

1 Charles Avrith (SBN 96804)  
2 NAGLER & ASSOCIATES  
3 2300 S. Sepulveda Boulevard  
4 Los Angeles, California 90064-1911  
5 Telephone: (310) 473-1200  
6 Facsimile: (310) 473-7144  
7 Email: [cavrith@nagler.com](mailto:cavrith@nagler.com)

8 *Attorneys for Plaintiffs America Unites for Kids and*  
9 *Public Employees for Environmental Responsibility*

10 Paula Dinerstein (admitted Pro Hac Vice)  
11 Public Employees for Environmental Responsibility  
12 2000 P. Street NW, Ste. 240  
13 Washington, DC 20036  
14 Telephone: (202) 265-7337  
15 Email: [pdinerstein@peer.org](mailto:pdinerstein@peer.org)

16 *Attorneys for Plaintiff Public Employees for Environmental Responsibility*

17  
18 UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT  
19 OF CALIFORNIA – WESTERN DIVISION

20 AMERICA UNITES FOR KIDS, et al.,  
21 Plaintiffs,  
22 v.  
23 SANDRA LYON, et al.,  
24 Defendants.

25 CASE NO. 2:15-cv-02124-PA-AJW  
26  
27 **PLAINTIFFS' MEMORANDUM**  
28 **OF POINTS AND AUTHORITIES**  
**IN SUPPORT OF THEIR**  
**MOTION FOR A PRELIMINARY**  
**INJUNCTION**

Hearing Date: May 4, 2015  
Hearing Time: 1:30 p.m.  
Judge: Hon. Percy Anderson  
Courtroom: 15

Complaint filed: March 23, 2015

**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

- I. INTRODUCTION .....1
- II. BACKGROUND .....3
  - A. The Parties .....3
  - B. PCBs And Their Adverse Health Effects .....4
  - C. PCBs In Schools .....5
  - D. The District Finds Illegal PCB Contamination At The School ... .....6
  - E. The District’s Refusal To Test Any More Rooms For PCB-Contaminated Caulk .....8
  - F. Independent Testing Reveals Widespread Illegal PCB Contamination At The School .....8
  - G. The District’s Inadequate Remediation Plan ..... 10
  - H. The District’s Belated Verification Of The Independent Testing .... 11
- III. ARGUMENT ..... 13
  - A. America Unites Has Standing ..... 13
  - B. America Unites Has Established The Requirement For Preliminary Injunctive Relief ..... 16
    - 1. America Unites Will Succeed On The Merits ..... 16
      - a. It Is Illegal To Use Materials Containing PCBs At Concentrations Of 50 PPM or Greater ..... 16
      - b. The Contaminated Rooms Have Caulk Containing PCBs At Levels Greater Than 50 PPM ..... 18

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 (cont'd)**

	Page
2. America Unites' Members Will Suffer Irreparable Injury In The Absence Of A Preliminary Injunction .....	19
3. Balance Of Hardship .....	21
4. Public Interest .....	21
C. The Court Should Waive The Bond Requirement .....	22
IV. CONCLUSION .....	22

**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(s)

**CASES**

*Alliance for the Wild Rockies v. Cottrell*  
632 F.3d 1127 (9<sup>th</sup> Cir. 2011) ..... 20, 21

*Amoco Production Co. v. Village of Gambell, Alaska,*  
480 U.S. 531 (1987) ..... 20

*Associated General Contractors of America v. Metropolitan Water Dist. Of  
Southern California,*  
159 F.3d 1178 (9<sup>th</sup> Cir. 1998) ..... 15

*Bowen v. Consol. Elec. Distribs.,*  
461 F. Supp.2d 1179 (C.D. Cal. 2006) ..... 20

*Burlington N.R.R. Co. v. Dept. of Revenue,*  
934 F.2d 1064 (9<sup>th</sup> Cir. 1991)..... 19

*Dennis Melancin, Inc. v. City of New Orleans,*  
703 F. 3d 262 (5<sup>th</sup> Cir. 2012) ..... 21

*Diaz v. Brewer,*  
656 F.3d 1008 (9<sup>th</sup> Cir. 2011) ..... 20, 22

*Enyart v. Nat’l Conference Bar Examiners,*  
630 F.3d 1153 (9<sup>th</sup> Cir. 2011) ..... 19

*GoTo.com v. Walt Disney Co.,*  
202 F. 3d 1199 (9<sup>th</sup> Cir. 2002) ..... 22

*Gwaltney of Smithfield v. Chesapeake Bay Found.,*  
484 U.S. 49 (1987)..... 1

*Harris v. Board of Supervisors,*  
366 F.3d 754 (9<sup>th</sup> Cir. 2004) ..... 20

**TABLE OF AUTHORITIES (cont'd)**

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(s)

*Hunt v. Washington State Apple Advertising Commission*,  
432 U.S. 333 (1977) ..... 14

*Johnson v. Conturier*,  
572 F. 3d 1067 (9<sup>th</sup> Cir. 2009) ..... 22

*Midlantic National Bank v. New Jersey Department of Environmental Regulation*,  
74 U.S. 494 (1986) ..... 1

*Roland Mach Co. v. Dresser Indus., Inc.*,  
749 F.2d 380 (7<sup>th</sup> Cir. 1984) ..... 19

*Save Our Sonoran, Inc. v. Flowers*,  
408 F. 3d 1113 (9<sup>th</sup> Cir. 2005) ..... 22

*Scherr v. Volpe*,  
466 F. 2d 1027 (9<sup>th</sup> Cir. 1972) ..... 22

*Scotts Co. v. United Industries Corp.*,  
315 F.3d 264 (2002) ..... 21

*Silver Sage Partners, Ltd. v. City of Desert Hot Springs*,  
251 F.3d 814 (9<sup>th</sup> Cir. 2001) ..... 19

*Simula, Inc. v. Autoliv, Inc.*,  
175 F. 3d 716 (9<sup>th</sup> Cir. 1999) ..... 21

*Thalheimer v. City of San Diego*,  
645 F.3d 1109 (9<sup>th</sup> Cir. 2011) ..... 21

*United States v. Commonwealth Edison Co.*,  
620 F. Supp. 1404 (N.D. Ill. 1985) ..... 4, 19

*United States v. Nutri-cology, Inc.*,  
982 F.2d 394 (9<sup>th</sup> Cir. 1992) ..... 19

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 (cont'd)**

Page(s)

*Utility Solid Waste Activities Group v. EPA*,  
236 F.3d 749 (D.C. Cir. 2001) ..... 20

*Winter v. Natural Resources Defense Council, Inc.*,  
555 U.S. 7 (2008) ..... 16, 21

**STATUTES**

15 U.S.C.  
§2605 ..... 8, 16, 17  
§2619 ..... 13

40 C.F.R.  
§702.61 ..... 11  
§761.3 ..... 17  
§761.20 ..... 4, 17

Fed. R. Civ. P.  
§24 ..... 2  
§65 ..... 22

1 **I. INTRODUCTION**

2 Plaintiffs, two non-profit organizations, bring this citizen’s suit action to  
3 restrain clear violations, in excess of 10,000 times the allowable limits, of the Toxic  
4 Substances Control Act (“TSCA”) at the Malibu Middle and High School (“MHS”)  
5 and Juan Cabrillo Elementary School (“JCES”) (collectively, the “School”), which  
6 are part of the Santa Monica-Malibu Unified School District (the “District”).  
7 Defendants are administrators and members of the District’s Board of Education.

8 The School is contaminated with polychlorinated biphenyls (“PCBs”), a  
9 “highly-toxic carcinogen.” *Midlantic National Bank v. New Jersey Department of*  
10 *Environmental Regulation*, 474 U.S. 494, 497 (1986). TSCA and the regulations  
11 thereunder (the “PCB Regulations”) prohibit the use of materials containing PCBs at  
12 concentrations of 50 parts per million (“ppm”) or greater, whereas the results of  
13 testing here show levels up to 570,000 ppm. Shocking, as it may be, although  
14 Defendants have acknowledged these violations, they have not remediated them,  
15 thereby putting the health of children and teachers at risk.<sup>1</sup> Instead of remediating,  
16 Defendants have spent over \$4,000,000 on lawyers and environmental and public  
17 relations consultants to “manage in place” the illegal contamination and try to  
18 convince the community that the School is safe.

19 To date, most of the PCB-contamination at the school has been found in  
20 caulk, which is a material used to seal gaps to make windows, door frames and  
21 joints in buildings air tight and water tight. Although only limited testing has been  
22 conducted to date, caulk with PCBs over 50 ppm have already been found in at least  
23

---

24  
25 <sup>1</sup> Also amazingly, the United States Environmental Protection Agency (the  
26 “EPA”) appears to be letting the Defendants get away with this brazen violation of  
27 the law. Congress expressly provided for citizen’s suits to enforce TSCA where, as  
28 here, the EPA is not enforcing the law. *See Gwaltney of Smithfield v. Chesapeake*  
*Bay Found.*, 484 U.S. 49, 62 (1987) (“The central purpose of citizen’s suits is to  
allow citizens to abate pollution when the government cannot or will not command  
compliance.”).

1 17 rooms at the School.<sup>2</sup> Plaintiffs will prove that illegal PCB contamination exists  
2 throughout the school, but, in the meantime, there is no valid reason why students  
3 and teachers should continue to be exposed to unlawful levels of PCB contamination  
4 in the rooms that have already been tested. Defendants have committed to  
5 remediate the caulk in 5 of those rooms by June 15, 2015. Plaintiffs now move for a  
6 preliminary injunction requiring Defendants to immediately cease use of the other  
7 10 rooms that Defendants' own testing has shown to have illegal levels of PCBs in  
8 caulk (the "PI Rooms")<sup>3</sup> and remediate the caulk in them by July 31, 2015.

9 As demonstrated in more detail below, Plaintiffs have satisfied all the  
10 requirements for issuance of the requested relief. First, Plaintiffs have established a  
11 likelihood of success. Defendants do not, and cannot, dispute that TSCA and the  
12 PCB Regulations prohibit the use of caulk containing PCBs in excess of 50 ppm and  
13 that such caulk must be remediated. There is also no dispute that the 10 PI Rooms  
14 have caulk with PCBs over 50 ppm. Defendants' own testing confirmed the  
15 presence of illegal levels of PCBs in those rooms.

16 Second, Plaintiffs will suffer irreparable injury if the preliminary injunction is  
17 not granted. PCBs bioaccumulate in humans, and every day that students and  
18 teachers are exposed to these highly-toxic substances increases their chances of  
19 contracting cancer or other serious diseases linked to PCBs. Students and teachers  
20 should not be required to study and learn in an illegal and contaminated  
21  
22

---

23 <sup>2</sup> Defendants have cynically refused to do any further testing of caulk.  
24 Accordingly, concurrently with the filing of this motion, Plaintiffs are filing an ex  
25 parte application with the Magistrate Judge for an order giving them access to the  
26 School pursuant to Fed. R. Civ. P. 24(a)(2) to collect samples for comprehensive  
testing of caulk and other building materials on an expedited basis.

27 <sup>3</sup> The 10 PI Rooms are: (1) MHS 3; (2) MHS 7; (3) MHS 401; (4) MHS 505;  
28 (5) MHS 704 (interior); (6) MHS 704 (exterior hallway); (7) JCES 18; (8) JCES 19;  
(9) JCES 22; and (10) JCES 23.



1 environment for another school year. Nor should parents have to make the difficult  
2 choice of finding another school for their children or risking their children’s health.

3 Third, the balance of the equities clearly favor Plaintiffs. Failure to grant the  
4 preliminary relief will needlessly increase students’ and teachers’ risk of serious  
5 illness. On the other hand, removal of the contaminated caulk promptly will only  
6 require the Defendants to expend money to do what the law requires them to do  
7 sooner rather than later. Finally, prompt remediation of illegal contamination is  
8 clearly in the public interest.

9 Accordingly, the Court should grant Plaintiffs’ motion.

10 **II. BACKGROUND**

11 **A. The Parties**

12 Plaintiff America Unites for Kids, formerly known as Malibu Unites  
13 (“America Unites”) is a non-profit organization, whose mission is to ensure  
14 environmental health excellence in schools for children and educators. America  
15 Unites’ members and supporters include parents, students and staff at the School,  
16 and it advocates for the removal of PCBs from the School. (DeNicola Decl. ¶2)<sup>4</sup>

17 Plaintiff Public Employees for Professional Responsibility (“PEER”) is a non-  
18 profit educational and advocacy incorporation, which advocates for public  
19 employees concerned with environmental issues, including the “Concerned  
20 Malibu/Cabrillo Teachers,” a group of 30 teachers and staff at the Schools.  
21 (Dinerstein Decl. ¶2)

22 Defendants Sandra Lyon and Jan Maez are the District’s Superintendent and  
23 Associate Superintendent and Chief Financial Officer, respectively. Defendant  
24 Laurie Lieberman is the President of the District’s Board of Education. The other

25 \_\_\_\_\_

26 <sup>4</sup> “ Decl.” refers to the accompanying declarations of Jennifer DeNicola,  
27 Paula Dinerstein, Paul Rosenfeld, Ph.D., Beth Lucas, Caren Leib, Hope Edelman,  
28 Jude Brown, Soniya Perl, Kathy Feig, Lisa Lambert, Brigitte Leonard and Gisselle  
Borress filed by Plaintiffs in support of this motion.

1 defendants are members of the District's Board of Education. (DeNicola Decl. ¶5)  
2 Plaintiffs are suing defendants in their official capacities.

3 **B. PCBs And Their Adverse Health Effects**

4 PCBs are man-made substances. Until TSCA banned their manufacture in the  
5 late 1970's, PCBs were used in numerous applications. One common use of PCBs  
6 was as a plasticizer in caulk. PCBs gave the caulk flexibility. (Rosenfeld Decl. ¶8)

7 PCBs do not readily break down in the environment. Due to their persistent  
8 nature, materials made with PCBs before they were banned in the late 1970's  
9 continue to have high levels of PCBs today. (Rosenfeld Decl. ¶9)

10 In TSCA, which was enacted in 1976, Congress imposed a near-total ban on  
11 PCBs because of the "extreme threat PCBs pose to human health and the  
12 environment." *United States v. Commonwealth Edison Co.*, 620 F. Supp. 1404,  
13 1408 (N.D. Ill. 1985). In the PCB Regulations, the EPA Administrator found that  
14 "the manufacture, processing, and distribution in commerce of PCBs at  
15 concentrations of 50 ppm or greater and PCB Items with PCB concentrations of 50  
16 ppm or greater present an unreasonable risk of injury to health within the United  
17 States. This finding is based upon the well-documented human health and  
18 environmental hazard of PCB exposure...." 40 C.F.R. §761.20.

19 According to EPA, "PCBs have been demonstrated to cause a variety of  
20 serious health effects. PCBs have been shown to cause cancer and a number of  
21 serious non-cancer health effects in animals, including effects on immune systems,  
22 reproduction systems, nervous systems, and endocrine systems. Studies in humans  
23 provide supportive evidence for the potential carcinogenicity and non-carcinogenic  
24 effects of PCBs." (Rosenfeld Decl. ¶11 and Ex. 2 thereto)

25 In 2013, the International Agency for Research on Cancer ("IARC"), a  
26 specialized agency of the World Health Organization, reassessed the carcinogenicity  
27 of PCBs. The Working Group, composed of 26 experts from 12 countries,  
28 considered more than 70 independent epidemiological studies. The Working Group

1 classified PCBs as carcinogenic to humans on the basis of sufficient evidence of  
2 carcinogenicity in humans and experimental animals. (Rosenfeld Decl. ¶12 and Ex.  
3 3 thereto)

4 **C. PCBs In Schools**

5 Many of the School's buildings were built prior to 1979. (DeNicola Decl. ¶10  
6 and Ex. 1 thereto) Caulk and other materials containing PCBs were used in schools  
7 built from the 1950's through the 1970's. A September 2012 report by the EPA,  
8 states as follows:

9 "Caulk containing [PCBs] was used in some buildings,  
10 including schools in the 1950's through the 1970's. PCBs  
11 were used as a plasticizer in caulk, added either during  
12 manufacture or mixed on site prior to installation. Other  
13 potential sources of PCBs, such as fluorescent light ballast  
14 capacitors, were also used in school buildings during that  
15 era.... Materials and components containing PCBs are  
16 still present today in many of these older buildings. PCBs  
17 are semi-volatile organic chemicals and can be transported  
18 in and around buildings through vaporization into the air  
19 and through absorption into dust and materials. PCBs may  
20 be present in the air, dust, soil and on surfaces in and  
21 around school buildings leading to the potential for  
22 occupant exposure through multiple routes."

23 (Rosenfeld Decl. ¶13 and Ex. 5 thereto)

24 Students and teachers may be exposed to PCB in a number of ways: (a)  
25 inhalation of PCBs which have vaporized into the air from the contaminated caulk  
26 or other building materials; (b) contact with caulk and any surrounding materials  
27 into which the PCBs may have been released or contact with contaminated soil  
28 adjacent to school buildings; and (c) particularly considering the young ages of

1 school children, through ingestion of caulk or other PCB-containing materials.  
2 (Rosenfeld Decl. ¶¶14, 36 and Ex. 27 thereto)

3 **D. The District Finds Illegal PCB Contamination At The School**

4 In 2009 and 2010, the District conducted environmental reviews in  
5 connection with planned improvements at the School. Arcadis, the District's  
6 environmental consultant, reported that soil at the School was contaminated with  
7 PCBs as well as with other toxins and pesticides. Arcadis concluded that pesticides  
8 and PCBs were present at concentrations that presented an "unacceptable health  
9 risk" and proposed a removal action plan. This plan was carried out during the  
10 summer of 2011, when the District removed about 1,180 cubic yards of soil.

11 (Rosenfeld Decl. ¶15 and Exs. 4 and 6 thereto)

12 Neither Arcadis nor the District attempted to determine the source of the  
13 PCBs in the soil, or to test building materials to determine if they also contained  
14 PCBs which may have migrated to nearby soils. (Rosenfeld Decl. ¶16 and Ex. 4  
15 thereto)

16 The District did not disclose this PCB contamination to parents or teachers at  
17 the School. The PCB contamination and soil removal was first publicly revealed by  
18 news reports in about October 2013. (Denicola Decl. ¶¶7, 9)

19 In October 2013, several teachers wrote to the District with concerns that  
20 medical conditions they suffered may have been caused by the school environment.  
21 They pointed to three diagnoses of thyroid cancer among them within the preceding  
22 six months, several other cases of thyroid disease, and cases of migraines, rashes,  
23 hair loss, respiratory problems and bladder cancer. The teachers asked for  
24 environmental testing and for access to testing that had already occurred.<sup>5</sup>

25 (Dinerstein Decl. ¶3 and Ex. 1 thereto; Leonard Decl. ¶¶4, 6)

26 \_\_\_\_\_  
27 <sup>5</sup> In the two year period following the soil removal, three teachers then  
28 working at the MHs campus were diagnosed with thyroid cancer. As of today, at

(continue...)

1 In October 2013, following the public revelation of these medical issues  
2 among teachers and of the 2011 removal of PCB-contaminated soil, a group of  
3 Malibu parents advocated for immediate testing of all of the school rooms as well  
4 comprehensive soil testing. Although no comprehensive testing was performed at  
5 that time, at the parents' insistence, ten of the School's rooms were tested for PCBs  
6 in caulk. (DeNicola Decl. ¶¶ 8, 11)

7 Results of testing caulk or other solid materials for PCBs are expressed as  
8 parts per million ("ppm"). As discussed below, federal regulations prohibit use of  
9 materials containing PCBs at concentrations of 50 ppm or greater. All of the caulk  
10 samples contained some level of PCBs. Four of the ten rooms tested had caulk  
11 samples with PCB levels above the regulatory threshold of 50 ppm. Rooms 1, 5 and  
12 8 in Building E had caulk with PCB levels of 164, 98.70 and 52.80 ppm,  
13 respectively. The library had caulk with a PCB level of 1,868 ppm. (DeNicola  
14 Decl. ¶12; Rosenfeld Decl. ¶18 and Ex. 7 thereto)

15 The PCBs used in caulk and other building materials are chemical mixtures  
16 made up of a variety of related compounds known as congeners. PCB congener 126  
17 is a dioxin-like chemical which is highly stable and resistant to biodegradation, and  
18 the most toxic of all of the PCB congeners. PCB 126 is orders of magnitude more  
19 toxic than other PCB congeners and PCB commercial mixtures. Significantly, the  
20 caulk in each of these four rooms with PCB concentrations over 50 ppm contained  
21 PCB 126. (DeNicola Decl. ¶13; Rosenfeld Decl. ¶19 and Ex. 8 thereto)

22 //

23 ///

24  
25 least three student alumni (each approximately 28 years old) and two more former  
26 teachers have also been diagnosed with thyroid cancer. There are also at least 14  
27 known cases of thyroid disease among teachers, and three cases of melanoma or pre-  
28 melanoma (a cancer which is also associated with exposure to PCBs) among  
teachers and former teachers, as well as other serious health problems. (DeNicola  
Decl. ¶6; Lambert Decl. ¶¶4-5; Leonard Decl. ¶¶4, 6)

1           **E. The District’s Refusal To Test Any More Rooms For PCB-**  
 2           **Contaminated Caulk**

3           Notwithstanding these results, and notwithstanding America Unites’ repeated  
 4 requests for same, the District steadfastly refused to conduct any further testing of  
 5 the caulk at the School. On August 12, 2014, America Unites submitted to the  
 6 District a Memorandum containing “Recommendations For PCB Investigation at  
 7 Malibu Middle & High” which contained a plan for thorough testing and  
 8 remediation throughout the Malibu Schools. This plan was never acknowledged or  
 9 followed. Also on August 12, 2014 at a public gathering, parents offered to pay for  
 10 full testing of all of the caulk at the School. The District did not accept this offer.  
 11 (DeNicola Decl. ¶16)

12           Since December 2013, the District has tested only air and dust in selected  
 13 rooms. It is impossible to determine from air and dust tests whether PCBs in caulk  
 14 or other materials exceed the regulatory threshold of 50 ppm.<sup>6</sup> Moreover, such  
 15 testing is inherently unreliable and subject to manipulation. (Rosenfeld, Decl. ¶¶35-  
 16 42 and Exs. 25-31 thereto; DeNicola Decl. ¶¶28-33 and Exs. 6 and 7 thereto)

17           **F. Independent Testing Reveals Widespread Illegal PCB**  
 18           **Contamination At The School**

19           Because of the District’s refusal to conduct any more tests of the caulk,  
 20 America Unites conducted its own “independent” testing. (DeNicola Decl. ¶18)

21           Testing of caulk samples collected in May 2014 showed that the caulk in  
 22 three rooms had caulk in excess of the ppm regulatory limit. Two of the rooms had  
 23  
 24

---

25           <sup>6</sup> The EPA has posted “suggested” screening levels for concentrations of  
 26 PCBs in air. The EPA’s guidelines do not provide an exemption to TSCA  
 27 regulations prohibiting the use of PCBs at concentrations over 50 ppm. TSCA  
 28 requires that any exceptions to its regulations be promulgated in a rulemaking  
 procedure in accordance with the notice and comment requirements of the  
 Administrative Procedure Act. 15 U.S.C. § 2605(e)(4). None of this has occurred.

1 caulk with PCBs above 340,000 ppm, i.e., more than 7,000 times the regulatory  
2 limit.<sup>7</sup>

- 3 • Window caulking from JCES room 19 contained 340,000 ppm PCBs,  
4 7,000 times the regulatory limit.
- 5 • Interior door caulking from MHS room 506 contained 370,000 ppm of  
6 PCBs.
- 7 • Caulking from the interior of a window in the physical education  
8 faculty office at MHS contained 190 ppm of PCBs.

9 (Rosenfeld Decl. ¶23 and Ex. 10 thereto) These results were submitted to the  
10 District on July 17, 2014. (Dinerstein Decl. ¶4)<sup>8</sup>

11 Laboratory testing of additional caulk samples collected in August 2014  
12 showed that the caulk from four other rooms at the School exceeded regulatory  
13 limits, with two of these in the hundreds of thousands of ppm PCBs.

- 14 • MHS room 401 had 146,000 ppm PCBs in the caulk in the interior of  
15 an office window.
- 16 • MHS room 505 in the Angel Building had 231,000 ppm PCBs in the  
17 caulk of an interior door frame.
- 18 • MHS room 205 in the Mako Building had 200 ppm PCBs in the caulk  
19 of an interior door frame.

---

21  
22 <sup>7</sup> The testing also found that in addition, dirt samples taken from three  
23 classrooms (MSH rooms 1, 2 and 5) contained higher levels of PCBs than the  
24 highest level found by Arcadis in 2009 in outdoor soil, which Arcadis found posed  
an “unacceptable health risk,” leading to the 2011 soil removal action. (Rosenfeld  
Decl. ¶25)

25 <sup>8</sup> In October 2014, America Unites asked the laboratory to re-test the caulk  
26 from the two rooms with the highest PCB concentrations (Juan Cabrillo Room 19  
27 and the High School woodshop room) for congener 126, the most toxic of all of the  
28 PCB congeners. These new tests found the presence of congener 126 at 122 ppm in  
Juan Cabrillo Room 19 and 57 ppm in the woodshop – up to more than two million  
times more toxic than the EPA’s regional screening levels for PCB 126. (Rosenfeld  
Decl. ¶24 and Exs. 11 and 12 thereto)

1           • MHS room 7 in Building E (Blue Building) had 190 ppm PCBs in the  
2           caulk in the interior of a window frame.  
3 (Rosenfeld Decl. ¶26 and Ex. 13 thereto) America Unites published these results on  
4 September 23, 2014. (DeNicola Decl. ¶22; Dinerstein Decl. ¶9)

5           On October 6, 2014, Plaintiffs wrote to Defendant Lyon and specifically  
6 asked “what information the District needs to identify and verify the presence of  
7 PCBs above TSCA limits.” Plaintiffs also requested that if the District considered  
8 the independent tests deficient, that the District specify in what manner they were  
9 considered deficient. Plaintiffs did not receive any response to this letter.  
10 (DeNicola Decl. ¶23 and Ex. 2 thereto)

11           Additional samples were collected and tested by America Unites in  
12 September 2014. The laboratory reports showed that caulk from six other rooms  
13 had PCBs in excess of the 50 ppm regulatory limit.

14           • MHS room 704 had 4,700 ppm PCBs in caulk in a door frame in the  
15           hallway.  
16           • MSH room 3 had PCBs in caulk at 330 ppm.  
17           • JCES room 22 had 74,000 ppm PCBs in interior window caulk.  
18           • JCES room 18 had 110,000 ppm PCBs in interior window caulk.  
19           • JCES office had 710 ppm PCBs in interior window caulk.  
20           • JCES Room 23 had 85,000 ppm PCBs in interior window caulk,  
21 (Rosenfeld Decl. ¶¶27-28 and Exs. 14-19 thereto) These test results were provided  
22 to the Defendants in January 2015. (Dinerstein Decl. ¶11)

### 23           **G. The District’s Inadequate Remediation Plan**

24           In April 2014, the District’s environmental consultant, Environ, prepared a  
25 remediation plan which proposed leaving in place caulk testing above the 50 ppm  
26 regulatory limit for PCBs, and only removing such caulk in connection with a  
27 renovation or demolition of the building in question, even though no such  
28 demolitions or renovations are scheduled. Environ proposed to “manage in place”



1 those PCBs and other suspected PCB-containing materials in the interim.  
2 Management in place consisted of cleaning and ventilation. (DeNicola Decl. ¶27;  
3 Rosenfeld Decl. ¶32 and Ex. 22 thereto)

4 After Plaintiffs' complained, Environ, on behalf of the District, submitted  
5 revised remediation plans. According to an October 31, 2014 letter from the EPA,  
6 the District had committed to remove by June 30, 2015, caulk from window areas in  
7 the four rooms its own testing had shown to contain PCBs over 50 ppm (i.e., MSH  
8 rooms 1, 5 and 8, and the Library); and (b) in the interior doorframe of MHS room  
9 506 (also known as the "woodshop").<sup>9</sup> The District also committed to remove from  
10 the [Schools] any newly-discovered PCB-containing caulk within one year after the  
11 District "verifies" that the caulk contains PCBs at or above 50 ppm. (DeNicola  
12 Decl. ¶27; Rosenfeld Decl. ¶33 and Ex. 23 thereto)

13 Even though a reasonable person would believe that caulk in the untested  
14 rooms (which is similar to the caulk in the tested rooms) would also contain illegal  
15 levels of PCBs, the District has no plan to identify the extent of the PCB-caulk  
16 contamination in buildings built before 1980, or to test other building materials to  
17 which PCBs may have migrated. (DeNicola Decl. ¶28; Rosenfeld Decl. ¶33)  
18 Instead, the District proposed to test air and dust only; as noted above, such tests  
19 does not trigger TSCA's 50 ppm prohibition and is inherently unreliable and subject  
20 to manipulation.

#### 21 **H. The District's Belated Verification Of The Independent Testing**

22 On January 12, 2015, Plaintiffs served their Notice of Intent to Sue required  
23 by 40 C.F.R. 702.61. The Notice of Intent to Sue stated that Plaintiffs intended to  
24 seek an injunction restraining Defendants from violating TSCA by, among other  
25 things, failing to remove the caulk in the rooms where Plaintiffs' testing had shown

---

26  
27 <sup>9</sup> MHS room 506 was the room identified in testing as having 370,000 ppm  
28 PCBs in the caulk.

1 that caulk contained PCBs in excess of 50 ppm. (Dinerstein Decl. ¶11 and Ex. 14  
2 thereto)

3 On March 23, 2015--the day this action was filed--the District posted on its  
4 website a March 20, 2015 letter from Environ to the EPA concerning the results of  
5 its “verification” of Plaintiffs’ independent testing. The results are frankly  
6 shocking. The District tested a total of 24 samples in 10 rooms. Each of the 24  
7 samples had PCB over the 50 ppm regulatory limit, with most over 100,000 ppm  
8 (i.e., two thousand times the regulation limit) and measurements up to 570,000 ppm.  
9 (Dinerstein Decl. ¶13 and Ex. 32 thereto (at Table 3)) The following table  
10 summarizes the result of Environ’s “verification” testing.

Room	Independent Results (ppm)	Environ Results (ppm)
<u>MH3</u> 3	330	1,800 1,800
7	190	330 1,800
505	23,000	220,000
401	146,000	190,000
704 inside office		4,500 1,800 1,500
704 hallway	4,700	3,800
<u>JCES</u> 18	110,000	280,000 270,000 230,000
19	340,000	390,000 570,000 560,000
22	74,000	290,000 470,000 220,000
23	85,000	350,000 440,000 280,000 180,000

1 Notwithstanding that the District has been sitting on some of the independent  
 2 results since July 2014, according to Environ’s March 20, 2015 letter to the EPA,  
 3 the District plans to “address” these ten rooms “within one year of validation of the  
 4 [independent] sampling results.” (Dinerstein Decl. Ex. 22, at p. 4) In other words,  
 5 the District proposes to have students and teachers using rooms that they have  
 6 known for a long time contain PCBs well in excess of the legal limit for at least  
 7 another year.<sup>10</sup> This additional long-term exposure to PCBs thousands of times over  
 8 the legal limit is a flagrant violation of TSCA, not to mention flagrant disregard of  
 9 students’ and teachers’ health and safety.

### 10 **III. ARGUMENT**

#### 11 **A. America Unites Has Standing**

12 TSCA citizens’ suit provision provides that “any person” may commence a  
 13 civil action...against any person who is alleged to be in violation of [TSCA] or any  
 14 rule promulgated [thereunder]...to restrain such violation.” 15 U.S.C.  
 15 §2619(a)(1).<sup>11</sup> Plaintiffs, non-profit organizations, are persons who have standing to  
 16 bring this action.

17 An organization has standing to sue in a representative capacity if: (a) at least  
 18 one member has standing, in his or her own right, to present the claim asserted by  
 19 the association; (b) the interests sought to be protected are germane to the  
 20 association’s purpose; and (c) neither the claim asserted nor the relief requested

---

22 <sup>10</sup> Moreover, the District arrogated to itself the right to seek an extension of  
 23 time to remediate “[i]n the event that the procedures...cannot be implemented  
 24 within one year following identification and verification.” (Dinerstein Decl. Ex. 22,  
 at p. 4 fn. 9)

25 <sup>11</sup> A TSCA citizen’s suit may not be brought until the expiration of 60 days  
 26 after the plaintiff has given notice of intent to sue. 15 U.S.C. §2619(b)(1)(A).  
 27 Plaintiffs served the Notice of Intent to File Suit on January 12, 2015. In addition, a  
 28 TSCA citizen’s suit may not be brought if the EPA has “commenced and is  
 diligently prosecuting a proceeding...to require compliance with TSCA.” The EPA  
 has not filed such a proceeding.

1 requires that the members participate individually in the suit. *Hunt v. Washington*  
2 *State Apple Advertising Commission*, 432 U.S. 333, 343 (1977).

3 America Unites satisfies all three requirements. First it has numerous  
4 members and supporters who are injured by the District's failure to comply with the  
5 law, and thus would have standing to sue in their own right. Some examples follow:

6 Beth Lucas

7 Beth Lucas' son attended MHS from 2011/12 to 2013/14. When he was six,  
8 Ms. Lucas' son was diagnosed with an aggressive form of cancer called  
9 Medulloblastoma. He survived his battle with cancer, and was a healthy child until  
10 he started at MHS and began experiencing, among other things, debilitating  
11 migraines, but only when he was in school, never during breaks. Once the PCB  
12 contamination at the school came to light, the son's physician recommended that he  
13 be removed from the school due to the significant risks PCBs pose to all children,  
14 but especially to a child who has been treated for cancer. He is now home-schooled,  
15 and his social life and happiness have suffered greatly because he can't attend  
16 school with his friends. (Lucas Decl. ¶¶3-4)

17 Ms. Lucas' daughter is currently enrolled in MHS. Ms. Lucas is going to  
18 remove her from the school if the PCBs are not removed. Ms. Lucas is very stressed  
19 to be faced with the choice of sending her children to a PCB-contaminated school or  
20 to be faced with extraordinarily long drives to drive them into other public schools  
21 or to spend money that she doesn't have on a private school tutor. Ms. Lucas's  
22 daughter will be very upset by being removed from her school and friends. (Lucas  
23 Decl. ¶5)

24 Jude Brown

25 Jude Brown has a 6 year old daughter at JCES. She takes her daughter from  
26 school on Tuesday and Wednesday to teach her computer, arts and science, because  
27 these subjects are taught in a building with excessively-high levels of PCBs. The  
28 District Superintendent threatened Ms. Brown's daughter with truancy proceedings.

1 Ms. Brown is paying for art and science supplies and computer programs to teach  
2 these subjects to her daughter, which is a financial burden for her. (Brown Decl. ¶3)  
3 Ms. Brown will remove her daughter from the School if the PCBs are not  
4 remediated, which will upset her daughter because her friends are there. (Brown  
5 Decl. ¶¶3-4)

6 Caren Leib

7 Caren Leib's daughter is in the 9<sup>th</sup> grade at MHS. Her daughter was taking  
8 art, but decided to take physical education instead because she was scared of the  
9 PCBs found in the Art Room (Room 505). Her daughter is scared to touch the soil  
10 and buildings at the school, and is bothered by the yellow tape blocking off toxic  
11 areas. (Leib Decl. ¶3)

12 Ms. Leib's son is in the sixth grade at MHS. He is currently in many  
13 classrooms with illegal levels of PCBs, including Building E, the Music Room, to  
14 Art Room and the Library. If the PCBs are not cleaned up, Ms. Leib plans to enroll  
15 her son in another school next year. (Leib Decl. ¶5)

16 Hope Edelman

17 Ms. Edelman's daughter was in sixth grade at MHS for the 2013/14 school  
18 year. Because the District did not remediate the PCBs, Ms. Edelman removed her  
19 daughter from the school and enrolled her in private school. Tuition payments have  
20 been a financial burden on her. (Edelman Decl. ¶1). (*See also* DeNicola Decl. ¶3;  
21 Perl Decl. ¶¶5-6; Borress Decl. ¶3; Feig Decl. ¶¶3-4; Lambert Decl. ¶¶3, 7)

22 American Unites meets the other two standing requirements for organizations.  
23 The remediation of PCB contamination is central to America Unites' purpose, which  
24 is to advocate for removal of PCB contamination at the School. (DeNicola Decl.,  
25 ¶2) Moreover, individualized proof is not necessary. Plaintiffs are not seeking  
26 damages, but declarative and injunctive relief which would benefit all their members  
27 and supporters. *See Associated General Contractors of America v. Metropolitan*  
28 *Water Dist. Of Southern California*, 159 F.3d 1178, 1181 (9<sup>th</sup> Cir. 1998).

1           **B. America Unites Has Established The Requirement For Preliminary**  
 2           **Injunctive Relief**

3           An applicant for preliminary injunctive relief must establish: (a) she is likely  
 4 to succeed on the merits; (b) she is likely to suffer irreparable harm in the absence of  
 5 preliminary relief; (c) the balance of equities tips in her favor; and (d) an injunction  
 6 is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555  
 7 U.S. 7, 20 (2008). America Unites has made a compelling showing as to each of  
 8 these elements.

9           **1. America Unites Will Succeed On The Merits**

10           As demonstrated in Section a. below, it is indisputable that TSCA prohibits  
 11 the use of materials containing PCBs at concentrations of 50 ppm or greater. And,  
 12 as demonstrated in Section b. below, it is indisputable that Defendants are using  
 13 materials containing PCBs with concentrations greater than 50 ppm. Thus,  
 14 Plaintiffs have shown that they are likely to succeed on the merits. Indeed, it is  
 15 certain that Plaintiffs will prevail.

16           **a. TSCA Prohibits The Use Of Materials Containing**  
 17           **PCBs At Concentrations Of 50 PPM Or Greater**

18           TSCA provides in pertinent part as follows:

19           “(A) Except as provided under subparagraph (B), effective  
 20 one year after January 1, 1977, no person may use any  
 21 polychlorinated byphenyl in any manner other than in a  
 22 totally enclosed manner.

23           “(B) The Administrator may by rule authorize the  
 24 ...use...of any polychlorinated biphenyl in a manner other  
 25 than in a totally enclosed manner if the Administrator  
 26 finds that such ...use...will not present an unreasonable  
 27 risk of injury to health or the environment.”

28           15 U.S.C. §2605(e)(2) (“Section 2605(e)(2)”).

1 The use of PCBs in caulk is not a use in a “totally enclosed manner.” TSCA  
2 defines “totally enclosed manner” as a manner that “will ensure that any exposure of  
3 human beings or the environment to PCBs will be insignificant as determined by the  
4 Administrator by rule.” Section 2605(e)(2)(C). The EPA Administrator has not  
5 made any such finding with respect to caulk. To the contrary, the TSCA regulations  
6 state that “any exposure of human beings or the environment to PCBs may be  
7 significant” and thus that “a totally enclosed manner” means “a manner which  
8 results in no exposure to humans or the environment to PCBs.” 40 C.F.R. 761.20  
9 (emphasis added) It is not rationally disputable that the use of PCBs in caulk results  
10 in exposure of humans and the environment to PCBs.

11 In addition, the EPA Administrator has not issued a rule authorizing the use  
12 of PCBs in caulk or made a finding that the use of PCBs in caulk will not present an  
13 unreasonable risk of injury to human health or the environment. To the contrary, the  
14 TSCA regulations expressly state that PCBs at concentrations of greater than 50  
15 ppm present an “unreasonable risk of injury to human health and the environment.”  
16 40 C.F.R. 761.20. Thus, TSCA’s regulations expressly provide that, with certain  
17 inapplicable exceptions, “[n]o person may use any PCB, or any PCB Item regardless  
18 of concentration, in any manner other than a totally enclosed manner, except [for]  
19 excluded PCB products as defined in §761.3.” 40 C.F.R. 761.20(a). A “PCB Item”  
20 is defined as “anything that deliberately or unintentionally contains or has as part of  
21 it any PCB or PCBs.” 40 C.F.R. 761.3 (1999). “Excluded PCB products” are  
22 defined as PCB materials which appear at concentrations less than 50 ppm. 40  
23 C.F.R. 761.3.

24 Accordingly, TSCA prohibits the Defendants’ continued use of caulk  
25 containing PCBs over 50 ppm because: (a) the PCBs in caulk are not being used in a  
26 “totally enclosed manner;” and (b) the PCB regulations expressly prohibit the use of  
27 materials containing PCBs over 50 ppm. *See, e.g.*, EPA, Facts About PCBs In  
28 Caulk, [www.epa.gov/pcbsincaulk/guide/guide-sect1.htm](http://www.epa.gov/pcbsincaulk/guide/guide-sect1.htm) (“The use of PCBs in caulk

1 is not authorized under TSCA’s PCB regulations.”); EPA, Current Best Practices for  
2 PCBs in Caulk Fact Sheet-Removal and Clean-Up of PCBs in Caulk and PCB-  
3 Contaminated Soil and Building Material, [www.epa.gov/pcbsincaulk/caulkremoval.](http://www.epa.gov/pcbsincaulk/caulkremoval.htm)  
4 [htm](http://www.epa.gov/pcbsincaulk/caulkremoval.htm) (“Caulk containing PCBs at levels  $\geq$  50ppm is not authorized for use under the  
5 PCB regulations and must be removed.”).

6 There is no dispute that TSCA prohibits Defendants’ continued use of caulk  
7 containing PCBs over 50 ppm. Indeed, the EPA has repeatedly stated that the  
8 District must remove any caulk at the School containing PCBs at 50 ppm or greater.  
9 *See, e.g.*, April 25, 2014 letter from EPA to America Unites (“Generally, when  
10 testing of caulk or other building materials in structures show PCBs are present at or  
11 above 50 ppm, the PCB regulations...require that the PCB-containing material be  
12 removed.”) (DeNicola Decl. ¶5 and Ex. 5 thereto); October 31, 2014 letter from  
13 EPA to the District (“As you know, [TSCA] and implementing regulations prohibit  
14 the use of caulk containing PCBs at or above 50 ppm. When such caulk is found, it  
15 must be removed and disposed of in accordance with TSCA.”). (Rosenfeld Decl.  
16 ¶33 and Ex. 23 thereto)

17 **b. The Contaminated Rooms Have Caulk Containing**  
18 **PCBs At Levels Greater Than 50 PPM**

19 As discussed above, Defendants’ own testing has demonstrated the presence  
20 of illegal levels of PCBs in caulk in the 10 PI Rooms. Thus, there is no question  
21 that the use of caulk in each of the 10 PI Rooms violates TSCA and that such caulk  
22 must be remediated.

23 The Court should issues a preliminary injunction enjoining the use of those  
24 rooms immediately and requiring the Defendants to remove the caulk in all the PI  
25 Rooms by July 30, 2015, so that students and teachers can have a safe and legal  
26 environment when they return for the 2015/16 school year.

27 ///

28 ///



1                   **2.     America Unites’ Members Will Suffer Irreparable Injury In**  
2                   **The Absence Of A Preliminary Injunction**

3                   As noted above, a plaintiff seeking an preliminary injunction must establish  
4 that irreparable harm is likely to result in the absence of the injunction. Irreparable  
5 harm is harm that which cannot be prevented or fully rectified by the entry of final  
6 judgment after trial. *Roland Mach Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386  
7 (7<sup>th</sup> Cir. 1984).

8                   Congress enacted TSCA and gave citizens the right to seek an injunction to  
9 restrain violations of the statute because it found that PCBs presented an “extreme  
10 threat...to human health and the environment.” *See Commonwealth Edison, supra*,  
11 620 F. Supp. at 1408. Thus, the likelihood of irreparable injury follows necessarily  
12 from Defendants’ violation of TSCA. *See, e.g., Silver Sage Partners, Ltd. v. City of*  
13 *Desert Hot Springs*, 251 F.3d 814, 827 (9<sup>th</sup> Cir. 2001) (holding that irreparable  
14 injury was presumed where defendants engaged in acts prohibited by statute);  
15 *United States v. Nutri-cology, Inc.*, 982 F.2d 394, 398 (9<sup>th</sup> Cir. 1992) (“the passage  
16 of the statute itself is itself an implied finding by Congress that violations will harm  
17 the public.”); *see also Burlington N.R.R. Co. v. Dept. of Revenue*, 934 F.2d 1064,  
18 1074 (9<sup>th</sup> Cir. 1991) (“The standard requirements for equitable relief need not be  
19 satisfied when an injunction is sought to prevent the violation of a federal statute  
20 which specifically provides injunctive relief.”). *But see Enyart v. Nat’l Conference*  
21 *Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9<sup>th</sup> Cir. 2011) (declining to decide  
22 whether violation of a statute constitutes irreparable harm or whether irreparable  
23 harm can be presumed based on such a statutory violation).

24                   In any case, the undisputed evidence shows that failure to issue the requested  
25 relief will result in irreparable injury. It is undisputed that (a) PCBs cause cancer  
26 and other serious illnesses; (b) that teachers and students are exposed to PCBs in  
27 caulk through ingestion, contact or inhalation of PCBs into the air from the caulk;  
28 and (c) PCBs bioaccumulate in the body. Thus, every day that students and teachers

1 learn and teach in classrooms with caulk containing PCBs increases their chances of  
2 contracting one of the serious diseases with which PCBs are linked. (DeNicola  
3 Decl. ¶33; Rosenfeld Decl. ¶46 and Ex. 28 thereto, at p. 1) (“PCBs build up in our  
4 bodies over time and PCB exposure over a long period of time can be harmful to our  
5 health”); *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 750 (D.C. Cir.  
6 2001) (“PCB dangers are compounded by the remarkable stability of PCB  
7 compounds, which bioaccumulate in fatty tissue and are readily absorbed through  
8 the skin and respiration, as well as through ingestion of animals exposed to PCBs”).  
9 Indeed, Defendants are proposing at least a year of continued exposure to levels of  
10 PCBs in excess of 10,000 times the legal limit.

11 Moreover, Plaintiffs’ members will suffer irreparable injury because, absent  
12 the requested relief, they will have to choose between the financial burden and  
13 social difficulties of sending their children to other schools, or worrying about the  
14 harmful effects of PCBs on their children’s health. These types of harm cannot be  
15 prevented or fully rectified by entry of final judgment after trial. *See Amoco*  
16 *Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987)  
17 (environmental injury “can seldom be adequately remedied by money damages and  
18 is often permanent or at least of long duration, i.e., irreparable”); *accord Alliance for*  
19 *the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9<sup>th</sup> Cir. 2011). Many other cases  
20 in various contexts have held that threats to health constitute the type of irreparable  
21 harm to support the issuance of a preliminary injunction. *See, e.g., Harris v. Board*  
22 *of Supervisors*, 366 F.3d 754 (9<sup>th</sup> Cir. 2004); *Diaz v. Brewer*, 656 F.3d 1008 (9<sup>th</sup> Cir.  
23 2011); *Oster v. Lightbourne*, 2012 U.S. Dist. LEXIS 28126 (N.D. Cal. 3/2/12);  
24 *Bowen v. Consol. Elec. Distribs.*, 461 F. Supp.2d 1179 (C.D. Cal. 2006).

25 We anticipate that Defendants will argue that the teachers’ and students’  
26 increased risk of serious illness from exposure to illegal PCBs during the pendency  
27 of this case is not large. It is not true, and it is irrelevant. Plaintiffs need only  
28 demonstrate a likelihood of irreparable injury, “irrespective of the magnitude of the

1 injury.” *Simula, Inc. v. Autoliv, Inc.*, 175 F. 3d 716, 725 (9<sup>th</sup> Cir. 1999); accord  
2 *Dennis Melancin, Inc. v. City of New Orleans*, 703 F. 3d 262, 279 (5<sup>th</sup> Cir. 2012)  
3 (“[I]t is not so much the magnitude but the *irreparability* that counts for purposes of  
4 a preliminary injunction.”) (internal quotes omitted; emphasis in original).

### 5 **3. Balance Of Hardship**

6 “The real issue in this regard is the degree of harm that will be suffered by the  
7 plaintiff or the defendant if the injunction is *improperly* granted or denied.” *Scotts*  
8 *Co. v. United Industries Corp.*, 315 F.3d 264, 284 (4<sup>th</sup> Cir. 2002) (emphasis in  
9 original). The balance of hardships clearly favors Plaintiffs.

10 As discussed above, Plaintiffs’ members will suffer irreparable injury to their  
11 health unless the injunction is granted and the PCB-contamination is remediated  
12 promptly. On the other hand, it is indisputable that Defendants are in violation of  
13 the law. Thus, requiring Defendants to remediate the PCB contamination promptly  
14 instead of at some undefinable time in the future will only require the District to  
15 expend money to comply with the law sooner rather than later. This is not a  
16 hardship, let alone a hardship that outweighs the risks to students’ and teachers’  
17 health.

### 18 **4. Public Interest**

19 Courts of equity “pay particular regard for the public consequences in  
20 employing the extraordinary remedy of injunction.” *Winter, supra*, 555 U.S. at 24.  
21 The public interest is served by requiring Defendants to comply with the law. *See,*  
22 *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1128-29 (9<sup>th</sup> Cir. 2011). The  
23 public interest is also served by having a school that is free from PCB  
24 contamination. *See Alliance for the Wild Rockies, supra*, 632 F.3d at 1540 (“On the  
25 side of issuing the injunction, we recognize the well-established public interest in  
26 preserving nature and avoiding irreparable injury.”) (internal quotation marks  
27 omitted).

28

1           **C. The Court Should Waive The Bond Requirement**

2           Fed. R. Civ. P. 65(c) provides for the posting of security “in an amount that  
3 the court considers proper to pay the costs and damages sustained by any party to  
4 have been wrongfully enjoined or restrained.” Notwithstanding the Rule’s  
5 language, the Court has the authority to waive the bond requirement. *See Diaz,*  
6 *supra*, 656 F. 3d at 1015. The Court retains discretion “as to the amount of security  
7 required, *if any.*” (*Johnson v. Conturier*, 572 F. 3d 1067, 1086 (9<sup>th</sup> Cir. 2009)  
8 (emphasis in original) (internal quotation marks and citations omitted)).

9           The Court should waive the bond requirement or require only a nominal bond  
10 for the following reasons. First, as discussed above, there is no realistic likelihood  
11 of harm to the Defendants because Plaintiffs are certain to prevail. *See, e.g., Scherr*  
12 *v. Volpe*, 466 F. 2d 1027, 1035 (9<sup>th</sup> Cir. 1972) (affirming waiver of bond  
13 requirement where a strong likelihood of success on the merits was shown).

14           Second, Plaintiffs are non-profit organizations with limited resources. A high  
15 bond requirement could effectively deny Plaintiffs the ability to obtain preliminary  
16 relief. *See, e.g., Save Our Sonoran, Inc. v. Flowers*, 408 F. 3d 1113, 1126 (9<sup>th</sup> Cir.  
17 2005) (stating that defendant’s argument that bond was too low “contradict(s) our  
18 long standing precedent that requiring nominal bonds is perfectly proper in public  
19 interest litigation”); *GoTo.com v. Walt Disney Co.*, 202 F. 3d 1199, 1211 (9<sup>th</sup> Cir.  
20 2002) (holding that district court properly ordered nominal bond where higher  
21 amount demanded by defendant would effectively preclude injunctive relief).

22           **IV. CONCLUSION**

23           For the reasons set forth above, the Court should issue a preliminary  
24 injunction and order that Defendants are: (1) restrained and enjoined from using  
25 MHS room nos. 3, 7, 401, 505, 704 (interior) and 704 (exterior hallway), and JCES  
26 room nos. 18, 19, 22 and 23 for any educational purpose until the remediation  
27 described in (2) below is completed; and (2) required to remove and dispose of all  
28

1 caulk, and remediate any other materials contaminated with PCBs, in those rooms in  
2 accordance with TSCA and regulations thereunder by July 31, 2015.

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

Respectfully submitted,

Dated: April 1, 2015

NAGLER & ASSOCIATES

By:   
Charles Avrith

*Attorneys for Plaintiffs America Unites for Kids and  
Public Employees for Environmental Responsibility*

Dated: April 1, 2015

PAULA DINERSTEIN

By:   
*Attorneys for Plaintiff Public Employees for  
Environmental Responsibility*