

1 XAVIER BECERRA
 Attorney General of California
 2 DAVID A. ZONANA, (SBN No. 196029)
 Supervising Deputy Attorney General
 3 MEGAN K. HEY (SBN No. 232345)
 ELIZABETH B. RUMSEY (SBN No. 257908)
 4 Deputy Attorneys General
 300 South Spring Street, Suite 1702
 5 Los Angeles, CA 90013
 Telephone: (213) 269-6344
 6 Fax: (916) 731-2128
 E-mail: Megan.Hey@doj.ca.gov
 7 *Attorneys for State of California, by and through*
Attorney General Xavier Becerra

8 MAURA HEALEY
 Attorney General of Massachusetts
 9 I. ANDREW GOLDBERG, Asst. Attorney General
 Environmental Protection Division
 10 One Ashburton Place, 18th Floor
 Boston, MA 02108
 Telephone: (617) 963-2429
 11 Fax: (617) 727-9665
 E-mail: andy.goldberg@mass.gov
 12 *Attorney for the Commonwealth of Massachusetts,*
by and through Attorney General Maura Healey
 13 *(admitted pro hac vice)*

14
 15 *Additional Parties & Counsel Listed on Signature Page*

16 IN THE UNITED STATES DISTRICT COURT
 17 FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

18 ASBESTOS DISEASE AWARENESS
 19 ORGANIZATION, AMERICAN PUBLIC
 HEALTH ASSOCIATION, CENTER FOR
 20 ENVIRONMENTAL HEALTH,
 ENVIRONMENTAL WORKING GROUP,
 21 ENVIRONMENTAL HEALTH STRATEGY
 CENTER, and SAFER CHEMICALS
 22 HEALTHY FAMILIES,
 23
 v.
 24 ANDREW WHEELER, as Acting
 Administrator of the United States
 25 Environmental Protection Agency, and the
 UNITED STATES ENVIRONMENTAL
 26 PROTECTION AGENCY,
 27
 28

Case No. 3:19-cv-00871-EMC

Plaintiffs,

Defendants,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATE OF CALIFORNIA, by and through Attorney General Xavier Becerra; COMMONWEALTH OF MASSACHUSETTS, by and through Attorney General Maura Healey; STATE OF CONNECTICUT, by and through Attorney General William Tong; STATE OF HAWAII, by and through Attorney General Clare E. Connors; STATE OF MAINE, by and through Attorney General Aaron M. Frey; STATE OF MARYLAND, by and through Attorney General Brian E. Frosh; STATE OF MINNESOTA, by and through Attorney General Keith Ellison; STATE OF NEW JERSEY, by and through Attorney General Grover Grewal; STATE OF OREGON, by and through Attorney General Ellen F. Rosenblum; and STATE OF WASHINGTON, by and through Attorney General Robert W. Ferguson; and DISTRICT OF COLUMBIA, by and through Attorney General Karl A. Racine,

Plaintiffs,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and ANDREW WHEELER, Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

Case No.: 3:19-cv-03807-EMC

THE STATES' MOTION FOR SUMMARY JUDGMENT ON THEIR CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT

Date: November 12, 2020
Time: 1:30 p.m.
Judge: Honorable Edward M. Chen
Courtroom: 5, 17th Floor

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
NOTICE OF MOTION FOR SUMMARY JUDGMENT	vi
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION	1
II. STATEMENT OF ISSUES	2
III. PROCEDURAL BACKGROUND	2
IV. STATUTORY BACKGROUND.....	3
A. Congress Enacted TSCA in 1976.....	3
B. Congress Amended TSCA in 2016 to Strengthen EPA’s Authority, Including EPA’s Ability to Regulate Asbestos.....	4
C. TSCA Requires EPA to Satisfy “Best Available Science,” Weight of the Scientific Evidence, and “Reasonably Available Evidence” Standards in Evaluating Risks and Regulating Toxic Substances, Including Asbestos.....	5
D. Congress Directed EPA to Collect Data About Chemicals Like Asbestos Under TSCA to Ensure that EPA Has Adequate Information about the Toxic Chemicals it Regulates.....	5
E. The States’ Rights to Petition for the Rulemaking and Judicially Challenge EPA’s Denial of the Petition.....	7
V. STATEMENT OF FACTS	7
A. EPA Has Known About Asbestos-Related Data Gaps Since at Least 2017.....	7
B. EPA Has Not Used the CDR Rule to Fill the Asbestos-Related Data Gaps	9
C. The Asbestos Draft Risk Evaluation Reflects EPA’s Failures to Fill the Asbestos-Related Data Gaps	10
VI. STANDING	10
VII. JURISDICTION.....	11
VIII. STANDARD OF REVIEW	11
A. Summary Judgment.....	11
B. The APA	12
IX. ARGUMENT	13
A. Robust Reporting of Asbestos Import and Use Is A Sine Qua Non of EPA’s Mandate under TSCA, and Its Denial of the Petition Was Arbitrary and Capricious, an Abuse of Discretion and Not in Accordance with Law	13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

(continued)

Page

1.	By Exempting Imported Asbestos-Containing Articles from Reporting under 40 CFR 711.10(b), EPA Runs Afoul of TSCA	16
2.	By Exempting Asbestos as a “Naturally Occurring Substance” from Reporting under 40 CFR 711.6(a)(3), EPA Runs Afoul of TSCA.....	17
3.	By Not Requiring Reporting by Asbestos Processors, EPA Runs Afoul of TSCA.....	18
4.	By Failing to Require Reporting of Asbestos as an Impurity to Address Increasing Recognition of Potential Exposures from Products such as Talcum Powders, EPA Runs Afoul of TSCA	19
B.	The Need to Require the Reporting the Petition Seeks is Not Avoidable Based on Timing for the Initial TSCA Asbestos Risk Evaluation	20
C.	EPA’s Failure to Require the Requested Reporting is Contrary to Law Because the Information is Neither Unnecessary Nor Duplicative.....	23
D.	EPA’s Assertion That Models Suffice Does Not Justify EPA’s Failing to Seek Actual Information Under the CDR Rule	24
	CONCLUSION	25

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Anderson v. Liberty Lobby, Inc.
477 U.S. 242 (1986).....12

Asbestos Disease Awareness Organization v. EPA
No. 19-cv-008711, 2, 11

California v. EPA
385 F. Supp. 3d 903 (N.D. Cal. 2019)11

Catawba Cty., N.C. v. EPA
571 F.3d 20 (D.C. Cir. 2009)16

Celotex Corp. v. Catrett
477 U.S. 317 (1986).....12

City of New Orleans v. SEC
969 F.2d 1163 (D.C. Cir. 1992)16

Dep’t of Homeland Sec. v. Regents of the Univ. of California
__U.S.__, 140 S. Ct. 1891 (2020).....12, 13

Food & Water Watch, Inc. v. EPA
291 F.Supp.3d 1033 (N.D. Cal. 2017)14

Keenan v. Allan
91 F.3d 1275 (9th Cir. 1996).....12

Kisor v. Wilkie
__ U.S. __, 139 S. Ct. 2400 (2019).....14

Lujan v. Defenders of Wildlife
506 U.S. 555 (1992).....11

Massachusetts v. EPA
549 U.S. 497 (2007).....11

Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.
463 U. S. 29 (1983).....12, 15, 20

Res. Ltd., Inc. v. Robertson
35 F.3d 1300 (9th Cir. 1993).....13, 16, 20, 25

Safer Chemicals, Healthy Families v. EPA
943 F.3d 397 (9th Cir. 2019).....10, 21

TABLE OF AUTHORITIES

(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

WildEarth Guardians v. U.S. E.P.A.
759 F.3d 1064 (9th Cir. 2014).....13

STATUTES

5 United States Code
§ 706(2)12, 13, 15

15 United States Code
§ 26014, 6, 14, 15, 24
§ 26024, 15
§ 2605(a)4, 5, 13
§ 2605(b)4, 5, 15
§ 2607(a) *passim*
§ 2614(3)7
§ 2620 *passim*
§ 26255, 15, 23, 24, 25

REGULATIONS

40 Code of Federal Regulations
§ 702.3315, 23, 24
§ 704.39
§ 704.59
§ 707.2017
§ 711.17
§ 711.510
§ 711.610, 17, 18
§ 711.1010, 16, 17
§ 711.157
§ 720.3010

COURT RULES

Federal Rules of Civil Procedure
56(a)12
56(c)12

FEDERAL REGISTER

51 Fed. Reg. 29,460 (July 12, 1989)13, 15
81 Fed. Reg. 91,927 (Dec. 19, 2016)5
84 Fed. Reg. 20,062 (Apr. 30, 2019)2
85 Fed. Reg. 20,122 (April 9, 2020)22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

162 Cong. Rec. S3511 (2016).....5

S. Rep. No. 94-698 (1976)4

S. Rep. No. 94-698 (Mar. 16, 1976).....24

EPA, *Chemical Data Reporting: Data Quality Assurance*6, 7

EPA, *CDR Primary Manufacturer Submission*7, 21

EPA, *Basic Information about Chemical Reporting*.....6

EPA, *2020 Chemical Data Reporting (CDR) Requirements Webinar Materials*22

NOTICE OF MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTICE that on November 12, 2020, at 1:30 P.M., before the Honorable Edward M. Chen, United States District Judge, in Courtroom 5, 17th Floor, 450 Golden Gate Avenue, San Francisco, California 94102, plaintiffs, the State of California, by and through Attorney General Xavier Becerra, the Commonwealth of Massachusetts, by and through Attorney General Maura Healey, and the States of Connecticut, Hawaii, Maine, Maryland, Minnesota, New Jersey, Oregon, Washington, and the District of Columbia (together, States), will and hereby do move for summary judgment in their favor pursuant to Federal Rule of Civil Procedure 56 and Civil Local Rule 56-1. This motion is based on the points and authorities below, the attached declarations, the administrative record and any hearing on this motion.

The States are entitled to summary judgment because the defendant Environmental Protection Agency (EPA) violated the Administrative Procedure Act (APA) by denying their January 31, 2019 petition for rulemaking under the Toxic Substances Control Act (TSCA). This petition, filed under section 21 of TSCA, asked EPA to initiate a rulemaking to amend the TSCA Chemical Data Reporting (CDR) rule to require reporting on asbestos. Asbestos is among the most dangerous chemicals ever produced; the reporting the States requested would have provided necessary use and exposure information for EPA’s evaluation and regulation of asbestos’ risks to human health and the environment, as required by TSCA. EPA denied the petition on April 30, 2019. As the States demonstrate below, EPA’s denial of the Petition and refusal to use its TSCA rulemaking power to require reporting of information necessary for informed and supportable conclusions about the risks of asbestos was arbitrary and capricious, an abuse of discretion, and contrary to law and should be set aside under the APA, 5 U.S.C. Chapter 7. The Court should direct EPA to grant the Petition and initiate the requested rulemaking, to require reporting on asbestos use and exposure under the CDR rule.

///

///

///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 14, 2020

Respectfully submitted,

FOR THE STATE OF CALIFORNIA
ATTORNEY GENERAL XAVIER BECERRA

/s/ Megan K. Hey

MEGAN K. HEY
Deputy Attorney General
Attorneys for State of California

Dated: July 14, 2020

FOR THE COMMONWEALTH OF
MASSACHUSETTS
ATTORNEY GENERAL MAURA HEALEY

/s/ I. Andrew Goldberg

I. ANDREW GOLDBERG
Assistant Attorney General
*Attorneys for Commonwealth of
Massachusetts*

Dated: July 14, 2020

FOR THE STATE OF CONNECTICUT
ATTORNEY GENERAL WILLIAM TONG

/s/ Matthew I. Levine

MATTHEW I. LEVINE
SCOTT N. KOSCHWITZ
Assistant Attorneys General
State of Connecticut
Office of the Attorney General
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5250
matthew.levine@ct.gov
Attorneys for State of Connecticut

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 14, 2020

FOR THE STATE OF HAWAII
ATTORNEY GENERAL CLARE E. CONNORS

/s/ Wade H. Hargrove III

WADE H. HARGROVE III
DIANE K. TAIRA
Deputy Attorneys General
Health Division
(admitted pro hac vice)
Hawaii Department of the Attorney
General
465 South King Street, Room 200
Honolulu, Hawaii 96813
(808) 587-3050
wade.h.hargrove@hawaii.gov
Attorneys for State of Hawaii

Dated: July 14, 2020

FOR THE STATE OF MAINE
ATTORNEY GENERAL AARON M. FREY

/s/ Katherine Tierney

KATHERINE TIERNEY
Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8897
katherine.tierney@maine.gov
Attorneys for State of Maine

Dated: July 14, 2020

FOR THE STATE OF MARYLAND
ATTORNEY GENERAL BRIAN E. FROSH

/s/ Steven J. Goldstein

STEVEN J. GOLDSTEIN
Special Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6414
sgoldstein@oag.state.md.us
Attorneys for State of Maryland

1 Dated: July 14, 2020

FOR THE STATE OF MINNESOTA
ATTORNEY GENERAL KEITH ELLISON

2
3 /s/ *Philip S. Pulitzer*

4 PHILIP PULITZER
Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
900 Town Square Tower
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
7 (651) 757-1244
philip.pulitzer@ag.state.mn.us
8 Attorneys for State of Minnesota

9 Dated: July 14, 2020

10 FOR THE STATE OF NEW JERSEY
ATTORNEY GENERAL GURBIR S. GREWAL

11 /s/ *Lisa Morelli*

12 LISA MORELLI
Deputy Attorney General
13 Division of Law
R.J. Hughes Justice Complex
14 25 Market Street, P.O. Box 093
Trenton, NJ 08625
15 (609) 376-2708
lisa.morelli@law.njoag.gov
16 Attorneys for State of New Jersey

17 Dated: July 14, 2020

18 FOR THE STATE OF OREGON
ATTORNEY GENERAL ELLEN F.
ROSENBLUM

19 /s/ *Paul Garrahan*

20 PAUL GARRAHAN
Attorney-in-Charge
21 STEVE NOVICK
Special Assistant Attorney General
(admitted pro hac vice)
22 Natural Resources Section
Oregon Department of Justice
23 1162 Court Street, N.E.
Salem, Oregon 97301-4096
24 (503) 947-4342
paul.garrahan@doj.state.or.us
25 steve.novick@doj.state.or.us
26 Attorneys for State of Oregon

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 14, 2020

FOR THE STATE OF WASHINGTON
ATTORNEY GENERAL ROBERT W.
FERGUSON

/s/ Jonathan C. Thompson

JONATHAN C. THOMPSON
Assistant Attorney General
Ecology Division
(admitted pro hac vice)
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6740
jonathan.thompson@atg.wa.gov
*Attorneys for Washington State Department
of Ecology*

Dated: July 14, 2020

FOR THE DISTRICT OF COLUMBIA
ATTORNEY GENERAL KARL A. RACINE

/s/ David S. Hoffman

KATHLEEN KONOPKA
Deputy Attorney General
Public Advocacy Division
CATHERINE A. JACKSON
Chief, Public Integrity Section
DAVID S. HOFFMANN
Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
441 Fourth Street N.W., Suite 650 North
Washington, D.C. 20001
(202) 442-9889
david.hoffmann@dc.gov
Attorneys for the District of Columbia

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The undersigned States challenge EPA’s denial of their petition under section 21 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2620, to initiate rulemaking under TSCA section 8(a), 15 U.S.C. § 2607(a) (Petition).¹ The Petition sought to address dangerous infirmities in asbestos reporting under EPA’s Chemical Data Reporting (CDR) rule, 40 C.F.R. pt. 711.

Asbestos is an extremely toxic carcinogen that unfortunately continues to be in widespread use in the U.S. and poses ongoing dangers to the States’ residents. The intended purpose of the CDR rule is to obtain reliable and comprehensive information from manufacturers and importers necessary for EPA’s regulation of dangerous substances like asbestos under TSCA. The current CDR rule for asbestos fails to achieve TSCA’s goal in four respects: (1) it exempts “raw” asbestos—characterized as a “naturally occurring substance”—from reporting; (2) it fails to require asbestos processors to report; (3) it exempts reporting of asbestos as an “impurity,” e.g., in talc products such as baby powder; and (4) it fails to require the reporting of the import of asbestos as a component of articles, such as in after-market brake parts. These gaps effectively shield asbestos importers, and those who manufacture/import goods that contain asbestos, from having to disclose their role in distributing asbestos, and prevent EPA from fulfilling its statutory mandate to protect the public from this notorious carcinogen. With these glaring deficiencies in the CDR rule, EPA cannot satisfy TSCA’s requirements that it evaluate reasonably available information about asbestos’ risks to human health and, where it identifies unreasonable risks, act to eliminate them.

The Petition sought to address these data gaps. EPA’s unlawful and arbitrary denial of the Petition deprives EPA, as well as the States and the general public, of the data that the reporting requirements sought by the Petition would have provided, perpetuating a status quo where EPA makes regulatory assessments with unreliable and inadequate information.

¹ The States support the positions presented in the Memorandum of Points and Authorities filed this date by the plaintiffs in the consolidated case *Asbestos Disease Awareness Organization v. EPA*, No. 19-cv-00871.

1 **II. STATEMENT OF ISSUES**

2 1. Whether the undisputed facts demonstrate that EPA's denial of the Petition for
3 reporting encompassing, among other things, importing of raw asbestos; asbestos as a component
4 of articles such as aftermarket brake parts; and asbestos as a contaminant in products like talcum
5 powders, children's crayons, and cosmetics—was arbitrary and capricious, an abuse of agency
6 discretion, and not otherwise in accordance with law?

7 2. Whether the undisputed facts demonstrate that EPA must require the reporting
8 about asbestos requested in the Petition for EPA to satisfy its ultimate statutory mandate to
9 prevent unreasonable risks of injury to human health?

10 **III. PROCEDURAL BACKGROUND**

11 On January 31, 2019, the States, concerned that EPA lacked comprehensive and accurate
12 information about asbestos exposure pathways, filed a petition under TSCA section 21, 15 U.S.C.
13 § 2620. The Petition requested that EPA proceed with rulemaking to ensure that the CDR rule, 40
14 C.F.R. pt. 711, required reporting of information regarding asbestos and articles containing
15 asbestos needed by EPA to satisfy its mandate under TSCA to prevent unreasonable risks of
16 injury to human health and the environment. Pls.' Pet.² 30–31. EPA denied the petition on April
17 30, 2019. TSCA Section 21 Petition; Reasons for Agency Response, 84 Fed. Reg. 20,062, 20,066
18 (Apr. 30, 2019) (hereinafter Denial).

19 Thereafter, on June 28, 2019, and within the 60-day period for suit, the States filed a
20 complaint for declaratory and injunctive relief in *California v. EPA*, No. 19-cv-03807 (States'
21 Case). ECF No. 1. On July 17, 2019, the States' Case was designated as related to *Asbestos*
22 *Disease Awareness Organization v. EPA*, No. 19-cv-00871 (ADAO Case), in which an Amended
23 Complaint had been filed February 19, 2019. ECF No. 5.

24 On November 15, 2019, the Court issued an order denying EPA's motion to dismiss the
25 ADAO Case but dismissing with prejudice that case's TSCA Section 21 claim for de novo
26 review. ADAO Case, ECF No. 43 at 12. Upon stipulation of the States and EPA, the Court

27 _____
28 ² The Petition is attached as Exhibit 1 to the States' Amended Complaint, ECF No. 50.

1 extended the deadline for EPA’s responsive pleading in the States’ Case until December 20,
2 2019, to afford the parties additional time to meet and confer (1) regarding the effect (if any) on
3 the States’ Case of the Court’s order on the motion to dismiss in the ADAO Case, and (2) to
4 propose a briefing schedule for the Court should briefing be required to address any potential
5 areas of dispute concerning how the States’ Case should proceed. States’ Case, ECF No. 43.

6 Thereafter, upon stipulation of the States and EPA, the Court consolidated the ADAO
7 Case and the States’ Case. States’ Case, ECF No. 46. In accordance with the Court’s order, the
8 States filed their amended complaint on January 30, 2020, States’ Case, ECF No. 50. The States
9 proceeded with their claim for relief under the APA, but did not pursue their “de novo” claim
10 under TSCA Section 21(b)(4)(B), 15 U.S.C. § 2620(b)(4)(B) in light of the Court’s decision on
11 the Motion to Dismiss in the ADAO Case. On February 20, 2020, EPA filed its answer to the
12 States’ amended complaint, States’ Case, ECF No. 51, and its certified administrative record,
13 ECF No. 52. On March 24, 2020, upon stipulation of the States, EPA, and the ADAO plaintiffs,
14 the Court extended the briefing schedule for summary judgment motions in the consolidated
15 cases. States’ Case, ECF No. 59.

16 **IV. STATUTORY BACKGROUND**

17 **A. Congress Enacted TSCA in 1976**

18 From its inception, TSCA has fulfilled an important information-forcing function
19 regarding chemicals and their potential impacts. It specifically authorizes EPA to require
20 reporting, record-keeping and testing requirements, and charges the agency with restricting the
21 distribution and use of chemical substances to prevent unreasonable risk to health or to the
22 environment. Congress passed TSCA because it believed that “adequate information should be
23 developed with respect to the effect of chemical substances and mixtures on health and the
24 environment,” and that “the development of such information should be the responsibility of
25 those who manufacture and those who process such chemical substances and mixtures.” 15
26 U.S.C. § 2601(b)(1). Moreover, “adequate authority should exist to regulate chemical substances
27 and mixtures which present an unreasonable risk of injury to health or the environment, and to
28

1 take action with respect to chemical substances and mixtures which are imminent hazards. . . .”
2 *Id.* § 2601(b)(2).

3 With TSCA, Congress also made EPA the federal agency responsible for
4 comprehensively evaluating hazards associated with toxic chemicals. As the Commerce
5 Committee report noted: “there is no agency which has the authority to look comprehensively at
6 the hazards associated with the chemical. Existing authority allows the agencies to only look at
7 the hazards within their jurisdiction in isolation from other hazards associated with the same
8 chemical. The bill would grant [EPA] the authority to look at the hazards in total.” S. Rep. No.
9 94-698 at 2 (1976).

10 **B. Congress Amended TSCA in 2016 to Strengthen EPA’s Authority,**
11 **Including EPA’s Ability to Regulate Asbestos**

12 The 2016 amendment of TSCA requires that EPA perform risk evaluations of priority
13 chemicals to determine whether they present “unreasonable risks” to human health or the
14 environment and to eliminate such risks. Frank R. Lautenberg Chemical Safety for the 21st
15 Century Act, Pub. L. No. 114—182, 130 Stat. 448 (2016); 15 U.S.C. § 2605(a)–(b).

16 In determining whether the risks posed by a substance, like asbestos, are unreasonable,
17 TSCA requires EPA to evaluate the risks from the full range of exposures in the circumstances
18 under which the chemical substance is intended, known, or reasonably foreseen to be
19 manufactured, processed, distributed in commerce, used, or disposed of, without consideration of
20 costs or other nonrisk factors. 15 U.S.C. §§ 2605(b)(4)(A), 2602(4). Where EPA determines that
21 a chemical poses an unreasonable risk, TSCA directs EPA to issue a rule imposing one or more
22 regulatory requirements so that the chemical substance no longer presents such risk. 15 U.S.C. §
23 2605(a). For example, it authorizes the agency to ban the chemical substance as necessary, *see* 15
24 U.S.C. § 2605(a)(1)(A), to limit the amount of the substance that may be manufactured, processed
25 or distributed, *id.* § 2605(a)(1)(B), and/or to ban the substance for a particular use, *id.* §
26 2605(a)(2)(A)(i). Absent the benefit of the reporting TSCA envisioned, EPA cannot perform the
27 analyses required to fulfill its mandate to protect the public from chemicals like asbestos.

1 Congress directed EPA to initiate risk evaluations of the ten highest priority chemicals
 2 within 180 days of the amendment’s enactment. Congress had asbestos in mind. As expressed by
 3 Senator Barbara Boxer in support of amending TSCA: “[W]e have made asbestos a priority in
 4 this bill.” *See* 162 Cong. Rec. S3511 (2016). In December 2016, EPA named asbestos among its
 5 ten high priority chemicals. Designation of Ten Chemical Substances for Initial Risk Evaluation
 6 under the Toxic Substances Control Act, 81 Fed. Reg. 91,927, 91,928 (Dec. 19, 2016).

7 **C. TSCA Requires EPA to Satisfy “Best Available Science,” Weight of the**
 8 **Scientific Evidence, and “Reasonably Available Evidence” Standards in**
 9 **Evaluating Risks and Regulating Toxic Substances, Including Asbestos**

10 In TSCA, Congress expressly requires EPA to engage in science-based actions to prevent
 11 unreasonable risk of injury to health or the environment as a result of exposures to hazardous
 12 chemical substances like asbestos, and to consider the information reasonably available to the
 13 Administrator regarding, among other things, exposure, in regulating under the Act.

14 Section 26 of TSCA, 15 U.S.C. § 2625 provides:

15 (h) Scientific standards

16 In carrying out [section 2605] of this title . . . the Administrator shall use scientific
 17 information, technical procedures, measures, methods, protocols, methodologies,
 18 or models, employed in a manner consistent with the best available science

19 (i) Weight of scientific evidence

20 The Administrator shall make decisions under [section 2605] of this title based on
 21 the weight of the scientific evidence.

22 * * *

23 (k) Reasonably available information

24 In carrying out [Section 6] of this title, the Administrator shall take into
 25 consideration information relating to a chemical substance or mixture, including
 26 hazard and exposure information, under the conditions of use, that is reasonably
 27 available to the Administrator.

28 Also, in its risk evaluations under TSCA, EPA must consider “the likely duration, intensity,
 frequency, and number of exposures under the conditions of use of the chemical substance....” 15
 U.S.C. § 2605(b)(4)(F)(iv).

29 **D. Congress Directed EPA to Collect Data About Chemicals Like Asbestos**
 30 **Under TSCA to Ensure that EPA Has Adequate Information about the**
 31 **Toxic Chemicals it Regulates**

32 To enable EPA to fulfill its mandate to protect public health, TSCA requires EPA to collect

1 chemical-related data. TSCA section 8(a), 15 U.S.C. § 2607(a), requires that EPA promulgate
2 rules requiring manufacturers (including importers) and processors of chemical substances to
3 report to the agency the information it needs to evaluate and regulate the target chemical.
4 Congress' intent was to place the burden of developing the necessary information on industry. *See*
5 *id.* § 2601(b)(1), (b)(3). For example, Congress authorized EPA to obtain the following data,
6 among other things, known to, or reasonably ascertainable by, the reporting person:

- 7 • Total amount manufactured or processed and reasonable estimates of amount to be
8 manufactured or processed for various uses (15 U.S.C. § 2607(a)(2)(C);
- 9 • All existing information about its environmental and health effects (*id.* §
10 2607(a)(2)(E)); and
- 11 • Individuals exposed and estimate of number of those who will be exposed in their
12 places of employment (*id.* § 2607(a)(2)(F)).

12 By legislating with such granularity, Congress expressed its belief that such information is
13 essential for effective regulation under TSCA. Congress also recognized that industry should not
14 be unnecessarily burdened, and specified that EPA should not require unnecessary or duplicative
15 reporting. *Id.* § 2607(a)(5).

16 Thus, EPA promulgated the CDR rule, 40 C.F.R. pt. 711. In EPA's own words, "The
17 CDR database constitutes *the most comprehensive source of basic screening-level, exposure-*
18 *related information on chemicals available to EPA . . . used by the Agency to protect the public*
19 *from potential chemical risks."* *See Chemical Data Reporting; Basic Information about Chemical*
20 *Reporting*, EPA, [https://www.epa.gov/chemical-data-reporting/basic-information-about-](https://www.epa.gov/chemical-data-reporting/basic-information-about-chemical-data-reporting)
21 [chemical-data-reporting](https://www.epa.gov/chemical-data-reporting/basic-information-about-chemical-data-reporting) (emphasis added). As EPA describes it, "[t]his information allows EPA
22 to develop an understanding of the types, amount, end uses, and possible exposure to chemicals in
23 commerce." *Id.* In the CDR rule itself, EPA characterized the information it would obtain as
24 "*necessary for the administration of TSCA.*" 40 C.F.R. § 711.1(a) (emphasis added).

1 Several mechanisms ensure the reliability of information gathered under the CDR rule. It
 2 is subject to audit by EPA. *Id.*³ The individual certifying the accuracy of the information does so
 3 on penalty of perjury. 40 C.F.R. § 711.15(b)(1).⁴ Moreover, failure or refusal to submit
 4 information required by the CDR rule is subject to civil and criminal penalties under TSCA. 40
 5 C.F.R. § 711.1(c); 15 U.S.C. § 2614(3).

6 **E. The States' Rights to Petition for the Rulemaking and Judicially Challenge**
 7 **EPA's Denial of the Petition**

8 TSCA section 21(a), 15 U.S.C. § 2620(a), authorizes persons, like the States, to initiate
 9 rulemaking under TSCA Section 8(a), 15 U.S.C. § 2607(a), to require the reporting sought by the
 10 Petition. TSCA section 21(b)(4)(A), 15 U.S.C. § 2620(b)(4)(A), provides that upon denial of such
 11 a petition, the petitioner may sue in the district court to compel EPA to initiate the requested
 12 rulemaking proceeding.

13 **V. STATEMENT OF FACTS**

14 The material facts establishing that EPA's denial of the Petition was arbitrary and
 15 capricious, an abuse of discretion, and/or not in accordance with law under the APA are not
 16 subject to genuine dispute.

17 **A. EPA Has Known About Asbestos-Related Data Gaps Since at Least 2017**

18 EPA has acknowledged there is no accurate information about the amount of imported
 19 asbestos-containing goods, and it recognized "certain asbestos-containing products can be
 20 imported into the U.S., but the amounts are not known. These products are mostly used in
 21 industrial processes (e.g. cement products) but could also be used by consumers, and include
 22 woven products and automotive brakes and linings." Office of Chemical Safety and Pollution
 23 Prevention, EPA, Doc. No. EPA-740-R1-7018, *Problem Formulation of the Risk Evaluation for*
 24 *Asbestos* 8 (2018) (hereinafter Asbestos Problem Formulation). And the agency recognized that,

25
 26 ³ See also *Chemical Data Reporting: Data Quality Assurance*, EPA, **Error! Hyperlink**
reference not valid.<https://www.epa.gov/chemical-data-reporting/data-quality-assurance>.

27 ⁴ See also *CDR Primary Manufacturer Submission*, EPA, [https://www.epa.gov/sites/production/](https://www.epa.gov/sites/production/files/2020-03/documents/cdr_primary_manufacturer_submission.pdf)
 28 [files/2020-03/documents/cdr_primary_manufacturer_submission.pdf](https://www.epa.gov/sites/production/files/2020-03/documents/cdr_primary_manufacturer_submission.pdf).

1 “[r]eporting of asbestos in the 2016 Chemical Data Reporting (CDR) period was limited.” *Id.* at
2 21. Further, it has admitted that “[c]onsumer exposures will be difficult to evaluate since the
3 quantities of these products that still might be imported into the United States *is not known.*” *Id.* at
4 39 (emphasis added).

5 In the Asbestos Problem Formulation, EPA stated that it “contacted a domestic brake
6 blocks manufacturing company to confirm that asbestos brake blocks are still used in oilfield
7 equipment within the United States.” *Id.* at 25. While the company “no longer fabricates brake
8 blocks using asbestos, [it] did confirm that they import asbestos-containing brake blocks on
9 behalf of some clients for use in the oil field industry.” *Id.* However, EPA stated that “[i]t is
10 unclear how widespread the continued use of asbestos brake blocks is for use in oilfield
11 equipment,” and it “continues to investigate the use of this product.” *Id.*

12 In its solicitation of public comments on the draft TSCA risk evaluation of asbestos, EPA
13 concedes its continuing lack of knowledge about imported asbestos: “EPA has also identified the
14 importation of asbestos-containing products; however, the import volumes of those products are
15 not fully known.” Notice of Availability and Request for Comment on Draft Evaluation of
16 Asbestos, 85 Fed. Reg. 18,954, 18,956 (Apr. 3, 2020).

17 Further, EPA has admitted it relies on data from the United States Geological Survey
18 (USGS) for its current risk evaluation of asbestos. Answer to Am. Compl. (hereinafter EPA
19 Answer) ¶ 72, States’ Case, ECF No. 51. In fact, EPA has relied heavily on USGS data for its
20 conclusions about the amount of imported asbestos and asbestos-containing articles. *See* Asbestos
21 Problem Formulation at 16, 19, 21-25, 57 (providing internet links to the USGS Mineral
22 Summaries 2016-2018); *see also* Office of Chemical Safety and Pollution Prevention, EPA, Doc.
23 No. EPA-740-R1-7008, *Scope of the Risk Evaluation for Asbestos* 24 (2017) (“Cement, textiles,
24 and articles not specified are potentially fabricated or imported into the United States. These
25 products fall into categories that were identified by USGS as having been reported to U.S.
26 Customs and Border Protection as being imported into the United States in 2016”) (hereinafter
27 *Scope of Risk Evaluation*). The USGS, in turn, states that its data, based on bills of lading
28

1 collected by a commercial database, are only *estimates* of total imports. USGS, U.S. Dep’t of the
2 Interior, *Mineral Commodity Summaries* 26–27 (2018). USGS notes that “an unknown quantity
3 of asbestos was imported within manufactured products, including asbestos-containing brake
4 linings, knitted fabric, rubber sheets for gasket manufacture, and potentially asbestos-cement
5 pipe.” *Id.* EPA stated that “[o]ther import data presented in the USGS report are difficult to
6 interpret with respect to volumes because most of the asbestos-containing products reported are
7 described in terms of monetary value and not import volume.” Asbestos Problem Formulation at
8 22. Further, EPA stated, “the monetary value is associated with a product without reference to
9 amount or type of asbestos present in that product.” *Id.*

10 **B. EPA Has Not Used the CDR Rule to Fill the Asbestos-Related Data Gaps**

11 EPA has admitted that “knowledge of which entities are importing and using asbestos and
12 asbestos-containing products, where and how these activities occur, and the quantities of asbestos
13 involved *is important* for identifying exposed populations and characterizing pathways of
14 exposure.” EPA Answer ¶¶ 13, 15 (emphasis added). Despite EPA’s acknowledgment of the
15 importance of this information, EPA lets it slip through its fingers. The CDR expressly exempts
16 from reporting articles that “contain” asbestos, 40 C.F.R. § 704.5(a), and the reporting of asbestos
17 when it is “unintentionally present with another chemical substance,” as an impurity, 40 C.F.R.
18 §§ 704.3, 704.5(c). In a July 28, 2017 letter to Occidental Chemical Corporation (“Occidental”),
19 EPA stated that “Occidental was not required to report its imports of asbestos under 40 C.F.R. pt.
20 711 because Occidental’s operations satisfied the criteria of the naturally occurring chemical
21 substances exemption.” EPA Answer ¶ 76; *see also* ADAO, *et al.*, Petition under TSCA Section
22 21 to Require Reporting on Asbestos Manufacture, Importation and Use under TSCA Section
23 8(a) (Sept. 25, 2018), Doc No. EPA-HQ-OPPT-2019-0038,
24 <https://www.regulations.gov/document?D=EPA-HQ-OPPT-2019-0038-0004>. And in the
25 Asbestos Problem Formulation, EPA acknowledged that “[r]eporting of asbestos in the 2016
26 Chemical Data Reporting (CDR) period was limited” to only two companies, in fact, both from
27 the chlor-alkali industry. *See* Asbestos Problem Formulation at 21. This information was not
28

1 required under the CDR rule; the companies provided it *voluntarily*. EPA has also “used its
2 discretion to not require processors to report under the CDR rule.” *See* Denial at 20,066.

3 **C. The Asbestos Draft Risk Evaluation⁵ Reflects EPA’s Failures to Fill the**
4 **Asbestos-Related Data Gaps**

5 In the Asbestos Draft Risk Evaluation (Asbestos DRE), EPA admits it failed to obtain
6 sufficient information to be able to evaluate risks to people from imported articles containing
7 asbestos, information that EPA has the authority to obtain, and could have obtained much earlier
8 in the process:

- 9 • “EPA has [identified the following] asbestos-containing products . . . as being imported
10 and used . . . sheet gaskets, brake blocks, aftermarket automotive brakes/linings, other
11 vehicle friction products, and other gaskets. Office of Chemical Safety and Pollution
12 Prevention, EPA, Doc. No. EPA-740-R1-8012, *Draft Risk Evaluation for Asbestos* 17-18
13 (2017). “[H]owever, *the import volumes of those products are not fully known.*” *Id.* at 17
14 (emphasis supplied).
- 15 • “[I]t is not known how many sites fabricate imported sheet gaskets containing asbestos in
16 the United States. . . . [I]t is not possible to rule out incidental releases of asbestos fibers in
17 wastewater . . . but any amounts of release cannot be quantified.” *Id.* at 54.
- 18 • “[T]he number of workers potentially exposed for other [non-chlor-alkali plants]
19 [conditions of use] is less certain.” *Id.* at 21. And, “[m]ost data sources do not sufficiently
20 describe the proximity of these employees to the exposure source.” *Id.* at 22.
- 21 • “It is unclear if any other companies fabricate or import asbestos-containing brake blocks,
22 or how widespread the continued use of asbestos brake blocks is in oilfield equipment.”
23 *Id.* at 83. And, “The extent of brake block usage and associated worker exposures are
24 highly uncertain.” *Id.* at 86.

25 Moreover, with the CDR rule’s exemptions for asbestos as an “impurity” and as a
26 “naturally occurring substance” it is undisputed that EPA is not collecting data about potential
27 exposure routes. *See* 40 C.F.R. §§ 711.6(a)(3), 711.10(c), 711.5, 720.30(h)(1).

28 **VI. STANDING**

The States have standing to bring this action. To demonstrate standing, plaintiffs must show
they have suffered “an injury in fact” that is “fairly traceable to the challenged conduct of the

⁵ The Court may take judicial notice of the Asbestos DRE, a document available to the public
online. *See Safer Chemicals, Healthy Families v. EPA*, 943 F.3d 397, 420 n.13 (9th Cir. 2019)
(judicial notice taken of EPA’s scope document for 1,4 dioxane, publicly available online).

defendant,” and is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 506 U.S. 555, 560-61 (1992). Particularly given that the States are entitled to special solicitude in the standing analysis in this case, *see Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007); *California v. EPA*, 385 F. Supp. 3d 903, 910–911 (N.D. Cal. 2019), these criteria are easily met here: The States have a strong interest—economic, fiscal, and otherwise—in preventing the adverse public health impacts caused by asbestos. Although asbestos is no longer produced in the U.S.—and many uses of asbestos are banned—it is still legal to import and process asbestos and various asbestos-containing articles. Thus, there remains an ongoing risk of exposure and associated health impacts, which impose direct costs on the states, including health care costs. *See* attached de Jung Decl., ¶ 7.

The information requested in the Petition would not only reduce direct costs attributable to asbestos exposure, but it would also serve an important “right to know” function consistent with Congress’s intent to provide states and other entities with information they need to safeguard public health. *See* attached Cogliano Decl. at ¶¶ 5–9; Cummings Decl. at ¶¶ 6–10. In denying the Petition, EPA knowingly deprives not only itself but state regulators of this critical information. They are thus harmed by EPA’s action, and the relief requested will redress that harm.

VII. JURISDICTION

The Court has jurisdiction under TSCA Section 21 to review EPA’s denial of the Petition to determine if the denial was arbitrary and capricious, an abuse of discretion and/or not in accordance with law under the APA, and should be vacated.⁶

VIII. STANDARD OF REVIEW

A. Summary Judgment

Summary judgment is appropriate when the record shows that “there is no genuine dispute

⁶ On November 15, 2019, the Court denied EPA’s motion to dismiss in *Asbestos Disease Awareness Organization v. EPA*. *See* Order Denying Def.’s Mot. to Dismiss 12, ADAO Case, ECF No. 43. But the court dismissed the ADAO Plaintiffs’ *de novo* review claim, and suggested it might dismiss the Plaintiff States’ claim for *de novo* review for similar reasons. *See id.* at 10 n.5. Accordingly, the Plaintiff States filed their Amended Complaint pursuing relief under the APA. Am. Compl., States’ Case, ECF No. 50

1 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
2 56(a). Material facts are those that may affect the outcome of the case. *See Anderson v. Liberty*
3 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is “genuine” if the evidence
4 is such that a reasonable jury could return a verdict for the nonmoving party. *See id.*

5 Plaintiffs “bear[] the initial responsibility” of “identifying those portions” of the record
6 that “demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477
7 U.S. 317, 323 (1986). If Plaintiffs carry that initial burden, the burden shifts to EPA to set forth
8 competent evidence setting forth specific facts showing that there is a genuine issue for trial. See
9 Fed. R. Civ. P. 56(c); *see also Celotex*, 477 U.S. at 324; *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th
10 Cir. 1996) (opposing party must “identify with reasonable particularity the evidence that
11 precludes summary judgment”).

12 **B. The APA**

13 The APA “sets forth the procedures by which federal agencies are accountable to the
14 public and their actions subject to review by the courts.” *Dep’t of Homeland Sec. v. Regents of the*
15 *Univ. of California*, ___U.S. ___, 140 S. Ct. 1891, 1905 (2020) (quoting *Franklin v. Massachusetts*,
16 505 U.S. 788, 796 (1992)). It requires agencies to engage in “reasoned decisionmaking,” *Id.*
17 (quoting *Michigan v. EPA*, 576 U. S. 743, 750 (2015)), and directs that agency actions be “set
18 aside” if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
19 with law.” 5 U. S. C. § 706(2)(A). Consistent with the U.S. Supreme Court’s interpretation of this
20 language in *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U. S.
21 29, 43 (1983), the Ninth Circuit has held that agency action is arbitrary and capricious if the
22 agency “relied on factors which Congress has not intended it to consider, entirely failed to
23 consider an important aspect of the problem, offered an explanation for its decision that runs
24 counter to the evidence before the agency, or is so implausible that it could not be ascribed to a
25 difference in view or the product of agency expertise.” *WildEarth Guardians v. U.S. E.P.A.*, 759
26 F.3d 1064, 1069–70 (9th Cir. 2014). The denial of the Petition is “agency action” under the APA.
27 *See* 5 U.S.C. § 706(2); *see also*, 15 U.S.C. § 2620(b)(4)(A). Under this applicable “narrow
28

1 standard of review, . . . a court is not to substitute its judgment for that of the agency.” *Dep’t of*
 2 *Homeland Sec.*, 140 S. Ct at 1905 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502,
 3 513 (2009)). It should assess only whether the decision was “based on a consideration of the
 4 relevant factors and whether there has been a clear error of judgment.” *Dep’t of Homeland Sec.*,
 5 140 S. Ct at 1905 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U. S. 402, 416
 6 (1971). And courts have found that an agency decision based on information known to be
 7 incomplete is arbitrary and capricious. *See Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1305 (9th
 8 Cir. 1993).

9 **IX. ARGUMENT**

10 **A. Robust Reporting of Asbestos Import and Use Is A *Sine Qua Non* of EPA’s** 11 **Mandate under TSCA, and Its Denial of the Petition Was Arbitrary and** 12 **Capricious, an Abuse of Discretion and Not in Accordance with Law**

13 TSCA specifies that EPA must undertake risk evaluations for the most dangerous
 14 chemicals so it can mitigate the unreasonable risks to human health and the environment. *See* 15
 16 U.S.C. § 2605. As to asbestos, the hazards to human health it poses are well documented. *See*,
 17 *e.g.*, Asbestos Problem Formulation at 35 (commenting on “the well-established carcinogenicity
 18 of asbestos for lung cancer and mesothelioma”).⁷ Thus, for EPA to perform adequate risk
 19 evaluation it must comprehensively catalog potential exposures.⁸

20 TSCA further specifies requirements to ensure that EPA conducts the risk evaluation
 21 appropriately. It requires EPA look to the manufacturers and importers—those in the best position
 22 to have the information—for the specific data points for hazard and exposure: i.e., volume, use,
 23 potential exposures and disposal of the chemical. *See* 15 U.S.C. § 2601(b)(1). As discussed above

23 ⁷ *See also* Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce
 24 Prohibitions, 51 Fed. Reg. 29,460, 29,467 (July 12, 1989) (“Studies show that asbestos is a highly
 25 potent carcinogen and that severe health effects occur after even short-term, high-level or longer-
 26 term, low-level exposures to asbestos.”).

25 ⁸ *See* Office of Chemical Safety and Pollution Prevention, EPA, *Guidance to Assist Interested*
 26 *Persons in Developing and Submitting Draft Risk Evaluation Under the Toxic Substances Control*
 27 *Act 13* (June 2017) (hereinafter TSCA Guidance) (EPA uses “risk assessment as a tool to
 28 integrate *exposure* and health effects or ecological effects information into a characterization of
 the potential for health hazards in humans or other hazards to our environment” (emphasis
 added)).

1 at 7, under the CDR rule, manufacturers/importers must provide EPA with detailed information
2 about volumes of subject chemicals, use, and potential exposures that would support a risk
3 evaluation. This includes all existing information about its environmental and health effects, 15
4 U.S.C. § 2607(a)(2)(E), and data that identifies individuals exposed and estimate of number of
5 those who will be exposed in their places of employment. *Id.* § 2607(a)(2)(F).

6 The purpose of citizen petitions under TSCA, like the Petition here, is to ensure that EPA
7 does not overlook unreasonable risks to health or the environment in evaluating and regulating
8 toxic chemicals. *See Food & Water Watch, Inc. v. EPA*, 291 F.Supp.3d 1033, 1048 (N.D. Cal.
9 2017) (citing *Env. Def. Fund v. Reilly*, 909 F.2d 1497, 1499 (D.C. Cir. 1990) (“Citizen
10 participation is broadly permitted [under TSCA] to ensure that bureaucratic lethargy does not
11 prevent the appropriate administration of this vital authority.”)). Citizen petitions under Section
12 21 are intended to be an “unusually powerful procedure[] for citizens to force EPA’s hand.” *See*
13 *Food & Water Watch, Inc.*, 291 F.Supp.3d at 1048 (citing *Trumpeter Swan Soc. v. EPA*, 774 F.3d
14 1037, 1039 (D.C. Cir. 2014).

15 Without robust reporting—including of data that is now expressly excluded under the
16 CDR rule—EPA cannot effectively evaluate the actual risks posed by asbestos in the
17 environment. In refusing to grant the Petition and require reporting related to, among other things,
18 imported raw asbestos, asbestos as a component of articles such as aftermarket brake parts, and
19 asbestos as a contaminant in products like talcum powders, children’s crayons, and cosmetics,
20 EPA is acting arbitrarily and capriciously, abusing its discretion in administering TSCA, and
21 acting contrary to the statute’s mandates that EPA (1) gather sufficient information to (2)
22 effectively regulate toxic substances to prevent unreasonable risks to health and the environment.
23 The Supreme Court recently recognized that “administrative law doctrines must take account of
24 the far-reaching influences of agencies and the opportunities such power carries for abuse.” *Kisor*
25 *v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2423 (2019). Here, the opportunities for EPA to abuse its
26 discretion in ignoring Congress’ mandate in TSCA for protecting the public from toxic chemicals
27 are striking, where EPA *admits* it is missing critical information needed for it to perform its risk
28

1 evaluation for asbestos and refuses to amend its CDR rule to obtain that information.

2 EPA has admitted throughout its asbestos risk evaluation process that it lacks information
3 about the volume of asbestos and asbestos-containing goods in commerce. This information
4 would inform EPA about *exposure*, one of the two critical components of risk.⁹ (The other
5 component of risk—the *effect* of exposure—is well-known. *See, e.g.*, Asbestos Problem
6 Formulation at 35 (commenting on “the well-established carcinogenicity of asbestos for lung
7 cancer and mesothelioma”); Asbestos; Manufacture, Importation, Processing, and Distribution in
8 Commerce Prohibitions, 51 Fed. Reg. at 29,467. Absent complete and reliable data about
9 exposure, risk evaluation compliant with TSCA is not possible. *See, e.g.*, 15 U.S.C. § 2625(h), (i),
10 (k) (requiring EPA use information “consistent with the best available science” based on the
11 “weight of scientific evidence”, and “reasonably available to the Administrator”); 40 C.F.R.
12 § 702.33 (defining best available science as “science that is reliable and unbiased”).

13 EPA’s decision to deny the Petition and refuse to add provisions to address asbestos in the
14 CDR rule should be reversed as “arbitrary, capricious, an abuse of discretion, or otherwise not in
15 accordance with law.” 5 U.S.C. § 706(2)(A). The agency’s action is inconsistent with Congress’
16 explicit intent that EPA administer TSCA to protect human health and the environment from
17 unreasonable risk of injury from chemical substances. *See* 15 U.S.C. § 2601(b), (c). More
18 specifically, it means the risk evaluation of asbestos will not be based on the requisite best
19 available science, the weight of scientific evidence, all information reasonably available, and may
20 well omit an otherwise foreseeable condition of use; thus, will not satisfy EPA’s obligations
21 under amended TSCA. *See* 15 U.S.C. §§ 2602(4), 2605(b)(4), 2625(h), (i), (k); *State Farm*, 463
22 U.S. at 43 (noting that an agency must “examine the *relevant data* and articulate a satisfactory
23 explanation for its action including a rational connection between the facts found and the choice
24 made.”) (emphasis added); *Res. Ltd., Inc. v. Robertson*, 35 F.3d at 1305 (holding that an agency
25 arbitrarily and capriciously relied on data it knew was incomplete for endangerment finding).

26 EPA’s decision to deny the Plaintiff State’s petition and continue to exempt the many

27 _____
28 ⁹ *See* TSCA Guidance, *supra* note 9, at 13.

1 asbestos-exposure data points from the CDR rule—data the Petition seek to have reported to
2 EPA—amounts to ignoring new or better data in rulemaking, which courts have consistently
3 found to be arbitrary. *See Catawba Cty., N.C. v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009) (agencies
4 “have an obligation to deal with newly acquired evidence in some reasonable fashion”); *see also*
5 *City of New Orleans v. SEC*, 969 F.2d 1163, 1167 (D.C. Cir. 1992) (“[A]n agency’s reliance on a
6 report or study without ascertaining the accuracy of the data contained in the study or the
7 methodology used to collect the data is arbitrary agency action . . .” (internal quotations omitted)).

8 The Petition seeks to have EPA address four specific areas in which the agency has failed
9 to obtain information about whether asbestos is being imported and processed but not reported to
10 EPA because of the identified significant infirmities in the current reporting regulations. In its
11 response to the Petition, EPA denies that its asbestos reporting requirements fail to adequately
12 yield information EPA needs to move forward under TSCA. However, in doing so EPA fails to
13 rebut the evidence to the contrary presented in the Petition. In rejecting all of the disclosure
14 requirements the States sought, EPA repeats the mantra that it has all of the information it needs.
15 *See Denial at 20,067-68.* On the contrary, EPA’s admitted data gaps here are legion and belie its
16 contention that it has the data needed to comply with TSCA.

17 **1. By Exempting Imported Asbestos-Containing Articles from**
18 **Reporting under 40 CFR 711.10(b), EPA Runs Afoul of TSCA**

19 The Petition requested that EPA craft a new rule requiring reporting of information under
20 the CDR for articles containing asbestos. Am. Compl. ¶¶ 4, 83, States’ Case, ECF No. 50. EPA
21 abused its discretion and acted arbitrarily and capriciously in denying this request.

22 EPA’s regulations demand rigorous reporting by importers to comply with TSCA and
23 allow the agency to address unreasonable risks presented by asbestos. As discussed above, under
24 the CDR rule, manufacturers/importers must provide EPA with detailed information about
25 volumes of subject chemicals, use, and potential exposures that would support a risk evaluation.
26 This includes all existing information about its environmental and health effects, 15 U.S.C.
27 § 2607(a)(2)(E), and data that identifies individuals exposed and estimate of number of those who
28 will be exposed in their places of employment, *id.* § 2607(a)(2)(F). However, without basis, EPA

1 is failing to require that such data be disclosed when asbestos is imported within an article (such
2 as when it is a component of imported automobile brake parts) notwithstanding the potential
3 exposures associated with such imported products. *See* 40 CFR 711.10(b). For EPA to be less
4 rigorous in demanding such data, information that sheds crucial light on potential exposure
5 pathways for asbestos in the U.S., is arbitrary and capricious, an abuse of EPA’s discretion, and
6 not in accordance with law, particularly where, as here, there is no basis in the record to conclude
7 that that information is not reasonably available.

8 “TSCA is intended to be comprehensive and assure protection of health and the
9 environment from unreasonable risks associated with chemicals whether the chemicals are
10 imported or produced domestically.” 40 CFR § 707.20(b)(1). By failing to require that importers
11 of articles known to contain asbestos provide information regarding the asbestos content of their
12 products, EPA is abusing its discretion by failing to consider known avenues of substantial
13 exposure risk in its decision making process and is acting unlawfully by proceeding with its
14 asbestos risk evaluation and regulation without the data it needs to fulfill TSCA’s statutory
15 requirement that the agency regulate to prevent unreasonable risks of injury from asbestos.

16 **2. By Exempting Asbestos as a “Naturally Occurring Substance” from**
17 **Reporting under 40 CFR 711.6(a)(3), EPA Runs Afoul of TSCA**

18 The Petition requested EPA to craft a new rule stating that raw asbestos is not a “naturally
19 occurring substance” as defined by the CDR rule. *Am. Compl.* ¶¶ 4, 83, States’ Case, ECF No.
20 50. EPA abused its discretion and acted arbitrarily and capriciously in basing its denial of this
21 request on the grounds that the agency already had such information and any reporting
22 requirement would only lead to duplicative information. *See* Denial at 20,067.

23 The record here supports, and EPA cannot reasonably dispute, the States’ assertions that
24 EPA is ignoring that unreported “raw” asbestos is being imported under the CDR rule’s
25 exemption for “naturally occurring substances,” information the agency requires and EPA’s
26 denial of the Petition forecloses the agency’s obtaining that necessary information under the CDR
27 rule. 40 CFR §711.6(a)(3). For example, EPA admits in its July 28, 2017 letter to Occidental that
28

1 the company was not required to report its imports of asbestos because the company's operations
 2 satisfied the criteria of the "naturally occurring substance" exemption under the CDR rule. *See*
 3 EPA Answer ¶ 76, States' Case, ECF No. 51. Voluntary reporting, not subject to certification or
 4 censure, is no substitute for the mandatory reporting requirements requested in the petition, and it
 5 appears that it is just this kind of voluntary reporting that EPA says it is relying on with respect to
 6 imports of raw asbestos. EPA can and must exercise the authority that was conveyed upon it by
 7 Congress *for this very purpose*, 15 U.S.C. § 2607, to help fill this information gap by eliminating
 8 the "naturally occurring substances" exemption for raw asbestos, so that importers like Occidental
 9 must provide detailed, certified information about their imports of raw asbestos into the U.S.

10 **3. By Not Requiring Reporting by Asbestos Processors, EPA Runs**
 11 **Afoul of TSCA**

12 The Petition requested EPA to craft a new rule requiring that processors report
 13 information under the CDR about their use/import of asbestos. Am. Compl., ¶¶ 4, 83, States'
 14 Case, ECF No. 50. EPA abused its discretion and acted arbitrarily and capriciously in basing its
 15 denial of the request for information from processors on the grounds that all necessary
 16 information regarding asbestos processing had been obtained voluntarily. *See* Denial at 20,067.

17 TSCA, 15 U.S.C. § 2607(a)(1)(A), is an unambiguous express mandate for EPA to require
 18 manufacturers *and processors* to report to the agency data that are needed for EPA to fulfill its
 19 statutory requirement of preventing unreasonable risks to health and the environment. It is
 20 undisputed that EPA is not seeking reporting from processors of asbestos. Denial at 20,067. In
 21 denying the Petition to seek such data, EPA acted unlawfully by ignoring this statutory mandate.

22 Here, too, EPA is arbitrarily and capriciously relying on *voluntary* reporting (e.g., the
 23 voluntary reporting by two chlor-alkali companies discussed above), rather than compelled
 24 reporting on penalty of perjury, to obtain the information needed for the agency to fulfill its
 25 mandates under TSCA. However, such voluntary reporting cannot adequately capture the extent
 26 of asbestos processing that is ongoing in the U.S. Even if EPA does have data on the processing
 27 of asbestos into diaphragm filters and sheet gaskets, a proposition that is not supportable given
 28

1 EPA's failures to require the reporting of necessary data, that does not mean that no other
 2 industry is processing asbestos here. Indeed, the USGS reports, which derive from an online
 3 database EPA used to evaluate the scope of asbestos processing, indicate that far more asbestos is
 4 being processed in the U.S. than EPA knows about.¹⁰ EPA asserts that the difference between
 5 imports and reexports reflected in the USGS reports is attributable to misclassification of
 6 products—i.e., they do not actually contain asbestos—but the agency provides no basis for this
 7 conclusion, and it should be rejected.

8 **4. By Failing to Require Reporting of Asbestos as an Impurity to**
 9 **Address Increasing Recognition of Potential Exposures from**
 10 **Products such as Talcum Powders, EPA Runs Afoul of TSCA**

11 The Petition sets forth sufficient facts to demonstrate the need for EPA to eliminate the
 12 impurities exemption to asbestos reporting. *See* Pls.' Pet. 17-18. The risks to human health posed
 13 by impurities in asbestos, in particular through consumer products, has been well-documented.
 14 The Petition shows that asbestos has been discovered as an impurity in talc in cosmetics
 (including those marketed to teens), baby powder, and crayons. *Id.* at 18.¹¹

15 EPA's sole reason for denying the States' request that EPA require the reporting of
 16 information about asbestos as an impurity was EPA's stated belief that, if it eliminates the
 17 exemption for asbestos impurities, "it is unlikely that requiring this reporting would yield any
 18 new information because rules under [15 U.S.C. § 2607(a)] do not require submitters to perform

19
 20 ¹⁰ Asbestos Problem Formulation at 57 (providing internet links to the USGS Mineral
 Summaries 2016-2018).

21 ¹¹ The Petition cites news reports from 2018, which were available to EPA when considering the
 22 States' petition. *See, e.g.,* Roni Caryn Rabin & Tiffany Hsu, *Johnson & Johnson Feared Baby*
 23 *Powder's Possible Asbestos Link for Years*, New York Times (Dec. 14, 2018),
<https://www.nytimes.com/2018/12/14/business/baby-powder-asbestos-johnson-johnson.html>;
 24 Kathy Kristof, *Asbestos found in some crayons, consumer group finds*, CBS News (Aug. 7, 2018,
 4:52 PM), <https://www.cbsnews.com/news/asbestos-crayons-playskool-consumer-group-finds/>;
 25 *Study finds asbestos in Claire's makeup products marketed to teens*, CBS News (Mar. 13, 2018,
 11:58 AM), [https://www.cbsnews.com/news/study-asbestos-claires-makeup-products-marketed-](https://www.cbsnews.com/news/study-asbestos-claires-makeup-products-marketed-to-teens/)
 26 [to-teens/](https://www.cbsnews.com/news/study-asbestos-claires-makeup-products-marketed-to-teens/). In May of 2020, the weight of the claims against its use of talc in baby powder
 27 compelled Johnson & Johnson to discontinue sales of talc-based baby powder in the U.S. and
 Canada. *See* Victoria Albert, *Johnson & Johnson to discontinue sales of talc-based baby powder*
 28 *in U.S., Canada*, CBS News (May 20, 2020, 6:18 AM), [https://www.cbsnews.com/news/johnson-](https://www.cbsnews.com/news/johnson-johnson-talc-baby-powder-discontinued-us-canada-asbestos-claims-denied/)
[johnson-talc-baby-powder-discontinued-us-canada-asbestos-claims-denied/](https://www.cbsnews.com/news/johnson-johnson-talc-baby-powder-discontinued-us-canada-asbestos-claims-denied/).

1 chemical analyses of products containing the chemicals they manufacture.” Denial at 20,069.
2 However, 15 U.S.C. § 2607(a) expressly provides that “the standard for all information required
3 to be reported under [§ 2607(a)(2)] is that it be ‘known or reasonably ascertainable.’” *Id.* The
4 extent of asbestos contamination of consumer products, like those of Johnson & Johnson,
5 Claire’s, and others, is reasonably ascertainable, if not known, by these sophisticated companies.

6 Accordingly, the fact that entities would not be required to perform additional chemical
7 analyses does not justify EPA’s decision. EPA admits that the data the States’ request does, in
8 fact, exist. EPA affirmed that it “is aware that testing by a small number of importers of talc or
9 products such as crayons has shown that some of these products are contaminated with asbestos
10 as an impurity.” Denial at 20,069; EPA Answer ¶ 71, States’ Case, ECF No. 51 (EPA “admits it
11 is aware of testing by a small number of importers”). There is no requirement that the information
12 in the CDR be widespread—just “known.” *See* Denial at 20,069. EPA’s refusal to require the
13 reporting of the data that it admits exist, pursuant to its powers under § 2607(a)—in one place,
14 where the public, scientific community, and states know they can find it—is not supported by the
15 record, is arbitrary and capricious and an abuse of the agency’s discretion. *See, e.g., State Farm,*
16 *463 U.S. at 43* (agency action found arbitrary where it “offered an explanation for its decision that
17 runs counter to the evidence before the agency”); *Res. Ltd., Inc. v. Robertson*, 35 F.3d at 1305
18 (agency decision based on information known to be incomplete held arbitrary).

19 **B. The Need to Require the Reporting the Petition Seeks is Not Avoidable**
20 **Based on Timing for the Initial TSCA Asbestos Risk Evaluation**

21 In denying the Petition, EPA claims it would lack the time to undertake the requested
22 rulemaking and use information collected under an amended CDR if it were to grant the Petition.
23 Denial at 20,066. This cannot justify denial. EPA bears an ongoing obligation—which does not
24 expire on completion of an initial risk evaluation—to ensure no unreasonable risks from chemical
25 substances either by its own initiative or by citizen’s petition for rulemaking, so EPA will
26 continue to make use of information it gathers regarding asbestos exposure pathways. In fact,
27 EPA admits its use of CDR data is not limited to the initial risk evaluation under TSCA; rather,
28

1 the data informs both EPA’s own ongoing risk management and states’ regulatory programs. *See*
2 EPA, *Overview of 2020 Chemical Data Reporting (CDR) 5-6* (2019), [https://www.socma.org/wp-](https://www.socma.org/wp-content/uploads/2019/09/03-EPA-CDR-Proposal-Update.pdf)
3 [content/uploads/2019/09/03-EPA-CDR-Proposal-Update.pdf](https://www.socma.org/wp-content/uploads/2019/09/03-EPA-CDR-Proposal-Update.pdf).¹² Even if data reported in response
4 to the requested changes cannot be used for the current asbestos risk evaluation, it can be used to
5 inform or compel change to future regulation. And until an asbestos rule is final, EPA continues
6 to consider relevant data and act on it, notwithstanding statutory deadlines. As EPA has put it,
7 “[s]cientific analysis is often iterative in nature as new knowledge is obtained.” Asbestos Problem
8 Formulation at 13–14. The timing of EPA’s current risk evaluation thus does not excuse EPA
9 from conducting a comprehensive survey of the ways in which workers, consumers, and the
10 public are exposed to asbestos.

11 TSCA regulation is an iterative process and, as EPA notes in the Denial, the publication of
12 the Asbestos DRE is subject to peer and public review, which EPA claims it “will use to refine
13 the risk evaluation of asbestos.” Denial at 20,066. Thus, the benefits of having as much data as
14 possible from the manufacturers, processors, and importers would accrue to the public and
15 scientific community and to EPA as well. EPA also acknowledges that the requested rulemaking
16 “could be completed prior to any potential subsequent risk management decision(s) being
17 finalized”—thereby affirming that the requested rulemaking was possible prior to any regulatory
18 response by EPA to address the risk of harm to human health from asbestos. *See id.*

19 However, the agency indeed had time to promulgate the requested regulations to use in its
20 ongoing asbestos risk evaluation process. EPA recently promulgated CDR regulations applicable
21 to the 2020 CDR reporting cycle. *See* TSCA Chemical Data Reporting Revisions Under TSCA
22 Section 8(a), 85 Fed. Reg. 20,122 (April 9, 2020) (to be codified at 40 CFR pt. 711). These new
23 CDR regulations neither satisfy EPA’s obligations under TSCA to gather the information it needs
24 to prevent unreasonable risks posed by asbestos, nor do they address the States’ concerns raised
25 in the petition as they do not require reporting of asbestos that is naturally occurring, processing

26 _____
27 ¹² The Court may take judicial notice of EPA’s CDR slide deck, a document available to the
28 public online. *See Safer Chemicals*, 943 F.3d at 420 n.13 (judicial notice taken of EPA’s scope
document for 1,4 dioxane, publicly available online).

1 of asbestos, asbestos as an unintended contaminant of or otherwise contained in products. *See id.*
2 However, the new CDR regulations did apply to the information required for the 2020 CDR
3 submission period. *See id.* at 20,133 (explaining the “new byproduct exemption in an effort to
4 help the commenter apply the updated CDR reporting requirements in its 2020 reporting”). The
5 2020 submission period runs from June 1 to November 30, 2020. *2020 Chemical Data Reporting*
6 *(CDR) Requirements Webinar Materials*, EPA, [https://www.epa.gov/chemical-data-](https://www.epa.gov/chemical-data-reporting/2020-chemical-data-reporting-cdr-requirements-webinar-materials-0)
7 [reporting/2020-chemical-data-reporting-cdr-requirements-webinar-materials-0](https://www.epa.gov/chemical-data-reporting/2020-chemical-data-reporting-cdr-requirements-webinar-materials-0). This shows that
8 had EPA granted the Petition, the agency could have required the reporting of, and obtained, the
9 missing information about asbestos for the 2020 submission period.

10 The Petition also was consistent with EPA’s solicitation for additional data from the
11 public and industry. EPA stated that while it conducted what it termed a “comprehensive search
12 for reasonably available information from public sources as described in the *Scope of the Risk*
13 *Evaluation for Asbestos*” in 2017, it “encourages submission of additional existing data, such as
14 full study reports or workplace monitoring from industry sources, that may be relevant for
15 refining conditions of use, exposures, hazards and potentially exposed or susceptible
16 subpopulations during the risk evaluation. EPA will continue to consider new information
17 submitted by the public.” *Asbestos Problem Formulation* at 47.

18 Indeed, the data reporting the States seek here would have formalized EPA’s request for
19 this missing information from importers of asbestos-containing goods. In 2017, EPA stated that
20 because it had decided to limit consumer exposure scenarios to two categories of use “and very
21 little information has been identified to date on the extent of the uses,” it “will attempt to
22 communicate with identified importers of asbestos-containing products (automotive brakes and
23 woven products) to determine current status of import and use.” *Id.* at 50. EPA’s ongoing risk
24 evaluation process belies the agency’s claim that the timing does not work for it to compel
25 disclosure, and the agency has abused its discretion and acted arbitrarily and capriciously in
26 relying on this specious claim to deny the petition.

1 **C. EPA’s Failure to Require the Requested Reporting is Contrary to Law**
2 **Because the Information is Neither Unnecessary Nor Duplicative.**

3 The reporting requirements the States requested are neither “unnecessary” nor
4 “duplicative” of existing information such that they would offend TSCA’s proscription against
5 requiring such data in 15 U.S.C. § 2607(a)(5)(A). Instead, the reporting the states seek here would
6 satisfying EPA’s duties to evaluate asbestos “in a manner consistent with the best available
7 science,” “based on the weight of the scientific evidence,” and after considering “hazard and
8 exposure information . . . that is reasonably available to the Administrator.” 15 U.S.C. § 2625 (h),
9 (i), (k). EPA’s definitions of these terms highlight this. The term “best available science” means
10 science that is “reliable and unbiased.” 40 C.F.R. § 702.33. It involves use of “supporting studies”
11 and “supporting studies and data collected by accepted methods or best available methods (if the
12 reliability of the method and the nature of the decision justifies use of the data).” *Id.* The CDR
13 information sought comes from the manufacturers and importers on penalty of perjury. If EPA
14 has other information about the same hazard/exposure, the CDR information reported pursuant to
15 the rule the states’ requested is “supporting” information that would help EPA assess the
16 reliability of its other information. In the absence of any other information (i.e. evidence going to
17 the volume of imported articles containing asbestos) then data reported pursuant to the rule the
18 states seek is the best available evidence.

19 The term “weight of the scientific evidence” refers to EPA’s protocol to “identify and
20 evaluate each stream of evidence, including strengths, limitations, and relevance of each study
21 and to integrate evidence as necessary and appropriate based upon strengths, limitations, and
22 relevance.” 40 C.F.R. § 702.33. Any reported information under the asbestos-specific CDR rule
23 the states seek would increase the evidence EPA would have that was directly relevant to its risk
24 evaluation process, from the manufacturer/importers themselves, and reported on penalty of
25 perjury; i.e., strong evidence. Finally, “[r]easonably available information means information that
26 EPA possesses or can reasonably generate, obtain, and synthesize for use in risk evaluations” in
27 light of its various deadlines. *Id.* TSCA makes consideration of such information mandatory. 15

1 U.S.C. § 2625(k). As discussed above, Congress gave EPA express authority to require
2 information for risk evaluations, and made clear its intent that the manufacturers and those who
3 process the subject chemicals should develop the information. 15 U.S.C. §§ 2601(b)(1), 2607.

4 The record also supports the reasonableness of the States' request as companies *have*
5 disclosed their imports/use voluntarily: Chemours disclosed its import of asbestos-containing
6 gaskets in a public comment. *See* Asbestos Problem Formulation at 25. And two of the three main
7 U.S. chlor-alkali manufacturers voluntarily disclosed their import of raw asbestos under the CDR.
8 *Id.* at 21. Such voluntary disclosure shows that it would be reasonable for EPA to require such
9 information. And relying on voluntary disclosure is inadequate: the company may determine
10 whether and what information to report, and the data is less reliable insofar as is not produced on
11 penalty of perjury. (EPA affirmatively told a third chlor-alkali company that it need not report,¹³
12 thereby negating any incentive for the two companies that reported voluntarily to do so again.)

13 Similarly, the facts show that the USGS and Border Patrol receive information about
14 imported asbestos and to some extent, goods containing it. *See* Scope of Risk Evaluation at 24
15 (commenting on asbestos-containing “products [that] fall into categories that were identified by
16 USGS as having been reported to U.S. Customs and Border Protection as being imported into the
17 United States in 2016.”). Thus, it is unreasonable for EPA to decline to ask the
18 manufacturers/importers of asbestos and asbestos-containing goods to submit that information
19 directly to EPA. This is especially true since Congress sought to consolidate information-
20 gathering and toxic-substance regulation functions in EPA. *See* S. Rep. No. 94-698 (Mar. 16,
21 1976) (commenting on the lack of an “agency which has the authority to look comprehensively at
22 the hazards associated with the chemical” and that TSCA “would grant [EPA] the authority to
23 look at the hazards in total.”)

24 **D. EPA's Assertion That Models Suffice Does Not Justify EPA's Failing to**
25 **Seek Actual Information Under the CDR Rule**

26
27 ¹³ EPA Answer, ¶ 76; *see also*, Record Document ID EPA-HQ-OPPT-2019-0038-0004
28 (letter attached to the petition of the plaintiffs in the ADAO Case).

1 EPA's denial of the Petition on the grounds that it can rely on modeling instead is
2 arbitrary and capricious. While failing to rebut the evidence presented in the Petition that the
3 agency's CDR reporting requirements fail adequately to yield information about asbestos that
4 EPA needs to comply with TSCA, EPA asserts that it may substitute modeling for the required
5 information: "[w]here EPA lacks information, the Agency has relied on models. This use of
6 modeled data is in line with EPA's final Risk Evaluation Rule . . . and EPA's risk assessment
7 guidelines." Denial at 20,066. Models are only as good as their data inputs and while models may
8 be useful for regulatory decision making where the data is well-developed and sufficient to
9 inform the models, that is not the case here: EPA admittedly does not have information about the
10 manufacture, import and use of asbestos sufficient either to inform its models or its risk
11 evaluation and ultimate regulation of asbestos. By denying the Petition seeking a rule that would
12 produce sufficient information on which to perform its asbestos risk evaluation, EPA acted
13 arbitrarily and capriciously and abused its discretion under TSCA, *see, e.g., Res. Ltd.*, 35 F.3d at
14 1305, while failing to comply with the mandate in TSCA Section 26(h), 15 U.S.C. § 2625(h), that
15 EPA employ models consistent with the best available science.

16 EPA has the clear authority to require industry to provide the information it needs.
17 Instead, through its exemptions in the CDR rule for naturally occurring substances, articles, and
18 impurities, EPA has cut off avenues necessary for it to obtain the information necessary for
19 TSCA-compliant regulation of asbestos, whether through adequately constructed models or direct
20 analysis. EPA's continuing efforts to shield industries from having to report the asbestos content
21 of their products are a dereliction of the agency's duties under TSCA, and its refusal to require
22 the requested reporting is supported by neither the record nor reason.

23 CONCLUSION

24 For the foregoing reasons, the States respectfully request that this Court issue an order
25 granting the States' Motion for Summary Judgment, vacating EPA's denial of the Petition, and
26 compelling EPA to promptly initiate the rulemaking the States requested.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 14, 2020

Respectfully submitted,
FOR THE STATE OF CALIFORNIA
ATTORNEY GENERAL XAVIER BECERRA

/s/ Megan K. Hey

MEGAN K. HEY
Deputy Attorney General
Attorneys for State of California

Dated: July 14, 2020

FOR THE COMMONWEALTH OF
MASSACHUSETTS
ATTORNEY GENERAL MAURA HEALEY

/s/ I. Andrew Goldberg

I. ANDREW GOLDBERG
Assistant Attorney General
*Attorneys for Commonwealth of
Massachusetts*

Dated: July 14, 2020

FOR THE STATE OF CONNECTICUT
ATTORNEY GENERAL WILLIAM TONG

/s/ Matthew I. Levine

MATTHEW I. LEVINE
SCOTT N. KOSCHWITZ
Assistant Attorneys General
State of Connecticut
Office of the Attorney General
165 Capitol Avenue
Hartford, CT 06106
(860) 808-5250
matthew.levine@ct.gov
Attorneys for State of Connecticut

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 14, 2020

FOR THE STATE OF HAWAII
ATTORNEY GENERAL CLARE E. CONNORS

/s/ Wade H. Hargrove III

WADE H. HARGROVE III
DIANE K. TAIRA
Deputy Attorneys General
Health Division
(admitted pro hac vice)
Hawaii Department of the Attorney
General
465 South King Street, Room 200
Honolulu, Hawaii 96813
(808) 587-3050
wade.h.hargrove@hawaii.gov
Attorneys for State of Hawaii

Dated: July 14, 2020

FOR THE STATE OF MAINE
ATTORNEY GENERAL AARON M. FREY

/s/ Katherine Tierney

KATHERINE TIERNEY
Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
(207) 626-8897
katherine.tierney@maine.gov
Attorneys for State of Maine

Dated: July 14, 2020

FOR THE STATE OF MARYLAND
ATTORNEY GENERAL BRIAN E. FROSH

/s/ Steven J. Goldstein

STEVEN J. GOLDSTEIN
Special Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6414
sgoldstein@oag.state.md.us
Attorneys for State of Maryland

1 Dated: July 14, 2020

FOR THE STATE OF MINNESOTA
ATTORNEY GENERAL KEITH ELLISON

2
3 /s/ *Philip S. Pulitzer*

4 PHILIP PULITZER
Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
900 Town Square Tower
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
7 (651) 757-1244
philip.pulitzer@ag.state.mn.us
8 Attorneys for State of Minnesota

9 Dated: July 14, 2020

10 FOR THE STATE OF NEW JERSEY
ATTORNEY GENERAL GURBIR S. GREWAL

11 /s/ *Lisa Morelli*

12 LISA MORELLI
Deputy Attorney General
13 Division of Law
R.J. Hughes Justice Complex
14 25 Market Street, P.O. Box 093
Trenton, NJ 08625
15 (609) 376-2708
lisa.morelli@law.njoag.gov
16 Attorneys for State of New Jersey

17 Dated: July 14, 2020

18 FOR THE STATE OF OREGON
ATTORNEY GENERAL ELLEN F.
ROSENBLUM

19 /s/ *Paul Garrahan*

20 PAUL GARRAHAN
Attorney-in-Charge
21 STEVE NOVICK
Special Assistant Attorney General
(admitted pro hac vice)
22 Natural Resources Section
Oregon Department of Justice
23 1162 Court Street, N.E.
Salem, Oregon 97301-4096
24 (503) 947-4342
paul.garrahan@doj.state.or.us
25 steve.novick@doj.state.or.us
26 Attorneys for State of Oregon
27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 14, 2020

FOR THE STATE OF WASHINGTON
ATTORNEY GENERAL ROBERT W.
FERGUSON

/s/ Jonathan C. Thompson

JONATHAN C. THOMPSON
Assistant Attorney General
Ecology Division
(admitted pro hac vice)
Office of the Attorney General
P.O. Box 40117
Olympia, WA 98504-0117
(360) 586-6740
jonathan.thompson@atg.wa.gov
*Attorneys for Washington State Department
of Ecology*

Dated: July 14, 2020

FOR THE DISTRICT OF COLUMBIA
ATTORNEY GENERAL KARL A. RACINE

/s/ David S. Hoffman

KATHLEEN KONOPKA
Deputy Attorney General
Public Advocacy Division
CATHERINE A. JACKSON
Chief, Public Integrity Section
DAVID S. HOFFMANN
Assistant Attorney General
(admitted pro hac vice)
Office of the Attorney General
441 Fourth Street N.W., Suite 650 North
Washington, D.C. 20001
(202) 442-9889
david.hoffmann@dc.gov
Attorneys for the District of Columbia

LA2019503598
63430664.docx

CERTIFICATE OF SERVICE

Case Name: **State of California, et al. v. U.S. Environmental Protection Agency, et al.**

Case No.: **3:19-cv-03807-EMC**

I hereby certify that on July 14, 2020, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

**PLAINTIFF STATES' MOTION FOR SUMMARY JUDGMENT
ON THEIR CLAIMS UNDER THE ADMINISTRATIVE PROCEDURE ACT**

I certify that **all** participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 14, 2020, at Los Angeles, California.

Beatriz Davalos
Declarant

/s/ Beatriz Davalos
Signature