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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NEWARK EDUCATION WORKERS CAUCUS and NATURAL RESOURCES DEFENSE COUNCIL, INC., Plaintiffs, v. CITY OF NEWARK, RAS BARAKA, in his official capacity as Mayor of the City of Newark, NEWARK DEPARTMENT OF WATER AND SEWER UTILITIES, KAREEM ADEEM, in his official capacity as Acting Director of the Newark Department of Water and Sewer Utilities, and CATHERINE R. McCABE, in her official capacity as Commissioner of the New Jersey Department of Environmental Protection, Defendants.	Case No. 2:18-cv-11025 **Judge Esther Salas** **Magistrate Judge Cathy L. Waldor** **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION**

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INTRODUCTION

Newark resists Plaintiffs' requests for targeted improvements to its deeply flawed filter program on the pretext that it is already doing everything that can be done. But Plaintiffs' evidence of harm—including unrebutted resident and expert declarations and an in-field study—exposes a different reality. Newark's filter program covers only a portion of those in need; provides inadequate information, access, and assistance to those who do qualify; and shifts the burden to individual residents to secure safe water, even though the City concedes its water treatment has failed. Some actions Newark claims to have taken to address the crisis have not occurred, while other half steps have been taken only on the eve of litigation deadlines. Meanwhile, the City fails to inform the Court that lead levels continue to rise dramatically, reaching 66.9 parts per billion (ppb) at the 90th percentile and far exceeding levels from any past monitoring period.[1] *See* Ex. 81, Drinking Water Watch (April 26, 2019); *see also* Ex. 82, Residential Sampling Results; Pl. Br. 1 n.2.

Making matters worse, Newark has established a pattern of failures to communicate with the public about the crisis. *See* Pl. Br. 39-40; *see also* Ex. 83,

[1] Newark accuses Plaintiffs of "tar[ring] Newark with the stigma of Flint," Def. Br. 1, but the data speak for themselves, *see* Pl. Br. 1-2. Newark's failure to treat its water for years, and potentially decades, has caused lead levels measured at the 90th percentile that are comparable to Flint's, if not higher. *Id.*

Feb. 28, 2019, Notice of Non-Compliance (detailing recent violations, including failure to confirm distribution of information to health agencies, women-and-children clinics, and childcare centers). These violations are exacerbated by recent misleading statements that "Newark has some of the best water in the state, in the country," and "Newark has great water." Ex. 84, WNYC radio excerpt at 4:24-44. These comments were not "made years ago," as the City asserts, *see* Def. Br. 2 n.3, but were made on January 23, 2019,[2] years after the crisis began and nearly a year after Newark learned its treatment had failed, *see* Pl. Ex. 34.[3] Many similar statements were made throughout 2018. *See* ECF No. 19-1, at 27; ECF No. 97-1, at 13-15; ECF No. 149, at 29.

Plaintiffs seek the Court's intervention to ensure that at-risk residents have the information and resources needed to protect themselves and their families from lead. Plaintiffs' injunction is flexible; it includes options that the Court can tailor to ensure that highest-risk residents receive necessary resources. It neither ignores Newark's recent efforts to provide filters, nor mandates expenditure of some set dollar amount. But some measure of robust,

[2] Plaintiffs previously cited a radio program that contained earlier recorded statements. The following day, Mayor Baraka appeared on the same program and gave the contemporaneous statements quoted above.

[3] Throughout this brief, "Pl. Ex. 1-80" refers to exhibits attached to Plaintiffs' motion. "Def. Ex. 1-17" refers to exhibits attached to the City's opposition. "Ex. 81-93" refers to exhibits attached hereto.

enforceable relief is needed to supplement Newark's piecemeal efforts.

ARGUMENT

I. Newark residents continue to face a risk of irreparable harm

A. Newark's filter program remains inadequate to protect residents

Although the City touts its distribution of over 35,000 filters[4] as proof that "Newark's filter program is working," Def. Br. 17-18; *see also id.* at 22-24, "handing out a water filter does not ensure that it is effective in reducing lead content of drinking water to an acceptable level," *Concerned Pastors for Soc. Action v. Khouri*, 220 F. Supp. 3d 823, 828 (E.D. Mich. 2017). Without an adequate protocol to ensure proper installation, operation, and maintenance, many Newark residents remain at risk of exposure. *See id.* at 828-29.

The City's attempt to dismiss filter-related problems as confined to "a small number of affected residents," Def. Br. 17-18; *see id.* at 26, is unconvincing, given both the nature of the challenges and data on literacy and language use in Newark, *see* Pl. Br. 14-21. Effective use of filters depends on strict adherence to an extended set of technical directions. *See, e.g.*, Pl. Ex. 22, PUR Filtration Manual (directing readers to remove a faucet's "aerator" and "washer"; to choose between multiple "adapters" for "external threaded" and

[4] The City has since stated that it has distributed only 32,210 filters. *See* Ex. 85, Newark Suppl. Resp. to Interrog. 12.

"internal threaded" faucets; and to ensure that a "washer is inserted into the threaded end of the adapter"); Long ¶ 16. These instructions could confuse anyone, and a single misstep can eliminate protection. *See* Long ¶ 16.

The likelihood of error is compounded by significant literacy and language barriers in Newark, which the City fails to address, *compare* Belzer ¶¶ 9-26*, with* Def. Br. 17-27. Over half of adults lack the reading skills to understand the only instructions Newark has consistently provided: the filter manual. *See* Pl. Br. 20-21; Belzer ¶¶ 9-26. That the instructions are only in English disadvantages the nearly half of residents who speak a non-English language at home. *See* Pl. Br. 21. The newly posted video on the City's website is no panacea, *see* Def. Br. 9; Def. Ex. 9, at 3, particularly where the website is accessible only to literate, English-proficient, and computer-literate residents.[5]

Both the declarations of Plaintiffs' individual witnesses (which the City ignores) and Mr. Long's observations further show barriers to health-protective

[5] Newark's March 21, 2019, press release trumpets its "multilingual website," ECF No. 180-6, at 2, but the website links to a single, outdated multilingual document related to October and November 2018 hours for filter distribution centers, *see* ECF No. 180-3, at 5, 8, 11. That same notice promised an "extensive public information campaign . . . including Spanish and Portuguese translations," *id.* at 3, but the City has not provided any multilingual guidance *on how to install, operate, or maintain filters*, *see* Ex. 86, Newark Resp. to Doc. Req. 2; Pl. Br. 21. Indeed, the "City's plan for communicating its distribution efforts to the residents," contains no mention of multilingual efforts on how to install, operate, or maintain filters. Adeem ¶ 4; *see id.* Ex. B.

use of filters. *See* Pl. Br. 14-21; Long ¶¶ 14-17. Wide-ranging problems, such as installation difficulties, incompatible faucets, inadvertent use of filters in bypass mode, running of hot water through filters, and failure to replace expired cartridges, have prevented residents from benefitting from their filters. *See id.* "[M]any residents had not absorbed or understood at least some critical directions about filter installation, use, and maintenance." Long ¶ 16. And many were simply *unaware* of their errors—and would have continued using their filters ineffectively but for affirmative intervention. *See id.* ¶¶ 9, 16.

Mr. Long's study is not "packed with errors caused by inadvertently duplicated records," as the City claims. Def. Br. 2-3; *see id.* at 22 & n.19, 24. Each of the 12 purported duplicate addresses, *see id*. at 22 n.19, Klein ¶ 8, corresponds to an independent unit in a multifamily building, *see* Long Reply ¶¶ 2-3, and is eligible for its own filter, *see* Ex. 86, Newark's Suppl. Resp. to Interrog. 3. Furthermore, that Mr. Long interviewed 46 unique individuals about the 48 separate units with City-provided filters does not change his conclusions about the difficulties residents experience in installing, operating, and maintaining filters. *Compare* Klein ¶ 8, *with* Long Reply ¶ 7 & n.5.

Nor should the Court credit any argument that Mr. Long's study "is not representative" because participants were more likely to be "people with filter

difficulties," Def. Br. 21; Goodman ¶¶ 63-69. Mr. Long never purported to survey random residents, *see* Def. Ex. 17-18; Long ¶ 8; Def. Br. 21, or claim that the percentage of problems observed should be projected to the full population. Mr. Long's observations corroborate independent evidence of flaws—like literacy barriers—and are plainly probative. *See, e.g.*, *Concerned Pastors for Soc. Action v. Khouri*, 217 F. Supp. 3d 960, 975-78 (E.D. Mich. 2016) (finding harm, based partly on "credible anecdotal evidence" indicating problems "in providing safe drinking water to several households"). His study shows that the range of problems residents experience are likely to prevail across Newark *because of their nature*. Any statistical critique is a red herring.

The City, moreover, ignores that participants in Mr. Long's study were actually *more* likely to be literate, computer-literate, English-proficient, and able and inclined to seek assistance with filter-related problems. *See* Ex. 87, Pl. Resp. to Interrogs. 9, 13. For example, many participants came from a list of residents who signed up to have their lead service lines replaced. *Id.* If even these residents had significant difficulties using filters properly, those who face literacy or other communication barriers likely face even greater challenges.[6]

[6] The City claims that Mr. Long's study shows residents know about the lead issue, *see* Def. Br. 24, but the method of arranging visits made it unlikely Mr. Long would encounter residents who were unaware of the issue or the filter program, Long ¶ 4; *see* Ex. 87, Pl. Resp. to Interrog. 9.

The City proffers that residents who "are having filter difficulties" are now "eligible for assistance" under the new Supplemental Compliance Agreement and Order (SCAO).[7] Def. Br. 17-18; *see id.* at 23-24. But eligibility for assistance falls short of actual assistance—particularly because the SCAO does not require Newark to *notify* residents of this apparent benefit.[8] The City misleadingly suggests it "publicly offer[ed] to help" with filter installation on its website. Def. Br. 26 (citing Def. Ex. 9). But the website does not offer in-person assistance. *See* Def. Ex. 9. And even if residents knew they could seek such help, many would not because they do not know they are misusing the filters. *See* Long ¶¶ 9, 16. Absent a robust protocol to ensure proper filter installation, operation, and maintenance, "the presence of a filter alone may cause the more insidious problem of false security in the suitability of the tap water for drinking." *Concerned Pastors*, 220 F. Supp. 3d at 828-29; *see* Long ¶ 17.

The City protests that Plaintiffs have not identified solutions, *see* Def. Br.

[7] The SCAO was signed the day the City filed their opposition, just as the City's filter program was announced the day briefing closed on Plaintiffs' first request for preliminary relief. The City's complaints about the role of citizen litigation ring hollow in light of its inadequate action absent litigation.

[8] Newark previously informed those who asked that they were *not* eligible for assistance, unless they were elderly or disabled. *See* Pl. Br. 18; Ex. 88, Stewart Dep. 152:15–153:4, 156:1-8. If other residents sought help, they were "told that there are instructions included in the box," *id*. at 153:8-9, or "instructed to contact the filter manufacturer," Pl. Ex. 21, Newark Resp. to Interrog. No. 25. Newark cannot expect residents to divine its apparent change in policy.

26, but Plaintiffs have proposed an "at-home filter installation and education program" which would address many of the City's program's failures, *see* ECF No. 143-2, at 3. Through in-home inspections, City staff would identify and remedy installation mistakes; and through in-person interviews like Mr. Long's, they would reinforce the prerequisites for effective filter use and correct errors. And Newark need not start from scratch: an installation and maintenance program of similar design has already been implemented in Flint. *See* Pl. Ex. 63, at 39-53; *cf. Concerned Pastors*, 217 F. Supp. 3d at 980-81.

Even by the City's own estimates, thousands of filter-eligible households still lack City-provided filters, *see* Smith ¶ 9, and an even greater number remain without replacement cartridges, *see id.* ¶ 4.[9] The City argues that it is "working on" closing this gap.[10] *See* Def. Br. 9-10. But material shortcomings in the SCAO make it unlikely that the City will timely provide filters and replacement cartridges to remaining households.

For example, although the SCAO requires the City to "deliver or

[9] The Court should disregard Mr. Smith's unsupported assertion that "[a]ll households in Newark have been visited for the purpose of attempted filter delivery at least once, and many have been visited multiple times," Smith ¶ 10, because Newark has not produced the underlying data for Plaintiffs' analysis, despite the Court's order requiring production, *see* ECF No. 193.

[10] The City also claims to have "substantially eliminated" its backlog in water testing, Def. Br. 9, but it continues to fail to provide sampling results for two-thirds of the requests it receives. *See* Lam Reply ¶ 6; *see also* Pl. Br. 25-26.

attempt to deliver the filter and cartridges to every qualified residence by May 15, 2019," the City can satisfy this requirement if it "(i) documents at least two attempts to deliver . . . and (ii) leaves a door hanger . . . [that] contain[s] information on how to obtain a water filter." Def. Ex. 17 ¶ 27.B-C. The SCAO does not require Newark to attempt delivery during times when residents are likely to be home. Nor does it require door hangers in languages other than English. And it is far from clear that door hangers will provide notice to residents who lack reading proficiency. *See* Belzer ¶ 9. The SCAO also fails to require urgency. For instance, although the SCAO states that "Newark shall notify residents who have received filters that they may receive a replacement cartridge," it sets no deadline for this crucial task. Def. Ex. 17 ¶ 27.G.

In yet another shortcoming, the SCAO permits Newark to close all but one of its existing distribution centers after May 15, 2019.[11] *See id.* ¶ 27.D. Accessible distribution centers are critical to ensuring that residents receive filters, replacement cartridges, and information. The City must be held to an enforceable commitment to maintain distribution centers, with sufficient operating hours, for as long as water treatment remains ineffective.

[11] Newark's corrosion control treatment is not likely to be effective in the near future, *see* Pl. Br. 9 n.7, and the Court should not heed Newark's suggestion otherwise, *see* Dr. Br. 10, given that Plaintiffs requested, but were denied, discovery on that subject. *See* ECF Nos. 186, 193.

B. Residents in the blended Wanaque service area remain at risk

Newark excludes most Wanaque service area (WSA) residents from the filter program,[12] claiming unequivocally that "[t]here is no lead problem in the Wanaque, even in the alleged potential blending areas."[13] Def. Br. 29 n.25. But the most recent data are dispositive: water in the WSA is *currently* exceeding the 15-ppb action level—23 ppb at the 90th percentile—based on samples from the most recent period. *See* Lam Reply ¶ 8. In recent months, individual homes in the WSA have reported levels as high as 242, 100, 88, 72.5, and 52.6 ppb. *Id.* Ex. F. These levels are consistent with recent sequential sampling in the WSA,[14] *see* Pl. Br. 23-24, as well as data showing elevated lead levels in the WSA in 2014, and again between 2016 and 2018, *see* Pl. Ex. 29-31.

Ignoring these data, Newark claims that WSA residents face no risk because samples from that area reached 9.6 ppb at the 90th percentile for the

[12] Although WSA homes qualify for a filter if a City test shows lead levels exceed 15 ppb, Newark has made such testing unlikely by telling residents that "those on the Wanaque system are not [a]ffected," Ex. 88, Stewart Dep. 232:1-4; *see, e.g.*, Def. Ex. 10, Newark Drinking Water Report (Mar. 2019).

[13] The City refers to "alleged potential blending," despite its consultant's repeated finding that areas in the WSA are "likely" and "potentially" supplemented with water from the Pequannock. *See, e.g.*, Pl. Ex. 24 at 4-1.

[14] Newark contends that sequential samples show "low lead levels in stagnant water *in lead service lines*," Def. Br. 30 (emphasis added), but ignores the homes where Newark's sequential sampling revealed extremely high lead levels *in plumbing*. *See* Pl. Br. 23 (citing Pl. Ex. 24).

second half of 2018, lowered to 4.1 ppb if one excludes customer-requested samples. *See* Def. Br. 28-29 & n.24. But those 2018 levels were calculated based on the entire WSA, potentially including areas outside of the blended area and thus unaffected by intrusion of ill-treated water from the Pequannock plant.[15]

The City claims that Plaintiffs "have no expert testimony" to show that WSA residents are at risk, Def. Br. 29, despite the two experts Plaintiffs offer on this topic: Dr. Giammar, who concludes that corrosion control treatment is not effective in the blended WSA, Giammar ¶¶ 42-53, and Dr. Griffiths, who concludes that those in the blended WSA face health risks, Griffiths ¶¶ 25-29. The City selectively quotes a single paragraph of Dr. Giammar's declaration to argue that he predicts likely lead problems only in the future. *See* Def. Br. 29. Not so. Dr. Giammar opines that the blended areas do not receive water that is "sufficiently treated to provide optimal corrosion control treatment," and that "there is a threat to residents who are drinking water in the blended portions of the [WSA]."[16] Giammar ¶ 53. Residents in the WSA face risks.

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[15] Additionally, Newark's argument is premised on a disproportionately low number of samples from the WSA; only 31 samples from the second monitoring period of 2018, compared with 49 and 67 samples taken from the same area in the previous two periods, and 75 samples from the Pequannock in the same period. *See* Pl. Ex. 24, at 2-2, 2-5; ECF No. 97-1, at 11-12 (describing Newark's failure to sufficiently sample the WSA).

[16] Dr. Reiber's testimony does not undercut Dr. Giammar's opinion that orthophosphate is not effective in the blended portion of the WSA. Giammar

C. Experts on the health effects of lead uniformly conclude that there is a likelihood of substantial irreparable harm

The City is mistaken that Plaintiffs are required, but have failed, to establish the "magnitude of harm," Def. Br. 31-32, caused by lead in Newark's drinking water. Plaintiffs' experts did not merely say that "lead in water causes *some* harm," Def. Br. 32, but uniformly concluded that Newark's water lead levels are likely causing "significant," "severe," and "irreversible" harm, particularly to children and those in utero. Lanphear ¶¶ 11, 13, 33, 44, 48; Hanna-Attisha ¶¶ 25-26; Griffiths ¶¶ 26, 29. And the case law does not require quantification beyond "significant harm" or "severe and irreversible harm."[17]

No expert on the health effects of lead in this case disputes those conclusions. Dr. Lanphear is one of the world's foremost experts in the field

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¶ 42-53. Indeed, Dr. Reiber's conclusion that there is a "substantial presence of lead phosphate" to support his finding of adequate corrosion control is belied by one of the two analyses he relies on, which contains very little indication of lead phosphate. *See* Reiber Ex. C at 147-51.

[17] Plaintiffs need show only that irreparable harm is "more likely than not," *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017). Courts routinely grant preliminary relief without quantification of the likely harm. *See, e.g.*, *United States v. M/V Sanctuary*, 540 F.3d 295, 297, 302-03 (4th Cir. 2008) (affirming preliminary injunction based on the presence of a chemical and studies showing that the chemical "may" cause adverse health effects); *Or. State Pub. Interest Research Grp. v. Pac. Coast Seafoods Co.*, 374 F. Supp. 2d 902, 907 (D. Or. 2005) (entering preliminary injunction based on general studies concluding that harm can occur at the same levels of the pollutants observed in that case).

and has published more than 40 studies specifically on lead exposure. *See* Lanphear, Ex. A at 6-23. In contrast, Dr. Goodman is not an expert in lead exposure, *has never published anything on lead or its health effects*, and has not subjected her fringe "no irreparable harm at these levels" opinions to peer review. *See* Lanphear Reply ¶ 4. Indeed, Dr. Goodman purports only to "analyz[e], summarize[e], and categoriz[e]" studies conducted by actual experts in the field.[18] Goodman ¶ 8. This case therefore does not involve a "battle of the lead experts" because Dr. Goodman is not one. The Court should credit the opinions of one of the world's foremost lead experts, based on solid research, and not the opinions of a long-time industry consultant[19] who is not a lead expert.

Significantly, the City and NJDEP have conceded that elevated water lead levels alone cause irreparable injury, absent an effective filter program.

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[18] Dr. Goodman, for example, relies on a study purporting to conclude that there was no health impact from elevated water lead levels in Washington, D.C. in 2003-04. Goodman ¶ 41. Experts in this field know that that conclusion was retracted by its authors. *See* Ex. 89, Envt'l Health Persp. (Aug. 2009) at 3.

[19] Dr. Goodman and her firm Gradient have for years worked as apologists for the chemical and metals industries. *See, e.g.*, Ex. 90, *Meet the 'Rented White Coats' Who Defend Toxic Chemicals* (Feb. 2016) (scientist's statement that Dr. Goodman and Gradient "have a reputation of misrepresenting the science consistently"); Ex. 91, *Contesting the Science of Smoking* (citing Dr. Goodman's work on behalf of tobacco companies). Lanphear Reply ¶¶ 5-6.

The City explicitly relied on the following admission by NJDEP:

> Whether somebody has high blood lead levels or low blood lead levels, I think we all agree that filters are required in the Pequannock. Filters are required if somebody's tap has high results. [. . .] Those are the people that need filters to prevent current irreparable harm.

ECF No. 186 (ellipses in original) (citing Feb. 22, 2019 Hr'g Tr. 62:23-64:4); *see also* Def. Br. 7 ("Newark understood immediately . . . that its residents needed interim protection from the risk of exposure."). The City's litigation tactic of questioning settled science is also inconsistent with its recent recognition that "[d]angerously 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." Pl. Ex. 18. Plaintiffs respond to the City's "no risk of harm" arguments despite the City's admissions.

The City next argues that Newark-reported blood lead levels do not suggest any harm. This claim is misguided and internally inconsistent. Dr. Goodman asserts that blood lead levels are the best evidence for assessing "recent and/or ongoing exposure" to lead, Goodman ¶ 17, but then relies on data from 2016 and the first half of 2017 to argue there is no evidence of *present* harm. Years-old data cited by Dr. Goodman tell the Court nothing about the recent or cumulative impact of Newark's water lead levels. The data do not include 2018, much less the second half of 2018 when water lead levels

reached 47.9 ppb at the 90th percentile. Lanphear Reply ¶ 13.

Even Dr. Goodman recognizes that blood tests are not performed for infants under 6 months old, Goodman ¶ 53, which belies her assertion that Newark's blood lead data show no harm to residents. Based on his decades of experience assessing the risk of lead in drinking water on children and infants, Dr. Lanphear concludes unequivocally that there is a substantial risk of significant harm—*particularly to infants*—from Newark's water lead levels, which is *not* captured in blood lead data. Lanphear ¶¶ 15-17, 46-48. No expert in the relevant field—lead exposure—has rebutted this conclusion.

Dr. Goodman draws the wrong conclusions even from the old data. Those data show an increase of blood lead levels from 2016 to the first half of 2017, after years of decline. Given the steady reductions in lead from other sources, Newark should be seeing marked decreases in blood lead levels. That there was any increase (even back in 2017, when water lead levels were much lower than they are now), is indicative of the health risks from Newark's elevated water lead levels. Lanphear ¶¶ 43-44; Lanphear Reply ¶¶ 14-15.

Finally, it is of no import that the health experts do not discuss the efficacy of the filter program, as Plaintiffs' other experts and witnesses do. From a *health* perspective, the critical points are that (1) *even a few months of exposure* to Newark's water can cause substantial harm; (2) the filter program

did not even *begin* until October 2018; and (3) the adverse health effects of lead are cumulative, Lanphear ¶¶ 10, 24-25, 41-48; Lanphear Reply ¶¶ 9-12. Newark residents were exposed to high levels of lead prior to October 2018, and Plaintiffs' other witnesses establish that many residents continue to be exposed to lead because of defects in the filter program. Those residents will suffer *cumulative* impacts of lead exposure over many months and thus face significant irreparable injury absent an injunction. Lanphear Reply ¶¶ 9-12.

D. Newark residents, including Plaintiffs' members, are suffering irreparable harm

The City advances an unduly narrow view of the irreparable harm this Court may consider. Def. Br. 30-31. Because "[t]he SDWA empowers citizens to act as 'private attorneys general' to 'seek relief . . . on behalf of society as a whole,'" *Concerned Pastors*, 220 F. Supp. 3d at 829 (quotation omitted), the Court may consider harm to Newark residents at large.

But even under the City's cramped view, Plaintiffs establish irreparable harm to their own members, beyond the financial costs, likely never to be recouped, of having to pay for protective measures. Members of NRDC and NEW Caucus and their families *do* describe ways in which they and their families may be exposed to lead through unfiltered residential tap water. *See* Gianni ¶ 18; Mitchelson-Parker ¶ 9; Moussab ¶ 9; Vicino ¶ 4. And members of

NEW Caucus describe irreparable personal and professional injuries related to their students' lead exposures, which the City has not challenged. *See* Canik ¶¶ 6-7; Gianni ¶¶ 6-13; Jordan ¶¶ 6, 20; Moussab ¶¶ 20-21.

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

Newark did not present a single piece of evidence to rebut Plaintiffs' demonstration of likelihood of success on the merits of seven violations. *See* Pl. Br. 30-47. The City does not profess compliance with the Rule's public education requirements, *see id.* 39, nor does it assert that its lead service line inventory is complete, *see id.* 40-41. It has not contested here its failure to complete the first phase of lead service line replacements under the Rule's timeline. *See id.* 42-47. It even concedes that it has not, and is not today, adequately treating its water to control corrosion. *See* Def. Br. 37. Plaintiffs have proffered facts to support serious violations that are directly causing residents' injuries. Instead of addressing the evidence of each violation, the City rests entirely on novel legal arguments.

A. The Court has discretion to grant preliminary equitable relief

Under the City's theory, this Court would have *no* equitable discretion to protect Newark residents from further exposure to lead in their water—no matter how high the lead levels were, and even absent any filter program. *See* Def. Br. 13 ("The Court cannot order equitable relief here that goes beyond the

Lead and Copper Rule's criteria," which "exclude bottled water and filter remedies."). The City would strip the Court of its traditional power to remedy injuries caused by statutory violations. While that power is not "limitless," Def. Br. 12, only Congress can limit it, and Congress did not do so here.

As Plaintiffs detailed in their opposition to the City's motion to strike, ECF No. 182, district courts have a full array of equitable tools to mitigate harm from violations of law, particularly where the public interest is at stake. *See Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Consistent with that principle, the Sixth Circuit denied a stay of an injunction that required defendants to "deliver bottled water to homes until they ensure that a home has a properly installed and maintained water filter," or unless the residents opted out. *Concerned Pastors for Soc. Action v. Khouri*, 844 F.3d 546, 549 (6th Cir. 2016). In that case, which the City ignores, the Sixth Circuit held that the district court, in its discretion, had ordered an "appropriate" preliminary remedy for the "specific systemic harms" caused by violations of the Act. *Id.* at 550. Here, too, now that the City's violations have created a City-wide health crisis, the Court may fashion temporary relief it deems necessary to achieve the Act's health-protective purposes, including provision of safe water in ways that would not be mandated—or needed—if the City were in compliance.

That the Act empowers courts to "enforce" statutory and regulatory requirements, 42 U.S.C. § 300j-8(a), does not impinge on their equitable powers to stem harm, as illustrated in *Concerned Pastors*. Cases brought under the similarly worded citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365(a), also require defendants found liable for statutory violations to take actions not otherwise required by regulation. *See United States v. Deaton*, 332 F.3d 698, 714 (4th Cir. 2003) (confirming court's discretion to order restoration of wetlands, exceeding regulatory obligations); *U.S. Pub. Interest Research Grp. v. Atl. Salmon of Me., LLC*, 339 F.3d 23, 29-31 (1st Cir. 2003) (holding that court had equitable authority to impose requirements, beyond permit obligations, to mitigate harm caused by violations); *NRDC v. Sw. Marine, Inc.*, 236 F.3d 985, 999-1000 (9th Cir. 2000) (holding that court's "enforcement" includes power to add remedies beyond permit terms for harms stemming from violations).

The availability to the government of "endangerment" remedies under other provisions of the Safe Drinking Water Act does not constrain the Court's equitable discretion under the citizen suit provision. *See* Def. Br. 13-15. The court in *Concerned Pastors* exercised that discretion. Further, the Clean Water Act contains a similar "emergency powers" provision for EPA to address "imminent and substantial endangerment." 33 U.S.C. § 1364(a). Despite that

provision, as discussed above, the First, Fourth, and Ninth Circuits held that courts retain equitable authority under the citizen suit provision to order remedies beyond mere "enforcement" of statutory and regulatory requirements. Similarly, the addition of an "imminent and substantial endangerment" citizen suit provision to RCRA, 42 U.S.C. § 6972(a)(1)(B), does not subtract from a court's equitable powers to mitigate harm from violations of that statute. Rather, it provides citizens an *additional* avenue to address harm, even in the complete *absence* of violations of any RCRA regulatory requirements. *Compare* 42 U.S.C. § 6972(a)(1)(A) (allowing enforcement of statutory and regulatory requirements), *with id.* § 6972(a)(1)(B) (providing for liability untethered from statutory and regulatory compliance).

The cases cited by the City do not undermine the Court's authority here. In *United States v. City of New York*, 198 F.3d 360, 366 (2d Cir. 1999), proposed intervenors were attempting to *block* enforcement of a statutory requirement, not enforce it, so the court found they did not have a protectable interest. In *United States v. Oakland Cannabis Buyers' Co-operative*, 532 U.S. 483 (2000), the district court had ordered a remedy that was inconsistent with and foreclosed by congressional findings. The Supreme Court found that the district court *did* have discretion to select a particular means of enforcing the statute, but did not

have a choice "whether enforcement is preferable to no enforcement at all." *Id.* at 497-98. Here, Plaintiffs ask the Court to enforce the Act and stem the continuing risks of lead exposure pending a final resolution on the merits.

B. Plaintiffs' claims are not barred by primary jurisdiction

In response to the City's motion to dismiss, Plaintiffs laid out the many reasons for the Court to adjudicate this case. *See* ECF No. 135, at 25-40. This case is not "truly the exception," where abstention might be considered given "heightened state involvement as evidenced by a formal administrative proceeding in process that the citizens' suit would disrupt." *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 695 (3d Cir. 2011) (quotation omitted). There is no formal administrative proceeding here, and the primary jurisdiction doctrine is inapplicable unless administrative procedures allow plaintiffs to "trigger and participate in" the agency process. *Rosado v. Wyman*, 397 U.S. 397, 406 (1970); *accord Cheyney State Coll. Faculty v. Hufstedler*, 703 F.2d 732, 737 (3d Cir. 1983). The administrative orders from NJDEP's informal enforcement have been negotiated in secret, with no opportunity for Plaintiffs' involvement.

Nor do Plaintiffs seek a remedy that "necessarily conflicts" with NJDEP's order. *Baykeeper*, 660 F.3d at 692. Plaintiffs agree the Court *should* consider actions the City is already taking to remedy ongoing risks from lead, and fashion further interim relief accordingly. *See Concerned Pastors*, 220

F. Supp. 3d at 828 (tailoring scope of order for bottled water delivery and water filter protocols to reflect evidence of what more is needed to ensure safe water for all residents). And should the Court order relief that *supplements* the State's order, "'a more stringent remediation standard . . . is not a reason to invoke the primary jurisdiction doctrine.'" *Baykeeper*, 660 F.3d at 692 (quoting *Interfaith Cmty. Org. Inc. v. PPG Indus.*, 702 F. Supp. 2d 295, 312 (D.N.J. 2010)).

Trinity Industries, Inc. v. Chicago Bridge & Iron Company, 735 F.3d 131 (3d Cir. 2013), is not to the contrary. In *Trinity*, the Third Circuit held that the district court did not abuse its discretion in denying relief where an order already required the cleanup of "all contamination," and the plaintiffs there did not contend that the remediation was deficient. *Id.* at 139-40. Here, by contrast, Plaintiffs contend the City's remediation is deficient. Moreover, principles of federalism relied on by the City are inapt here, where the Commissioner herself is a Defendant.

C. The City's reliance on a self-coined "safe harbor" is misplaced

The City claims the Rule bars Plaintiffs' corrosion control claims because NJDEP has stated that Newark is in "substantial compliance" with the SCAO. Def. Br. 39-40. But the provision on which the City relies provides:

> Any water system that complies with the applicable corrosion control treatment requirements specified by the State under

> §§ 141.81 and 141.82 shall be deemed in compliance with the [§ 141.80(d)(1)] treatment requirement . . . .

40 C.F.R. § 141.80(d)(2). Significantly, the "*applicable* corrosion control treatment requirements specified by the State under §§ 141.81 and 141.82," *id.* (emphasis added), include continued operation of State-designated optimal corrosion control treatment within State-designated optimal water quality control parameters. *See* 40 C.F.R. § 141.81(d)(3)-(7); *id.* § 141.82(d)-(g). Neither the City nor the State have shown that such designations have been made, nor have they argued that the City has operated pursuant to those designations. The Rule requires full compliance with its corrosion control treatment requirements, not just substantial compliance with a negotiated State order.

III. Plaintiffs' request for relief is appropriate and necessary

The City's wild overestimates of the cost of Plaintiffs' proposed relief are unsupported by evidence or logic. With respect to filter installation, providing the same number of filters in less time increases the *rate* of installation, not the total hours worked; implementing the relief in three months instead of a year will not materially change the labor cost. *See* Shefftz Reply ¶ 8; *contra* Def. Br. 19-20. There is thus no reason to depart from Plaintiffs' estimated installation costs, which is based on the City's own estimate, *see* Shefftz tbl. 3 (citing October 1, 2018, Stewart ¶ 15), except to *subtract* the $1.7 million worth of

filters that the City has already obtained, *see* Pl. Br. Ex. 17, at 3.

The City's claim of a "potential $50 million bill" when inspection costs are included, Def. Br. 20, is similarly baseless. Inspection is no more work than installation, and the labor cost of installation for *every home in Newark* is about $1 million. *See* Shefftz tbl. 3. The cost of inspecting only those homes covered by the proposed relief would be likely be lower, offsetting the potential increase in per-house costs from the speed of the work. Four inspections would therefore add about $4 million, not $50 million, in labor costs.[20]

Nor would the injunction displace NJDEP. *See* Def. Br. 42-43. First, it is incorrect that the "requested injunction conflicts squarely" with the SCAO, *id.* at 42; both may be followed simultaneously. Second, an injunction is warranted because "dilatory tactics and NJDEP's inability to deal effectively with those tactics" have "thwarted" the regulatory process. *Trinity Indus., Inc.*, 735 F.3d at 140 (quoting *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 399 F.3d 248, 267-68 (3d Cir. 2005)). NJDEP has either extended or allowed the City to blatantly ignore many of its deadlines. *E.g.*, SCAO ¶¶ 5, 12-14, 33. Third, a "deficient or ineffective" negotiated remedy does not bar injunctive relief, Def.

[20] Thus, the proposed relief does not "ignore" the work that the City has done, Def. Br. 18; the City would be required to "ensure" that each household "has been provided" with filters, not provide additional filters to those that already have them. ECF No. 143-1, at 4-5; ECF No. 143-2, at 3.

Br. 42; Plaintiffs have shown that the filter program is both. *See supra* § I.

The City is responsible for preventing further harm from its failure to abide by law, and this is all the requested relief would require.[21] Plaintiffs provide multiple options for relief, and the Court has the discretion to consider costs and protectiveness. Furthermore, the cost of protecting residents should be more than offset by the benefits of avoiding lead exposure, which can lead to increased health-care and special-education expenditures, increased crime, and decreased lifetime earnings. *See, e.g.*, Ex. 92, Envt'l Health Persp. (July 2009). By comparison, lead-paint remediation has been found to provide $17 to $221 worth of benefits for every $1 expended. Lanphear Ex. J, at 749-50. And the cost of not entering the injunction will be borne by Newark residents in other ways as well; those who are even aware of the problem will be forced to pay for their own protection, or put themselves and their families at risk.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction and order the City to implement relief necessary to abate ongoing harm to the City's most vulnerable populations.

[21] Plaintiffs do not ask the Court to force other agencies to turn over data, *contra* Def. Br. 44-45; they merely note—and the City tacitly accepts—that those entities could provide the data necessary for the proposed relief.

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Respectfully submitted,

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