**[ORAL ARGUMENT NOT SCHEDULED]**

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

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

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AMERICAN PUBLIC GAS ASSOCIATION,

Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY,

Respondent.

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On Petition for Review of Action by the U.S. Department of Energy

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# BRIEF FOR RESPONDENT

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

### A. Parties and Amici

Petitioners in these consolidated cases are the American Public Gas Association (20-1068), the Air-Conditioning, Heating, and Refrigeration Institute (20-1072), and Spire Inc. and Spire Missouri Inc. (20-1100). Respondent in each case is the United States Department of Energy. The American Gas Association has intervened in support of petitioners. The City of New York, the Commonwealth of Massachusetts, the Consumer Federation of America, the District of Columbia, the Massachusetts Union of Public Housing Tenants, the Natural Resources Defense Council, the Sierra Club, and the States of California, Illinois, Maine, Maryland, Minnesota, Nevada, New Jersey, New York, Oregon, and Vermont have intervened in support of respondent.

As of the date of this filing, no amicus curiae has appeared in these consolidated cases.

### B. Rulings Under Review

Petitioners seek review of the Department of Energy's final rule captioned Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020).

### C. Related Cases

These cases have not previously been before this Court or any other court. In *National Resources Defense Council, Inc. v. Perry*, Nos. 18-15380, -15475 (9th Cir.), the Ninth Circuit considered a challenge to the Department of Energy's failure to publish the final rule at issue in this case after it was publicly posted for error correction purposes. In that case, the Ninth Circuit held that publicly posting the rule for error correction purposes triggered a non-discretionary duty to publish, and ordered the Department of Energy to publish the rule. *National Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072, 1075 (9th Cir. 2019). Counsel for respondent are not aware of any other related cases.

*/s/ Jack Starcher*
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# TABLE OF CONTENTS

# TABLES OF AUTHORITIES

**Cases:** **Page(s)**

**Statutes:**



**Other Authorities:**

## GLOSSARY

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|---|---|
| Commercial boilers | Commercial packaged boilers |
| Department | Department of Energy |
| Industry group | American Society of Heating, Refrigerating, and Air-Conditioning Engineers |
| Process rule | Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment, 85 Fed. Reg. 8626 (Feb. 14, 2020) |
| Rule | Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020) |

## INTRODUCTION

Petitioners challenge a final rule issued by the Department of Energy (the Department) setting new, more stringent energy conservation standards for commercial packaged boilers, which are large boilers used to heat commercial spaces. In the course of setting those standards, the Department indicated—for the first time—that it interpreted the underlying statute as authorizing it to issue more stringent energy efficiency standards, even if those more stringent standards are not supported by clear and convincing evidence. That conclusion was out of step with the Department's views as expressed both before and after the final rule was issued, and is inconsistent with the text of the underlying statute, which authorizes the Department to impose more stringent energy efficiency standards only if it "determines … , supported by clear and convincing evidence, that adoption of" more stringent standards would "produce significant additional conservation of energy and [would be] technologically feasible and economically justified." 42 U.S.C. § 6313(a)(6)(A)(ii)(II).

Because the Department now believes that the final rule should have been subject to a clear and convincing evidence standard, the Department agrees with petitioners that the final rule should be vacated and remanded to the agency on that basis. If this Court vacates the final rule based on the Department's legal error, it need not reach petitioners' remaining challenges to various data and analysis underlying the final rule. On remand, the Department will engage in a new

rulemaking and may rely on different data and different methodologies in a way that would negate the challenges that petitioners now raise. In addition, the Department is currently engaged in a peer review process to evaluate the methodologies it uses in evaluating energy efficiency standards like the ones at issue here. The Department expects that process to be completed in early 2021, and would incorporate the results of that peer review on remand, potentially addressing some of the concerns petitioners raise regarding the Department's methodologies.

For these reasons, the Department asks this Court to vacate and remand the final rule on the basis that the Department incorrectly believed that it was not required to find that more stringent energy efficiency standards were supported by clear and convincing evidence.

## STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 42 U.S.C. §§ 6306(b) and 6316 over these petitions for review. The Department issued the final rule (Energy Conservation Program: Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020)), pursuant to its authority under 42 U.S.C. § 6313, and the rule was published in the Federal Register on January 10, 2020. Petitioners each filed a timely petition for review—the American Public Gas Association petitioned for review on March 9, 2020, and both Spire and the Air-Conditioning, Heating & Refrigeration Institute filed separate petitions for review on March 10, 2020.

## STATEMENT OF THE ISSUES

This petition for review arises out of a rulemaking under the Energy Policy and Conservation Act. The rule—Energy Conservation Standards for Commercial Packaged Boilers, 85 Fed. Reg. 1592 (Jan. 10, 2020)—amends energy efficiency standards for commercial packaged boilers, which are large boilers used to heat commercial spaces. The questions presented on this petition are:

1. Whether the Department erred in concluding that it was not required to find that its revised energy efficiency standards were supported by clear and convincing evidence.

2. Whether, assuming that clear and convincing evidence was required, the Department's analysis provides a sufficient basis to uphold the rule.

3. Whether the rule is otherwise arbitrary and capricious and unsupported by substantial evidence in light of alleged methodological errors.

## PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

## STATEMENT OF THE CASE

### A. Statutory Background

The Energy Policy and Conservation Act of 1975 establishes a variety of provisions designed to improve the energy efficiency of various categories of industrial equipment and entrusts the Department of Energy (Department) with implementing those provisions. *See* 42 U.S.C. § 6291, *et seq.* As relevant here, the

statute requires the Department to evaluate and set energy efficiency standards for commercial packaged boilers (commercial boilers). Commercial boilers are powered by oil or natural gas and generally serve buildings and facilities with central distribution systems that circulate the steam or hot water from the boiler to other parts of the building. Commercial boilers are widely used to heat commercial and multifamily buildings.

In setting efficiency standards for commercial boilers, the statute directs the Department to rely on efficiency standards set by a private industry group—the American Society of Heating, Refrigerating, and Air-Conditioning Engineers (the industry group). The statute directs the Department to adopt standards at the level promulgated by the industry group: Subparagraph (A) of § 6313(a)(6) provides that, if the industry group amends its standards, the Department must adopt those revised standards unless it "determines … , supported by clear and convincing evidence," that adopting more stringent standards would produce "significant additional conservation of energy and [would be] technologically feasible and economically justified." 42 U.S.C. § 6313(a)(6)(A)(ii)(II). Subparagraph (A) thus explicitly sets a "clear and convincing evidence" standard for a determination by the Department that more stringent efficiency levels are warranted.

Subparagraph (B) of § 6313(a)(6) provides that, if the Department "makes a determination described in subparagraph (A)(ii)(II)," it must engage in notice and comment rulemaking and "issue the rule establishing the amended standard" within a

certain period. 42 U.S.C. § 6313(a)(6)(B)(i). In conducting notice-and-comment rulemaking to establish a more stringent standard than that set by the industry group, subparagraph (B) directs the Department to consider a list of seven factors in determining "whether the benefits of the standard exceed the burden of the proposed standard" "for purposes of subparagraph (A)(ii)(II)." *Id.* § 6313(a)(6)(B)(ii). In other words, subparagraph (B) sets out various procedures for making the determination that a more stringent standard is required, a determination it defines by referencing subparagraph (A).

As directly relevant here, subparagraph (C) of § 6313(a)(6) requires the Department to evaluate its standards for commercial boilers every six years. 42 U.S.C. § 6313(a)(6)(C). If the Department determines that the standards do not need to be amended, it must publish a notice of that determination "based on the criteria established under subparagraph (A)." *Id.* § 6313(a)(6)(C)(i)(I). If the Department wishes to propose new standards, it must publish a notice of a proposed rulemaking that includes a new proposed standard "based on the criteria and procedures established under subparagraph (B)." *Id.* § 6313(a)(6)(C)(i)(II). As mentioned above, subparagraph (B), in turn, expressly references subparagraph (A)'s "clear and convincing evidence" requirement.

### B. The Rulemaking

In 2013, the Department began a 6-year look back to reconsider energy efficiency standards for commercial boilers, as required by subparagraph (C) of

section 6313(a)(6). Prior to that lookback, the Department had last amended its energy conservation standards for commercial boilers through a final rule published in the Federal Register in July 2009. *See* 74 Fed. Reg. 36,312 (July 22, 2009). The July 2009 final rule updated the energy conservation standards for commercial boilers to correspond to the levels set in the 2007 revision of the industry group's efficiency standards for commercial boilers. In that rulemaking, the Department concluded that the standards set by the industry group were appropriate, and that more stringent standards were not justified. The industry group has not revised its efficiency standards for commercial boilers since 2007.

In 2013, the Department prepared and published a framework document explaining the procedural and analytical approach the Department would take to evaluate energy conservation standards for commercial boilers. *See* 78 Fed. Reg. 54,197 (Sept. 3, 2013). Over the next two years, the Department gathered data, conducted and published preliminary results of its analysis, held various public meetings, and received and reviewed feedback and comments from the public to help improve the Department's analysis.

In March 2016, the Department published a notice of proposed rulemaking based on its evaluation of energy conservation standards for commercial boilers. 81 Fed. Reg. 15,836 (Mar. 24, 2016) (JA ___-___). In that notice of proposed rulemaking, the Department explained that, in order to satisfy its statutory obligations under subparagraph (C) of section 6313(a)(6), it "must determine that there is clear

and convincing evidence supporting the adoption of more stringent energy conservation standards" than the current industry group level. *Id.* at 15,837-38 (JA ___). The Department explained that, based on its initial analysis, it had tentatively concluded that there was "clear and convincing evidence that" the proposed, more stringent standards "would result in significant additional conservation of energy and would be technologically feasible and economically justified, as mandated by [section] 6313(a)(6)." *Id.* at 15,843 (JA ___).

During notice and comment, commenters levied various criticisms against the analysis and data underling the Department's tentative conclusion that a more stringent standard was supported by clear and convincing evidence. As particularly relevant here, commenters argued that the Department could not rely on unsupported assumptions and conjecture to satisfy its heightened burden to show that the proposed efficiency standards were justified by clear and convincing evidence. *See* 85 Fed. Reg. at 1607 (JA ___).

Commenters also criticized the Department's method for calculating energy and cost savings to consumers. *See* 85 Fed. Reg. at 1636 (JA ___). To calculate savings that would result from the rule's more stringent efficiency standards, the Department used a random distribution to assign expected shipments of different types of commercial boilers to consumers over a 30-year analysis period. The Department then compares energy use and costs between a 30-year analysis period *without* new energy conservation standards (base case) and a 30-year analysis period

*with* new energy conservation standards (standards case). The Department calculates energy and cost savings by taking the difference between those two cases. Commenters argued that a random distribution ignores the reality that consumers who would benefit from purchasing more efficient boilers are already making the economically beneficial decision to acquire them. Thus, commenters complained that the Department's random distribution systematically overestimates the economic and costs savings that consumers would enjoy under the Department's proposed new standard. *See id.* at 1635-36 (JA ___-___).

### C. The Final Rule

In January 2020,[1] the Department published the rule at issue in these petitions, adopting more stringent standards than those set by the industry group. 85 Fed. Reg. at 1592. The Department responded to comments criticizing various aspects of its analysis, and concluded that the amended standards would produce significant additional energy conservation, and were economically justified and technologically feasible even after taking the comments into account. *See* 85 Fed. Reg. at 1594-98 (JA ___-___).

In response to comments arguing that the evidence before the Department did not satisfy the "clear and convincing evidence" standard required by the statute, the

[1] The Department Posted the rule online for error-correction purposes in December 2016. Following litigation in the Ninth Circuit, *see Natural Res. Def. Council, Inc. v. Perry*, 940 F.3d 1072 (9th Cir. 2019), the Department published the rule in the federal register in January 2020.

Department's initial response was to, for the first time, take the position that it had authority to adopt more stringent standards even without finding those standards were justified by clear and convincing evidence because the standards were being adopted pursuant to the 6-year lookback provision. 85 Fed. Reg. at 1607 (JA ___). The 6-year lookback provision, the Department reasoned, only incorporates "criteria and procedures" from subparagraph (B), not the "clear and convincing evidence" requirement from subparagraph (A). *Id.* at 1607.

In a lengthy footnote, the Department explained that conclusion in more detail. 85 Fed. Reg. at 1607 n.21 (JA ___). The reference contained in subparagraph (C) "to 'criteria and procedures established under subparagraph (B)' is not best read as encompassing a 'clear and convincing evidence' threshold" because the phrase "clear and convincing evidence" appears in subparagraph (A), not subparagraph (B). *Id.* That result is also consistent with subparagraph (C)'s purpose, the Department explained. *Id.* The lookback provision "encourages [the industry group] to keep its standards up to date, because if it has recently amended its standards … , [the Department] will not need to engage in its independent standards revision"; "if [the industry group] has not revisited its standards for some while," however, the lookback process allows the Department to "adopt more stringent standards, without being tied to the [industry group] standards. *Id.*

In the alternative, the Department concluded that, even "assuming that clear and convincing evidence is required here, [the Department] believes its findings fully

satisfy that threshold." 85 Fed. Reg. at 1608 (JA ___). In so concluding, the Department acknowledged that "clear and convincing evidence" requires "a higher degree of confidence in its conclusions" than would be required under the ordinary agency rulemaking. To satisfy that heightened standard, the Department explained that it would need to conclude that "the administrative record, taken as a whole, … justif[ies] [the Department] in a strong conviction that its conclusions are highly likely to be correct." *Id.* The Department concluded that, "[w]ith respect to the findings discussed in this rulemaking, [the Department] does have that strong conviction, well placed given the record as a whole." *Id.*

### D Recent Department Actions Affecting this Case

In February 2020, the Department issued a final rule titled Energy Conservation Program for Appliance Standards: Procedures for Use in New or Revised Energy Conservation Standards and Test Procedures for Consumer Products and Commercial/Industrial Equipment (the process rule). 85 Fed. Reg. 8626 (Feb. 14, 2020) (JA ___-___). The process rule "update[s] and moderniz[es] aspects of [the Department's] current rulemaking method for considering new or revised energy conservation standards for consumer products and certain types of industrial equipment" and "clarifies the process [the Department] will follow" when revising those standards. *Id.* at 8626 (JA ___).

In the course of clarifying the Department's process for revising energy efficiency standards for commercial equipment like commercial boilers, the process

rule disavowed the interpretation of the 6-year lookback provision contained in the final rule, stating that "the plain language of the statute does not support such a reading." 85 Fed. Reg. at 8643 (JA ___). The Department also concluded that applying the clear and convincing evidence standard to the lookback process described in subparagraph (C) was consistent with Congressional purpose. The "statutory structure," the Department explained, "demonstrates a strong Congressional preference for adoption of [industry group] levels, except in extraordinary cases where a high evidentiary hurdle has been surmounted." *Id.* at 8637 (JA ___).

The Department also considered comments urging it to adopt the view it had taken in the final rule, but rejected those argument as "difficult to square with the statute." 85 Fed. Reg. at 8643 (JA ___). In particular, the Department pointed out that subparagraph (C) requires the Department to either publish a determination "that standards for the product do not need to be amended" based on the clear and convincing standard articulated in subparagraph (A), 42 U.S.C. § 6313(a)(6)(C)(i)(I), or issue a notice of proposed rulemaking proposing new standards based on the standards established by subparagraph (B), 42 U.S.C. § 6313(a)(6)(C)(i)(II). 85 Fed. Reg. at 8643 (JA ____). Under the interpretation set forth in the final rule and proposed by some commenters to the process rule, that means that the Department could be required to "issue a notice of determination that a product does not need to be amended when there is no clear and convincing evidence to support a more-

stringent standard (applying the criteria of subparagraph (A))," but would then simultaneously "be able to issue a proposed rule for those same more-stringent standards using the preponderance of the evidence standard." *Id.* The Department concluded that such a reading would be "unworkable in practice." *Id.*

In addition to concluding that the lookback procedure set forth in subparagraph C of § 6313(a)(6) *is* subject to the clear and convincing evidence standard, the process rule also provided additional clarification about what exactly "clear and convincing evidence" requires. The Department explained that "clear and convincing evidence" would exist "only if," upon considering the "circumstances, facts, and data," the Department "determines there is no substantial doubt that the more-stringent standard would result in a significant additional conservation of energy and is technologically feasible and economically justified." 85 Fed. Reg. at 8642 (JA ___) (emphasis omitted) (*citing Dongguk Univ. v. Yale Univ.*, 734 F.3d 113, 123 (2d Cir. 2013); *Hunt v. Pan Am. Energy*, 540 F.2d 894, 901 (8th Cir. 1976); *Ittella Foods, Inc. v. Zurich Ins. Co.*, 98 F. App'x. 689, 691 (9th Cir. 2004)).

Finally, the process rule noted that the Department "continues to think about potential changes to its analytical methodologies and models for assessing the costs and benefits of appliance standards rulemakings." 85 Fed. Reg. at 8627 (JA ___). In particular, the Department explained that it would "convene an expert independent peer review … of its assumptions, models, and methodologies to ensure that its approach is designed to provide projections that are sufficiently rigorous for their

intended use." *Id.* at 8686 (JA ___). The Department set out twelve "focus areas for the peer review," including the Department's "[b]aseline efficiency estimates" and "[c]onsumer choice model." *Id.*

### E. Petitions for Review

Petitioners the American Public Gas Association, the Air-conditioning, Heating, and Refrigeration Institute, and Spire Inc. filed timely petitions for review in the D.C. Circuit, Fourth Circuit, and Eight Circuit, respectively. The three petitions were consolidated in this Court (No. 20-1068). After the petitions were consolidated before this Court, several states and environmental groups intervened in support of the rule, and the American Gas Association intervened in support of petitioners.

## SUMMARY OF ARGUMENT

1. The Department agrees with petitioners that, when engaging in the lookback required by subparagraph C of § 6313(a)(6), the Department is permitted to impose energy efficiency standards more stringent than those set by the industry group only if the agency concludes by clear and convincing evidence that more stringent standards would result in significant additional conservation of energy and is technologically feasible and economically justified. The rule's contrary conclusion is not supported by the text of the statute, and contradicts the Department's view as expressed both before and after the rule issued. Because the Department erroneously believed that it was not required to find that more stringent efficiency standards were justified by clear and convincing evidence, the Department agrees that the rule should

be vacated and remanded so that the Department may reconsider whether higher efficiency standards for commercial boilers are justified under the appropriate standard.

2. While the rule provided in the alternative that the record supported the Department's determination even assuming that the "clear and convincing evidence" standard applied, the Department does not believe that the alternative rationale was sufficiently developed or explained to uphold the rule. The Department made clear that it did not believe it was required to make such a finding, and the explanation given as to why the Department thought that heightened standard was met in the alternative is too scant to independently support the rule. In addition, the Department has since provided additional guidance regarding what it believes is required in order to satisfy the "clear and convincing evidence" standard imposed by § 6313(a)(6).

3. Because the Department incorrectly believed that it was not required to find that more stringent efficiency standards were justified by clear and convincing evidence, this Court should vacate the rule and remand this case back to the Department. On remand, the Department will reevaluate the appropriate efficiency standards for commercial boilers under the correct evidentiary standard. There is therefore no need for this Court to reach petitioners' remaining arguments, which attack the conclusions and analysis contained in the rule. If the rule is vacated because the Department held itself to the wrong evidentiary standard, then the

conclusions and analysis contained in the rule will be vacated along with it. On remand, the Department will again be required to consider and respond to any comments it receives challenging its methods or analysis. Rather than prejudging those issues, this Court should vacate and remand the matter without addressing petitioners' other challenges.

In addition, the Department is currently engaged in a peer review process to evaluate its methodologies. That peer review is expected to address several focus areas that are relevant to petitioners' arguments in these petitions, including baseline efficiency estimates and the Department's consumer choice model. The results of that peer review process are expected to be available in early 2021, and the Department plans to consider and incorporate the results of that peer review process when it reconsiders these issues on remand, including by potentially making changes to the Department's methodologies. It is therefore possible that the methodological issues petitioners raise in their brief will not present themselves again on remand.

## STANDARD OF REVIEW

The Court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). When an agency action turns on the agency's interpretation of a statute, this Court applies the well-known framework articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In considering whether an agency action is arbitrary and capricious, the Court must determine whether the agency considered the relevant

issues, examined the relevant evidence, and provided a cogent explanation of the basis for its decisions. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

## ARGUMENT

### I. Subparagraph (C) Of Section 6313(a)(6) Requires The Department To Find That More Stringent Energy Efficiency Standards Are Supported By Clear And Convincing Evidence

As it has explained in a subsequent rulemaking, *see supra* pp. 10-12, the Department agrees with petitioners that, contrary to the view expressed in the final rule, the Department is held to a clear and convincing evidence standard if it intends to revise energy efficiency standards during the lookback process described in subparagraph (C) of section 6313(a)(6). The final rule's contrary conclusion rested on a legal error, and agency action that "stands on a faulty legal premise and [lacks] adequate rationale" is arbitrary and capricious. *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985); *see also United Parcel Serv., Inc. v. Postal Regulatory Comm'n*, 955 F.3d 1038, 1050 (D.C. Cir. 2020) ("An agency Order that is at odds with the requirements of the applicable statute cannot survive judicial review."); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[A]n order may not stand if the agency has misconceived the law."). The Department therefore asks this Court to vacate the final rule on that basis and remand to the agency for reconsideration under the proper evidentiary standard.

### A. The Text and Purpose of Subparagraph (C) Indicate that More Stringent Efficiency Standards Must Be Supported by Clear and Convincing Evidence

Subparagraph (C) of section 6313(a)(6) provides that every six years, the Department shall conduct an evaluation of each class of covered equipment and shall publish either: (1) "[a] notice of the determination … that standards for the product do not need to be amended, based on the criteria established under subparagraph (A)" (42 U.S.C. § 6313(a)(6)(A)) or (2) "a notice of proposed rulemaking including new proposed standards based on the criteria and procedures established under subparagraph (B)" (42 U.S.C. § 6313(a)(6)(B)). 42 U.S.C. § 6313(a)(6)(C)(i).

The question raised in this petition is whether "the criteria and procures established under subparagraph (B)" incorporates the clear and convincing evidence standard. Subparagraph B does not specifically set out the clear and convincing standard. But subparagraph B applies "[i]f the Secretary makes a determination described in subparagraph (A)(ii)(II)," and then requires the Department to consider various factors "in determining whether a standard is economically justified *for the purposes of subparagraph (A)(ii)(II).*" 42 U.S.C. § 6313(a)(6)(B) (emphasis added). Subparagraph A, in turn, does set out the clear and convincing standard—requiring a "determin[ation]," supported by "clear and convincing evidence," that adoption of more stringent efficiency standards would both produce "significant additional conservation of energy" and be "technologically feasible and economically justified." 42 U.S.C. § 6313(a)(6)(A)(ii)(II). Subparagraph (B) thus plainly assumes that a

determination has already been under the clear and convincing evidence standard set out in subparagraph (A), and the "criteria and procedures" described in subparagraph B only makes sense against the backdrop of such a determination. The Department therefore agrees with petitioners that the "the criteria and procures established under subparagraph (B)," 42 U.S.C. § 6313(a)(6)(C)(i)(I), includes the requirement that the Department first make the triggering determination described in subparagraph (A)—a "determin[ation], … supported by clear and convincing evidence, that adoption" of a more stringent standard "would result in significant additional conservation of energy" and would be "technologically feasible and economically justified," 42 U.S.C. § 6313(a)(6)(A)(ii)(II).

That conclusion is consistent with Congressional intent. As the Department has since explained, the "statutory structure demonstrates a strong Congressional preference for adoption of [industry group] levels, except in extraordinary cases where a high evidentiary hurdle has been surmounted. In this way, Congress sought to ensure that more-stringent standards have objectively recognized benefits that unquestionably justify their costs." 85 Fed. Reg. at 8637 (JA ___).

A contrary reading of the statute, on the other hand, would produce bizarre results. Congress provided that, in order to *retain* the existing efficiency standards during the lookback process, the Department should use the "criteria established under subparagraph (A)," 42 U.S.C. § 6313(a)(6)(C)(i)(I), which undisputedly requires the Department to retain the industry group standard unless there is clear and

convincing evidence for a more stringent standard. Reading the requirement for *amending* the standard during the lookback period to allow action based on only a preponderance of the evidence would leave a strange gap between the two standards: If the Department concludes by a preponderance of evidence (but not by clear and convincing evidence) that a more stringent standard is justified, it would apparently be required to simultaneously *retain* the standard under subparagraph (C)(i)(I), and to *amend* the standard under subparagraph (C)(i)(II), a nonsensical result.

A contrary reading would also hold the Department to two different evidentiary standard levels in rulemakings that involve essentially the same standard-setting decision. Under the interpretation expressed in the final rule, when the industry group revises its efficiency standards for a product, the Department would be required to adopt those standards unless there is clear and convincing evidence to support more-stringent standards. But using the same record, the Department would be able to issue a proposed rule under subparagraph (C) imposing more stringent standards based only on a preponderance of the evidence standard. There is no indication that Congress intended to create that sort of moving target when it created this scheme, and doing so would make little sense. Indeed, if the Department could impose more stringent standards by only a preponderance of the evidence during subparagraph (C)'s lookback, the requirement in subparagraph (A) that it adopt the industry group standards unless there is clear and convincing evidence to support a

more-stringent standard would no longer impose much of a limit on the Department's authority.

### B. The View Expressed in the Final Rule is Inconsistent with the Department's Prior and Subsequent Practice

The view expressed in the final rule is also inconsistent with the Department's prior and subsequent understanding of the statute. The Department is aware of no prior rulemaking under subparagraph (C) of § 6313(a)(6) in which the Department took the position that it could impose more stringent efficiency standards without finding that such standards were justified by clear and convincing evidence. To the contrary, prior to the final rule the Department consistently indicated that it could only impose more stringent efficiency standards pursuant to subparagraph (C) "if there is clear and convincing evidence in support of doing so"). Energy Conservation Program, 78 Fed. Reg. 7296, 7297 (Feb. 1, 2013); *see also, e.g.*, Energy Conservation Program, 80 Fed. Reg. 1172, 1174-75 (Jan. 8, 2015); Energy Conservation Program, 80 Fed. Reg. 43,162, 43,163 (July 21, 2015); Energy Conservation Program, 84 Fed. Reg. 32,328, 32,330 (July 8, 2019). Indeed, even in the notice of proposed rulemaking for the final rule, the Department indicated that it understood the statute to require that "clear and convincing evidence support[ed] the adoption of more stringent energy conservation standards than the [industry group] level." 81 Fed. Reg. at 15,837 (JA ___).

And as discussed above, *supra* pp. 10-12, the Department has since disavowed the final rule's interpretation of subparagraph (C) of section 6313(a)(6) in the process rule. The process rule explained that the interpretation advanced in the final rule "is difficult to square with the statute" and that "the plain language of the statute does not support such a reading." 85 Fed. Reg. at 8643 (JA ___). The interpretation of subparagraph (C) expressed in the final rule is therefore an outlier in an otherwise uninterrupted string of Department rules indicating that clear and convincing evidence is required to impose more stringent efficiency standards during the lookback process.

### C. The Alternative Conclusion that the Clear and Convincing Evidence Standard was Met Cannot Save the Final Rule

After explaining that the Department did not believe it was required to find that more demanding efficiency standards were justified by clear and convincing evidence, the final rule stated, in the alternative, that even "assuming that clear and convincing evidence is required here, [the Department] believes its findings fully satisfy that threshold." 85 Fed. Reg. at 1608 (JA ___). The final rule then explained that the Department will find that "it has 'clear and convincing evidence' only when it is strongly convinced that it is highly likely to have reached appropriate findings." *Id.* "With respect to the findings discussed in this rulemaking," the final rule stated only that the Department "does have that strong conviction, well placed given the record as a whole." *Id.*

The conclusory statement that, in the alternative, the Department "believes its findings" satisfy the clear and convincing evidence standard does not negate the legal error contained in the final rule. 85 Fed. Reg. at 1608. First, the final rule's initial response to comments questioning whether the evidence satisfied the clear and convincing standard was to state that clear and convincing evidence was not required, and to explain that interpretation of the statute at great length in a footnote. It is unlikely that the final rule would have gone to such lengths to disavow the clear and convincing evidence requirement unless it considered the lower evidentiary standard to be important.

Second, the requirement that more stringent efficiency standards be supported by clear and convincing evidence is expressly imposed on the Department by statute. As this Court had held in related contexts, when Congress imposes a rulemaking requirement on an agency, this Court asks whether the agency has reached an "express and considered conclusion" pursuant to that statutory mandate. *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (per curiam) (quotation marks omitted). "Merely referencing a requirement is not the same as complying with that requirement." *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002) (quotation marks omitted); *see also Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 446 (D.C. Cir. 2017). And merely stating that something was considered or found "is not a substitute for considering or finding it." *Gerber*, 294 F.3d at 185 (quotation marks omitted). The final rule's conclusion—that the Department had a "strong conviction,

well placed given the record as a whole," that "the findings discussed in this rulemaking," 85 Fed. Reg. at 1608, were correct—falls short of that standard. *See Getty v. Federal Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1057 (D.C.Cir.1986) (holding that a "conclusory recitation" failed to satisfy a statutory requirement that the agency "consider[]" a specified factor).

Moreover, the clear and convincing evidence standard is significantly more demanding than the normal evidentiary standard applied in the rulemaking context. *See Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (agency factual findings normally need only be supported by substantial evidence, which "means—and means only—such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (quotation marks omitted)). Clear and convincing evidence is a demanding standard. As the Department has since explained, it will only find that standard to be met if, upon considering the "circumstances, facts, and data," the Department "determines there is *no substantial doubt* that the more-stringent standard would result in a significant additional conservation of energy and is technologically feasible and economically justified." 85 Fed. Reg. at 8642 (JA ___) (emphasis added); *cf. United States v. Montague*, 40 F.3d 1251, 1255 (D.C. Cir. 1994) (the "clear and convincing evidence" standard of proof requires that the party bearing the burden of proof on a given issue present evidence sufficient to allow the court to "reach a firm conviction of the truth on the evidence about which [it] is certain"). The Department's terse conclusion that it had a "strong conviction, well placed given the

record as a whole," that "it is highly likely to have reached appropriate findings," 85 Fed. Reg. at 1608 (JA ___), does not establish that the Department made a sufficiently "considered conclusion" pursuant to the statutorily mandated clear and convincing evidence standard. *Time Warner*, 56 F.3d at 175.

For all of those reasons, this Court should vacate and remand the rule so that the Department can reconsider the issues presented in the final rule under the appropriate evidentiary standard.

## II. This Court Should Not Address Petitioners' Remaining Challenges To The Rule

Petitioners also raise additional argument attack various conclusions and analysis contained in the rule. *See* Pet. Br. 41-59. But because the rule should be vacated and remanded back to the agency because the Department held itself to the wrong evidentiary standard in issuing the rule, this Court should not address those arguments. If the rule is vacated because the agency wrongly thought that the "clear and convincing evidence" standard does not apply to a 6-year look back, there is no reason to evaluate whether any particular analysis or conclusion in the rule withstands scrutiny. The challenged rule, along with the analysis contained therein, would be vacated. And on remand, the Department would again be subject to the requirements of the Administrative Procedure Act and 42 U.S.C. § 6313(a)(6), including the requirement that the Department issue a notice of proposed rulemaking and engage with any comments submitted in response to that notice. It remains to be seen

whether any of the challenges petitioners raise now will apply, or apply in the same way, to that new rulemaking. So resolving those challenges now would be premature.

In addition, as discussed above, *supra* pp. 12-13, the Department has convened an expert independent peer review of the models and methodologies used to evaluate efficiency standards, including under 42 U.S.C. § 6313(a)(6). The express goal of that peer review process is "to assess whether any changes are needed to the agency's analytical methodologies." 85 Fed. Reg. at 8686 (JA ___). And among the "focus areas" that the Department has identified for that process are several topics related to the challenges petitioners' raise, including the Department's "[c]onsumer choice model" and "[b]aseline efficiency estimates." *Id.*; *see, e.g.*, Pet. Br. 41-42 (arguing that final rule lacked information necessary to establish baseline energy efficiency distribution); Pet. Br. 46-59 (challenging aspects of final rule's consumer choice model). The peer review process is currently underway, and the Department expects that process to be completed in early 2021. If this Court were to vacate and remand the final rule, the Department would incorporate the results of the peer review on remand, including by "assess[ing] whether any changes are needed to the agency's analytical methodologies." 85 Fed. Reg. at 8686 (JA ___). It is therefore possible that the methodological challenges that petitioners raise in their brief will not present themselves again on remand. And even if some of the same issues arise again on remand, the Department and the parties will be aided by the results of the peer review

in addressing those issues. There is therefore no reason for this Court to address petitioners' methodological challenges at this time.

## CONCLUSION

For the foregoing reasons, the final rule should be vacated and remanded to the agency.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,007 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

*/s/ Jack Starcher*
Jack Starcher

## CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

*/s/ Jack Starcher*
Jack Starcher

# ADDENDUM

# TABLE OF CONTENTS

**49 U.S.C. § 706. Scope of Review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

**42 U.S.C. § 6306. Administrative procedure and judicial review**

* * *

(b) Petition by persons adversely affected by rules; effect on other laws

(1) 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. A copy of the petition shall be transmitted by the clerk of the court to the agency which prescribed the rule. Such agency shall file in the court the written submissions to, and transcript of, the proceedings on which the rule was based, as provided in section 2112 of Title 28.

(2) Upon the filing of the petition referred to in paragraph (1), the court shall have jurisdiction to review the rule in accordance with chapter 7 of Title 5 and to grant appropriate relief as provided in such chapter. No rule under section 6293, 6294, or 6295 of this title may be affirmed unless supported by substantial evidence.

(3) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(4) The remedies provided for in this subsection shall be in addition to, and not in substitution for, any other remedies provided by law.

(5) The procedures applicable under this part shall not--

(A) be considered to be modified or affected by any other provision of law unless such other provision specifically amends this part (or provisions of law cited herein); or

(B) be considered to be superseded by any other provision of law unless such other provision does so in specific terms by referring to this part and declaring that such provision supersedes, in whole or in part, the procedures of this part.

* * *

**42 U.S.C. § 6313. Standards**

(a) Small, large, and very large commercial package air conditioning and heating equipment, packaged terminal air conditioners and heat pumps, warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, and unfired hot water storage tanks

* * *

(6) Amended energy efficiency standards

(A) In general

(i) Analysis of potential energy savings

If ASHRAE/IES Standard 90.1 is amended with respect to the standard levels or design requirements applicable under that standard to any small commercial package air conditioning and heating equipment, large commercial package air conditioning and heating equipment, very large commercial package air conditioning and heating equipment, packaged terminal air conditioners, packaged terminal heat pumps, warm-air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, or unfired hot water storage tanks, not later than 180 days after the amendment of the standard, the Secretary shall publish in the Federal Register for public comment an analysis of the energy savings potential of amended energy efficiency standards.

(ii) Amended uniform national standard for products

(I) In general

Except as provided in subclause (II), not later than 18 months after the date of publication of the amendment to the ASHRAE/IES Standard 90.1 for a product described in clause (i), the Secretary shall establish an amended uniform national standard for the product at the minimum level specified in the amended ASHRAE/IES Standard 90.1.

(II) More stringent standard

Subclause (I) shall not apply if the Secretary determines, by rule published in the Federal Register, and supported by clear and convincing evidence, that adoption of a uniform national standard more stringent than the amended ASHRAE/IES Standard 90.1 for the product would result in significant additional conservation of energy and is technologically feasible and economically justified.

(B) Rule

(i) In general

If the Secretary makes a determination described in subparagraph (A)(ii)(II) for a product described in subparagraph (A)(i), not later than 30 months after the date of publication of the amendment to the ASHRAE/IES Standard 90.1 for the product, the Secretary shall issue the rule establishing the amended standard.

(ii) Factors

In determining whether a standard is economically justified for the purposes of subparagraph (A)(ii)(II), the Secretary shall, after receiving views and comments furnished with respect to the proposed standard, determine whether the benefits of the standard exceed the burden of the proposed standard by, to the maximum extent practicable, considering--

(I) the economic impact of the standard on the manufacturers and on the consumers of the products subject to the standard;

(II) the savings in operating costs throughout the estimated average life of the product in the type (or class) compared to any increase in the price of, or in the initial charges for, or maintenance expenses of, the products that are likely to result from the imposition of the standard;

(III) the total projected quantity of energy savings likely to result directly from the imposition of the standard;

(IV) any lessening of the utility or the performance of the products likely to result from the imposition of the standard;

(V) the impact of any lessening of competition, as determined in writing by the Attorney General, that is likely to result from the imposition of the standard;

(VI) the need for national energy conservation; and

(VII) other factors the Secretary considers relevant.

(iii) Administration

(I) Energy use and efficiency

The Secretary may not prescribe any amended standard under this paragraph that increases the maximum allowable energy use, or

decreases the minimum required energy efficiency, of a covered product.

* * *

(C) Amendment of standard

(i) In general

Every 6 years, the Secretary shall conduct an evaluation of each class of covered equipment and shall publish--

(I) a notice of the determination of the Secretary that standards for the product do not need to be amended, based on the criteria established under subparagraph (A); or

(II) a notice of proposed rulemaking including new proposed standards based on the criteria and procedures established under subparagraph (B).

(ii) Notice

If the Secretary publishes a notice under clause (i), the Secretary shall--

(I) publish a notice stating that the analysis of the Department is publicly available; and

(II) provide an opportunity for written comment.

(iii) Amendment of standard; new determination

(I) Amendment of standard

Not later than 2 years after a notice is issued under clause (i)(II), the Secretary shall publish a final rule amending the standard for the product.

(II) New determination

Not later than 3 years after a determination under clause (i)(I), the Secretary shall make a new determination and publication under subclause (I) or (II) of clause (i).

* * *