ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 9

No. 20-1068 (consolidated with Nos. 20-1072 and 20-1100)

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

AMERICAN PUBLIC GAS ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

On Petitions for Review of an Order of the
United States Department of Energy

JOINT RESPONSIVE SUPPLEMENTAL BRIEF OF AMERICAN PUBLIC GAS ASSOCIATION, AIR-CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE, SPIRE INC., AND SPIRE MISSOURI INC.

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August 23, 2021

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Act	Energy Policy and Conservation Act
American Society of Engineers	American Society of Heating, Refrigeration and Air-Conditioning Engineers (ASHRAE)
DOE or Department	Department of Energy
Final Rule	Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020)
Petitioners	Air-Conditioning, Heating & Refrigeration Institute, American Public Gas Association, Spire Inc. and Spire Missouri Inc.

INTRODUCTION

In its initial brief, DOE confessed error and said the Court "should vacate and remand the rule so that the Department can reconsider the issues presented in the final rule under the appropriate evidentiary standard." DOE Br. 24. In its supplemental brief, DOE says the "Rule should be remanded … without vacatur." Supp. Br. 6. DOE was right the first time. Vacatur is necessary to *enable* DOE to "reconsider the issues" because—absent vacatur—the anti-backsliding provision of the Act[1] would likely deprive DOE of the ability to address the serious substantive errors that underlie the standards imposed by the Final Rule. Even if DOE could amend the standards to address its errors, vacatur is necessary to prevent disruption its unjustified standards would cause in the interim.

ARGUMENT

"[V]acatur is the normal remedy" when a reviewing court finds that an agency has unlawfully issued a rule. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014). When choosing a remedy, this Court considers (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" and (2) "the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear*

[1] 42 U.S.C. § 6313(a)(6)(B)(iii)(I).

Regul. Comm'n, 988 F.2d 146, 150–51 (D.C. Cir. 1993) (citation omitted). Both factors favor vacatur and remand.

First, the deficiencies in DOE's justification for the Final Rule were serious and produced an unsustainable regulatory outcome. DOE incorrectly says its alternative rationale in the Final Rule—that the clear-and-convincing-evidence standard was actually satisfied (despite its conclusion that a lower standard applied)—"is only deficient because it is inadequately explained." Supp. Br. 3. But as DOE previously stated, the problem was not that DOE did not explain its conclusions; rather, it "held itself to the wrong evidentiary standard." DOE Br. 24. DOE must make a *finding* supported by clear-and-convincing evidence, not merely say it "believes its findings" meet that bar. *Id.* at 22 (quoting JA592). As DOE wrote, "merely stating that something was considered or found 'is not a substitute for considering or finding it.'" *Id.* (citation omitted).

DOE's assertion that the Final Rule's flaws are "relatively unimportant" (Supp. Br. 2 (citation omitted)) is wrong. It is no accident that DOE admitted legal error and urged the Court not to consider Petitioners' other challenges to the Final Rule. DOE lacked evidence for critical factors in its regulatory analysis (*see* Opening Br. 42-44, 51-52; Reply Br. 14-18) and cannot remedy its errors simply by elaborating on its conclusory assertions. It must "issue a notice of proposed rulemaking and engage with any comments submitted in response to that notice."

DOE Br. 24. Moreover, DOE is unlikely to reach the same result—especially under the proper evidentiary standard. The analysis supporting DOE's razor-thin economic justification for the standards relied on an arbitrary and erroneous assumption that grossly overstated the economic benefits the standards could provide. *See* Opening Br. 51-57; Reply Br. 14-20. Beyond that, DOE justified the standards economically by assuming that there would be a dramatic increase in natural-gas prices between 2015 and 2020—thus increasing the economic benefits of the standards—and no such price increase occurred.[2] In view of the magnitude of these errors, it is unlikely that DOE could reasonably justify the same standards on remand.

Second, DOE's claim that vacatur would have "significant disruptive consequences" is upside down. Supp. Br. 4. DOE complains that vacatur would mean that the energy conservation standards effective since 2012 would remain in place, delaying the purported environmental benefits of the Final Rule. Supp. Br. 4-5. But it is not disruptive for the current standards (which are consistent with

[2] Compare JA496 (showing DOE's projected price increase) with DOE's Energy Information Administration data for the same period at *U.S. Price of Natural Gas Sold to Commercial Consumers*, https://www.eia.gov/dnav/ng/hist/n3020us3m.htm. Converting units and accounting for inflation, DOE's projected 2020 prices were roughly $9.33-$11.87 per thousand cubic feet, as compared to actual average monthly prices of $6.87-$8.51 per thousand cubic feet. *Id.*; *see also* U.S. Energy Information Administration, *What Are Ccf, Mcf, Btu, and Therms?*, https://www.eia.gov/tools/faqs/faq.php?id=45&t=7.

American Society of Engineers standards and embedded in building codes around the country) to remain in place. Rather, Congress *intended that these standards would be maintained* absent clear and convincing evidence that a more-stringent standard is technologically feasible and economically justified. *See* Opening Br. 1, 5-7, 33. By contrast, it would be stunningly disruptive to require an entire industry to invest millions of dollars to develop, test, and produce new products in anticipation of standards that are inconsistent with those in building codes throughout the country, and that DOE could well abandon on remand.

Finally, remand without vacatur is particularly problematic under the Act. DOE entirely ignores that, absent vacatur, the "anti-backsliding" provision may effectively tie DOE's hands and render the proceedings on remand a formality. *See* Reply Br. 32. This provision bars DOE from issuing any amended efficiency standard that "decreases the minimum required energy efficiency[] of a covered product." 42 U.S.C. § 6313(a)(6)(B)(iii)(I). Accordingly, if the Final Rule remains in place, DOE could be statutorily barred from adopting any standards less stringent than the Final Rule, *even if it decides that those standards are not economically justified as required by law.* Under the anti-backsliding provision, "an aggrieved party's only recourse, should it believe a standard too stringent, [is] to petition the court of appeals for review of the final rule." *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 203 (2d Cir. 2004) (discussing the parallel provision at

42 U.S.C. § 6295(o)(1)). Thus, absent vacatur, the Department could be unable to provide relief from its unlawfully adopted standards.

CONCLUSION

This Court should vacate the Final Rule.

Dated: August 23, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman font. I further certify that this brief complies with this Court's Order dated August 16th, 2021, because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1), it contains 953 words according to the word-count feature of Microsoft Word.

/s/ Scott Blake Harris
Scott Blake Harris

CERTIFICATE OF SERVICE

I certify that on this 23rd day of August, 2021, the foregoing brief was filed via CM/ECF. Service was accomplished on all parties or their counsel of record via CM/ECF.

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