IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALLIANCE FOR WATER EFFICIENCY, U.S. PUBLIC INTEREST RESEARCH GROUP, and ENVIRONMENT AMERICA, Petitioners, v. UNITED STATES DEPARTMENT OF ENERGY and JENNIFER M. GRANHOLM,[1] Secretary, United States Department of Energy, Respondents.	No. 21-1167

RESPONDENTS' OPPOSITION TO MOTION FOR STAY

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[1] Substituted for David G. Huizenga, former Acting Secretary, U.S. Department of Energy, pursuant to Federal Rule of Appellate Procedure 43(c)(2).

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INTRODUCTION

Petitioners—three organizations committed to water and energy efficiency—ask this Court to stay a Department of Energy (DOE) rule defining the term "showerhead" under the Energy Policy and Conservation Act (EPCA). That rule is currently being reconsidered by DOE pursuant to an Executive Order directing the agency to review rules promulgated during the last four years to ensure that they are consistent with certain environmental objectives.

Petitioners have failed to satisfy any of the prerequisites for the extraordinary relief they seek. They can demonstrate neither a likelihood of success on the merits nor a likelihood of irreparable harm because they fail to identify any actual or imminent injury sufficient to support Article III standing.

Petitioners primarily assert future harm to their members from the alleged downstream environmental effects of using new multi-headed showerheads permitted under the challenged rule. Yet petitioners fail to identify a single new multi-headed showerhead for sale in the United States or abroad. Nor do they show that manufacturers and distributors are likely to sell such products while this petition is pending. To the contrary, petitioners' own members include trade associations that represent such companies, which have submitted declarations supporting this challenge and suggesting no imminent plans for new multi-headed showerhead production. These actors are particularly unlikely to incur the significant costs of

designing and producing such products now that DOE has publicly announced that it is reconsidering the showerhead rule.

Even if petitioners could identify new multi-headed showerheads on the market, they have not demonstrated that consumers are likely to purchase and install them. Petitioners have consistently maintained that consumers are satisfied with existing showerhead offerings. Moreover, as petitioners note, many jurisdictions have adopted showerhead standards that are more stringent than the federal standard and that would prevent the installation of new multi-headed showerheads. And, even if a consumer somewhere in the United States wanted to and could install a new multi-headed showerhead, petitioners fail to demonstrate that any of their members would experience a concrete and particularized harm from that activity. This speculative chain of possibilities does not establish a likelihood of imminent harm. And petitioners cannot establish a legally cognizable injury by alleging that they have incurred costs monitoring the market for the unlikely appearance of new multi-headed showerheads. The Supreme Court has made clear that an organization cannot manufacture standing by choosing to make expenditures based on some hypothetical future harm that is not certainly impending.

Petitioners' failure to identify any harm sufficient to support standing means that they have shown neither a likelihood of success on the merits nor a likelihood of irreparable harm. For that reason, the Court need not proceed to the balance of harms, which, in any event, weighs in the government's favor.

STATEMENT

1. Title III, Part B of the EPCA, codified as amended at 42 U.S.C. §§ 6291-6309, authorizes DOE to regulate the energy and water efficiency of a variety of household appliances and consumer products. As relevant here, the statute contains a list of "covered products," *see* 42 U.S.C. § 6292, and prescribes an "energy conservation standard" for each of those products, *see id.* § 6295, which is "a minimum level of energy efficiency or a maximum quantity of energy use[] or . . . water use" for the covered product, *id.* § 6291(6)(A). Under certain circumstances, DOE is authorized to amend a covered product's conservation standard. *See id.* § 6295(m)-(p).

In 1992, Congress added "showerheads" to the list of covered products, 42 U.S.C. § 6292(a)(15), and established a conservation standard for showerheads, providing that "[t]he maximum water use allowed for any showerhead . . . is 2.5 gallons per minute," *id.* § 6295(j)(1). *See* Energy Policy Act of 1992, Pub. L. No. 102-486, § 123(c)(2), (f)(2), 106 Stat. 2776. At the same time, Congress defined the term "showerhead" to mean "any showerhead (including a handheld showerhead), except a safety shower showerhead." 42 U.S.C. § 6291(31)(D); Energy Policy Act of 1992, § 123(b)(5).

In August 2020, "DOE propose[d] to revisit its prior interpretation of the EPCA definition of showerhead." 85 Fed. Reg. 49,284, 49,287 (Aug. 13, 2020) (proposed rule). The agency explained:

> DOE's current definition considers all of the individual showerheads (which DOE has termed variously as sprays, openings, or nozzles) in a product containing multiple showerheads together for purposes of compliance with the water conservation standard established in the [EPCA]. DOE proposes instead to define showerhead as that term is defined in the 2018 [American Society of Mechanical Engineers (ASME)] standard, such that each showerhead in a product containing multiple showerheads would be considered separately for purposes of determining standards compliance[.]

85 Fed. Reg. at 49,284-85. After a period of notice and comment, DOE adopted the ASME definition of "showerhead" and explained that, under this definition, "each showerhead included in a product with multiple showerheads would separately be required to meet the 2.5 gallons per minute standard established in EPCA." 85 Fed. Reg. 81,341, 81,341-42 (Dec. 16, 2020) (final rule). The agency revised the definition in order to address "ambiguity [that] exists regarding what is considered a 'showerhead' under EPCA" and to "align" the definition with the ASME standard. 85 Fed. Reg. at 81,344, 81,345. In response to comments, DOE emphasized that the rule did "not amend[] the current energy conservation standard" of 2.5 gallons per minute (gpm). 85 Fed. Reg. at 81,349.

The showerhead rule took effect on January 15, 2021. 85 Fed. Reg. at 81,341.

2. 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. 7037 (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, 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 subject to OMB review. *Id.* at 7038, § 2(b).

On February 19, DOE publicly released the list of the Office of Energy and Renewable Energy actions that it is considering pursuant to Executive Order 13,990. The showerhead 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 (listing rules to be included in DOE's OMB list).

3. On January 27, 2021, petitioners Alliance for Water Efficiency (AWE), U.S. Public Interest Research Group (PIRG), and Environment America filed a petition for review of the showerhead rule in this Court under 42 U.S.C. § 6306(b)(1).[2] On February 17, petitioners moved for a stay of the showerhead rule pending the Court's review of their petition.

[2] The Court initially consolidated this petition with another petition filed concurrently by the same petitioners, which sought review of a separate DOE rule concerning washers and dryers. The Court later severed the two cases and transferred the washer/dryer case to the Second Circuit.

ARGUMENT

Petitioners seek a stay of an agency rule pending review, a form of extraordinary relief akin to a preliminary injunction. *See Cook County v. Wolf*, 962 F.3d 208, 221 (7th Cir. 2020). A petitioner seeking such extraordinary relief "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 762 (7th Cir. 2020) (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The last two factors "merge" where relief is sought against the federal government. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

I. Petitioners Have Failed to Establish a Likelihood of Success on the Merits

A petitioner must make "a strong showing that she is likely to succeed on the merits" to obtain preliminary relief. *Illinois Republican Party*, 973 F.3d at 762. Contrary to petitioners' assertion, Mot. 15, a "better than negligible" chance is not enough, nor is a mere "possibility of success." *Illinois Republican Party*, 973 F.3d at 762 (quotation marks omitted); *see id.* (noting that the Supreme Court has "expressly disapproved" the "better than negligible" formula). "[O]ne ingredient" of petitioners' likelihood of success on the merits "is, of course, establishing that the court has jurisdiction." *SEC v. Lauer*, 52 F.3d 667, 671 (7th Cir. 1995). Petitioners fail to make a "strong showing"

that they will establish that this Court has jurisdiction because they fail to identify any actual or imminent harm sufficient to support standing.[3]

To support standing, petitioners must assert an injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Speech First, Inc. v. Killeen*, 968 F.3d 628, 638 (7th Cir. 2020), *as amended on denial of reh'g and reh'g en banc* (Sept. 4, 2020) (quoting *Susan B. Anthony List v. Driehaus* (*SBA List*), 573 U.S. 149, 158 (2014)). Allegations of future harm can establish Article III standing "only if the threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur." *Swanigan v. City of Chicago*, 881 F.3d 577, 583 (7th Cir. 2018) (quoting *SBA List*, 573 U.S. at 158). "[A]llegations of *possible* future injury are not sufficient." *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 692 (7th Cir. 2015) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013)) (emphasis in *Clapper*).

Petitioners are three organizations. "When an organization seeks to assert standing, it can do so either on behalf of itself or on behalf [of] its members. The latter is called associational standing." *Milwaukee Police Ass'n v. Board of Fire & Police Comm'rs of Milwaukee*, 708 F.3d 921, 926 (7th Cir. 2013). "To bring suit in its own right, an organization must itself satisfy the requirements of standing," *id.*, while an organization has associational standing if, among other things, "its members would

[3] The government does not dispute that this Court has statutory jurisdiction under 42 U.S.C. § 6306(b)(1).

otherwise have standing to sue in their own right," *id.* at 928 (quoting *United Food & Commercial Workers Union, Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996)).

Petitioners' "burden to demonstrate standing" in the context of preliminary relief is "at least as great as the burden of resisting a summary judgment motion." *Speech First, Inc.*, 968 F.3d at 638 (quotation marks omitted). Thus, petitioners "must set forth by affidavit or other evidence specific facts, rather than general factual allegations of injury." *Id.* (quotation marks omitted).

Petitioners' motion does not independently address standing. Instead, petitioners claim that their allegations of irreparable harm "suffice[] to establish standing." Mot. 9. They assert two kinds of harm. First, they assert future harm to their members related to the environmental effects of using new multi-headed showerheads that were not permissible under DOE's prior interpretation of the statute. *See* Mot. 10-14. Second, they assert current harm from their activities monitoring the market for the introduction of such showerheads. *See* Mot. 13. But petitioners fail to demonstrate that the sale of new multi-headed showerheads is imminent, let alone a substantial risk of the alleged downstream harms of such products. And any costs petitioners incur monitoring the market based on their speculative fears cannot support standing.

A. Petitioners' Potential Future Environmental Harms Are Speculative

Petitioners principally argue that their members will suffer various harms related to the environmental effects of using new multi-headed showerheads. AWE's members include municipal water utilities "working to manage and mitigate the scarcity of water." Mot. 11. These utilities anticipate that increased water usage from new multi-headed showerheads "will make it more difficult and costly . . . to fulfill their customers' needs for water." Mot. 11. PIRG and Environment America "represent hundreds of thousands of individuals affected by the consequences of energy production and consumption." Mot. 12. They assert that increased water usage will result in increased energy consumption, which will lead to pollution and climate impacts that harm their members' health and well-being. Mot. 12.

All of these purported harms rest on the "highly speculative fear" that (1) manufacturers and distributors will make and sell new multi-headed showerheads, (2) consumers will want to purchase them, (3) consumers will be able to buy and install them consistent with state law, (4) their use will lead to increased water and energy consumption, (5) that consumption will exacerbate environmental problems like water scarcity, pollution, and climate change, and (6) those environmental problems will directly impact petitioners' members. *Clapper*, 568 U.S. at 410. This "highly attenuated chain of possibilities" does not satisfy petitioners' burden to show

a "substantial risk" of imminent harm or that such harm is "certainly impending." *Id.* at 410, 414 n.5 (quotation marks omitted).

1. Petitioners' causal chain falls apart at the start. They fail to demonstrate a substantial risk that manufacturers and distributors will design, produce, market, and distribute new multi-headed showerheads during the pendency of their petition. Indeed, all signs, including petitioners' own submissions, point in the opposite direction—that the imminent sale of new multi-headed showerheads is highly improbable.

Petitioners fail to identify a single new multi-headed showerhead currently for sale in the United States. Nor do any of their submissions suggest that U.S. manufacturers and distributors intend to develop and sell such products imminently. Quite the opposite. AWE's member Plumbing Manufacturers International (PMI) is a trade association "representing manufacturers that provide 90% of the plumbing products sold in the United States, including showerheads." Mot., Ex. M ¶ 5. And AWE's member American Supply Association (ASA) represents "U.S. showerhead manufacturers and distributors of plumbing fittings and supplies." Mot., Ex. N ¶ 7. Far from suggesting that their members intend to take advantage of the showerhead rule to design and market new multi-headed showerheads, PMI and ASA support this challenge and represent that their "member showerhead manufacturers . . . generally seek to preserve and advance water conservation, rather than develop new products with increased water consumption." Mot., Ex. M ¶ 15; Mot., Ex. N. ¶ 12; *see also*

Mot., Ex. N ¶ 7 ("ASA's members are committed to facilitating water conservation."). Petitioners' members represent the very companies that are in the business of producing and selling showerheads, and they are suggesting that these manufacturers and distributors do not want to market new multi-headed showerheads.

Unable to point to any domestic new multi-headed showerheads or plans for domestic production, petitioners gesture at the specter of foreign-manufactured multi-headed showerheads. *See* Mot. 13. AWE, PMI, and ASA speculate that consumers may import foreign multi-headed products and that domestic manufacturers and distributors may eventually "face market pressure" to make and distribute such products or may lose consumers who switch to such products. Mot., Ex. M ¶ 13; Mot., Ex. N ¶ 11; *see* Mot., Ex. H ¶¶ 10, 11. But as with the domestic market, petitioners fail to identify a single multi-headed showerhead on the international market that would not satisfy DOE's previous interpretation of the statute. AWE and its members claim that "[m]any countries do not have standards comparable to the 2.5-gpm showerhead standard," and that "[f]oreign manufacturers in many countries, such as China, *have been free to* manufacture and distribute showerheads . . . outside the United States that exceed EPCA's standards." Mot., Ex. H ¶¶ 10, 11 (emphasis added); Mot., Ex. M ¶¶ 11, 12 (same); Mot., Ex. N ¶¶ 9, 10 (similar). Accordingly, they "*are concerned about* foreign products ready for sale and distribution in the United States that take advantage of DOE's 'showerhead' redefinition . . . but would not have been compliant under the previous rules." Mot., Ex. H ¶ 11 (emphasis added); Mot.,

Ex. M ¶ 12 (same); Mot., Ex. N ¶ 10 (similar). These assertions stop short of claiming that foreign multi-headed showerheads that would not satisfy DOE's previous interpretation of the statute actually exist. And they certainly do not demonstrate an imminent threat that they will be imported. Moreover, if foreign manufacturers have been free to make such showerheads all this time and have not done so, petitioners offer no reason to think they would start making them now.

Domestic companies and any foreign companies eyeing the U.S. market are especially unlikely to incur the expense of making and marketing new multi-headed showerheads now that DOE has publicly announced that it is reconsidering the showerhead rule pursuant to Executive Order 13,990. As petitioners' members stress, "[m]anufacturing and distributing new products that take advantage of the Showerheads Rule will impose significant costs on [manufacturers and distributors] relative to existing manufacturing and distribution standards—including investments in product development, design, and tooling, among other costs." Mot., Ex. M ¶ 13; Mot., Ex. N ¶ 11 (same); *see also* Mot., Ex. M ¶ 10 (explaining that manufacturers "have spent millions of dollars on research and development, manufacturing, third-party certification, packaging, marketing, and distribution" to create products that comply with DOE's previous interpretation of the statute); Mot., Ex. N. ¶ 13 (explaining that distributing new multi-headed products would "add[] cost to distributors' inventory systems"). DOE anticipates completing review of the showerhead rule by December 31, 2021. While the legal landscape is potentially in

flux, petitioners have not shown that companies are likely to expend such significant resources revamping their showerhead offerings.

2. Even were a domestic or foreign company to begin marketing new multi-headed showerheads, petitioners "can only speculate as to whether" consumers would purchase them.[4] *Clapper*, 568 U.S. at 413; *see* Mot. 13. Courts "have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 413. Moreover, petitioners have adamantly maintained that consumers prefer lower-flow showerheads, such as those that qualify for the Environmental Protection Agency's WaterSense label, given to showerheads that use 2.0 gpm or less. *See* Mot., Ex. E at 2 (PIRG and Environment America commenting that "consumers are comfortable" with existing showerheads and "are satisfied with even lower-flow showerheads qualifying for the EPA WaterSense label"); *see also* Mot., Ex. B (Kohler Company commenting that it is "invested heavily" in the WaterSense program "not only

[4] Petitioners claim that "the significant risk of harmful product sales, on its own, warrants preliminary relief." Mot. 13. But neither of the cases they cite supports that proposition. *See Baird v. Hodge*, 605 F. App'x 568 (7th Cir. 2015) (denying an inmate's request for a preliminary injunction that would compel his transfer to a different prison or placement in protective custody); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (upholding a preliminary injunction requiring a school district to grant a transgender student access to the boys' restrooms). In any event, as discussed, petitioners fail to demonstrate a substantial risk that new multi-headed showerheads will be sold while their petition is pending.

because we believe in the value of water, but because consumers are purchasing these products"). Plumbing contractors and officials advise that existing shower/bath fittings and plumbing systems are ill-equipped to handle high-flow showerheads, providing another reason why contractors and consumers may be unlikely to turn to new multi-headed products. *See* Mot., Ex. C.

3. Even if a consumer somewhere in the United States wanted to install a new multi-headed showerhead, "[m]any jurisdictions . . . have showerhead flow rates lower than the federal requirements as well as clear restrictions on the flow rate for systems with multiple showerheads."[5] Mot., Ex. B; *see also* Mot., Ex. D (explaining that "at least eight states—which contain 40% of the nation's population and housing—already have laws in place that effectively restrict shower flows to lower than the 2.5 gpm federal standard").[6] In such jurisdictions, consumers could not install new multi-headed showerheads even if some company, somewhere in the world, were selling them.

4. Even if a consumer somewhere in the United States were to install and use a new multi-headed showerhead, that hypothetical scenario would be insufficient to establish that petitioners' members suffered a cognizable injury from the

[5] DOE waived federal preemption of state showerhead water efficiency and use standards that are more stringent that the federal standard. 75 Fed. Reg. 80,289 (Dec. 22, 2010) (final rule).

[6] *See also* Appliances Standards Awareness Project, *Showerheads*, https://appliance-standards.org/product/showerheads (last visited Mar. 7, 2021).

showerhead's use. Petitioners offer declarations from Denver Water (AWE's member), an individual who resides in Washington (Environment America's member), and an individual who resides in New York (PIRG's member), all of whom claim to fear future harm from the increased water consumption of new multi-headed showerheads. *See* Mot., Exs. I, K, L. But Colorado, Washington, and New York are three of the states that have adopted more stringent shower fixture standards. *See supra* n.6. Even were there a risk that someone, somewhere in the United States might install a new multi-headed showerhead, petitioners would be unable to demonstrate a concrete and particularized harm from that activity if their members are not in an area affected by it. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565-66, (1992) ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity."). Moreover, petitioners do not explain in their motion or their declarations how some limited increased energy usage would cause increased pollution—let alone enough of an increase to cause difficulty breathing or flooding due to climate change. *See* Mot., Exs. K, L.

In sum, petitioners' "speculative chain of possibilities does not establish that injury based on potential future [environmental harm]" is certainly impending or that there is a substantial risk that such harm will occur during the pendency of this petition. *Clapper*, 568 U.S. at 414. These are the only purported harms underlying any

plausible theory of standing that PIRG and Environment America could make on their present submissions.[7]

B. Petitioners' Market Monitoring Costs Cannot Support Standing

AWE and its member PMI assert in the alternative that they must "commit their limited resources to monitor the market" for the unlikely appearance of new multi-headed showerheads. Mot 13. AWE and PMI "consider this monitoring necessary given the risks created by DOE's rule[]." Mot., Ex. H ¶ 11; Mot., Ex. M ¶ 12. This attempt to manufacture standing is foreclosed by *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013).

1. In *Clapper*, U.S.-based lawyers and organizations challenged a provision of the Foreign Intelligence Surveillance Act. To establish standing, the plaintiffs primarily argued that their communications with foreign contacts were likely to be intercepted under the provision. 568 U.S. at 401, 410. The Supreme Court rejected this argument, holding that this alleged future injury was not certainly impending. *Id.* at 410-14. In the alternative, the plaintiffs argued that the "costly and burdensome measures" they were taking to address the risk of surveillance established standing. *Id.*

[7] In addition to the declarations of its Washington-based and New York-based members, PIRG and Environment America offer a declaration from their parent organization that generally sets out the two petitioners' advocacy interests and efforts. Of course, neither "'an organizational interest in the problem' of environmental or consumer protection" nor a "mere 'interest in [the] problem'" of water efficiency is sufficient to establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972).

at 402, 415. The Court rejected this secondary theory of standing as well, holding that plaintiffs "cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending." *Id.* at 402; *see id.* at 415-16.

Here, petitioners primarily allege various future environmental harms that will purportedly result from the use of new multi-headed showerheads. As discussed, those future harms are entirely speculative because, among other things, petitioners cannot establish a substantial risk of the sale of new multi-headed showerheads. Petitioners' alternative theory of harm—that they must monitor the market for such products—is merely an attempt to "repackage[]" their "first failed theory of standing." *Clapper*, 568 U.S. at 416. Because petitioners "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impeding," these monitoring costs cannot establish standing. *Id.* Were the law otherwise, any "enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear." *Id.*

2. The speculative nature of petitioners' alleged environmental injuries distinguishes this case from those in which courts have found certain organizational expenditures sufficient to support standing.

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), Housing Opportunities Made Equal (HOME), an organization that employed "testers" to apply for rental apartments in order to root out conduct in violation of the Fair Housing Act,

uncovered racial steering by Havens Realty. *Id.* at 368. HOME sued Havens for the violation, and Havens challenged HOME's standing to sue. *Id.* at 369. The Supreme Court concluded that HOME sufficiently alleged an organizational injury because Havens' "steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers." *Id.* at 379. "Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.*

Similarly, this Court in *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), held that voting rights organizations had standing to challenge a state law designed to remove certain people from the voter rolls. There, the district court had preliminarily enjoined the state from taking actions to implement the law. *Id.* at 946. The Court held that the organizations sufficiently established injury in fact because the law had already "created a culture of voter confusion" that had caused the organizations to divert substantial resources from their core programs to educating voters about the law. *Id.* at 952. Moreover, if the law were to go into effect, the organizations would immediately need to devote additional and significant resources to addressing voter confusion, erroneous registration removal, and chaos at polling places. *See id.* at 951-52.

"Importantly," this Court explained in *Common Cause*, "neither *Havens* . . . nor the present case involves any effort to rely on . . . speculative injury." 937 F.3d at 950.

In *Havens*, HOME had already uncovered evidence of Havens' racial steering, and in *Common Cause*, the voting law had already created voter confusion and, were it to go into effect, would allow defendants "*immediately* to remove a voter based on information received from a third-party database rather than in response to direct contact with the voter." *Id.* at 946 (emphasis added). For that reason, the Court emphasized that "the injury the Organizations describe is either imminent or has already begun; it is concrete, ongoing, and likely to worsen." *Id.* at 951. Here, unlike in *Havens* and *Common Cause*, the underlying harms that petitioners allege are speculative, as petitioners fail to demonstrate that the sale of new multi-headed showerheads is ongoing or imminent, and a string of hypothetical possibilities stands between any such sale and the environmental harms petitioners allegedly fear. For that reason, *Clapper* precludes petitioners from establishing standing based on their monitoring costs.

In any event, AWE and PMI fail to establish that the costs of monitoring are so substantial that they have "perceptibly impaired" the organizations' missions. *Havens Realty Corp.*, 455 U.S. at 379; *see also Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (an organization's mission "has been perceptibly impaired when the defendant's conduct causes an 'inhibition of [the organization's] daily operations'" (alteration in original)). AWE and PSI "have not identified any specific projects that [they] had to put on hold or otherwise curtail in order to" monitor the market, and have instead "only conjectured that the resources that [they] ha[ve] devoted to"

monitoring "could have been spent on other unspecified [organization] activities." *NAACP v. City of Kyle*, 626 F.3d 233, 238-39 (5th Cir. 2010); *see* Mot., Ex. H ¶ 11; Mot., Ex. M ¶ 12 (AWE and PMI "staff are monitoring the market for [new multi-headed showerheads]. Our resources for such monitoring are limited . . . .").

In sum, because petitioners fail to make a "strong showing" that they will establish standing, they cannot show a likelihood of success on the merits. *Illinois Republican Party*, 973 F.3d at 762. In view of this fundamental defect, and because DOE is currently reconsidering the showerhead rule, the government does not independently address the merits of petitioners' challenges to the rule here.

II. All Remaining Factors Weigh Against a Stay

Petitioners' failure to demonstrate any non-speculative harm sufficient to support standing is dispositive of the remaining stay factors.

A petitioner "must demonstrate that he will likely suffer irreparable harm absent obtaining" preliminary relief, which "requires more than a mere possibility of harm." *Whitaker*, 858 F.3d 1044-45. Given the "speculative nature" of petitioners' "claim of future injury," they have "failed to demonstrate a 'likelihood of substantial and immediate irreparable injury,' which is a 'prerequisite of equitable relief.'" *Lopez-Aguilar v. Marion Cty. Sheriff's Dep't*, 924 F.3d 375, 394-95 (7th Cir. 2019) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). And because petitioners' market monitoring costs do not even constitute a cognizable legal injury, *see Clapper*, 568 U.S. at 402, they do not establish irreparable harm.

Because petitioners have shown neither a likelihood of success on the merits nor a likelihood of irreparable harm, the Court need not consider the balance of harms. *See Mays v. Dart*, 974 F.3d 810, 818 (7th Cir. 2020) (the Court "proceeds to a balancing analysis" only where the petitioner makes an initial showing on these first two factors). In any event, the balance of harms weighs in the government's favor. While petitioners fail to establish any irreparable harm, the government and the public suffer a form of irreparable injury whenever a court enjoins a regulation duly promulgated by the people's representatives. *Cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (alteration in original) (quoting *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers))).

CONCLUSION

For these reasons, the Court should deny petitioners' motion to stay the showerhead rule pending review.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing response 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 Garamond, 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 5,108 words according to the count of Microsoft Word.

s/ *Kyle T. Edwards*
KYLE T. EDWARDS

CERTIFICATE OF SERVICE

I certify that on March 8, 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/ *Kyle T. Edwards*
KYLE T. EDWARDS