IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ORAL ARGUMENT NOT YET SCHEDULED
No. 24-1376

AMERICAN WATER WORKS ASSOCIATION,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; *and* LEE M. ZELDIN, *in his official capacity as Administrator of the United States Environmental Protection Agency*,
Respondents,
and
NATURAL RESOURCES DEFENSE COUNCIL; NEWBURGH CLEAN WATER PROJECT; *and* SIERRA CLUB,
Intervenor-Respondents.

On Petition for Review of Final Action by the
United States Environmental Protection Agency
89 Fed. Reg. 86,418 (Oct. 30, 2024)

BRIEF FOR *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Chamber of Commerce of the United States of America ("Chamber") certifies the following:

(A) Parties and *Amici*. All parties and intervenors are listed in the opening brief for Petitioner.

Amicus curiae also acknowledge that additional *amici* may file briefs in support of Petitioner.

(B) Rulings Under Review. The petition challenges a final action of the United States Environmental Protection Agency entitled *National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI)*, published at 89 Fed. Reg. 86,418 (Oct. 30, 2024).

(C) Related Cases. An accurate statement regarding related cases appears in the opening brief for Petitioner.

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DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* hereby submits the following corporate disclosure statement:

The Chamber states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), all parties in this case have consented to or affirmed no objection to the filing of this *amicus* brief.

Pursuant to D.C. Circuit Rule 29(d), counsel for *amicus curiae* certifies that a separate brief is necessary to provide the broad perspective of the business community that *amicus* represents, which covers every sector of the nation's economy, and is not limited to businesses that are directly subject to the rule at issue in this litigation. *Amicus curiae* are well-suited to provide the Court with important context and perspective on the two important legal questions that are addressed in this brief, which will assist the Court in resolving this case.

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GLOSSARY OF TERMS

APA	Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*.
EPA or the Agency	U.S. Environmental Protection Agency
Level	Maximum Containment Level
SDWA or the Act	Safe Drinking Water Act, 42 U.S.C. §§ 300f *et seq*.
System	Public Water System
The Final Rule or the 2024 Rule	National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI), 89 Fed. Reg. 86,418 (Oct. 30, 2024)
The 2021 Rule	National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4,198 (Jan. 15, 2021)
The 1991 Rule	Maximum Contaminant Level Goals and National Primary Drinking Water Regulations for Lead and Copper; Final Rule, 56 Fed. Reg. 26,460 (June 7, 1991)

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addenda to Petitioner's Brief.

INTEREST OF *AMICUS CURIAE*

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community. The Chamber's members include businesses affected by the rule at issue in this case, which imposes new requirements on public water systems. Along with businesses directly subject to the rule, all businesses rely on supplies of clean, safe water for their manufacturing processes, customers, employees, and the communities where they operate. And businesses generally benefit from

lawful, cost-effective regulations that do not impose unworkable obligations on the private sector.

INTRODUCTION AND SUMMARY OF ARGUMENT

When Congress enacted the Safe Drinking Water Act ("SDWA"), it knew that our nation's water supply includes both large, sophisticated, and relatively well-funded public water systems, and small water systems that serve as few as "twenty-five individuals." 42 U.S.C. § 300f(4)(A). Congress empowered the Environmental Protection Agency ("EPA") to promulgate national "primary drinking water regulation[s]" for all public water systems, *id.* § 300f(1), establishing a maximum permissible level of a contaminant, like lead, in drinking water that systems can deliver to customers so long as it is "economically [and] technologically feasible" for the systems to do so, *id.* §§ 300f(3), 300f(1)(C)(ii). National primary drinking water standards may require treatment techniques to achieve them, *id.* § 300g-1(b)(7)(A), and here those include public water systems taking action to replace lead service lines on private properties owned by individuals and businesses, *see* 89 Fed. Reg. at 86,445–46. Previously, EPA's regulations only mandated removal of lines that water systems owned. Now, for the first

time, EPA is requiring public water systems to replace the homeowner's pipes if those systems can access them. *See* 89 Fed. Reg. at 86,445–46. A significant difficulty in replacing service lines is that public water systems typically own only a portion of the line servicing a private property. *See* Opening Br. Of Pet. Am. Water Works Ass'n, *Am. Water Works Ass'n v. EPA*, No.24-1376, Dkt.2134752 at 2–3 (Sept. 12, 2025) ("Pet. Br."). Thus, public water systems of all sizes generally need private individuals' and businesses' consent to complete a costly replacement of the service line. *See id.* at 3–4.

EPA's new National Primary Drinking Water Regulations for Lead and Copper: Improvements ("Final Rule"), 89 Fed. Reg. 86,418, ignores this challenge, requiring public water systems to complete replacement of all lead service lines to which they have "access" within 10 years, 40 C.F.R. §§ 141.80(a)(3), 141.84(d)(2); 141.84(d)(4), 141.84(d)(5)(iii). But EPA's authority here only extends to a "public water system," defined as "a system for the provision to the public of water for human consumption through pipes or other constructed conveyances," including any "collection, treatment, storage, and distribution facilities *under control of the operator* of such a system and used primarily in connection with such

system." 42 U.S.C. § 300f(4)(A)(i) (emphasis added); *see also id.* § 300f(4)(A)(ii) (also including "any collection or pretreatment storage facilities not under such control which are used primarily in connection with such system"). The Final Rule rewrites the statutory phrase "under control of" to mean any service lines that "a water system has access (*e.g.*, legal access, physical access) to," 89 Fed. Reg. at 86,445, which would include portions of service lines on individuals' and businesses' private property. This Court should set aside the Final Rule because "under control of" does not equate to "access," and, in addition, because the Final Rule's deadlines and requirements ignore the practical realities that are central to providing drinking water across the United States.

First, EPA unlawfully rewrote the statutory term "control" to mean mere "access," leading to absurd results and threatening broad harms to businesses in a variety of contexts. The SDWA's plain text and context show that "control" means more than mere "access." EPA's assertion that "access" should be equated to "control" is thus wrong. "Access" often means only the ability to enter or approach, which does not even grant "control" over who else may access a property. After all, a business's granting a plumber access to its property does not mean that the plumber

then "controls" that business or property, or even that the plumber is authorized to forbid others from having such access; the same is true when a typical homeowner grants a contractor access to do work on the homeowner's property.

Endorsing EPA's contrary reading is not only inconsistent with the plain statutory text; it would also result in an unworkable regulatory framework for public water systems. Public water systems' responsibilities to impose the Final Rule would vary from jurisdiction to jurisdiction, as the systems would have to navigate diverse state and local laws to determine under what conditions they can "access" private property. Public water systems' responsibilities to impose the Final Rule would also vary property to property, as these systems would often be required to obtain property owner consent to access service lines on private property, and such consent could be granted or revoked at any time as property owners change their minds or as properties change hands.

Second, and relatedly, EPA's assertion that the Final Rule is feasible and cost-effective, which rests on the premise that compliance is technically possible for *some* large public water systems, is arbitrary and

capricious. EPA did not address the challenges that *all* regulated parties—not just a couple of large players—would face. To determine feasibility (as well as conduct a sufficient assessment of costs and benefits), EPA should have considered "the advantages *and* the disadvantages," *Michigan v. EPA*, 576 U.S. 743, 753 (2015), of the Final Rule's requirements for the industry as a whole, including whether the regulation's "benefits . . . justify or do not justify the costs of complying with" those requirements, 42 U.S.C. § 300g-1(b)(6)(D); *see id.* § 300g-1(b)(3)(C)(ii). But EPA's feasibility analysis excluded many public water systems. Even with that unlawfully narrow focus, EPA's analysis found that almost 40% of those public water systems it did study could not comply within the Final Rule's 10-year compliance timeframe based on current replacement rates. This is not surprising, because EPA thought just three years ago that it would take "approximately 33-year[s]" to "replace all lead and GRR service lines" impacted by the rule. 89 Fed. Reg. at 86,456. More generally, EPA's approach to feasibility and the cost-benefit analysis—refusing to look at the entire industry and focusing only on technical feasibility for just a subset of the regulated industry's

members—is unlawful and, if accepted by this Court, would have harmful and perverse effects on businesses.

ARGUMENT

I. "Control" Does Not Mean "Access," And A Contrary Conclusion Would Impose Substantial Harms

A. The APA requires courts to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction, authority, or limitations," or is "otherwise not in accordance with law." 5 U.S.C. § 706(2)(A)–(C). "[A]n agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). "Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority," "applying all relevant interpretive tools" to reach "*the best reading* of the statute and resolve [any] ambiguity." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 400, 412–13 (2024) (emphasis added).

Courts must interpret a statutory provision by "begin[ning] with the text," "look[ing] to the ordinary meaning of its key terms," and assuming that "statutory terms bear their ordinary meaning unless evidence suggests otherwise." *Pac. Gas & Elec. Co. v. FERC*, 113 F.4th

943, 948 (D.C. Cir. 2024) (citations omitted). "Dictionary definitions confirm th[e] ordinary meaning" of statutory terms, and courts consider the "structure" of the statute at issue "as well as the broader statutory context" to determine its best reading. *Id.* at 948–49. "Statutory history is an important part of this context," *Jazz Pharms., Inc. v. Kennedy*, 141 F.4th 254, 261 (D.C. Cir. 2025) (citation omitted), "'including prior laws, amendments, codifications, and repeals,'" *United States v. Griffin*, 549 F. Supp. 3d 49, 55 (D.D.C. 2021) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 352 (2012)). Courts presume "that Congress says what it means and means what is says" in a statute, *Banks v. Booth*, 3 F.4th 445, 449 (D.C. Cir. 2021), and that it "acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another," *Intel Corp. Inv. Pol'y Comm. v. Sulyma*, 589 U.S. 178, 186 (2020) (citation omitted). Finally, courts should "not read statutes to be 'unworkable,'" *Pileggi v. Wash. Newspaper Publishing Co., LLC*, 146 F.4th 1219, 1234 (D.C. Cir. 2025) (citation omitted), and must adhere to "the long-standing rule that a statute should not be construed to produce an absurd result," *Ctr. for*

Biological Diversity v. EPA, 722 F.3d 401, 411 (D.C. Cir. 2013) (citation omitted).

B. Here, by redefining "control" to mean "access," 89 Fed. Reg. at 86,445, EPA acted "in excess of [its] statutory [ ] authority," 5 U.S.C. § 706(2)(C), contrary to "the best reading of the statute," *Loper Bright Enters.*, 603 U.S. at 400, while creating needless threats to water systems and ordinary homeowners.

The SDWA's "text" and "broader statutory context" make clear that control requires more than mere access. *Pac. Gas & Elec. Co.*, 113 F.4th at 949; *see* Pet. Br.18–25. The SDWA does not define "under control of," 42 U.S.C. § 300f(4)(A), but that phrase's "ordinary meaning," *Pac. Gas & Elec. Co.*, 113 F.4th at 948 (citations omitted), is best read as requiring more than mere *access* to the facilities, *see* Pet. Br.19–25. "Dictionary definitions," *Pac. Gas & Elec. Co.*, 113 F.4th at 948, reveal that "control" is typically understood to mean having the "power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise," *Control*, Black's Law Dictionary (12th ed. 2024); *see Control*, Oxford English Dictionary (2015) (the "power of directing and regulating the actions of people or

things").[1] Thus, if a water system merely has access to a property, that does not mean that the water system has control over that property (*i.e.*, the power to direct or manage what happens to it).

"[T]he broader statutory context," *Pac. Gas & Elec. Co.*, 113 F.4th at 949, confirms this conclusion, *see* Pet. Br.25–31. EPA acknowledges that the SDWA grants it authority to promulgate national primary drinking water regulations "for [public water systems] and *not* for individual property owners." 89 Fed. Reg. at 86,445 (emphasis added); *see* 42 U.S.C. §§ 300f(1)(A), 300g, 300g-3. Unlike the SDWA's definition of a public water system, another SDWA provision applies broadly to all "person[s]" who install or repair not only public water systems but "residential or nonresidential facilit[ies]," 42 U.S.C. § 300g-6(a)(1)(A), which means that Congress intended to limit EPA's national primary drinking water standards authority to apply only to public water systems and not (for example) to private residences, *see Intel Corp. Inv. Pol'y Comm.*, 589 U.S. at 186. EPA appeared to endorse this understanding when it previously stated that it "*believes it is appropriate to equate*

[1] Available at https://www.oed.com/dictionary/control_n?tab=meaning_and_use#8252087 (all webpages last accessed September 19, 2025).

'control' with 'ownership'" in prior versions of the Final Rule. *National Primary Drinking Water Regulations for Lead and Copper*, 65 Fed. Reg. 1,950, 1,963 (Jan. 12, 2000) (emphasis added).

"[A]ccess," 89 Fed. Reg. at 86,445, has a different meaning that does not equal control, *see* Pet. Br.18–25. In context, "access" is a limited right to enter or use property that generally requires permission from the property owner. *See Access*, Black's Law Dictionary (12th ed. 2024) ("A right, opportunity, or ability to enter, approach, pass to and from, or communicate with"); *Access*, The American Heritage Dictionary of the English Language (5th ed. 2022) ("The ability or right to approach, enter, exit, communicate with, or make use of"). The ability to enter or approach does not even include the right to allow or forbid *others* to access a property. In contrast, "the right to exclude" others from property, which surely is a fundamental attribute of control of such property, necessarily implies the right to grant or deny others "access" to that property. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 158 (2021); *id.* at 159–162.

Additional indicia support the same conclusion. In Section 300g-1 of the SDWA, Congress referred to treatment requirements for systems

that "hav[e] uninhabited, undeveloped watersheds in consolidated *ownership*, *and having control over access to*, and activities in, those watersheds." 42 U.S.C. § 300g-1(b)(7)(C)(v) (emphasis added). This shows that Congress differentiated "control" from "access" in the SDWA; if "control" were equal to "access," it would make no sense to refer to "control over access" to watersheds. Moreover, that Congress uses "access" in other SDWA sections, *id.*; *see id.* §§ 300g-3(j)(2)(C), 300g-9(f)(4)(C), while omitting that term from the definition of a "public water system," *id.* § 300f(4)(A), supports the conclusion that Congress "intentionally and purposely" chose not to include access, *Intel Corp. Inv. Pol'y Comm.*, 589 U.S. at 186 (citation omitted). As the Georgia Supreme Court explained when interpreting similar statutory language, "private lines running from the service connections of the distribution facilities into the homes of the residents" fell outside of the state environmental regulator's "authority," and it had "no responsibility for those private lines" because the agency's statutory authority was "confined [ ] to any facilities of the public water system under the operator's control." *Bass v. Ledbetter*, 363 S.E.2d 760, 761 (Ga. 1988).

More generally, if "control" meant (or included) mere "access," that would upend the relationships of businesses in every industry, as well as those of ordinary homeowners. To take just one prosaic example, businesses and homeowners that employ cleaning services, HVAC services, plumbers, and electricians grant contractors access to their properties to supply those services on a regular basis. Before EPA's assertion that access equals control, no one previously thought that such service providers have control over businesses' properties and individual homes on this basis; any such interpretation of control would be "absurd." *Ctr. for Biological Diversity*, 722 F.3d at 411 (citation omitted). Endorsing such an interpretation could also make property owners more wary of allowing any business onto their properties, for fear that the business would be deemed to be in "control" of the property.

Endorsing EPA's reading equating control with access would also be "'unworkable.'" *Pileggi*, 146 F.4th at 1234 (citation omitted). The mere fact that a third party has granted "access" to that party's portion of a service line is insufficient to give a water system "control" over that privately owned portion of the line. *See supra* pp.9–12; Pet. Br.23–25. Public water systems often only own service lines up to a private

individual's or business's property line, with the private party typically owning the portion of the service line running from the curb to the building. Pet. Br.3–4, 23–24; Assoc. of Metro. Water Agencies, Comment, *Re: EPA-HQ-OW-2022-0801 Environmental Justice Considerations for the Development of the Proposed Lead and Copper Rule Improvements (LCRI)* at 2–3 (Nov. 15, 2022) ("AMWA Comment");[2] *see Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994); 56 Fed. Reg. 26,460, 26,503 (June 7, 1991). As EPA itself has recognized, "lead and copper-bearing plumbing material [that] is privately owned [is] outside the public water system's control," 56 Fed. Reg. at 26,471, and EPA does not contest that systems are "generally unable to access the customer-owned portion of the service line without the customer's permission," AMWA Comment at 2; *see* 89 Fed. Reg. at 86,445. Simply having access to part of a lead service line does not allow systems to do everything necessary to replace "the entire service line," 89 Fed. Reg. at 86,445, as is required to comply with the Final Rule—such as excavating private property to replace the privately owned portions of the line. Thus, EPA's

[2] Available at https://www.regulations.gov/comment/EPA-HQ-OW-2022-0801-0024.

interpretation is unworkable in the Final Rule because public water systems cannot comply on their own. Rather, their responsibilities to impose the Final Rule's requirements on a given property would depend on the third-party private individual or business that owns the property denying, granting, or revoking the system's access. And that access could change periodically throughout EPA's 10-year compliance timeline as property owners change their minds or properties change hands and new owners grant or revoke consent. *See* Pet. Br.14, 24–25, 34, 51–52 n.20. In such a scenario, a water system could be forced to halt its work on a given property before completing full service line replacement. It would seem odd for the scope of statutory and regulatory obligations applying to a "public water system"—"a system for the provision to the public of water for human consumption through pipes or other constructed conveyances," if above a certain size, 42 U.S.C. § 300f(4)—to wax and wane from month to month, and indeed from day to day, depending on such vagaries.

The problems with EPA's adoption of "access" would not end there. EPA failed to provide a clear definition of what it means by "access," asserting that access will often depend on a patchwork of "State or local

law or water tariff agreements," which can greatly vary from State to State. 89 Fed. Reg. at 86,445. So, EPA burdens *public water systems* to navigate various state and local legal regimes to guess at whether they have "access" to privately owned portions of service lines under EPA's regulation. *See* Pet. Br.24–25. On top of that, the Final Rule imposes a complicated set of administrative burdens on public water systems to contact property owners at least four times by two different methods seeking to obtain such consent where it is required. 89 Fed. Reg. at 86,453. And a public water system must also contact the new property owners when it learns that title changes hands. *See id.* Many private properties owned and controlled by individual or corporate landlords may be difficult for public water systems to reach. *See* AMWA Comment at 5. And ownership may change several times with restructuring, requiring additional outreach (and recordkeeping) by public water systems. *See* Pet. Br.13–14, 24, 34, 51–52 n.20. Endorsing an agency's unclear and third-party-dependent definition of a key term like "access"—one that determines the scope of regulated entities' responsibilities under the Final Rule—would deprive businesses of the much-needed regulatory certainty that they require to properly function and budget their

compliance expenses. The complexity and uncertainty of the interpretation of "control" set forth in the Final Rule thus weigh heavily against the reasonableness and propriety of that determination.

In all, under the Final Rule, public water systems would be left in the "unworkable" position, *Pileggi*, 146 F.4th at 1234 (citation omitted), where their responsibility to impose the Rule's requirements would vary from jurisdiction to jurisdiction, and owner to owner. Public water systems would need to monitor changes in property ownership within their service areas, as they may be required to start or stop replacing service lines on a given property any time it changes hands. *See* Pet. Br.23–24. That would be an "absurd result," *Ctr. for Biological Diversity*, 722 F.3d at 411 (citation omitted), further showing that EPA's preferred reading of "under control of," 42 U.S.C. § 300f(4)(a), is not "the best reading of" that statutory language, *Loper Bright Enters.*, 603 U.S. at 400.

II. A Rule's Mandates Cannot Be "Feasible" Or Otherwise Lawful Where—As Here—Industry-Wide Compliance Cannot Be Achieved Within The Rule's Timeframe

A. Agency action that is "arbitrary, capricious, an abuse of discretion," or taken "without observance of procedure required by law" is also "unlawful" under the APA. 5 U.S.C. § 706(2). Agency action is arbitrary and capricious if the agency failed to "examine the relevant data and articulate a satisfactory explanation for its action," *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citation omitted), or "offered an explanation for its decision that runs counter to the evidence before the agency," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*").

An agency must also take the costs of agency action into account because "reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Michigan*, 576 U.S. at 752–53; *see also id.* at 769 (Kagan, J., dissenting) ("Cost is almost always a relevant—and, usually, a highly important—factor in regulation."). Absent a statutory instruction that "unambiguously bars cost considerations," *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001), it is "unreasonable" for an agency "to read [a statute] to mean

that cost is irrelevant," *Michigan*, 576 U.S. at 759. The SDWA specifically requires EPA's national primary drinking water regulations to be "feasible," 42 U.S.C. § 300g-1(b)(7)(A), meaning "feasible with the use of the best technology, treatment techniques and other means which the Administrator finds, after examination for efficacy under field conditions and not solely under laboratory conditions, are available (taking cost into consideration)," *id.* § 300g-1(b)(4)(D); *see City of Portland v. EPA*, 507 F.3d 706, 712 (D.C. Cir. 2007) (citation omitted) (defining feasible as "technically possible *and* affordable") (emphasis added). Further, the SDWA requires EPA to decide whether "the benefits" of a proposed national primary drinking water regulation "justify, or do not justify, the costs" of that regulation. 42 U.S.C. § 300g-1(b)(6)(D). A rule is "unreasonable" and must be vacated where an agency relies "on [an] arbitrary and capricious cost-benefit analys[i]s." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (citations omitted).

An agency must be "aware[ ]" of the surrounding context in which it regulates, *FCC*, 556 U.S. at 515, has an "obligation to acknowledge and account for" the "regulatory posture the agency creates," *Portland*

Cement Ass'n v. EPA, 665 F.3d 177, 187 (D.C. Cir. 2011) (*per curiam*), and cannot ignore "an important aspect of the problem when deciding whether regulation is appropriate," *Michigan*, 576 U.S. at 752 (citation omitted). Thus, when carrying out its obligation to consider the feasibility, costs, and benefits of its regulations, *see Michigan*, 576 U.S. at 752–53; 42 U.S.C. §§ 300g-1(b)(7)(A), 300g-1(b)(4)(D), EPA should consider the nature of the entities it is regulating and whether the standards it is promulgating are feasible for the regulated industry as a whole. Simply asking whether such standards are feasible for some *subset* of businesses within that industry ignores an important aspect of the problem, and thus does not suffice. *See*, *e.g.*, *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 431 (D.C. Cir. 1980) (remanding because "the record d[id] not support the 'achievability' of the promulgated standards for the industry as a whole"); *United Steelworkers of Am., AFL-CIO-CLC v. Marshall*, 647 F.2d 1189, 1309 (D.C. Cir. 1980) (stating that an agency "had to assess the economic effect of" the regulation at issue "in light of the economic feasibility of the standard as a whole"); *see also Sierra Club v. Costle*, 657 F.2d 298, 377 (D.C. Cir. 1981) (EPA must establish that the data it relied on was "representative of potential industry-wide

performance" to demonstrate that performance standards are achievable under Section 111 of the Clean Air Act); *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 434 (D.C. Cir. 1973) (an achievable standard cannot be "purely theoretical or experimental").

Further, the Regulatory Flexibility Act specifically requires agencies to consider the "economic impact" of their regulations on "small entities" under their purview, 5 U.S.C. § 604(a)(6), so it would be arbitrary and capricious for an agency to promulgate regulations that focus only on larger entities within a given regulated industry and do not account for regulations' financial impact on small businesses that comprise the majority of the industry, as here, *see Nat'l Telephone Co-op. Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir. 2009) ("[T]he APA together with the Regulatory Flexibility Act require that a rule's impact on small businesses be reasonable and reasonably explained.").

B. EPA's conclusion that the Final Rule is "feasible," *see* 89 Fed. Reg. at 86,434–35, was arbitrary and capricious because its analysis did not consider the realities of the regulated industry or how the Final Rule impacted entities industry-wide, *see* Pet. Br.36–50.

EPA did not fulfill its obligation to ensure that the Final Rule's requirements are "feasible" and to adequately account for costs here because EPA narrowly considered only whether it would be "both affordable" and "technically possible" "*for large water systems*" to do so. 89 Fed. Reg. at 86,434, 86,499 (emphasis added). EPA's "feasibility analysis" only reviewed "data from 30 systems serving more than 50,000 persons" and "12 systems serving between 10,000 and 50,000 persons"—only 42 systems out of the over *66,000* in the United States. *Id.* at 86,457–58 (citation modified). In fact, EPA chose "not [to] include replacement rate data from [the] two systems" it identified "serving 10,000 persons or fewer in the feasibility analysis for the final rule." *Id.* at 86,457–58. Thus, EPA's limited sample included *no* public water systems that serve fewer than 10,000 people—even though such water systems amount to nearly two-thirds of all public water systems and approximately 90% of community water systems subject to the Final Rule. Am. Water Works Ass'n, Comment, *RE: National Primary Drinking Water Regulations for Lead and Copper: Improvements* at 2

(Feb. 2, 2024) ("AWWA Comment");[3] Pet. Br.37 (noting that "approximately 91 percent of water systems regulated under the 2024 Rule are small systems" and that "[t]he vast majority of water systems are relatively small") (citations omitted); 89 Fed. Reg. at 86,499 (recognizing that "small systems comprise the vast majority of [public water systems]").

By ignoring the 91 percent of small public water systems regulated under the Final Rule, EPA "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43: most of the industry's "limited resources, complex budgeting and contracting procedures, and aging infrastructure," which present "significant logistical, financial, and practical challenges to securing the qualified personnel" and "money" to whether the industry can comply with the Final Rule, AWWA Comment at 2; *see* AMWA Comment at 3; 89 Fed. Reg. at 86,459 (downplaying that "small systems may face" "potential resource limitations"). EPA received extensive comments highlighting concerns over small systems' ability to comply with the Final Rule, *see* 89 Fed. Reg. at 86,457–60 (discussing

[3] Available at https://www.regulations.gov/comment/EPA-HQ-OW-2022-0801-0782.

comments); Pet. Br.36–39 (same), but EPA, without having analyzed a single small system, waved those concerns off, asserting that small systems have "fewer lines to replace compared to larger systems" and "can take advantage of the economy of scale present in" replacing service lines, 89 Fed. Reg. at 86,459. This does not amount to "a satisfactory explanation," *FCC*, 556 U.S. at 513, for EPA's choice not to evaluate the Final Rule's feasibility for small systems.

EPA failed to adequately consider the practical challenges related to third-party consent and affordability that the Final Rule would impose on the industry. Those challenges make industry compliance impossible under EPA's 10-year deadline. *See* 89 Fed. Reg. at 86,445. For example, even if a public water system receives consent to replace a service line, such consent could be revoked before completing the project. *See* Pet. Br.13–14, 24, 34, 51–52 n.20. Or the private owner could wait too long to provide consent for public water systems with limited resources to complete the replacement. *See id.*; AMWA Comment at 3–5. Tied into the problems associated with needing private owners' consent are the immense costs that the Final Rule imposes, amounting to billions of dollars annually. *See* 89 Fed. Reg. at 86,420 (estimating "the

quantifiable annual costs of the rule [to] be $1.47 to $1.95 billion in 2022 dollars"); *id.* at 86,568 (setting a "35-year period of analysis"). Federal funds do not cover those costs, and small public water systems will disproportionately struggle to obtain such funds. *See* Pet. Br.39–44. They may not be able to raise user rates (particularly in low-income areas) or to obtain loans to finance replacements. *See* AMWA Comment at 2–3; Nat'l Conf. of State Legislatures, Comment, *RE: National Primary Drinking Water Regulations for Lead and Copper: Improvements (LCRI)* at 1–2 (Feb. 1, 2024).[4] EPA's deadline compounds these difficulties by arbitrarily compressing what EPA had considered would take "approximately 33-year[s]" to "replace all lead and GRR service lines" into only 10 years. 89 Fed. Reg. at 86,456; *see* 86 Fed. Reg. 4,198, 4,216, 4,219 (Jan. 15, 2021) (discussing, *inter alia*, feasibility of minimum annual replacement rate of three percent). Even in EPA's truncated analysis, nearly 40% of the *larger* public water systems it examined would not be able to comply in that time based on actual replacement

[4] Available at https://www.regulations.gov/comment/EPA-HQ-OW-2022-0801-0783.

rates. *See* EPA, *Technical Support Document for the Final Lead and Copper Rule Improvements* at 2–4, EPA-HQ-OW-2022-0801-2646 (2024).[5]

Given the difficulties most public water systems will face to cover billions in costs and obtain access to comply within 10 years, the Final Rule will likely "result in widespread noncompliance" among many public water systems. 56 Fed. Reg. at 26,476; *see* Pet. Br.38–50. EPA's failure to responsibly consider and address that problem is arbitrary and capricious. *See Michigan*, 576 U.S. at 752–53; *State Farm*, 463 U.S. at 43–44; *FCC*, 556 U.S. at 513.

More broadly, this Court should reject EPA's myopic view of "feasibility" and of how to properly consider costs and benefits in this rulemaking. As a general matter, for statutes like the SDWA that expressly require regulations be "feasible" to comply with, and for statutes that otherwise require consideration of costs and benefits, agencies must promulgate rules that are achievable across the entire regulated industry as a whole. *See, e.g.*, *State Farm*, 463 U.S. at 55 ("standard[s] [should] be practicable," considering "technological ability

[5] Available at https://www.epa.gov/system/files/documents/2024-10/usepa-2024-technical-support-document.pdf.

to achieve the goal of a particular standard" and "economic factors") (citing H. Rep. No.1776, 89th Cong., 2d Sess. 21, at 16 (1966)); *Sierra Club*, 657 F.2d at 377 (recognizing that EPA must "demonstrate the achievability of the standard for particulate matter," in part, by "establish[ing] that the test data relied on by the agency are representative of potential *industry-wide* performance") (emphasis added); *Nat'l Lime Ass'n*, 627 F.2d at 431 n.46 (recognizing that Congress intended for "emissions control systems [to] operate continuously" and thus not for EPA to establish "a standard which cannot be achieved on *a regular basis*") (emphasis added); *Am. Pub. Gas Ass'n v. U.S. Dep't of Energy*, 22 F.4th 1018, 1022 (D.C. Cir. 2022) (recognizing that standards must be "'technologically feasible' *for the industry*") (emphasis added); *Advocs. for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 596 (D.C. Cir. 2022) (upholding rule where agency reasonably "conclude[ed] that the new rules would not foster noncompliance" in the regulated industry).

It would violate these established principles and harm many businesses if agencies were to short-circuit conducting a complete analysis of feasibility, costs, and benefits, by focusing only on a portion of

the regulated industry. While an agency's standard can still be considered "generally feasible" if "'a few isolated operations within an industry' will not be able to comply with the standard," *Kennecott Greens Creek Min. Co. v. Mine Safety & Health Admin.*, 476 F.3d 946, 957 (D.C. Cir. 2007) (citation omitted), adopting EPA's reasoning here would flip that logic on its head and encourage agencies to determine that a standard *is* feasible because "a few isolated operations within an industry" *can* comply with that standard, *contra id.* (citation omitted). Employing that logic at scale would have disastrous consequences for the Chamber's members who represent businesses in every regulated sector.

It also makes good policy sense to avoid agencies setting standards that result in widespread noncompliance. If a large group of regulated entities cannot comply with new rules, that noncompliance causes market disruptions, creates competition problems, and invites even wider-spread non-compliance—results that both EPA and this Court have acknowledged should be avoided. *See, e.g.*, 56 Fed. Reg. at 26,476; *Nat'l Lime Ass'n*, 627 F.2d at 431–33 & n.46. Rules with high rates of noncompliance also lead to selective and arbitrary enforcement schemes, because an agency simply does not have resources to enforce the rules as

proposed. *See People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric.*, 7 F. Supp. 3d 1, 10 (D.D.C. 2013) (observing that agencies "cannot act against each technical violation" of a rule and must consider "whether the agency has enough resources to undertake [enforcement] action at all") (citations omitted), *aff'd on other grounds sub nom. People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087 (D.C. Cir. 2015); *Pub. Citizen v. FEC*, 547 F. Supp. 3d 51, 56 (D.D.C. 2021) (acknowledging that "agency resources" to prosecute violations are "limited") (citing *FEC v. Rose*, 806 F.2d 1081, 1092 (D.C. Cir. 1986)). Congress certainly does not intend for agencies to promulgate rules so broad in scope that they cannot widely be enforced, *see generally* Jentry Lanza, *Agency Underenforcement As Reviewable Abdication*, 112 Nw. Univ. L. Rev. 1171–1210 (2018) (discussing how "severe underenforcement" of regulations can "undermine complex statutory schemes and implicate[ ] separation of powers concerns"), and doing so could encourage noncompliance among regulated entities.

CONCLUSION

This Court should grant the Petition.

Dated: September 19, 2025 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,652 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and D.C. Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2025, I filed the foregoing Brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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