UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

Bill Word, David Daquin,
Plaintiffs,

v.

U.S. Department of Energy
Defendant.

Plaintiffs' Memorandum of Law in
Opposition to Defendant's Motion to Dismiss

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SUMMARY OF ARGUMENT

This Court has jurisdiction due to 42 U.S.C. § 6306(b)(4)—and that statute expressly allows a district court to issue declaratory and injunctive relief for *ultra vires* agency action. The Supreme Court has interpreted the text of that statute in *Abbott Laboratories v. Gardner* (1967) to mean what Congress said it meant previously: a report from the House of Representatives had explained that this portion of the statute "saved as a method to review a regulation placed in effect by the Secretary whatever rights exist to initiate a historical proceeding in equity to enjoin the enforcement of the regulation, and whatever rights exist to initiate a declaratory judgment proceeding." 387 U.S. 136, 145. Plaintiffs bring this action in equity, seeking injunctive and declaratory judgment; mysteriously, Defendant alleges that Plaintiffs have only requested statutory relief and that they have chosen the wrong forum in which to do so. Indeed, Defendant's failure to describe the nature of Plaintiffs' Complaint accurately is accompanied by Defendant's failure to provide a jurisdictional argument that is warranted by existing law. The only binding precedent Defendant cites are two opinions that explain how Congress expressly created exclusive jurisdiction for the Courts of Appeals in certain circumstances, but those opinions reveal that such exclusive jurisdiction is accompanied by express statutory creation of forum exclusivity—a circumstance which the case at hand does not share. Even if the petition for review process were exclusive, the binding framework of law in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), entirely unmentioned by Defendant, rests on three different factors that unanimously call for this Court's jurisdiction.

Plaintiffs have standing because the agency's actions prevent them from purchasing their desired products. Defendant recognizes that the lost opportunity to purchase products is a judicially cognizable injury-in-fact. It is reasonable to infer from the Complaint that Plaintiffs would purchase those products after the rules go into effect, but the rules prevent them from

doing so—which shows concrete and particularized harm to the Plaintiffs. Defendant appears to acknowledge that these rules will go into effect on April 23, 2027, and March 1, 2028, which itself demonstrates harm that is not conjectural or hypothetical. Defendant has not challenged Plaintiffs' claim that Defendant's rules caused Plaintiffs' injuries or that this Court could remedy those injuries. All of this shows that Plaintiffs have standing.

ARGUMENT

I. This Court Has Equitable Jurisdiction

Defendant has misrepresented the cause of action and the relief requested in the Plaintiffs' complaint, and Plaintiffs decline to defend the straw men that Defendant attacks. Indeed, the fundamental misunderstanding of Plaintiffs' case that Defendant has presented to this Court has generated unnecessary delay and needlessly increased the cost of this litigation.

Defendant asserts that Plaintiffs want to set aside the clothes washer and dishwasher Direct Final Rules (DFRs) under 5 U.S.C. § 704. Mem., ECF 14 at PageID 380 n.1, PageID 383. Defendant's claim is groundless; § 704 was never mentioned anywhere in Plaintiffs' Complaint. Plaintiffs are not invoking the APA's cause of action to set aside the two DFRs, and Defendant's misrepresentation of this relatively simple matter is puzzling and troubling.

Plaintiffs' Complaint discussed those DFRs because they provide *standing* to the Plaintiffs and because those agency acts *harm* the Plaintiffs. Plaintiffs invoked this Court's equitable jurisdiction because they sought declaratory and injunctive relief for *ultra vires* agency actions. This is an equitable cause of action under the "inherent equitable power of this Court," not a statutory one. Compl., ECF 1 at 2. Our Complaint's sole count is titled "DECLARATORY AND INJUNCTIVE RELIEF AGAINST *ULTRA VIRES* AGENCY ACTION." Compl., ECF 1 at 11. In short, the case made in the Complaint was hardly vague or ambiguous.

It is true that Plaintiffs invoked section 10(a) of the Administrative Procedure Act (APA), codified at 5 U.S.C. § 702, in paragraph 2 of Plaintiffs' Complaint—along with "the inherent equitable power of this Court"—as the basis for this Court's jurisdiction. Here's why: unlike § 704 (the portion of the APA that is flourished by defendant and that provides a cause of action), § 702 provides the waiver of sovereign immunity in the Administrative Procedure Act (APA). As § 702 explains: "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party." Plaintiffs seek only non-monetary relief; this clause only applies to non-monetary relief; plaintiffs are therefore covered under this clause. "Sovereign immunity is jurisdictional in nature," *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); Plaintiffs invoked § 702 to demonstrate that sovereign immunity had been waived so this Court could have jurisdiction.

Plaintiffs do not seek to set aside the two direct final rules (DFRs) under the APA, and—to repeat—Defendant is mistaken to suggest that we wish to do so (Mem., ECF 14 at PageID 380 n.1, PageID 383). Defendant's posture thus requires us to reiterate the remedy that Plaintiffs seek: (1) to declare DOE's actions unlawful, (2) to enjoin DOE to set the water efficiency regulations for dishwashers and clothes washers back to the standard set by Congress before DOE's unlawful and *ultra vires* amendment, and, furthermore, (3) to enjoin DOE from amending the water efficiency of any product other than showerheads, faucets, water closets, or urinals in the future (unless DOE is granted additional statutory authority in the future). Compl., ECF 1 at 12. Again, the remedy originally requested in the Complaint was neither complex nor

mysterious, and the misdescription of that remedy that is provided by Defendant does more to obscure the issues at hand than to resolve them.

The cause of action under equity is not established by statute. "After Congress created federal question jurisdiction in 1875, federal courts began entertaining bills of equity that sought to enjoin allegedly unlawful administrative action. They did so on the theory that federal courts needed only a grant of jurisdiction, not a statutory cause of action." Thomas W. Merrill, Article III, *Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 Colum. L. Rev. 939, 949 (2011). This Court has federal question jurisdiction. 28 U.S.C. § 1331.

Specifically, Plaintiffs ask for the regulations for the water efficiency level for dishwashers to be set as specified in 42 U.S.C. § 6295(g)(10)(A): "A dishwasher manufactured on or after January 1, 2010, shall— (i) for a standard size dishwasher not exceed . . . 6.5 gallons per cycle; and (ii) for a compact size dishwasher not exceed . . . 4.5 gallons per cycle." Plaintiffs request a similar remedy for clothes washers: under 42 U.S.C. § 6295(g)(9)(A)(ii), "A top-loading or front-loading standard-size residential clothes washer manufactured on or after January 1, 2011, shall have . . . a water factor of not more than 9.5."

Because Defendant lacks authority to amend those congressionally determined limits (more precisely, because Defendant lacks authority to issue the *ultra vires* amendments in the DFRs), those statutory water efficiency levels are the proper limits under the law today. Notably, however, the regulations that existed before the creation of the DFRs at issue here also trespassed beyond the level established by Congress. Therefore, the proper remedy is not confined to the invalidation of the latest DFRs; properly setting water efficiency levels requires a return to Congress's specifications. This means the conventional APA cause of action and the petition for

review process cannot provide the remedy that the Plaintiffs are entitled to. As explained below, the jurisdiction of this Court must ultimately be determined by analysis of the relevant *Thunder Basin* factors—the binding framework of law that Defendant has inexplicably ignored.

A. Statutory Text, Legislative History, and Binding Supreme Court Precedent Demonstrate that Circuit Review Is Not Exclusive

Defendant cites a number of relatively old cases to argue that this Court lacks jurisdiction. It is quite all right to cite old cases; the difficulty for Defendant is that many of those cited cases are essentially outmoded. The law in this area has seen a sea change, starting with *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), and continuing with *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 489 (2010)), *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012), and—most recently—in *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023).

These landmark cases govern whether the petition for review procedure removes district court jurisdiction. Defendant made no attempt to apply established and binding doctrine to this case—indeed, Defendant didn't even mention these precedents. Their absence from Defendant's Motion to Dismiss is surprising. Defendant's attempt to rely on outmoded and out-of-circuit cases to make arguments that are not warranted by existing law is more so.

After the Supreme Court's opinion in *Whitney Nat. Bank in Jefferson Par. v. Bank of New Orleans & Tr. Co.*, 379 U.S. 411 (1965), some lower courts determined that a judicial review provision (such as the petition for review process for a court of appeals, as in this case) was always exclusive and applied to all cases. Defendant's logic is that this kind of across-the-board exclusivity is the current state of the law. Mem., ECF 14 at PageID 379-84. Defendant's argument is thirty years out of date: this theory of across-the-board exclusivity began to topple under *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

In *Thunder Basin*, the Supreme Court clarified *Whitney*: the Court held that "Whether a statute is intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review." *Id.* at 207 (internal citations omitted) (citing *Whitney Nat. Bank in Jefferson Par.*, 379 U.S. 411 (1965)). Generally, *Thunder Basin* analysis is supposed to resolve "whether it is 'fairly discernible' from the 'text, structure, and purpose' of the statutory scheme that Congress intended to preclude district court jurisdiction." *Bank of Louisiana v. Fed. Deposit Ins. Corp.*, 919 F.3d 916, 923 (5th Cir. 2019) (quoting *Free Enter. Fund*, 561 U.S. at 489).

If the court determines that the statutory scheme is designed to create exclusive jurisdiction in the court of appeals, the court must then determine "whether the 'claims at issue are of the type Congress intended to be reviewed within th[e] statutory structure.'" *Id.* (quoting *Free Enter.*, 561 U.S. at 489). That subsequent inquiry reveals whether the statutory scheme's exclusive jurisdiction applies to the specific case.

To help answer that question, the Supreme Court has identified three *Thunder Basin* factors: (1) Could precluding district court jurisdiction foreclose all meaningful judicial review of the claim? (2) Is the claim wholly collateral to the statute's review provisions? (3) Is the claim outside the agency's expertise? *See Axon Enter.*, 598 U.S. at 185–86.

The statutory petition for review scheme in 42 U.S.C. § 6306(b) was not intended by Congress to be exclusive. The language in 42 U.S.C. § 6306(b)(4) demonstrates this; that statute has already been determined by the Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977), to contain a "general saving clause" to preserve the "normal equity power." But even if we assumed for the sake of argument that the petition for review procedure at hand was intended to be exclusive,

analysis of the three *Thunder Basin* factors would show that exclusive appellate jurisdiction is improper for this case.

B. The Supreme Court Already Interpreted the Statutory Language at Issue to Create Concurrent Jurisdiction, Not Exclusive Jurisdiction

Plaintiffs' Complaint seeks "other remedies provided by law" than those of a petition for review. 42 U.S.C. § 6306(b)(4). This express statutory language demonstrates this Court's jurisdiction in this case. By this statute, Congress expressly and unambiguously demonstrated that the remedy of petition for review should supplement, not eliminate, the existing remedies provided through district courts—such as the injunctive and declaratory relief that Plaintiffs seek. Defendant asserts otherwise, Mem., ECF 14 at PageID 383. However, the fact that Defendant omits any discussion of contrary Supreme Court precedent that is directly on point and that expressly analyzes the statutory text at issue deserves emphasis.

The text at issue in this case is in 42 U.S.C. § 6306(b)(4): "The remedies provided for in this subsection shall be in addition to, and not in substitution for, any other remedies provided by law." That statutory text was enacted in Section 336 of the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871, 931 (enacted Dec. 22, 1975). Eight years before its enactment, the identical language it used had been interpreted by the United States Supreme Court in *Abbott Laboratories v. Gardner*, 387 U.S. at 144. EPCA's duplicated language suggests that Congress enacted this provision because it intended to incorporate the Supreme Court's interpretation of *Abbott Laboratories*. *Abbott Laboratories* interpreted the Food, Drug, and Cosmetic Act of 1938, Section 701(f)(6), now codified at 21 U.S.C. § 371(f)(6), which states, "The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law." But for a few commas, that text is identical to the EPCA provision at issue in

this case. Defendant's silence here is deafening: Defendant's failure here to discuss binding Supreme Court precedent is not warranted by existing law.

In *Abbott Laboratories*, drug manufacturers sued the FDA, and "[t]hey challenged the regulations on the ground that the Commissioner exceeded his authority under the statute." *Abbott*, 387 U.S. at 139. "The District Court, on cross motions for summary judgment, granted the declaratory and injunctive relief sought," and the circuit court found that the proceeding was "beyond the jurisdiction of the District Court" due to the way that the statutory scheme provided review through the circuit court. *Id.* The question before the court was "whether Congress by the Federal Food, Drug, and Cosmetic Act intended to forbid pre-enforcement review of this sort of regulation promulgated by the Commissioner." *Id.* at 139-140. In short, the statutory text, the posture of the case, the legal question at issue, and the claims of the petitioners were essentially identical to the instant case—which means that it is squarely on point and binding on this Court. The *Abbott* Court held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.* at 141.

The Supreme Court, when applying that standard, was "wholly unpersuaded that the statutory scheme in the food and drug area excludes this type of action." *Id.* The Court noted that there was "no explicit statutory authority for its argument that pre-enforcement review is unavailable." *Id.* The Court rejected the government's argument by implication that judicial review in the district court was excluded. *Id.* at 141-44.

Then the Court turned to the text of the specific provision at issue in this case, holding:

> This conclusion is strongly buttressed by the fact that the Act itself, in § 701(f)(6), states, 'The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.' This saving clause was passed over by the Court of Appeals without discussion. In our view, however, it bears heavily on the issue, for if taken at face value it would foreclose the Government's main argument in this case. The Government deals with the

> clause by arguing that it should be read as applying only to review of regulations under the sections specifically enumerated in § 701(e). This is a conceivable reading, but it requires a considerable straining both of language and of common understanding. The saving clause itself contains no limitations, and it requires an artificial statutory construction to read a general grant of a right to judicial review begrudgingly, so as to cut out agency actions that a literal reading would cover.
>
> There is no support in the legislative background for such a reading of the clause. It was included in the House bill, whose report states that the provision '* * * saved as a method to review a regulation placed in effect by the Secretary whatever rights exist to initiate a historical proceeding in equity to enjoin the enforcement of the regulation, and whatever rights exist to initiate a declaratory judgment proceeding.' H.R.Rep.No.2139, 75th Cong., 3d Sess., 11. The Senate conferees accepted the provision. The Government argues that the clause is included as a part of § 701(f), and therefore should be read to apply only to those sections to which the § 701(f) special-review procedure applies. But it is difficult to think of a more appropriate place to put a general saving clause than where Congress placed it—at the conclusion of the section setting out a special procedure for use in certain specified instances. Furthermore, the Government's reading would result in an anomaly. The §§ 701(e)—(f) procedure was included in the Act in order to deal with the problem of technical determinations for which the normal equity power was deemed insufficient. See, supra, pp. 1512—1513. There would seem little reason for Congress to have enacted § 701(f), and at the same time to have included a clause aimed only at preserving for such determinations the other types of review whose supposed inadequacy was the very reason for the special-review provisions.

Id. at 144-46.

The Supreme Court thus directly interpreted the language at issue, following a direct statement by a congressional report in creating that language, to allow a district court to "review a regulation placed in effect by the Secretary whatever rights exist to initiate a historical proceeding in equity to enjoin the enforcement of the regulation, and whatever rights exist to initiate a declaratory judgment proceeding." *Id.* at 149 (citing H.R. Rep. No.2139, 75th Cong., 3d Sess., 11).

It is a "longstanding interpretive principle [that w]hen a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *Taggart v. Lorenzen*, 587

U.S. 554, 560 (2019) (quoting *Hall v. Hall*, 584 U.S. 59 (2018)); *Field v. Mans*, 516 U.S. 59, 69 (1995) ("It is ... well established that [w]here Congress uses terms that have accumulated settled meaning ... a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of these terms." (alteration in original)). It is therefore correct to assume that Congress meant to incorporate the Supreme Court's interpretation when it enacted the provision at issue in EPCA. Again, this suggests that Defendant's contentions about 42 U.S.C. § 6306(b)(4) are not warranted by existing law.

Furthermore, defendant's misrepresentation of EPCA is not defensible. Defendant's Motion asserted that "EPCA ***requires*** '[a]ny person who will be adversely affected by' an EPCA rule to 'file a petition with the United States court of appeals for the circuit in which such person resides or has his principal place of business.' 42 U.S.C. § 6306(b)(1)." Mem., ECF 14 at PageID 375 (emphasis added). This is wrong. There is no such requirement in 42 U.S.C. § 6306(b)(1): the statute says that those who are adversely affected "may … file a petition." The statute's language is permissive, not mandatory. Defendant's misrepresentation is especially surprising in this context, because his brief had correctly quoted the entire rule just a few pages above at its page 6:

> Any person who will be adversely affected by a rule prescribed under section 6293, 6294, or 6295 of this title ***may***, at any time within 60 days after the date on which such rule is prescribed, file a petition with the United States court of appeals for the circuit in which such person resides or has his principal place of business, for judicial review of such rule.

42 U.S.C. § 6306(b)(1) (emphasis added). Such permissive language was recognized by the Fifth Circuit in *Cochran v. SEC* (5th Cir. 2021) as a factor that would tilt the scales towards non-preclusion in its interpretation of 15 U.S.C. § 78y(a)(1):

> [The statute] is phrased in permissive terms. It says a person aggrieved by a final order "may" petition for review in the court of appeals. But it does not say that

> anyone "shall" or "shall not" do anything. It would be troublingly counterintuitive to interpret [the statute]'s permissive language as eliminating alternative routes to federal court review. . . .

20 F.4th 194, 200 (5th Cir. 2021), *aff'd and remanded sub nom. Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023).

Defendant argues that the mandatory jurisdiction of the district court in 42 U.S.C. § 6306(c) shows that the district court has no other jurisdiction through the *expressio unius* canon. This argument fails, essentially because the whole-act canon leads to the opposite result. *See Marlow, L.L.C. v. BellSouth Telecommunications, Inc.*, 686 F.3d 303, 309 (5th Cir. 2012). As the Fifth Circuit explained in *Cochran v. SEC* (5th Cir. 2021), when the statute "elsewhere uses mandatory terms," this "confirm[s] our understanding that Congress did not strip district courts of § 1331 jurisdiction," because it "shows that Congress knew how to strip jurisdiction when it wanted to—and it only highlights that Congress did not strip § 1331 jurisdiction elsewhere." *Cochran*, 20 F.4th 194 at 201 *aff'd and remanded sub nom*. *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175 (2023). In other words, if Congress wanted to provide exclusive jurisdiction in the Circuit Court, it could have, but it certainly did not expressly do so; furthermore, the fact that Congress provided exclusive jurisdiction elsewhere demonstrates only that Congress knew how to do that when it wanted to—but chose not to.

In short, binding Supreme Court precedent in *Abbott Laboratories* demonstrates that the statutory text unambiguously provides this Court jurisdiction over this case.

C. The Cases That Defendant Cites Fail to Show that This Court Lacks Jurisdiction

Defendant provides only two cases that supply binding precedent for the notion that this Court lacks jurisdiction: *Ligon v. LaHood*, 614 F.3d 150, 154–55 (5th Cir. 2010) and an attendant parenthetical citation noting that *Ligon* cited *Leal v. Szoeke*, 917 F.2d 206, 207 (5th Cir. 1990). Neither of these cases demonstrates that this Court lacks jurisdiction.

Ligon v. LaHood concerned "Section 46110(a) of the Federal Aviation Act." *Ligon*, 614 F.3d at 154; 49 U.S.C. § 46110. That statute not only created a petition for review process (in 49 U.S.C. § 46110(a)), but also specified that the circuit "court has *exclusive jurisdiction* to affirm, amend, modify, or set aside any part of the order." 49 U.S.C. § 46110(c) (emphasis added). *Ligon* quotes *Zephyr Aviation, L.L.C. v. Dailey* (5th Cir. 2001) to demonstrate that "The United States Courts of Appeals then have 'exclusive jurisdiction to affirm, amend, modify or set aside' orders of the NTSB or the FAA. 49 U.S.C. § 46110(c) (2000)." 247 F.3d 565, 571. Thus, *Ligon* relied upon an explicit grant of exclusive jurisdiction to the circuit court, and that explicit grant is absent here.

Likewise, *Leal v. Szoeke*, 917 F.2d 206 (5th Cir. 1990), describes an identical grant that provides for identical exclusive jurisdiction. That case concerned the Railroad Retirement Board and the petition for review process specified in 45 U.S.C. § 355(f). That statute requires that the circuit "court shall have *exclusive jurisdiction* of the proceeding." 45 U.S.C. § 355(f) (emphasis added).

The language of "exclusive jurisdiction," an explicit limitation on district court jurisdiction, is nowhere to be found in this case. In fact, the opposite result—concurrent jurisdiction with the district court—is supported by the statute's text, as explained in Section A above. The statute expressly states in 42 U.S.C. § 6306(b)(4) that jurisdiction under 42 U.S.C. § 6306 is concurrent between the circuit court and the district court: the circuit court handles remedies under the petition for review process, while district court jurisdiction remains for "any other remedies provided by law."

Plaintiffs do not claim that exclusive appellate petition-for-review jurisdiction only happens when Congress explicitly says so. As the Supreme Court noted in *Axon*, "Congress of

course may do so explicitly, providing in so many words that district court jurisdiction will yield. But Congress also may do so implicitly, by specifying a different method to resolve claims about agency action." *Axon*, 598 U.S. at 185.

Generally, when Congress specifies an alternative review process, the presumption is that the process is exclusive to the agency actions that fall within it. *Id.* (citing *Free Enterprise Fund* in "noting that statutory schemes for agency review '[g]enerally' are 'exclusive'"). However, there is more to statutory analysis than default presumptions. All other traditional methods of statutory interpretation must also be applied to determine whether Congress opted for exclusivity. Here, those methods necessarily include consideration of the statutory language in 42 U.S.C. § 6306(b)(4), and that language makes it clear that this Court has jurisdiction over this case.

* * *

In short, this Court has jurisdiction over an equitable action seeking declaratory and injunctive relief to stop *ultra vires* agency action. In *Abbott Laboratories,* the Supreme Court held that the statutory text at issue, especially in light of legislative history, expressly authorized such jurisdiction. *Abbott Laboratories* is binding precedent, and all that plaintiffs ask this Court to do is to follow the rule of jurisdiction that *Abbott Laboratories* supplies.

II. All Three *Thunder Basin* Factors Show That This Court Has Jurisdiction

Defendant argues that exclusive petition for review schemes apply to all cases, but that is wrong. Last year, the Supreme Court reaffirmed precisely the opposite position:

> [A] statutory review scheme of that [exclusive] kind does not necessarily extend to every claim concerning agency action. Our decision in *Thunder Basin* made that point clear. After finding that Congress's creation of a "comprehensive review process" like the ones here ousted district courts of jurisdiction, the Court asked another question: whether the particular claims brought were "of the type Congress intended to be reviewed within this statutory structure." 510 U.S. at 208, 212, 114 S.Ct. 771. The Court identified three considerations designed to aid in

> that inquiry, commonly known now as the *Thunder Basin* factors. First, could precluding district court jurisdiction "foreclose all meaningful judicial review" of the claim? *Id.*, at 212–213, 114 S.Ct. 771. Next, is the claim "wholly collateral to [the] statute's review provisions"? *Id.*, at 212, 114 S.Ct. 771 (internal quotation marks omitted). And last, is the claim "outside the agency's expertise"? *Ibid.* When the answer to all three questions is yes, "we presume that Congress does not intend to limit jurisdiction." *Free Enterprise Fund*, 561 U.S. at 489, 130 S.Ct. 3138. But the same conclusion might follow if the factors point in different directions. The ultimate question is how best to understand what Congress has done—whether the statutory review scheme, though exclusive where it applies, reaches the claim in question.

Axon Enter., 598 U.S. at 185–86.

Even if the review scheme in 42 U.S.C. § 6306(b)(1) is exclusive rather than concurrent with other types of remedies due to 42 U.S.C. § 6306(b)(4), the action here should not be considered to fall within that review scheme. It is exempt from the preclusion of district court's jurisdiction under the *Thunder Basin* factors, as demonstrated below.

A. Plaintiffs Cannot Receive Meaningful Review Through the Petition for Review Process

Defendant claims that there is no apparent difference between the injunctive relief that the Fifth Circuit could issue and the district court in this action. Mem. ECF 14 at PageID 383. Perhaps this claim is based on Defendant's misunderstanding of Plaintiffs' cause of action and prayer for relief sought—but, in any event, Defendant's claim is incorrect. Nonetheless, Defendant's misunderstanding illuminates the nature of the first *Thunder Basin* factor: can preclusion of district court jurisdiction foreclose meaningful judicial review of the claim?

Through the petition for review process, the U.S. Court of Appeals for the Fifth Circuit generally exercises "jurisdiction to review the rule in accordance with chapter 7 of title 5 and to grant appropriate relief as provided in such chapter." 42 U.S.C. § 6306(b)(2). That power includes the granting of relief to "compel agency action unlawfully withheld or unreasonably

delayed" and to "hold unlawful and set aside agency action, findings, and conclusions." 5 U.S.C. § 706.

It is true that the Fifth Circuit could set aside both DFRs at issue, but that would only return matters to the immediately previous status quo. Instead, Plaintiffs asked this Court to enjoin Defendant so that the regulations could return to the water efficiency levels that Congress originally set. That cannot be done through the petition for review process, because it is beyond the remedy of 5 U.S.C. § 706.

Additionally, Plaintiffs ask that Defendant be enjoined from issuing water efficiency amendments for other products—outside of showerheads, faucets, water closets, and urinals, which of course are authorized by law in 42 U.S.C. § 6291(6) and 42 U.S.C. § 6295(l)(1)—unless new authorizing legislation is enacted. Such relief that focuses on future agency actions cannot be sought through 5 U.S.C. § 706 or the petition for review process.

Notably, both of those remedies are within the scope of the injunctive relief that this Court can grant to cure *ultra vires* agency action. Because the remedies Plaintiffs seek fall outside of the scope of the petition for review process, "a finding of preclusion could foreclose all meaningful judicial review." *Free Enter. Fund*, 561 U.S. at 489. This factor of *Thunder Basin* is in Plaintiffs' favor.

In short, the first *Thunder Basin* factor—whether a finding of preclusion could foreclose all meaningful judicial review—favors allowing review by the district court.

B. Plaintiffs' Claims Are Wholly Collateral to the Review Provisions

The second *Thunder Basin* factor is whether the claim is "wholly collateral to [the] statute's review provisions." *Thunder Basin*, 510 U.S. at 212. The Supreme Court clarified this factor's operation last year in *Axon*. 598 U.S. at 192. The action in *Free Enterprise Fund* and *Axon* was "wholly collateral," because the "parties object to the Commissions' power generally,

not to anything particular about how that power was wielded." *Id.* at 193. "Nor do the parties' claims address the sorts of procedural or evidentiary matters an agency often resolves on its way to a merits decision." *Id.* They are thus outside what the agency "regularly adjudicates" and "[b]ecause that is so, the parties' claims are 'collateral' to any Commission orders or rules from which review might be sought.'" *Id.* (citing *Free Ent. Fund,* 461 U.S. at 490).

The relevant analysis here is similar to *Axon* and *Free Enterprise Fund*: Plaintiffs do not challenge the way in which Defendant exercised its power to amend water-efficiency regulations; instead, Plaintiffs challenge the agency's power generally. Fundamentally, this case is not about dishwashers, clothes washers, or the technical aspects of any home appliance. Rather, this case is about whether the agency has lawful authority to amend water efficiency standards.

The remedy sought does not operate so as to invalidate some particular exercise of the agency's power. Instead, it challenges the agency's authority to issue unauthorized rules—whether those rules have been issued in the past or will be issued in the future. This remedy is perfectly "collateral" in *Axon's* sense.

In short, the second *Thunder Basin* factor—whether the claims are wholly collateral to the statutory review provisions—favors allowing review by the district court.

C. Plaintiffs' Claims Are Outside Defendant's Expertise

The third *Thunder Basin* factor asks whether the claims are "outside the agency's expertise." *Thunder Basin*, 510 U.S. at 212. The Supreme Court recognized in *Axon* that a claim is outside the agency's expertise if it raises "'standard questions of administrative' and constitutional law, detached from 'considerations of agency policy.'" *Axon*, 598 U.S at 194 (quoting *Free Enter. Fund,* 561 U.S. at 491).

Cases of statutory interpretation "'may fall more naturally into a judge's bailiwick' than an agency's." *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2247 (2024) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 578 (2019)). "[A]lthough an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" *Loper Bright Enterprises*, 144 S. Ct. at 2267.

The issue in this case is not fundamentally driven by considerations of agency policy or technical aspects of dishwashers, clothes washers, or other appliances. This case does not rest on any factual premises within agency expertise, because it involves a pure question of statutory interpretation (and, more broadly, a pure question of law). The expertise at issue in this case is possessed by judges, not agency appointees.

The third *Thunder Basin* factor—whether the claims are outside the agency's expertise—favors allowing review by the district court.

* * *

To sum matters up: the argument that Plaintiffs should be permitted to pursue an equitable remedy in this Court is well-supported on multiple fronts. By and large, Defendant's jurisdictional arguments to the contrary are meritless: they have consumed two-thirds of Plaintiff's allotted briefing space, created unnecessary delay and needless expense, and flunked the standard that contentions in pleadings must be warranted by existing law. Plaintiffs' statutory argument should control, but even if this Court doesn't find that argument convincing, all of the *Thunder Basin* factors are also in favor of allowing review by the district court.

III. Plaintiffs Have Standing Because Their Choice of Products Is Limited

Defendant acknowledges that it is judicially recognizable that a "lost opportunity to purchase products" is a valid "injury in fact" in *Louisiana v. U.S. Dep't of Energy*, 90 F.4th 461, 467 (5th Cir. 2024). Mem., ECF 14 at PageID 384. Defendant acknowledges that Plaintiffs have

asserted that: "They are harmed by these recent direct final rules, because their choice of a preferred clothes washer or dishwasher would be eliminated by these rules." Mem., ECF 14 at PageID 385. Nonetheless, Defendant maintains that this harm is insufficient for standing.

Defendant relies upon non-binding out-of-circuit precedent, Mem., ECF 14 at PageID 384, to claim that this Court must examine "whether the challenged action made a consumer's desired product, as defined by its core features, 'not readily available,' and whether it rendered the product 'unreasonably priced.'" *Weissman v. Nat'l R.R. Passenger Corp.*, 21 F.4th 854, 858 (D.C. Cir. 2021). Defendant claims that Plaintiffs "do not identify the 'core features' of their preferred appliance, or why a product with those features would no longer be available." Mem., ECF 14 at PageID 385. Additionally, Defendant uses the same non-binding out-of-circuit precedent to argue that Plaintiffs' choice in desired appliances has not been demonstrated to be "meaningfully abridged." Mem., ECF 14 at PageID 384.

Defendant's argument would wrongly bar Plaintiffs from the courthouse: more precisely, Defendant's argument would impose a pleading requirement on Plaintiffs that is found nowhere in the law. The only relevant requirement here is contained in the Federal Rules of Civil Procedure: Plaintiffs' complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a)(2). Furthermore, Rule 8 requires that "Pleadings must be construed so as to do justice." FRCP 8(e).

In accordance with FRCP 8(e), "at the pleading stage, general factual allegations of injury resulting from Defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

In a motion to dismiss under FRCP 12(b)(6), "well-pleaded factual allegations in the complaint are accepted as true," and "[t]he complaint must be liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff." *Woodward v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005).

Plaintiffs have challenged two direct final rules that establish the maximum water efficiency of clothes washers and dishwashers. They have asked this Court to return the water efficiency requirements back to those set by Congress. Thus, when Plaintiffs explain that their "choice of a preferred clothes washer or dishwasher would be eliminated by these rules," it is reasonable to infer that Plaintiffs' "preferred clothes washer or dishwasher" are those clothes washers and dishwashers with a water efficiency level that is not permitted by the direct final rules, but that is or would be permitted by the requirements set by Congress.

The reason Plaintiffs want these products is not mysterious. As Defendant U.S. Department of Energy (DOE) has acknowledged for many years: because manufacturers want to "help compensate for the negative impact on cleaning performance associated with decreasing water use and water temperature," they "will typically increase the cycle time." DOE, 2016-11-22 Final Rule Technical Support Document, chapter 3 at page 330 (Nov. 22, 2016), https://www.regulations.gov/document?D=EERE-2014-BT-STD-0021-0029. Plaintiffs ask this Court to take judicial notice that DOE issued this statement and the facts laid out immediately below under Federal Rules of Evidence Rule 201(b)(2).

Defendant DOE's acknowledgment of the box that its behavior had put manufacturers in was coupled with the creation of a new class of dishwashers and clothes washers to allow consumers more choice. 85 FR 68723; 85 FR 81359. Defendant DOE created a new class of dishwashers that would allow higher water use per cycle—and, in particular, that would allow a

"cycle time for the normal cycle of one hour or less from washing through drying"; such a class had previously been disallowed from the market. 85 FR 68721. Likewise, Defendant DOE created a new class of clothes washers that would allow higher water use per cycle—in particular, a class that would allow top-loading clothes washers to operate in less than 30 minutes and front-loading clothes washers to operate in less than 45 minutes. 85 FR 81361.

When Defendant DOE changed course and decided against the creation of a new class for these products, it made clear that it was "not contending in this rulemaking the validity of the determinations made about whether short cycles provide a 'performance-related feature' and 'utility.'" 87 FR 2682. Indeed, to this day Defendant DOE has never formally disputed that clothes washers and dishwashers that are allowed to use more water and to complete their cycles faster have a "a 'performance-related feature' and 'utility'" to consumers like the Plaintiffs.

When the Fifth Circuit reviewed Defendant DOE's rule, it noted that "the record contains historical evidence that dishwasher cycle time has increased from around one hour at the advent of DOE's conservation program to around two and a half hours in 2020. *See* CEI Petition, 83 Fed. Reg. at 17773–74. DOE does not appear to contest this data." *Louisiana v. United States Dep't of Energy*, 90 F.4th 461, 472 (5th Cir. 2024). This increase in cycle time harms the Plaintiffs and other consumers like them, and for that reason Plaintiffs would prefer appliances that use more water.

The Fifth Circuit then noted that Defendant DOE itself was concerned that the "slow pace of modern dishwashers caused consumer substitution away from dishwashers and toward handwashing" and that "nothing wastes water and energy like handwashing: DOE itself estimated in 2011 that handwashing consumes *350% more water and 140% more energy* than machine washing." *Id.* at 473. Thus, consumers like the Plaintiffs are left to practice

handwashing far more often than they would choose to do so, due to Defendant DOE's rules that are being challenged, and DOE's rules therefore cause more water to be consumed by consumers such as Plaintiffs than if these water limitations on dishwashers had never come about.

As described by the Fifth Circuit: "What did DOE say in response? Basically nothing: It acknowledged the concern and moved on." *Id.* Plaintiffs view this empty acknowledgment as unsatisfactory. They want to purchase appliances that don't handcuff their ability to clean their dishes and clothes. They are harmed by these rules, because these rules present significant obstacles to cleaning the things that they own. They are harmed by expanded cycle times, but not only by expanded cycle times: the expanded cycle times are a consequence of the inability of modern appliances to clean dishes and clothes rapidly and efficiently.

Ultimately, anything more than cursory scrutiny of the reasons why Plaintiffs want to purchase such products is premature. The point is that Plaintiffs want to buy such products, and they are prevented from doing so by Defendant, and that causes an injury-in-fact to the Plaintiffs. Plaintiffs are not required to prove such harm at this stage: all they currently must do is claim such harm, and they have done so. They have provided the "short and plain statement of the claim showing that the pleader is entitled to relief" required by FRCP 8(a)(2).

Next, Defendant claims that "Plaintiffs have not explained why the DFRs would constrict market choices at all." Mem., ECF 14 at PageID 385. Defendant argues that the rule only applies to products manufactured three or four years in the future. *Id.* Based on this, Defendant asserts that "Plaintiffs must plausibly plead that at some point, after April 23, 2027 or March 1, 2028, their preferred low-efficiency appliances would no longer be available. They have not." Mem., ECF 14 at PageID 385.

In fact, this is the argument that Plaintiffs have made. As Defendant acknowledged, Plaintiffs have alleged that "their choice of a preferred clothes washer or dishwasher would be eliminated by these rules." *Id.* Plaintiffs did not provide the specific dates of April 23, 2027 or March 1, 2028, but they have shouldered their burden: they have pled that their preferred choice of dishwashers would be eliminated. Given the effective date of the rules that are challenged, this Court can reasonably infer that those dates mark the time when Plaintiffs' choice would begin to be undercut by these specific rules.

To establish standing, all Plaintiffs need do is establish that the harm is imminent—or, in other words, "certainly impending." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 n.2 (1992). Defendant has recognized the specific dates when Plaintiffs will be harmed; that is all that is needed to show imminent harm. Of course Defendant could change course and withdraw the rule, but that is the case for all government action; a contingency of this kind cannot defeat standing. These are final rules, not proposed rules, and Plaintiffs (and this Court) are entitled to take the government at its word. Given the length of time that litigation against the government takes, this case might even continue past these rules' effective date.

Defendant claims that "Plaintiffs make no attempt to show that they intend to purchase any dishwasher or clothes washer—let alone one impacted by these rules—after those dates." Mem., ECF 14 at PageID 385. Defendant also claims that "Neither Plaintiff even alleges that he owns (or plans to purchase) a dishwasher or clothes washer." *Id.* This line of argument appears to ignore the original Complaint, which stated that "Plaintiffs are consumers of consumer appliances that are unlawfully regulated by the Defendant." Compl., ECF 1 at 11, ¶ 43. When "liberally construed, with all reasonable inferences drawn in the light most favorable to the plaintiff," *Woodward v. Andrus*, 419 F.3d 348, 351 (5th Cir. 2005), that statement implies that

Plaintiffs own such products and intend to purchase such products. The Complaint noted that "They are harmed by these recent direct final rules, because their choice of a preferred clothes washer or dishwasher would be eliminated by these rules." *Id.* One reasonable implication of that statement is that such a purchase would have occurred after those rules go into effect, but for those rules blocking such purchases. Indeed, Plaintiffs intend to provide evidence of these facts prior to any request for summary judgment.

Defendant complains that "At no point in the Complaint do Plaintiffs identify, with any specificity, what dishwasher(s) or clothes washer(s) would be rendered unavailable by the challenged DFRs." Mem., ECF 14 at PageID 385. There is no requirement for Plaintiffs to specify the specific models that would be made unavailable, and there is no precedent that requires Plaintiffs to include such details. Some models that Plaintiffs might wish to purchase have already been barred from the marketplace; others don't exist yet, because Defendant's regulations have impeded their development. As long as some models are made unavailable, as demonstrated by the DFRs themselves prohibiting them, and the Plaintiffs have asserted that the products they prefer are or will be unavailable, that is sufficient to satisfy the initial requirements for standing. Defendant's suggestion that Plaintiffs must demonstrate extensive knowledge of appliance manufacturers' current models—and, indeed, inside knowledge of manufacturers' future designs—in order to acquire standing is unserious and unrealistic.

Defendant tries to claim that Plaintiffs must meet the standard of the merits stage by rehearsing what plaintiffs in three cases did at the merits stage in the past—*Louisiana v. United States Dep't of Energy*, 90 F.4th 461, 472 (5th Cir. 2024), *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 112–13 (D.C. Cir. 1990), and *Sierra Club v. Perry*, 373 F.Supp.3d, 128, 137 (D.D.C. 2019). Counsel for Plaintiffs is quite familiar with these

standards (and, indeed, with these cases: our colleagues at CEI represented the named party in one of them and submitted an amicus brief in another), but Defendant has misconstrued them. Plaintiffs look forward to providing declarations that will demonstrate standing at the summary judgment stage, but they are not required to prove standing in the complaint. Instead, "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Bennett*, 520 U.S. at 168 (quoting *Lujan*, 504 U.S. at 561).

In short, Plaintiffs have provided all necessary materials under FRCP Rule 8 in their Complaint. However, if this Court believes otherwise, Plaintiffs request permission to amend their Complaint under Rule 15(a)(2) to include whatever factual details this Court decides are needed. In such circumstances, Plaintiffs will be pleased to provide any requested factual details with alacrity. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of a pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41, 48 (1957).

To sum up, Defendant has only challenged the injury-in-fact element of Plaintiffs' standing. Plaintiffs have already supplied what the Supreme Court required in *Bennett v. Spear* (1997), "an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Bennett*, 520 U.S. at 167. Defendant acknowledges that the "lost opportunity to purchase products" is a valid "invasion of a judicially cognizable interest." Mem., ECF 14 at PageID 384. Plaintiffs have expressed, with significant precision, what restrictions on their judicially cognizable interest they are challenging and what

they are asking this Court to do—this is a concrete and particularized claim. As far as we can tell, Defendant has acknowledged that the invasion of their judicially cognizable interest will begin on April 23, 2027, for dishwashers, and March 1, 2028, for clothes washers, Mem., ECF 14 at PageID 385—which means that this is an imminent harm, not one that is conjectural or hypothetical. That means that Plaintiffs have provided everything necessary under FRCP 8(a)(2) in their Complaint.

CONCLUSION

Defendant's claims that this Court lacks jurisdiction are incompatible with binding Supreme Court precedent in *Abbott Laboratories*; indeed, the legal contentions that Defendant makes about jurisdiction are not warranted by existing law. Defendant recognizes that the lost opportunity to purchase products is a judicially recognizable injury-in-fact. Plaintiffs have explained the concrete and particular restrictions on their conduct that they challenge. These restrictions commence on April 23, 2027 and March 1, 2028, which shows that the harm such restrictions create is neither conjectural nor hypothetical. In short, Plaintiffs have standing. For the foregoing reasons, this Court should deny the motion to dismiss.

Dated: September 9, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 9, 2024, I served the foregoing document through CM/ECF upon Defendant's counsel.

/s/ Devin Watkins
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