

ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1030; 23-1285; 23-1337

IN THE
United States Court of Appeals
for the District of Columbia Circuit

AMERICAN GAS ASSOCIATION, *et al.*,

Petitioners,

– v. –

U.S. DEPARTMENT OF ENERGY, *et al.*,

Respondents.

On Petitions for Review of Final Rules of the U.S. Department of Energy

**BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW
YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN
SUPPORT OF RESPONDENTS**

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CIRCUIT RULE 28(A)(1) STATEMENT

As required by Circuit Rule 28(a)(1), counsel for the Institute for Policy Integrity at New York University School of Law certifies as follows:

- (1) All parties, amici, and intervenors appearing in this case are listed in Respondents' brief.
- (2) References to the final agency actions under review and related and consolidated cases appear in Respondents' brief.

RULE 26.1 DISCLOSURE STATEMENT

The Institute for Policy Integrity (Policy Integrity) is a nonpartisan, not-for-profit organization at New York University School of Law.* No publicly held entity owns an interest in Policy Integrity. Policy Integrity does not have any members who have issued shares or debt securities to the public.

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GLOSSARY OF ACRONYMS & ABBREVIATIONS

Pursuant to Circuit Rule 28(a)(3), the following is a glossary of acronyms and abbreviations used in this brief:

Base Case	DOE’s model of consumers’ baseline appliance efficiency in the no-action scenario with no new rules
Commercial Water Heaters Rule	<i>Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment</i> , 88 Fed. Reg. 69,686 (Oct. 6, 2023)
Consumer Furnaces Rule	<i>Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces</i> , 88 Fed. Reg. 87,502 (Dec. 18, 2023)
DOE	Department of Energy
DOT	Department of Transportation
Energy-Efficiency Gap	Phenomenon wherein consumers frequently fail to purchase efficient products despite long-term savings that more than offset upfront costs
EPA	Environmental Protection Agency
EPCA	Energy Policy Conservation Act
the Rules	Commercial Water Heaters Rule and Consumer Furnaces Rule, collectively
Working Group	Interagency Working Group on the Social Cost of Greenhouse Gases

INTEREST OF *AMICUS CURIAE* & AUTHORITY TO FILE

The Institute for Policy Integrity at New York University School of Law (Policy Integrity) is a nonpartisan, not-for-profit think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.¹

Policy Integrity publishes scholarship on the use of economic analysis in agency decisionmaking, including on cost-benefit analysis of federal energy and environmental regulation. Policy Integrity submitted comments in each administrative proceeding below on the proper application of the Energy Policy and Conservation Act (EPCA) and the economic analysis conducted under that statute. *E.g.*, Policy Integrity, Comments on the Proposed Interpretive Rule (Oct. 12, 2021) (EERE-2018-BT-STD-0018-0145); Policy Integrity et al., Comments on Monetizing Greenhouse Gas Emissions in Proposed Energy Conservation Standards for Commercial Water Heating Equipment (July 25, 2022) (EERE-2021-BT-STD-0027-0019). And Policy Integrity has filed *amicus*

¹ Per Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief wholly or partly, and no person contributed money intended to fund its preparation or submission.

curiae briefs in prior challenges to energy-efficiency standards from the Department of Energy (DOE) and other federal agencies, focusing on such issues as the energy-efficiency gap and the consideration of climate impacts. *E.g.*, Brief of Pol’y Integrity as Amicus Curiae in Support of Respondents, *Zero Zone, Inc. v. U.S. Dep’t of Energy*, 832 F.3d 654, 677 (7th Cir. 2016).

Policy Integrity’s expertise in energy and administrative law, especially regarding economic analysis, provides a unique perspective on this case. Policy Integrity submits this *amicus curiae* brief to address Joint Petitioners’ arguments regarding DOE’s economic justifications for Energy Conservation Program: Energy Conservation Standards for Commercial Water Heating Equipment, 88 Fed. Reg. 69,686 (Oct. 6, 2023) (the Commercial Water Heaters Rule), and Energy Conservation Program: Energy Conservation Standards for Consumer Furnaces, 88 Fed. Reg. 87,502 (Dec. 18, 2023) (the Consumer Furnaces Rule) (collectively, the Rules). *See* Opening Br. 72–100.

No party objects to the filing of this brief: Respondents and Intervenors consent, and Petitioners take no position.

SUMMARY OF ARGUMENT

Petitioners challenge DOE’s findings that its Rules were economically justified. In response, this brief supports DOE’s economic analyses and explains how Petitioners’ arguments overlook DOE’s sound assumptions and EPCA’s statutory framework.

I. Petitioners barely acknowledge the market failures supporting DOE’s modeling of baseline appliance efficiency (i.e., the “base case”), but those market failures are well documented. DOE relied on peer-reviewed economic analysis and literature establishing the “energy-efficiency gap”—a phenomenon whereby many consumers fail to purchase (and producers under-supply) energy-efficient products offering long-term cost savings that more than offset any additional upfront costs. Relevant market failures, which DOE’s Rules discuss in detail and with specific evidence, include principal-agent problems, incomplete and asymmetrical information, salience, status-quo bias, loss aversion, myopia, short-termism, and first-mover disadvantages. These market failures affect the purchasing decisions not just of individual consumers and households, but also both institutional and commercial consumers.

DOE's modeling approach reflects the complexities of accounting for consumer choices in markets where the energy-efficiency gap exists.

II. Petitioners' claim that DOE cannot consider any benefits or costs resulting from consumers' fuel switching. But that reading conflicts with EPCA's text and DOE's prior practice.

III. The States of Tennessee et al. (State Amici) contend that DOE arbitrarily valued climate benefits in its economic analysis. This argument is both irrelevant and unpersuasive. In fact, DOE relied on widely-used and well-supported valuations of climate impacts.

ARGUMENT

I. Market Failures Support DOE's Economic Analysis.

Petitioners contend that assigning consumers base-case efficiency levels according to probabilities drawn from historical data, as DOE did here, fails to “model[] the real-world more accurately than assuming consumers tend to act in their best interests.” Opening Br. 74. But ample evidence demonstrates that consumers frequently fail to “act in their best interests” when it comes to energy efficiency—a phenomenon economists call the “energy-efficiency gap” or “energy paradox.” Given that phenomenon, DOE reasonably modeled consumer behavior.

A. Well-established market failures, collectively known as the “energy-efficiency gap,” affect consumers’ appliance purchases.

Across a broad range of appliances and equipment—from lightbulbs and cars to the heating appliances at the center of this litigation—both individual and commercial consumers frequently decline to purchase more efficient products even when the present-day value of the products’ long-term energy savings would more than offset their additional upfront costs. This phenomenon is widely documented and explained in the economic literature as a group of market failures collectively known as the “energy-efficiency gap” or the “energy paradox.” *See* 88 Fed. Reg. at 87,577–79 nn.182–200 (citing economic literature using these and similar terms).

Respondents highlight several “particularly pernicious” market failures that explain why, in the absence of adequate efficiency standards, consumers will not select the economically optimal appliance. Resp’ts Br. 55. But their brief recounts only the tip of the iceberg of scholarship on this subject. The Consumer Furnaces Rule and Commercial Water Heater Rule provide extensive additional detail and

demonstrate how DOE’s approach to modeling consumer behavior in its base-case scenarios is well-grounded in the economic literature.

i. Nobel Laureate Richard Thaler’s insights on information salience and bounded rationality apply to furnaces and water heaters.

Respondents explain that a “typical consumer” of furnaces or water heaters “has neither the expertise nor the time to review information about . . . price trends, or [a] host of other variables Instead, consumers generally rely on the appliances recommended by contractors, who typically prefer to install appliances that are in stock and with which they are familiar.” Resp’ts Br. 54. The Rules elaborate further on the well-regarded economics literature underpinning this statement.

“Imperfect information,” as the Rules explain, affects consumers in several ways, including an average predisposition across consumers to “underestimate the energy use of large energy-intensive appliances.” 88 Fed. Reg. at 87,577 (citing, e.g., Davis and Metcalf (2016) and Attari et al. (2010)); *see also id.* at 69,759. The Rules cite Nobel Laureate Richard Thaler’s work on how the distortionary effects of “information salience” and “other forms of bounded rationality” are “strongest when the decisions are complex and infrequent [and] when feedback on the

decision is muted and slow.” *Id.* at 69,758; *id.* at 87,577. Those circumstances precisely apply to appliances like furnaces and water heaters, which consumers typically purchase no more than once every two decades, and for which changes in operating costs may not become “fully apparent” for “multiple billing cycles,” *id.* at 69,758, or until the appliance has been used for “at least one full heating season,” *id.* at 87,577. In other words, “the very infrequent nature of furnace replacements impact[s] information transparency with respect to costs.” *id.* at 87,585 (agreeing with public comments).

ii. Mismatched principal-agent incentives affect the purchase of furnaces and water heaters.

Respondents repeatedly explain that landlords, builders, and third parties not responsible for paying energy bills tend to select appliances with lower initial costs but higher long-term expenses. Resp’ts Br. 14, 20, 55. In the economics literature, this widely recognized dynamic is known as the “split-incentive or principal-agent problem.” 88 Fed. Reg. at 87,577. The Rules cite extensive evidence of this dynamic. *Id.* at 69,758–59; *id.* at 87,577–78 (citing, e.g., Blum and Sathaye (2010) on the principal-agent problem in commercial buildings). Notably, landlord-renter dynamics make it especially difficult for low-income households,

which rent rather than own at disproportionate rates, to benefit from the long-term savings of energy-efficient appliances. *Id.* at 87,577.

iii. Emergency replacements exacerbate information asymmetries and status-quo bias.

Emergency replacement situations, Respondents note, exacerbate both consumers' tendency to focus mostly on initial costs, Resp'ts Br. 14, and their limited time to conduct "an exhaustive review of all variables," *id.* at 54, with many consumers thus defaulting to "like-for-like" replacements (i.e., installing "a similar or identical product"), *id.* at 66. That explanation draws on multiple market failures, including information asymmetries and status-quo bias. *See* 88 Fed. Reg. at 87,577.

In addition to consumers defaulting during replacements to their pre-existing appliance model, a similar status-quo bias among contractors and retailers can affect purchasing choices. *Id.* (noting the strong bias toward like-for-like replacements despite the technical availability on the market of a full range of options). Urgency during emergency replacements will steer consumers toward models that are in stock locally, and status-quo bias can cause retailers to stock the most efficient models at only a few locations, given lower historical sales volumes for such models. *See* Hunt Alcott & Richard Sweeney, *The Role*

of Sales Agents in Information Disclosure: Evidence from a Field Experiment, Nat'l Bur. of Econ. Res. Working Paper 20048 at 9–10 (2014) (on water heater purchases).

iv. Loss aversion and myopia compound consumers' undervaluation of long-term energy savings.

Additional market failures further explain why consumers focus more on upfront costs and undervalue long-term energy savings. “Loss aversion,” 88 Fed. Reg. at 69,759, 87,577 (citing work by Nobel Laureate Thaler among others), is the widely described behavioral pattern in which individuals place greater weight on costs compared to gains of an equivalent monetary value. *Id.* at 69,759 n.106; *id.* at 87,577 n.182 (citing Klemick et al. (2015)’s evidence of loss aversion affecting otherwise profit-maximizing firms). And myopia can occur when consumers’ decision-making heuristics or rules of thumb tend to underemphasize effects occurring further into the future. Indeed, the Rules cite one study that found “a significant subset of consumers that appear to purchase appliances *without taking into account their energy efficiency and operating costs at all.*” *Id.* (emphasis added) (citing Houde (2018)).

v. Market failures affect institutional consumers of commercial water heaters and furnaces—like libraries, churches, and courthouses.

The Rules also refute the mistaken assumption that all commercial consumers—due to their profit motives and trained managers—are immune to the market failures that affect individual consumers. 88 Fed. Reg. at 87,577–78; *id.* at 68,758–59. To begin with, many entities without a profit motive—including government facilities (like post offices, fire stations, libraries, and courthouses), nonprofit hospitals, public schools and dormitories, and places of worship—purchase “commercial” appliances. DOE, *Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Commercial Water Heating Equipment*, 7-5-7-7 (2023).² Even if profit motives could partially mitigate certain market failures (but see *infra* on how commercial consumers experience short-termism), profit-maximization is less likely to motivate these institutional consumers, and they remain vulnerable to a variety of market failures.

² Available at <https://www.regulations.gov/document/EERE-2021-BT-STD-0027-0038> (<https://perma.cc/5TLK-FQ7Y>).

vi. Commercial consumers face market failures like short-termism and first-mover disadvantages.

Even with a profit motive, commercial consumers of all stripes routinely fall into the energy-efficiency gap. For example, principal-agent failures affect commercial tenants of third-party landlords as well as businesses with different departments responsible for capital expenditures (like equipment purchases) versus operating expenses (like energy bills). 88 Fed. Reg. at 87,578 (citing research on the principal-agent problem in commercial buildings); *id.* at 69,758–59. Additionally, a common variety of myopia in the business-world is “short-termism,” in which excessive focus on shareholder expectations or other incentives for short-term gains can result in near-term cost-cutting at the expense of long-term savings. 88 Fed. Reg. at 87,578 (citing, among others, DeCanio’s work on connections between underinvestment in energy efficiency and short-termism and organizational structure); *id.* at 68,759. Indeed, “[m]any companies require a payback” on investments to be achieved within as little as “one to two years.” Respt’s Br. 56; 88 Fed. Reg. at 87,579 (citing Andersen and Newell’s work on energy audits showing internal implicit requirements of one-to-two-year paybacks); *id.* at 68,760.

Commercial consumers face additional variations of behavioral failures. Information asymmetries, including incomplete information about returns to investments in energy efficiency, can bias lenders and real-estate financiers against funding investments in new energy-efficient technologies. *Id.* at 87,578 (citing a 300-page, DOE-commissioned report called “Who pays and who decides: The structure and operation of the commercial building market”); *id.* at 68,759. Such difficulties financing new, more efficient capital purchases can be exacerbated by the first-mover disadvantage. Namely, the first firm to install a new energy-efficiency technology bears all the costs but generates valuable information on cost-savings, allowing others to benefit from that information by following suit without bearing any of the upfront risks of the first actor. 88 Fed. Reg. at 87,578–79. The result is an inefficient initial underinvestment in new energy technologies. *Id.*

In the end, the businesses and institutions that buy commercial water heaters or furnaces are run by individuals, who remain fallible and subject to incomplete information and inattention. As the Rules note, “[e]ven factors as simple as unmotivated staff or lack of priority-setting . . . can have a sizable effect on the likelihood that an energy-efficient

investment will be undertaken.” *Id.* at 87,578 (citing multiple papers including studies on commercial buildings’ energy use); *id.* at 68,759.

Overall, the vast economic literature cited in the Rules refutes Petitioners’ contention that consumers always “act in their best interests” when making energy purchases.

B. DOE’s base case reflects real-world market failures, consistent with best economic practices.

Given the myriad market failures above, many consumers in the base case (i.e., the no-action scenario without new standards) will fail to purchase more efficient furnaces or water heaters even when it would be economically beneficial to invest in greater efficiency. DOE thus needed a methodology “reflect[ing] the full range of consumer behaviors” in the appliance markets, 88 Fed. Reg. at 87,583. That meant assigning consumers realistic probabilities of purchasing either the economically optimal level of efficiency, a lower efficiency level than optimal (reflecting market failures), or a higher efficiency level than economic self-interest

alone would predict (reflecting, for instance, some voluntary internalization of environmental externalities). *Id.* at 87,580.

To achieve that result, DOE appropriately used the best available data to assign efficiency levels across a nationally representative sample of appliance users. DOE used historical shipment data and real-world factors like state-level market share to estimate probability distributions for how average consumers would purchase furnaces or water heaters in the base-case scenarios. Resp'ts Br. 13, 48–52. DOE also carefully ruled out, when possible, correlations between efficiency status and other observable consumer characteristics. 88 Fed. Reg. at 87,576. As Respondents explain, the probabilities used are not truly “random,” as they reflect historical data and real-world factors. Resp'ts Br. 61. This methodology aligns with how DOE and other federal agencies have approached similar efficiency rules in the past—and with standard economic practice.

For many years and under both Republican and Democratic administrations, DOE has used historical data to generate probability distributions to represent consumer choices about energy efficiency and to assign base-case levels accordingly. For example, in January 2020, the

Trump Administration published final standards for portable air conditioners, for which DOE used sample data to “derive[] a distribution of the ratio of fan-only mode hours to cooling-mode hours, and used this distribution to randomly assign a ratio to each of the sample households.” Energy Conservation Program: Energy Conservation Standards for Portable Air Conditioners, 85 Fed. Reg. 1409 (Jan. 10, 2020). In that same rule’s technical support document, which DOE prepared several years earlier during the Obama Administration, DOE further explained that, “[u]sing the projected distribution of efficiencies for portable ACs, DOE randomly assigned a product efficiency to each household and [] commercial user.” DOE, *Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Portable Air Conditioners*, 8-28 (2016).³ Under the Biden Administration, DOE built on that same technique and applied the best available data to assign base-case efficiency levels in these Rules.

Other government models similarly adopt assumptions and methods to reflect relevant market failures. For example, as DOE

³ Available at <http://regulations.gov/document/EERE-2013-BT-STD-0033-0047> (<https://perma.cc/JRW3-W3DJ>).

explains, the Energy Information Administration’s energy-use model also reflects market failures, such as assuming very fast payback periods (i.e., “very high discount rates” reflecting myopia) and a strong tendency to stick with the same type of technology when replacing equipment, even if other options offer higher net economic benefits (i.e., a status-quo bias). 88 Fed. Reg. at 68,760. Other agencies have also ruled out strictly matching base-case consumers to the economically rational efficiency level predicted by their energy-use patterns alone. For example, the Department of Transportation (DOT) acknowledges that the model it uses to assess vehicle fuel-efficiency standards cannot perfectly assign more-efficient cars to purchasers who anticipate driving more and less-efficient cars to purchasers who anticipate driving less; instead, DOT’s model “is necessarily based on empirical estimates of average vehicle use.” DOT, *Technical Support Document: Corporate Average Fuel Economy Standards for Passenger Cars and Light Trucks for Model Years 2027 and Beyond*, 6-5–6-6 (2024)⁴; accord DOT & EPA, *Final Regulatory Impact Analysis: The Safer Affordable Fuel-Efficient (SAFE) Vehicles*

⁴ Available at https://www.nhtsa.gov/sites/nhtsa.gov/files/2024-06/CAFE-2027-2031-HDPUV-2030-2035_Final-Technical-Support-Document.pdf (<https://perma.cc/PS9Y-JDKS>).

Rule for Model Year 2021-2026 Passenger Cars and Light Trucks, 1813–14 (2020).⁵

DOE’s methodology also parallels what the econometrics literature calls “random utility models.” *E.g.*, Daniel McFadden, *Conditional Logit Analysis of Qualitative Choice Behavior* (1972); Kenneth E. Train, *Discrete Choice Methods with Simulation* (2009) (overviewing random utility models). Like DOE’s approach, random utility models assume that both observed economic constraints and unobservable consumer preferences may influence consumer choices. Randomness in consumer choice arises from “unobserved variations in tastes and in the attributes of alternatives, and errors of perception and optimization by the consumer,” which economists capture with a random variable. Daniel McFadden, *Econometric Models for Probabilistic Choice Among Products*, 53 J. Business S13, S15 (1980). Economists frequently use random utility models to estimate consumers’ energy-efficiency choices. *E.g.*, Sébastien Houde, *How Consumers Respond to Product Certification and the Value of Energy Information*, 49 RAND J. Econ. 453 (2018); see 88 Fed. Reg. at

⁵ Available at https://www.nhtsa.gov/sites/nhtsa.gov/files/documents/final_safe_fria_web_version_200701.pdf (<https://perma.cc/SBM4-D4Q6>).

87,577 n.186 (citing Houde (2018)). For example, in the Environmental Protection Agency’s (EPA’s) latest analysis of its emissions standards for light-duty vehicles (which affect vehicle fuel-efficiency), EPA explains that it chose a “random utility discrete choice model[],” which is “the dominant paradigm for modeling [consumers’] automotive demand,” based on a review of “over 200 automotive demand model studies in the scientific literature and government reports.” EPA, *Multi-Pollutant Emissions Standards for Model Years 2027 and Later Light-Duty and Medium-Duty Vehicles: Regulatory Impact Analysis* 4-7 (2024).⁶

In short, DOE’s approach to assigning base-case efficiency levels is consistent with best economic practices.

II. EPCA Allows DOE To Consider Fuel Switching In Its Economic Analysis.

The Consumer Furnaces Rule⁷ is likely to cause some consumers to shift from gas to electric appliances, generating additional consumer,

⁶ Available at <https://www.epa.gov/system/files/documents/2024-03/420r24004.pdf> (<https://perma.cc/L96U-E3HT>). EPA cites Jeremy Michalek et al., *A Review of Automotive Demand Models for Informing Public Policy* (2023) (EPA-HQ-OAR-2022-0829-0705), available at https://downloads.regulations.gov/EPA-HQ-OAR-2022-0829-0705/attachment_5.pdf (<https://perma.cc/3QWG-9PCJ>).

⁷ DOE determined that the Commercial Water Heating Rule was unlikely to induce fuel switching and thus “did not explicitly include fuel or

health, and environmental benefits. Although DOE found that the shift would be “small,” it conducted an alternative analysis without any fuel switching⁸ and concluded “the rule would be economically justified even” without fuel switching. 88 Fed. Reg. at 87,590. Petitioners nonetheless assert that DOE unlawfully assessed fuel switching.

This argument has no bearing here given DOE’s non-reliance and counterfactual analysis. In any event, it is incorrect for at least three reasons. First, EPCA authorizes DOE to adopt efficiency standards that may result in fuel switching. Second, several economic-justification factors in 42 U.S.C. § 6295 invite consideration of fuel switching. Third, DOE’s incorporation of fuel-switching effects aligns with standard agency practice, relevant caselaw, and DOE’s past practice.

A. EPCA focuses on energy efficiency and only one obsolete provision explicitly addresses fuel switching.

EPCA exudes broad support for DOE’s consideration of all energy savings, including any that may result from fuel switching. The statute’s

technology switching” from the rule in its economic analysis. 88 Fed. Reg. at 69,771.

⁸ DOE’s approach of conducting “sensitivity analysis” around different levels of fuel switching, including “upper and lower bounds,” aligns with economic best practices. Office of Mgmt. & Budget, Circular A-4: Regulatory Analysis 41, 45 (2003) (Circular A-4).

purposes, after all, include to “conserve energy supplies” and “improve[] energy efficiency.” 42 U.S.C. §§ 6201(4)–(5). The statute directs DOE to set standards that achieve “the maximum improvement in energy efficiency” that “is technologically feasible and economically justified”—without any mention of fuel switching. *Id.* § 6295(o)(2)(A). Given EPCA’s focus on energy conservation, it would be extremely odd for it to tacitly require DOE to disregard certain energy-saving effects just because they happen to result from fuel switching.

Petitioners point to 42 U.S.C. § 6295(f)(1)(B)(iii), Opening Br. 67, but that provision did one thing and one thing only: Limit “*significant*” gas-to-electric switching in DOE’s *initial* standards for *small furnaces*, which the agency had to establish by 1989. If anything, that narrow and now obsolete provision cuts against Petitioners’ argument, demonstrating that even “significant” fuel switching is not prohibited for *other* EPCA standards. In other words, “where Congress includes particular language in one section of a statute”—like a prohibition on significant fuel-switching for a single set of standards—“but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.”

Bates v. United States, 522 U.S. 23, 29–30 (1997) (internal quotation marks omitted). Moreover, the provision Petitioners cite is consistent with EPCA’s fuel-conservation purpose because it prohibited only “an *inefficient* [i.e., energy-increasing] shift” to “electric *resistance* heating,” not an “efficient” shift to electric heat pumps. 88 Fed. Reg. at 87,591 (emphases in original).

B. EPCA’s economic-justification factors invite consideration of energy conservation resulting from fuel switching.

Petitioners seeks support in the economic-justification factors in 42 U.S.C § 6295(o)(2)(B)(i), but find little. In fact, those factors support consideration of energy-conservation impacts from fuel switching.

Respondents note, for example, that the factor requiring consideration of “the total projected amount of energy[] . . . savings likely to result directly from the imposition of the standard” permits DOE to consider the effects of fuel switching. Resp’ts Br. 70 (citing 42 U.S.C. § 6295(o)(2)(B)(i)(III)). To elaborate, “direct” energy savings include net savings from changes in consumers’ appliance purchasing decisions, including switching to an appliance that consumes a different type of fuel. By comparison, an “indirect” energy effect (which this factor may

not necessarily capture) could include, for example, energy consumption effects caused by consumers taking the monetary savings generated by this efficiency standard and choosing to increase spending on completely distinct high-energy products (like buying new home entertainment systems). *See* 88 Fed. Reg. at 87,602 (discussing this kind of uncertain “indirect” energy rebound).

Additional statutory factors beyond Respondents’ citations point in the same direction. Notably, the sixth factor requires DOE to consider “the need for national energy . . . conservation.” 42 U.S.C. § 6295(o)(2)(B)(i)(VI). The U.S. Court of Appeals for the Seventh Circuit held that this factor “requires” DOE to consider “the expected reduction in environmental costs” resulting from energy-conservation standards. *Zero Zone, Inc. v. U.S. Dep’t of Energy*, 832 F.3d 654, 677 (7th Cir. 2016) (“[T]he expected reduction in environmental costs needs to be taken into account. We have no doubt that Congress intended that DOE have the authority under the EPCA to consider the reduction.”). DOE thus has authority to consider the emissions reductions resulting from fuel switching.

DOE also explained in the Consumer Furnaces Rule why a careful reading of the second statutory factor allows DOE to consider how fuel switching contributes to consumers' net savings. Section 6295(o)(2)(i)(II) directs DOE to consider "the savings in operating costs throughout the estimated average life of the covered product . . . compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the *covered products* which are likely to result from the imposition of the standard" (emphasis added). As DOE recognizes, the provision's "use of 'covered products' in the plural . . . suggests that DOE could consider covered products other than that subject to the standard." 88 Fed. Reg. at 87,551.

Taken together, these factors establish that DOE should broadly consider the energy-saving impacts of its standards, including those resulting from fuel switching.

C. DOE's inclusion of fuel switching in its economic analysis is consistent with standard agency practice and DOE's past practice.

Considering energy conservation resulting from fuel switching is consistent not only with EPCA, but also with prior agency practices.

When federal agencies conduct economic analysis, they normally aim to include all foreseeable regulatory impacts. The Office of Management and Budget’s *Circular A-4*, the longstanding federal guidance on conducting cost-benefit analysis, confirms this practice.⁹ Specifically, that guidance instructs agencies to “look beyond the direct benefits and direct costs of [their] rulemaking and consider any important ancillary benefits and countervailing risks.” *Circular A-4, supra*, at 26.¹⁰ Thus, whether fuel-switching effects are direct or indirect effects, agencies should fully consider them in their analyses.

This Court has also supported agency consideration of a wide range of regulatory impacts, including ancillary impacts. In one case, this Court permitted EPA “to consider potential co-benefits” from Clean Air Act

⁹ Formally, *Circular A-4* provides guidance for conducting the cost-benefit analysis of new rules that Executive Order 12,866 requires. *Circular A-4, supra*, at 1. However, agencies also look to *Circular A-4* more generally for guidance when performing economic analysis. *See, e.g.*, Secs. & Exch. Comm’n, Memorandum RE: Current Guidance on Economic Analysis in SEC Rulemakings 3–4 (Mar. 16, 2012).

¹⁰ In late 2023, after the publication of the Rules at stake in this litigation, the Office of Management and Budget released an updated *Circular A-4*. That update similarly instructs agencies to “look beyond the obvious benefits and costs of [their] regulation and consider any important additional benefits or costs, when feasible.” Office of Mgmt. & Budget, *Circular A-4* at 39 (2023).

pollution standards when statutory “text does not foreclose” such consideration “and doing so is consistent with the [statute’s] purpose.” *U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 625–26 (D.C. Cir. 2016) (emphasizing that EPA “was under no obligation to ignore the [statute’s] purpose in making a final decision on whether to exercise a discretionary authority”). In another, it faulted DOT for inadequately considering potential safety effects of its fuel-economy standards under EPCA—even though the statute is silent on safety effects. *Competitive Enter. Inst. v. Nat’l Highway Traffic Safety Admin.*, 956 F.2d 321 (D.C. Cir. 1992).

DOE’s consideration of fuel-switching impacts is also consistent with its own past practice. “DOE has analyzed potential changes in consumer behavior in a number of other rulemakings . . . [and] has analyzed the impacts of a potential standard on out-of-scope products as well as cross-elasticities between different product classes in other rulemakings.” 88 Fed. Reg. at 87,589. This consideration extends back decades. *E.g.*, Energy Conservation Standards for Water Heaters, 66 Fed. Reg. 4474, 4487 (Jan. 17, 2001) (accounting for fuel switching in the life-cycle cost and national-energy-savings analyses and explaining that

“DOE has taken fuel switching into account in reaching its final decision”).

Other agencies also account for relevant fuel-switching effects. In setting vehicle pollution and fuel-economy standards, for instance, DOT and EPA have traditionally considered the potential for standards to cause consumers to switch between cars of different fuel types and considered the resulting benefits and costs. *E.g.*, DOT & EPA, *Final Regulatory Impact Analysis: The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Year 2021–2026 Passenger Cars and Light Trucks* 2018 tbl.VIII-11 (2020) (concluding that standards would increase fleetwide electric vehicle sales to 7.9%, compared to 6.9% under a no-standards scenario).

III. DOE Properly Accounted For Climate Benefits.

State Amici contend that DOE erred in its economic analysis by using “misguided estimates” of climate impacts. State Amici Br. 7. This argument is not properly before this Court, because Petitioners did not

raise it.¹¹ Nonetheless, for context, this section explains why DOE properly assessed climate impacts.¹²

A. DOE’s approach to valuing climate impacts is well established.

The social cost of a greenhouse gas—calculated for carbon dioxide, methane, and nitrous oxide—reflects the estimated “monetary value of the net harm to society associated with a marginal increase in emissions” by one metric ton, “or the benefit of avoiding that increase.” 89 Fed. Reg. at 87,613.

Experts first developed these estimates in the 1990s, and federal agencies began to use them routinely after the U.S. Court of Appeals for

¹¹ The Rules explain that while DOE qualitatively considers the climate benefits of “emission reductions, and the estimated monetary value of the net health benefits of emissions reductions” in setting the standards, 88 Fed. Reg. at 87,640, DOE does not rely on the monetized value of climate benefits in setting the standards, *id.* at 87,616; *accord id.* at 69,815. Petitioners ignore that DOE may still *qualitatively* factor climate benefits into its decisions even if the *monetized* values “did not affect the rule.” Opening Br. 97–98 n.9.

¹² Another lawsuit pending before this Court—filed by many of the State Amici here—challenges EPA’s use of the same climate-damage estimates that DOE used. Brief for State Petitioners at 24–27, *Texas v. Env’t Prot. Agency*, D.C. Cir. Case No. 22-1031 (filed Nov. 3, 2022). Policy Integrity submitted an *amicus curiae* brief in that case with a more extensive rebuttal. Final Brief for the Institute for Policy Integrity at 18–34, *Texas v. Env’t Prot. Agency*, D.C. Cir. Case No. 22-1031 (filed Apr. 26, 2023).

the Ninth Circuit faulted a DOT vehicle fuel-efficiency rule for failing to value climate impacts. *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198–1203 (9th Cir. 2008). Under the George W. Bush Administration, EPA endorsed use of a global damage value that accounts for the full impacts caused by a unit of emissions “over hundreds of years.” EPA, *Technical Support Document on Benefits of Reducing GHG Emissions* 10 (2008); see also *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354, 44,414–16 (July 30, 2008) (endorsing a “global analysis”).

In 2009, President Obama convened an interagency working group (Working Group) to ensure that the federal government used consistent, rigorous values to estimate climate damages. That group, which includes DOE, released estimates in 2010, updated them in 2013 and 2016, and reaffirmed them in 2021. Interagency Working Grp., *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide* 2 (2021) (2021 TSD). The Working Group based these estimates, which were subject to public comment, on three widely used independent models. *Id.* at 2–3. All three models appeared in peer-reviewed economic journals;

one (the DICE model) earned William Nordhaus the Nobel Prize in Economics.¹³

DOE and other agencies have applied these valuations in dozens of rulemakings. Peter Howard & Jason A. Schwartz, *Think Global: International Reciprocity as Justification for a Global Social Cost of Carbon*, 42 Colum. J. Env't L. 203, 270–84 (2017) (listing uses through mid-2016). These prior applications include numerous DOE efficiency standards.¹⁴ *E.g.*, Energy Conservation Program: Energy Conservation Standards for Uninterruptible Power Supplies, 85 Fed. Reg. 1447, 1477 (Jan. 10, 2020) (finding the Working Group's estimates "well supported by the existing scientific and economic literature"); Energy Conservation Program: Energy Conservation Standards for Air Compressors, 85 Fed. Reg. 1504, 1565, 1580 (Jan. 10, 2020) (recognizing that Working Group's estimates were "developed over many years, using the best science available, and with input from the public" and extend out to 2300

¹³ William D. Nordhaus, The Nobel Prize, <https://perma.cc/385P-YV5H>.

¹⁴ During the Trump Administration, agencies frequently applied climate-damage values with higher discount rates and omitted all climate impacts originating outside U.S. borders. *See* Exec. Order No. 13,783 §§ 5(b)–(c), 82 Fed. Reg. 16,093 (Mar. 28, 2017). Estimates used under the Trump Administration otherwise followed the Working Group's approach, including its nearly 300-year time horizon.

“[b]ecause [carbon dioxide] emissions have a very long residence time in the atmosphere”).

The Seventh Circuit upheld DOE’s use of these climate-damage estimates in 2016, finding them consistent with EPCA and appropriate in time horizon and geographic scope. *Zero Zone, Inc. v. Dep’t of Energy*, 832 F.3d 654, 677–79 (7th Cir. 2016). The court held that “DOE ha[s] the authority under the EPCA to consider the reduction in” climate damages resulting from energy-efficiency standards. *Id.* at 677. The court found that it was “neither arbitrary nor capricious” for DOE to consider the “long-term effects on the environment” that will predictably result from greenhouse gas reductions occurring within the rule’s analytical time frame. *Id.* at 679. And the court found it was “reasonabl[e]” for DOE to value the “global” benefits of greenhouse gas reductions even though the rule’s other effects were mostly national in scope. *Id.*

B. State Amici’s objections to DOE’s approach fail.

This history demonstrates that, contrary to State Amici’s assertion, DOE did not use a “previously unheard-of analytical approach.” State Amici Br. 8–9. An analytical timeframe extending far into the future is consistent with the recommendations of the National Academies of

Sciences;¹⁵ the approaches of federal agencies under the George W. Bush, Obama, and Trump Administrations; and interagency guidance instructing that regulatory analysis “cover a period long enough to encompass all the important benefits and costs likely to result from the rule.” Circular A-4 (2003), *supra*, at 15; *see also* Working Grp., Response to Comments 29 (2015) (Response to Comments)¹⁶ (“[B]ecause of the long atmospheric lifetime of [carbon dioxide], using too short a time horizon could miss a significant fraction of damages[.]”). It is also comparable to prior regulations affecting other pollutants with long time horizons. *E.g.*, EPA, *Regulatory Impact Analysis: Protection of Stratospheric Ozone 7-2* (1988) (projecting impacts on cancer incidence from ultraviolet radiation through 2165).

Nor was DOE’s use of a global climate-damage estimate inappropriate. *Zero Zone*, 832 F.3d at 679 (concluding that “global effects

¹⁵ Nat’l Acad. of Sci., *Valuing Climate Damages: Updating Estimation of the Social Cost of Carbon Dioxide* (2017), available at <https://nap.nationalacademies.org/catalog/24651/valuing-climate-damages-updating-estimation-of-the-social-cost-of> (<https://perma.cc/VN4F-K6L2>).

¹⁶ Available at <https://obamawhitehouse.archives.gov/sites/default/files/omb/infoereg/scc-response-to-comments-final-july-2015.pdf> (<https://perma.cc/V423-9Q3B>).

are an appropriate consideration” under EPCA). As DOE explained, climate-change impacts that initially occur abroad will have both direct and indirect effects on U.S. citizens and residents and on U.S. physical and financial assets. These range from impacts to “investments located abroad [and] supply chains” to effects on “U.S. military assets . . . and political destabilization and global migration that can lead to adverse impacts on U.S. national security.” 88 Fed. Reg. at 87,614; *see also* Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Consumer Furnaces 14-3 (2023) (Consumer Furnaces TSD) (noting that “spillover pathways such as economic and political destabilization and global migration . . . can lead to adverse impacts on U.S. national security, public health, and humanitarian concern”).

Moreover, if the United States reduces its greenhouse gas emissions, foreign nations are more likely to reduce their own emissions, which in turn will benefit U.S. citizens and residents. Accordingly, DOE recognized that “assessing the benefits” of reducing domestic emissions “requires consideration of how those actions may affect mitigation activities by other countries.” 88 Fed. Reg. at 87,614; *see also* Consumer

Furnaces TSD, *supra*, at 14-3. Extensive economic scholarship supports this approach to valuing climate damages. *See* 2021 TSD, *supra*, at 16 (citing, *inter alia*, Robert E. Kopp & Bryan K. Mignone, *Circumspection, Reciprocity, and Optimal Carbon Prices*, 120 *Climatic Change* 831 (2013)). And agencies have considered reciprocity in similar contexts: For instance, when EPA began its program of stratospheric ozone regulation under the Reagan Administration, it “consider[ed] . . . other countries’ willingness to take regulatory action” in “deciding whether and how to regulate.” *Protection of Stratospheric Ozone*, 53 *Fed. Reg.* 30,566, 30,569 (Aug. 12, 1988).

Finally, State Amici’s argument that the Working Group values unlawfully bypassed public comment is baseless. The Working Group held a comment period and responded to comments. *See* *Response to Comments*, *supra*. Its estimates have also been subject to comment in many proceedings including the rules here. 88 *Fed. Reg.* at 69,785–87 (responding to comments); *id.* at 87,615–16 (same).

CONCLUSION

For the foregoing reasons, this Court should deny the petitions.

June 17, 2024

Respectfully submitted,

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¹⁷ Policy Integrity gratefully acknowledges Megan Chu and Sasha Kliger, students in New York University School of Law's Regulatory Policy Clinic, for assisting in the preparation of this brief.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 6044 words as counted by counsel’s word processing system, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June 2024, a true and correct copy of the foregoing Brief of the Institute for Policy Integrity at New York University School of Law as *Amicus Curiae* in Support of Respondents was filed with the Clerk of the United States Court of Appeals for the District of Columbia Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

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