State of Tennessee
Office of the Attorney General & Reporter

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SUBMITTED ELECTRONICALLY
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Appliance and Equipment Standards
Program
U.S. Department of Energy
Building Technologies Office
Mailstop EE-5B
1000 Independence Ave. SW
Washington, D.C. 20585

Re: Energy Conservation Program: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, No. EERE-2017-BT-STD-0003

Dear Secretary Granholm,

The Department of Energy has proposed yet another rule to micro-manage the lives—and kitchens—of Americans. This time, it is a set of efficiency standards (the "Proposed Standards" or "Standards") for refrigerators, refrigerator-freezers, and freezers. *See generally* Dep't of Energy, Energy Conservation Program: Energy Conservation Standards for Refrigerators, Refrigerator-Freezers, and Freezers, 88 Fed. Reg. 12,452 (Feb. 27, 2023).

The States of Tennessee, Alabama, Arkansas, Florida, Georgia, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, and Virginia appreciate the chance to comment—and to register their concerns with the Standards. Time and again, this administration has stretched the law and statistics to direct the domestic lives of Americans—from dictating the ovens and stoves with which Americans can cook, *see* 88 Fed. Reg. 6,818 (Feb. 1, 2023), to the dishwashers they can use to clean their dishes, *see* 88 Fed. Reg. 2,673 (Jan. 19, 2022). The Proposed Standards are more of the same, and the States encourage the Department to resist the impulse to further insinuate the federal government into the daily lives of American consumers.

Comment

I. The Department should not use, or reference, the IWG estimates in its analysis.

A significant problem with the Proposed Standards is the Department's extensive and misguided use of the social costs of carbon, methane, and nitrous oxide (the "social cost of greenhouse gases"

or "SCGHG" or "IWG estimates"), *see, e.g.*, 88 Fed. Reg. at 12,494–97, as developed by the Interagency Working Group on the Social Cost of Greenhouse Gases (IWG), *see* IWG, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide – Interim Estimates Under Executive Order 13990 (Feb. 2021) [hereinafter 2021 TSD].[1]

The issues with the IWG estimates have been addressed exhaustively in numerous other forums—very recently in the context of the Department's proposed rulemaking setting energy conservation standards for consumer conventional cooking products, *see* 88 Fed. Reg. 6,818, 6,818–6,904 (Feb. 1, 2023). The States attach that comment letter, and its exhibits, as Exhibit A and incorporate the letter's criticisms of the IWG estimates in Section I with one modification: The Fifth Circuit reversed the preliminary injunction that a coalition of States received in *Louisiana v. Biden*, 585 F. Supp. 3d 840 (W.D. La. 2022), because the States lacked standing. *See Louisiana ex rel. Landry v. Biden*, 64 F.4th 674, 677 (5th Cir. 2023). That does not change the criticisms in Section I.B of the attached letter because "standing in no way depends on the merits." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see Lopez v. Pompeo*, 923 F.3d 444, 447 (5th Cir. 2019) (holding that a jurisdictional dismissal does not preclude later adjudication on the merits). Thus, the Department cannot refuse to grapple with the district court's substantive analysis. *See Texas v. Biden*, 20 F.4th 928, 992 (5th Cir. 2021), *rev'd on other grounds* 142 S. Ct. 2528 (2022) (being aware of legal challenges to a rule means the agency must "consider the problem" identified in the challenge).

This rulemaking is not the first time that the Department has extensively used the SCGHG. *See, e.g.*, 88 Fed. Reg. at 6,865–68; Dep't of Energy, Energy Conservation Program: Energy Conservation Standards for Residential Clothes Washers, 88 Fed. Reg. 13,520, 13,579–83 (Mar. 3, 2023). The Department's apparent rote application of the IWG estimates is inappropriate. The Fifth Circuit's decision underscores that the Department "must exercise discretion in … deciding to use the" IWG estimates. *Louisiana ex rel. Landry*, 64 F.4th at 681 (citing Exec. Order No. 13,990, § 5(b)(ii)).

In light of the many issues with the IWG estimates, the States request that the Department revisit its apparent reliance on those numbers in this and other proposed EPCA standards. The IWG estimates are fundamentally flawed and are an unreliable metric on which to base administrative action.

II. The Department's analysis does not comply with Executive Order 13,132.

Next, the Proposed Standards' Executive Order 13,132 analysis is woefully deficient. Per the Proposed Standards, the Department "tentatively determined that [the Standards] would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government" because (1) "EPCA governs and prescribes Federal preemption of State regulations as to energy conservation for the products that are the subject of this proposed rule" and (2) "States

[1] *Available at* https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf. The States attaches this, and all other articles referenced in this comment that are available online, as Exhibit C.

can petition [the Department] for exemption from preemption." 88 Fed. Reg. at 12,529. Thus, the Proposed Standards say, "no further action is required by Executive Order 13,132." *Id.*

That determination is incorrect. The Proposed Standards have significant federalism implications within the meaning of Executive Order 13,132. For example, if the Proposed Standards are promulgated, "[a]ny State regulation which sets forth procurement standards" relating to refrigerators, refrigerator-freezers, or freezers, is "superseded" unless those "standards are more stringent than the corresponding Federal energy conservation standards." 42 U.S.C. § 6297(e). Preempting—even in part—State procurement rules is plainly a direct effect on the States and alters the federal-state relationship by directly regulating the States. *See* Exec. Order No. 13,132 § 6(c).

Additionally, States are purchasers of refrigerators, refrigerator-freezers, and freezers—as the Department knows. *See* Dep't of Energy, *Technical Support Document: Energy Efficiency Program for Consumer Products and Commercial and Industrial Equipment: Refrigerators, Refrigerator-Freezers, and Freezers* 8-38 tbl.8.3.14 (Feb. 2023) (providing discount rates for state and local governments) [hereinafter *TSD for Proposed Standards*]. That indicates the Proposed Standards implicate reliance interests the Department must consider. *See, e.g., Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1913 (2020). It is also another example of an effect of the Standards on the State—indeed, of an effect that could give rise to "substantial direct compliance costs." Exec. Order No. 13,132 § 6(b). So, since the efficiency standards set forth in the Proposed Standards are "not required by statute," section 6(b) applies.

In sum, the Proposed Standards misstate whether Executive Order 13,132 applies. It does. The Department must rectify that before promulgating any final standards.

III. The Department failed to consider the EPCA's constitutional issues in analyzing the Proposed Standards.

Next, the Proposed Standards do not reflect consideration of the EPCA's constitutional issues. The EPCA is an exercise of Congress's Commerce Clause power. The law prohibits "any manufacturer or private labeler to distribute in *commerce* any new covered product which is not in conformity with an applicable energy conservation standard established in or prescribed under this part." 42 U.S.C. § 6302(a)(5) (emphasis added). "Commerce," in turn, "means trade, traffic, commerce, or transportation (A) between a place in a State and any place outside thereof, or (B) which affects trade, traffic, commerce, or transportation described in subparagraph (A)." § 6291(17). Consistent with that language, the Proposed Standards do not differentiate between interstate and intrastate markets. That is, the Standards—like § 6291(17)—cover all commercial activity, whether inter- or intrastate.

This cavalier approach to the Commerce Clause is improper. Precedent dictates that Congress can regulate intrastate activity under the Commerce Clause only when that activity "substantially affects interstate commerce." *United States v Lopez*, 514 U.S. 549, 559 (1995) (quotations omitted). Thus, for the Proposed Standards to reach the intrastate market for refrigerators, refrigerator-freezers, and freezers, the Department must show that the intrastate activity covered by §§ 6291(17) and 6302(5) substantially affects the interstate market for those products. There is no such analysis in the Proposed Standards—and so no constitutional basis for application of the

Standards to intrastate refrigerator, refrigerator-freezer, and freezer markets. Furthermore, if such an analysis showed that the intrastate market did not substantially affect the interstate market (and so was not properly the subject of federal regulation), then the Department must redo its cost-benefit analysis since the Proposed Standards would apply to a more limited set of products—those traveling interstate. *See* 42 U.S.C. §6295(*o*)(2)(B)(i) (focusing on the effect of "the proposed standard").

Moreover, even if the Department finds that intrastate commerce in refrigerators and freezers substantially affects interstate commerce, it should *still* exclude purely intrastate activities from any promulgated standard. The original meaning of the Commerce Clause does not give Congress the power to regulate "activities that 'substantially affect' interstate commerce." *Lopez*, 514 U.S. at 587 (Thomas, J., concurring). That includes pairing the Commerce Clause with the Necessary and Proper Clause. If, by the combination of the two, Congress could regulate intrastate activities with a substantial effect on interstate commerce, "much if not all of Art. I, § 8 (including portions of the Commerce Clause itself) would be surplusage." *Id.* at 588–89. Such a construction also threatens to turn "the Tenth Amendment on its head" by giving "to the United States all powers not expressly *prohibited* by the Constitution." *Id.* at 589; *see also Printz*, 521 U.S. at 923–24 ("When a Law for carrying into Execution the Commerce Clause violates the principle of state sovereignty . . . it is not a Law proper for carrying into Execution the Commerce Clause.") (alterations and quotations omitted); *In re MCP No. 165*, 20 F.4th 264, 283 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc) (The Commerce Clause is "not a clause that grants the national government all of the police powers customarily associated with state governments in order to fix any new societal challenge.").

The Proposed Standards illustrate the point. The Department has "tentatively concluded that a standard set at TSL 5 for refrigerators, refrigerator-freezers, and freezers would be economically justified." 88 Fed. Reg. at 12,524. At that level, however, the Department has eliminated much of the existing market. The Proposed Standards say that roughly 80 percent of current shipments of refrigerators and freezers do not meet the Standards. *Id.* ("DOE estimates that approximately 18 percent of refrigerator, refrigerator-freezer, and freezer annual shipments meet the TSL 5 efficiencies."). And 95 percent of "standard-size refrigerators-freezers, which account for approximately 70 percent of total annual shipments," do not meet the proposed standards. *Id.* ("For standard-size refrigerator-freezers, which account for approximately 70 percent of total annual shipments, approximately 5 percent of shipments meet the efficiencies required at TSL 5.").

The Proposed Standards therefore remake the regulated market and so "foreclose[ ] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"—regulation of consumer goods. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring). In short, if implemented, the Proposed Standards will dominate the field. That surely turns "the Tenth Amendment on its head," *id.* at 589 (Thomas, J., concurring), and suggests the EPCA does not provide the Department such sweeping authority, *see, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (major-questions doctrine); *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) (avoiding agency interpretations that push constitutional boundaries); *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (federalism canon); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (avoiding interpretations that raise constitutional doubts).

The fix is to exclude from the Proposed Standards all intrastate activity even if such activity has a substantial effect on interstate commerce in refrigerators, refrigerator-freezers, and freezers. *See In re Aiken County*, 725 F.3d 255, 261 (D.C. Cir. 2013) (opinion of Kavanaugh, J.) (Under the Take Care Clause, "the President (and subordinate executive agencies supervised and directed by the President) may decline to follow [a] statutory mandate or prohibition if the President concludes that it is unconstitutional."). Doing so ensures that the federal government stays within its constitutionally proscribed limits and preserves the "healthy balance of power between the States and the Federal Government [that] will reduce the risk of tyranny and abuse from either front." *Gregory*, 501 U.S. at 458.

IV. The Department's analysis ignores the effect the Proposed Standards will have on individuals, especially lower-income individuals, and families.

The States also have significant concerns about the costs of the Proposed Standards. According to the Department, at the proposed TSL 5 standard, "[a]n estimated 27.5 percent of all refrigerator, refrigerator-freezer, and freezer consumers experience a net cost." 88 Fed. Reg. at 12,524. "[A]n estimated 12 percent of all low-income households experience a net cost, including less than 10 percent of low-income households with a top-mount or single-door refrigerator-freezer (represented by PC 3 and used by 72 percent of low-income households) and 23 percent of low-income households with a side-by-side refrigerator-freezer (represented by PC 7 and used by 19 percent of low-income households)." 88 Fed. Reg. at 12,523.

That the Proposed Standards impose net costs on over a quarter of all consumers is concerning—especially for lower-income individuals. That is so even if the net costs to some are relatively minimal as compared to the net benefits to others. For example, the analysis writes off the net costs to lower income individuals using products in the PC 7 product class because "more than half of those consumers experience a net cost of $30 or less and low-income PC 7 consumers experience an average LCC savings of $134.54." *Id.* at 12,524. That minimization is unwarranted. For people living paycheck-to-paycheck, there isn't $30 lying around—and the extra cost may require that those consumers go hungry for a few days.

That concern exists even for consumers who are projected to receive net savings. That is because there is a mismatch between when they incur the costs (upfront, at purchase and installation of the new product) and when they receive savings (over the life of the refrigerator or freezer). *See*, *e.g.*, *id.* at 12,523 (providing the payback periods—"the amount of time it takes the consumer to recover the additional installed cost of more efficient products, compared to baseline products, through energy cost savings," *id.* at 12,485); *see also TSD for Proposed Standards*, *supra*, at 8-40–8-49 (giving installation costs for the TSL levels and baseline scenarios). The Proposed Standards do not address whether households—especially low-income ones—can absorb those upfront costs (which for the largest product classes range from $50 to $142, *see* 88 Fed. Reg. at 12,523) while waiting for future benefits.

The failure to account for those concerns renders the claim that the Proposed Standards are "economically justified," 42 U.S.C. § 6295(*o*)(2)(B)(i), questionable. Indeed, TSL 4 (though problematic in its own right) is arguably the more efficient standard under the Department's analysis; it represents a minimal loss of energy efficiency compared to TSL 5 (0.4 quads) while

reducing the number "of low-income PC 7 households experienc[ing] a net cost" to 14 percent. 88 Fed. Reg. at 12,524. The Department's dismissal of the costs of the Proposed Standards is also inexcusable given the administration's claimed prioritization of environmental justice, as embodied in the recently signed Executive Order 14,096. *See also* Exec. Order No. 14,096 § 1 (listing other executive orders establishing "the policy of [this] Administration to pursue a whole-of-government approach to environmental justice").

A related, but more general issue, is the fact the Proposed Standards "affect family well-being" within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105-277). *Contra* 88 Fed. Reg. at 12,530. On an intuitive level, that must be the case. The Proposed Standards regulate an appliance that appears in family kitchens around the country and is integral to the process by which families keep and prepare food. It blinks reality to say, as the Proposed Standards do, that the rule will "not have any impact on the autonomy or integrity of the family as an institution." *Id.* The costs the Proposed Standards impose show that concretely. As the forgoing shows, the Proposed Standard "increases or decreases disposable income or poverty of families and children." Pub. L. No. 105-277, § 654(c)(4). By increasing the costs families face to purchase a common, integral appliance (refrigerators, refrigerator-freezers, or freezers), the Proposed Standards will affect *every* family's budget—and force lower-income families to make difficult financial decisions. The Department must therefore provide the assessment required by Section 654 of the Treasury and General Government Appropriations Act, 1999.

Conclusion

To summarize, the Department should not use or reference the IWG estimates. The IWG used a fatally flawed model to generate those estimates. Furthermore, the estimates are unlawfully promulgated and inconsistent with the EPCA. The States' suggestion is thus modest and logical: eschew the analysis. After all, the IWG's analysis does not turn on data, but on assumptions—and under equally reasonable assumptions, the SCGHG may be negative or zero. There is thus no reason for the Department to conclude that the Proposed Standards' effect on greenhouse gases will have a measurable economic impact.

Moreover, the Department needs to do the federalism analysis that Executive Order 13,132 requires because the Proposed Standards are "policies that have federalism implications" within the meaning of the order.

The Department should also exclude intrastate commerce in refrigerators, refrigerator-freezers, and freezers from any final standards to avoid constitutional issues with the regulation. At a minimum, the Department must adjust its analysis to reflect the fact that the federal government can regulate purely intrastate activity under the Commerce Clause only where such activity has a substantial effect on interstate commerce.

Finally, the Department's analysis fails to account for the fact the effect the Proposed Standards will have on individuals' budgets, particularly low-income individuals. That includes the effect the Standards will have on families—and so means the Department must engage in the assessment required by Section 654 of the Treasury and General Government Appropriations Act, 1999.

Sincerely,

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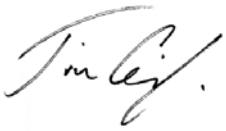

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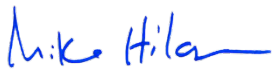

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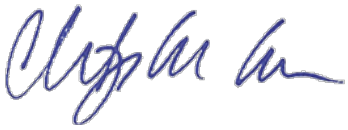

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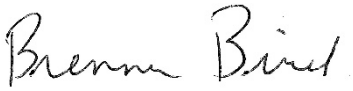

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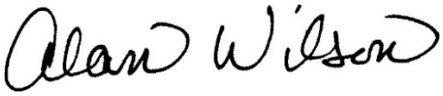

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