**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500**

**MOTION INFORMATION STATEMENT**

**Docket Number(s):** 21-428

**Caption [use short title]**

Alliance for Water Efficiency, et al.

v.

United States Department of Energy

**Motion for:** Stay Pending Review

Set forth below precise, complete statement of relief sought:

Stay of agency action pending judicial review.

**MOVING PARTY:** Alliance for Water Efficiency **OPPOSING PARTY:** United States Department of Energy

☐ Plaintiff ☐ Defendant

☑ Appellant/Petitioner ☐ Appellee/Respondent

**MOVING ATTORNEY:** Keith Bradley **OPPOSING ATTORNEY:** Katherine Twomey Allen

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Court- Judge/ Agency appealed from: United States Department of Energy

**Please check appropriate boxes:**

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:**

Has this request for relief been made below? ☑ Yes ☐ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

**Signature of Moving Attorney:**

Keith Bradley **Date:** 2/23/21 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

**No. 21-428**

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**In the United States Court of Appeals**
**for the Second Circuit**

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ALLIANCE FOR WATER EFFICIENCY, U.S. PUBLIC INTEREST RESEARCH GROUP, and ENVIRONMENT AMERICA,

*Petitioners*,

v.

UNITED STATES DEPARTMENT OF ENERGY and DAVID HUIZENGA, IN HIS OFFICIAL CAPACITY AS ACTING SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,

*Respondents*,

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On Petition for Review of a Rule of the
United States Department of Energy

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# MOTION FOR STAY PENDING REVIEW

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February 23, 2021

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America (collectively, "Petitioners") submit the following corporate disclosure statement:

Petitioners are nonprofit corporations. None of the Petitioners has parent corporations or any publicly issued stock shares or securities. No publicly held corporation holds stock in any of the Petitioners.

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## INTRODUCTION

For decades, all clothes washers and dryers have been subject to minimum energy efficiency standards, and all clothes washers to minimum energy efficiency and maximum water use standards. Respondents (collectively, "DOE") have now erased those standards for washers and dryers that have "average cycle times" less than 30 minutes (45 minutes for some types).

DOE purported to act under an authority in the Energy Policy and Conservation Act ("EPCA") that permits it, in appropriate circumstances, to create energy efficiency standards specific to product groups with particular performance features. But DOE's rule established a "short-cycle" standard of zero, a level for which DOE has no justification. The rule also violated a statutory prohibition on decreasing the energy efficiency standard for any product. Meanwhile, the "product group" authority is not available for water conservation standards at all. DOE also willfully ignored multiple important factors, and flouted the National Environmental Policy Act ("NEPA").

Commenters demonstrated that many products already on the market comply with the pre-existing standards and have cycle times just as short as DOE's new product groups. DOE openly acknowledged that it has decided

there should be more, and that it wants to "spur innovation" by giving manufacturers a break on conservation standards. DOE's naked engagement in industrial policy is contrary to its statutory mandate, which is simply to develop conservation standards and increase them over time as technology enables greater efficiency.

Petitioners represent water utilities managing scarce and dwindling water supplies; manufacturers that strive to make water-efficient products; and a public grappling with the consequences of water overuse, as well as organizations committed to reducing energy consumption. DOE's rule will increase residential water and energy consumption, and consequently increase utility costs, and will erode the energy and water efficiency gains made by manufacturers in the past two decades. The Court's immediate intervention is necessary because every washer and dryer sold while this case is pending will remain in use, consuming scarce water and increasing energy demands, for the rest of its lifetime.

## BACKGROUND

### I. Existing Rules Mandated Minimum Energy and Water Efficiency for Washers and Dryers.

DOE implements energy and water conservation standards under EPCA. 42 U.S.C. §§ 6291 *et seq.*[1] EPCA specifies initial conservation standards—minimum energy efficiency, maximum water usage, or associated design requirements—for various products. *Id.* § 6295. It is unlawful to "distribute in commerce" a product that does not meet an applicable standard. *Id.* § 6302(a)(5). DOE must periodically assess whether to tighten each product's conservation standard. *Id.* § 6295(m). EPCA's "anti-backsliding provision" expressly bars DOE from "prescrib[ing] any amended standard which increases the maximum allowable energy use" of a product. *Id.* § 6295(o)(1). "Any new or amended energy conservation standard prescribed by [DOE] ... shall be designed to achieve the maximum improvement in energy efficiency." *Id.* § 6295(o)(2).

Section 435(q) permits DOE, when it issues "[a] rule prescribing an energy conservation standard for a type … of covered product[]," to set a different standard than what "applies (or would apply) for such type … for

[1] EPCA Part B addresses consumer products, while Part A covers commercial products. The rule at issue affects only the consumer products, not commercial washers and dryers.

any group of covered products which have the same function or intended use," if one of two preconditions applies. *Id.* § 6295(q)(1). The relevant prerequisite here is a determination that products "within such group … have a capacity or other performance-related feature which other products within such type … do not have and such feature justifies a higher or lower standard from that which applies (or will apply) to other products within such type." *Id.* "Any rule" exercising this authority "shall include an explanation of the basis on which such higher or lower level was established." *Id.* § 6295(q)(2).

Until now, all washers and dryers were subject to energy and water conservation standards: for dryers, a minimum "combined energy factor" ranging from 2.08 to 3.73 lbs./kWh (depending on certain product characteristics); for washers, a minimum "integrated modified energy factor" ranging from 1.13 to 1.84 $ft^3$/kWh/cycle and a minimum "integrated water factor" from 4.7 to 12.0 gal./cycle/$ft^3$. 10 C.F.R. § 430.32(g), (h).

## II. DOE Created New Categories of Washers and Dryers for Which it Eliminated Standards.

Last summer, DOE proposed to establish new product classes for washers and dryers defined by the ability to wash or dry clothes in under 30 minutes. 85 Fed. Reg. 49,297 (Aug. 13, 2020) ("Proposal"). DOE said that

characteristic is a "performance-related feature" warranting group-specific standards under section 435(q).

Commenters objected nearly unanimously. Selected comments are attached as Exhibits A through E. Among other themes, commenters complained that DOE was flouting the text and the intent of EPCA, which mandate progressive increases in conservation. Industry representatives pointed out that many washers and dryers on the market have cycles shorter than DOE's target while satisfying existing conservation standards. Ex. B (95% of front-loading washers offer short cycles averaging 20 minutes); Ex. D ("more than 90% of GEA washers and more than 60% of GEA dryers have a fast wash or fast dry cycle that is faster than the targets proposed by DOE"). Thus DOE's claims that new standards-free product classes are necessary to preserve that feature are false. DOE responded that the existence of such products shows consumers value short cycle times, and said it "intends to … push for the development of short-cycle products" that *DOE* thinks will be useful. 85 Fed. Reg. 81,359, 81,366 (Dec. 16, 2020) ("Washer-Dryer Rule").

Commenters, including petitioners, also pointed out that any new washer or dryer group must be subject to energy efficiency standards at least

as tight as the existing standards; otherwise, DOE would violate EPCA's anti-backsliding provision. *See* Ex. A at 2.

Nonetheless, on December 16, 2020, DOE published the Washer-Dryer Rule establishing the new short-cycle product groups and stating those groups are no longer subject to standards. *Washer-Dryer Rule* at 81,375-76 (codified at 10 C.F.R. § 430.32(g)(4)(ii), (h)(3)(ii)).

The Washer-Dryer Rule took effect on January 15, 2021. Now, DOE permits the sale of short-cycle washers and dryers that meet no energy or water conservation standards at all.

## LEGAL STANDARD

EPCA section 336 and Administrative Procedure Act section 705, made applicable here by section 336, *see* 42 U.S.C. § 6306(b)(1); 5 U.S.C. § 705, empower the Court to stay DOE's rule. The standard for staying a rule pending appeal is like that for a preliminary injunction. *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund, Ltd.*, 598 F.3d 30, 37 (2d Cir. 2010). The Court considers four factors: irreparable harm to the movant absent a stay, the likelihood of success on the merits, substantial injury to the non-movant by issuing a stay, and the public interest. *E.g.*, *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). Money damages must also be inadequate to

remedy the harm. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004). Greater harm can bolster a weaker showing on the merits, and a stronger likelihood of success can warrant a stay with less injury at stake. *Mohammed*, 309 F.3d at 101.

## ARGUMENT

### I. The Court Has Jurisdiction Over the Petition.

This Court has jurisdiction (upon a timely petition) to review a rule "prescribed under" EPCA section 323, 324, or 325 (42 U.S.C. §§ 6293, 6294, and 6295). 42 U.S.C. § 6306(b)(1). The action under review was such a rule; DOE purported to act under section 325(q). *Washer-Dryer Rule* at 81,361 ("Establishment of Short-Cycle Product Classes Pursuant to 42 U.S.C. 6295(q)").

The Court's jurisdiction depends also on petitioners' standing. The showing of irreparable harm below suffices to establish standing. *See New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 86 (2d Cir. 2020) (same injuries establish standing and irreparable harm).

### II. DOE Has Not Stayed the Rule.

Petitioners asked DOE to stay the Rule. Ex. F. DOE refused, and is likely to oppose this motion. *See* Fed. R. App. P. 18(a).

## III. Petitioners Will Suffer Irreparable Harm Without a Stay.

Products that used to be, and should still be, unlawful to distribute in commerce can now be sold to U.S. consumers. These products are washers and dryers that have short cycle times and are now not subject to any water or energy conservation standards. Any consumer that buys a short-cycle washer or dryer will be able to keep using it even if the Court vacates the Washer-Dryer Rule as petitioners request, because EPCA generally does not regulate end-users. Every short-cycle washer or dryer sold thanks to DOE's unlawful removal of standards will remain in place, consuming excessive amounts of water and energy, for the rest of its durable lifetime—on average, 10-13 years. Ex. G, at 24.

This excessive energy and water consumption is a substantial and irreparable harm. DOE previously recognized that its energy and water conservation standards for washers and dryers have "significant environmental benefits" because they reduce energy and water consumption. 77 Fed. Reg. 32,308, 32,310 (May 31, 2012); 76 Fed. Reg. 22,454, 22,457 (Apr. 21, 2011). DOE previously concluded that the washers standards will, over 30 years, save an estimated "2.04 quads of energy and 3.03 trillion gallons of water" reduce carbon dioxide emissions by about 113 million

metric tons. 77 Fed. Reg. 32,310. Efficient clothes washers have helped reduce water use by an average of 5.4 gallons per person per day—nationwide savings of more than 640 billion gallons a year, the single most effective per-capita water reduction effort in 15 years. Ex. A at 2, 3.

Similarly for dryers, DOE previously found its conservation standards will, over 30 years, save 0.39 quads of energy, reduce electricity generation requirements by nearly 1 gigawatts, and reduce carbon dioxide emissions by about 36 million metric tons. 76 Fed. Reg. 22,457.

Petitioner Alliance for Water Efficiency represents utilities responsible for supplying water in locations across the United States; its mission, for its members, is to support and enhance water conservation efforts. Ex. H ¶ 3. Utilities in most states are already confronting serious water shortages. *Id.* ¶ 4; Ex. A at 2. These pressures will only grow, due to population increases in areas like the Southwest where water has always been scarce, and climate change is causing a "mega-drought." Ex. A at 2.

AWE's members are constantly working to manage and mitigate the scarcity of water. Ex. H ¶¶ 4-5. AWE and its members have consistently advocated for policies to foster water conservation. They have done so because, to supply growing populations from ever-tighter water sources,

they need to reduce per-capita usage. Ex. H ¶ 4; Ex. I, ¶ 14. Water providers are relying on the pre-existing reductions to extend future supplies and serve new customers. Ex. I ¶¶ 7-14, 18-19. The increased demand on water from washers newly released from conservation standards will make it more difficult and costly for AWE's members to fulfill their customers' needs for water, and negatively impact American utilities and consumers for years. Ex. H ¶¶ 8, 12; Ex. I ¶¶ 15-21.

Petitioners U.S. Public Interest Research Group and Environment America represent hundreds of thousands of individuals affected by the consequences of energy production and consumption. Ex. J. The consumption of fossil fuels—a staple in the nation's energy diet—inevitably produces pollutants such as particulate matter and carbon dioxide. Petitioners' members suffer directly from those pollutants, through inhaling toxic byproducts, through experiencing the climate impacts, and more. Exs. K & L. DOE's decision to lift the energy conservation standards from washers and dryers representing a significant portion of the market will inevitably lead to increased energy usage. DOE said explicitly that it intended to give consumers the opportunity to prioritize cycle time at the expense of lower energy efficiency. *Washer-Dryer Rule* at 81,362. The

byproducts from the resulting energy consumption will cause increased harm to petitioners' members. Exs. K & L.

Courts routinely conclude such harms warrant injunctions. *Cf. Town of Brookhaven v. Sills Rd. Realty LLC,* 2014 U.S. Dist. LEXIS 85202, at *15, *19 (E.D.N.Y. June 23, 2014) (threatened impact to water supply and quality constitutes irreparable harm); *California v. BLM*, 286 F. Supp. 3d 1054, 1073 (N.D. Cal. 2018) (wasteful energy consumption constitutes irreparable harm).

To be sure, petitioners cannot say with certainty whether any given distributor will sell short-cycle washers or dryers, or how many consumers will buy them. However, that lack of certainty is not an obstacle. For one thing, AWE must now commit its limited resources to monitor the market for such products. Ex. H ¶ 11; Ex. M ¶ 12; *See New York*, 969 F.3d at 61, 86 (diverting resources away from other programs "to mitigate the Rule's impact on those they serve" constitutes irreparable harm). This is necessary given AWE's mission and membership, and given the long-term consequences of any sales of high-flow washers. If AWE discovers such products for sale, it must undertake immediate advocacy efforts to try to prevent those sales. AWE's monitoring cannot be comprehensive and it may

not find every product of concern. But it is something AWE is forced to do by DOE's precipitous elimination of standards.

Moreover, the significant risk of harmful product sales, on its own, is enough to warrant preliminary relief. *See Standard & Poor's Corp. v. Commodity Exch., Inc.*, 683 F.2d 704, 711 (2d Cir. 1982) (significant risk of irreparable harm to the public warrants injunction). DOE said it intended and expected the rule to "spur manufacturer innovation," freeing "[c]onsumers who place a higher value on time saved" to purchase short-cycle products. *See Washer-Dryer Rule* at 81,360, 81,362. At a minimum, the rule creates the very substantial risk that such sales will occur; and from those washers and dryers that are sold under the Washer-Dryer Rule, the harmful consequences are inevitable and irreversible. *See New York v. Actavis PLC*, 787 F.3d 638, 661 (2d Cir. 2015) (harms that are difficult to reverse are irreparable). Even short-term operation of the rule pending review, permitting about a year's-worth of sales of these products with decade-scale lifetimes, locks in part of the damage from DOE abrogating its standards.

## IV. Legal Remedies Are Inadequate.

Inadequacy of legal remedies is the natural consequence of irreparable harm. *E.g.*, *Int'l Dairy Foods Ass'n. v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996).

Money damages cannot make more rain to offset increased water use or remediate the consequences of extra energy consumption. Similarly, "environmental injury, by its nature, can seldom be adequately remedied by money damages and … the balance of harms will usually favor the issuance of an injunction." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). Moreover, DOE bears sovereign immunity against damages to remediate an unlawful EPCA policy. DOE will not compensate AWE for the monitoring work it must do.

Once a short-cycle washer or dryer is sold, neither DOE nor the Court can recover the product from the consumer. The product will overconsume water and/or energy for the duration of its lifetime. The longer the Washer-Dryer Rule is operational, the greater the harm will be. Only a stay can prevent petitioners' harms.

## V. Petitioners Are Likely to Succeed on the Merits.

To obtain injunctive relief, a movant need only show a "substantial possibility" of success; "less than a likelihood" can suffice. *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994); *Mohammed*, 309 F.3d at 101. Petitioners easily clear this threshold. The rule has too many defects to cover in this motion; petitioners highlight some of the more glaring problems.

### A. DOE Has No Authority to Exempt a Product Group from Water Conservation Standards.

Before the Washer-Dryer Rule, all washers were subject to minimum water conservation standards. The Rule eliminated those standards for products with short cycle times. DOE's sole purported authority for doing that was section 325(q). *Proposal* at 49,298 ("DOE … has legal authority pursuant to 42 U.S.C. 6295(q) to establish separate product classes."); *Washer-Dryer Rule* at 81,361 ("Establishment of Short-Cycle Product Classes Pursuant to 42 U.S.C. 6295(q)"). But section 325(q) gives DOE no such authority for water conservation standards.

Section 325(q) says "[a] rule prescribing an energy conservation standard" can "specify a level of ***energy use or efficiency***" specific to a "group of covered products" within the larger type. 42 U.S.C. § 6295(q)(1). Nothing about setting a different level of water use or efficiency.

This is no mere technicality. DOE itself has stressed repeatedly that another EPCA provision (the anti-backsliding restriction) does not generally limit its relaxation of water standards, precisely because that provision addresses "maximum allowable energy use … or minimum required energy efficiency." *Id.* § 6295(o)(1); 84 Fed. Reg. 33,869, 33,873 (July 16, 2019) (explaining that section 325(o)(1) covers water standards only for four

specific products). DOE took that position in the Washer-Dryer Rule too. *Washer-Dryer Rule* at 81,370. The same principle applies for section 325(q). When Congress wrote "energy use or efficiency," it meant energy. Not water.

When commenters raised this issue, DOE's *non sequitur* response was that washers are not among the products for which section 325(o) limits backsliding on water standards. *Id.* at 81,369-70. DOE did not address the real defect, which is that section 3256(q) does not allow special product-group water standards at all.[2] Besides being contrary to law, DOE's approach is arbitrary and capricious, because DOE ignored that key issue.

### B. DOE Did Not Comply with the Requirements for a Section 325(q) Rule.

Even with respect to energy efficiency, DOE violated the plain terms of section 325(q).

- Section 325(q) applies in a "rule prescribing an energy conservation standard for a type … of products." In such a rule, DOE may choose a

[2] The pre-existing standards do include different product-group standards that DOE established using section 325(q) authority. When DOE defined those product groups, it did not assess whether section 325(q) permits such segregation; it used a special EPCA authority, 42 U.S.C. § 6295(p)(4), to adopt a consensus proposal from a cross-section of interested parties. 77 Fed. Reg. 32,307, 32,319 (May 31, 2012).

different standard "for any group" with special features. 42 U.S.C. § 6295(q)(1). This was not a rule prescribing a standard for any larger type of products. It was solely a rule to define a group of products to have zero standards.

- In a section 325(q) rule, DOE "shall specify a level of energy use … or efficiency" for the special group. *Id.* "As the Supreme Court has often explained, the use of the word 'shall' makes the action mandatory." *Salazar v. King*, 822 F.3d 61, 77 (2d Cir. 2016). DOE declined to specify a level of energy use or efficiency for short-cycle products; instead it simply abrogated all standards for these groups.
- A section 325(q) rule "shall include an explanation of the basis on which such higher or lower level was established." 42 U.S.C. § 6295(q)(2). Again, a mandatory instruction. DOE did not explain why the standards should be immediately eliminated—effectively setting the minimum energy efficiency at zero—for its new product groups. On its face, the decision was irrational. Washers and dryers have been subject to energy conservation standards for decades. Even if short-cycle products were a valid category, there is no apparent reason they should be completely unregulated.

Commenters raised these issues too. DOE offered two unlawful, irrational responses. First, it claimed it intends eventually to issue new standards for short-cycle products, *Washer-Dryer Rule* at 81,369, at which time it will analyze what standards are appropriate. That plan is no excuse. For one thing, DOE did alter standards for these products. They used to be subject to minimum efficiency requirements like energy factor of at least 2.08. 10 C.F.R. § 430.32(g), (h). Now there is no minimum efficiency for short-cycle products. Whatever group-specific standard DOE might eventually settle on, section 325(q) required it to explain why it immediately erased the existing standard.

Moreover, an agency cannot "defer[] consideration of the statutory factors and objectives." *Carlson v. Postal Regulatory Comm'n*, 938 F.3d 337, 350 (D.C. Cir. 2019). In *Carlson* an agency declined to determine its ratemaking satisfied statutory standards because it planned to consider the details in annual reviews; the D.C. Circuit rejected that approach because "[j]ust as Congress' choice of words is presumed to be deliberate, so too are its structural choices" such as the requirement to evaluate certain factors. *Id.* (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 353 (2013)). EPCA specifically directs DOE to explain, in the section 325(q) rule, what group-

specific standard it chooses and why. A plan to come up with a standard at some unspecified future time is simply not the same.

Second, DOE asserted that it may establish a 325(q) group and set the standard later. *Washer-Dryer Rule* at 81,367. DOE did not explain how that claim could be consistent with the clear mandate. Section 325(q) is an authority to establish a group-specific standard. By declining to set a standard, DOE was failing to do the one and only thing that section 325(q) allows.

DOE said it had explained its interpretation previously. *Id.* But it cited no such explanation. It only described two examples of cases in which DOE deferred setting standards for particular product groups. *Id.* at 81,367-68. "[T]hat is history, not explanation." *Se. Ala. Med. Ctr. v. Sebelius*, 572 F.3d 912, 920 (D.C. Cir. 2009). None of those examples considered the statutory question. "No matter how consistent its past practice, an agency must still explain why that practice comports with the governing statute and reasoned decisionmaking," and "no amount of historical consistency can transmute an unreasoned statutory interpretation into a reasoned one." *Id.*

### C. DOE Violated the Anti-Backsliding Provision.

DOE also flouted the strict limitation that it must not amend any standard in a way that increases a product's allowable energy use. 42 U.S.C. § 6295(o)(1).

DOE insisted that because it will set the short-cycle standards later, it is "premature to presume" they will be lower than the pre-existing standards. *Washer-Dryer Rule* at 81,369. ***They are already lower.*** The Rule self-evidently amended the existing standards for washers and dryers. *Id.* at 81,375-76 (amendatory instructions). Short-cycle products used to be subject to the same standards as other washers and dryers. Now they are "not currently subject to … standards," *id.*, meaning that any amount of energy use is allowable, and certainly amounts higher than the prior standards permitted. DOE has already violated the anti-backsliding rule; pretending otherwise is irrational.

DOE's musings that a future short-cycle standard might be no lower than prior standards are irrational for a second reason too. The whole premise of the rulemaking was that existing products have the shortest cycle times that are achievable under the pre-existing standards, and those standards are "precluding manufacturers from introducing models" with

shorter cycle times. *Washer-Dryer Rule* at 81,361. If the future group-specific standards will not be lower, there was no point. DOE's refusal to acknowledge that reality was irrational. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. United States EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("[A]n internally inconsistent analysis is arbitrary and capricious."). Worse, if DOE does not know whether it will choose a higher or lower standard, it cannot possibly satisfy section 325(q), which as noted applies only when DOE determines product features actually do warrant a different standard.

DOE further asserted that the anti-backsliding rule is no limit at all, because section 325(q) is (it says) an exception. *Washer-Dryer Rule* at 81,368-69. DOE didn't even comply with section 325(q), so it can hardly rely on that authority to exempt it from the anti-backsliding restriction.

Even if it had complied, there is no ground for thinking section 325(q) is an exception. Nothing in EPCA says so. Section 325(o)(1) says DOE "may not prescribe any amended standard which increases … allowable energy use." No exceptions. Section 325(q) allows DOE to set a group-specific standard. No mention of any exception from the anti-backsliding limitation.

DOE thinks EPCA means it generally can't reduce standards, but it can so long as it is reducing them for particular product groups. That reading

eviscerates the anti-backsliding restriction, as the rule under review—in which DOE eliminated a standard in order to encourage manufacturers to develop less efficient products that DOE hypothesizes consumers might want—demonstrates. DOE cited nothing in EPCA or its history suggesting Congress intended such an exception.

A court—and an agency—is "not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). That is certainly possible here. When DOE considers a new or amended standard for an overall type of products, it might increase the standard in general, while leaving the existing, lower standard in place for a subgroup. That action could comport with both section 325(q) and the anti-backsliding rule.

DOE, on the other hand, suggested that section 325(q) creates some conflict by using the present tense. It says DOE can set a group-specific standard that is lower than what "applies (or would apply)" to the broader category; DOE believes the word "applies" must mean DOE can set a standard lower than the prior, pre-existing one. *Washer-Dryer Rule* at 81,369. That rationale is far too thin a reed to support a reading that disregards the explicit, blanket prohibition of section 325(o)(1). Moreover, the reed buckles

when one realizes that when DOE sets a new standard for a product type, that standard "applies," present-tense, in many senses. *E.g.* 42 U.S.C. § 6297(c) (EPCA standards preempt state law immediately upon their effective dates). Thus, in a rule that establishes a broad standard, setting a group-specific standard lower than the one that "applies" to the broad category just means deviating from the new standard—not going lower than the old one.[3] The supposed conflict—DOE's sole justification for inferring an exception from the anti-backsliding rule—disappears.

The Court must, of course, defer to DOE's interpretation if EPCA is ambiguous on this point and DOE adopted a reasonable interpretation. *See NRDC, Inc. v. United States EPA*, 961 F.3d 160, 172 (2d Cir. 2020). The foregoing discussion demonstrates that EPCA is not ambiguous. Even if it were, DOE had no rational policy justification for its interpretation. DOE asserted that it must be able to accommodate new technologies and features, like network connectivity for "smart products," even though the new features increase energy usage. *Proposal* at 49,306. That rationale is contrary to the purposes and structure of EPCA. The overarching goal is energy conservation, 42

[3] Setting a standard lower than the one that "would apply" or "will apply," 42 U.S.C. § 6295(q)(1), just refers to the possibility of standards that come into force later.

U.S.C. § 6201; and the statute mandates DOE to drive technological innovation towards conservation and efficiency. *See id.* § 6295(o)(2) ("Any new or amended standard" must "be designed to achieve the maximum improvement in energy efficiency" that is "technologically feasible and economically justified."). Nothing in EPCA asks DOE to foster innovation that increases energy usage. That DOE thinks short-cycle washers and dryers or smart home products are good ideas, and worth increased energy usage, does not justify deviating from the choices Congress made. *See NRDC*, 961 F.3d at 175-76 (holding interpretation unreasonable because it disregards statutory context).

### D. DOE Violated NEPA.

Instead of assessing the rule's environmental impacts as NEPA requires, 42 U.S.C. § 4332(c), DOE relied on "categorical exclusion" A5 in its NEPA-implementing regulations. *Washer-Dryer Rule* at 81,370.

Exclusion A5 is for a "rulemaking[] interpreting or amending an existing rule … that does not change the environmental effect of the rule." 10 C.F.R. part 1021 subpart D app. A. But "merely … asserting that an activity … will have an insignificant effect" is not enough to qualify for a categorical

exclusion. *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986). "[A]n agency must provide a reasoned explanation of its decision." *Id.*

Invoking exclusion A5 was irrational. DOE said the Rule won't change the environmental effect of washer and dryer standards because DOE plans to develop standards for short-cycle products in the future. *Washer-Dryer Rule* at 81,370. But the Rule eliminated the conservation standards for short-cycle products. When DOE originally adopted those standards, it determined they would have significant environmental benefits by causing reductions in energy usage, water usage, and the associated environmental detriments. *See* 77 Fed. Reg. 32,310; 76 Fed. Reg. 22,457. Zeroing out the standards for a subset of products—as it happens, a subset that comments showed would encompass a substantial portion of the existing market, *see supra* at _—cannot help but cause increases in those areas. DOE's refusal to acknowledge the reality of its own rule was not reasoned decisionmaking.

## VI. The Remaining Stay Factors Overwhelmingly Favor Staying the Rule.

To overcome the significant harms petitioners face and the invalidity of the rule itself, the harms to DOE and the public from staying the rule must be great. *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (discussing the

"sliding scale" approach to balancing stay factors). Staying the rule, however, will not harm DOE and the public interest plainly demands a stay.

### A. A Stay Will Not Harm DOE.

Maintaining the status quo will have no harmful effect on DOE or the manufacturers it regulates. Industry members opposed the relaxation of standards, arguing that the consumers were satisfied with products already available. Exs. A–E.

### B. The Public Interest Mandates a Stay.

Public comments nearly unanimously opposed the rule change. *See* 85 Fed. Reg. 81,345-56.

DOE contended the rule beneficially adds "consumer choice" to the clothes washer and clothes dryer market. *Washer-Dryer Rule* at 81,360. The desire of some consumers to buy short-cycle washers and dryers that use more water and energy while the case is pending pales compared to the decade-long harms from their continued ability to use those products even if the Court invalidates the rule.

DOE says the rule will "spur manufacturer innovation." *Washer-Dryer Rule* at 81,366. If so, that goal addresses the longer term. The innovation that DOE dreams of can still happen, even if the rule is stayed during review. Meanwhile, manufacturers and distributors generally prefer the stability of

knowing what the standards are. If unregulated short-cycle products are allowed into distribution networks now and the Court then invalidates the Rule, distributors will be left holding unlawful inventory. Ex. N ¶¶ 13-15. Far better to preserve the pre-rule status quo; then, distributors will only be demanded to carry the unregulated products in the unlikely event that the Court concludes DOE's rule was lawful and reasonable.

Finally, and above all, "there is an overriding public interest" in "an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). DOE tried to maneuver around its statutory obligations to loosen water and energy conservation standards; "faithful adherence" to EPCA calls for enjoining the Washer-Dryer Rule.

## CONCLUSION

For these reasons, the Court should stay the Washer-Dryer Rule pending review.

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I hereby certify that on February 23, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Keith Bradley
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