue is not whether the WSA would have triggered an action level exceedance, were it measured in isolation. Moreover, the action level is not a health-based standard and thus provides no lower limit of actual or potential harm. *See* Lanphear Decl. ¶ 13 n.4.

²¹ On February 13, 2019, the State notified Newark that its recent WSA Report is deficient, and that it failed to comply with the minimum requirements for sequential sampling pipe scale analyses. *See* Ex. 32, Letter from J. Mattle to K. Adeem (Feb. 13, 2018) at 3. However, this Court need not await the results of the delayed WSA analyses to determine the threat to residents in the Wanaque service area. *See* Giammar Decl. ¶ 53.

C. Newark’s water sampling efforts are inadequate to meet even modest demand

Newark’s public-facing materials promise free drinking water sampling and lead service line inspections for any resident who requests such services. One way to qualify for a filter is through a City-administered sample showing a lead concentration above 15 ppb. But hundreds of residents who otherwise cannot qualify for a filter are left without knowing whether their families may be at risk because the City is not responding to residents’ requests for testing with the urgency this crisis demands.

The vast majority of residents’ requests for drinking-water tests appear to have gone unanswered. Plaintiffs analyzed more than 1,600 requests for testing made to the City in 2018; for *more than three-quarters* of those, no result corresponding to the test could be found in the City’s records. *See* Lam Decl. ¶ 6. Between January and early November 2018, the City received more than 800 requests for testing; fewer than 300 of those requests had a corresponding result by the end of December. *Id.* The City has admitted that it was unable to timely process requests for testing, resulting in a “backlog.” Ex. 20, Stewart Dep. Tr. 187:4-11; 188:11-25. And the gridlock has not abated with time: of the 783 requests for lead testing from early November through December, approximately 91% had no matching result. *See* Lam Decl. ¶ 6. Newark’s backlog is not surprising, given that it hired only one laboratory technician and

has only enough equipment to process 40 drinking water samples per week.

Ex. 20, Stewart Dep. Tr. 196:21-24.

Indeed, for many residents it takes months and repeated requests to receive a sampling kit, much less results. For example, when Susana Melo first called to request water sampling in October 2018, she was told there were no appointments available. Melo Decl. ¶ 4. She called again in early November, made an appointment, and confirmed it the day of, but the City never showed up despite speaking to Ms. Melo twice that day. *Id.* ¶ 5. On her third attempt, the City promised again that someone would arrive in the morning, then changed the time to 4 p.m. only after Ms. Melo called to inquire. *Id.* ¶ 6. That employee eventually arrived at 6 p.m., after Ms. Melo needed to leave home to attend class. *Id.* ¶¶ 6, 7. The employee claimed that testing was not necessary, but Ms. Melo's mother, who was home at the time, insisted. *Id.* ¶ 7. After approximately five weeks of additional delay, the Melo family finally received their home's results: 184 ppb. *Id.* ¶ 8. A program that requires families to exert this level of effort to have their water tested has failed.

Ms. Melo's experience is not unique. Yvette Jordan, a Newark resident and member of Plaintiff NEW Caucus, repeatedly asked the City to test her home's water, without success. Jordan Decl. ¶ 7. When the City finally completed testing and provided results—months after her initial request—Mrs.

Jordan learned that the lead concentration in her home's water was 42.2 ppb. *See id.* ¶¶ 8-9. Likewise, Miriam Vazquez requested water sampling back in December 2018, but has not yet heard from the City to schedule an appointment; Lillian Ribeiro waited over two months for her test before giving up on City testing entirely and resorting to private testing. Vazquez Decl. ¶ 3; Ribeiro Decl. ¶¶ 7-10. Byron Vivas learned only at the end of January that testing was available. Vivas Decl. ¶ 10. When Mr. Vivas called the City to request sampling on January 31, 2019, he was told that the office was currently busy and to call back the next day. *See id.* When he called the following day, he was told that he would need to call back again. *Id.* The person with whom Mr. Vivas spoke did not add him to any wait list for water testing. *Id.*

In January and February 2019, residents have been told that water sampling could not be scheduled because the City has run out of the sample bottles. *See Brown-Coleman Decl. ¶ 11.* When residents request water testing, City staff have arrived prepared only to conduct an inspection, without the equipment necessary to take a water sample. *See id.* ¶ 7; Burroughs Decl. ¶ 17. Sometimes City staff do not even exit their vehicle, opting to make a determination from the street that a resident's home does not need to be tested. Glenn Decl. ¶¶ 5-8. Residents are also told they do not need water testing if their neighbors have received low results, Burroughs Decl. ¶ 18, an assertion

that has no basis in fact or science, Giammar Decl. ¶ 24. At least one resident whose home has tested with elevated lead levels was berated by City employees for sharing her concerns with other residents. *See* S. Thomas Decl. ¶¶ 6, 9. The same resident received an unscheduled and intimidating night-time visit from the Acting Director of the Water Department. *See id.* ¶ 10.

Many Newark residents have lost trust in the City because of its repeated failures to provide safe water. *See* Mitchelson-Parker Decl. ¶¶ 10-13. These residents are forced to shoulder the substantial financial burden of purchasing bottled water or un-certified filters for their families to use for drinking and cooking. Alston-Singleton Decl. ¶¶ 10-11; Moussab Decl. ¶¶ 11, 13; Mitchelson-Parker Decl. ¶ 5; Burroughs Decl. ¶ 14; Vazquez Decl. ¶¶ 5, 6; R. Thomas Decl. ¶¶ 5, 6. And City-administered water tests are the only backstop for those residents who the City assumes are not eligible for a filter—including all residents in large buildings, public housing, or any part of the WSA. *See* Ex. 20, Stewart Dep. Tr. 81:25-82:6, 97:24-98:3. If they cannot get a test, these residents are completely barred from the filter program.

D. Newark’s failure to communicate the crisis to the public has increased the threat of irreparable harm

For more than two years, City officials repeatedly assured residents that their water was safe, promising through most of 2017 that “NEWARK’S WATER IS ABSOLUTELY SAFE TO DRINK.” *See* Ex. 33, Newark

Website. Even after the City's consultants told officials that corrosion treatment "has not been effective for [the] Pequannock" service area, Ex. 34, Email from Kutzing to Adeem (Feb. 22, 2018), Defendant Baraka issued a press release stating: "[o]ur water is safe," and "the City's water is not contaminated with lead." Ex. 35, Newark Press Release, June 26, 2018. As recently as January 22, 2019, the Mayor promised that Newark's water is safe and drinkable. *See* Panditharatne Decl. ¶ 5.

To Plaintiffs' knowledge, the City has not held a community event or town hall since November, which means that nearly three months have passed since Newark has communicated the need for filters through an in-person or on-line town-hall forum. The events that have been held have been peppered with inaccurate statements, *see* Panditharatne Decl. ¶ 5, and the City does not have adequate procedures in place to ensure that the information provided to residents is accurate. *See* Ex. 20, Stewart Dep. Tr. 235:5-237:12. Additionally, reliance on social media leaves many residents without information necessary to protect themselves. *See* Lee Decl. ¶ 7.

City officials' inaccurate statements undermine not only the public education efforts Newark is required to take under the Rule, but make vulnerable residents less likely to take time off of work to try to pick up a filter, go through the complicated process of installing their filter or hunting down

replacement cartridges, or navigate the time-intensive, unreliable system for getting their water tested.

II. Plaintiffs are likely to succeed on the merits of their claims

A. Plaintiffs have standing to bring their claims

Plaintiffs have standing to bring this case on behalf of their members. Plaintiffs' members are concerned about the effects lead-contaminated water has already had and will continue to have on their health and the health of their families, students, and community. They are burdened physically, emotionally, and financially by their exposure to lead and their struggles to secure safe water.²² Additionally, members of Plaintiff NEW Caucus are subject to extreme stress and anxiety, and teach students who may be limited in their ability to learn because of the devastating effects of lead.²³ These are all concrete injuries, traceable to Defendants' violations, and redressable by the relief Plaintiffs seek.²⁴

²² Alston-Singleton Decl. ¶¶ 4, 8-11, 14; Mitchelson-Parker Decl. ¶¶ 4, 9; Moussab Decl. ¶¶ 5-8, 11-13; Jordan Decl. ¶¶ 5, 10-11, 16, 18; Gianni Decl. ¶¶ 14, 18; Canik Decl. ¶¶ 6, 12, 13; Vicino Decl. ¶¶ 4, 7-9; Fenniman Decl. ¶ 5-7.

²³ Gianni Decl. ¶¶ 8-13; Moussab Decl. ¶ 19-21; Rippey Decl. ¶ 7; Jordan Decl. ¶¶ 6, 19-20; Canik Decl. ¶¶ 6-8.

²⁴ Plaintiffs satisfy the remaining requirements for standing. Ensuring access to safe water is germane to the interests of Plaintiffs, *see* Trujillo Decl. ¶¶ 5-10; Moussab Decl. ¶¶ 4, 21, and the relief does not require member participation.

B. City Defendants are liable for violations of the Act as owners and operators of the Water System

The “owners and operators” of a public water system are responsible for ensuring the system complies with the Act. *See United States v. Ritz*, 772 F. Supp. 2d 1017, 1021 (S.D. Ind. 2011); *United States v. Alisal Water Corp.*, 114 F. Supp. 2d 927, 937-38 (N.D. Cal. 2000). Newark, through its Department of Water and Sewer Utilities, owns and operates a public community water system. *See Newark Mun. Code 2:17-1, 2:17-1.1; Ex. 77, Compliance Agreement & Order (July 25, 2018) (“CAO”).* The Mayor and Acting Director of the Water Department are also operators because they are actively involved in managing the water system. *See Newark Mun. Code 2:17-1.1; United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).²⁵

C. City Defendants have violated and continue to violate the Act

Newark has allowed its Pequannock plant to fall into disrepair, with much of its poorly maintained equipment nearing the end of “service life.” *See Ex. 36, H2M Assocs., Comp. Tech. Assistance for the Pequannock Water Treatment Plant*, at ES-6 to ES-7, 8-2 to 8-3 (May 2016). Newark has failed to conduct routine calibration, *see id.* at ES-6 to ES-7, and has a system with

²⁵ Courts apply the ordinary meaning of “operator” in the Safe Drinking Water Act context. *See, e.g., Ritz*, 772 F. Supp. 2d at 1021-22; *Alisal Water Corp.*, 114 F. Supp. 2d at 937-38; *see also United States v. Cnty. of Westchester*, No. 13-CV-5475 (NSR), 2014 WL 1759798, at *6 (S.D.N.Y. Apr. 28, 2014).

leaking valves and failing filters, *id.* at 6-2, ES-3- to ES-5; a substantial rate of “unaccounted for” water loss, *see id.* at 2-17; an unlicensed superintendent, *id.* at 11-21; inadequate staff and insufficient engineering expertise, *id.* at 9-1 to 9-2; poor technological controls, *id.* at 9-2; a “general disregard of a structured chain of command,” *id.* at 9-5; and widespread “employee friction,” *id.* at 9-8, among other serious problems. *See* Griffiths Decl. ¶ 9. It is no wonder that Newark is violating the Rule’s mandates to complete corrosion control treatment, a materials evaluation, monitoring, public education, a lead service line inventory, and lead service line replacements, among other violations.

1. Newark is violating the Rule’s requirement to complete a materials evaluation (Claim 1)

Each water system “shall complete a materials evaluation of its distribution system in order to identify a pool of targeted sampling sites that meets the requirements of [§ 141.86]” before beginning sampling under the Rule. 40 C.F.R. § 141.86(a)(1), (d)(1). The materials evaluation must include the construction materials present in the system, including any presence of lead. *See id.* § 141.42(d); *see also id.* § 141.86(a)(2). The purpose of the materials evaluation is to ensure that water systems have the information necessary to take sufficient samples from high-priority Tier 1 sites. *See id.* § 141.86(a)(1).

Newark did not complete the required materials evaluation. *See* Ex. 37, Email from M. Coefer to M. Panditharatne (discussing item 4) (Nov. 16,

2017); *See also* Ex. 38, K. Stewart Paff Certification ¶ 4.iii (certifying that all documents responsive to Plaintiffs' request for a materials evaluation were provided). If Newark had completed a materials evaluation, it would have identified 100 Tier 1 sites to include in its sampling pool, since there were more than 18,000 such sites to choose from. *See infra* II.C.3.

Newark may claim that its post-hoc evaluation of the sites within its sampling pool satisfies the Rule's requirement, but a materials evaluation that does not review the distribution system as a whole is inconsistent with the Rule's requirement to complete "a materials evaluation of *its distribution system*," 40 C.F.R. § 141.86(a)(1) (emphasis added), and runs counter to the objective to ensure the system has enough information to identify sufficient high-priority sites to fill its sampling pool with Tier 1 sites. *See* Ex. 39, Memorandum from P. Gardner (Jan. 22, 2018) (the materials evaluation should "evaluat[e] your entire distribution system (not just those sample site locations you have used previously)"); *see also* Ex. 40, Fact Sheet, Material Eval[u]ation & Sample Location Identification (Mar. 2018) (requiring completion of a "distribution system Materials Evaluation"). Newark did not complete the required system-wide materials evaluation before beginning sampling, and still has not done so.

2. Newark is violating the Rule’s requirement to install and maintain optimal corrosion control treatment (Claims 5 and 6)

Newark’s drinking water crisis stems from the City’s failure to treat its water to minimize corrosion from lead infrastructure. Absent adequate treatment, Newark’s water corrodes leaded materials in the City’s infrastructure, including the lead service lines that carry water to homes and businesses, and lead plumbing and fixtures within residents’ homes. *See* Giammar Dec. ¶¶ 10-15. As a result, lead particles enter the water that flows through the pipes and to residents’ faucets. *Id.*

To prevent exactly this situation, the Rule requires systems to “install and operate optimal corrosion control treatment,” 40 C.F.R. § 141.80(d)(1); *see id.* § 141.82(e), and thereafter, to “continue to operate and maintain optimal corrosion control treatment,” *id.* § 141.82(g). Optimal corrosion control treatment is treatment—often the addition of anti-corrosion additives—that “minimizes the lead and copper concentrations at users’ taps” *Id.* §§ 141.2, 141.80(d).

The evidence shows that Newark never installed optimal corrosion control treatment across the regulated system. Although Newark claims it began adding sodium silicate to the PSA in 1997, *see* Ex. 13, CDM Smith, LCR Compliance Study, at 1-1 (Oct. 10, 2018) (“LCR Compliance Study”), it

was never effective. Newark's consultant has confirmed that "[b]etween 1992 and 2017, lead results from the [PSA] . . . suggest[] that [treatment] was relatively ineffective," that "the addition of sodium silicate in 1997 . . . was ineffective in lowering the lead levels," and that the PSA experienced "ineffective . . . treatment over time." Ex. 41, CDM Smith, Frequency Distribution Analysis 3-4 (Feb. 21, 2018); *see also* Ex. 42, CDM Smith, Lead Service Line Replacement Program 1-2 (Mar. 2018) (confirming "Pequannock . . . has not shown significant improvement since . . . the late 1990s"); *see also* Giammar Decl. ¶¶ 59-60 (confirming that the City's 1994 study was deficient). The evidence is clear: Newark never installed optimal treatment required to minimize lead concentrations to the maximum extent feasible. *See* 40 C.F.R. § 141.2; 56 Fed. Reg. at 26,477, 26,491.

Newark has also admitted that it has failed to maintain the system's corrosion control treatment.²⁶ *See* Ex. 78, Mem. in Supp. of Defs. Motion to Dismiss at 16-17; Ex. 34, Email from Kutzing to Adeem (Feb. 22, 2018) (treatment "has not been effective for [the] Pequannock"); Ex. 13, LCR Compliance Study, at 4-7 (treatment "is not effective at controlling . . . lead");

²⁶ The Rule's treatment requirements apply across the system, not some gerrymandered portion of the system. The evidence shows that Newark has failed to install and maintain corrosion control across the entire regulated system. Plaintiffs separately address the harm WSA residents face. *Infra* II.B.4.

Ex. 8, Filter Program Notice 3 (Oct. 22, 2018) (“corrosion control in the [PSA] is no longer effective”).

Even without these admissions, however, Newark’s repeated action level exceedances, fluctuating pH levels, and inadequate pipe scales evidence its failure to maintain optimal treatment. A system experiencing lead levels as high as Newark’s levels is not maintaining optimal treatment.²⁷ Giammar Decl. ¶¶ 49-50, 53, 57, 58, 61. Additionally, Newark’s pH, which significantly impacts water corrosivity, “has fluctuated substantially . . . between 1992 and 2018,” ranging from 6 to 8.8 between 2015 and 2018,²⁸ making corrosion control treatment ineffective. Ex. 13, LCR Compliance Study, at 1-5, 3-4, 6-1; Giammar Decl. ¶¶ 20, 21, 41. And, according to Newark’s consultant reports, scales on pipes in the PSA—which indicate whether corrosion control is effective—were “porous” and “physically unstabl[e],” and were “not acting as an effective barrier against . . . lead release.” Ex. 13, LCR Compliance Study 1-5, 5-3 to 5-4; *See also* Giammar Decl. ¶¶ 17-23, 36. Newark’s elevated lead levels, failure to control its variable pH levels, and inadequate protective scale,

²⁷ Even a system that tests below the action level, but without low, stable lead levels, has failed to operate and maintain corrosion control treatment that minimizes lead levels at consumers’ taps. Giammar Decl. ¶ 57.

²⁸ Even a 1-point pH change can greatly increase corrosion of lead materials, increasing lead levels at residents’ taps by orders of magnitude: for example, from 34 ppb at a pH of 8.0, to 172 ppb at a pH of 7.0, and up to 2,600 ppb at a pH of 6.0. Giammar Decl. ¶ 39.

corroborate Plaintiffs' claim that Newark failed to maintain optimal corrosion control treatment.

3. Newark is violating the Rule's monitoring requirements (Claim 2)

Water systems must use their materials evaluation to identify a pool of sampling sites. 40 C.F.R. § 141.86(a). Systems that serve more than 100,000 people must draw at least 100 samples from their pool during each six-month monitoring period (unless the system is subject to reduced monitoring). *Id.* § 141.86(c)-(d). Systems must sample only from available Tier 1 sites, and may not use lower-priority Tier 2 or Tier 3 sites unless they do not have sufficient Tier 1 sites. *Id.* § 141.86(a)(3)-(5).

Throughout 2017 and at least the first half of 2018, Newark failed to sample 100 Tier 1 sites. Panditharatne Decl. ¶¶ 7-15. Newark admits it did not sample 100 Tier 1 sites in 2017, *see* Ex. 79, Adeem Declaration at ¶ 10 (Oct. 4, 2018), but claims it should be excused because it needed additional time to identify such sites. But Newark already had at least 131 Tier 1 sites in its sampling pool, *see* Ex. 43, Lead & Copper Sampling Plan 15 (Sept. 2016), and more than 18,000 Tier 1 sites it could have added to its sampling pool, *see* Ex. 77, CAO at ¶ 21(C). Where sufficient Tier 1 sites are available, the Rule is not flexible: systems must sample "as many Tier 1 sites as possible." Ex. 44, Lead & Copper Sample Site Selection Certification 1 (item 13); *see* Ex. 45, EPA

Memorandum: Sample Site Selection and Triennial Monitoring (Oct. 13, 2016); Ex. 46, Letter from Holst to Oswald 3 (July 24, 2018) (enclosure). In diluting its sampling pool with non-Tier 1 sites, Newark under-reported lead levels in its drinking water.

This Court should give no weight to Newark's claim that it could not attract volunteers, given that it neither completed its materials evaluation, *supra* II.C.1., nor took steps to increase the number of Tier 1 sites in its sampling pool until recently.²⁹ See Ex. 21, Newark's Resps. to Pls.' Interrogatory No. 24; Ex. 48, Email from R. Prather to C. Woods (Jan. 17, 2019). The State confirmed that Newark did not exhaust options for identifying Tier 1 sites for inclusion in its pool. See Ex. 49, Letter from K. Burkhard to A. Adebowale (Nov. 2, 2016).

Newark may assert that it now has more than 100 Tier 1 sites in its sampling pool. But Plaintiffs remain concerned that this violation is ongoing because of the discrepancy between the already high lead levels in samples

²⁹ Any reluctance among residents to participate in the City's sampling program would not confer permission to abandon the Rule's requirements. Many large cities offer financial incentives to encourage participation by residents at high priority sites, including water bill credits of \$50 in Philadelphia, \$100 in New York, and \$100 in Cleveland. See Ex. 47, Phila. Water Dep't, Written Testimony Before Comm. on Pub. Health & Human Servs. 4 (Nov. 16, 2016); N.Y.C. Water & Wastewater Rate Sched. 36 (Jan. 26, 2018); Cleveland Div. of Water, Lead & Copper Compliance Sampling Instructions (2018).

taken from the City's pool and the even higher lead levels in samples requested by Newark residents whose homes are not in the pool. *See* S. Woods Decl. ¶¶ 8, 20 (describing statistically significant difference between customer requested samples and sampling pool samples). This discrepancy evidences Newark's ongoing failure to sample from sufficient high-priority homes: if Newark were sampling the homes most likely to have elevated lead levels, the samples taken outside of their sampling plan—as customer requests—should show lower, not significantly higher, lead levels.³⁰

4. Newark is violating the Rule's requirement to notify and educate the public about its lead action level exceedances (Claim 7)

A water system that exceeds the action level must deliver public education materials to each customer. 40 C.F.R. § 141.85(a), (b). The materials must include a warning that lead exposure can cause serious specific health effects, *id.* § 141.85(a)(1)(ii), and describe precautions residents should take, how residents can have their water tested, and the steps being taken to address the problem, *id.* § 141.85(a)(1)(iv), (1)(v), (2)(i). Public education must be delivered to every bill-paying customer within sixty days of the close of the monitoring period in which the exceedance occurred. *Id.* § 141.85(b)(2).

³⁰ The discrepancy could also indicate that the City may not be complying with the Rule's sampling requirements. For example, flushing water before taking first draw samples may alter the lead concentration in the sample.

Newark failed to notify as many as 20,000 service account holders about its June 30, 2017, action level exceedance within sixty days, in violation of the Rule. Ex. 50, Emails between M. Bleicher and A. Pappachen (Sept. 2018). Correspondence between the State and the City shows that only 36,800 public education notices were mailed after the June 2017 action level exceedance, *id.*, compared to the 57,616 service connections in Newark. Ex. 51, Drinking Water Watch, Service Connections.

Newark's public education violations are ongoing. In the July 20, 2018, Compliance Agreement and Order (CAO), Newark admitted that it "failed to comply with the billing notice public education requirements in the last quarter of the [sic] 2017 and the first quarter of 2018." Ex. 77, CAO at 1 n.1; *see also* Ex. 52, Drinking Water Watch, Notice of Violation (June 27, 2018). And in January 2019, Newark received another notice of violation for violations of the Rule's public education requirements. Ex. 53, Drinking Water Watch, Notice of Violation (Jan. 24, 2019). Newark's violation of the Rule's public education requirement began after it first triggered the action level in June 2017, and remains ongoing.

5. Newark is violating the Rule's requirement to complete a lead service line inventory (Claim 8)

A water system that exceeds the action level must prepare within 12 months an inventory identifying the number of lead service lines in the

distribution system. *See* 40 C.F.R. §§ 141.84(a)-(b)(1), 141.90(e)(1). Newark was required to identify the number of lead service lines by June 30, 2018.³¹

More than seven months have passed since the June 30, 2018, deadline for Newark to complete its inventory. In July 2018, Defendants reported that the 5,119 service connections that remain unaccounted for would not be inventoried for “several years,” and that many others that had been inventoried were based on “making assumptions.” Ex. 77, CAO at ¶ 35. Newark’s most recent inventory remains incomplete, with nearly 1,000 accounts wholly unidentified, and more than 33,000 accounts with at least part of the service line material unidentified. *See* Panditharatne Decl. ¶ 22; *see also* Ex. 54, Partial Lead Service Line Inventory 623 (noting at least 2,963 unconfirmed lines in the PSA, alone). An inventory that is based largely on assumptions with thousands of missing entries does not satisfy the Rule’s requirement to *complete* a lead service line inventory by June 30, 2018.³²

³¹ After Newark’s first action level exceedance, the State required Newark to complete an inventory within 60 days. *See* Ex. 3, Notice of Non-Compliance ¶ 6 (July 11, 2017). When Newark could not meet that deadline, the State granted a 90-day extension for the submission of the inventory, until December 11, 2017. *See* Ex. 77, CAO at ¶ 15.

³² Residents face harm because of Newark’s failure to complete its inventory. When Ms. Burroughs looks up her home in Newark’s inventory, the system reports that “records don’t indicate whether [your home] has a lead service line.” Burroughs Decl. ¶ 4; *see also* Moussab Decl. ¶ 17. If residents do not know whether they have a lead service line, they do not know whether

6. Newark is violating the Rule's requirement to replace lead service lines (Claim 9)

Once a system exceeds the action level, it must replace at least 7% of lead service lines in the system within 12 months. 40 C.F.R. § 141.84(a)-(b)(1). Because Newark's first reported action level exceedance occurred on June 30, 2017, the City was required to replace 7% of its approximately 23,584 lead service lines by June 30, 2018. *See* Ex. 4, Notice of Non-Compliance ¶ 9 (Jan. 23, 2018); Ex. 77, CAO at ¶ 34(A). The State instructed Newark that "lead service line replacement shall commence immediately," Ex. 3, Notice of Non-Compliance ¶ 6 (July 11, 2017), and estimated the number of lines to be replaced under the 7% requirement to be 1,651, *see* Ex. 77, CAO at ¶ 34(A). The State warned that Newark must complete the required replacements by "no later than June 30, 2018 *or the system will be in violation.*" Ex. 55, Letter from M. Bleicher to A. Adebowale 2 (Jan. 30, 2018) (emphasis added).³³

Newark has not begun to replace lead service lines in any meaningful way. As of January 2019, it appears that fewer than 20 service lines have been

they need to have their line replaced or whether they fall within the category of residents who face the highest risk of exposure to lead.

³³ The obligation to replace lead service lines is cumulative. Thus, since Newark exceeded the action level in the first half of 2018, at least another 7% of service lines must be replaced by June 30, 2019. *See* Ex. 6, Notice of Non-Compliance ¶ 9 (Jan. 24, 2019).

replaced.³⁴ *See* Ex. 54, Partial Lead Service Line Inventory (indicating 17 lead service line replacements); *see also* Ex. 56, Email from S. Kutzing to M. Bleicher 1-2 (July 10, 2018) (indicating 13 lead service line replacements). The City’s lead service line replacement program is much delayed, *see* Ex. 77, CAO at ¶¶ 34, 37, and, for the reasons discussed below, does not meet the Rule’s most basic requirements.

Under its initial iteration, Newark did not intend to commence the program until June 2018, making compliance with the June 30, 2018, deadline an impossibility. Ex. 57, CDM Smith, Proposal for Prof’l Eng’g Servs., at A-4 (Jan. 4, 2018) (“CDM Eng’g Servs.”); Ex. 58, CDM Smith, Minutes from City of Newark Lead & Copper Rule Compliance Assistance Kickoff Meeting 4 (Jan. 18, 2018). Newark did not solicit volunteers for the program until May 1, 2018, leaving insufficient time to receive responses and coordinate construction by the June 30, 2018, deadline. *See* Ex. 59, Newark Lead Service Line Replacement Program. Newark did not even plan to award a construction contract until September 2018, a deadline that was later delayed until December 2018. *See* Ex. 60, CDM Smith, Lead Service Line Replacement Program tbl. 1-1 (March 2018) (“LSLR Program”); Ex. 61,

³⁴ Of those lines that have been replaced, it appears that several have been partial replacements, which poses a serious risk to residents’ health. *See* Ex. 75, Emails between M. Bleicher and L. Ofori (October 25, 2018).

Email from J. Notte to F. Scangarella (Nov. 19, 2018). Even under the earlier schedule, the first 1,651 replacements would not be completed until October 11, 2019. *See* Ex. 60, LSLR Program tbl. 1-1. Thus, if Newark complies with the current schedule, the first 7% of replacements will not be complete until 15 months after the Rule's June 30, 2018, deadline.

The City claims that it is relieved of the obligation to replace lead service lines within the Rule's deadline based only on its self-serving claim that "[h]istorically in the City, service lines from the water main to the meter inside the home are owned by the resident." *Id.* at 1-6. Indeed, Newark's materials tell homeowners that they own the entire length of the line, including the portion that lies underneath the public street, *see* Ex. 62, City of Newark, Get the Lead Out 2, despite the City's consultant's acknowledgment that private ownership of full lead service lines is "somewhat unique," Ex. 57, CDM Eng'g Servs., A-1. To support its attempt to shift the financial burden of replacement onto individual residents, Newark has offered only an attorney declaration, Ex. 80, Stewart Declaration ¶ 3 (Oct. 4, 2018), and has cited no controlling or even persuasive law. The State has apparently accepted, without question, Newark's characterization of its lines as privately owned, endorsing the City's

attempt to shift the cost to individual residents.³⁵ *See, e.g.*, Ex. 66, Email from M. Bleicher to A. Adebowale (Aug. 24, 2017).

But for years, Newark exerted ownership and control over lead service lines. Beginning in 1891, Newark adopted a policy directing that the General Superintendent of Works would have “charge and supervision” over the public water supply, including the “laying, repairing and extension of street water mains, [and] services.” Ex. 67, 1891 By-Laws, Rules and Regulations of the Board of Street and Water Commission of the City of Newark, Excerpt, Chapter 7, p. 21 (“1891 Bylaws”). City employees and plumbers installed scores of—and in some years more than one thousand—service lines, and the City paid thousands of dollars to purchase lead pipes. *See, e.g.*, Ex. 68, Statement of Street Mains Laid Excerpt:1891; Ex. 69, Dep’t of Water, Street and Water Commissioners Annual Report:1893. By 1922, there were nearly 60,000 lead service lines in the City. *See* Ex. 70, Annual Rep. of the Dept. of

³⁵ At least two other systems have committed to replace lead service lines, at no cost to customers. *See* Ex. 63, Settlement Agmt. ¶ 10, *Concerned Pastors*, No. 2:16-cv-10277 (E.D. Mich. Mar. 27, 2017); Ex. 64, Press Release, NRDC, Pittsburgh Settlement Points the Way for Cities Exposed to Lead-Tainted Drinking Water 3 (Feb. 7, 2019); *see also* Ex. 65, Email from K. Burkhard to K. Adeem. (Mar. 12, 2018) (noting that a public utility commission in Pennsylvania allowed a municipal water system to “fund replacement on private property because it was in the public interest to avoid both the public health threat posed by partial replacements and the haphazard approach of relying on property owners to replace their portion”).

Streets and Sanitation:1922, at 32; *see also* Ex. 71, Annual Rep. of the Dept. of Streets and Public Improvement:1918, at 70. And homeowners had no choice: only City-licensed plumbers were permitted to install lead service lines, and all service lines were to be made of lead pipes of a certain weight per foot. *See* Ex. 67, 1891 Bylaws, at 53-54, 56. Importantly, Newark considered the lead service lines to be “works of the public water department.” Ex. 67, 1891 Bylaws & Regulations, p. 21. For decades, Newark acted with an indicium of ownership over lead service lines; now that they must be fixed, Newark cannot deny ownership and shift the cost to individual residents.³⁶

However, even if this Courts accepts Newark’s claim that the whole length of lead service lines are privately owned, Newark’s failure to replace 7% of lead service lines by June 30, 2018, is still a violation. Under Newark’s interpretation, it must send only a mailer containing an offer to replace residents’ service lines, but it need not act on that offer under any regulatory deadline, even when residents have responded indicating they wish to have theirs replaced. Newark’s interpretation is contrary to the text and language of the Rule. If completion of a mailing were enough to comply with the Rule’s

³⁶ Newark claims that the \$1,000 it requires residents to pay for replacements is a “nominal cost.” Ex. 35, Press Release, City of Newark, Statement by Andrea Adebowale Regarding False Claims 2 (June 26, 2018). Not so: \$1,000 is a substantial payment that many Newark residents cannot bear. Jordan Decl. ¶¶ 16, 21; Moussab Decl. ¶ 10; Mitchelson-Parker Decl. ¶ 8.

requirements, then the provision would have no effect. Here, more than 1,000 residents responded that they are willing and waiting to have their lead service lines replaced. *See* Ex. 54, Partial Lead Service Line Inventory 623. Some of those residents have yet to hear from the City, *see, e.g.*, Johnson Decl. ¶ 17, and construction has not started in any meaningful way.

D. Defenses likely to be raised by Newark are without merit³⁷

1. This Court has discretion to order relief to remedy harm caused by Newark’s violations of the Act

Absent an unambiguous congressional limitation, courts retain expansive discretion to provide relief to remedy statutory violations. The Act contains no such constraints on the Court’s discretion. This Court may bring to bear its full equitable powers to mitigate Newark’s health emergency pending a final resolution of Plaintiffs’ statutory claims.

“District courts have the freedom to fashion preliminary equitable relief so long as they do so by ‘exercising their sound discretion.’” *Reilly v. City of Harrisburg*, 858 F.3d 173, 178-79 (3d Cir. 2017) (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008)). Where a defendant’s statutory violations have caused injury, courts may wield “the historic power of equity to provide complete

³⁷ This Court has not granted Plaintiffs’ request to file a reply brief. However, if Newark raises defenses in its opposition that are not addressed herein, Plaintiffs will seek leave to file a short, expedited reply.

relief in the light of statutory purposes.” *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960). When the public interest is at stake, such authority “assume[s] an even broader and more flexible character.” *Id.* at 291 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

Newark has previously argued that this Court lacks the power to require the City to provide safe water for those residents who are most at risk because, it claims, that is not an available remedy under the Act. *See* ECF No. 46, at 14-20. However, unless a statute clearly prohibits a specific form of relief, courts may “give whatever other relief may be necessary under the circumstances” to remedy the harm caused by a defendant’s violations. *Porter*, 328 U.S. at 398. This “comprehensive[]” equitable jurisdiction is not to be “denied or limited in the absence of a clear and valid legislative command.” *Id.*

The Third Circuit has adopted this “expansive” view of a court’s equitable powers. *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 223 (3d Cir. 2005). In *Lane Labs*, the underlying statute granted the district court jurisdiction only “to restrain violations” of the act. *Id.* (quoting 21 U.S.C. § 332(a)). Following *Mitchell* and *Porter*, the court upheld an equitable remedy of restitution. *Id.* at 223-26. The court held that “when a statutory provision gives the courts power to ‘enforce prohibitions’ contained in a regulation or statute, Congress will be deemed to have granted as much equitable authority

as is necessary to further the underlying purposes and policies of the statute.” *Id.* at 225. Here, Plaintiffs request interim relief to further the Act’s health-protective purposes.

Consistent with these bedrock principles, the Sixth Circuit determined that door-to-door delivery of bottled water and installation of filters were “appropriate” remedies for the “specific systemic harms” resulting from many of the very same violations of the Act that are at issue here. *Concerned Pastors for Soc. Action v. Khouri*, 844 F.3d 546, 550 (6th Cir. 2016).

That the Act empowers courts only to “enforce” statutory requirements does not impinge on their equitable powers. Cases under the similarly worded Clean Water Act confirm this core principle. In *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 999-1000 (9th Cir. 2000), the Ninth Circuit held that a district court’s “enforcement” of a statutory requirement includes the power to order additional remedies for harms stemming from violations of those requirements. In *U.S. Public Interest Research Group v. Atlantic Salmon of Maine, LLC*, 339 F.3d 23, 29-31 (1st Cir. 2003), the First Circuit held that, once a defendant violated its permit, the district court had equitable authority to impose additional requirements that went beyond the permit to mitigate the harm caused by those violations. And in *United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003), the Fourth Circuit upheld a district court’s discretion to order remedial

measures that would not have been required by the Clean Water Act absent the violations.

Here, too, the requested relief furthers the health-protective aims of the Act and is not proscribed. Congress has not imposed any limitations on this Court's discretion to remedy harm from violations of the Act, as would be required under *Porter, Mitchell*, and their progeny. *Cf. Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 173, 194-95 (1978) (holding that the language and purpose of the Endangered Species Act limited district court's traditional equitable discretion by requiring an injunction upon a finding of violation). The Act's citizen suit provision is broad, allowing suit against "any person . . . who is alleged to be in violation of any requirement" of the Act. 42 U.S.C. § 300j-8(a)(1). It also includes a savings clause, which notes the availability of other relief and the right to seek it. *Id.* § 300j-8(e). Clearly, Congress preserved the full range of a district court's powers to remedy a defendant's violations in a citizen suit.

To be sure, a district court must consider the nature of the violations at issue, and tailor its remedy to correct the effects of those violations. *See Temple Univ. v. White*, 941 F.2d 201, 214-16 (3d Cir. 1991) (upholding an injunction ordering a state agency to revise its Medicaid rate program to comply with federal law and make interim payments during the revision process). This Court has comparable powers to remedy the harm caused by the City's

violations of the Act pending a permanent solution that brings the City into compliance with all mandates of the Rule. This Court, like the court in *Concerned Pastors*, may order equitable measures that fully protect the City's residents from the continuing threats to their health until the City completes the steps required for its drinking water to be safe.

2. The State has not required compliance with the Act, nor does its Compliance Agreement and Order bar relief

The State has long been complicit in Newark's violations, allowing the City to operate without optimizing corrosion control treatment, without sampling sufficient Tier 1 sites, and without completing a materials evaluation, among other violations. The July 2018 CAO permits unlawful extensions to regulatory deadlines, allows for incomplete submission of mandatory documentation, excuses the City from paying for required infrastructure improvements, and sets a protracted schedule for the abatement of lead in the City's water. The CAO does not require the City to begin replacing lead service lines within the timeframe mandated by the Rule, *supra* II.B.6., nor does it require Newark to complete a lead service line inventory within the Rule's deadlines, *supra* II.B.5. The CAO also acknowledges, but fails to address, the City's third-consecutive violation of the Rule's requirement to distribute public education materials. *See* Ex. 77, CAO at 1 n.1. It does nothing

to enforce the obligation to promptly notify residents in the future, beyond including regulatory language that the City has repeatedly flouted.

Nor does the CAO bar citizen enforcement. Citizen suits under the Act may be precluded only when the state “has commenced and is diligently prosecuting a civil action in a court of the United States” for the same violation that citizens seek to prosecute. 42 U.S.C. § 300j-8(b)(1)(B); see *Interfaith Cmty. Org., v. PPG Indus., Inc.*, 702 F. Supp. 2d 295, 304-05 (D.N.J. 2010). The State has taken no such action here, so this suit may proceed. In adjudicating it, the Court is free to order relief that goes beyond the State’s regulatory efforts.

In previous memoranda, the City has relied heavily on *Trinity Industries, Inc. v. Chicago Bridge & Iron Co.*, 735 F.3d 131 (3d Cir. 2013). That case does not stand for the proposition that a court is constrained by whatever remedy an agency orders. In *Trinity*, the Third Circuit held that the district court did not abuse its discretion in denying relief where an effective remedy was already in place, and the plaintiffs did not argue otherwise. *Id.* at 140. The district court found that an injunction would be “futile” because the existing order already required the cleanup of “all contamination” at the disputed site. *Id.* at 139. The *Trinity* court recognized that injunctive relief may be appropriate where an agency’s remediation scheme is “deficient or ineffective.” *Id.* at 140. Here, the CAO is not sufficiently protecting Newark residents from the effects of the

City's violations, so the Court may order additional relief, like the provision of bottled water, that does not interfere with the tasks or deadlines specified in the CAO. *See Atl. Salmon*, 339 F.3d at 31 (holding that a court may order relief beyond that required by an agency if it does not reduce protections and is aimed at remedying past violations).

Any invocation of the primary jurisdiction doctrine is the same argument in a different guise. Federal courts have a “virtually unflagging obligation . . . to exercise the jurisdiction given them.” *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). “Abstention, therefore, is the exception rather than the rule.” *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (citations and internal quotations omitted). The primary jurisdiction doctrine has no application where, as here, Congress enacted a law authorizing federal courts to decide citizen suits. *See id.*; *PennEnvironment v. PPG Indus., Inc.*, 964 F. Supp. 2d 429, 453 (W.D. Pa. 2013); *see also Interfaith Cmty. Org.*, 702 F. Supp. 2d at 311 (holding primary jurisdiction inapplicable because, by narrowly defining conditions that circumscribe a citizen suit, Congress signaled the courts' duty to hear cases). The Court is free to impose more—and more stringent—mandates than the CAO. *PennEnvironment*, 964 F. Supp. 2d at 450, 453; *see also Interfaith Cmty. Org. v. Honeywell Int'l*, 399 F.3d 248, 267-68 (3d Cir. 2005).

III. The relief Plaintiffs seek serves the public interest

Access to safe drinking water is a “fundamental” and “unusually compelling public interest.” *Alisal Water Corp.*, 431 F.3d at 656; *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 112 (2d Cir. 2013). More generally, the protection of environmental and public health rights is in the public interest. *See Amoco Prod.*, 480 U.S. at 545; *S. Camden Citizens in Action*, 145 F. Supp. 2d at 501-02. The Act’s “minimum national standards for protection of public health,” H.R. Rep. No. 93-1185, 1974 U.S.C.C.A.N. at 6454, and the Rule’s aim to “protect populations from exposure to lead . . . in drinking water,” 72 Fed. Reg. 57,782, 57,784 (Oct. 10, 2007), reflect this interest in ensuring access to safe water.

Exposure to lead, even at low levels for a short period, may change the course of a person’s life. Minimizing these effects will allow children in Newark to grow to their potential and adults to live without debilitating health burdens. Additionally, the relief requested will mitigate some of the fear and stress that Newark residents experience when worrying about the effects of lead from tap water on their own health and the health of their families. Plaintiffs’ requested relief is narrowly tailored to achieve these goals until tap water in Newark is safe to drink.

IV. Plaintiffs' requested relief

Plaintiffs ask this Court to order tailored relief focused on those residents who are most at risk of being exposed to and harmed by lead. Plaintiffs' requested relief is reasonable in view of the ongoing irreparable harm that Defendants' violations have caused and will continue to cause.

A. Description of relief necessary to avoid irreparable harm

Plaintiffs request that this Court require the City to deliver bottled water to the most at risk, to ensure that they have reliable access to safe drinking water.³⁸ For the reasons discussed, *supra* I.B., Newark has shown that it cannot effectuate a sufficiently protective filter program; therefore, bottled water is needed until optimal corrosion control is implemented.³⁹ Providing bottled

³⁸ Plaintiffs request that this Court waive the bond requirement under Federal Rule of Civil Procedure 65(c) or, in the alternative, permit Plaintiffs to post a nominal bond. Plaintiffs qualify for waiver or a nominal bond because they are non-profit organizations that seek to “enforce an important federal right” arising out of a “comprehensive federal health and welfare statute[.]” *Temple Univ.*, 941 F.2d at 220 (internal quotation marks omitted); *see also S. Camden Citizens in Action*, 145 F. Supp. 2d at 504; *McCormack v. Twp. of Clinton*, 872 F. Supp. 1320, 1328 (D.N.J. 1994); *Am. Freedom Def. Initiative v. Se. Pa. Transp. Auth.*, 92 F. Supp. 3d 314, 331 (E.D. Pa. 2015); *Stilp v. Contino*, 629 F. Supp. 2d 449, 468 (M.D. Pa. 2009).

³⁹ If this Court declines to order bottled water, Plaintiffs request that the Court—at the very least—require the City to implement a robust and enforceable filter program, meeting the minimum requirements described in the attached alternative proposed order, *see* Proposed Order Requiring Robust Filter Program.

water for the City's most vulnerable populations is also consistent with the State's recommendation that "bottled water be used for infants who are being fed with formula" and that "pregnant women and children under the age of six should use bottled water." Ex. 8, Filter Program Notice, at 3; *see also* ECF No. 53 at 4. As explained in the attached proposed order, *see* Ex. Proposed Order Requiring Bottled Water, Plaintiffs request preliminary relief as follows:

First, the City should deliver bottled water for those residents most likely to suffer irreparable harm because of exposure to lead through drinking water, including homes in the PSA and blended areas of the WSA: (1) with pregnant or nursing women; (2) with children aged six or younger; (3) where water samples have tested above 15 ppb; or (4) that have a lead service line or lead plumbing or elements, or copper plumbing with lead solder.

Additionally, Newark should provide free tap water testing to all residents, respond to all requests for testing, and provide testing results, all on an expedited and enforceable schedule. Newark should maintain and provide to Plaintiffs records of all homes it tests, including name, address, date of request, result (ppb of lead), and date of results provided.

Newark should engage in a public awareness campaign to ensure residents know about the alternative water supply and testing services. As part of that campaign, Newark should establish drinking water resource centers,

where residents may obtain resources from trained staff, including water bottles, filters, and water testing kits, and may drop off completed testing kits for laboratory analysis.

B. Newark has the information necessary to implement relief

Defendants have access to the information necessary to identify nearly all of these households. A lack of perfect information should not defeat relief; the Court can target the vast majority of those facing grave injury. The City can use preexisting databases to identify households with young children, a strategy frequently used by municipalities in public-health work. Ghani Decl. ¶¶ 10-13. The Newark Board of Education maintains a list of enrolled students—who may be as young as three because of Newark’s free pre-kindergarten program, *see* Ex. 72, Newark Public Schools, PreK Enrollment—including their ages and addresses. *See* N.J.A.C. § 6A:32-7.3(a). This information may be used for purposes of the proposed relief because it would be in service of public health and effectuating a court order. *See id.* § 6A:32-7.5(e)(15), (f); *see also* 34 C.F.R. § 99.31(9)(i), (10).

The City may also identify households with young children using state health records. The New Jersey Department of Health maintains a record of the age and address of any child who received a lead screening or vaccination. *See* N.J.A.C. § 8:44-2.11(c) (lead screening); *id.* § 8:57-3.16(d) (vaccinations).

Such records include information on almost every child in New Jersey, since children must be screened for lead at ages one and two, N.J.A.C. § 8:51A-2.2(a)(1), and must receive a wide variety of vaccinations before enrolling in school or childcare, *see generally id.* §§ 8:57-4.10 to -4.20.⁴⁰ As with school records, these data may be used for protection of public health or in response to a court order. *Id.* § 8:51-3.3(a)(2)-(3); 45 C.F.R. § 164.512(b)(1)(i), (e)(1)(i).

C. Relief will not harm Defendants

Where, as here, Defendants are governmental entities, “assessing the harm to the opposing party and weighing the public interest . . . merge.” *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 256 (3d Cir. 2011) (quoting *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Thus, because the requested relief will serve the public interest, it will not cause substantial harm to the City. Moreover, the balance of harms tips decidedly in favor of Plaintiffs’—and the public’s—interests.

Defendants claim it would be prohibitively expensive to provide bottled water to every resident. As discussed below, the City has workable strategies to

⁴⁰ New Jersey has lead-screening reports on 93% of children by the time they turn six, DTaP vaccination reports for at least 87% of children by the time they turn three, and hepatitis B vaccination reports for 66.7% of children within a few days of birth. *See* Ex. 15, N.J. Dep’t of Health, Childhood Lead Exposure in New Jersey: Annual Report 10 (2016); Ex. 73, New Jersey DTaP Report 1 (2016); Ex. 74, New Jersey Hepatitis B Report 2 (2016).

target the most vulnerable households, greatly reducing those costs. Moreover, while it is impossible to quantify the avoided costs from granting Plaintiffs' relief, preventing scores of children from having serious and permanent health conditions, as well as behavioral and development problems, will lower Defendants' health-care, educational, and other social support expenses. Finally, households will have the option of using a water filter instead of bottled water.

Newark has feasible and economical options for responding to residents' health needs. *See* Shefftz Decl. ¶¶ 13-16. For example, if the amount of water provided to each household were reduced from four to three cases per person per week, relief would cost about \$25 million. *Id.* ¶ 16. If the population covered were limited to households with pregnant women or children age six or under, relief would cost about \$9 million. *Id.* ¶ 15. This change would protect the most vulnerable Newark residents, but would leave unprotected many families with high lead concentrations.

Even if City Defendants were to argue that the costs of the relief sought somehow outweigh the substantial benefits, such costs are self-inflicted. Newark residents need the relief requested because of City Defendants' disregard for their obligations under the Act. Such "self-inflicted" harm "weighs in favor of granting preliminary injunctive relief." *Pappan Enters. v.*

Hardee's Food Sys., Inc., 143 F.3d 800, 806 (3d Cir. 1998). Indeed, the “injury a defendant might suffer if an injunction were imposed may be discounted by the fact that the defendant brought that injury upon itself.” *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 596 (3d Cir. 2002). The cost of implementing the relief pales in comparison to the long-term health and developmental benefits the relief will provide. Any claimed monetary harm is therefore “substantially outweighed by the profound public interest at stake here.” *Alisal Water Corp.*, 431 F.3d at 656.

Additionally, the relief requested is narrowly tailored. At this time, Plaintiffs do not request that this Court order an alternative water supply for every resident. Rather, as discussed below, Plaintiffs have limited the most expansive aspect of the requested relief—the provision of alternative water supply—to those most likely to be exposed to lead through their drinking water and harmed by that exposure. This will significantly lessen the City’s burden.

CONCLUSION

Plaintiffs respectfully request that this Court enter a preliminary injunction requiring City Defendants to provide relief for Newark residents who are currently exposed to lead through their drinking water.

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Respectfully submitted,

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