No. 22-60146

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOUISIANA, et al.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY, et al.,
Respondents.

On petition for review of an agency order

BRIEF OF *AMICI CURIAE* COMPETITIVE ENTERPRISE INSTITUTE AND FREEDOMWORKS FOUNDATION IN SUPPORT OF PETITIONERS

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CERTIFICATE OF INTERESTED PARTIES

(1) *Louisiana v. DOE*, Fifth Circuit Case No. 22-60146.

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Petitioners

The States of Arizona, Alabama, Arkansas, Kentucky, Louisiana, Missouri, Montana, Oklahoma, South Carolina, Tennessee, Texas, and Utah.

Respondents

United States Department of Energy, Secretary of Energy Jennifer Granholm.

Intervenors

None.

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INTEREST OF AMICUS CURIAE[1]

Amici include the following organizations:

The **Competitive Enterprise Institute** (CEI) is a nonprofit organization headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, the institute has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

The **FreedomWorks Foundation** is a non-profit, nonpartisan grassroots organization dedicated to upholding free markets and constitutionally limited government. Founded in 2004, FreedomWorks Foundation is among the largest and most active right-leaning grassroots organizations, amplifying the voices of millions of activists both online and on the ground.

BACKGROUND

I. Statutory Background

The Energy Policy and Conservation Act ("EPCA") was enacted in response to the 1973 energy crisis. In 1987, it was amended by the National Appliance Energy Conservation Act to include appliance

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[1] This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Undersigned counsel for amici curiae certifies that this brief was not authored in whole or in part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than amici and their counsel have contributed to this brief.

efficiency regulation. The goal of Congress was to increase energy efficiency while ensuring "that energy savings are not achieved through the loss of significant consumer features." H.R. Rep. No. 100-11, 22 (1987).

For instance, EPCA requires the Secretary of Energy to consider "any lessening of the utility or the performance of the covered products likely to result from the imposition of the standard." 42 U.S.C § (o)(2)(B)(i)(IV). And it prohibits standards that result in the "unavailability in the United States in any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes." 42 U.S.C § 6295(o)(4).

Under the statute, if there are no characteristics being eliminated or utility lessened, the federal standard set by the Department of Energy (DoE) must be one that is "designed to achieve the maximum improvement in energy efficiency" that is technologically feasible and economically justified. 42 U.S.C § 6295(o)(2). Once such a standard for a class of products is established, then no "amended standard which increases the maximum allowable energy use, or, in the case of showerheads, faucets, water closets, or urinals, water use, or decreases the minimum required energy efficiency" is allowed. 42 U.S.C § 6295(o)(2).

Congress was aware, however, that technology is not static. New inventions might use electric power rather than gas power, which would

make some kinds of comparisons (for instance, efficiency per cubic meter of gas used) impossible. New models might contain a "performance-related feature which other products within such type (or class) do not have and such feature justifies a higher or lower standard." 42 U.S.C § 6295(q)(2). This incomparability might be due to the addition of a new feature that provides substantial value to the consumer or the absence of a previous feature that was accidentally eliminated by federal regulation.

To solve these problems, Congress authorized the Secretary to establish different standards for products that consume different kinds of energy or contain substantial performance-related features that require additional energy or water. 42 U.S.C § 6295(q). This provision allowed the Secretary to establish new, alternate standards that are lower than existing standards, thus allowing the creation of substantial performance-related features regardless of the standard currently applied to existing products. In establishing a new class of products, the statute authorized the Secretary to establish "a level of energy use or efficiency higher *or lower* than that which applies" to other such products without the performance-related feature. 42 U.S.C § 6295(q)(1) (emphasis added).

For instance, consider the example of a new internet-connected refrigerator that would automatically order grocery deliveries when supplies run low. DoE currently has 42 classes of refrigerators and/or

freezers, with different options for models with or without automatic defrost, an icemaker, a freezer, compact or full size, etc. 10 C.F.R § 430.32. DoE has requested information on new internet-connected refrigerators, 84 FR 62470 (2019), although due to lack of data it is not yet testing the power consumption of such features. 86 FR 56814 (2021). Requiring maximum energy efficiency while ignoring the difference in features would prohibit technological advancements that use energy. Therefore, 42 U.S.C § 6295(q) allows an existing standard for refrigerators to be segmented by DoE so that such models would only be compared against others with similar features. The creation of a new set of standards would thus allow the creation of new models—in this case, internet-connected models that use more energy because they have new features.

The creation of those new standards would have no impact on the existing standards; that creation would not change, amend, or eliminate those existing standards.

II. CEI's Petition for Dishwashers

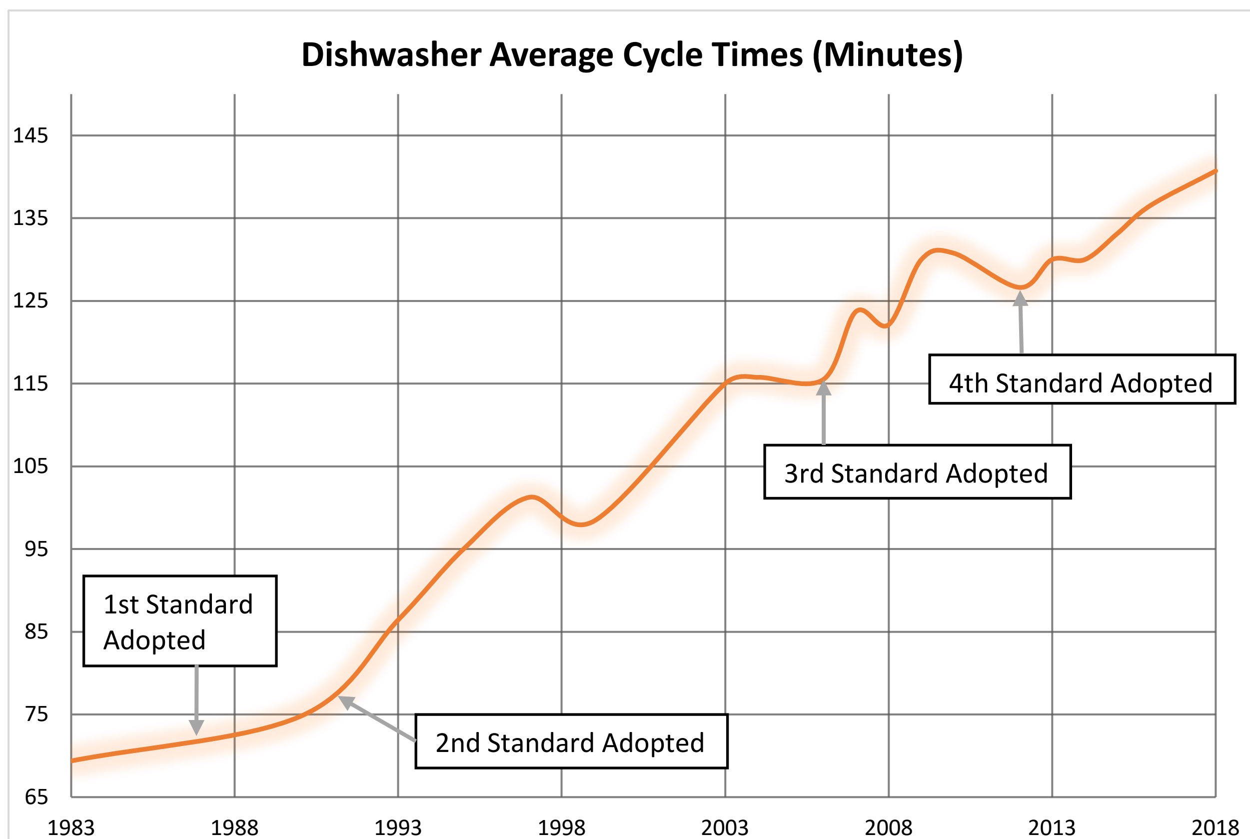
Over time it has become increasingly apparent that dishwashers are taking longer to clean dishes. This is odd: technology is supposed to get better over time, not worse.

In 2014, Consumer Reports warned not to "expect normal cycles to drop anytime soon from their 2- to 3-hour mark" due to federal regulations. Ed Perratore, *Why do new dishwashers take so long to*

complete a normal cycle?, Consumer Reports (April 23, 2014). In 2015, David Kreutzer, a senior economist at the Institute for Energy Research, wrote that "To save eight cents of hot water, federal mandates led to wash cycles taking much longer to complete. Two- and three-hour cycles, virtually unheard of 20 years ago, are commonplace today." David Kreutzer, *Why it's the Government's Fault Your Dishwasher Cycle Is 2 or 3 Hours Long*, Daily Signal (July 12, 2015) *cited in* CEI Petition 83 FR 17772. The Association of Home Appliance Manufacturers (AHAM) collected data "from manufacturers making up over 90 percent of the market [which] show that as energy use decreases, cycle time (including dry time) gets longer." Jennifer Cleary, *AHAM Comments on DOE's NOPR for Energy Conservation Standards for Residential Dishwashers* 8 (March 25, 2015) *cited in* CEI Petition 83 FR 17774.

Furthermore, DoE itself determined that the longer wash cycles were due to its own regulations, writing: "To help compensate for the negative impact on cleaning performance associated with decreasing water use and water temperature, manufacturers will typically increase the cycle time." DoE, *Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment*, Docket No. EERE-2014-BT-STD-0021-0029, 3-28 (Nov. 22, 2016) *cited in* CEI Petition 83 FR 17772.

As part of its investigation of this issue, CEI examined Consumer Reports' evaluations of dishwashers (many of which had recorded dishwasher cycle times for 35 years or more) and compared those evaluations to those that had been conducted when previous dishwasher standards were adopted, finding this relationship:



CEI, Petition for Rulemaking, 83 FR 17773 (March 21, 2018).

It's worth noting that GE Appliances identified a similar relationship. 2 Kelley Kline, *GE Appliances Comments on DOE's NOPR for Energy Conservation Standards for Residential Dishwashers*, Docket No. EERE-2014-BT-STD-0021 4 (March 25, 2015) *cited in* CEI Petition 83 FR 17774. In 1983, dishwasher cycle times averaged a little over an

hour, with several models having cycle times under an hour. In comparison, by 2018 dishwasher cycle times averaged 2 hours and 20 minutes. No dishwashers on the market by 2018 had a cycle time of under 1 hour; the fastest was 90 minutes. Substantial increases in dishwasher cycle time occurred shortly after changes were made in federal energy regulation of dishwashers.

Because of this failure of governance, CEI submitted a petition for rulemaking under the Administrative Procedures Act. 5 U.S.C. § 553(e). CEI's petition argued that—contrary to the expressed intent of Congress—DoE regulations had caused a substantial loss of consumer welfare. CEI requested that DoE create a new class of dishwashers under 42 U.S.C. § 6295(q) that would once again allow the sale of dishwashers with the performance feature of a 1-hour cycle time.

III. Massive Public Support for CEI's Petition

Congress required that "In making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher or lower standard, the Secretary shall consider such factors as the utility to the consumer of such a feature." 42 U.S.C. § 6295(q)(1)(B). Consumers are often the best judges of their own utility, and so the level of public support for the standard at issue is an appropriate factor when determining whether the Secretary was authorized by Congress to establish that standard.

The outpouring of support for CEI's proposed rule from the general public was huge. FreedomWorks both filed its own comments about the rule and alerted its members about it; many were enthusiastic about the prospect of this proposal and filed comments individually. Generally, appliance rulemakings receive a few hundred comments; CEI's petition received several thousand. Of those comments, an incredibly high percentage supported the rule: among individual commenters, 16 opposed the new class of dishwashers, 41 were neutral, and more than 2,200 supported CEI's petition. These comments were not form letters with identical language; rather, they were individually written. A few examples are indicative:

- Please mother of God, allow someone to make a dishwasher that will get my dishes for a family of 5 clean enough, fast enough to empty the dishwasher by bedtime! Gregory, Docket No. EERE-2018-BT-STD-0005-0309 (May 24, 2018), included in CEI Comments, Docket No. EERE-2021-BT-STD-0002-0239, Attachment D.
- If regulations don't get rolled back to sane thinking, we may end up just repairing the old one or do without. Rick Vitti, Docket No EERE-2018-BT-STD-0005-1208 (June 27, 2018), included in CEI Comments, Docket No. EERE-2021-BT-STD-0002-0239, Attachment D.
- Until we went to my [parent's] house, who have a much older dishwasher... we had no clue how terrible of a job our newer dishwasher was doing. James King, Docket No. EERE-2018-BT-STD-0005-0009 (May 18, 2018), included in CEI Comments, Docket No. EERE-2021-BT-STD-0002-0239, Attachment D.

- On our second dishwasher and still dishes come out smelly and not fully clean with long run times. Spent $900 on a dishwasher that is far worse than my first one bought in the early nineties that cost $200. Aren't we supposed to be improving? Dennis Truszkowski, Docket No. EERE-2018-BT-STD-0005-0284 (May 24, 2018), included in CEI Comments, Docket No. EERE-2021-BT-STD-0002-0239, Attachment D.
- I realized months ago that I have to do my dishes overnight, because it takes way to long during the day. I'm older and don't remember dishes taking so long in a dish washer. Kurt Meyer, Docket No. EERE-2018-BT-STD-0005-0797 (June 14, 2018), included in CEI Comments, Docket No. EERE-2021-BT-STD-0002-0239, Attachment D.
- I clean houses and I have to do dishes. The dishwasher takes too long and holds me up from moving on to my next house to clean. Tomas Doyle, Docket No. EERE-2018-BT-STD-0005-2751 (Oct. 10, 2019), included in CEI Comments, Docket No. EERE-2021-BT-STD-0002-0239, Attachment D.

The Wall Street Journal called it "The Dishwasher Rebellion." James Freeman, *The Dishwasher Rebellion*, Wall Street Journal (June 27, 2018). Daniel Simmons, then Assistant Secretary for Energy Efficiency and Renewable Energy at DoE, described it as "an overwhelmingly positive response from consumers who were tired of waiting for their dishes to dry." Hiroko Tabuchi, *Inside Conservative Groups' Effort to 'Make Dishwashers Great Again'*, New York Times (Sept. 17, 2019) *cited at* CEI Comments, Docket No. EERE-2021-BT-STD-0002-0239, Attachment B at 1. Assistant Secretary Simmons explained that "People's time is a nonrenewable resource. People get

frustrated when their appliances take longer, whether it's dishwashers or washing machines." *Id.*

In response to this outpouring of public support, DoE granted CEI's petition for rulemaking and started the rulemaking process. *Energy Conservation Program: Energy Conservation Standards for Dishwashers, Grant of Petition for Rulemaking*, 84 FR 33869 (2019). Although CEI had petitioned DoE to establish the standards as a part of the same rulemaking process that created the class, DoE made the choice to split those decisions into separate rulemakings.

The public was so supportive of this new rulemaking that the President regularly alluded to it in his public speeches. *See, e.g.,* President Trump, Speeches on Jan. 14, 2020, Oct 19, 2020, Oct. 29, 2020. In a recent rally, he highlighted this change as a notable accomplishment of his administration. President Trump, Speech on April 23, 2022.

Given the popularity of the dishwasher rule, DoE *sua sponte* enacted a similar rule for clothes washers and dryers. 85 FR 81359 (2020).

IV. DoE Repeal of the Fast Dishwasher, Clothes Washer and Dryer Rules

On President Biden's first day in office, he told the agencies to reconsider most major rules issued by the Trump administration. White House, Fact Sheet: List of Agency Actions for Review (Jan. 20, 2021).

Among those to be reconsidered were the dishwasher and clothes washers and dryers rules, although the President provided no reason for this action. *Id.* According to DoE, it was this list, when accompanied by Executive Order 13990, that "triggered the Department's re-evaluation" of the dishwasher, clothes washer, and dryer rules at issue in this case. 86 FR 43974 (2021).

Given the absence of any reason given in the President's orders to DoE, DoE justified its regulatory backflip on two grounds: it reversed its prior legal interpretation of what it means to "amend" a standard under 42 U.S.C. 6295(o)(2)(A), and it argued that the anti-rollback provision in 42 U.S.C. 6295(o)(1) applied to a new class of products. With this new legal interpretation in hand, DoE determined that it had "improperly amended standards" for these products; on that basis, it "reinstat[ed] the prior product classes and applicable standards." *Energy Conservation Program: Product Classes for Residential Dishwashers, Residential Clothes Washers, and Consumer Clothes Dryers*, 87 FR 2673, 2686 (2022).

CEI asked DoE to consider finalizing standards for these new classes in this rulemaking, even if DoE thought the original rulemaking process was flawed. 87 FR 2673, 2683. Because DoE did not dispute the demonstrated public utility that Congress asked DoE to consider, CEI argued that DoE should follow its own procedures by issuing standards for the new product classes. DoE rejected this proposal, arguing that it

lacked the "time and resources" necessary to analyze the products that it had previously examined only a year prior. *Id.* DoE also justified this rejection because of the lack of products in the market for these new classes; this second justification is a non-sequitur because DoE's regulatory powers allow it to serve as a market gatekeeper. The obvious reason for the absence of such products, as acknowledged by DoE, was "due to the uncertainty in the market about these product classes and energy conservation standards." 87 FR 2673, 2683. Bosch's senior manager even stated that "Bosch would probably redesign the machines somewhat" to use these product classes if a final standard were issued for them. Liam McCabe, *Did Trump Really Make Dishwashers Great Again?*, New York Times (Mar. 2, 2021) *cited in* CEI's Comments. No manufacturer will invest in product development if told that those products will be made illegal soon.

On March 17, 2022, twelve states sought review of the repeal of the fast appliance rules.

SUMMARY OF ARGUMENT

In 2020, DoE established new classes for faster dishwashers, clothes washers, and dryers (hereinafter fast appliance rules). DoE did so in order to follow the statutory provision that instructed it to establish a separate class for products with additional useful features that use more energy.

DoE now contends that it violated the law in 2020 when it established these new classes. It argues that its 2020 action was an "amendment" of the prior energy convention standard. But DoE's argument ignores the statutory definition of an "energy convention standard"; notably, that definition does not include the specification of the class of products to which the standard applies. DoE also argues that the prior rules "effectively amend" the standard, but that argument forces DoE into an unworkable, self-contradictory account of the nature of an "amendment."

In short, the fast appliance rules were not amendments to energy standards; rather, they created new classes of products without energy standards. In the past, DoE has frequently changed the definition of a class of products, such that some products are no longer included within the scope of that definition. DoE has also created new classes of products without establishing a standard for those products. None of these changes were considered "amendments," nor were the fast appliance rules amendments.

DoE also claims the prior rules did not "adequately consider" 42 U.S.C. § 6295(q)(1). The prior rules had an entire section devoted to this provision, and DoE has never specified what was "inadequate" about that section's explanation.

DoE also appears to argue that legislation enacted in 1987 invalidated a statute originally passed in 1978. However, in the course

of enacting these 1987 changes, Congress inserted phrasing that was identical to the language that DoE contends was invalidated. All of the resultant statutory text can easily be harmonized—and that harmonization necessarily leads to the conclusion that no such invalidation ever occurred. A comparatively reasonable interpretation that harmonizes such provisions should be adopted over one that implies statutory conflict.

Finally, even if (for the sake of argument) DoE's position that the previous rules did not follow the proper legal process is granted, DoE nonetheless failed to meet its obligation to consider reasonable alternatives to (in effect) the abolition of the product class. DoE does not dispute the utility of the features at issue—the only factor Congress told DoE to consider. DoE has conceded that it determined that considering such an alternative would not be worth its time and resources. But both the Supreme Court and this Court have held that such a justification is an arbitrary and capricious exercise of power—and therefore it fails as a matter of law.

ARGUMENT

I. The Creation of a New Product Class Does Not Amend the Prior Standards

DoE's argument rests on an incorrect claim: namely, that the prior rule "amended" the existing energy conservation standard. But as shown below, no such amendment ever took place.

DoE claims that the prior rule violated 42 U.S.C. 6295(o)(1) and (o)(2)(a). That statute requires: "Any new or amended energy conservation standard prescribed by the Secretary under this section for any type (or class) of covered product shall be designed to achieve the maximum improvement in energy efficiency . . . which the Secretary determines is technologically feasible and economically justified." To state the obvious, this statute only applies to new standards or amended standards. As shown below, no new energy conservation standard was ever created in the case at hand, nor was any energy conservation ever amended.

A. The Statutory Text Contradicts DoE's Interpretation

Congress declared that "[t]he term 'energy conservation standard' means—(A) a performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use." 42 U.S.C. § 6291(6)(A) (quoting relevant part). That definition goes on to include water use and design requirements or other requirements specified by the Secretary under section 6295(r). *Id.* An "energy conservation standard" thus requires the specification of a minimum level of energy efficiency or a maximum quantity of energy use: that standard would then be applied to a class of products.

The text of the statute distinguishes between the "energy conservation standard prescribed by the Secretary under this section" and the application of that standard "for any type (or class) of covered

product." 42 U.S.C. 6295(o)(2)(a). In other words, the standard itself is notably distinct from its application to the covered product class. *Id.*

Under the statute, "[a] proposed rule which prescribes [(1)] an amended or [(2)] new energy conservation standard or [(3)] prescribes no amendment or [(4)] no new standard for a type (or class) of covered products shall be published in the Federal Register." 42 U.S.C. 6295(p)(1). The creation of the product classes at issue in the instant rule falls in the fourth category, "no new standard for a type (or class) of covered products," which the statute expressly distinguishes from the first category—namely, an amendment. *Id.*

DoE defined "amend" to mean "alter formally by adding, deleting or rephrasing." 87 FR 2673, 2678 (quoting *American Heritage Dictionary for the English Language* 42 (1981)). According to DoE, the prior rule "altered the existing energy and water conservation standards" by "removing the standards applicable to those products." But DoE's analysis is sloppy: it ignores the statutory distinction between the standard and its application. Notably, the prior rule never altered the standard; rather, it changed its application—namely, the products to which the standard applied. No "adding, deleting or rephrasing" of the standard ever took place: it's the same as it ever was.

B. DoE's Argument Is Both Internally Contradictory and Inconsistent

DoE also argues that even if the 2020 rule didn't *formally* amend the standard, it *effectively* did so. According to DoE, those fast appliances "now do not have any applicable standard, which *effectively amended* the prior energy or water conservation standards for those products to zero." 87 FR 2673, 2678. DoE claims that there is now no standard at all that applies to these new classes—but the problem with DoE's logic is that it requires the conclusion that no amended standard was ever produced. DoE's "effective amendment" argument cannot be squared with DoE's own definition of "amend." An amendment must, according to DoE's own definition, *id.*, "alter [text] formally"; merely asserting that the text is "effectively amended" won't do. In fact, DoE never formally set the standards to zero (or anything else); rather, it simply hadn't set those standards yet.

It is telling that DoE fails to stick to its unworkable interpretation in the course of explaining its new rule. DoE claims that the 2020 rule establishing the new class "amended" the standard by removing its applicability to a set of products by creating a new class; under new management, DoE therefore re-applies the prior standard to these products. Notably, if the prior rule "amended" the standard by removing applicability to these products, then (given that interpretation) re-applying that standard to the products must also constitute an

amendment. DoE attempts to escape this obvious inference by insisting that "DOE is not establishing or amending energy conservation standards in this final rule under 42 U.S.C. 6295." 87 FR 2673, 2683. How is the creation of a new class an "amendment of the standard," but the abolition of that class isn't one? This is a question that DoE cannot answer.

C. DoE Has Created or Changed Classes Without Creating or Changing the Associated Standards

DoE has historically created new product classes without establishing standards for the new classes. A few examples:

- DoE established a new class of "combination vending machines" without "amending" a standard. 74 FR 44920 (2009) (2009) ("DOE concludes that combination vending machines have a distinct utility that limits the energy efficiency improvement potential possible for such beverage vending machines. . . Based on the above, DOE concludes that combination vending machines are a class of beverage vending machines, and, since DOE cannot determine whether standards would meet EPCA's statutory criteria, DOE is not setting standards for combination vending machines at this time.").
- DoE created a new class of "underground mining distribution transformers" without setting (or "amending") a standard for that class. 72 FR 58189 (2007).

- DoE created a new class of "underground mining distribution transformers" without setting (or "amending") a standard for that class. 72 FR 58189.
- DoE effectively amended the class of conventional ovens by removing consideration of oven door windows efficiency effects. 63 FR 48041 (1998).

DoE claims the above instances of its establishing classes without standards are irrelevant because "there were already standards in place for these products." 87 FR 2673, 2680. In contrast, the fast appliance rules "changed the status quo in a direction that would allow for unlimited energy and water use by these short-cycle products." 87 FR 2673, 2680.

But that second contention is incorrect. The fast appliance rules did not immediately unleash any fast appliances onto the market, because those appliances did not exist at the time. As DoE admitted when it rescinded the fast appliance rule, "new products in these short-cycle product classes have not entered the market at this time." 87 FR 2673, 2683. Because there were no such appliances, they did not create the alleged problem of "unlimited energy and water use."

DoE has also changed product classes to exclude products that had previously been within a product class. For instance, when DoE excluded incandescent reflector lamps from the definition of general service lamps. 82 FR 7324 (2017). Furthermore, as explained in Part II

below, DoE claims there is a direct conflict in the statute, but that conflict can easily be harmonized by interpreting a new product class as not "amending" a standard. Even assuming, for the sake of argument, that such a harmonization were not the best reading, the harmonious-reading canon provides that a reasonable interpretation must be preferred to keep the statute consistent rather than contradictory.

In short, DoE's argument is incompatible with the statutory definition of "energy conservation standard" in 42 U.S.C. § 6291(6); it ignores the statutory distinction between an "amendment" and "no standard" in 42 U.S.C. 6295(p)(1); it is contrary to its own definition requiring formal amendment (rather than effective amendment); and it is inconsistent with the history of DoE's creation of product classes without standards. Additionally, DoE's own argument on statutory conflict, as explained in Section II, must be harmonized by interpreting the creation of a new class as not amending a standard.

II. DoE's Argument Cannot Be Squared With the Express Statutory Language That Allows "Lower" Standards

DoE also claims the prior rules were unlawful because it violated what it calls the "anti-rollback" provision (42 U.S.C. 6295(o)(1)). To reach this conclusion, DoE relies on a dubious interpretive claim: namely, that Congress in 1987 *sub silentio* effectively abolished the prior 1978 statutory language. DoE's claim is flawed, because that statutory language was also included in the same 1987 statute as

section (o)(q), and the language can easily be harmonized without conflict.

The purpose of the anti-rollback provision, as acknowledged by DoE, was "to maintain a climate of relative stability with respect to future planning by all interested parties." 87 FR 2673, 2679 (citing House Report 100-11 (Mar. 3, 1987)).

DoE said it agreed with multiple commenters in the instant proceeding. However, the nature of this agreement is mysterious: DoE never explains which commenters' statutory interpretations it was agreeing with, many of which conflict with one another. All DoE says on this question is that the prior rules did not "adequately consider" 42 U.S.C. 6295(o)(1). The prior rules both had entire sections devoted to considering 42 U.S.C. 6295(o)(1) (section III.B in both rules), and the instant rule never explains why such consideration was "inadequate." Such attempts at retroactive justification are not generally permitted.

Furthermore, the arguments and interpretations of these commenters are defective—not only because they conflict with one another, but also because they conflict with express statutory language.

The provision which authorizes the creation of new product classes specifies that:

> A rule prescribing an energy conservation standard for a [new] type (or class) of covered products shall specify a level of energy use or efficiency higher *or lower* than that which

> applies (or would apply) for such type (or class) for any group of covered products.

42 U.S.C. 6295(q)(1) (emphasis added).

Two words here are key: "or lower." The statute expressly allows for the creation of lower (energy use or efficiency) standards for new classes of products. Interpreting the "anti-rollback provision" as a restraint in this context misunderstands the scope of that provision, because the surrounding text shows that the provision does not apply in the context of the creation of new classes or subclasses. Note the pervasiveness of the phrase "or lower": that phrase isn't a one-off – rather, it is used repeatedly throughout subsection (q):

- 42 U.S.C. 6295(q)(1)(B)(paragraph 1): "have a capacity or other performance-related feature which other products within such type (or class) do not have and such feature justifies a higher *or lower* standard from that which applies (or will apply) to other products within such type (or class)."
- 42 U.S.C. 6295(q)(1)(B)(paragraph 2): "In making a determination under this paragraph concerning whether a performance-related feature justifies the establishment of a higher *or lower* standard, the Secretary shall consider such factors as the utility to the consumer of such a feature, and such other factors as the Secretary deems appropriate."

- 42 U.S.C. 6295(q)(2): "Any rule prescribing a higher *or lower* level of energy use or efficiency under paragraph (1) shall include an explanation of the basis on which such higher *or lower* level was established."

According to the commenters that DoE agreed with, this explicit statutory language authorizing what the prior rules did doesn't mean anything. For instance, the Natural Resources Defense Council, Sierra Club, and Earthjustice—parties which DoE said it "agrees with"—claim that:

> As enacted in 1978, the product class provision might have been reasonably interpreted to allow for the weakening of existing standards. However, when Congress imposed the anti-backsliding provision on DOE in 1987 and made conforming changes to the product class provision, that amendment altered the degree of discretion conferred in the product class provision.

87 FR 2673, 2679.

The commenters' argument (with which DoE apparently agreed) is that Congress failed to properly amend a number of statutory provisions from 1978 containing the phrase "or lower"—and that the newer 1987 language ultimately invalidated those provisions. This argument faces a heavy burden:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "to give effect to both." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). A party seeking to suggest that two

> statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "a clearly expressed congressional intention" that such a result should follow. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995). The intention must be "clear and manifest." *Morton*, *supra*, at 551. And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452, 453 (1988).

Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

Adoption of the commenters' argument would make for an uphill battle for DoE, even if the 1987 statute had only inserted that new provision into the existing statute. The argument that some kind of scrivener's error had occurred, which relies on the theory that Congress just didn't realize that parts of the older provisions were directly contrary, is highly disfavored without very strong evidence. But Congress did more than modify the existing language. Rather, Congress struck the entire section, and then it inserted the very language DoE and its commenters insist are in conflict with 42 U.S.C. 6295(q)(1) (including the "or lower" part) into the 1987 statute. The so-called "anti-rollback" provision was at 101 Stat. 114 (1987), while the "or lower" language was two pages later at 101 Stat. 116 (1987).

Because the same statute of Congress contained both provisions, literally two pages apart, this Court should attempt to harmonize those

provisions into a coherent whole. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

Harmonization is accomplished easily if the court views the creation of a new product class as distinct from "amending" a standard. Under this view, the standard for any given product class can only become higher or more stringent (thus encouraging more efficiency) over time. But products with useful features that require additional energy or a different type of energy can be segmented into a separate product class with its own standard that is appropriate for those features (thus preserving consumer choice). This harmonizes both provisions 42 U.S.C. 6295(q)(1) and (o)(1) without any conflict.

III. DoE's Failure to Consider Reasonable Alternatives Was Arbitrary and Capricious

CEI's original petition stated, "We are not proposing specific energy and water requirements for this new product class, in the belief that these details can be determined during the course of the rulemaking." CEI, Petition for Rulemaking, 83 FR 17773, 17771 (March 21, 2018). The use of the phrase "the rulemaking" rested on the expectation of a single rulemaking that would establish both the class of products and the standard for that class.

DoE decided to grant the 2018 petition but do so in two separate rulemakings. In our view, DoE had the power to create the class with the intention of properly establishing a standard for that class shortly thereafter. If DoE had failed to start the process to establish such a standard with reasonable speed—even though it had said that it would—there would likely be litigation to compel the agency to do so. See, e.g., *Natural Resources Defense Council v. Brouillette*, Case No. 20-cv-09127 (filed Oct. 30, 2020).

"[W]hen an agency rescinds a prior policy its reasoned analysis must consider the 'alternative[s]' that are 'within the ambit of the existing [policy].'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020). Even assuming that DoE was correct that the process used by the prior administration was incorrect or unlawful, it must at least consider reasonable alternatives to just abolishing the existing policy. One of those reasonable alternatives would be to follow what DoE now claims is the proper process to create such a new class of products.

According to the agency, "DOE is not contending in this rulemaking the validity of the determinations made about whether short cycles provide a 'performance-related feature' and 'utility.'" 87 FR 2673, 2682. This is the sole factor which Congress required the Secretary to consider when creating a new product class.

And yet despite the obvious popularity and uncontested utility of a feature that allows faster cycles, DoE has chosen not to restart the process for creating product classes that allow the inclusion of that feature. DoE admits that it has the power to do so, writing that "While DOE could propose new standards for short-cycle products—as certain commenters suggested—DOE is declining to do so at this time." 87 FR 2673, 2683. DoE goes on to provide three reasons DoE reached this decision:

> (1) The time and resources that it would entail to develop these new standards in relation to other obligations of the program,
>
> (2) the lack of presently-available data that would be necessary to analyze the short-cycle product classes and establish new standards for these class, and
>
> (3) the absence of new products on the market that would fall within these new product classes.

Id.

These are not sufficiently reasonable justifications for DoE's decision. DoE recognized that the lack of new products on the market are due to the administration's own actions in announcing that such products would soon be made illegal. 87 FR 2673, 2683 (lack of such products in the market "due to uncertainty in the market about these product classes and energy conservation standards.").

Of course it takes time and resources for DoE to follow Congress's instructions and to develop the data necessary for reasoned analysis,

but that is inherent in all actions agencies take. If that alone were sufficient justification, the agency could reject any alternative it didn't like without further explanation, "but cheapness alone cannot save an arbitrary agency policy." *Judulang v. Holder*, 565 U.S. 42, 64 (2011). In *Judulang*, the Supreme Court rejected a claim almost identical to DoE's: ultimately, the fact that it takes an agency longer to do its job than not to do its job isn't an excuse not to do it. *Id.*

When DoE failed to evaluate the new classes it had previously adopted, using the process that DoE now says is required, its behavior bore remarkable similarities to another agency's disfavored conduct in another case: when the FDA ignored a marketing plan in *Wages & White Lion Invs., L.L.C. v. United States Food & Drug Admin.*, 16 F.4th 1130 (5th Cir. 2021). In that case, the FDA said it didn't consider the marketing plan "for the sake of efficiency." *Id.* at 1137. In other words, FDA didn't think it was worth the agency's time. But this Court held that the agency's excuse "is no substitute for 'reasoned decisionmaking.'" *Id.* An agency should expect no deference if it simply declines to spend the time needed to perform appropriate analysis. *Id.* That excuse, this Court found, is "conclusory, unsupported, and thus wholly insufficient." *Id.*

DoE's failure to consider this reasonable regulatory alternative because it lacks the time to do so is arbitrary and impermissible.

CONCLUSION

This Court should grant the petition for review and set aside the repeal of the faster appliance rules as arbitrary and contrary to law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6181 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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I certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system which will send notice of such filing to all registered CM/ECF users.

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