

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): 21-108, 21-428, 21-564

Caption [use short title]

Motion for: Stay Briefing

Set forth below precise, complete statement of relief sought:

Stay briefing of case until October 1, 2021

STATE OF CALIFORNIA, et al. v. US DOE

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: Kyle T. Edwards

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

Please check appropriate boxes:

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

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

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:

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

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

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: 5/12/21

Service by: CM/ECF Other [Attach proof of service]

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

STATE OF CALIFORNIA, et al.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF
ENERGY, et al.,

Respondents.

No. 21-108 (L)

No. 21-428 (CON)

No. 21-564 (CON)

UNOPPOSED MOTION TO STAY BRIEFING

The above-captioned case represents three petitions (consolidated in this Court) for review of a final rule, issued by the U.S. Department of Energy (DOE), to establish new product classes for residential clothes washers and clothes dryers. *See* 85 Fed. Reg. 81,359 (Dec. 16, 2020) (“Washer-Dryer Rule”). The petitioners across the consolidated cases—the Alliance for Water Efficiency, U.S. Public Interest Research Group, Environment America, the State of California and its co-petitioners, and the Sierra Club (collectively “Petitioners”)—respectfully move to stay the briefing of this case until October 1, 2021.

1. On January 20, 2021, President Biden issued Executive Order 13,990 on “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” which sets out various public health and environmental policy objectives. Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 20, 2021). The Executive Order directs all agencies “to immediately review” all agency actions taken in the past four years “that are or may be inconsistent with, or present obstacles to,” the policy objectives set forth in the executive order, and “consistent with applicable law, consider suspending, revising, or rescinding” those actions. *Id.* at 7037, § 2(a). The Executive Order required agencies to submit to the Office of Management and Budget (OMB) by February 19, 2021, a “preliminary list of any actions being considered pursuant” to that directive “that would be completed by December 31, 2021, and that would be subject to OMB review.” *Id.* at 7038, § 2(b).

2. On February 19, DOE publicly released a list of past actions that it is reviewing pursuant to Executive Order 13,990. The Washer-Dryer Rule appears on that list. *See* Memorandum from Kelly Speakes-Backman, Acting Assistant Secretary for Energy Efficiency and Renewable Energy (Feb. 19, 2021), <https://go.usa.gov/xsmKj>.

3. DOE has represented to Petitioners that it is reconsidering the Washer-Dryer Rule, and that it expects to complete that reconsideration by the end of the year. DOE has also represented to Petitioners that completing the reconsideration will mean taking whatever final action DOE concludes is appropriate regarding the Rule.

4. Meanwhile, briefing in the case is underway. Petitioners' briefs are due on June 1, 2021, and DOE's response briefs would be due within 90 days after Petitioners' briefs. Petitioners seek vacatur of the Washer-Dryer Rule.

5. DOE has suggested that a possible outcome of its review process would be a revocation of the Washer-Dryer Rule, and that a revocation would make the further prosecution of the petitions unnecessary. DOE has suggested holding the case in abeyance.

6. Petitioners do not take a position on whether a repeal or rescission of the Washer-Dryer Rule would indeed obviate the petitions. But they recognize that a short pause in the case while DOE reviews the Rule would conserve the resources of DOE, of Petitioners, and of the Court. If DOE revises or repeals the Rule, Petitioners would probably need to address the consequences of that action. If Petitioners have already filed opening

briefs, they would likely need to request supplemental briefing to address the impact of DOE's action regarding the Rule. Staying the briefing schedule, and the filing of opening briefs, until more information is available about DOE's plans would decrease the likelihood that Petitioners would need to seek leave for supplemental briefing.

7. For the same reason, Petitioners recognize that staying the briefing for a few months to learn more about DOE's plans will likely lead to a faster outcome for the case overall. Requesting and then conducting an additional round of briefs, for both sides, to address the consequences of DOE's plans would take additional months, whereas the brief pause that Petitioners propose could obviate that additional time.

8. Petitioners remain concerned that, while the Washer-Dryer Rule is in place, washers and dryers can be sold that use substantially more water and energy than was permitted before DOE adopted the Rule. Such sales would cause long-lasting harm, in the form of excessive water and energy consumption, which would continue even if DOE rescinds the Rule and eventually bars further sales. Petitioners move for a stay of briefing not because they have lost this concern, but because a careful assessment of the

briefing schedule shows that a stay will produce the swiftest path to a decision, in light of DOE's review of the Rule.

9. The Alliance for Water Efficiency, U.S. Public Interest Research Group, and Environment America have moved the Court to stay the Washer-Dryer Rule while the case is pending. The Court has scheduled that motion for decision on May 18, 2021. Petitioners respectfully submit that their request for a stay of the briefing schedule should not affect the Court's consideration of the stay motion. Staying the effectiveness of the Rule is consistent with, and would serve, the goal of a swift resolution of the merits that this motion is also meant to serve.

10. Furthermore, Petitioners note it would be inappropriate to stay the briefing until the December 31, 2021 date by which DOE says it will complete its action regarding the Rule. DOE adopted the Washer-Dryer Rule through notice-and-comment rulemaking, and a rescission or repeal of the Rule, if that is what DOE chooses, would likely also involve notice-and-comment rulemaking. For such a process, DOE would need to publish a notice of proposed rulemaking well in advance of the December 31 date, so that the public has time to submit comments and DOE has time to review and consider them.

11. Accordingly, Petitioners ask the Court to stay the briefing of the case until October 1, 2021. Petitioners' respective briefs would be due on that date. Well in advance of October 1, 2021, additional information should be available about DOE's plans regarding the Washer-Dryer Rule.

12. To ensure that the Court and Petitioners have adequate information to assess, before Petitioners prepare their briefs, whether the status of DOE's deliberations is such that briefing should indeed resume, Petitioners further move the court to order DOE to provide periodic status reports at 60-day intervals (July 1 and September 1, 2021).

13. Petitioners have conferred with DOE, and DOE consents to staying the briefing of the case until October 1, 2021. DOE also consents to the request for periodic status reports.

Dated this 12th day of May, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Vollkorn, a proportionally spaced font. I further certify that this response complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 1,031 words according to the count of Microsoft Word.

/s/ Keith Bradley
Keith Bradley

CERTIFICATE OF SERVICE

I certify that on May 12, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second 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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